State of Iowa
1938

TWENTY-SECOND BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1938

JOHN H. MITCHELL
Attorney General

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*Appointed September, 1937.
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***Attorney for Liquor Control Commission attached by Commission to Attorney General's Staff.

REPORT OF THE ATTORNEY GENERAL

December 31, 1938.

HONORABLE NELSON G. KRASCHEL,
Governor of Iowa.

My Dear Governor Kraschel:

In accordance with the provisions of Section 249, 1935 Code of Iowa, I have the honor to submit herewith the biennial report of the Attorney General covering the period of his regular term beginning January 1, 1937, and ending January 1, 1939. This report contains the important opinions rendered by the Attorney General during this period and sets forth the litigation for the State of Iowa which has been handled in the Supreme Court and the district courts of this state, and litigation handled in the courts of the United States in which the State of Iowa was a party. The report also sets forth a brief resume of the work and activities of the Bureau of Investigation which, by statute, is included in the Department of Justice and is under the direction of the Attorney General.

Much new legislation has been passed by the General Assembly of this state in their recent sessions. This legislation was made necessary by changes in our economic situation in the State of Iowa and because of a desire on the part of our legislative bodies to inaugurate new social reforms for the benefit of the people of this state. This legislation created various new departments of state government, and in the case of each new act, the Attorney General was named the legal adviser for the new department and became responsible for the handling of its legal problems. The creation of these new departments necessitated changes in our tax laws, which resulted in much litigation with reference to their validity. Consequently, the past few years have seen a large increase in the amount of business handled in the Attorney General's office in addition to the general work of advising all the departments of state government.

Chapter 12 of the 1935 Code provides:

"It shall be the duty of the attorney general, except as otherwise provided by law to:

"1. Prosecute and defend all causes in the supreme court in which the state is a party or interested.

"2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the

state requires such action, or when requested to do so by the governor, executive council, or general assembly.

"3. Prosecute and defend all actions and proceedings brought by or against any state officer in his official capacity.

"4. Give his opinion in writing, when requested, upon all questions of law submitted to him by the general assembly or by either house thereof, or by any state officer, elective or appointive. Questions submitted by state officers must be of a public nature and relate to the duties of such officer.

"5. Prepare drafts for contracts, forms, and other writings which may be required for the use of the state.

"6. Report to the governor, at the time provided by law, the condition of his office, opinions rendered, and business transacted of public interest.

"7. Supervise county attorneys in all matters pertaining to the duties of their offices, and from time to time to require of them reports as to the condition of public business intrusted to their charge.

"8. Promptly account, to the treasurer of state, for all state funds received by him.

"9. Keep in proper books a record of all official opinions, and a register of all actions prosecuted and defended by him, and of all proceedings had in relation thereto, which books shall be delivered to his successor.

"10. Perform all other duties required by law."

Under the provisions of this chapter, the Attorney General is required to give his opinion in writing to the members of the General Assembly and to any state officer, elective or appointive.

The passage of new legislation and the creation of new departments have made it necessary for the Attorney General to prepare and issue many more official opinions than in previous years. It has also been necessary to advise the county attorneys and county officers of the State of Iowa in connection with this new legislation, as well as to guide them in the performance of their regular official duties. All of this has resulted, during the past two years, in our department's being required to render 613 official opinions, as well as numerous advisory opinions, which is a larger number than has been rendered in any equal period of time during the history of the Attorney General's office, and indicates the large volume of work which this department has had to assume.

Commencing January 1, 1937, we inaugurated what we termed the "staff system" for the consideration of official opinions. Every opinion was passed upon by the Attorney General and his assistants, and before it became the official opinion of the department, it had to receive a majority vote of those present at our regular

staff meetings. This is somewhat of a departure from the ordinary method of considering and issuing official opinions, but the importance of the questions involved, in our opinion, justifies and makes necessary such careful consideration. This procedure, of course, resulted in many hours of consultation, and the number of opinions indicates the time that had to be spent in the preparation of the opinions and the consideration of the decisions before they became official.

As provided in chapter 12 of the 1935 Code, the Attorney General must also prosecute and defend all causes in the Supreme Court in which the state is a party or interested, and prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested. During the past two years we have prepared and presented in the Supreme Court of the State of Iowa seventy criminal appeals. The presentation and preparation of these criminal appeals in the Supreme Court is made by the Attorney General and his assistants, and the abstracts and briefs and arguments are prepared in this department. We are pleased to be able to report to you that the record shows that we have won fifty-eight appeals and lost twelve, a record which indicates the time and effort that has been spent in this particular field. At the completion of our term of office on December 31, 1938, we will have completed the preparation of the brief and argument in every criminal case in which we have been furnished a brief and argument by the attorneys on the other side, leaving only fifteen appeals pending at the present time in which any preparation will have to be made by our successors.

We have set forth in this report a list of cases which have been handled in the federal courts, in the supreme court of the state, and the various district courts throughout the State of Iowa. An examination of this report will indicate that a large volume of work has been handled in the courts of the United States and of this state in connection with civil matters in which the state had an interest. It is not possible in this report to review the issues presented in connection with this litigation, but in order that you may be advised of the importance of these various suits and the wide range of issues that they cover, I desire to call your attention to the following.

The first day that we assumed the duties of this office, on January 1, 1937, a suit was commenced by the Werner Transportation Company against the State of Iowa, in which the plaintiff claimed

that because it was engaged in interstate commerce that certain of the laws protecting our highways were not enforcible against it. The action was commenced in the United States District Court for the Southern District of Iowa and questioned the constitutionality of a number of our state statutes. Early in 1937 this matter was submitted to a three-judge federal court, which after hearing the evidence and arguments, decided in favor of the State of Iowa and made possible the protection of our fine system of Iowa highways against those who would attempt to injure them.

The Forty-seventh General Assembly of the State of Iowa passed what is known as the Iowa "use tax" act, which was an attempt to protect our Iowa retail merchants against competition from outside the State of Iowa in view of the provisions of our Iowa sales tax act which requires the payment of a sales tax on retail purchases made within the state. The new act required the payment of a use tax on purchases made outside the State of Iowa for use within the state. The Iowa State Board of Assessment and Review contended that concerns such as Montgomery Ward and Company and Sears Roebuck and Company should be required to collect the use tax upon purchases of merchandise made by residents of the State of Iowa from the mail order branches of these concerns in Chicago, Minneapolis and elsewhere in view of the fact that these concerns maintain retail outlets within the State of Iowa. This position was taken in view of the provisions of the use tax act and was an attempt to protect the merchants of this state against such competition. Sears Roebuck and Company commenced an action in the United States District Court for the Southern District of Iowa in which they questioned the validity of the use tax act. We appeared in that action on behalf of the State of Iowa and were able to have it dismissed before a three-judge federal court. Subsequently Montgomery Ward and Company and Sears Roebuck and Company instituted actions in the district court of the State of Iowa in and for Polk County in which they questioned the validity of the Iowa use tax act, and these cases were recently decided by the district court of Polk County, Iowa, in favor of these companies. The question of an appeal will have to be decided within a short time, and we suggest that the issues are of such importance that the incoming state officers and the State Board of Assessment and Review should carefully and seriously consider the taking of such an appeal.

During the past two years the validity of our Iowa statutes reg-

ulating the sale in this state of substitute milk products was questioned and the Secretary of Agriculture enjoined from refusing to allow a concern known as the Carolene Products Company to distribute and sell a substitute milk product in the State of Iowa. This question involved an attack upon a statute which was designed to protect one of the major industries of this state, the dairy industry. We immediately prepared a defense in this action, and the suit was tried in the district court of Polk County, Iowa. After it was tried for a period of several weeks, and after the court had heard many expert witnesses and the arguments advanced by this department, the validity of the statute was sustained and the Carolene Company was refused the right to sell this substitute milk product.

The foregoing are only three of the important suits that we have tried in the federal and state courts, and we call them to your attention for the purpose of showing the many difficult and varied legal problems which arise in connection with the conduct of the legal business of this state. This report lists in detail the many cases, both civil and criminal, which have been handled by this department during the biennium.

The question of the passage of new legislation for the best interests of the people of this state is one that in our opinion should be left with the members of the General Assembly. We have no desire to encroach upon the other departments of government in the State of Iowa, but our experience leads us to the conclusion that there are a number of changes in our Iowa law which should be made by the incoming General Assembly in order to correct certain weaknesses which now exist in our statutes, and which if made would enable the state to collect certain taxes which are now delinquent. One of the problems that is becoming increasingly important is the handling of the real estate owned by the State of Iowa. The Conservation Commission of this state and the Board of Education have acquired a large amount of real estate both by purchase and by mortgage foreclosure. Many legal problems arise in connection with the foreclosure of mortgages and the taking of the title to this real estate. We suggest that the attention of the legislature be directed to this problem and we believe that it necessitates the careful attention of a division in the Attorney General's office.

It is with a good deal of pride that I call your attention to the fact that during the past few weeks I have had the pleasure of

hearing from the different departments to which my assistants have been assigned and with which they have worked the past two years. Almost without exception, these departments have, by official action and by resolution, expressed to me their appreciation for the fine services that have been rendered by this department and by my assistants in connection with the legal matters of the different departments of the state government. Such cooperation makes for a fine relationship between the Attorney General's office and the different departments of state government, and results in the careful conduct of the state's business.

Under the statutes of this state, the Bureau of Investigation is under the control and direction of the Attorney General, and is an integral part of the Department of Justice.

We have attached hereto a report showing the work that has been done during the past two years by the Bureau of Investigation in fighting organized crime throughout the State of Iowa and in aiding local peace officers in the enforcement of the law. The Bureau of Investigation, under the fine leadership of Mr. W. W. Akers as chief of the Bureau, has reached a new standard of efficiency, and I am proud to report to you that this department at the present time is recognized by the federal government and by the different departments throughout the United States as one entitled to their respect and confidence, and it has been a pleasure for us to know that the agents of the Federal Bureau of Investigation and various other federal departments have at all times worked very closely with our Iowa Bureau and they have been of great assistance to us and we have cooperated in every way with them.

I would not want to mention the Iowa Bureau of Investigation without calling attention to the development that has been made in the Iowa police radio system. This system was started a few years ago and during the past two years has been developed to a high degree of efficiency.

In March of 1937 we were able to install at the state fair grounds in Des Moines a new 1000 watt police radio station which is now the central station for this system throughout the state. In September of 1937 we were able to establish on a permanent basis the police radio station for northeastern Iowa and through the cooperation of the city of Cedar Falls the station was housed in a new building provided by the city and equipped with the finest equipment by this department. In March of 1938 we established a mobile police radio station to operate in case of an emergency with the

present state-wide police radio system, and it is possible within a few hours' time to send this mobile unit into any section of the state in case of any kind of an emergency and to broadcast and receive messages throughout the state. This is one of the first police mobile radio units developed in the state of Iowa, and we are proud of the fact that we were able to pioneer in this field. In July of 1938 we were able to establish on a permanent basis a police radio station for northwestern Iowa by the relocation and erection of a police radio station at Storm Lake, and that section of the state of Iowa is now adequately and completely covered. The other two stations in the state of Iowa are located at Atlantic and Fairfield and these are also equipped to cover their respective sections.

Through the cooperation of the Iowa state highway patrol, we have been able to increase the hours of service of the police radio broadcasting system, and at the present time the service is in operation from eight o'clock a. m. until two o'clock a. m. daily.

At the time of the installation of the new station at the fair grounds at Des Moines, we were able to immediately join the national police radio system, making it possible for the officers of Iowa to radio messages to the officers of other states where there exists a police radio system in operation.

At each of the radio stations of the system is a chief operator in charge of that particular station. All of the operators employed by this department are government licensed radio engineers. The operator on duty at any particular station maintains the equipment, makes all dispatches and does all of the clerical work for the proper keeping of the station's records. We feel that the greatest progress made in the last two years is the erection of the two stations and the completion of the central station in Des Moines. The effect of such a system in Iowa is demonstrated by the fact that two years ago we had as many as fifteen or twenty bank robberies in the state in one year, and during the past two years bank robberies have been reduced to a small number. In this day and age of paved highways and fast automobiles, it is necessary to have a rapid system of forwarding information concerning serious crimes that have been committed, and through the operation of the Iowa police radio system it is now possible within a few minutes after the commission of a crime to have word broadcast throughout the state furnishing every peace officer with a description of the crime, the automobile in which the criminals are traveling and a descrip-

tion of the individuals taking part. We feel that we are turning over to our successors one of the finest police radio broadcasting systems in the United States. Incidentally, we desire to refer to the fact that recoveries of stolen property during the past year have many times exceeded the cost of operating this system.

Because of the fine cooperation that we have received from local peace officers throughout the State of Iowa, it has been possible for the Iowa Bureau of Investigation to assist in solving practically every serious crime that has been committed in the past two years and to bring the offenders to justice. The men that have been employed as agents have rendered efficient service under the direction of Mr. Akers, and it is unfortunate that their employment is on such basis that they may lose their positions with a change of administration. It would seem that a much more efficient department might be developed if these men could be retained over a period of years and make a career out of this type of work.

One of the important activities the Bureau of Investigation has been engaged in is that of attempting to eliminate slot machines in the State of Iowa. The Forty-seventh General Assembly enacted new legislation in connection with this problem, and we have carried on a vigorous campaign to outlaw these machines in Iowa. Early in our administration we rendered an official opinion in connection with the possession of slot machines, and the county attorneys and local enforcement officers throughout the state were furnished with copies of this opinion. Since that time we have received very fine cooperation from most of the peace officers of this state, and we believe a great deal of progress has been made in eliminating these machines in Iowa.

We also desire to call your attention to the fact that during the past two years we have inaugurated, with the cooperation of the officials and faculty of the state university, a school of instruction for peace officers, which has been conducted for one week the past two summers at the state university at Iowa City. At this school we have been able to give the peace officers of Iowa the benefit of the training and experience of men from all over the United States who are particularly schooled in law enforcement work, and we believe that this school of instruction has been of great value to these officers and necessarily of great value to the people of this state. We again recommend to the new General Assembly that the laws of the State of Iowa be revised in that there can be no doubt about the right of these officers to attend this school of instruction and to receive their expenses while in attendance.

Every law enforcement officer throughout the state has a particular duty to perform and a particular field in which to operate. We have refrained at all times from any attempt to usurp their authority or to invade their particular fields. Law enforcement is essentially a local problem and the Bureau of Investigation at Des Moines should at all times remain an auxiliary force to be available when the local officers need the assistance.

We maintain at Des Moines in the state capitol building, a fingerprint department which at the present time consists of over three hundred fingerprint records. The cooperation between this department and the local officers during the past two years is indicated by the fact that in 1937 we received an increase of over 11,100 fingerprints above the previous years, which were sent to this department by the various officers throughout the state.

We maintain at Des Moines in this department a scientific laboratory equipped for blood tests, infra red ray, violet ray, ballistics, handwriting analysis, photography and various other instruments such as a microscope, comparascope and other instruments used in the scientific analysis of evidence. In addition, there is maintained a well equipped department of photography for the aid of local officers in the preservation of evidence. Modern methods of law enforcement require that such a department be maintained, and we suggest that it is going to be necessary to enlarge the quarters provided for the Iowa Bureau of Investigation in order that they may continue the splendid development which has gone on the past few years. We refer you to the list of activities which is attached to this report.

As we said in the beginning, it is impossible to review in detail in this part of the report the various things that have been done by this department. It has been a source of great satisfaction to me as Attorney General in the past two years to have been able to have associated with me in this work the most loyal group of people with whom it has ever been my privilege to associate. They have rendered faithful service to the State of Iowa and I know the many long hours they have spent in an effort to do their particular job well. It has been a pleasure and an honor to have served the State of Iowa as its Attorney General, but the success of our department would not have been possible except for the fine group of people that have been associated with me in the various positions. It is my sincere desire that my successors in office may continue to have such fine cooperation from the various departments of state

government and from the employees in the department. Such cooperation makes for good government in this great state and makes it possible for this important department in state government to better serve all of the people of this commonwealth.

I cannot close this report without expressing to you my deep appreciation for the cooperation we have received from you as Governor and for the encouragement you have given us at all times.

Respectfully submitted,
JOHN H. MITCHELL, *Attorney General.*

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

Title	County	Crime Charged	Decision
Ackerman, Rube	Black Hawk	Larceny of poultry	Affirmed 11/24/36 Pet. Rhg. Overruled 3/19/36
Barnes, Arlan	Harrison	Larceny of domestic poultry	Affirmed 3/19/37
Bazoukas, George and Eugenia	Cerro Gordo	Arson	Dismissed 3/ 8/38
Bazoukas, George and Eugenia	Worth	Arson	Pending
Beltz, Clarence	Cass	Rape	Affirmed 5/ 3/38 Pet. Rhg. Overruled 11/25/38
Berryhill, W. H.	Hamilton	Illegal selling of an estray—steer	Affirmed 3/16/37
Booster Club	Polk	Condemnation of certain gambling devices	Dismissed 8/ 5/38
Boyd, William	Woodbury	Murder in second degree	Affirmed 9/28/37
Breitenbach, Adam	Calhoun	Driving motor vehicle while intoxicated	Affirmed 5/20/37
Carlson, Adolph	Marshall	Operating motor vehicle while intoxicated	Affirmed 12/14/37
Carter, Archie	Dubuque	Sodomy	Pending
Chenoweth, Robert	Appanoose	Circulating obscene literature	Submitted
Chrismore, Alvin	Marion	Manslaughter	Reversed 6/15/37 Pet. Rhg. Overruled 2//14/38
Clay, Louis	Johnson	Murder in first degree	Affirmed 1/19/37 Pet. Rhg. Overruled 2/14/38
Cole, Raphael	Clinton	Rape	Affirmed 6/21/38
Coleman, Lee and Oral	Marion	Murder	Pending
Conner, Lox	Carroll	Rape	Affirmed 5/20/38
Dale, Clay	Harrison	Operation of motor vehicle while in intoxicated condition	Affirmed 12/13/38
Davison, Joiner	Des Moines	Embezzlement	Reversed 1/12/37
DeBont, Robert, No. 43823	Benton	Operating motor vehicle while intoxicated	Reversed 6/15/37
DeBont, Robert	Benton	Operating motor vehicle while intoxicated	Affirmed 11/28/38
DeKoning, Leonard	Mahaska	Larceny of domestic animals	Affirmed 6/15/37

SCHEDULE "A"—Continued

Title	County	Crime Charged	Decision
DeKraai, Elmer	Howard	Theft of sheep	Affirmed 11/23/37
Dillard, Charles	Mahaska	Forging a check	Reversed 10/25/38
Dirst, Charles F.	Franklin	Conspiracy to defraud	Affirmed 10/27/38
Doudna, Vern I.	Henry	False uttering of a bank check	Submitted 5/13/38
Dyke, John T.	Polk	Embezzlement by a public officer	Dismissed 4/ 1/38
Ehlerman, W. A.	Woodbury	Conspiracy	Affirmed 10/20/37
Erickson, John	Winneshiek	Unlawful possession of alcoholic liquor	Affirmed 12/13/38
Ervin, Fred	Lee	Rape	Affirmed 11/15/37 Pet. Rhg. Pending
Faye, Fred	Dallas	Breaking and entering	Affirmed 6/21/38
Ferguson, E. B. (Lash) No. 43587	Mahaska	Larceny of domestic animals	Reversed 1//12/37 Pet. Rhg. Overruled 5/10/37
Ferguson, E. B. (Lash) No. 44475	Jasper	Larceny of domestic animals	Submitted 9/29/38
Fisher, Paul	Poik	Rape	Appeal never perfected
Freeman, O. E.	Warren	Driving while intoxicated	Pending
Ghrist, J. N.	Story	Refusing to send child to school	Reversed 12/15/36 Pet. Rhg. Overruled 4/10/37
Gillman, Howard	Webster	Maintaining liquor nuisance as defined in Sec. 1921-f60	Affirmed 5/20/37
Graff, Charles	Floyd	Involuntary manslaughter	Affirmed 12/13/38
Griswold, John	Calhoun	Driving improperly registered automobile	Affirmed 6/21/38
Hall, Thomas	Black Hawk	Lascivious acts with child	Affirmed 1/17/39
Hamer, Wilson	Harrison	Operating motor vehicle while intoxicated	Reversed 9/21/37
Hathaway, Anna	Black Hawk	Keeping a house of ill fame	Affirmed 11/16/37
Hardy, George	Woodbury	Violation of motor vehicle fuel tax law	Pending
Heath, Wayland	Poik	Child desertion	Affirmed 11/23/37
Heinz, Marlo	Dubuque	Murder	Affirmed 9/21/37 Pet. Rhg. Overruled 3/19/38
Hillman, Albert	Ida	Murder	Pending

Horton, Floyd	Taylor	Murder	Affirmed 4/ 6/37
Houchins, Ed	Woodbury	Intoxication	Affirmed 10/ 3/38
Howard, Theo	Page	Selling intoxicating liquor	Affirmed 6/15/37
Jacobsen, Franz A.	Wapello	First degree murder	Affirmed 11/16/37
Johns, George	Black Hawk	Lewd and lascivious acts with child	Affirmed 10/27/38
Johns, William J.	Dallas	Embezzlement by public officer	Affirmed 10/26/37
Johnson, Bert	Page	Murder in first degree	Affirmed 6/15/37
Johnson, Luther	Page	Illegal possession of alcoholic liquor	Affirmed 1/19/37 Pet. Rhg. Overruled 5/10/37
Johnson, Lyle	Union	Rape	Affirmed 10/20/36
Jones, B. R.	Polk	Uttering a forged instrument	Dismissed 10/28/38
Keturokis, Bennie	Polk	Rape	Affirmed 12/14/37
Korbel, William J.	Winneshiek	Carrying illegally intoxicating liquors	Pending
Kray, Herman	Linn	Illegal possession of alcoholic liquors	Affirmed 3/19/37
LaMiller, Lester	Harrison	Lewdness	Dismissed 5/10/38
Lewis, Mrs. Fred	Webster	Keeping house of ill fame	Affirmed 1/17/39
McAteer, Dave	Jasper	Stealing a cow	Pending
Mercer, John M.	Cedar	Murder in first degree	Affirmed 9/22/37
Mighell, Harvey	Audubon	Larceny in nighttime	Pending
Mikels, Sigle	Appanoose	Arson	Reversed 4/ 5/38
Nesbeth, Emma	Woodbury	Illegal possession of narcotics	Dismissed 3/29/38
Norton, Cresser	Wapello	Murder	Pending
Olson, Katherine	Webster	Maintaining a liquor nuisance	Affirmed 11/16/37
Peck, Glen B.	Buena Vista	Obtaining money under false pretenses	Pending
Philpott, Ed	Taylor	Larceny of coal	Affirmed 2/16/37 Pet. Rhg. Overruled 6/18/37
Proost, Harold	Clinton	Breaking and entering	Reversed 8/ 5/38 Pet. Rhg. Overruled 11/25/38
Rhodes, Walter H.	Johnson	First degree murder	Reversed and Remanded 11/22/38 Pet. Rhg. Pending
Rhone, Ivan*	Madison	Murder	Reversed 9/28/37
Rorris, George	Woodbury	Illegal use of live decoys	Reversed 2/16/37
Rosene, Harry	Polk	Forgery and uttering forged instrument	Dismiss'd 10/28/38
Slater, Francis	Woodbury	Assault and battery	Affirmed 9/28/37
Stoner, J. C.	Woodbury	Improper registration of motor vehicle	Affirmed 10/27/38

SCHEDULE "A"—Continued

Title	County	Crime Charged	Decision
Swanson, Francis	Sac	Operating motor vehicle while intoxicated	Affirmed 4/ 5/38
Thomason, William "Pink"	Union	Carrying concealed automatic pistols in car	Affirmed 12/14/37
Van Ekeren, Gerrit	Mahaska	Driving car while intoxicated	Dismissed 5/ 4/37
Van Trump, A. S.	Henry	Violation of certain rules and regulations of the conservation commission	Affirmed 10/19/37
Wehde, Louis	Cedar	Receiving stolen property	Affirmed 12/30/38
Weston, M. P. No. 44307	Polk	Speeding	Reversed 12/13/38
Weston, M. P. No. 44341	Polk	Operating motor vehicle in reckless manner	Affirmed 6/21/38
Wheaton, Allen B.	Pottawattamie	First degree murder	Affirmed 6/15/37 Pet. Rhg. Overruled 9/24/37
Wilson, Harold J.	Lee	Appeal from $25.00 fine and costs imposed by justice of peace	Affirmed 10/20/36 Pet. Rhg. Overruled 2/19/37
Wilson, Joe	Polk	Murder	Pending
Woitha, W. J.	Woodbury	Violation of motor vehicle fuel tax law	Pending
Wolfe, Chas. J.	Clayton	Criminal libel	Dismissed 5/14/38
Yanich, Nick, alias Ynich, Yinich	Woodbury	Using profane language	Affirmed 11/18/38

*When case went back to trial court for third time, defendant entered a plea of guilty.

SCHEDULE "B"—HABEAS CORPUS AND CERTIORARI PROCEEDINGS

Title	County	Crime Charged	Decision
Leo Besch v. Glenn C. Haynes, et al.	Lee	Robbery with aggravation	Dismiss'd 11/23/37
Joe Thilges v. Glenn C. Haynes, et al.	Lee	Robbery with aggravation	Dismiss'd 11/23/37
F. L. Hawk v. Polk County District Court	Polk	Violation of Section 8581-c22 of Code—sale of securities	Petition denied 6/12/38
Emil Krueger v. Municipal Court of Sioux City, etc.	Woodbury		Writ annulled 9/28/37
Loyal Order of Moose No. 806 v. District Court of Webster County	Webster	Maintaining a liquor nuisance	Writ sustained 9/21/37
Veterans of Foreign Wars v. District Court of Webster County	Webster	Maintaining a liquor nuisance	Writ sustained 9/21/37
Don. L. Harris v. District Court of Lee County, et al.	Lee	Violation of securities law	Pending
Albert Maher v. Brown, Judge	Fremont	Driving while intoxicated	Writ annulled
Raymond Hurd v. R. O. Rodman, Judge.	Cherokee	Operating motor vehicle while intoxicated	Pending
Elmer F. Burkhardt, et al. v. Syl McCauley, Superintendent	Scott	Illegal restraint of state ward placed under contract	Pending

SCHEDULE "C"—CIVIL CASES

Case	County	Notation
Aliber & Company vs. D. W. Bates, Superintendent, et al.	Polk	Action to restrain defendants from enforcing provisions of small loan law. Pending.
Amana Society vs. Robert E. O'Brian, as Secretary of State	Polk	Action to correct official records. Judgment for plaintiff.
American Cooperative Serum Asso. vs. Thomas L. Curran, Secretary of Agriculture, et al.	Plymouth	Action to enjoin interference with plaintiff's business. Temporary injunction issued—pending.
Anderson vs. Moon	Polk	Action for damages. Special appearance overruled. Affirmed on appeal—pending in district court.
Atlee, John C., et al. vs. P. C. Johnstone, et al.	Lee	Action to restrain defendants from trespassing. Pending.
Automatic Merchandisers Association, et al. vs. John H. Mitchell, Attorney General, et al.	Polk	Action to enjoin defendants from enforcing gambling laws. Temporary injunction issued—dissolved on final hearing.
Axmear, H. M. vs. State of Iowa Motor Vehicle Department	Keokuk	Action to enjoin enforcement of trucking laws. Judgment for plaintiff.
Baker, Norman G., vs. State of Iowa	United States Supreme Court	Appeal from judgment finding plaintiff in contempt. Dismissed by court.
Bates, D. W., Superintendent, etc., vs. Dawson Savings Bank	Dallas	Receivership proceedings. Pending.
Bates, D. W., Superintendent, etc., vs. Red Oak Trust & Savings Bank	Montgomery	Receivership proceedings. Pending.
Beller, et al. vs. State Board of Assessment and Review	Polk	Action in mandamus to compel defendant to rescind order. Motion to dismiss sustained—pending.

Bennett, Nettie Mae, vs. C. B. Murtagh, Comptroller	Polk	Action in mandamus to compel issuance of salary warrant. Settled.
Board of Control of State Institutions, etc., vs. Minnie Pomerantz	Polk	Action on an account. Pending.
Board of Control of State Institutions, etc., vs. A. F. Schaeffer	Dallas	Action to quiet title. Pending.
Boyer, Executrix, et al. vs. Leo J. Wegman, Treasurer, et al.	United States District Court, Southern Divisior Cedar Rapids	Action to restrain collection of inheritance tax. Pending.
Burch Construction Company vs. Leo J. Wegman, Treasurer	Polk	Action in mandamus to compel tax refund. Submitted in district court. Ruling pending.
Butler vs. Thomas L. Curran, Secretary of Agriculture	Polk	Action to order defendant to reinstate plaintiff under soldiers' preference law. Judgment for plaintiff reversed on appeal.
Carolene Products Company vs. Thomas L. Curran, Secretary of Agriculture, et al.	Polk	Action to enjoin defendants from enforcing filled milk law. Temporary injunction issued—dissolved on final hearing.
Champlin Refining Company vs. Leo J. Wegman, Treasurer, et al.	Polk	Action to enjoin defendant from performance under employment compensation law. Dismissed by plaintiff.
Collins, Jackson L., vs. Iowa State Board of Assessment and Review	Marion	Appeal from additional tax on income. Settled.
Cox, Leslie, vs. Lew E. Wallace, Commissioner	Polk	Appeal from commissioner's order of revocation of driver's license. Judgment for plaintiff.
Currier, Herman L., vs. Allaire Woodward, et al	Linn	Action to foreclose mortgage. Dismissed.
David, Daniel W., vs. Old Age Assistance Commission, et al.	Polk	Action to compel issuance of assistance certificate. Judgment for plaintiff.
Davis, Duke, vs. Nelson G. Kraschel, et al.	Polk	Action to recover salary. Dismissed by plaintiff.

Case	County	Notation
J. J. Dolan vs. W. E. Marvin, et al.	Marshall	Action for damages. Pending.
Draper vs. Iowa State Board of Assessment and Review	Fremont	Appeal from additional tax on income. Settled.
Dreier, Leo, vs. Iowa Soldiers' Home, et al.	Marshall	Action to order defendants to reinstate plaintiff under soldiers' preference law. Judgment for the defendant.
Ellis-McDowell Lumber Company vs. Robert W. Scott & Company, et al.	Benton	Action on a contract. Pending.
Equitable Life Assurance Society vs. Iowa State Conservation Commission	Dickinson	Appeal from condemnation commissioners' award. Settled.
First Trust Joint Stock Land Bank vs. Adolph P. Arp, et al. (Attorney General, amicus curire)	Scott	Application for continuance of mortgage foreclosure. Application granted—reversed in supreme court.
First Trust Joint Stock Land Bank vs. Iowa State Conservation Commission	Dickinson	Appeal from condemnation commissioners' award. Verdict for plaintiff.
Fisher, Harry L., vs. Iowa State Board of Assessment and Review	Pottawattamie	Action to restrain collection of income tax. Pending—submitted in district court.
Gilchrist, E. E., vs. Walter L. Bierring, Commissioner, et al.	Wapello	Action to restrain defendants from interfering with conduct of cosmetology schools. Pending.
Gilchrist, E. E., vs. Walter L. Bierring, Commissioner, et al.	Webster	Action to restrain defendants from interfering with conduct of cosmetology schools. Dismissed by plaintiff.
Goodale, Clara, vs. State of Iowa, et al.	Chickasaw	Action to establish lost will. Judgment for plaintiff—supreme court appeal pending.

Hale, Henry O., vs. Iowa State Board of Assessment and Review	Webster	Action to annul income tax assessments. Judgment for defendant. Affirmed on appeal to supreme court. Affirmed, U. S. supreme court.
Hall, P. H., vs. Lew E. Wallace, Commissioner	Hardin	Appeal from order of commissioner revoking driver's license. Dismissed by plaintiff.
Harrah, C. C., vs. Mrs. Alex Miller, Secretary of State, et al	Polk	Action to restrain defendants from interfering with operation of plaintiff's trucks. Dismissed by plaintiff.
Hasenmillen, Carrie, vs. City of Davenport, et al	Polk	Hearing before industrial commissioner for recovery of damages. Pending.
Havel, R. J., vs. Iowa State Board of Assessment and Review	Polk	Action to restrain collection of sales tax. Pending.
Higbee, Beth Mather, vs. Rachel Mather Bush, et al	Cedar	Action in partition. Pending.
Homesteaders Life Association vs. Ray Murphy, et al	Polk	Action to restrain collection of taxes. Judgment for plaintiff affirmed on appeal.
Howe vs. A. & P. Gulf Oil Company, et al	United States District Court, Kansas City and Des Moines	Bankruptcy. Pending.
Illinois Bankers Life Assurance Company vs. Maurice V. Pew, Commissioner, et al	Polk	Action to restrain defendants from interfering with conduct of plaintiff's business. Pending.
Independence Fund of North America vs. Mrs. Alex Miller, Secretary of State, et al	Polk	Appeal from order of secretary of state under securities law. Judgment for defendants. Appeal pending.
Independence Fund of North America vs. Robert E. O'Brian, Secretary of State, et al	Polk	Appeal from order of secretary of state under securities law. Judgment for plaintiff. Appeal to supreme court pending.
Independent School District, etc., vs. State Appeal Board, et al	Pottawattamie	Action in certiorari to review order of defendants. Pending.

SCHEDULE "C"—Continued

Case	County	Notation
In the Matter of Appeal of Alfred Daniel Carter	Woodbury	Appeal from decision of State Board of Social Welfare as to old age assistance. Appeal denied.
In the Matter of Appeal of Ellen W. and Martin F. Fitzgibbons	Dickinson	Appeal from decision of State Board of Social Welfare as to old age assistance. Appeal denied.
In the Matter of Appeal of Andrew Peter Johnson	Monona	Appeal from decision of State Board of Social Welfare as to old age assistance. Appeal denied.
In the Matter of Appeal of Frank Mitschele	Monona	Appeal from decision of State Board of Social Welfare as to old age assistance. Appeal dismissed.
In the Matter of Appeal of John W. Newbrough	Humboldt	Appeal from decision of State Board of Social Welfare as to old age assistance. Appeal dismissed.
In the Matter of Appeal of Ole Thomas Reisetter	Hardin	Appeal from decision of State Board of Social Welfare as to old age assistance. Appeal dismissed.
In the Matter of Appeal of William Wachendorf and Minnie Wachendorf	Clayton	Appeal from decision of State Board of Social Welfare as to old age assistance. Pending.
In the Matter of Appeal of Clem A. and Anna P. Olberding	Carroll	Appeal from decision of State Board of Social Welfare as to old age assistance. Pending.
In the Matter of Appeal of Aaron K. Williams	Linn	Appeal from decision of State Board of Social Welfare as to old age assistance. Pending.
In the Matter of Appeal of Mary E. Carter	Woodbury	Appeal from decision of State Board of Social Welfare as to old age assistance. Pending.

In the Matter of Condemnation of Certain Land by the Iowa State Executive Council, etc.	Kossuth	Condemnation proceedings. Pending.
In the Matter of Construction of Proposed Dam and Other Improvements Relative to Reclamation of Goose Lake	Kossuth	Condemnation proceedings. Pending.
In the Matter of Disbarment of Wm. Clarke	Clinton	Disbarment proceedings. Order of disbarment entered.
In the Matter of Disbarment of Wm. B. Egan.	Woodbury	Disbarment proceedings. Order suspending license.
In the Matter of Estate of Max Murray Bannon	Keokuk	Application for order of escheat. Pending.
In the Matter of Estate of Susan Barsch	Dubuque	Action to urge transfer of real estate not subject to inheritance tax. Order of exemption.
In the Matter of Estate of John Corbin	Dubuque	Action for escheated property. Pending.
In the Matter of Estate of Park A. Findley	Polk	Action to collect inheritance tax. Settled.
In the Matter of Estate of James R. Frazer	Woodbury	Action for order of escheat. Dismissed.
In the Matter of Estate of Randolph L. Gallagher	Superior Court, State of California, City of Los Angeles	Action to establish claim of board of control of state institutions. Pending.
In the Matter of Estate of Emily B. Hayden	Jefferson	Action to collect inheritance tax. Settled.
In the Matter of Estate of John F. Hubri	Henry	Action to collect claim of state for care in state institution. Administrator ordered to pay claim.
In the Matter of Estate of Ed Johanson	Dallas	Application for order of escheat. Application.
In the Matter of Estate of Charles A. Lindenau	Jackson	Action to collect inheritance tax. Judgment for state.
In the Matter of Estate of Andrew Lockridge.	Iowa	Action for collection of inheritance tax. Settled.
In the Matter of Estate of Sabine Siebel Lofland	Polk	Application for approval of compromise settlement of inheritance tax. Settled.
In the Matter of Estate of Carl J. Mangan	Scott	Application for transfer of assets to Iowa executor for tax purposes. Settled.
In the Matter of Estate of Christ Walich Martin	Warren	Action for escheated property. Dismissed on motion of state.

SCHEDULE "C"—Continued

Case	County	Notation
In the Matter of Estate of Peter Marx	Sioux	Application for order of escheat. Pending—supreme court.
In the Matter of Estate of James McCann	Buchanan	Action to collect claim of state for care in state institution. Administrator ordered to pay claim.
In the Matter of Estate of Susan McCrea	Warren	Action to establish lien for old age assistance. Pending.
In the Matter of Estate of Emma Miller	Cherokee	Action to collect inheritance tax. Judgment for state.
In the Matter of Estate of Henry Riebkes	Hardin	Action to collect inheritance tax. Settled.
In the Matter of Estate of Elmer Terril	Woodbury	Action to collect claim of state for care in state institution. Administrator ordered to pay claim.
In the Matter of Estate of Witfield M. Thompson	Sioux	Action to collect inheritance tax. Pending.
In the Matter of Estate of Sherman Joseph Wilkinson	Clinton	Action to establish claim of state for old age assistance granted and paid, and penalty. Settled.
In the Matter of Keating-Stanford Coal Company	United States District Court, Southern District Des Moines	Application for money and sealing of mine shaft. Dismissed.
In the Matter of Revocation of Wm. E. Moore	Polk	Hearing on revocation of driver's license. Dismissed.
Iowa State Board of Education vs. J. R. Mealy, et al	Warren	Action to foreclose mortgage. Judgment in foreclosure.
Iowa State Board of Education vs. Ross McClintic, et al	Warren	Action to foreclose mortgage. Pending.
Iowa State Board of Education vs. Chas. F. Tomash, et al	Johnson	Action to foreclose mortgage. Pending.

Iowa State Board of Education vs. Hugh E. Brown	O'Brien	Action to foreclose mortgage. Judgment in foreclosure.
Iowa State Board of Education vs. Henry Kruse	Grundy	Action to foreclose mortgage. Pending (continuance under moratorium).
Iowa State Board of Education vs. Edward F. Borschel	Johnson	Action to foreclose mortgage. Settled.
Iowa State Board of Education vs. William and Alta Leighton	Buena Vista	Action to foreclose mortgage. Pending (continuance under moratorium).
Iowa State Board of Education vs. Fred Miller	Johnson	Action to foreclose mortgage. Judgment in foreclosure.
Iowa State Board of Education vs. Henry Bruggeman, et al	Lyon	Action to foreclose mortgage. Pending (continuance under moratorium).
Iowa State Board of Education vs. John J. VandenBerg, Aggo Beek, et al	Lyon	Action to foreclose mortgage. Judgment in foreclosure.
Iowa State Board of Education vs. A. F. Klink, et al	O'Brien	Action to foreclose mortgage. Judgment in foreclosure.
Iowa State Board of Education vs. L. C. Urlab, et al	Lyon	Action to foreclose mortgage. Pending (continuance under moratorium).
Iowa State Board of Education vs. William Mueller	Johnson	Action to foreclose mortgage. Judgment in foreclosure.
Iowa State Board of Education vs. B. F. Ostercamp	Butler	Action to foreclose mortgage. Settled.
Iowa State Board of Education vs. Robert M. Finlayson, et al	Grundy	Action to foreclose mortgage. Judgment in foreclosure (receivership pending).
Iowa State Board of Education vs. R. O. McClintic	Warren	Action to foreclose mortgage. Pending.
Iowa State Board of Education vs. Blanche I. B. Foffel	Delaware	Action to foreclose mortgage. Pending.
Iowa State Board of Education vs. Eliza A. Swartzendruber, Administratrix	Iowa	Action to foreclose mortgage. Pending.

SCHEDULE "C"—Continued

Case	County	Notation
Iowa State Board of Education vs. Jennie Leusink, et al.	Lyon	Action to foreclose mortgage. Judgment in foreclosure (receivership pending).
Iowa State Board of Education vs. Christy Kahler, Administrator	Johnson	Action to foreclose mortgage. Judgment in foreclosure.
Iowa State Board of Education vs. Dennis Robert Mahoney, et al.	Johnson	Action to foreclose mortgage. Settled.
Jackson, Paul F., vs. John Goode, et al.	Monroe	Action for damages for malicious prosecution. Pending.
Janotta, Frank S., vs. Equitable Life Insurance Company, et al.	Jasper	Action for damages. Pending.
John Hancock Mutual Life Insurance Company vs. Sam Eggland, et al. (Attorney General, amicus curire)	Story	Application for extension of period of redemption in mortgage foreclosure. Application granted—reversed in Supreme Court.
Johnson, A. C., vs. Clyde L. Herring, et al.	Polk	Action to order reinstatement of plaintiff under soldiers' preference law. Judgment for defendants. Affirmed on appeal.
Johnson, Russell S., vs. W. F. Kucharo, et al.	Black Hawk	Action on contract. Pending.
Keefe, Lucy, vs. A. S. Price, et al.	Polk	Action for damages for illegal restraint. Judgment for defendants. Appeal dismissed. Pending on petition for rehearing.
Kennedy, Sam, vs. Iowa State Board of Assessment and Review	Cerro Gordo	Action to compel defendant to remit sales tax. Judgment for defendant. Appeal to Supreme Court. Affirmed.
Kirshner vs. Iowa State Board of Assessment and Review	Pocahontas	Action to restrain collection of sales tax. Pending.
Kistner, E. F., vs. Iowa State Board of Assessment and Review	Black Hawk	Appeal from assessment of sales tax. Judgment for defendant. Appeal to Supreme Court. Affirmed.

Klassie vs. Iowa State Board of Assessment and Review	Humboldt	Action to restrain collection of sales tax. Pending.
Kountz, Grace, vs. State of Iowa, et al	Polk	Hearing on claim before industrial commissioner. Dismissed as to state of Iowa.
Lathrop vs. Lew E. Wallace, Commissioner, et al.	Polk	Appeal from order of commissioner revoking driver's license. Pending.
Lesser, Adolph, vs. State of Iowa, et al	Palo Alto	Application for order of escheat. Pending.
Luedeman, Otto Carl, vs. Lew E. Wallace, Commissioner, et al	Polk	Appeal from order of commissioner revoking driver's license. Judgment for defendant.
Lutheran Mutual Aid Society vs. Ray Murphy, al	Polk	Action to restrain defendant from collecting tax on gross premiums, and refusing to renew license. Judgment for plaintiff. Affirmed on appeal.
Martin, Howard V., vs. Iowa State Board of Assessment and Review	Woodbury	Appeal from ruling of defendant refusing to revise additional income tax assessment. Judgment for defendant. Appeal pending in Supreme Court. Submitted.
McBurney, Alfred, et al. vs. Board of Osteopathy Examiners, et al	Polk	Action in mandamus to compel issuance of salary warrant. Settled.
McGinnis, Samuel L., vs. Old Age Assistance Commission, et al	Polk	Action in mandamus to compel defendants to issue assistance certificate. Dismissed.
Miller, Oliver, vs. L. J. Shuster	Polk	Action to enjoin defendants from enforcing provisions of small loan law. Pending.
Missouri, State of, vs. State of Iowa	United States Supreme Court	Boundary dispute. Pending.
Modern Woodmen of America vs. Ray Murphy, et al	United States District Court, Southern District, Des Moines, Iowa	Action to enjoin collection of taxes. Judgment for plaintiff.

SCHEDULE "C"—Continued

Case	County	Notation
Montgomery Ward and Company vs. Board of Assessment and Review	Polk	Action to restrain collection of use tax. Judgment for plaintiff.
Moore, Louise M., vs. Iowa State Board of Assessment and Review	Polk	Hearing before industrial commissioner on injury claim. Pending.
Muntz, Otto S., vs. Board of Education, et al.	Polk	Action to enjoin purchase of coal by state institution. Pending.
Muntz, Otto S., vs. O. R. Sweeney, et al.	Polk	Action to restrain defendants from interfering with plaintiff's official capacity. Dismissed.
Muscatine Municipal Eliectric Plant vs. Iowa Board of Assessment and Review	Muscatine	Action to restrain collection of use tax. Pending.
Navarro, Maud, vs. Bettendorf Company, et al.	Polk	Hearing before industrial commissioner on death claim. Pending.
Northwestern Mutual Life Insurance Company vs. Ray Murphy, et al	Polk	Action to enjoin collection of taxes. Judgment for plaintiff. Reversed on appeal.
O'Brian, Robert E., Secretary of State, vs. M. S. Ackles	Scott	Action to enjoin defendant under securities law. Judgment for plaintiff.
O'Connor, Edward L., vs. C. B. Murtagh, Comptroller	Polk	Action in mandamus to compel issuance of salary warrant. Judgment for plaintiff. Reversed on appeal. Petition for rehearing pending.
Old Age Assistance Commission vs. Charles Batcher	Clay	Action to recover assistance granted and paid. Settled.
O'Malley, Alice, vs. State of Iowa	Polk	Hearing before industrial commissioner on death claim. Pending.
Palmer, Sadie W., vs. Iowa State Board of Assessment and Review, et al	Linn	Appeal from order of defendant ruling rentals taxable. Judgment for plaintiff. Reversed in Supreme Court.

Polk County, et al. vs. Nelson G. Kraschel, Governor, et al.	Polk	Action to restrain defendants from curtailing emergency relief funds to Polk County. Dismissed.
Putnam, Harley, S., vs. Byron G. Allen, Superintendent, et al.	Mahaska	Appeal from order of commission denying assistance. Dismissed.
Pyle, C. W., vs. Bessie Ackland, et al.	Buena Vista	Action in partition. Pending.
Ray, Wm. M., vs. State of Iowa, et al.	Polk	Hearing before industrial commissioner on injury claim. Pending.
Reliable Transit Company vs. Robert E. O'Brian, Secretary of State, et al.	Polk	Action to restrain defendants from enforcing provisions of motor vehicle law. Pending.
Resch, F. A., et al. vs. Iowa State Conservation Commission	Dickinson	Appeal from condemnation commissioners' award. Settled.
Roberts, Nancy Ellen, vs. Hosea B. Horn, et al.	Davis	Action to divest liens. Settled.
Rogers, Wilfarene, vs. Iowa State Board of Assessment and Review	Linn	Action to collect income tax. Pending.
Rowley, Julia, vs. Mrs. Henry Frankel, et al.	Linn	Action for damages resulting from erection of dam. Judgment for plaintiff. Appeal to Supreme Court. Settled.
Royal, C. D., vs. Central Iowa Fuel Company	Polk	Hearing before industrial commissioner on workmen's compensation claim. Pending.
State of Iowa ex rel. O'Connor vs. Hamilton County, et al.	Hamilton	Action to establish legal settlement. Pending.
State of Iowa ex rel. O'Connor vs. Cerro Gordo County, et al.	Cerro Gordo	Action to establish legal settlement. Pending.
State of Iowa ex rel. O'Connor vs. Clay County, et al	Clay	Action to establish legal settlement. Submitted on rehearing to Supreme Court. Pending.
State of Iowa ex rel. O'Connor vs. Fayette County, et al.	Fayette	Action to establish legal settlement. Pending.
State of Iowa ex rel. O'Connor vs. Story County, et al.	Story	Action to establish legal settlement. Pending.
State of Iowa ex rel. O'Connor vs. Washington County, et al.	Washington	Action to establish legal settlement. Pending.
State of Iowa ex rel. O'Connor vs. O'Brien County, et al.	O'Brien	Action to establish legal settlement. Pending.

Case	County	Notation
State of Iowa ex rel. Mitchell vs. Mutual Home Loan Savings Association, et al.	Poweshiek	Receivership proceedings. Judgment in receivership.
State of Iowa ex rel. Mitchell vs. Board of Adjustment of Iowa City, et al.	Johnson	Action to restrain defendants from constructing and operating tourist cabins in violation of city ordinances. Judgment enjoining defendants.
State of Iowa ex rel. Kraschel vs. District Court of Iowa in and for Polk County, et al.	Polk	Action for writ of prohibition to restrain defendants from interfering with executive department. Writ annulled.
State of Iowa ex rel. Iowa State Board of Assessment and Review vs. Local Board of Review of the City of Des Moines, et al.	Polk	Action in mandamus to compel defendants to perform and carry into effect orders and directions of the state board. Judgment for defendants. Reversed on appeal.
State of Iowa ex rel. Muntz vs. O. R. Sweeney.	Polk	Action in quo warranto to test title of office. Dismissed.
State of Iowa and C. B. Murtagh vs. R. R. Sassaman, et al.	Harrison	Action to set aside last will and testament in the estate of John Young, deceased. Judgment for defendants. Appealed to Supreme Court. Dismissed.
State of Iowa vs. Otto J. Sorenson	Johnson	Action to quiet title. Judgment for defendants. Affirmed in Supreme Court.
State of Iowa vs. Graham-Lewis Oil Company.	Des Moines	Action to recover motor vehicle fuel tax. Pending.
Sears, Roebuck and Company vs. Iowa State Board of Assessment and Review	Polk	Action to restrain collection of use tax. Judgment for plaintiffs.
State of Iowa and Leo J. Wegman vs. Clark Criss, et al.	Polk	Action to collect motor vehicle fuel tax. Judgment for plaintiffs.

State of Iowa and Leo J. Wegman vs. Alber A. Law, et al	Polk	Action to collect motor vehicle fuel tax. Judgment for plaintiffs.
State of Iowa and Leo J. Wegman vs. Alva B. McIntyre	Polk	Action to collect motor vehicle fuel tax. Judgment for plaintiffs.
State Apeal Board, et al, vs. District Court of Pottawattamie County, et al	Pottawattamie	Action in certiorari to review legality of court's ruling denying change of venue. Writ annulled.
State of Iowa ex rel. Mitchell vs. Standard Mutual Automobile Association of Council Bluffs	Pottawattamie	Receivership proceedings. Pending.
State of Iowa ex rel. Mitchell vs. American Life Insurance Company	Polk	Receivership proceedings. Pending.
State of Iowa ex rel. Murray vs. Royal Canadian Beverage Company	Polk	Action to restrain defendant from operating bottling works. Pending.
Stevens, Orville, vs. Horace Tate, et al	Polk	Appeal from order revoking automobile dealer's license. Pending.
State of Iowa ex rel. Pugh, et al, vs. Independent Order of Foresters	Polk	Action to enjoin collection of taxes. Judgment for defendants. Appeal to Supreme Court pending.
State of Iowa ex rel. Mitchell vs. Thompson School of Beauty Culture	Polk	Action to enjoin defendants from charging fees for students' employment. Judgment for plaintiffs. Appeal to Supreme Court submitted.
State of Iowa ex rel. Bierring vs. Sophie Ritholz, et al	Polk	Action to enjoin defendants from practicing optometry without a license. Judgment for plaintiff. Reversed in Supreme Court.
State of Iowa vs. James I. Connor	Lyon	Action to revoke defendant's license to practice chiropractic. Judgment for plaintiff.
State of Iowa vs. Cecil R. Bruggeman	Black Hawk	Action to revoke defendant's license to practice dentistry. Dismissed.
Stewart, Marie, vs. State of Iowa, et al	Polk	Action to determine priority of liens. Judgment for defendants.

SCHEDULE "C"—Continued

Case	County	Notation
State of Iowa ex rel. Mitchell vs. J. F. McKean	Marshall	Settled.
State of Iowa vs. Ben Hughes	Buena Vista	Action to restrain defendant from practicing medicine. Dismissed.
State of Iowa vs. Anton G. Johnson	Polk	Action to restrain defendant from practicing cosmetology. Judgment for plaintiff.
Smernoff, Louis Noah, vs. State of Iowa, et al.	Lyon	Dismissed.
State of Iowa vs. Ewell, Neil C.	Cherokee	Action to restrain defendant from practicing dentistry. Dismissed.
State of Iowa vs. Mrs. Joseph Frier	Greene	Action to restrain defendant from practicing medicine. Dismissed.
State of Iowa vs. James Otis Ewing	Van Buren	Action to restrain defendant from practicing medicine. Dismissed.
State of Iowa ex rel. Bierring vs. Henry H. Koller	Mitchell	Action to restrain defendant from practicing medicine. Judgment for plaintiff.
State of Iowa ex rel. Bierring vs. George W. Doxsee	Scott	Action to revoke defendant's license to practice barbering. Judgment for plaintiff.
State of Iowa ex rel. Bierring vs. T. H. Atteberry	Franklin	Action to revoke defendant's license to practice barbering. Dismissed.
State of Iowa ex rel. Bierring vs. H. W. Day	Taylor	Action to restrain defendant from practicing podiatry. Judgment for plaintiff.
State of Iowa ex rel. Bierring vs. Leo Sturmer	Page	Action to restrain defendant from practicing medicine. Dismissed.
State of Iowa vs. Myron Roy Runions	Woodbury	Action to restrain defendant from practicing dentistry. Dismissed.
State of Iowa vs. John Eyerly	Polk	Action for judgment on bond. Settled.
State of Iowa ex rel. Bierring vs. Roscoe Moore	Polk	Action to restrain defendant from practicing barbering. Judgment for plaintiff.

Sheldon and Company, et al, vs. L. W. Laughlin	Polk	Action to restrain secretary of state from granting reinstatement of corporation. Dismissed.
State of Iowa vs. J. W. McCann	Dallas	Action to restrain defendant from practicing medicine. Judgment for plaintff.
Schmidt, Herman, vs. State of Iowa, et al.	Van Buren	Action for injuries sustained while in municipality's employ. Dismissed.
State of Iowa vs. Lewis Levy	Cedar	Action to restrain defendant from practicing optometry. Dismissed.
State of Iowa vs. Don C. Knee	Harrison	Action to restrain defendant from practicing chiropractic. Judgment for plaintiff.
State of Iowa ex rel. vs. Ex Line Fuel Company	Appanoose	Action to dissolve corporation. Judgment of dissolution reversed and remanded on appeal. Petition for rehearing submitted. Ruling pending.
Smith, Roy, vs. Iowa State Conservation Commission, et al	Dickinson	Appeal from condemnation commissioners' award. Settled.
Sherman, Roger S., vs. Anna A. Davis, et al.	Washington	Action to establish priority of lien of state and old age assistance granted and paid. Judgment for plaintiff.
Sandberg, W. J. Company, vs. Iowa State Board of Assessment and Review	Polk	Action to contest validity of sales tax assessed. Judgment for defendant. Affirmed on appeal. Petition for rehearing denied.
State of Iowa, etc., vs. L. C. Sprague and John Junell, Co-receivers, etc.	Polk	Action to recover monies paid under contract. Judgment for defendants. Affirmed on appeal.
State Board of Social Welfare, etc., vs. Municipal Court of City of Des Moines, etc.	Polk	Action in certiorari to review legality of default judgment rendered against state. Pending.

SCHEDULE "C"—Continued

Case	County	Notation
State of Iowa vs. Charles J. Boston	Scott	Action to enjoin defendant from practicing medicine and surgery without a license. Judgment for plaintiff in part. Reversed on plaintiff's appeal. Affirmed on defendant's appeal. Petition for rehearing submitted. Pending ruling.
State of Iowa ex rel. Mitchell vs. National Life Insurance Company of United States, et al	Polk	Action to collect tax on gross premiums. Judgment for defendant. Reversed on appeal.
State of Iowa ex rel. O'Connor vs. Sorenson, et al	Johnson	Action to recover possession of real estate and to quiet title. Judgment for defendants. Reversed on appeal.
State of Iowa vs. Standard Oil Company of Indiana	Polk	Action to recover motor vehicle fuel tax. Judgment for plaintiff. Affirmed in part, reversed in part. Petition for rehearing denied.
State of Iowa vs. Phillips Petroleum Company	Polk	Action to recover motor vehicle fuel tax. Judgment for plaintiff. Affirmed in part, reversed in part. Petition for rehearing denied. Plaintiff's appeal dismissed, United States Supreme Court.
State of Iowa ex rel. Farnsworth vs. Padavich, et al	Appanoose	Action to restrain the operation of a coal mine in violation of mine inspector's orders. Plaintiff's petition dismissed. Affirmed on appeal.
Taylor, Lillian M., et al, vs. Iowa State Conservation Commission	Dickinson	Appeal from condemnation commissioners' award. Verdict for plaintiff.
Tierney & Clermont vs. Iowa State Board of Assessment and Review	Polk	Action to restrain collection of sales tax. Pending.

Trainor, Ruby, vs. Cherokee State Hospital....	Polk....................	Hearing before industrial commissioner on injury claim. Pending.
Travelers Insurance Company vs. Cedar Rapids and Missouri Railroad Company, et al...	Pottawattamie...........	Action to quiet title. Pending.
Tuffree, F. J., vs. A. A. Coulter..............	Grundy..................	Action to foreclose mortgage. Pending.
United States of America vs. Certain Lands in Allamakee County	United States District Court, Northern District, Dubuque	Condemnation of state lands for navigation and improvement purposes. State awarded damages. Appeal pending.
United States of America vs. Certain Lands in Allamakee County	United States District Court, Northern District, Dubuque	Condemnation of islands and lands bordering Mississippi River. Pending.
United States of America vs. Certain Lands in Clayton, Louisa, Des Moines, Muscatine Counties	United States District Court, Northern District, Dubuque	Condemnation of islands and lands bordering Mississippi River. Pending.
United States of America vs. Certain Lands in Dubuque and Jackson Counties.............	United States District Court, Northern District, Dubuque	Condemnation of islands and lands bordering Mississippi River. Pending.
United States of America vs. Certain Lands in Muscatine County	United States District Court, Southern District, Davenport	Condemnation of islands and lands bordering Mississippi River. Pending.
United States of America vs. Certain Lands in Scott County	United States District Court, Southern District, Davenport	Condemnation of islands and lands bordering Mississippi River. Pending.

SCHEDULE "C"—Continued

Case	County	Notation
United States of America vs. Certain Lands in Scott County	United States District Court, Southern District, Davenport	Condemnation of islands and lands bordering Mississippi River. Pending.
United States of America vs. First Capital National Bank of Iowa City, et al.	United States District Court, Southern District, Des Moines	Action to collect admission taxes. Judgment for state. Reversed, C. C. A. Compromise settlement. Pending.
United States of America vs. Wilbert Flower, et al.	United States District Court, Omaha, Nebraska	Action to quiet title to land bordering on Winnebago Indian reservation. State's petition of intervention withdrawn.
Vilas, Bert, vs. Iowa State Board of Assessment and Review	Buena Vista	Action to restrain defendants from collecting income tax. Judgment for defendants. Affirmed on appeal.
Vilas, Oliver Wilbert, vs. Iowa State Board of Assessment and Review	Buena Vista	Action to restrain defendants from collecting income tax. Plaintiff's petition dismissed by court. Affirmed on appeal.
Visisel, Joseph M., vs. Iowa State Board of Conservation, et al.	Linn	Action to restrain defendant's from interfering with rights of plaintiff as riparian owner on Cedar River. Pending.
Wagner, Joseph B., vs. Motor Vehicle Department	Polk	Appeal from order suspending driver's license. Judgment for defendant.
Weissenburger, C. E., vs. Keokuk Trust Company, et al.	Lee	Receivership proceedings. Pending.

Werner Transportation Company vs. Mrs. Alex Miller, Secretary of State, et al.	United States District Court, Southern District, Des Moines	Action to enjoin enforcement of trucking laws. Dismissed.
White, Don C., vs. Board of Examiners, et al.	Woodbury	Action to restrain defendants from issuing certificate in basic sciences. Judgment for plaintiff.
Willts, Jerry, vs. Robert E. O'Brian, Secretary of State, et al.	Osceola	Action to determine exemption of corn sheller from licensing provisions of motor vehicle law. Judgment for plaintiff.
Wolfe, Chas. J., vs. District Court of Clayton County, et al.	Clayton	Action in mandamus to compel correction of records. Dismissed.
Woodmen of the World vs. Ray Murphy, Commissioner, et al.	United States District Court, Southern District, Des Moines	Suit to enjoin collection of taxes. Judgment for plaintiff.
Yeoman Mutual Life Insurance Company vs. Ray Murphy, et al.	Polk	Action to enjoin collection of taxes. Judgment for plaintiff. Affirmed on appeal.

*Includes cases submitted in whole or in part and pending decision during prior administration.

REPORT OF SPECIAL ASSISTANT ATTORNEY GENERAL AND COUNSEL TO THE IOWA STATE HIGHWAY COMMISSION

January 1, 1938, to December 31, 1938

APPEALS FROM CONDEMNATION

Appeals pending January 1, 1938.................................. 17
Appeals instituted during 1938.................................. 18
Old appeals tried or settled during the year 1938.................................. 13
New appeals tried or settled during the year 1938.................................. 8
Condemnation appeals pending December 31, 1938.................................. 14

FORECLOSURE PROCEEDINGS

Foreclosures pending January 1, 1938.................................. 14
New foreclosures during 1938.................................. 3
Old foreclosures disposed of in 1938.................................. 5
New foreclosures disposed of in 1938.................................. 2
Foreclosure actions pending December 31, 1938.................................. 10
(All but two postponed until March 1, 1939, under moratorium laws.)

MISCELLANEOUS CASES

(Injunction, Mandamus, Damage, Quiet Title Actions, Guardianships, Workmen's Compensation)

Pending January 1, 1938.................................. 8
New miscellaneous cases during 1938.................................. 19
Old miscellaneous cases tried or settled during 1938.................................. 6
New miscellaneous cases tried or settled during 1938.................................. 8
Miscellaneous cases pending.................................. 13

RETAINED PERCENTAGE CASES

(On Construction Contracts)

Percentage cases pending January 1, 1938.................................. 3
New percentage cases during 1938.................................. 7
Old percentage cases disposed of during 1938.................................. 1
New percentage cases disposed of during 1938.................................. 3
Percentage cases pending December 31, 1938.................................. 6
Total number of cases pending December 31, 1938.................................. 43

Condemnation proceedings instituted during 1938, number of parcels...... 121
Condemnations held (number of parcels).................................. 79
Number purchased before condemnation completed, or condemnation dismissed—parcels 42
Number of acres condemned..................................156.16
City lots and parts of lots, including two buildings.................................. 11

Number of cases pending in Supreme Court.................................. 4
Stoner vs. Highway Commission—appealed by Highway Commission.
Ersland vs. Highway Commission—appealed by Highway Commission.
Dawson vs. Highway Commission—appealed by plaintiff.
P. A. Blackford vs. Dorr Anderson (Coleman will case)—appealed by plaintiff.

Supreme Court cases finished up in 1938.................................. 4
Cutler vs. Highway Commission—affirmed.
Dyvig vs. Highway Commission—dismissed by Commission.
Luthi vs. Highway Commission—reversed—settled.
State vs. Dickinson County—settled.

(All of the above appealed by the Commission.)

REPORT OF THE BUREAU OF INVESTIGATION

W. W. AKERS, Chief

The following is a consolidated report of reports from the coroners of the various counties of the state, showing the number of accidental deaths, suicides, and murders, for the years of 1937 and 1938, as per Chapter 143 of the 43rd General Assembly of the State of Iowa. No reports of justifiable homicides were received.

Counties	1937			1938		
	Accidents	Suicides	Murders	Accidents	Suicides	Murders
Adair						
Adams	5	1		2	1	
Allamakee	1			1		
Appanoose						
Audubon		1		1		
Benton	18	9	1	5	2	1
Black Hawk						
Boone						
Bremer	5	1	2	4	1	1
Buchanan						
Buena Vista	7	4	1	3		
Butler						
Calhoun						
Carroll	2					
Cass	4	5		1	2	
Cedar						
Cerro Gordo	13	3	1	1		
Cherokee						
Chickasaw						
Clarke				2		
Clay	4	7	1	7	5	
Clayton						
Clinton	29	6		14	7	
Crawford						
Dallas	2	2		6	3	
Davis						
Decatur						
Delaware						
Des Moines	2	4		15	6	1
Dickinson				1		
Dubuque	19	4	1	19	15	1
Emmet				6		
Fayette	4	4		7	4	
Floyd	7	2		6	3	1
Franklin	6			10	2	
Fremont	7			11	1	
Greene		1				
Grundy		1				
Guthrie	4	2		3	2	
Hamilton						
Hancock	2					
Hardin	2	1				
Harrison				2		
Henry						
Howard						
Humboldt						
Ida						
Iowa	6	1		4	2	
Jackson	5			2		
Jasper	2		1			
Jefferson	1					

REPORT OF BUREAU OF INVESTIGATION—Continued

Counties	1937			1938		
	Accidents	Suicides	Murders	Accidents	Suicides	Murders
Johnson	20	6	1	7	3	
Jones				1	1	
Keokuk						
Kossuth	11	1				
Lee						
Linn	32	25	3	19	12	2
Louisa	5	3		1	2	
Lucas	5					
Lyon	2	4			1	
Madison		1				
Mahaska						
Marion						
Marshall	2	3		5		
Mills	1	1		2	2	
Mitchell						
Monona	2	4		3	1	
Monroe				1		
Montgomery	4			4	3	
Muscatine	6			1		
O'Brien						
Osceola						
Page		1			4	
Palo Alto	4	1		5	2	
Plymouth						
Pocahontas						
Polk				6	1	1
Pottawattamie	10	4		11	6	
Poweshiek	6	2		4	1	
Ringgold				1	1	
Sac	1			5	1	
Scott	37	9	3	39	16	2
Shelby	3	2		2	1	
Sioux	8	2				
Story	9	1	2	8	2	
Tama	11	8		1	3	
Taylor		2	2		3	
Union	1	1		3		
Van Buren						
Wapello				1	1	
Warren	10	4	5	10	1	
Washington						
Wayne	2	1				
Webster				7	6	
Winnebago	2	1		2		
Winneshiek						
Woodbury						
Worth					1	
Wright						
Total	351	146	24	282	129	10

LIST OF PERSONS COMMITTED TO FORT MADISON FOR MURDER DURING YEARS 1937 AND 1938

FORT MADISON MURDERS
1937, 1938

Name	Degree	County	Date
Franz A. Jacobsen	First	Wapello	Jan. 16, 1937
Claud Foutch	Second	Wapello	Jan. 27, 1937
Harry L. Stoner	Accessory	Kossuth	Feb. 3, 1937
William H. Jordon	Murder 2 chgs.	Washington	Feb. 5, 1937
James McIntosh	First	Scott	Feb. 20, 1937
Robert Avery	First	Calhoun	Feb. 24, 1937
Thomas J. Runyon	Murder (life)	Hancock	Mar. 9, 1937
Albert Cornwell	Murder (life)	Clayton	Mar. 24, 1937
James Rines	First	Clayton	April 1, 1937
Kidora King	Second	Black Hawk	April 13, 1937
Walter H. Rhodes	First	Johnson	April 15, 1937
William Boyd	Second	Woodbury	June 4, 1937
Clinearth Lindely	Second	Worth	Oct. 9, 1937
Paul Verner	Murder (life)	Clay	Oct. 27, 1937
Lowell Lair	Murder (life)	Clay	Oct. 27, 1937
Warren Bianco	First	Polk	Nov. 19, 1937
Edgar Rogers	Second	Dubuque	Jan. 28, 1938
Joe Wilson	First	Polk	Feb. 23, 1938
James E. Burget	First	Polk	April 1, 1938
Ray Menely	First	Muscatine	April 22, 1938
Paul R. Kuepper	First	Des Moines	April 25, 1938
John C. Cook	First	Des Moines	April 25, 1938
Eugene Cooper	First	Lee	May 20, 1938
Kenneth Caulk	First	Lee	May 20, 1938
Earl Davis	First	Lee	May 20, 1938
Lee Coleman	Second	Marion	June 16, 1938
R. L. McNelly	First	Decatur	July 13, 1938

FOR MANSLAUGHTER
1937, 1938

Name	County	Date
Erious Holder	Woodbury	July 10, 1937
Leslie Alexander	Webster	Dec. 24, 1937
Bert L. Shoenberger	Woodbury	Mar. 25, 1938
Howard Friend	Fayette	Nov. 3, 1938
Frank Brown	Polk	Nov. 21, 1938

FORT MADISON PAROLES

1937, 168; 1938, 93 (to Nov. 30, 1938); total, 264.

ANAMOSA MURDERS
1937, 1938

Name	Degree	County	Date
Obed B. Coving	Murder (until sane)	Cerro Gordo	May 17, 1937
Rex Hennick	Second	Jones	Sept. 10, 1937
Clineorth Lindely	Second	Worth	Dec. 31, 1937
Paul Verner	Murder (life)	Clay	Dec. 31, 1937
Lowell Lair	Murder (life)	Clay	Dec. 31, 1937
Warren Bianco	Murder (life)	Polk	Dec. 31, 1937
Louis J. Erie	Murder (until sane)	Webster	Dec. 15, 1937
Rodney Pace	Murder (life)	Buchanan	Dec. 31, 1937
Robert Avery	First	Calhoun	Dec. 31, 1937

MANSLAUGHTER

Name	County	Date
John Bulten	Black Hawk	April 16, 1937
Oda Phelps	Delaware	Jan. 14, 1938
Keith Young	Polk	April 11, 1938

ABSCONDED FROM PAROLE

Name	County	Date
Charles Daniels	Jones	Sept. 14, 1937
James Montgomery	Webster	Nov. 1, 1937
Sam Fairbanks	Sac	Nov. 22, 1937
John Glick	Decatur	Dec. 18, 1937
Floyd Evans	Pottawattamie	Jan. 31, 1937
Dave Sorbaugh	Lee	Feb. 1, 1937
William J. Kohn	Marshall	April 14, 1937
Donald Madding	Jones	Mar. 21, 1937
Welah, Davis	Sac	Feb. 8, 1938
Guy Karsner	Keokuk	Feb. 27, 1938
Robert Rivers		Feb. 27, 1938
Thomas Falkenstein	Worth	Aug. 23, 1938
William Wignall	Marion	Jan. 15, 1938
Edward Blankinship	Lee	June 4, 1938
Raymond Parker	Fremont	June 4, 1938
A. F. Thomason	Dickinson	June 6, 1938
Victor Marks	Union	June 7, 1938
Eldred Widel	Jones	April 19, 1938
Glenn More	Keokuk	June 29, 1938
Findley Murphy	Palo Alto	June 9, 1938

ANAMOSA PAROLES

1937, 227; 1938, 182 (to Nov. 30, 1938); total, 409.

ROCKWELL CITY MURDERS

1937, 1938

Name	Degree	County	Date
Goldie Pritchard	Murder (not sentncd)	Calhoun	Mar. 3, 1937
Minnie Hines	Second	Clayton	May 26, 1937

MANSLAUGHTER

Name	County	Date
Edna Thomas	Woodbury	Sept. 8, 1938

Paroles—26 (1937, 15) (1938, 11) 1938 to Nov. 30.
Parole Board—26 (1937, 21) (1938, 5) 1938 to Nov. 30.

CONVICTIONS FOR COMMITMENTS FOR FELONY

The following is a summary of the convictions and commitments for felons to the penitentiary and reformatories of the state as a result 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 sentence or fines:

ANAMOSA, 1937

Offense	Number
A. W. I. T. C. G. B. I.	2
Arson	1
Arson to building	1
Assault to rob	5
Assault to commit felony	1
Assault to maim	1
Assault to manslaughter	1
Assault to murder	2
Assault to rape	2
Assisting prisoner to escape	1
Attempt to break and enter	5
Breaking and entering	57
Breaking and entering a car	1
Bigamy	1
Bootlegging	1
Burglary	1
Burglary with aggravation	1
Carrying concealed weapons	2
Conspiracy	6
Desertion	6
Escape	6
Custody (escape)	2
Embezzlement by officer	1
False pretense	13
Forgery	28
Hall liquor on state grounds	1
Incest	2
Insane	3
Jail break	10
Larceny	61
Larceny of domestic animals	10
Larceny nighttime	15
Larceny of poultry	12
Lascivious acts	8
Larceny of motor vehicle	49
Manslaughter	1
Malicious injury to building	1
Malicious injury to motor vehicle	3
Malicious mischief	1
Murder	9
Operating motor vehicle while intoxicated	2
Operating motor vehicle without consent	12
Rape	11
Receiving stolen property	3
Receiving stolen motor vehicle	1
Returned from escape	6
Returned from parole	35
Robbery	28
Robbery with aggravation	8
Safekeeping	1

Sodomy	2
Uttering false instrument	5
Uttering forged instrument	9

ANAMOSA, 1938

A. T. C. G. B. I.	2
Adultery	1
Arson	1
Assault to commit a felony	1
Assault to rob	7
Assault to rape	4
Assault to manslaughter	3
Assault to murder	1
Attempt to break and enter	6
Breaking and entering	30
Breaking and entering a car	1
Bootlegging	1
Bringing drugs into state institution	1
Burglary	1
Carrying concealed weapons	4
Conspiracy	14
Desertion	1
Embezzlement	4
Embezzlement by bailee	3
Embezzling mortgaged property	1
Escape	7
Escape custody	2
Escape P. V.	2
False pretense	4
False drawing and uttering checks	1
Forgery	26
Illegal possession of liquor	1
Insane	1
Intoxication	1
Jail break	9
Larceny of poultry	25
Lascivious acts	2
Larceny	49
Larceny by embezzlement	1
Larceny of domestic animals	20
Larceny of motor vehicle	32
Larceny nighttime	5
Malicious threats to extort money	1
Manslaughter	4
Operating motor vehicle without consent	23
Rape	3
Receiving stolen property	1
Robbery	14
Robbery with aggravation	15
Returned from escape	10
Returned from Ft. Madison	1
Returned for violation of parole	23
Safekeeping	2
Sodomy	1
Transferred from Fort Madison	1
Uttering forged instrument	5

FORT MADISON, 1937

A. W. I. C. G. B. I.	15
A. W. I. T. C. murder	1

Accepting reward for public duty	1
Accessory in crime of murder	1
Aiding escape from officer	1
Adultery	2
Assault to commit felony	2
Assisting felon to escape	2
Arson	3
Assault to maim	4
Assault to manslaughter	4
Assault to commit rape	8
Attempted arson	2
Attempt to break and enter	4
Attempt to suborn perjury	1
Breaking and entering	32
Bigamy	2
Breaking and entering a car	5
Bootlegging	5
Burglary	3
Burglary with explosives	1
Carrying concealed weapons	6
Child desertion	3
Conspiracy	7
Carnal knowledge of imbecile	1
Desertion	5
Embezzlement	3
Embezzlement by public officer	3
Entering bank to rob	2
Escape	10
Escape from penitentiary	3
Escaping custody	2
Forgery	29
False pretense	6
Illegal transportation of intoxicating liquor	1
Illegal possession of intoxicating liquor	7
Incest	9
Jail break	3
Keeping house of ill fame	2
Lewdness	2
Lewd and lascivious acts	3
Larceny	59
Larceny domestic animals	20
Larceny by embezzlement	2
Larceny of domestic fowls	1
Larceny of motor vehicle	17
Larceny nighttime	4
Lascivious acts	14
Maintaining liquor nuisance	2
Malicious injury to motor vehicle	2
Malicious injury	1
Malicious threats	1
Manslaughter	2
Murder	14
Obtaining goods by false pretense	1
Obtaining money by false pretense	7
Operating motor vehicle while intoxicated	5
Operating motor vehicle without consent	5
Petty larceny	2
Possession of a forged check	1
Possession of stolen automobile	1
Prostitution	1
Rape	14

Returned by court order	9
Returned from Anamosa by transfer	23
Returned from escape	16
Returned for violation of parole	18
Received for safekeeping	1
Receiving stolen goods	3
Receiving stolen property	1
Robbery	9
Robbery with aggravation	11
Sodomy	5
Soliciting for prostitution	1
Uttering counterfeit coins	1
Uttering false instruments	3
Uttering forged instruments	16

FORT MADISON, 1938

A. W. I. T. C. G. B. I.	4
Adultery	2
Assault to commit manslaughter	1
Assault to maim	1
Assault to murder	4
Assault to rape	2
Attempted arson	1
Attempt to break and enter	2
Assisting a felon in escape	1
Assault to rob	5
Breaking and entering	27
Breaking and entering a car	3
Burglary	2
Bootlegging	1
Burglary with aggravation	1
Carrying concealed weapons	2
Child desertion	2
Common thief	2
Conspiracy	13
Defrauding insurer	1
Desertion	3
Embezzlement	10
Embezzlement by bailee	1
Entering bank to rob	2
Escape	14
Escape P. V.	1
False pretense	13
False checks	1
Forgery	33
False entries in corp. book	1
Great body injury	4
Habitual crime	1
Incest	6
Jail break	8
Kidnapping	1
Larceny	35
Larceny of domestic animals	20
Larceny of domestic fowls	7
Larceny of motor vehicle	20
Larceny nighttime	7
Lascivious acts	13
Lewdness	2
Liquor nuisance	2
Malicious injury to building	1
Malicious mischief	2

Manslaughter	3
Murder	10
Murder second degree	1
Obtaining money by false pretense	1
Operating motor vehicle while intoxicated	6
Operating motor vehicle without consent	3
Perjury	1
Petty larceny	1
Possession of narcotics	1
Rape	10
Receiving stolen property	7
Returned by court order	3
Returned from Dallas county	1
Returned from escape	13
Returned from Keokuk county	2
Returned by order of municipal court	1
Returned for violation of parole	16
Robbery	4
Robbery with aggravation	5
Seduction	1
Sodomy	11
Statutory rape	3
Transferred from Anamosa	8
Uttering false checks	1
Uttering forged instrument	16
Assault to commit felony	2
Larceny by embezzlement	1
Returned from Anamosa	14

ROCKWELL CITY, 1937

A. W. I. T. C. G. B. I.	2
Adultery	2
Attempted arson	1
Assisting felon to escape	1
Attempt to produce abortion	1
Breaking and entering	1
Bootlegging	2
Cheating by false pretenses	2
Contempt of court	2
Embezzlement	1
Forgery	5
Grand larceny	2
House of ill fame	6
Illegal possession of intoxicating liquor	4
Illegal sale of intoxicating liquor	1
Larceny	6
Larceny from building	1
Larceny daytime	1
Larceny nighttime	1
Lewdness	6
Maintaining liquor nuisance	1
Malicious mischief	1
Murder	2
Operating motor vehicle while intoxicated	1
Prostitution	6
Public nuisance	1
Returned from escape	1
Returned from parole	1
Soliciting	1
Transferred from Mitchellville	1

Transmitting disease	2
Uttering forged instrument	5
Vagrancy	5
Violating liquor control act	1

ROCKWELL CITY, 1937

A. W. I. T. C. G. B. I.	2
Abandoning a dead man	1
Adultery	4
Bootlegging	1
Conspiracy	1
Delinquent	1
Driving a car on public highway intoxicated	1
Embezzlement	1
Embezzlement by public officer	1
False pretenses	2
Forgery	2
Grand larceny	2
Illegal possession of alcoholic liquor	1
Illegal possession intoxicating liquor	1
Illegal possession narcotic drugs	1
Illegal sale of intoxicating liquor	1
Incorrigibility	1
Intoxication	1
Larceny	2
Larceny of domestic animals	3
Larceny of motor vehicle	1
Larceny nighttime	2
Larceny from a person	1
Larceny of property	1
Lewdness	3
Maintaining a liquor nuisance	1
Malicious threats to extort money	2
Manslaughter	1
Operating motor vehicle while intoxicated	6
Prostitution	4
Receiving stolen goods	1
Robbery with aggravation	3
Soliciting	2
Safekeeping	1
Transmitting venereal disease to another	1
Uttering a forgery	1
Uttering forged instrument	2

IOWA POLICE RADIO SYSTEM

1937 and 1938

At the beginning of 1937 the Iowa police radio system consisted of five low wave police radio stations located at Des Moines, Storm Lake, Atlantic, Fairfield, and Waterloo.

The Des Moines station which was established in 1932 has been operated and maintained up to the present time by the Iowa Bankers Association at their office in the Liberty Building, Des Moines. The radio antenna towers of this station were located on top of the twelve story building and during the summer of 1936 they had begun to cause serious damage to this building. In order that these towers could be removed it was suggested by the Iowa Bankers Association that the State of Iowa assume the operation and maintenance of this Des Moines station and transfer it to a more suitable and permanent location. This station was relocated in a small existing brick and tile building at the state fair grounds through the cooperation of the State Fair Board and placed in service in March, 1937, and its operation was increased so that it was on the air continuously from 8 a. m. until 2 a. m. daily.

Prior to 1937 the Bureau had been conducting an investigation of all types of police radio receiving equipment in order that satisfactory recommendations as to the type of equipment to be used could be made to the peace officers of the state. Efforts were also made to improve receiving conditions at any office where electrical interference was making it difficult for the officers to receive the transmissions from the police radio system. The elimination of electrical interference was a serious problem, not only at the offices of the peace officers of the state, but also at the Waterloo station itself. This station had been installed in the old building which housed the studios of Radio Station WMT. This building adjoined the business district of Waterloo and interference from X-ray machines in nearby doctors' offices at times disrupted the operation of this station. Since a change to a more permanent location was desirable, plans were made to transfer this equipment to a new location. The city of Cedar Falls had become interested in having this unit of the police radio system located at Cedar Falls and offered to provide a satisfactory site and erect a building if the state would establish this station at Cedar Falls. This matter was presented to the Forty-seventh General Assembly and the sum of

$3,500.00 was appropriated to transfer the equipment and install a new vertical antenna at Cedar Falls. This new station was placed in service at Cedar Falls in September, 1937.

In November, 1937, the city council of Storm Lake directed a letter to the State Bureau of Investigation advising that the tower which supported the radio antenna of the Storm Lake station was causing serious damage to the roof of their city hall building. The city hall building is across the street from the court house and the radio antenna was strung from the top of this tower to a mast on the court house. In this letter the city of Storm Lake asked the Bureau if it would be possible to remove this tower before their building was damaged beyond repair. The city council of Storm Lake offered the state the use, without cost, of a city owned park located on Highway No. 71 at the southeast corner of the city for the permanent establishment of this police radio station. The emergency matter was immediately presented to the Retrenchment and Reform Committee of the Forty-seventh General Assembly and the sum of $7,650.00 was provided for the erection of a new building, a new vertical tower antenna, and the reinstallation of the equipment of this station from the court house to its new location. Plans were immediately drawn by the State Bureau of Investigation for the new quarters of this station and bids were taken for its erection. After all bids were presented to the Retrenchment and Reform Committee for their approval, the contracts were let for this project. This work was completed and the new station was placed in service in June, 1938.

During the spring of 1938 the Bureau recognized the need of a mobile broadcasting unit which would operate in conjunction with the existing police radio system. This unit was placed in service on March 1, 1938. It is a complete portable police radio station and its equipment is permanently installed in a sedan delivery type automobile. This station which has a high degree of mobility is equipped with a 50 watt police radio transmitter and carries its own power plant which makes it entirely independent of any external source of power supply. Besides covering matters of a criminal nature, this unit can be and has been used in cases of floods, tornadoes, or similar disasters in establishing communications and furnishing a limited amount of electric power. It was the first unit of its type in the country and the Bureau has been requested to supply information regarding its construction and operation to many of the states now operating police radio systems.

The following are some interesting statistics on the accomplishments of the Iowa police radio system from January 1, 1938, to December 1, 1938.

(a) Classification of some of the items broadcast by the Iowa police radio system:

Item	Number
Stolen automobiles	1,319
Recovered automobiles	1,087
Automobiles wanted	297
Wanted automobiles located	289
Stolen license plates	218
Recovered license plates	82
Persons wanted for criminal charges (this includes bank robbery, counterfeit money, armed holdups, check artists, rackets, murders, etc.)	1,062
Persons apprehended	582
Persons missing	644
Missing persons located	501
Stolen livestock	184
Recovered livestock	73
Miscellaneous stolen property	366
Breakins	155

(b) Authority for items released over the Iowa police radio system:

Authority	Number
Federal Bureau of Investigation	21
Iowa State Bureau of Investigation	262
Iowa Highway Safety Patrol	469
County sheriffs	2,878
Municipal police department	2,623
Outside state authority	935
Total	7,188

(c) Routine orders issued to officers through the Iowa police radio system:

Officers	Number
Federal officers	37
Iowa State Bureau of Investigation officers	1,045
Iowa highway patrolmen	6,174
County sheriffs	168
Municipal police officers	15
Total	7,439

During the year 1937 there were a total of 6,910 items carried over the Iowa police radio system. From the above it can be seen that during the year of 1938 there has been a material increase of traffic dispatched over the system. This does not mean that crime is on the increase in the state but that the peace officers of Iowa are realizing the importance of the radio system and are taking advantage of its facilities.

(d) Apprehension of the Imogene bank robbers secured through the Iowa police radio system.

At 1:45 p. m., Thursday, May 26, 1938, two armed bandits held up and robbed the Bank of Imogene, Iowa. The sheriff of Fremont county was notified and immediately telephoned the information to the Atlantic station of the Iowa police radio system. The information was dispatched from the Atlantic station at 1:50 p. m., exactly five minutes after the

holdup had occurred. The Des Moines station routed the warnings to the Missouri police via the Fairfield station. Within a few minutes after Atlantic had broadcast the news of the holdup, Missouri was radioing their available squad cars to cover important intersections in northwest Missouri. At 3:45 p. m., after the bandits had traveled about 50 miles over side roads, they were apprehended by troopers of the Missouri State Highway Patrol at the intersection of Highways 275 and 46, one mile southeast of Fairfax, Missouri. Besides the Imogene bank robbery these two men confessed to 11 other bank robberies in Missouri, Kansas, and Nebraska, and $42,000.00 in securities were recovered.

One of the most important duties of the police radio system is the maintaining of an accurate card index system of all material broadcast. All items which are dispatched by the radio system are cross filed in a card index file enabling the operators of any of the stations to immediately supply information which may be requested by any peace officer of the state. At the present time there are over 75,000 cards in this file and it is corrected after each item is broadcast.

The five stations of the Iowa police radio system besides being in constant radio communication with each other maintain continuous contact with municipal police radio stations at Des Moines, Sioux City, Davenport, Cedar Rapids, Ottumwa, Burlington, and Iowa City. The states of Minnesota, Illinois and Missouri are in constant contact with the Iowa system by police radio. Information which is released by the peace officers of Iowa can be immediately transmitted to not only these surrounding states but to any other state in the country which maintains a police radio communications system. Criminals who cross the state lines for security now find alert officers awaiting them who have been advised of their activities by the facilities of the police radio.

State of Iowa
1938

TWENTY-SECOND BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1938

JOHN H. MITCHELL
Attorney General

Published by
THE STATE OF IOWA
Des Moines

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*Appointed September, 1937.
**Resigned September, 1937.
***Attorney for Liquor Control Commission attached by Commission to Attorney General's Staff.

SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period
1937-1938

OPINIONS OF THE ATTORNEY GENERAL

CITIES AND TOWNS: RESIGNATION OF OFFICERS: A city office becomes vacant upon the resignation of an officer. City Council does not have authority to reject resignation.

January 5, 1937. *Victor D. Vifquain, County Attorney, Belle Plaine, Iowa:* In response to your request for an opinion on the proposition hereinafter set out, we submit to you the following opinion of this department under the facts set forth.

It is our understanding from your letter that Wallace F. Snyder, Attorney at Law, Belle Plaine, Iowa, was elected Mayor of the city of Belle Plaine, and his term of office expires on March 1, 1937. He was duly nominated and was elected on November 3, 1936, for the office of County Attorney of Benton County. His term of office as County Attorney commences on January 1, 1937, leaving a period of three months between that date and the date his term as Mayor expires. He submitted to the City Council of Belle Plaine his resignation to the office of Mayor and they refused to accept the same. Your inquiry is relative to whether or not he can legally hold the office of Mayor of Belle Plaine, Iowa, and County Attorney concurrently for the three months' period. It is our understanding that Belle Plaine is a city known as "Second Class."

It is the opinion of this department that at the time Mr. Snyder submitted to the City Council his resignation that the same became effective immediately, or upon any date specified in his resignation; that under the law of this state, it is not necessary that the City Council accept his resignation, but that it is effective regardless of whatever action the City Council takes in the matter.

The case of *Gates vs. Delaware County*, 12 Iowa, page 405 (Withrow), is controlling, and the same has never been overruled. In that case the county superintendent of common schools tendered his resignation. The resignation was received by the county judge and placed on file in his office marked: "Resignation. H. N. Gates, superintendent of common schools." Nothing further was done. The question arose as to whether or not his resignation became effective. The court in that case on page 407 stated as follows:

"The Code designates the county judge as the officer to whom a county school superintendent may resign his office. But it does not specify the mode or ceremony which must be adopted in order to consummate this object, nor does it invest the county judge with any discretionary power to refuse such resignation. The right to lay down office in this country is so clear and universally acknowledged, that it may well be questioned whether the officer appointed to take such resignation would have the right to prevent it. Certainly no such power is given him in the law. It is true in particular cases, or under special circumstances, he might with propriety advise against it, but he has no absolute legal right to peremptorily forbid the act, or refuse the resignation. Such is neither the language, the spirit, nor the policy of the law. Hence we infer that there can be no good reason for requiring that the resignation should be formally accepted in writing, or entered on record and the incumbent notified thereof before the same can be effectual in rendering vacant the office."

The case of *Curtright vs. Independent School District of Center Junction*, 111 Iowa, page 20, turns, in our opinion, upon the proposition that the school teacher in that case, who had tendered her resignation, was under a contract of hire, and to terminate that contract it was not only necessary that her offer of resignation be tendered, but also that the same be accepted by the board. The

court in that case said that her tender of resignation was "simply a tender—an offer—to resign, to terminate the contract, and, until accepted, was not binding on either party." But that court did uphold the *Gates vs. Delaware County case, supra,* stating that in that case no further action was required.

Section 1146 of the Code of Iowa of 1935 states as follows:

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

"4. The resignation or death of the incumbent, or of the officer elect before qualifying."

Section 1148 of the 1935 Code of Iowa states as follows:

"Resignations in writing by civil officers may be made as follows, except as otherwise provided: * * *

"5. By all councilmen and officers of cities and towns, to the clerk or mayor."

The question of what constitutes a resignation is one of which there is a decided split of authority, as is shown in the note in 95 A. L. R., page 216. Probably the weight of authority is to the effect that the resignation must be accepted before it becomes effective, but on page 216 thereof the minority view is expressed in which Iowa cases are cited, and it is our opinion that Iowa has adopted the minority view. If the statute read that the office would become vacant upon the resignation of the officer and upon his successor being duly qualified, then probably a different ruling would be made for the reason that under such a statute as some states have it would be essential that the successor qualify before a vacancy by resignation could exist for the term of a predecessor. Statutes of Iowa are not so written, and due to the fact that the legislature has never seen fit to enact a statute making it also necessary that a successor be appointed and qualified where a resignation is submitted, and further due to the fact that the legislature has never seen fit to enact a law authorizing the City Council to either refuse or accept a resignation, it is our opinion that they are without authority to reject the same, and that the resignation is effective whether it is accepted, rejected, or no action taken.

This opinion then, turning upon the proposition that the resignation was complete at a time prior to the date when the term of County Attorney commenced, it disposes of any question relative to the right of the newly elected County Attorney to hold that office concurrently with the office of the Mayor of Belle Plaine.

TAX SALE: REDEMPTION: One who makes payment for redemption from tax sale without having such interest in the land as entitles him to make such redemption, is a mere volunteer.

January 5, 1937. *Mrs. Virginia Bedell, County Attorney, Spirit Lake, Iowa:* This office has your request of January 3, 1937 for an opinion upon the questions hereinafter set out, based upon the following facts, as gathered from your letter.

At the annual 1935 tax sale of Dickinson County the county bid in certain property which had previously been advertised and not sold—this bid being under what has long been referred to as the scavenger sale statute, now known as the Public Bidder Statute. This property not having been redeemed, notice of right of redemption was served on September 11, 1936. On December 3, 1936, the son of the record owner of this property mailed to the county auditor the amount necessary to make redemption from this sale (we do not know

whether this amount was the amount represented by the tax sale certificate, or the full amount of the taxes against the property).

Upon receipt of the money sent by the son of the owner, the county auditor issued a redemption receipt to the son and entered the redemption upon her records. On December 30 or 31 the owner's son called at the office of the county auditor and informed her that he had not intended to redeem said property but had meant to purchase an assignment of the tax sale certificate from the county. No action of the Board of Supervisors had been taken with reference to the sale or assignment of said tax sale certificate. The auditor refused to return the money to the son or to cancel the redemption.

On January 2d both the owner of the property and the son of the owner appeared before the Board of Supervisors and asked for the cancellation of the redemption and the return of the money—at the same time expressing a desire to purchase and secure an assignment of the tax sale certificate from the county, or to purchase the real estate from the county, if the same went to tax deed.

There is a mortgage of record against this property but no special assessments.

Your questions are:

"1. Can the county sell or assign a tax sale certificate to any person except those designated in Section 6041 of the 1935 Code?"

You are advised that Section 6041 has to do with the rights of the holders of special assessment certificates or bonds payable out of this special assessment to an assignment of tax sale certificates upon tender to the holder or the county auditor of the amount to which the holder of the tax certificate would be entitled in case of redemption. This section permits the holder of a special assessment certificate or a bond, payable out of this special assessment certificate, to tender the amount due upon a certificate of tax sale and thereby become the owner of a tax sale certificate without paying to the auditor the full amount which would be due if redemption was being made by the owner of the property, thereby giving the holder of any special assessment certificate or a bond payable out of the special assessment the right to protect himself by acquiring the tax sale certificate.

The purpose of a tax sale is to urge the payment of taxes and to permit the county or tax levying body to secure revenue and, if it becomes necessary for the county or other tax levying body to purchase property under the public bidder statute, they are accomplishing their purpose in securing the revenue by a sale of the certificate. There is no provision of the statute prohibiting the county or other tax levying bodies, who have purchased property at a tax sale, from selling and assigning the certificate.

"2. Would the county be liable to any lienholder or any person having an interest in the property if they contract, through the Board of Supervisors, to sell any real estate upon which they hold tax sale certificates prior to obtaining deed?"

Such contract by a Board of Supervisors would, at all times, be contingent upon their acquiring a tax deed to the property. A tax deed is a new and independent title and would extinguish all prior liens. Therefore, there can be no liability on the part of the county in entering into such contract unless they contracted to deliver the property without making it contingent upon their acquiring a tax deed, in which event there could be a possible liability

on account of the county's failure to comply with the contract with the purchaser.

"3. Can the Board of Supervisors sell any real estate, obtained under the provisions of said Chapter 83, for any sum less than a fair valuation of same as provided in Section 5130, par. 13, of the 1935 Code?"

Section 5130, par. 13, of the 1935 Code has to do with the powers and duties of the Boards of Supervisors generally. The legislature has, however, apparently deemed it necessary to safeguard all taxing bodies in their interest in property acquired by the county under tax deeds. Section 10260-g1 of the statute specifically provides the manner in which property acquired under tax deeds shall be managed and sold by the county after it has acquired title to the property. This section of the statute is mandatory.

"4. Could the money paid by the owner's son, as set out above, be treated as anything but a redemption?

"A. If so, could it be refunded as an erroneous payment?

"B. In any event, would not the entry of redemption in the books of the county auditor require a new expiration notice?"

From the facts, as outlined in your letter, we do not understand that the county is questioning the right of the son in this matter. Redemption from tax sale can only be made by someone having an interest in the property to be redeemed.

Garrigan vs. Knight, 47 Iowa 525;
Iowa Railroad Co. vs. Davis, 102 Iowa 128.

One who makes payment for redemption from tax sale without having such interest in the land as entitles him to make such redemption, is a mere volunteer.

Ellsworth vs. Randall, 78 Iowa 141;
Penn vs. Clemans, 19 Iowa 372.

It would, therefore, appear that unless the county is questioning the son's right to make redemption that what he has done has been done as a volunteer and he is not entitled to a return of the money.

A. The Board of Supervisors could, by resolution, provide for a refund to the son if they felt the facts warranted them in treating his action as having been taken through mistake or misunderstanding.

B. The county auditor, having entered a redemption in the books of her office opposite the tax sale in question, cannot erase or deface that entry. The statute prohibits erasures. Section 7276-c1, Code of 1935. Encumbrancers or lienholders would have a right to rely upon the records made by the county auditor, that redemption of this property had been made on December 3.

It is our opinion that redemption of the property has been made from the tax sale referred to—

First: If the redemption was made by the son and his action was not questioned by the tax certificate-holder, he acted as a volunteer, and the county has received and accepted the money due under the tax sale and has cancelled the certificate and the sale out of which it grew.

Second: If it should be claimed that the money belonged to the father and that the son was acting for the father, and the father being the owner of the property and also the mortgagor of the property, the action of the son would be that of his agent and any payment of the tax due upon this property, whether in the attempted redemption or to secure an assignment of the certificate

would be a payment of the taxes by the mortgagor who is legally bound to pay the taxes. See,

Hawkeye Life Ins. Co. vs. Valley-Des Moines Co., 206 N. W. 669.

SOLDIERS' RELIEF COMMISSION: FUNDS, DISTRIBUTION OF: Chapter 273 of the 1935 Code makes it mandatory that that commission disburse the money to the parties entitled to it—fund not transferable.

January 7, 1937. *Mr. Frank E. Gill, Attorney for Board of Supervisors, Sioux City, Iowa:* Your letter of December 19, 1936, requests the opinion of this department as to the duties of the soldiers' relief commission created under the provisions of Chapter 273, Code of Iowa, 1935.

Your specific question is whether or not the soldiers' relief commission may turn over to the Iowa emergency relief administration, funds derived from taxation for the relief of soldiers, sailors, marines, and nurses who served in the military or naval forces of the United States, etc. for distribution under a plan adopted by said administration.

The enactment of Chapter 273, supra, was for the purpose of providing a fund for the relief of those who served in the military or naval forces of the United States, their indigent wives, widows, and minor children of certain age, and to create a commission to determine the eligibility of applicants, and to disburse the funds raised by taxation for such purpose. The pertinent provisions of Chapter 273, supra, are as follows:

"5386. *Control of fund.* Said fund shall be expended for the purposes aforesaid by the joint action and control of the board of supervisors and the relief commission hereinafter provided for."

"5387. *Relief commission.* Said fund shall be disbursed by the soldiers' relief commission, which shall consist of three persons, all of whom shall be honorably discharged soldiers, sailors, marines, or nurses of the United States who served in the military or naval forces of the United States in any war. Said membership shall at all times, as near as possible, be equally divided between the soldiers, sailors, marines, and nurses of the civil war, Spanish-American war, and world war."

In addition, the statute requires that the commission meet annually at the office of the county auditor and at such other times as may be necessary to determine who are entitled to relief, and the probable amount to be expended therefor. After this determination is made, the commission is required to certify to the board of supervisors, together with the list of those determined entitled to relief, the sum to be paid in each case. Upon the filing of this list, it becomes the duty of the county auditor to submit to the township clerks in the county, the names of those, if any, to whom relief has been awarded, and the amount. Section 5392 of Chapter 273, supra, then goes on to provide:

"5392. *Disbursements.* On the first Monday of each month after the fund is ready for distribution, the auditor shall issue his warrant to the commission for the sums thus awarded, and it shall proceed to disburse the same to the parties named in the list, or disbursements may be made in any other manner the commission may direct. Receipts shall be taken for all payments."

It is clear from the foregoing quoted sections that the disbursement of funds raised by taxation for the purposes contemplated by the legislature in the enactment of said chapter, is to be made under the direct supervision of the soldiers' relief commission. Throughout the statute, the word "shall" is used, and in the opinion of this department is employed in its mandatory connotation.

The only apparent authority to be found in the statute authorizing the commission to deviate from the method of direct distribution is in the language contained in the last quoted section—"or disbursements may be made in any other manner the commission may direct." This language, in the opinion of this department, gives the commission the power to determine whether disbursements should be made in a lump sum or in weekly payments or by way of providing supplies and necessities. It does not, in our opinion, authorize the commission to transfer the entire fund to some other agency for distribution, thus placing the fund beyond the immediate control and supervision of the soldiers' relief commission.

It is accordingly the opinion of this department that the soldiers' relief commission may not undertake the procedure outlined in your inquiry.

DEPUTY COUNTY RECORDER: FEES: DUAL COUNTY SEAT: Extra compensation provided for in Section 5236 was intended to compensate for the maintaining of the extra office and not intended to apply simply because there were two county seats or two places where the district court is held.

January 7, 1937. *Mr. Robert B. Organ, County Attorney, Council Bluffs, Iowa:* Your letter of January 5, 1937, requests the opinion of this department concerning the basis for salary of the first deputy county recorder of Pottawattamie County, Iowa. Pottawattamie County, pursuant to law, maintains two court houses, and the district court of Iowa in that county convenes both in Council Bluffs and Avoca. However, the only offices maintained at Avoca are those of the deputy clerk and deputy sheriff. The question arises as to whether or not the salary of the first deputy county recorder is to be determined under the provisions of Section 5225 or Section 5236, Code of Iowa, 1935.

For judicial purposes, Pottawattamie County has been divided by legislative enactment, as follows: Litigation arising west of range 40 is triable in Council Bluffs; litigation arising east of range 40 is triable at Avoca. While it is true that Section 5236 provides for additional salary in any county having two county seats, and where the district court convenes in two places, yet in providing compensation under those conditions, the statute specifies "the first deputy county auditor, county treasurer, county clerk, and county recorder, or the deputy in charge of such office, shall receive sixty-five per cent of the amount of the salary of his principal."

It would appear from an analysis of Section 5236, supra, that it was the intention of the legislature that the person in charge of the dual office should have extra compensation on account of extra services involved. There being no recorder's office maintained at Avoca, the duties of the county recorder's office would be no more nor no greater than in a county where one court house is maintained. It is accordingly the opinion of this department that Section 5225 and not Section 5236 is applicable and that the first deputy county recorder's salary should be fixed as provided in Section 5225, supra. It is our further opinion that the extra compensation, provided in Section 5236, supra, was intended to compensate for the maintaining of the extra office, and was not intended to apply simply because there were two county seats or two places where the district court convened.

INSURANCE: COMPENSATION: VOLUNTARY WORK AGREEMENT SIGNATORIES: PUBLIC FUNDS: Volunteer workers would not be protected by Workmen's Compensation, as municipality would have no control over

selection of personnel, and relation of employer and employee, as required by compensation law, is lacking.

January 7, 1937. *Hon. Clyde L. Herring, Governor of Iowa:* We respond to your request for an opinion requested of you by R. C. Smith of Indianapolis, regional director of the Resettlement Administration, on the following questions:

1. May the public funds of the state and political subdivisions thereof and other local governing or public administrative bodies be used for the payment of premiums or workmen's compensation insurance or other equivalent form of insurance covering signatories of voluntary work agreements?
2. Are the state and its political subdivisions and other local authorities authorized by law to assume liability for injuries sustained by assigned voluntary work agreement signatories?
3. Will assigned voluntary work agreement signatories be otherwise similarly protected by such insurance by the operating of the provisions of any other applicable state statute?

There is no special statute in Iowa governing such matters and the questions must be answered in the light of the Workmen's Compensation act. The broad question is as follows:

Where a relief client of the Resettlement Administration signs what that administration denominates a volunteer work agreement and said signatory is then set to work by some public body of this state pursuant to the request of such body to the Resettlement Administration, will such signatory be protected by the Workmen's Compensation law as an employee of such public body?

The law applies to the state, counties, municipal corporations, school districts and all cities. (Code Section 1362.)

An employee is defined by the act as a person who has entered the employment of, or works under contract of service, express or implied, or apprenticeship for an employer. The law makes certain exceptions including (a) a person whose employment is purely casual, and not for the purpose of the employer's trade or business; (b) a person engaged in clerical work only whose work is not subject to the hazards of the business; (c) an independent contractor; and (d) a person holding an official position or standing in a representative capacity of the employer. (Code Section 1421.)

The compensation schedule is set out in Code Section 1390. It provides in case of injury for the payment on the basis of sixty per cent per week of the average weekly earnings, but not to exceed fifteen dollars, nor less than six dollars a week, except where the earnings are less than six dollars a week, and in that case the employee receives in weekly payments a sum equal to the full amount of his weekly earnings.

Serious question would arise concerning the compensation to be paid in case of injury, even if we assume that the volunteer worker would be an employee within the meaning of the act. He would not be receiving wages. His work would be in recognition of some obligation that he owed the government because the government had made a grant to him. But aside from that, one must be an employee as defined by the act to come within its provisions.

A number of cases have come before the Industrial Commission involving relief workers, CWA workers, etc.

In *Hoover vs. Independent School District*, 220 Iowa 1365, decided January 21, 1936, by the supreme court of Iowa, a worker for the Civil Works Administration was injured while engaged in redecorating a high school building at

Shenandoah. In the course of the opinion, the court remarked that so far as concerns cases of where paupers on relief sustain injury while performing service for the governmental body furnishing the relief, it is quite uniformly held that the relation of employer and employee does not exist. And the court goes on to say:

"This is because the workmen under such circumstances is not working under any contract of employment or for a wage, but received benefits from the governmental body to the same extent whether he works or not." (Citing cases.)

The court then goes on to say that these Civil Works men were not on relief. They were employees receiving so much per hour from the Civil Works Administration. It was claimed that while the federal government was the general employer, the school district was their special employer and it was claimed that the claimants came within the rule of "loaned employees." The court after discussing the rule as to "loaned employees," which it said has been widely recognized outside this state, finally said:

"This court has adopted a test for determining whether the relation of employer and employee exists under our statute which would seem to quite effectively exclude the loaned employee as an employee of the person to whom he was loaned."

And the court goes on to say that the workman was actually working for the Civil Works Administration and the rule of "loaned employee," even if recognized by the court, would not apply.

There is another case now pending in the supreme court. It is the case of *Oswald vs. Lucas County.* In that case the claimant was a relief worker. He was assigned to work by the director of relief work and reported to the supervisor of employment. He was to receive forty cents per hour for his work. Lucas County paid the salaries of the persons working in the relief office. The funds used for the payment of the work of the claimant and other like workers were supplied chiefly by the Iowa Emergency Relief Administration with a limited contribution by Lucas County. While the claimant was at his work of spreading shale on a secondary road, he was injured. The arbitration board made an award. This was affirmed by the Industrial Commissioner. The findings of the Industrial Commissioner were reversed by the Lucas County district court, and it is now in the supreme court on appeal by the claimant. Probably when a decision is rendered in that case, it will shed some light upon the subject. However, in our opinion, the question framed out of the questions asked by the regional resettlement director must be answered in the negative. In other words, we do not believe that these volunteer workers would be protected by the Workmen's Compensation laws, if assigned to work under the conditions set out in the regional director's letter. Incidentally, the worker's agreement contains a clause giving the worker the right to substitute an adult member of his family in his place. This fact rather emphasizes the general proposition that the municipality would have no control over the selection of the personnel, and the usual incidents of the relation of employer and employee as required by our compensation law are lacking.

The matter of municipalities taking out insurance would not be material for the reason that the insurance would not protect the resettlement workers, if they were not in fact employees within the meaning of the law.

TAXES: REMISSION OF TAXES ON CAPITAL STOCK: BANKS: BOARD OF SUPERVISORS: State Board of Supervisors may consent to remission of taxes on capital stock, providing taxes are paid or the delinquency in payment is not longer than thirty days at the time of loss of said stock. Stockholders must also have paid the stock assessment.

January 11, 1937. *Mr. M. C. Williams, County Attorney, Boone, Iowa:* We have your request for an opinion under the following facts: A bank in your county went into voluntary liquidation and appointed trustees for the purpose of paying off their liabilities. It was about the year 1932 that the bank first started to liquidate. Some of the stockholders have paid the tax on their stock in the years 1933 and 1934. This was paid by the stockholders themselves and not by the bank as is the general custom. The stockholders have filed a claim with the board of supervisors to remit the amount of these claims paid by them. There was no stock assessment for the year for which the tax remission is claimed.

Query: Can the board of supervisors remit the tax paid by these stockholders?

Section 7004-g1 does not apply for the reason that the same refers to banks being closed and put in the hands of a receiver. Clearly that section does not apply because we do not have a receivership here, but we have a voluntary liquidation in the appointment of a trustee. That reason in itself is controlling in our opinion. It will also be noted that that section refers to unpaid taxes on the capital stock of the bank. The taxes here have been paid.

The only other section which might be applicable is Section 7237 of the Code of 1935, which, in sofar as it relates to this matter, states as follows:

> "The board of supervisors shall have power to remit in whole or in part the taxes of any person whose property has been destroyed, if said taxes have not been delinquent for thirty days at the time of destruction. The loss of capital stock in a bank operated within the state and the making and paying of a stock assessment for the year such stock was assessed for taxation shall be a destruction within the meaning of this section."

Interpreting the first part of said section then, as a prerequisite for the remission of taxes by the board, if they see fit, it is essential that the taxes on the stock either be paid or that the delinquency in the payment of the same be for not longer than thirty days at the time of the destruction or loss of capital stock.

Construing the last part of Section 7237, we see that in addition to the loss, it also is necessary that the stockholders have paid a stock assessment, and according to the facts presented to us by you there was no stock assessment for the year that the remission is claimed, and it is the opinion of this office that that in itself is fatal to a recovery of the tax paid.

It will also be noted in said section that a recovery can only be had for the year that the tax was paid and a stock assessment made. The tax on stock is due and payable the year following the year of taxation. For example, if the bank went into receivership in 1932, the tax assessed in 1932 being payable in 1933 would be the only tax that would be subject to remission by the board of supervisors.

Another question that arises, but which need not be determined, due to the ruling we must make in this matter, is:

Query: When a bank goes into voluntary liquidation, and a trustee is

appointed, does that constitute the loss of capital stock as is used in Section 7237 of the Code of 1935?

It is therefore the opinion of this office that due to the fact that there was no stock assessment, that the stockholders are not entitled to a remission of taxes, and the board of supervisors does not have the power to remit said taxes in whole or in part under Section 7237 of the Code of 1935.

TAX SALES: SCAVENGER: PUBLIC BIDDER: Section 7255-b1, Chapter 347, Code 1935 makes it mandatory upon the Board of Supervisors to bid at a scavenger sale the full amount of all delinquent general taxes, interest, penalties and costs.

January 12, 1937. *Mr. C. H. Fishburn, County Attorney, Muscatine, Iowa:* Your letter of January 6, 1937 addressed to the State Board of Assessment and Review has been referred to this office for an opinion upon the question therein stated. Your question involves the following facts:

A piece of property upon which there are no special assessments is offered for sale at the scavenger tax sale. The public bidder bids the full amount of the tax and an outside bidder then bids the full amount of the tax due for a one-half interest in the property.

Question: Should this property be sold to the bidder for a one-half interest, or must he raise the bid by paying more money?

Under the statute covering tax sales, authority is conferred upon the Board of Supervisors to purchase property at scavenger sales. This provision is found in Section 7255-b1 in the Code of 1935, the pertinent part of which is as follows:

"The county in which said real estate is located, through its Board of Supervisors, shall bid for the real estate the sum equal to the total amount of all delinquent general taxes, interest, penalties and costs charged against said real estate."

This statute makes it mandatory upon the Board of Supervisors to bid at a scavenger sale the full amount of all delinquent general taxes, interest, penalties and costs. There is no provision of law authorizing the County, through the Board of Supervisors, to bid more or less than the total sum of all delinquent general taxes, interest, penalties and costs charged against the real estate.

The so-called Public Bidder Statute is contained in Chapter 347 of the Code as is Section 7253. Under Section 7253 the mode and method of bidding at tax sales is prescribed by statute and no other method or mode is recognized. Section 7253 provides:

"The person who offers to pay the amount of taxes which are a lien on any parcel of land or town lot for the smallest portion thereof shall be the purchaser."

This provision of the statute, with reference to bidding, has reference to the smallest fractional part of the whole.

Therefore, it is the opinion of this office that the bidder who offered to pay the full amount of the general taxes, interest, penalties and costs for a one-half interest in the property, unless some other bidder offered to pay the full amount of the general taxes, interest, penalties and costs for a smaller fractional part of the property, should be declared the purchaser and would be entitled to a tax sale certificate to the property upon the payment of the amount of the taxes.

BOARD OF SUPERVISORS: EXPENDITURES: WHEN VOTE NECESSARY: Section 5261, Code of Iowa, 1935, prohibits a county board of supervisors purchasing real estate for county purposes in excess of $10,000.00 in value, until a proposition therefor is first submitted to the legal voters of the county.

January 12, 1937. *Mr. Carl Nystrom, County Attorney, Decorah, Iowa:* Your letter of January 8, 1937, to this office, received.

The opinion submitted herewith is based upon the following facts:

Your board of supervisors has under consideration the purchase of a farm adjoining the county home at a consideration of $15,000.00. The purpose of purchasing this farm is to more adequately furnish food and other supplies for the inmates of the county home.

Your question: Can the board of supervisors lawfully purchase land of the valuation of ten thousand dollars, and at a later date purchase land of the valuation of five thousand dollars, or in other words, divide the proposed purchase?

Section 5261 of the Code of 1935 is as follows:

"*Expenditures—when vote necessary.* The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a court house, jail or county home when the probable cost will exceed ten thousand dollars, * * * nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition. * * *"

The board of supervisors is the financial agent of the county, intrusted with the expenditure of the taxpayers' money, and of whom the law exacts the utmost good faith.

The statute heretofore quoted prohibits the board of supervisors from "ordering the erection of, or building of an addition or extension to or the remodeling or reconstruction of a court house, jail or county home when the probable cost will exceed $10,000.00," and further limits the board of supervisors in the purchase of real estate "for county purposes exceeding $10,000.00 in value," until either proposition has been submitted to the legal voters of the county.

The question under consideration deals entirely with the purchase of land, and it may be conceded that the purchase is contemplated for county purposes. Therefore, the limitations placed upon the amount of money which a board of supervisors would be authorized to expend applies in this instance. That limitation is fixed at $10,000.00. It would be but a subterfuge and an evasion of the statute to divide this purchase into parts in order that no one tract of land, even though contiguous to another that is to be purchased, would exceed $10,000.00 in cost. *State vs. Garretson,* 207 Iowa 627.

It is apparent that the legislature, in placing a limitation upon the amount of money to be spent by the board of supervisors in the purchase of real estate, intended that limitation to apply to the particular matter under consideration by the board. To go beyond that would be to destroy the effectiveness of the statute.

It is therefore the opinion of this department that the board of supervisors of Winneshiek County may not proceed to purchase land for county purposes without submitting the proposition to the legal voters of the county by the subterfuge of dividing the transaction into parts so that the value of land

purchased in each instance is $10,000.00, or less. This would be a clear evasion of the statute, illegal, and beyond the scope of the board of supervisors' authority.

SHERIFF AND DEPUTIES: TERMS OF OFFICE: SALARY FOR TERM OF OFFICE: The term of office of the sheriff, being a term of two years as fixed by statute, began on the second secular day of January, 1935, and ended at midnight on the first day of January, 1937. His salary having been paid in twelve equal installments would be in full payment of his annual salary fixed by law.

January 13, 1937. *Mr. Leon A. Grapes, County Attorney, Davenport, Iowa:* This office has your request for an opinion covering the following facts:

The personnel of the Sheriff's office changed on January 2, 1937. The retiring Sheriff and his deputies filed claims with the Board of Supervisors for one day's pay covering their services on January 1, 1937, claiming that the warrants issued to them for their December services covered only the calendar month of December.

The facts stated require an answer to the question:

Are the Sheriff and his deputies entitled to pay for January 1, 1937?

This question becomes more a matter of mathematics than of law. Section 5226 of the Code of 1935 fixes the annual salary of sheriffs, and reads as follows:

"*Sheriff.* Each sheriff shall receive for his annual salary in counties having a population of:

"(1) Less than fifteen thousand, seventeen hundred dollars. * * *"

And the subsequent paragraphs of the section fix the compensation according to the population of the county. These salaries are annual salaries.

Section 1218 of the Code is as follows:

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

Section 520 of the Code is as follows:

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

Section 511 of the Code is as follows:

"*Term of office.* The term of office of all officers chosen at a general election for a full term shall commence on the second secular day of January next thereafter, except when otherwise provided by the constitution or by statute * * *"

The deputies of the sheriff are governed, with reference to salary and tenure of office, by the same sections of the statute, except with relation to the amount of their fees, which is fixed by Section 5227 of the Code.

Therefore, the term of office of the Sheriff, being a term of two years as fixed by statute, began on the second secular day of January, 1935, and ended at midnight on the first day of January, 1937. His salary having been paid, as by law provided, in twelve equal monthly installments, would be in full payment of his annual salary fixed by law.

It is therefore the opinion of this department that neither the Sheriff nor his deputies were entitled to any extra compensation for services rendered on January 1, 1937.

EXPENSES OF COUNTY SUPERINTENDENT: APPROVAL BY BOARD OF SUPERVISORS: Failure of county superintendent to obey the mandates of the statute in filing her expense accounts, as by law provided, and the fact that her expenses exceeded the amount approved by the board, bar her right to recover excess amount from the county. (Section 5233, Code 1935.)

January 13, 1937. *Mr. Charles P. Vogel, County Attorney, Grinnell, Iowa:* We have your letter of January 8th asking an opinion of this Department based upon the following facts:

The County Superintendent of Poweshiek County, prior to January 1, 1936, filed with the County Auditor a statement of estimates of the expenses of her office for supplies, mileage, stationery and so forth for the year 1936. Subsequently thereto, the Board of Supervisors approved the sum of $400 for mileage for the year. The County Superintendent exhausted her allowance, or the amount authorized to be expended by her office, in October or November of 1936 and held back the unpaid bills and filed them with the Board of Supervisors subsequent to January 1, 1937. Your question has to do with the status of these bills filed subsequent to January 1, 1937, which are in excess of the amount authorized by the Board of Supervisors for 1936.

Section 5233 of the Code is as follows:

"*Expenses of county superintendent.* The county superintendent shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performance of his official duty within his county and such expenses shall be allowed by the county board of supervisors and paid out of the county fund, as other expenses of the county, but the total amount so paid in any one year for traveling expenses of the superintendent shall not exceed four hundred dollars, unless approved by the Board of Supervisors. In determining the actual and necessary expenses incurred under this section, mileage at the rate of five cents per mile for distance actually traveled may be included."

Under this section of the statute, it is mandatory that the County Superintendent shall, on the first Monday of each month, file with the County Auditor an itemized and verified statement of her actual and necessary expenses incurred during the preceding month. It is likewise mandatory that the allowance for traveling expenses shall not exceed the sum of four hundred dollars, unless approved by the Board of Supervisors.

In the instant case the Board of Supervisors has approved the sum of four hundred dollars for mileage for the year 1936. This is in accordance with the statute. The County Superintendent has failed to comply with the statute and the mandatory provisions thereof with reference to the filing of her itemized and verified statement on the first Monday of each month. She has exhausted the sum approved for her office for mileage before the end of the year. This is in violation of the statute. She cannot withhold her expense items incurred in 1936 and have them paid during 1937. The provisions with reference to the filing of her accounts are mandatory, and the amount fixed and determined by statute is likewise mandatory and can only be exceeded by approval of the Board of Supervisors. Approval of the Board of Supervisors does not mean ratification by the Board of Supervisors. The expenditures made in this matter were unauthorized.

It is therefore the opinion of this Department that the failure of the County Superintendent to obey the mandates of the statute in filing her expense

accounts, as by law provided, and the fact that her expenses exceeded the amount approved by the Board of Supervisors bar her right to recover the excess amount from the County.

BANKS: REFUND OR CANCEL TAXES IN CLOSED BANK: County is entitled to remit the unpaid taxes but is not entitled to return the taxes referred to.

January 13, 1937. *Mr. Wallace F. Snyder, County Attorney, Belle Plaine, Iowa:* Replying to your letter of the 9th instant concerning the right of the Board of Supervisors to refund or cancel taxes on closed banks, in accordance with Section 7004-g1 and Section 7237 of the Code, will say that in our opinion, the county is entitled to remit the unpaid taxes but is not entitled to return the taxes referred to.

Your question relates to banks closed prior to the enactment of Section 7004-g1. That section makes it mandatory on the board to remit all unpaid taxes on capital stock of the bank that so closes. Section 7237 also refers to unpaid taxes. As to banks that closed or that may close after the enactment of Section 7004-g1, it would seem that Section 7235 would authorize a refund to the taxpayer of taxes that he had paid for the year during which the bank was closed, because the supervisors are required to remit such taxes, and requiring payment of such taxes would be contrary to the law and so they would be erroneously and illegally exacted or paid. But when these taxes were paid in the case to which you refer, the taxes were not erroneously exacted and we find nothing in the law that would warrant the board in returning the taxes so paid.

TAXES: SALE OF REAL ESTATE UPON WHICH TAXES HAD BEEN SUSPENDED: Upon the sale or transfer of property upon which the taxes had been suspended, the suspended tax together with six per cent interest should be collected. Board of Supervisors without authority to compromise tax or settle with tax payer upon any other method. (Section 6952, Code 1935.)

January 14, 1937. *Mr. Hillis W. Noon, County Attorney, West Union, Iowa:* This office is in receipt of your letter requesting an opinion upon the following facts:

Up until about nine months ago an old lady "who was entitled to real estate property exemption" owned real estate. Since 1921 this property has been carried on the tax list as suspended, although it was evidently the intention of the assessor and Board of Review to list the same as exempt.

Must the Board of Supervisors now collect the suspended taxes together with 6 per cent interest, or can they compromise the tax by remitting the interest?

In your query you state that this property was owned by the old lady up until about nine months ago. Presumably the property has now passed by deed or devise. Section 6952 provides:

"*Grantee or devisee to pay tax.* In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance to any person other than the surviving spouse or minor child of such infirm person, the taxes, without any accrued penalty, that have been thus suspended shall all become due and payable, with six per cent interest per annum from the date of such suspension * * *"

It would appear from the provisions of the foregoing section that upon the

sale or transfer of property upon which taxes had been suspended that the suspended tax together with six per cent interest should be collected. Under the circumstances, the Board of Supervisors would be without authority to compromise the tax or to settle with the taxpayer upon any other method or basis than as outlined in Section 6952, except in computing the interest upon the suspended tax. Section 7194 of the statute should be taken into consideration. Section 7194 reads as follows:

"*Penalty and interest limited—unavailable taxes.* No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer * * *"

It is therefore the opinion of this Department that the Board of Supervisors are without authority to compromise the taxes and that the suspended taxes, together with six per cent interest, should be figured in accordance with Section 7194 of the statute.

TAXES: DELINQUENT PERSONAL TAXES: WHEN OUTLAWED: As the statute of limitations does not run against the state or county in public matters, the state, as well as the county being interested in the tax, the statute of limitation does not run against taxes. In other words, taxes do not outlaw.

January 14, 1937. *Mr. George F. Mikesh, County Attorney, Cresco, Iowa:* The receipt of your letter is acknowledged wherein you ask an opinion of this office upon the following question:

Are taxes due on personal property ever outlawed? If so, after how long a time?

We do not find any provision of the statute nor any opinions of our court touching directly upon the question involved. We must, therefore, in answering your question apply the general principles of law.

Personal taxes become due and payable January 1st following the assessment of the property. Personal taxes are made a lien upon any and all real estate owned by the taxpayer for one year following December 31st of the year of levy. From and after the expiration of one year, personal taxes are a lien on all real estate owned by the taxpayer for an additional period of nine years, providing said taxes are entered upon the delinquent personal tax list as provided by law, Section 7203 of the Code. But in no instance shall personal taxes be a lien upon real estate after the expiration of ten years from December 31st of the year of levy, Section 7203. Under this section of the statute, personal taxes cease to become a lien upon real estate, even though carried forward in the delinquent personal tax list, ten years after December 31st of the year in which levied. In other words, personal taxes becoming due on January 1st cease to become a lien, though carried forward on the delinquent tax list, in ten years. The fact that personal taxes are a lien upon real estate and continue to be a lien if carried forward on the delinquent tax list over a period of ten years, does not in any way interfere with or prevent the county treasurer from collecting the tax by other methods.

The taxpayer has the privilege of paying the tax in two equal installments, one installment before April 1st and the second installment before October 1st. The interest and penalty attaches to the first installment if not paid by April 1st and to the second installment if not paid by October 1st. Therefore, on

October 1st both installments, or the total tax would be delinquent and would be a debt by the taxpayer to the taxy levying body.

In addition to the methods pointed out by statute for the collection of delinquent taxes, the county treasurer could maintain a suit against the taxpayer asking judgment for the amount of the tax due. However, regardless of the procedure that is taken for the collection of delinquent taxes, it would be in the nature of an action for the enforcement of a public right rather than the recovery of a debt.

Therefore, as the statute of limitations does not run against the state or county in public matters, the state, as well as the county being interested in the tax, it is the opinion of this Department that the statute of limitations does not run against taxes. In other words, taxes do not outlaw.

PRINTING BOARD: BIDS ON CONTRACT FOR PUBLICATION OF OFFICIAL REGISTER: Members of printing board are ineligible to bid on the contract for publication of official register, if it is let by contract and they are likewise ineligible for employment in making compilation, if that method is adopted.

January 14, 1937. *Hon. John H. Mitchell, Attorney General:* Complying with your request for an opinion on whether or not a member of the State Printing Board is eligible to bid on the contract for the publication of the official register, or whether such member could be employed in the publication of the official register, we submit the following:

Section 180 of the Code provides as follows:

"*Financial interest.* No member of said board and no appointee thereof shall be financially interested, directly or indirectly, in any plant or business in which work is performed for the state, under the provisions of this and chapters 15 and 16, nor shall he be interested in any contract let under said chapters."

The duties of the board as provided in Section 183 of the Code include the following:

"1. Let contracts, except as provided in Section 205, for all printing for all state offices, departments, boards, and commissions, when the cost of such printing is payable out of any taxes, fees, licenses, or funds collected for state purposes.

* * *

"3. Employ and discharge all assistants necessary to enable the board to perform its duties and determine the compensation of such assistants when not otherwise determined by law."

* * *

Section 213 of the Code provides for the appointment of the Superintendent of Printing and Section 215 provides that among his duties shall be:

"10. In odd-numbered years, compile for publication, the Iowa official register which shall contain historical, political, and other statistics of general value, but nothing of a partisan character."

The provision in Section 180 that no member of the board and no appointee thereof, shall be financially interested in any contract let by the board, is one of the numerous statutes to the same effect governing other boards and officials, so it is the public policy of the state declared in many statutes, that officials charged with the duty of letting any contract must not be financially interested.

A somewhat similar proposition was involved in the case of *Bay vs. Davidson*, 133 Iowa 688. That was an action for an injunction to restrain the town of Grand River from paying a claim of one Binning, who had sold and delivered to the town certain lumber, paints, oils and machinery which are used by the

town in the construction of and repairing of sidewalks, etc. Binning was a member of the Town Council. The plaintiff was a taxpayer of the town and the defendant alleged in his answer that the fact of his furnishing lumber for sidewalks, crossing and so forth, was well known to the plaintiff and no objection was ever made; that accordingly plaintiffs were estopped. The plaintiffs demurred to the answer, thereby admitting as true the matters set out in the answer. The demurrer was sustained and a decree was entered enjoining the town from paying the bill. On appeal, the Supreme Court said that the statute governing town officials, which provided that no member of any council shall be interested directly or indirectly in any contract or job for work, or the profits thereof, or services for the corporation, did not apply. The court said that the statute was intended to forbid any connection with public work, the employment by the council of one of its own members, but the court held that the common law applied and that such a transaction as this was against the public policy of the state even though a specific statute did not apply. The court referred to the fact that the compensation of members of the council was fixed by the Code just as the compensation of the members of the printing board are fixed by the Code, and the court went on to say: "It (this compensation) cannot be increased either by direct payment, or indirectly through the medium of profits on sales of goods."

The opinion of the Supreme Court discusses the underlying principles governing in such cases and cites numerous authorities, not only from Iowa, but from other states, to the effect that all of such contracts are against public policy and the court goes on to say that it was immaterial that the town had received the benefits of the contract and the plaintiff was not estopped from maintaining the action.

In addition to the plea of estoppel hereinbefore referred to, the answer in that case admitted the sale of the merchandise, alleged that the sale was upon open market, in good faith, and for the reasonable value; that at the time there were but two merchants in and proximate to the town from whom such merchandise could be purchased, viz., Binning and one, Griffin, the latter also being a member of the town council. These allegations were admitted by the demurrer. So the fact of perfect good faith and fair consideration did not affect the proposition that such contracts are illegal.

We think the reasoning of the case referred to applies to the question submitted. In our opinion, the fact that the Superintendent of Printing is charged with the duty of compiling the official register makes no difference. The board is charged with the duty of hiring necessary assistance and of making contracts. In our opinion, there seems to be no escape from the conclusion that the members of the board are ineligible to bid on the contract, if it is let by contract, and they are likewise ineligible for employment in making the compilation, if that method is adopted.

SCHOOLS: FACILITIES TO HANDICAPPED CHILDREN: TRANSPORTATION: The plan of providing cooperation with the boards in matters regarding handicapped children is in accordance with the legislative intent in appropriating $10,000 for handicapped children, and local boards are authorized to cooperate with the Department of Public Instruction to expend funds under their control in aiding in educating handicapped children.

January 15, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* You have submitted a request for an opinion concerning the rights of

local boards to furnish extra facilities to handicapped children, this in cooperation with your department, such as furnishing special transportation or providing teaching in the home.

We find that this office in an opinion rendered March 28, 1933, concurred with a county attorney in his opinion that the board had no right to use the funds of the district in furnishing special transportation in such case.

However, since that opinion was rendered, the legislature appropriated $10,000 to your department to aid in the education of handicapped children. This seems to have been placed in your hands without restriction and is headed, "For aid to public schools" and under the sub-head "For handicapped children, $10,000." (Chapter 126, Section 35, 46th General Assembly.)

Very recently, the Supreme Court rendered an opinion in the case of *State vs. Ghrist*, 270 N. W. 376, that has some bearing upon the question.

When the state appropriated $10,000 for state aid to public schools under the sub-head "Handicapped children," it was a legislative recognition of the fact that extra expense is sometimes involved in the education of such children. The use of the word "aid" in the appropriation bill, as well as the size of the appropriation itself, both indicate that the state did not intend to assume this extra burden. The appropriation provided for only a little more than $100.00 for each county.

The legislature, under the constitution, has control of the schools. There is no statute authorizing the school board to go to extra expense in providing handicapped children with common school education. Neither is there any statute prohibiting action along that line. The Ghrist case sheds some light on the inherent powers of the board. There is no statute that authorizes the school board to establish a separate school for backward pupils. The city cf Ames established such a school in a residence property. It is an ungraded school. Certain backward pupils who are unable to make their grades are required by the board to attend this school. The children are given individual instruction and some of them have been enabled to resume their work in the graded school after some special instruction in this ungraded school.

Ghrist's son was a backward student and the board ordered that he attend this school. Ghrist refused to send him there. He was prosecuted under the compulsory education statute. The trial court found that the board had no authority to establish the school and directed a verdict for the defendant. The Supreme Court reversed the decision. In the discussion, the court referred to the statute authorizing the boards to establish grade schools, but said that the boards were not required to do so, and referred to the fact that the average rural school was originally an ungraded school.

The decision is not exactly in point, for as stated, the statute merely authorizes the boards to establish graded schools, but the case recognizes the proposition that though the board establishes graded schools, it still has authority tc establish ungraded schools. The court thereby recognizes the authority of the board to make special provision for the teaching of certain of the pupils. The case further recognized the right of the board to conduct a school in a building that is not a regular school building. There seems to be nothing in the law that prohibits the giving of instruction by a teacher in a home, and if a child is so handicapped that it cannot attend school and if it is normal mentally, the board should have discretion to provide instruction for it. So,

if a child is so crippled that it cannot walk to school and transportation cannot be otherwise provided, it seems that the board should have the discretion to provide such transportation. The board has the right to employ a part time teacher or a special teacher if it so desires.

As to the transportation, Section 4233-e4 provides for transportation where children live more than two and one-half miles from the school, or when the school in their district is closed and they are thereby placed more than two miles from the school designated for their attendance, the board shall arrange for transportation; and the section further provides:

"or the board may provide transportation for a less distance."

While the section relates to cases where the children live at some distance from the school, it seems to give authority to provide transportation for any distance in the proper case.

The policy of the law is to provide common school education for all of the children. The welfare of the child is the primary consideration. The enlightened policy of the state would seem to require that these handicapped children should be given a reasonable opportunity to obtain a common school education to aid them in supporting themselves when they reach maturity. Their situation in life should not be made more difficult by depriving them of the education that is freely given to other children of like mentality.

It is the opinion of this department that your plan of providing cooperation with the boards in such matters is in accordance with the legislative intent and that the local boards are authorized to cooperate with you and in their discretion, to expend funds under their control for the purpose of aiding in the education of such handicapped children.

COUNTY SUPERINTENDENT: BOARD OF SUPERVISORS: The county superintendent violated the statute when she permitted the expenditures of her office to exceed the appropriation made for it during the year 1936. Board of Supervisors would be exceeding its authority in allowing the bills filed in January, 1937, for expenditures made by the superintendent's office during 1936.

January 16, 1937. *Miss Emma P. Denham, Montezuma, Iowa:* This department is in receipt of your letter asking an opinion on the following matter:

The board of supervisors reduced the budget of the county superintendent's office without consulting the county superintendent. In October and November the county superintendent bought of certain supply companies, supplies with the understanding that they were to be paid at a later date, the bills for which were filed with the county auditor on January 1, 1937. The board of supervisors refused to pay these bills.

Chapter 24 of the 1935 Code is applicable to the office of the county superintendent. Under this chapter of the statute, the board of supervisors, before certifying or levying in any year any tax on property subject to taxation, is required to make the following estimates:

"1. The amount of income thereof for the several funds from sources other than taxation;

"2. The amount purposed to be raised by taxation;

"3. The amount purposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing;

"4. A comparison of such amounts so purposed to be expended with the amounts expended for like purposes for the two preceding years."

After the making of such estimates, as is provided, Section 375 of the statute requires that the same be filed and the time and place of hearing fixed and notice thereof given and at such hearing any person interested may appear and be heard, after which a record is made as to the tax levy authorized.

Section 380 provides that no greater tax than that so entered upon the record of the meeting heretofore referred to shall be levied or collected and that no greater expenditure of public money shall be made for any specific purpose than the amount estimated.

Chapter 264-C1 of the statute required that on or before the thirty-first day of December of each year, each elective or appointive officer of the county having charge of any county office or department shall prepare and submit to the board of supervisors a detailed and itemized statement of the amount of money necessary to be expended for his office or department, and on or before the thirty-first day of January the board of supervisors shall make appropriations to cover the cost of operating such office or department under his supervision.

The methods are set up by the statute for estimating and determining the amount of money to cover the needs of each office and department of the county and the tax levy is made upon that basis. These provisions of the statute are mandatory, as are the provisions for filing the annual estimates for which the board of supervisors makes its appropriation. To go beyond the limits of the appropriation made for an office or department under the supervision of the board of supervisors is not only prohibited by statute, but is made a misdemeanor.

The county superintendent violated the statute when she permitted the expenditures of her office to exceed the appropriation made for it during the year 1936. The board of supervisors would be exceeding its authority and would be violating the statute in allowing the bills filed in January, 1937, for expenditures made by the superintendent's office during 1936.

DRAINAGE DISTRICT BONDS: PRIORITY OF INTEREST COUPONS AND OF BONDS: There is no priority as far as interest coupons are concerned, except when the bond is surrendered for cancellation upon payment, which would necessarily carry with it the surrender of the current coupon.

January 16, 1937. *Mr. George C. Van Nostrand, County Attorney, Fairfield, Iowa:* We have your letter addressed to this office requesting an opinion upon the following question:

Must the interest coupons attached to drainage district bonds be paid in the order of the maturity dates or serial numbers on the bonds to which they are attached, or may the treasurer, in the case of insufficient funds to pay all coupons, pay the coupons which are first presented to him for payment? Should the coupons be paid prior to payment of past due bonds?

Submitted with your question are certain statements from which we gather the following facts:

The drainage district No. 6 issued drainage district bonds in part payment of the drainage improvement. There is not now in the hands of the treasurer sufficient money to pay all of the coupons due, nor sufficient to pay the next bond when it comes due. On account of taxes being delinquent, it appears that the drainage district will not be able to pay all of the bonds and interest coupons as they fall due. In answering your question we assume that the

bonds have been issued in accordance with the statute and that at the outset a sufficient levy was made upon the properties benefited to raise sufficient revenue from which to pay the bonds as they matured, together with the interest coupons due each year.

With reference to the first question involved, namely, the payment of the interest coupons, these coupons are obligations of the drainage district all maturing at a given date. The revenue derived by the special tax levied upon the property in the drainage district is raised for the purpose of paying the bonds and the interest. The fact that a coupon may represent the interest due upon a bond carrying a smaller serial number than another coupon, or upon a bond maturing prior to another bond does not give that coupon priority of payment. Each and all of the coupons are obligations which should be met when due or when the coupon is presented for payment.

It is the opinion of this department that there is no priority as far as the interest coupons are concerned, except as will be noted in answer to the next question.

The second question deals with the payment of the bonds, and whether or not the bonds should have priority over the interest coupons.

The statute provides that the board of supervisors fix the maturity of each bond, and when maturity is fixed, the law contemplates that the bonds must be paid and retired in the order of their maturity. It being necessary that the bond be surrendered for cancellation upon payment, it would necessarily carry with it the surrender of the current coupon. It would therefore appear that a bond maturing in any given year would be entitled to preference over unpaid interest coupons and that the coupon for the current year should be paid with the principal of the bond.

In the case of *Bechtel vs. Mostrom*, 243 N. W. 361, the court had before it the question of priority of bonds, and while the question before the court in that case was somewhat different from the question submitted to us, it would seem that the ruling in that case should govern as far as applicable to the questions here involved. However, we are impressed with the following statement contained in the opinion in the Bechtel case:

"No authorities have been called to our attention bearing directly upon the question in issue, and we have been unable to find any."

The opinion was rendered by a divided court.

BOARD OF SUPERVISORS: COUNTY FUNDS: Funds collected by the county for the year 1937 cannot be applied to the payment of claims during the year 1936, nor would the proposition be any different if such claims were refiled after January 1, 1937.

January 16, 1937. *Mr. Edward P. Powers, County Attorney, Centerville, Iowa:* This office is in receipt of your letter of January 5th requesting an opinion upon the following question:

Can funds collected by the county for the year 1937 be applied to the payment of claims filed during the year 1936? The claims referred to are claims against the general fund. Would it make any difference if such claims are re-filed after January 1, 1937?

The local budget law, Chapter 24 of the 1935 Code, covers levying and apportioning of county taxes. This Chapter in Section 370 makes certain requirements which are mandatory upon tax levying bodies, and is as follows:

"No municipality shall certify or levy in any year any tax on property

subject to taxation unless and until the following estimates have been made, filed and considered, as hereinafter provided:

"1. The amount of income thereof for the several funds from sources other than taxation.

"2. The amount proposed to be raised by taxation.

"3. The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing.

"4. A comparison of such amounts so proposed to be expended with the amounts expended for like purposes for the two preceding years."

After the filing of the above estimates, Section 375 of the statute provides that there shall be a time and place fixed for a hearing upon said estimates and that notice of the hearing shall be given, and in Section 377 provision is made for the certifying board or levying board to conduct a hearing at which hearing any person interested may appear and be heard either in favor of or against the purposed tax, of which hearing a record shall be made fixing and determining the amount of tax to be levied. Section 380 provides:

"*Tax limited.* No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373, 381 and paragraph 4 of Section 5259."

The exceptions noted in the above section quoted have to do with matters with which we are not concerned at this time.

Chapter 264-C1 governs the county budget. Under this chapter it is required that each elective or appointive officer having charge of any office or department shall, on or before December 31st, submit to the board of supervisors a detailed, itemized statement showing the purposed expenditure of his office for the coming year, and that on or before the 31st day of January of each year the board of supervisors shall appropriate by resolution such amounts as are deemed necessary for each of the different county officers and departments during the ensuing year and shall specify from which of the different county funds created by law the appropriated sums shall be derived.

1. By following the procedure outlined in Chapter 24 and Chapter 264-C1, an estimate of the amount of money necessary to be raised by taxation by each tax levying body is fixed and determined, this after a full hearing has been had.

2. By fixing and determining the levy necessary to produce the amount of funds necessary to carry on the business of each tax levying body as shown by the estimate previously approved.

3. In counties by an appropriation by the board of supervisors to each fund of the necessary amount to carry on the business of the office for the ensuing year as shown by the itemized statement filed by the person in charge of such office.

The procedure outlined requires those in charge of the expenditure of public money to estimate their needs for the ensuing year and gives the taxpayer an opportunity to appear and be heard before levying the tax, and by following the procedure outlined in Chapter 264-C1 a fund is created and set up out of which any county official charged with the management of an office or department may pay the expenses of his office. If the amounts determined at the hearing upon the estimates and later appropriated to the various funds or departments is not to be controlling, it is a useless procedure.

The Supreme Court in a recent case, *Clark vs. City of Des Moines*, 267 N.

W. 98, had before it the consideration of Chapter 24 of the statute. The Clark case was an action brought by G. L. Clark, a taxpayer of the city of Des Moines to restrain the city from drawing warrants on the city funds in excess of the amount of tax to be produced by the levy made by the city. The district court denied the relief prayed for, but upon appeal, the ruling of the district court was reversed. After reviewing the facts, the court stated:

"The amount estimated was $832,000. In disregard of the provisions of Section 380, which provides that 'no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor', the city council in April, 1935, passed an ordinance raising the amount that might be expended $188,000. This is against the statute. The city council raised the amount it estimated in its August estimate at $212,000 to $400,000. If it could be raised a dollar, it could be raised a million dollars. An ordinance was then passed by the city council raising the amount to be expended on the same basis as though instead of the amount of $212,000 being the amount estimated to be received from sources other than taxes, it would be $400,000, and allocated the sums to the various departments so that as warrants were drawn and they came in they would be charged as against the funds for that department so allocated. This is a clear evasion of the statute; it is absolutely contrary to the terms of the statute. When Section 380 says that no tax greater than that so entered upon the record shall be levied, it referred, by 'so', to what? To the preceding sections of the statute. This statute then limits not only the taxation that may be levied, but the expenditures of the city of public moneys to the amount as originally would be derived from the estimates of the budget made up in August, 1934, and was clearly without question a violation of the statute."

It would seem, from a reading of the statute, Chapters 24 and 264-C1 in the light of the interpretation placed upon Chapter 24 by the court in the Clark case, that there is only one answer to the question involved, and that is that funds collected by the county for the year 1937 cannot be applied to the payment of claims filed during the year 1936, nor would the proposition be any different if such claims were re-filed after January 1, 1937. In either event, the board of supervisors or the head of the department wherein the claims originated, would be expending funds in excess of the amount of tax levied, assessed and collected for the department during 1936 and the appropriation made for the department during 1937.

This the statute prohibits, even to the extent of making it unlawful for any county official to authorize expenditures in excess of the appropriation made for his office.

PUBLIC CONTRACTS: BOARD OF SUPERVISORS: Members of Boards of Supervisors and township trustees shall not buy from, sell to, nor in any manner become parties, directly or indirectly, to any contract to furnish supplies, material, or labor to the county in which they are members of such Board of Supervisors or township trustees.

January 20, 1937. *Mr. John E. Miller, County Attorney, Albia, Iowa:* This office is in receipt of your letter of recent date requesting an opinion based upon the following facts:

A member of the Board of Supervisors is the owner of a farm. At the direction of the Highway Commission, arrangements were made for taking limestone from this farm for surfacing roads in the county. This arrangement was completed by an agreement between the Board of Supervisors and the member owning the farm that the member owning the farm was to be paid on the basis of seven cents per yard for the limestone. The member of the

Board of Supervisors who owned the farm has filed a bill for the limestone taken with the Board of Supervisors and asks payment of same.

Section 13327 of the Code is as follows:

"*Interest in public contracts.* Members of Boards of Supervisors and township trustees shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material, or labor to the county or township in which they are respectively members of such Board of Supervisors or township trustees."

Any part taken in this matter by the State Highway Commission may be eliminated for the reason that the Highway Commission is not charged or clothed with the duty of procuring materials for the surfacing of county highways.

The matter in question arises on an understanding or arrangement between the Board of Supervisors and one of its members. In the first instance, the claimant was at the time a member of the Board of Supervisors. He sold to the Board of Supervisors or to the county which the Board of Supervisors represented. He became a party to the transaction. He was directly interested in the arrangement. He did furnish material to the county. He brought himself within each and every inhibition of the statute herein quoted.

The same inhibition placed upon members of the Board of Supervisors and township trustees by Section 13327 is placed upon councilmen of cities and towns, members of boards of directors of school districts and various boards and state officers under different sections of the statute.

In construing these statutes our court has held that such contracts are void. In the case of *State vs. York*, 109 N. W. 122, a township trustee was indicted for entering into a contract with the township trustees to perform work on the public road. In that case the court said:

"They (the trustees) also fix the wages or compensation to be allowed for labor done on the road, and provide for the purchase of tools, supplies, and machinery for their township. * * * And it is under their authority and direction that the taxes collected for road purposes are to be equitable and judiciously expended. * * * It is obviously a matter of wise public policy that these trustees, who are thus expressly charged with the responsibility of appropriating and expending public funds, and of fixing the price which shall be paid for labor and supplies furnished their township, shall not be exposed to the temptation to use their official position to their own private advantage, and to that end the Legislature has undertaken to prohibit them from having any direct interest in such contracts. The wisdom of this is doubly apparent when we note that, in the cases at bar, the alleged contracts for the use of the township were made by the trustees with an officer appointed by them, subject to removal by them, and whose compensation is fixed by them."

In the case of *James vs. City of Hamburg*, 156 N. W. 394, there was an action in mandamus to compel the City of Hamburg to issue and deliver certain improvement certificates to the plaintiff. The Merchants' Exchange Bank intervened and claimed the certificates under an assignment to them from the contractor. It appears from the facts that J. F. Baldwin was cashier and financially interested in the Merchants' Exchange Bank which was a co-partnership and was also a member of the city council at the time the work or improvement, for which the certificates were issued, was authorized. The court dismissed the petition of the intervener and entered an order and decree in favor of the plaintiff. The court said:

"If the contract had not been performed by the construction company as required by its contract, and was presented to the city in an unfinished condi-

tion, or in a condition not in compliance with the contract, a temptation would be offered to the intervener, represented by Baldwin, to disregard his public duty, and yield to the temptation of personal interest. It is this that the law guards against. It is this sort of a condition that the law is intended to avoid. It is not necessary that there be evidence of dereliction of duty on the part of a public officer, to bring these contracts within the inhibition of the law. The inhibition applies when the contract is of such a character that, in the very contract and in the making of it, a temptation to dereliction of duty is created. * * * It is the universal holding of the courts that, in determining the validity of contracts such as we are dealing with, it is not necessary, to avoid the contract, that it be adjudicated and determined that the parties stipulated for corrupt action. It is enough for the court to know that the contract tends to those results, and furnishes a temptation to the plaintiff to resort to corrupt means or improper influences to accomplish results."

In the case of *Liggett vs. Shriver*, 164 N. W. 611, in passing upon a question arising under a statute similar to the one quoted herein the court said:

"If the contract in question comes within the purview of this statute, it is void, and plaintiff could not recover for services rendered thereunder."

In the case of *Krueger vs. Ramsey*, 175 N. W. 1, the court quoted with approval the following statement from the case of *Bay vs. Davidson*, 111 N. W. 25:

"This court held that the purpose of this statute was to prevent councilmen, directly or indirectly, from making profit out of their relationship with the city. Such contracts are void at common law, and this court has repeatedly refused to enforce them.

The law, as laid down by our court in numerous decisions construing Section 13327 and similar provisions of the statute regarding councilmen, members of boards of directors of school districts and like officers, leaves no escape from the conclusion that the contract in question is void, and that the member of the Board who entered into such contract did so in violation of the statute. The contract being void, it goes without saying that the members of the Board of Supervisors would be without authority to pay the claim in question from county funds.

BOARD OF CONSERVATION: COMPTROLLER: LEGAL SERVICES IN CONNECTION WITH TRIAL OF CONSERVATION OFFICER. There is no authority in the law for Comptroller to authorize payment of attorney fees to Baron & Bolton, for their services in connection with trial of Mr. Courtright of the Board of Conservation.

January 21, 1937. *Mr. C. B. Murtagh, State Comptroller:* Your letter of the 16th instant enclosing letter from H. M. Sanderson, Chief, Division of Administration for the Iowa State Conservation Commission, and claim of Baron & Bolton for legal services in connection with the trial of a Conservation officer of Onawa, Iowa, received, and we note your request as to how this claim can be paid.

While the position of the State Conservation Commission is appreciated and its desire to protect its officers in matters of this kind is natural, this department is unable to find any authority for the payment of his claim.

It is quite obvious that the state of Iowa is not indebted to Baron & Bolton on account of their services to Mr. Courtright, and under no possible theory could the claim be allowed to them. It is assumed from Mr. Sanderson's letter, as well as the standing of the attorneys themselves, that the claim is just so far as the amount is concerned, but the State Conservation Board would have no authority to authorize the incurring of a bill, and the services having been rendered at the request of Mr. Courtright, the Conservation Board have no right

to ratify the hiring of the attorneys because they could not have hired them in the first instance.

Section 1703-g6 provides that the members and employees, the director and conservation officers, shall be reimbursed for all actual and necessary expense incurred by them in the discharge of their official duties when absent from their usual place of abode. This statute obviously was not intended to apply to a case like this.

Then Section 1703-d12 in Sub-section 7, provides for the payment of traveling and other necessary expense of the State Conservation Commissioners, director, officers and employees and to make such other expenditures as may be necessary for the carrying into effect the provisions of this chapter.

The question resolves itself into this: Is the expense incurred in hiring attorneys to defend a Conservation officer in a criminal proceeding brought against him on account of the manner in which he performed his official duty, a necessary expense, and if this is a necessary expense, is the expense incurred in defending against a civil action on account of his manner in performing an official duty, an expense within the meaning of the chapter?

The only case in Iowa that we have been able to find bearing upon the subject is *Scott vs. The Independent District of Hardin*, 91 Iowa 156. In that case, the school board, at the time the cause of action arose, was authorized to employ an attorney in all cases wherein suits may be instituted by or against any of the school officers to enforce any of the provisions contained in the chapter relating to schools. The school board let a contract for building a schoolhouse. An action was brought against the directors claiming that they had conspired with the contractor to cheat and defraud the district. A judgment was recovered against them. They hired a lawyer to defend them and they issued warrants for his pay and one of these warrants was involved in this action.

The court said that the suit was not against the district and was not a suit instituted by or against any of the school officers within the meaning of the code. It was held that the warrants were illegally issued. The court goes on to say:

"By this construction of the law, directors who are honest in the performance of their duties, even though mistaken as to their powers, and so acting illegally, have power to employ counsel, at the expense of the district, in a case instituted against them as such officers, while directors who knowingly act illegally or corruptly, or knowingly disregard their duty, whereby an injury results to the district, are deprived of the benefit of this statutory provision."

This case would be authority for the proposition that if there was statutory authority for the hiring of the attorney, such statute would protect in a case like this, where good faith is shown. But the general rule is that in the absence of statute, the expense of defending against a lawsuit brought against an officer on account of his manner of performing his duties cannot be allowed and paid by the employing political subdivision.

The following cases from other jurisdictions, viz., *McKinnon vs. State*, 1916-D, L. R. A., 90; *State of Missouri, ex rel., Attorney General, vs. City of St. Louis*, 61 L. R. A., 593; *Daggett vs. Colgan*, 14 L. R. A., 477; *Chapman vs. New York*, 56 L. R. A., 846; *Schiefflein vs. Henry*, 206 New York Supp. 172, relate largely, if not wholly, to the question whether statutes which allow the payment of claims like the claim involved in this action, are constitutional.

In *Schiefflein vs. Henry*, 206 N. Y. Supp. 172, a police officer incurred large expense in defending himself against two charges, one for omitting to perform a public duty required of him as an officer, and the other for committing the crime of perjury in testifying before the grand jury as to the activities of an assistant district attorney. The verdict was directed in favor of the defendant on the charge of wilfully omitting to perform a duty. He was convicted in the lower court of perjury but this was reversed on appeal. The evidence showed that he had been a member of the police force for thirty years and no charges had ever been made against him up to the indictment, and the court said: "It may be conceded, therefore, that this claim for reimbursement is supported by strong, moral and equitable appeal."

There was a statute authorizing the payment of such expense where the expense had been incurred prior to the time the statute was enacted. The court found that the statute was a violation of a constitutional restriction against giving public money or property to an individual, and in the course of the opinion, the court said:

"Asking for aid to pay the expenses of a defense already made from one's own resources is like asking for aid in the payment of taxes or the discharge of any public burden. It is not a city or county purpose, but a mere gift."

And the court further quoted approvingly from another case in New York, in which it is said:

"When a citizen accepts public office, he assumes the risk of defending himself against unfounded accusations at his own expense. Whoever lives in a country governed by law assumes the risk of having to defend himself without aid from the public against even unjust attempts to enforce the law, the same as he assumes the burden of taxation."

For the reasons stated, we know of no authority in the law for you to authorize the payment of this claim.

HIGHWAYS—CITIES AND TOWNS: BOARD OF SUPERVISORS: SECONDARY ROAD CONSTRUCTION FUNDS: Under the provisions of Section 4644-c47, Boards of Supervisors are not permitted to pave or to contribute to the cost of paving streets within cities or towns which are extensions of county trunk or county local roads.

January 21, 1937. *Iowa State Highway Commission, Ames, Iowa:* We are in receipt of your request for an opinion as to whether Boards of Supervisors may enter into contracts to pave or to contribute towards the cost of paving a road or street within a city or town which is a continuation of a county trunk or local county road. You are concerned in the matter in that under Section 4644-c44 all secondary road contracts involving a cost of $2,000.00 or more per mile and more than $5,000.00 in the aggregate, must be approved by the Commission.

Section 4644-c47 of the 1935 Code of Iowa, provides as follows:

"The board of supervisors may, subject to the approval of the council of any city or town, purchase or condemn right of way therefor or eliminate danger at railroad crossings, and shall grade, drain, bridge, gravel or maintain any road or street which is a continuation of the county trunk highway system, or a continuation of a county local road which is built to grade and surfaced or about to be built to grade and surfaced, and which is (1) within, or partly within and located along the corporate limits of any town, or (2) within or partly within and located along the corporate limits of, any city including cities under special charter, having a population of less than twenty-five hundred or (3) within that part of any city, including cities acting under special

charter, where the houses or business houses average not less than two hundred feet apart. The location of such extensions shall be determined by the board of supervisors. The council's approval shall extend only to the consideration of such improvements in their relationship to municipal improvements such as sewers, water lines, change of established street grades, sidewalks or other municipal improvements."

It will be noted that the authority given the Board of Supervisors is to "grade, drain, gravel or maintain." It is the opinion of this department that the grant of power given is not broad enough to, and does not, include the right to pave such extensions or to contribute towards the cost of the same. This grant of power is much narrower than that given to the Board of Supervisors as to the secondary roads outside of cities and towns under the provisions of Sections 4644-c1 and 4644-c2 where the grant of power is to "construct." Since the cost of improving streets which are extensions of county trunk or county local roads would have to be paid out of the secondary road construction funds provided by Sections 4644-c8 to 4644-c10, inclusive, the legislature by the use of the restricted language noted has denied the use of such funds for paving within cities and towns.

PUBLIC OFFICERS: COMPENSATION OF PUBLIC OFFICERS: DEPUTY CITY TREASURER: The city council having fixed the compensation to be paid the deputy treasurer has therefore prescribed the salary to be paid to the deputy treasurer during the term for which the treasurer was elected. The salary fixed applies to the full term for which he was appointed.

January 21, 1937. *Mr. Robert B. Organ, County Attorney, Council Bluffs, Iowa:* This office is in receipt of your recent letter containing a letter from the city attorney of Council Bluffs requesting an opinion upon the following facts:

The city ordinance of Council Bluffs does not fix the salary or compensation of the deputy city treasurer. The deputy treasurer has, however, been drawing a stated salary. Can this salary be increased during the tenure of office of this deputy?

Section 5671 of the Code provides as follows:

"*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. * * *"

In the question under consideration the council has prescribed the salary to be paid to the deputy city treasurer. It is not necessary that such salary be fixed by ordinance. The council has authority to fix and determine the salary to be paid by motion.

Section 5672 of the statute provides:

"* * * nor shall the emoluments of any city or town officer be changed during the term for which he has been elected or appointed, unless the office be abolished. No person who shall resign or vacate any office shall be eligible to the same during the time for which he was elected or appointed, when during the time, the emoluments of the office have been increased."

No doubt the ordinance of the city of Council Bluffs prescribes the length of the term of office of the city treasurer, and while it is true the deputy serves at the pleasure of the treasurer, he nevertheless is appointed for the same term to which the treasurer was elected. The council having fixed the compensation to be paid the deputy treasurer has therefore prescribed the salary to be paid to the deputy treasurer during the term for which the treasurer was elected.

It therefore goes without saying that the salary fixed for the deputy treasurer applies to the full term for which he was appointed, namely, the term for which his principal was elected. The statute herein quoted would make him ineligible for reappointment if he should resign in order to be reappointed at a higher salary.

It is the opinion of this office that the deputy treasurer is a public officer and comes within the purview of the statutes herein quoted.

HIGHWAYS: SURFACING: MATERIALS: CONSTRUCTION WORK: PUBLIC LETTINGS: Under the provisions of Section 4644-c42 of the 1935 Code of Iowa, contracts where the cost of processing, handling, and distributing surfacing materials from pits or quarries exceeds $1,500.00, must be submitted to a public letting.

January 21, 1937. *Iowa State Highway Commission, Ames, Iowa:* We are in receipt of your request for an opinion as to the construction of Section 4644-c42 of the 1935 Code of Iowa, which provides as follows:

"All contracts for road or bridge construction work and the materials therefor of which the engineer's estimate exceeds fifteen hundred dollars, except surfacing materials obtained from local pits and quarries shall be advertised and let at a public letting. * * *."

Your question is whether under this Section a Board of Supervisors can dispense with a public letting and enter into a private contract involving and combining the obtaining of surfacing materials from local pits or quarries, the processing of the same and the distribution of the same upon the highways, where the amount involved is substantially more than $1,500.00. Your interest in the matter grows out of the supervisory powers over county road matters vested in your Commission under the provisions of Section 4644-c44 of the 1935 Code of Iowa. The question in effect is as to what is included within the exception relating to "local" pits and quarries.

A study of the different laws of the State going back to territorial days shows that from the earliest history of the State public lettings for public contracts have been regarded as good public policy and it is so universally regarded by public agencies both State and Federal. A study of the present laws of the State relating to public contracts shows they are replete with requirements for public lettings on public contracts. Therefore, in view of this long adopted rule and universally recognized rule of public policy, any provisions tending to exempt contracts from public lettings should be considered in the light of this policy. The purposes of public lettings are to make sure that public contracts are not let on the basis of favoritism, and to stimulate competition so the public may have the benefit of the ordinarily lower prices resulting from such competition. There are certain cases where the nature of the contract is such that there would be little or no opportunity of securing competitive bids. The most frequent example of this is in connection with deposits of gravel and rock. In most cases there is rarely more than one pit or quarry available. In such cases it would be an idle procedure to go through a form of public letting for gravel or rock in place, for there could generally be but one bidder. In addition to this, the cost of such materials in place is generally a very minor item of highway construction cost. Further the county is always able to protect itself against exorbitant demands from the particular owner, because of the legislative grant of power authorizing the counties to acquire the same by

eminent domain. Therefore, the obvious legislative intent in excepting such contracts from public lettings is that no competition would result.

In regard to hauling and distributing the surfacing materials on the highways, the reasons for the exceptions do not apply, for it is common knowledge that in hauling and distributing of surfacing materials upon the highways the element of trucking is an important element, and matters involving truckery are highly competitive in nature and the cost of the same substantial as contrasted with the comparatively moderate cost of rock or gravel in place. It is the opinion of this department that the hauling and distributing of surfacing materials is not within the exception and is subject to the requirement of a public letting.

There is the further question in regard to the matter of processing of rock and gravel. The cost of such processing is generally substantial as contrasted with the small cost of the materials in place, and in a good many cases constitutes a substantial portion of the construction cost. When the subject matter of the contract changes from dealing with rock or gravel in place to dealing with it as processed, then the competitive feature enters in most strongly, for on processed rock or gravel there is very strong competition and those engaged in that business can compete with each other in quite a widespread area and the public could be assured of lower costs by a public letting. Therefore, the reason for the exception would not apply to this situation. For a long period of time the Federal government and other agencies under their rules and regulations and practices have drawn and observed a sharp distinction between what is known as "local" pits or quarries and "commercial" pits or quarries. Those pits or quarries whose owners sell rock or gravel in place are known as "local," while the moment they engage in processing of the same and disposing of the same as processed they become known as "commercial" pits or quarries and are considered as having entered into the commercial field. Section 4644-c42 was passed long after this practice and classification into "local" and "commercial" had been recognized and established in highway practice.

It is a rule of statutory interpretation that the legislature in legislating in a particular field, is presumed to have used the terms with the meaning given to such terms by recognized usage and practice in that field. It should be kept in mind that the reasons for excepting the purchase of rock or gravel in place from the requirements of public lettings do not apply when such is dealt with commercially as processed, and that to except such commercial matters from public lettings would be detrimental to the public's interest. It should also be kept in mind that to except such commercial matters from the requirements of public letting would in a great measure render nugatory the entire section. The Legislature is not presumed to be designedly passing nugatory statutes, and any interpretation that practically nullifies a statute is to be avoided if possible, and, if practical nullification of a statute can be avoided by interpreting it in the light of the long observed public policy of the State and in the light of the recognized usages and practices in the field with which such legislation deals, it should be so interpreted. It is therefore the opinion of this department that the Legislature in referring to "local" pits or quarries used the term with the meaning given to it in established highway practices, and that what the Legislature intended to except from the requirement of public letting was contracts for rock or quarry in place, which would be necessarily non-

competitive, and did not intend to except pits or quarries entering the competitive commercial field as "commercial" pits or quarries. To hold otherwise would be to hold that highway construction contracts amounting to thousands of dollars could be given out privately without competition and with possible favoritism, when competition was ready and available, all to the detriment of the interest of the public.

The exception provided in Section 4644-c42 relates to and excepts only the obtaining of rock or gravel in place and all further steps in its utilization for highway construction purposes are not within the exception. Any other view would be to allow a part to swallow the whole and the exception to be greater than the rule to which it is subsidiary. If the engineer's estimates show that the cost of utilization of the materials apart from cost of the rock or gravel in place is in excess of $1,500.00, it should be put up for a public letting. If the engineer's estimate exceeds $1,500.00 and the estimate does not indicate separately the cost of such rock or gravel in place, then under the rule of law that exceptions are not presumed, the requirement as to public lettings would apply.

This opinion does not cover or deal with operations of quarries or pits by relief or WPA labor, or to maintenance contracts.

UNEMPLOYMENT INSURANCE LAW: TREASURER OF STATE: Treasurer of state should be legally designated as the payee of the moneys ear-marked for the unemployment compensation administration fund.

January 22, 1937. *Mr. Louis Shneider, Iowa Unemployment Compensation Commission:* This is a reply to your inquiry concerning whom the unemployment compensation funds should be paid in the state of Iowa, under Senate File No. 1 of the Forty-sixth General Assembly in Extraordinary Session.

We find in Section 13 that:

"The fund shall consist of all moneys appropriated by this state, and all moneys received from the United States of America, or any agency thereof, including the Social Security Board and the United States Employment Service, or from any other source, for such purpose. All moneys in this fund shall be deposited, administered, and disbursed, in the same manner and under the same conditions and requirements as is provided by law for special funds in the state treasury."

Section 134 of the 1935 Code of Iowa provides as follows:

"*Receipts.* When money is paid him, the treasurer shall execute receipts in duplicate therefor, stating the fund to which it belongs, one of which must be delivered to the comptroller in order to obtain the proper credit, and the treasurer must be charged therewith."

Section 144 of the Code provides:

"*Statement itemized.* Each deposit shall be accompanied by an itemized statement of the sources from which the money has been collected, and the funds to be credited, a duplicate of which shall, at the time, be filed with the comptroller."

Section 145 provides:

"*Comptroller and treasurer to keep account.* The treasurer and comptroller shall each keep an accurate account of the moneys so deposited."

It is our opinion that the state treasurer of Iowa should be legally designated as the payee of the moneys ear-marked for the unemployment compensation administration fund.

We recommend that on receipt of a check from the federal government with

a statement as to the fund to be credited and the source of the money, that the treasurer's office should send the check and statement to the comptroller's office, and a letter to the unemployment compensation commission notifying it of the amount and all the details. The comptroller will then return the check to the state treasurer so that it may be deposited.

STOCK: SALE ON INSTALLMENT PLAN: So long as Securities Credit Corporation is authorized to do business on plan outlined and so long as it is specifically provided that they may loan money on the Supervised shares, both companies come within the provisions of Chápter 392 of the Code.

January 22, 1937. *Mr. C. W. Storms, Auditor of State:* Replying to your request in your letter of January 6th for an opinion on whether Supervised Shares, Inc. and Securities Credit Corporation, or either of them, are required to qualify under Chapter 392 of the Code, in view of the close relationship between these two corporations and the character of the business to be done by them, as set out in your letter, will say Chapter 392, being a remedial statute, should be liberally construed.

The first question for determination is whether or not the two corporations are so related that the acts of one may be considered as the acts of the other, for the purpose of determining whether they come within the chapter referred to.

There is a recognized rule of law that the legal rule which regards a corporation as an artificial person and limits the interest of the stockholder to his share in the corporation will not stand in the way of a court of equity in giving relief. This is usually done in cases where fraud is involved, but the case of *Keokuk Elec. R. & P. Co. vs. Weisman*, 146 Iowa 679, is an illustration of the application of the principle to a case where no fraud was involved. In that case, an individual owned all of the stock in the corporation. He owned certain real estate individually. He permitted the corporation, the electric company, to string its wires over his individually owned land. In an action involving the successor corporation and his estate, it was held that his individual property was charged with the servitude of these wires.

The case of *Weitz' Sons vs. United States Fidelity & Guaranty Company*, 206 Iowa 1025, likewise involved a case where no fraud was involved. In that case, the court held that though Weitz' Sons, a co-partnership, owned 99.8 per cent of the stock of the Century Lumber Company, and the partners in Weitz' Sons were the directors of the Century Lumber Company, a contract entered into between the lumber company and the Pyramid Portland Cement Company was not the contract of Weitz' Sons. So the court held that though the contract with the lumber company, if entered into by Weitz' Sons, would constitute a material alteration of the original contract between Weitz' Sons and the cement company, this latter contract did not affect the surety on the bond of the cement company for the performance of its contract with Weitz' Sons.

The two corporations under consideration are separate entities and they would ordinarily be treated as such. There is no complete identity of ownership although there seems to be identity of management.

It is noted that the business of the Securities Credit Corporation includes "the making of loans to purchasers of stock in Supervised Shares, Inc., taking over such stock as collateral for the money loaned to such purchasers." It is further noted that the agent selling Supervised Shares, Inc. may also act as

a lending agent for the Securities Credit Corporation, or at least for the taking of applications for loans on Supervised Shares, Inc. stock. Chapter 392 of the Code was designated for the protection of the purchasers of the corporation stock on the installment plan.

First, considering the Securities Credit Corporation—is that corporation required to qualify under Chapter 392? The question is—does the transaction by which the Securities Credit Corporation advances part of the purchase price of stock in the Supervised Shares, Inc., taking the shares in Supervised Shares, Inc. as collateral, constitute a sale of stock on the installment plan by the Securities Credit Corporation?

Section 8517 of the Code provides as follows:

"*Terms defined.* The term 'association' when used in this chapter shall mean any person, firm, company, partnership, association, or corporation, other than building and loan associations and insurance companies and associations, which issue stocks on the partial payment or installment plan. The term 'issue' shall mean issue, sell, place, engage in or otherwise dispose of or handle. The term 'stock' shall mean certificates, membership, shares, bonds, contracts, debentures, stocks, tontine contracts, or other investment securities or agreements of any kind or character issued upon the partial payment or installment plan."

It will be noted that the term "issue" shall mean issue, sell, place, engage in or otherwise dispose of or handle. Obviously, the section applies to the sale of any kind of stock of any concern. Strictly speaking, the Securities Credit Corporation would not issue the stock nor would it sell it, and perhaps it does not place it, although there is more question on this point, but it does engage in and handle such stock. We think that the Securities Credit Corporation comes under Chapter 392 and that this corporation will have to qualify under that chapter.

The next question is—does the Supervised Shares, Inc. come under Section 392 of the Code because it is selling its own stock by using the company controlled by its managers, sales being made in the manner as outlined in your letter? The question in its essence, resolves itself into this—can a concern which is prohibited from selling stock on the installment plan unless it complies with Chapter 392, evade the provisions of that chapter by the organization of another corporation which puts up a part of the cash required for the purchase of the stock and takes the stock as collateral? We think not. Of course, the Supervised Shares, Inc. gets its cash when it sells the stock, but in effect, it is selling its stock on the installment plan because its managers, acting for the other company, will determine whether or not credit should be given.

Under the facts set out in your letter, we are of the opinion that Supervised Shares, Inc., as well as the Securities Credit Corporation, come within the provisions of Chapter 392 of the Code and are required to qualify under that chapter.

LEAGUE OF IOWA MUNICIPALITIES: DUES, AMOUNT OF MONEY ALLOWED BY STATUTE TO PAY SAME: Cities and towns are permitted, under Section 5683 to appropriate out of the general fund, money to pay the annual dues to the League of Iowa Municipalities, and the amount they are permitted to expend is fixed by statute.

January 29, 1937. *Mr. C. W. Storms, Auditor of State:* This office is in receipt of your letter asking an opinion upon the following matter:

Does Section 5683 of the Code permit cities and towns to pay dues to become members of the Municipal Utilities Subdivision of the League of Municipalities?

Cities and towns are permitted, under Section 5683, to appropriate out of the general fund money to pay the annual dues to the League of Iowa Municipalities, and the amount they are permitted to expend is fixed by statute according to the population of the city or town. The expenditure is limited to dues to the League of Iowa Municipalities. To permit cities and towns to join or affiliate with some subsidiary or auxiliary of the League of Municipalities would be in violation of the statute. If they could join one such affiliated organization, there would be no limit to the number they might join.

It is therefore the opinion of this Department that cities and towns are restricted to the appropriation of money for dues to those required by the League of Iowa Municipalities.

OFFICIAL NEWSPAPERS: BOARD OF SUPERVISORS: If one of the two highest in number of bona fide subscriptions unites with any other publication, the Board may, in that event, name three newspapers as official papers, but the two papers thus united, can only secure fees upon the basis of one publication. Under that arrangement the Board could select three publications as Official Newspapers.

January 30, 1937. *Mr. Ernest W. Ruppelt, County Attorney, Grundy Center, Iowa:* Your letter of January 21st requesting an opinion of this department is received. Your question states:

This county is entitled to two official newspapers. Two of the publications entered into an agreement for a "division of compensation" and in 1936 there were three newspapers named as official papers. This year, 1937, four newspapers have asked to be designated as official papers, which makes a contest. Can two of the papers unite in a request to have their publications selected as official papers?

The answer to your inquiry turns upon the interpretation to be given Section 5410 of the Code of Iowa, 1935, which reads as follows:

"*Division of compensation.* If in any county the publishers of two or more newspapers, at least one of which by reason of its location and circulation is entitled to be selected as a county official newspaper, have entered into an agreement to publish the official proceedings or have united in a request to have their publication selected for such purposes, and such agreement or request has been filed, with the board of supervisors prior to the naming of the official newspapers, the board of supervisors shall designate each of them a county official newspaper, but the combined compensation of the newspapers so requesting or agreeing, added to that of the other official newspaper or newspapers, if any, shall not exceed the combined compensation allowed by law to two official newspapers in counties having a population below fifteen thousand or to three official newspapers in counties having a population of fifteen thousand or more."

At the outset you state that your county is entitled to two official newspapers. The number of official newspapers is determined by the population of the county. Where more publishers file than the number of official papers to which the county is entitled, the matter is determined by the bona fide subscription list of the papers. The statute requires that sworn lists must be filed with the county auditor. If two newspapers unite in a request to have their publications selected for such purpose, the Board may agree that the two papers may unite. This, however, does not mean that they may unite or join their subscription lists and have the subscription list treated as one list of subscribers.

The matter must be determined upon the verified list of bona fide subscriptions of each paper, and the two papers with the largest list of bona fide subscribers are entitled to be named as official newspapers. However, if one of the two highest in the number of bona fide subscriptions unites with any other publication, the Board of Supervisors may, in that event, name three newspapers as official papers, but the two papers thus united can only secure fees upon the basis of one publication, and the fees paid to the united publications added to the fees paid to the other newspaper selected shall in no event exceed the compensation fixed by law for two publications of matters required to be published in official newspapers.

Under the above arrangement, your Board of Supervisors could select three publications as official newspapers.

EMERGENCY FEED LOAN ACT: TRACTOR FUEL: Emergency Feed Loan Act does not authorize Boards of Supervisors to make loans for tractor fuel.

February 1, 1937. *Mr. Kenneth C. Mumma, County Attorney, Corydon, Iowa:* In your letter of January 26 addressed to this office, you ask the following question:

"Is the Board of Supervisors, under the Emergency Feed Loan Act, Chapter 149, Laws of the 47th General Assembly of Iowa, authorized to make a loan or loans to any farm operator who is without fuel for his tractor and without funds with which to purchase fuel for said tractor, and which said tractor is used solely for farm operations?"

It is our opinion that the Emergency Feed Loan Act does not authorize the Boards of Supervisors to make such a loan to any farm operator. The purpose of this act was to create an emergency feed loan fund for drought areas and provide for the levying of taxes therefor, and the purchase of fuel oil for a tractor would hardly come within the meaning and intent of this act.

BEER: An individual who buys beer from the holder of a permit, takes the beer to another restaurant (which has no permit) to drink it, does not violate the state beer law.

February 1, 1937. *Mr. Kenneth C. Mumma, County Attorney, Corydon, Iowa:* In your letter of December 16, 1936, addressed to this office, you ask the following question:

"An individual buys beer from a holder of a Class B permit, then takes the beer into another restaurant and drinks it. The second restaurant does not have a beer permit. Has the said individual or the restaurant owner violated any law?"

We are of the opinion that the above does not constitute the violation of the state law, or more particularly Chapter 93-F2, of the Iowa Code.

However, we are of the further opinion that according to Section 1921-f126, Code of Iowa, 1935, part of which reads as follows:

"1921-f126. *Power of municipalities.* * * * Cities and towns, including cities under special charter, are hereby empowered to adopt ordinances for the enforcement of this chapter, and are further empowered to adopt ordinances providing for the limitation of class 'B' permits, as follows: * * *"

that a city is vested with the power to adopt ordinances to take care of such cases.

TAXES: (PERSONAL PROPERTY) BEER PARLOR FURNITURE AND FIXTURES: FURNITURE AND FIXTURES OF BEER PARLOR: A lien

for taxes would follow personal property, when sold in bulk, in the hands of the purchaser or vendee.

February 3, 1937. *Mr. J. W. Pattie, County Attorney, Marshalltown, Iowa:* This office is in receipt of your letter asking an opinion upon the following question:

Does a lien for taxes attach to and follow beer parlor fixtures sold in bulk?

Section 7205 of the statute is as follows:

"*Lien follows certain personal property.* Taxes upon stocks of goods or merchandise, fixtures and furniture in hotels, restaurants, rooming houses, billiard halls, moving picture shows and theatres, shall be a lien thereon and shall continue a lien thereof when sold in bulk, and may be collected from the owner, purchaser, or vendee, and such owner, purchaser, or vendee of any of such goods, merchandise, furniture, or fixtures shall be personally liable for all taxes thereon."

The above quoted statute provides for a specific lien upon certain enumerated properties, the lien to follow such property into the hands of a purchaser or vendee thereof when the same is sold in bulk.

The statute having specifically designated the particular kinds of property upon which said lien attaches, it necessarily follows that the lien would not attach under those circumstances except to the properties designated.

However, the statute legalizing the sale of beer in Iowa requires that the vendor shall first secure a permit. These permits are classified, A, B, and C. Class "A" authorizing the manufacture and sale of beer at wholesale for consumption off the premises; Class "C" permits the sale of beer for consumption off the premises; Class "B" authorizes the sale of beer for consumption on or off the premises, provided, however, that unless otherwise provided, no sale of beer shall be made on the premises unless food is served and consumed therewith, and unless such place where such service is made is equipped with tables and seats sufficient to accommodate not less than twenty-five persons at one time. Section 1921-f106 Code of Iowa.

It therefore becomes necessary for a person operating a beer parlor to bring himself within the provisions of the statute with reference to Class "B." And if he operates a beer parlor under the provisions of the statute with reference to Class "B," he must necessarily have his parlor equipped and serve food. If he serves food, he brings his business within the definition of a restaurant, and as the statute provides that the lien of taxes shall follow furniture and fixtures of restaurants, it would necessarily apply to the furniture and fixtures of a beer parlor.

It is therefore our opinion that the lien for taxes would follow personal property, when sold in bulk, in the hands of the purchaser or vendee.

TAXES: SCHOOL BOARDS: CITY COUNCILS: School Boards, like City Councils are authorized to impose taxes by certifying them to the tax levying body, but School Boards and City Councils have only those authorities which are invested in them by statute, and there is no statutory provision authorizing School Boards or City Councils to cancel taxes after they have been levied. Counties cannot assign tax certificates except upon full payment to it of general taxes and interest.

February 3, 1937. *Mr. Harold Bickford, County Attorney, Villisca, Iowa:* This office is in receipt of your letter asking an opinion upon the following matters:

1. Can the county assign tax certificates for an amount less than the general taxes plus interest and accrued general taxes?

Our answer to the above question is no. In answering the question in that manner we are assuming that the county, when it became the purchaser of the tax sale certificate, purchased the same for the full amount of the general taxes then due against the property. Under such circumstances it cannot sell and assign the certificate for less than the amount for which it has bid the property in, plus penalty, interest and subsequent taxes which have accrued.

2. If so, what sort of compromise could the supervisors make, and what would be their procedure?

The answer to question No. 1 eliminates question No. 2.

3. If the county would convert their certificates into tax deeds, could the county then sell the property for less than they bid?

Section 10260-g1 of the statute provides:

"* * * any sale thereof shall be for cash and for a sum not less than the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interest and costs, without the written approval of a majority of all the tax levying and tax certifying bodies having any interest in said general taxes. * * *"

4. Has the Stanton School Board a legal right to cancel their share of the general taxes collected by the county?

5. Has the City Council of Stanton a legal right to cancel their share of the general taxes collected by the county?

The same answer will apply to questions 4 and 5. The Stanton School Board and the Stanton City Council are by law authorized to certify certain taxes to the County Auditor to be levied by the Board of Supervisors upon the property in the school district and city respectively. School Boards, like City Councils are authorized and empowered to impose taxes by certifying them to the tax levying body, but School Boards and City Councils have only those authorities which are vested in them by statute, and there is no statutory provision authorizing School Boards or City Councils to cancel taxes after they have been levied. They may, however, recommend the cancellation of taxes upon specific properties for reasons specified in their recommendation, and the Boards of Supervisors acting upon said recommendations may or may not cancel such taxes in their discretion.

6. Can the City Council of Stanton legally cancel their special taxes?

The answers to the foregoing questions likewise apply to this one, and a further reason may be assigned for our conclusion, i. e., that special taxes are levied for a particular purpose and are usually levied to pay for some public improvement which has been made and belongs to the person who has made such improvement. However, when such special taxes are certified to the tax levying body, the City Council loses authority over the same.

REAL ESTATE BROKERS: LICENSES: LICENSEE: PROSECUTION OF: Real Estate Broker's dishonesty in dealing with personal property would not in any way involve him as far as his real estate license was concerned. It would not be the province of Real Estate Commissioner's office to prosecute such licensee merely on account of his holding a license from Real Estate Department.

February 3, 1937. *Mr. H. H. Crenshaw, Secretary to Real Estate Commissioner:* This office is in receipt of your request for an opinion upon the following question:

Can we prosecute a licensee who has been dishonest in dealing with personal

property if we do not have evidence of his dishonesty while operating as a real estate broker or real estate salesman?

The answer to the above question as it applies to a real estate licensee would be that such licensee's dishonesty in dealing with personal property would not in any manner involve him as far as his real estate license was concerned. It would be sufficient to disqualify him for a license, or it might be sufficient grounds for revoking his license. His conduct with reference to the dealing in personal property would reflect upon him as being trustworthy and honorable. It would not be the province of your office to prosecute such licensee merely on account of his holding a license from your department.

HEARINGS: REAL ESTATE COMMISSIONER: DEPUTY SECRETARY OF STATE: The statute has denominated the commissioner as the party before whom such hearing is had and who shall report the findings of fact upon such hearing. One thus clothed with a discretionary authority cannot delegate such an authority to an agent or deputy.

February 3, 1937. *Mr. H. H. Crenshaw, Secretary to Real Estate Commissioner:* This office is in receipt of your inquiry in which you desire an opinion upon the following question:

Can the Deputy Secretary of State act in the capacity of the real estate commissioner in holding hearings?

Section 1905-c49 of the Code is as follows:

"*Hearings.* The commissioner shall before denying an application for license or before suspending or revoking any license set the matter down for a hearing * * *"

Section 1905-c56 of the Code is as follows:

"*Findings of fact.* If the commissioner shall determine that any applicant is not qualified to receive a license, a license shall not be granted to such applicant, and if the commissioner shall determine that any licensee is guilty of a violation of any of the provisions of this chapter, the license shall be suspended or revoked. * * *"

Under Section 1905-c49 a hearing is provided for. The statute provides that this hearing be before the commissioner. Section 1905-c56 provides for a finding of fact and requires the commissioner to determine the qualifications of the applicant and to make a finding of fact thereon. This requirement is more than a mere ministerial act. The hearing provided for and the findings of fact are such as involve the judgment or discretion of the party conducting such hearing. The statute has denominated the commissioner as the party before whom such hearing is had and who shall report the findings of fact upon such hearing. One thus clothed with a discretionary authority cannot delegate such an authority to an agent or deputy.

It is therefore the opinion of this department that the hearing provided for in Section 1905-c49 must be had by the commissioner and the finding of facts required in Section 1905-c56 must be made by the commissioner.

BOARD OF CONTROL: HOSPITAL, MOUNT PLEASANT: CONTRACTS: Board required to provide specifications and call for bids. Board cannot enter into private contracts with companies or individuals representing companies unless there is competitive bidding.

February 3, 1937. *Board of Control:* In your letter of January 29, 1937, you submit the question of the power of the Board of Control to enter into a contract with F. B. Dickinson and Company for the reconstruction of the hospital

building at Mount Pleasant. The question in simple form is—Has the Board the right to enter into a contract on the cost plus basis for the reconstruction of any of your buildings when the amount involved is large, as in this case?

We note the suggestions of Brunk, Janss and Bauch, Attorneys, in their letter submitted with your letter, and in addition to these, Mr. Brunk has kindly furnished us with a citation of authorities which he considered had some bearing upon the subject.

In view of the importance of the question involved, it would seem that such a question would have been settled long ago, but Mr. Brunk's research and our own has failed to bring to light any former opinion of the office, or any other authority directly at point, so we have proceeded with the analysis of the question as a new one.

The question is essentially one of statutory construction. The constitution is silent upon the subject of how public contracts shall be let, so the legislature has a free hand in providing or failing to provide, legislation regulating the making of such contracts. The statutes regulating the making of improvements by the Board of Control include the following:

Section 3345 of the Code provides for a State Architect. Section 3346 provides for plans and specifications where the amount exceeds one thousand dollars. Section 3347 provides for the letting of contracts to the lowest responsible bidder where the amount exceeds three hundred dollars. Section 3348 provides for a deposit by bidder. Section 3349 provides that executive heads of institutions may employ day labor on improvements costing three hundred dollars or less. Section 3350 provides that the requirements for contracts where cost exceeds three hundred dollars shall not be mandatory at any institutions where the labor of inmates may be used on the work either to the state's or the inmate's advantage.

These are companion statutes to others involving expenditures by other public bodies.

The State Board of Education is required to call for bids where the amount exceeds ten thousand dollars (Section 5131); counties must call for bids when the amount exceeds two thousand dollars (Section 5131). The general statute placing public contracts in general under the control of the State Comptroller, provides that notice must be given by the municipality of the proposed contract and a hearing had on the proposal in cases where the amount exceeds five thousand dollars. Section 352 of the Code and Section 351 provides that the term municipality as used in the chapter shall include the state Board of Control.

These budget statutes relate largely to the requirements for hearing, and not on the subject of the contract, but the municipality is required by Section 357 to advertise for bids after the Comptroller has authorized the work to be done. So it seems to be the policy of the state to require that contracts be let by competitive bids where the amount exceeds certain figures. The Executive Council does not seem to be limited by any such provision, although Section 297 of the Code requires that the Council advertise for bids for supplies, and for the letting of the contract to the lowest responsible bidder.

Section 286 is as follows:

"286. *Contingent fund.* A contingent fund set apart for the use of the executive council may be expended for the purpose of paying the expenses of suppressing any insurrection or riot, actual or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding, or restoring any state poperty injured, destroyed, or lost by fire, storm, theft, or unavoidable cause, and for no other purpose whatever."

It is suggested by Brunk, Janss and Bauch that this section authorizes the entering into the proposed contract with Dickinson and Company. We do not think that it does. In the first place, the proposed contract is with the Board of Control and the section refers to powers of the Executive Council. In the second place, it seems quite obvious that the section relates to such matters as cannot await the attention of the legislature. In other words, it applies to emergency matters such as destruction of a building that is required for immediate use, and it appears to have been provided to enable the Executive Council to have the repairs made or the reconstruction done without the necessity of calling the legislature into session.

But here, the fire which destroyed the hospital occurred several months ago, and the legislature has convened in special session and adjourned, and a new legislature is now in session. We do not think this section is of much aid in the consideration of the problem, and there must necessarily be some limit of time during which the Executive Council may exercise the rights given by this section. If a building burns down and the institution gets along without it for, say, three or four years, no one would seriously contend that the Executive Council could then decide that because the building had been destroyed by fire, it had the power to go ahead and rebuild after the lapse of any such length of time. We think that the convening of the legislature would mark the end of the Executive Council's right to proceed to the reconstruction that it is authorized to undertake under the quoted section.

In any event, this is a Board of Control matter, and we think that the Board is limited by the statute governing its method of management of state institutions. We do not think that the Board would have authority to enter into the proposed contract with Dickinson and Company.

However, on the morning of February 1, Mr. Brunk and Mr. Dickinson proposed a substitute contract (forwarded herewith). By the terms of this contract F. B. Dickinson, as an individual, is to be hired by the Board to supervise the repairing, rebuilding and restoration of the hospital building. The contract provides that he shall utilize the labor of inmates as may be to the advantage of the state and the inmates. The contract is to be terminable on so many days' notice to Dickinson, and he is to be paid five per cent of the cost which shall include payment for professional fees of F. B. Dickinson and the members of his firm. It provides that no expenditures or contracts shall be made by Dickinson without the approval of the Board.

This new proposed contract raised the simple question whether the Board can hire a superintendent to supervise the work of rebuilding. Section 3287 of the Code gives the Board of Control full power to "contract for, manage, control, and govern, subject only to the limitations imposed by law" the institutions placed within its control. Section 3288 reserves the right of the governor to exercise his general supervisory or examining power given him by law.

There seems to be nothing in the statutes that would prohibit the Board from hiring a superintendent to supervise the reconstruction work, but it is quite apparent from the consideration of the two contracts submitted, that this proposition involves much more than the mere hiring of a superintendent.

The situation as explained to the writer by Mr. Brunk and Mr. Dickinson is this:

There are no plans and specifications except the original plans and specifications for this building when erected. The building was badly damaged. It is impossible to tell whether certain walls will be required to be torn down or reconstructed until they get at the work.

The intention is to proceed with the work and determine from time to time what should be done as they discover the condition of certain parts of the building.

The object is to get the work done as speedily as possible, and the proposed plan will not only save time but expense incident to a prior examination before getting into the work as to just how much must be done.

Much preliminary work would have to be done to ascertain just what is required for the building before the plans and specifications are prepared.

(Mr. Miller advises that plans and specifications are being prepared.)

That the proposed contract would offer many advantages cannot be denied. On the other hand, it is proposed to use the Dickinson and Company equipment and its employees, and there is serious objection to any such plan because of the possibility it affords of making the cost of reconstructing the building greatly in excess of the amount for which the work could be done by competitive bids. It is assumed from the statements that the Board has every reason to have full confidence in Dickinson and Company, but when it comes to a question of the power to enter into the contract, we are concerned only with the question whether the language and spirit of the statutes authorize the entering into any such arrangement, and with the further question whether or not it is in accord with public policy.

The proposition of hiring Mr. Dickinson would be a simple one, and undoubtedly would be within the power of the Board.

The proposition of allowing him to use his machinery, equipment and employees, would allow the Superintendent's fee, which includes the profit of the firm, to be increased as the cost increased. He would be in the position of being required, as superintendent, to keep costs down while his profits would increase as the cost increased. This would not do in public work. Neither do we think that the fact that the work of the inmates might be utilized, affects the proposition. If it does, then any public work at any of the State institutions, no matter how great the project may be, would not be subject to the provision requiring sealed bids, because in almost any kind of a contract, the inmates, or some of them, might do some work. We think that the Board is required to determine, first, what shall be done; that is, provide specifications for the reconstruction or improvement, and that it is required to call for bids. We do not think that either the original proposed contract with Dickinson and Company, or the substitute contract with Mr. Dickinson would be one that the Board is authorized to make.

COMMISSIONS: GOVERNOR'S SECRETARY: Governor is authorized to keep a secretary at his office during his absence, but is not authorized to issue him a commission. (Section 78, 1935 Code; Article 4, Section 17, Constitution.)

February 4, 1937. *Mr. Robert Burlingame, Governor's Office:* In answer to your question—"Should Governor Kraschel issue Mr. Kirtley, his executive secretary, a commission"—we find that Section 78 of the Code states as follows:

"78. *Office—secretary.* The governor shall keep his office at the seat of government, in which shall be transacted the business of the executive department of the state. He shall keep a secretary at said office during his absence."

This section makes provision for a secretary.

However, the Constitution in Article 4, Section 17, provides as follows:

"Sec. 17. In case of the death, impeachment, resignation, removal from office, or other disability of the Governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the Lieutenant Governor."

It is our opinion that the intention of the law in regard to the issuance of commissions was that if there was to be a commission issued, that there would be a delegation of authority or power to act for the official under whom the commission was issued. The Constitution provides for a Lieutenant Governor to act in the disability of the Governor to act.

This being the law, we are of the opinion that there would be no provision for the issuance of a commission to Mr. Kirtley, even though Section 78 designates that the Governor shall have a secretary.

BOARD OF SUPERVISORS: ROAD CONSTRUCTION PROGRAM: When Board of Approval makes its final road program selection, it is conclusive. To permit the Board of Supervisors who are members of the Board of Approval to nullify the action of the Board of Approval, would be transferring the final action and the final approval of the county road program to the Board of Supervisors.

February 5, 1937. *Mr. Wallace F. Snyder, County Attorney, Belle Plaine, Iowa:* This office is in receipt of your letter requesting an opinion upon the following matter:

The County Board of Supervisors has followed the procedure outlined in Section 4644-c24 to and including Section 4644-c34 of the Code referring to the secondary road program in the county with reference to local county roads. The township trustees have made first and second choices of roads to be improved which, in the opinion of the Board of Supervisors, is unsatisfactory. Does the Board of Supervisors have authority to substitute other roads which in their opinion should be improved in order to make a balanced program and to accommodate the people of the township as a whole?

In giving you an opinion based upon the above statement of facts, we are assuming, as suggested in your question, that the procedure outlined in the statute has been followed. If such procedure has been followed, Section 4644-c33 provides for the organization of a Board of Approval. This Board of Approval is composed of a representative from each township and the members of the Board of Supervisors. The representatives of the townships are named by the Board of Trustees of each township. To this Board of Approval is submitted programs recommended by the county engineer in his report together with a map of the county showing the location of the proposed program or project and this Board, after studying and considering the program submitted to it, adopts from the information before it, a program of road improvement in each of the townships of the county.

The statute in Section 4644-c34 provides that at the meeting of the Board of Approval it, the Board of Approval "shall proceed to the final adoption of the program as it pertains to the local county roads." And in the second paragraph of the same section the statute provides that "the action of this Board (Board of Approval) shall be final, except as it applies to the sixty-five per cent of the secondary road construction fund." In the first instance, the statute specifically provides that the Board of Approval shall proceed to the final adoption of a program and later that the approval by the action of the

Board of Approval shall be final. The wording of the statute is susceptible of but one interpretation and that is that when the Board of Approval makes its final road program selection it is conclusive. The members of the Board of Supervisors are members of this Board of Approval and to permit them to participate in the meeting of the Board of Approval, and then because the action taken by the Board of Approval did not suit them, to nullify the action of the Board of Approval, would be transferring the final action and the final approval of the county road program to the Board of Supervisors.

It is therefore the opinion of this department that the action of the Board of Approval is final and that the program adopted by it cannot be changed or disturbed by the Board of Supervisors.

TAXES: BOARD OF SUPERVISORS: EXEMPTION FROM TAXES: It is not the duty of the assessor to check through his former records, or the records of some former assessor to ascertain those persons to whom exemptions are due and make a list of them. The statute only requires him to make a list of such persons as have filed a written request with him for an exemption. (Section 6948.)

February 5, 1937. *Clarence A. Kading, County Attorney, Knoxville, Iowa:* This office is in receipt of your letter requesting an opinion upon the following questions:

Where a property owner entitled to an exemption has failed to file a written statement with the assessor at any time in the past and has now, for the first time after allowing three or four years' taxes to become delinquent, petitioned the Board for a cancellation of these taxes, does the Board of Supervisors have authority to make such cancellation?

Section 6948 of the statute provides for the filing of a written statement with the assessor by one claiming an exemption of his property from taxation. Section 6949 of the statute provides:

"*Exemption by Board of Supervisors.* If no such statement is filed, no exemption shall be allowed by the assessor, but it may be allowed by the Board of Supervisors if such statement is filed before September 1st of the year following the year for which same is claimed."

It would appear from the above quoted section that the statute contemplates the exemption of taxes, where no claim therefor is made to assessor, by the Board of Supervisors upon filing with the Board of Supervisors a claim for such exemption on or before September 1st of the year following the year for which the exemption is claimed. In Section 6950 the Board of Supervisors is given authority to suspend or remit taxes for the *current year.*

It is the opinion of this department that the authority of the Board of Supervisors to grant exemptions is limited to one year, that is, it may exempt taxes for the preceding year where application therefor is made before September 1st. Otherwise there could be no claim for exemption allowed.

Your second question is as follows:

A property owner had claimed exemption in 1929 and 1930 but no claim was made in 1931 and 1932. The assessor did not list the property as exempt, and the property was advertised for sale for delinquent taxes. The property owner filed an application with the Board of Supervisors asking that this assessment be cancelled for the years 1931 and 1932. We assume that this request has been made only recently.

Section 6949 of the statute provides for the exemption by the Board of Super-

visors of property of those entitled to such exemption for which no claim has been made to the assessor. When the claim is filed with the Board of Supervisors before the first of September, the Board may then exempt the property for the preceding year. Under the facts above stated, the taxes in question were for the years 1931 and 1932. It would be the opinion of this department that the Board of Supervisors would be without authority to exempt the property from taxation for the years 1931 and 1932 where claim therefore was made at the late date of 1936.

Your next question is whether or not there would be a different ruling if the property owner were a non-resident of the county wherein the property was located, or of the state. It is our opinion that it would make no difference whether he were a resident or non-resident.

We have read the opinions of this office on page 420 of the 1928 Attorney General's Report and on page 178 of the 1930 Report. These opinions cannot be reconciled.

It is our opinion that the provisions of Section 6948 of the statute wherein it states "and every assessor shall annually make a list of persons entitled to such exemptions and return such list to the county auditor upon forms to be furnished by the auditor for that purpose" has reference to those persons who have filed with the assessor a written statement that he is the owner of the property on which the exemption is claimed. We do not believe that Section 6948 makes it a duty of the assessor to check through his former records, or perhaps the records of some former assessor, to ascertain those persons to whom exemptions are due and make a list thereof, but that the statute only requires him to make a list of such persons as have filed a written request with him for exemption of property from taxation.

BONUS BOARD: COUNTY OFFICERS: COUNTY SOLDIERS' RELIEF COMMISSION: MILEAGE: Members of the County Soldiers' Relief Commission are not entitled to draw mileage and expenses from the county for attending a meeting called by the Iowa Bonus Board.

February 8, 1937. *Hon. C. W. Storms, Auditor of State:* We are in receipt of your request for an opinion upon the following question:

"Are the members of the County Soldiers' Relief Commission entitled to mileage and expense for attending a meeting called by the Iowa Bonus Board, such meeting being held in Des Moines?"

The County Soldiers' Relief Commission is an organization existing by statutory provision. After the appointment of the members of the Soldiers' Relief Commission by the Board of Supervisors of the respective counties, the Soldiers' Relief Commission organizes by the selection of a chairman and secretary. The statute provides for the holding of certain meetings by the commission and prescribes the duties to be performed by it. The Commission is not under the supervision or jurisdiction of any county or state board although the members are appointed by the county boards of supervisors. Section 5388, Code of Iowa, 1935. The members of the Soldiers' Relief Commission are county officers.

Section 5260 of the statute provides as follows:

"*Unallowable claims.* No claim shall be allowed or warrant issued or paid for the expense incurred by any county officer in attending any convention of county officials."

It cannot, however, be said that the meeting called by the Iowa Bonus Board

was a convention of county officials. It was, however, a meeting called at which members of the County Soldiers' Relief Commission were invited to attend. The Iowa Bonus Board has no authority to dictate to the members of the County Soldiers' Relief Commission. Therefore, the question of whether the members of the Soldiers' Relief Commission would attend this meeting would be in their discretion. They were not required, under the law, to attend it and whatever they did with reference to attending it would be voluntary on their part and would not be in the performance of the duties required by them under the statute.

It is therefore the opinion of this Department that the members of the County Soldiers' Relief Commission are not entitled to draw mileage and expenses from the county for attending such meeting.

REAL ESTATE BROKERAGE LAWS, VIOLATION OF: FINES: PENALTIES: All fines and penalties collected for a breach of any of the provisions of Chapter 91-C2 of the Code should be distributed under the provisions of the Constitution.

February 8, 1937. *Mr. H. H. Crenshaw, Secretary to Real Estate Commissioner:* This department is in receipt of your request for an opinion on the question of what disposition is to be made of fines and penalties collected for violation of Chapter 91-C2 of the Code. Section 1905-c59 provides for punishment by fine or imprisonment for a violation of the provisions of Chapter 91-C2 and also provides that "all fines and penalties shall inure to the commission and shall be placed in the general fund of the state." There is no provision in this chapter of the statute for assessing penalties or fines except for a violation of the law and then only upon a conviction of the licensee by the court. Therefore, the provisions of Section 1905-c59 governing the disposition of fines and penalties must refer to those collected after a conviction in the District Court.

Article XII, Section 4 of the Constitution provides:

"All fines, penalties, or forfeitures due, or to become due, or accruing to the State, or to any County therein, or to the school fund, shall inure to the State, county, or school fund, in the manner prescribed by law."

Article IX, Section 4 of the Constitution provides:

"Fines—how appropriated. * * * and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, shall be exclusively applied, in the several counties in which such money is paid, or fine collected, among the several school districts of said county."

Under the provision of Section 4, Article IX of the Constitution heretofore quoted, all fines collected for any breach of the penal laws are exclusively applied in the several counties. This section of the Constitution makes a specific declaration as to the disposition of fines collected for breach of the penal laws. Section 1905-c59 of the Code and Section 4, Article IX of the Constitution cannot be harmonized. The provisions of the Constitution are superior to the provisions of the statute, and where the two cannot be harmonized, the provisions of the Constitution must prevail.

It is therefore the opinion of this Department that all fines, and penalties collected for a breach of any of the provisions of Chapter 91-C2 of the Code inure and are appropriated as provided in the Constitution.

COUNTY RECORDER: CHARGE FOR FILING CHATTEL MORTGAGES: On a chattel mortgage with duly executed assignment thereon filed for record

with view to having assignment of mortgage also filed and indexed, the county recorder would be entitled to two fees of 25 cents each.

February 8, 1937. *Mr. Robert B. Organ, County Attorney, Council Bluffs, Iowa:* This office is in receipt of your letter asking an opinion upon the following question:

Should the county recorder charge a fee of twenty-five cents for the recording of a chattel mortgage with a printed and duly executed assignment on the back thereof, or should the fee be fifty cents?

Chapter 437 of the Code has to do with chattel mortgages and conditional sales of personal property. Section 10031 provides:

"*Fees.* The fees to be collected by the county recorder under this chapter shall be as follows:

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

Under the above, the Legislature has provided first, a fee for filing a chattel mortgage, to-wit, twenty-five cents, second, a fee for recording a chattel mortgage which shall be fifty cents for the first 400 words and ten cents for each 100 additional words or a fraction thereof. The Legislature plainly intended to make a distinction in the charge for filing a chattel mortgage and the fee for recording one. The twenty-five cent fee provided for in the above section refers only to the filing of the chattel mortgage. The second paragraph states that for recording, a fee of fifty cents for the first 400 words and ten cents for each additional 100 words shall be charged.

In answering your question we are assuming that in the case of the filing of the chattel mortgage, the printed and duly executed assignment on the back thereof is likewise being filed, that is, that in filing the chattel mortgage the assignment is being indexed to show the assignee. In that instance it would require two entries on the part of the recorder, first an entry of the mortgage of the mortgagor to the mortgagee, second the assignment from the mortgagee to the assignee. Under such circumstances the same would amount to two filings for which the county recorder should charge two fees of twenty-five cents each.

It is therefore the opinion of this department that on a chattel mortgage with a duly executed assignment thereon filed for record with a view to having the assignment of the mortgage also filed and indexed, the county recorder would be entitled to two fees of twenty-five cents each. If the mortgage is recorded, the fee should be as provided under the second paragraph of the statute and a fee of fifty cents for the first four hundred words plus ten cents for each one hundred additional words charged.

TAXATION: INCOME TAX: STATE INSTITUTIONS: EMPLOYEES OF: A fair valuation should be placed upon the maintenance furnished to employees of State Institutions, and such amount as represents maintenance should be added to their stipulated salaries in computing gross incomes.

February 8, 1937. *Mr. Robert B. Miller, Secretary Board of Control of State Institutions:* We have a letter asking an opinion of this Department upon the following question:

Is the maintenance received by the employees of state institutions in addition to their regular salary subject to assessments for income tax purposes?

From the correspondence enclosed it would appear that state employees of the various state institutions are furnished maintenance under two methods:

1. Employees are paid a regular salary and in addition thereto are furnished board and room.

2. Employees are paid a regular salary and live away from the institution but are furnished room and board in the event they are called on duty under extraordinary circumstances.

Under Chapter 329-F1 of the Code relating to income tax the Legislature has defined gross income. Section 6943-f8 is as follows:

"*'Gross Income' defined—exceptions.* 1. 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. * * * and income derived from any source whatever and in whatever form paid. * * *"

Under the first method herein set out wherein employees are paid a stipulated wage and in addition thereto are furnished room and board at the institution, the room and board are a part of the salary paid to the employee. It, together with the stipulated salary paid, constitutes pay for his services. The room and board are as much a part of his compensation as is the cash he receives.

Persons employed at state institutions who receive a stipulated amount of money for their services and who live in their own homes or room and board away from the institution are not permitted, under the provisions of the income tax law, to deduct from their compensation the amount expended by them for the maintenance of their home, or the amount expended for room and board, the supposition being that the exemption allowed under the provisions of the income tax law is sufficient to maintain the home or to provide room and board. Therefore it is the opinion of this Department that a fair valuation should be placed upon the maintenance furnished to employees and that such amount as represents the maintenance should be added to their stipulated salaries in computing their gross incomes.

Under the second method set out herein, where the employee is furnished lodging or meals when through some extraordinary occasion he is required to be on duty or to stay at the institution, such items would not be considered as a part of the wage or salary. One working on a stipulated salary who is required to secure a meal or a night's lodging away from home occasionally is permitted to deduct the expense thereof from his gross income. Under the same reasoning, the state employee would be entitled to deduct such items if he should include them in his gross income.

Therefore it is the opinion of this department that, under the second method, it would not be necessary for the employee to include in his gross income meals or lodging procured at the state institutions.

JUSTICE OF PEACE: CONSERVATION LAW VIOLATOR: Conservation officer may obtain warrant for arrest of a violator from any justice of peace or other magistrate in county where offense took place. If such arrest is made without warrant, arrested person should be taken before nearest justice of peace, regardless of township, in county where violator is arrested.

February 15, 1937. *Iowa State Conservation Commission:* We are in receipt of your letter requesting a written opinion on the following question:

"Is it or is it not legal for a Conservation Officer, acting in his lawful capacity, to arraign for prosecution a violator of the fish and game laws in a Justice of the Peace Court in a Township other than the Township where the violator was apprehended? It is understood the two Townships are located in the same county."

Violations of the fish and game laws are punishable as non-indictable misdemeanors under the provisions of Section 1789, 1935 Code.

Section 13557, 1935 Code, provides as follows:

"13557. *Jurisdiction.* Justices of the peace have jurisdiction of, and must hear, try, and determine all public offenses, less than felony, committed within their respective counties, in which the punishment prescribed by law does not exceed a fine of one hundred dollars or imprisonment thirty days."

It is clear that the jurisdiction of a justice of the peace is co-extensive with his county as to such violations of the fish and game laws within the county. Thus a warrant may issue under such circumstances from any magistrate within the proper county, irrespective of the township of the magistrate.

If the officer arrests a violator without a warrant, then the provisions of Section 13488, Code of 1935, are applicable to the situation. This section provides as follows:

"13488. *Disposition of prisoner.* When an arrest is made without a warrant, the person arrested shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and the grounds on which the arrest is made shall be stated to the magistrate by affidavit, subscribed and sworn to by the person making the statement, in the same manner as upon a preliminary information, as nearly as may be."

Therefore, it is the opinion of this department that the conservation officer may lawfully obtain a warrant for the arrest of such a violator from any justice of the peace or any other magistrate in the county wherein the offense took place.

It is further our opinion that if such arrest is made without a warrant, under the provisions of Section 13488 above quoted the arrested person should be taken before the nearest or most accessible justice of the peace or other magistrate in the county, irrespective of the township, in which the violator is arrested.

NOTARIES PUBLIC:
1. Residence clause of application may be waived.
2. Married women must use name under which commission is issued or apply for new commission.

February 16, 1937. *Mr. G. W. Kirtley, Executive Secretary, Office of Governor:* In answer to your question of February 11, 1937, in which you ask:

"Is it possible to waive: 'and have resided in this state for six months last past?' "

contained in the application issued by your office and used by applicants for appointment as a notary public, this department is of the opinion that the same may be waived for the reason that we find nothing in Chapter 65, Section 1200, of the Code, that refers to residence directly in the state of Iowa for any specific period. Since the law does not require such a length of residence in the state, we feel that the applicant should not be required to make such a statement in his application.

In answer to your second question:

"A married woman, upon being divorced, wishes to resume her maiden name. Under what conditions, if any, can she continue to use her notary commission, or will a new one have to be issued?"

Section 1207, Code of Iowa, 1935, provides:

"*Acting under maiden name.* When a female has, prior or subsequent to the adoption of this Code, been commissioned a notary public, and has, after

the issuance of said commission and prior to the expiration thereof, contracted a marriage, the official acts of such notary public after said marriage and prior to the expiration of said commission shall not be deemed illegal or insufficient because, after said marriage, she performed said official acts under the name in which said commission was issued."

It would appear from the quoted section that such a duly commissioned notary public could continue to discharge her official duties under the name in which the commission issued. However, if she were to use her maiden name, whereas her official seal contained in its impression her married name, there would be such a discrepancy as might raise a doubt as to the authenticity of the document so notarized. It is accordingly the opinion of this department that under the statutory law of Iowa governing notaries public, it would not be possible for the person in question to exercise the duties of her office as a notary public under her current commission in any other name than that in which the commission issued.

ROADS: BOARD OF APPROVAL: Section 4644-c34. Time of passage of act fixes status of townships.

February 16, 1937. *Mr. Ray A. Potter, County Attorney, Tipton, Iowa:* We have your request for an opinion as to what action should be taken by the board of approval in view of the fact that the percentage of improved roads varies greatly among your townships, your specific question being:

"In view of the variations between the townships (running from 21 per cent to 46 per cent) can an equalization be made by adopting mileage sufficient to make all percentages the same, or will the board of approval proceed to give each township the mileage based on the total local road mileage in each township that it bears to the total local road mileage of the county."

We are of the opinion that Section 4644-c34 of the Code was intended to protect the townships that had improved their roads prior to the enactment of Chapter 20 of the Laws of the 43rd General Assembly. In other words, the basis of future operations is the state of the roads prior to the enactment of that law. The board of approval is given considerable discretion, but in exercising this discretion it is prohibited from discriminating against townships which had improved their roads prior to the enactment of the law. Therefore, we do not think that your board of approval would be justified in adopting a plan that would equalize all percentages, and we do think that the board is authorized to give each township its proportionate share of the improvement.

EXPENSE ACCOUNTS: CANDIDATES: Expense accounts of candidates for public office as filed shall at all times be open to the public for inspection.

February 16, 1937. *Honorable W. Mighell, Senate Chamber:* In answer to your inquiry—"whether or not there is any law to compel public officials to show public records as to expense accounts of candidates for office within said counties"—we call your attention to Chapter 46 entitled "Statement of Expenses," of the Code, and more particularly to Section 977 of this chapter which reads as follows, to-wit:

"977. *Public inspection.* Said statements shall be open at all times to the inspection of the public, and remain on file and be a part of the permanent records in the office where filed."

It is the opinion of this department that the expense accounts as filed under this chapter shall at all times be open to the public for inspection.

COUNTY OFFICERS: COUNTIES: EMPLOYMENT OF COUNSEL: The board of supervisors of a county may employ counsel to defend member or members of the board in an action against such member or members arising out of the honest and proper performance of statutory duties involving an exercise of discretion.

February 17, 1937. *Mr. Curtis W. Gregory, Attorney at Law, Adel, Iowa:* This office is in receipt of your letter asking an opinion upon the following matter:

D. W. Hall was a member of the Board of Supervisors of Dallas County. While serving in that capacity, a resident of Dallas County, one Bonnie Mae Matherly became ill while in Polk County and was taken to the Broadlawns Hospital in the City of Des Moines. She was a charity patient and the Superintendent of the hospital contacted Mr. Hall by telephone with reference to her care and keep at the Broadlawns Hospital. Mr. Hall, with the approval of the other members of the Board and the doctor in charge, directed that the said Bonnie Mae Matherly be removed from the Broadlawns Hospital to the Dallas County Poor Farm where a hospital is maintained. Later she was taken from the County Farm Hospital by her mother and removed to Mercy Hospital in the city of Des Moines where she died.

The action is instituted by the administratrix of her estate against the Broadlawns Hospital, Dallas County, and D. W. Hall, individually. Is Dallas County liable for attorney's fees incurred by Mr. Hall in the defense of this case?

From the posited facts, we assume Mr. Hall was made a party-defendant to the action instituted by the deceased administratrix for the reason that while assuming to act as a member of the board of supervisors of Dallas County, yet he was guilty of conduct resulting in alleged damage to the decedent or her administratrix. This assumption is indulged in by reason of the facts stated, viz., that Bonnie Mae Matherly was a "charity patient," and that during a part of the time she was indisposed she was confined in the county home and there given medical assistance at the county's cost. In other words, the named person apparently was in the class of persons eligible for relief under the "Support of the Poor" laws. Chapter 267, Code of Iowa, 1935. The provisions of said chapter provided for the furnishing of medical attendance (Section 5327), and a board of supervisors is empowered to make contracts with any reputable and responsible person licensed to practice medicine to furnish medical attendance required for the poor. (Section 5334-c1.) Furthermore, it is the statutory duty of counties to assist poor persons having a legal settlement within the county. *Cass County vs. Audubon County,* 221 Iowa 1037, 266 N. W. 293. A county, of course, can act only through its duly elected and legally qualified officers. The acts of a board of supervisors, within the statutory power and authority of such board, are, so to speak, the acts of the county. *In the Matter of the Assessment of the Farmers Loan and Trust Company, etc.,* 155 Iowa 536, 136 N. W. 543; *Cunningham vs. Adair County,* 190 Iowa 913, 181 N. W. 20; *Mortland vs. Poweshiek County,* 156 Iowa 720, 137 N. W. 1009. Therefore, in view of the facts presented to us, it may be stated categorically that the action undertaken by the board of supervisors of Dallas County, of which D. W. Hall was a member, was within the scope of the board's authority,—more, in the exercise of the mandatory duty of a county to aid its poor. This being true, does the law inhibit an expenditure by the county (it should be borne in mind that Dallas County was likewise a party-defendant) to defray

the cost (legal fees) of defending one or more members of the board in an action arising out of the discharge of such official duty, as was presumably the instant case?

In the case of *Scott vs. The Independent District of Hardin*, 91 Iowa 156, 59 N. W. 15, an action was brought on two school orders, both payable out of the contingent fund,—one for attorneys fees, and the other for stenographic service. Both items arose out of a case (*Carthan vs. Lang, et al.*, 69 Iowa 384, 28 N. W. 650) wherein an injunction had been sought and was granted against the individual members of the school board, which issued the orders, to restrain them from paying for a newly erected school house for the reason that the same was not constructed as per contract specification, and that the real contractors were the board members themselves. The board had hired counsel to defend them in said injunction proceedings, and the two orders issued by the board were for attorneys fees and stenographic service in connection with such legal services. In the *Scott case, supra*, and being an action to recover payments on said orders by the plaintiff who had purchased the same, the supreme court of Iowa stated (id. page 159, et seq., of 91 Iowa):

"* * * Now, bearing in mind the fact that this suit was brought against the directors to restrain them from doing an illegal act,—from consummating a fraud upon the district,—and that these directors, if not active parties to the fraud, were guilty of the grossest neglect and carelessness in the performance of their duties, does the law contemplate that they shall have power to bind the district by issuing orders, to pay attorneys and stenographers for services, not in defending a suit for the benefit of the district, but in defending acts of their own, which, when done, they knew were improper if not fraudulent, and about the impropriety of which there could be no question? We think not. To hold such orders legal is to offer a premium to incompetent or dishonest school directors to squander the funds under their control, and then, when called to an account, to further intrench themselves by hiring and paying attorneys out of the district funds, to aid in defending them. The law contemplates no such thing. *It was designed that school directors, in the proper performance of their duties, should be provided with counsel in case of suits brought by or against them, but it was not designed that such officers should have the benefit of this statutory provision when a suit was brought against them by reason of their own corrupt or illegal acts, which, when done, were by them known to be such. By this construction of the law, directors who are honest in the performance of their duties, even though mistaken as to their powers, and so acting illegally, have power to employ counsel, at the expense of the district, in a case instituted against them as such officers, while directors who knowingly act illegally or corruptly, or knowingly disregard their duty, whereby an injury results to the district, are deprived of the benefit of this statutory provision.* * * *"

Again in *Rural Independent School District, et al., vs. Daly, et al.*, 201 Iowa 286, 207 N. W. 124, wherein the question of employment of counsel by a school corporation was involved, the supreme court of Iowa, at page 290 of 201 Iowa, stated:

"One of the duties of a county attorney prescribed by statute is to furnish, free of charge, legal advice to all school board and township officers when requested so to do by such board or officer. Chapter 232, Section 2, Acts of the Thirty-eighth General Assembly; Section 5180, Paragraph 7, Code of 1924. This provision simply defines one of the duties of a county attorney, but the law does not make it mandatory upon a school board or officer to employ the county attorney.

"Counsel for appellant rely on *Templin & Son vs. District Township of Fremont*, 36 Iowa 411; but in that case there was no official action of the board in reference to employing counsel.

"It is the general rule that a municipal corporation which is authorized to contract and to sue or be sued may employ legal counsel, unless the statute expressly or by fair implication denies that right. In *Taylor County vs. Standley*, 79 Iowa 666, it is said:

" 'We are of the opinion that the board of supervisors was authorized to employ counsel on behalf of the county by virtue of the general powers given them by statute to manage the affairs of the county, and that their right to do so, and to cause proceedings to be instituted in the name of the county, in cases of this kind, does not depend upon the consent of the county attorney, nor upon his willingness or ability to appear for the county.'

* * *

"This appeal involves the right of a school corporation to employ the services of an attorney when its corporate right to exist is in jeopardy. In such a case, must the authority to contract for legal services be found in the express terms of the statute, or is this power an incident to corporate existence, and relevant to the many powers directly granted by statute? We are of the opinion that such authority impliedly exists, and under the circumstances of this case it would be unreasonable to deny such incidental and implied power to a corporation, taking into consideration its character and the interests involved. Discretion in this particular must be conceded, unless the charter of its being forbids, or the general scheme of its government provides for an attorney or legal officer, as to negative authority to employ others. 2 Dillon on Municipal Corporations (5th Ed.) 1243, Section 824.

"In the instant case, the question whether the corporation should or should not be dissolved certainly pertained to the affairs of the school district. It involved its very right to exist. Its interests were directly challenged. 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. Furthermore, the proceeding for the dissolution of the school district is quasi judicial in character. (Chapter 175, Acts of the Thirty-ninth General Assembly.)

"Under the law, the matter was submitted to the county superintendent, and the petition for dissolution was to be allowed or disallowed only upon a hearing on its merits. The statute contemplates that evidence shall be taken, witnesses examined, and arguments made, to determine whether the interests of all parties shall be served by a submission of the question to the electors. Under such provisions, and having in mind the nature and purpose of a petition for dissolution of such a school corporation, we hold that the board may lawfully incur reasonable expense by the employment of legal counsel to represent the corporation upon the hearing. The trial court properly concluded that a school corporation was a creature of law, established for a definite purpose, and that through its lawfully constituted officers it may resist all attacks made upon it, either in the discharge of its legitimate functions or in its right to exist."

In the case of *Taylor County vs. Standley*, 79 Iowa 666, 44 N. W. 911, quoted from by the court in the Daly case, supra, there was involved an action to recover money alleged to belong to the county and wrongfully obtained by the defendant and converted by him to his own use. The board of supervisors had employed counsel to prosecute the action. Before answering, the defendant filed a motion to dismiss the action on the ground that it was not brought or authorized by the county attorney, and that the petition on file was not filed by the county attorney or by anyone authorized to do so. The motion was overruled, so that the question precisely before the supreme court was the board's authority to employ counsel. The court stated, quoting from page 669 of 79 Iowa:

"Section 205 of the Code, prior to its repeal in the year 1886, provided that the district attorney should appear, for the several counties in his district, in all matters in which such counties might be parties, or interested; but it also provided that nothing therein contained should prevent the board of super-

visors from employing other counsel, in any case properly belonging to the duties of the district attorney, when they deemed it necessary. While that section was in force it was held by this court that the board of supervisors might employ counsel whenever they deemed it expedient to prosecute or defend an action to which the county was a party. *Tatlock vs. Louisa County,* 46 Iowa 138; *Jordan vs. Osceola County,* 59 Iowa 389.

"But it is said that Chapter 73, Acts Twenty-first General Assembly, has so far changed the law as to require the appearance of the county attorney in all actions to which his county is a party. It is true that it makes it his duty to so appear, but in terms substantially like those used in Section 205 of the Code which it repealed. Attention is called to the last provision of Section 4 of that chapter, which is as follows: 'But nothing in this section shall be con strued to prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested.' There is nothing in that provision, however, which can be construed to take away the power of the board of supervisors, which had theretofore existed, to employ counsel for the county. There is nothing in Chapter 73 which would prevent the bringing of an action in the name of the county unless the county attorney appeared therein. The provision of Section 5, in regard to the appointment of an attorney to act in case of the absence, sickness or disability of the county attorney and his deputies, was designed to prevent delays, and secure justice, in the prosecution of proceedings in court. We are of the opinion that the board of supervisors was authorized to employ counsel on behalf of the county by virtue of the general powers given them by statute to manage the affairs of the county, and that their right to do so, and to cause proceedings to be instituted in the name of the county, in cases of this kind, does not depend upon the consent of the county attorney, nor upon his willingness or ability to appear for the county. The motion to dismiss was properly overruled."

While it must be conceded that there is some difference between a county as a corporation and a school district as such, yet in our opinion the language quoted supra lays down the test in any given case.

Now the presumption in the first instance is that a public officer or board has discharged his or its duty in accordance with law and within statutory authority. *Dollarhide vs. Muscatine County Commissioners,* 1 G. Greene 158. That presumption is indulged in by us in the instant case in the absence of any showing to the contrary. Furthermore, there exists on the statute books of Iowa the same provision of law as was considered by the supreme court in the Standley case, supra, to the effect that whereas the county attorney shall appear for the county, yet "nothing * * * shall prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested." Section 5243, Code of Iowa, 1935.

In view of the foregoing discussion, and under the facts presented, it appears that D. W. Hall, in collaboration with other board members was exercising a duty or function *per se* governmental and involving discretion. While we make no attempt to pass upon the question of personal liability, yet we are inclined to the view that in those cases where from an analysis of the facts and circumstances it appears that a board and the members thereof were in the honest and proper performance of an official duty, and thereafter one or more of the board members is sued for damages arising out of the performance of such duty, the board of supervisors, under the provisions of Section 5243, supra, has authority to employ counsel to defend such member or members of the board in an action brought against them in their individual capacities. This, under the authority of the language quoted from the decisions of the supreme

court, supra. See also *Cowles vs. Independent School District*, 204 Iowa 689, 216 N. W. 83.

In this same respect it is stated in 15 Corpus Juris 547, Section 239, that a county generally has express or implied statutory authority, through its proper officers or agents, usually the county board of supervisors, to employ counsel other than the official attorney to represent the county in civil suits in which the county is interested. *Bevington vs. Woodbury County*, 107 Iowa 424, 78 N. W. 222; *Taylor County vs. Standley*, 79 Iowa 666, 44 N. W. 911.

It is accordingly the opinion of this department that, in the language of the Iowa court, Section 5243, supra, was designed that board members, in the proper performance of their duties, should be provided with counsel in case of suits brought by or against them.

By reason of the express statutory provision which permits the hiring of counsel, Section 5243, supra, and which authority has been confirmed by the Iowa supreme court in numerous cases (*Bevington vs. Woodbury County, supra; Taylor County vs. Standley, supra*) the instant case is distinguishable from one that confronted this department in an opinion issued January 21, 1937, to the state comptroller. See page 25 this report, supra. In that opinion we found no statutory authority permitting the expenditure of funds by the state comptroller to defray legal charges in a judicial proceedings involving one of the conservation officers. As has been pointed out in the instant case, there is express statutory authority. Whether or not a further distinction could be made between the cases on the ground that herein there is involved, as the defendant in the civil proceedings, a judicial or quasi judicial officer in contradistinction to a conservation (peace) officer engaged for the most part in the performance of ministerial duties, we have no occasion to decide.

BOARD OF SUPERVISORS: NON-RESIDENT LAND OWNERS: ROAD ASSESSMENT DISTRICT: All owners of the land in proposed assessment district are non-resident owners. Can the Board proceed with the establishment of such district? Inasmuch as all of the owners of land within the proposed district are non-residents of Iowa, there would be no one competent to sign the petition, and no valid petition for such an establishment could be presented. Chapter 130, 47th General Assembly, amendatory.

February 17, 1937. *Mr. Harry E. Coffie, County Attorney, Estherville, Iowa:* This office has your request for an opinion upon the following question:

A request has been made of the Board of Supervisors to establish a road assessment district for the purpose of graveling a secondary road. All of the owners of the land within the proposed district are non-resident owners. Can the Board proceed with the establishment of such district?

The establishment of a road assessment district for the purpose of improving a secondary road is provided for in Section 4746 of the Code, to which reference is directed. The establishment is upon a petition to the Board of Supervisors. The petition shall describe the land within the proposed district, the road or roads the petitioners desire to have improved, and the general nature of the improvement. The statute provides:

"* * * Said petitions shall be signed by thirty-five per cent of the owners of the lands within the proposed district who are residents of the county. * * *"

In the question propounded, all of the owners of the land within the proposed district are non-residents of the State. The statute does not make any provi-

sion for the securing of any other names to the petition for the establishment of such district. It would appear from the statute that it was the intention of the Legislature in the enactment of the statute to require the signatures of land owners who are residents of the county. There is no provision for establishing such district upon the petition of any other parties.

Therefore, in answer to your question, it would be our opinion that inasmuch as all of the owners of the land within the proposed district are non-residents of the State of Iowa, there would be no one competent to sign the petition, and no valid petition for such an establishment could be presented. (See, however: Chapter 130, Laws of the 47th General Assembly.)

COUNTY OFFICERS: COUNTY ATTORNEYS: TRAVELING EXPENSES: Board of Supervisors not authorized to allow actual expenses to County Attorneys incurred in traveling between his residence and county seat.

February 18, 1937. *Mr. Wallace F. Snyder, County Attorney, Belle Plaine, Iowa:* We are in receipt of your letter asking an opinion of this department on the following question:

> You are the county attorney of Benton County and maintain your residence at Belle Plaine. Can the Board of Supervisors allow actual expenses incurred in traveling from your residence at Belle Plaine to Vinton in attendance upon county matters?

Section 5228 of the statute fixes and prescribes the compensation of county attorneys, and further provides:

> "The county attorney shall also receive his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat."

It is apparent that the Legislature had in mind a situation such as is embodied in the inquiry before us at the time of the enactment of the Code provision quoted above. The statutory language is specific. It is not susceptible to a construction that would permit the Board of Supervisors to allow traveling expense between the two places mentioned.

It is accordingly our opinion that the Board of Supervisors is not authorized to allow expenses incurred by the county attorney in traveling between his residence in Belle Plaine and the county seat,—Vinton.

TAXATION: BOARD OF SUPERVISORS: Board of Supervisors may levy a tax not to exceed one-eighth mill under provisions of Section 2905 and a tax not to exceed one-eighth mill under Section 2909.

February 18, 1937. *Hon. C. W. Storms, Auditor of State:* This office is in receipt of your request for an opinion from this department on the following question:

> Can the Board of Supervisors levy a one-eighth mill tax under Section 2905 of the statute and a one-eighth mill tax under Section 2909 of the statute making a total levy of a one-fourth mill, or are they limited to a levy of a one-eighth mill under one or the other of the above sections?

Both of these sections of the statute are contained in Chapter 136 of the Code. This chapter has reference to county and district fairs.

Under sub-division 2 of Section 2894 the word "society" is defined as meaning a county or district fair or agricultural society incorporated under the laws of this state for the purpose of holding fairs, and in addition to those requirements owns or leases real estate and buildings and improvements as specified

in the statute. Such society may obtain state aid by complying with the provisions of Section 2902 of the statute.

If such society as is defined by sub-section 2 of Section 2894 exists and has complied with the requirements of Section 2902 to secure state aid, then and in that event, the provisions of Section 2905 apply. Section 2905 reads as follows:

"*County aid.* The board of supervisors of the county in which any such society is located may levy a tax of not to exceed one-eighth mill upon all the taxable property of the county, the funds realized therefrom to be known as the fair ground fund, and to be used for the purpose of fitting up or purchasing fair grounds for the society, or for the purpose of aiding boys' and girls' 4-H Club work in connection with said fair, provided such society shall be the owner in fee simple, or the lessee of at least ten acres of land for fair ground purposes, and shall own buildings and improvements thereon of at least eight thousand dollars in value."

Section 2906 of the statute provides for additional county aid as follows:

"*Additional county aid.* The board of supervisors may upon a petition signed by twenty-five per cent of the qualified voters of the county as shown by the poll books of the last preceding general election, submit to the voters of the county, at a general election, the proposition to purchase or accept as a gift, for county or district fair purposes, real estate exceeding one thousand dollars in value. Notice of such election shall be published in the official newspapers of the county for four weeks previous to such election."

In such election, if a majority of the votes cast are in favor of such proposition, then the Board of Supervisors is empowered to make the authorized purchase and pay for the same out of the county general fund, or accept the gift as the case may be. Thereafter, the "society" is authorized to erect and maintain buildings and make such other improvements on the real estate as is necessary, *but the county incurs no liability for such improvements or expenditures therefor.* Section 2907, of the 1935 Code.

In the event real estate or a fair ground has been secured, under the provisions of Sections 2906 and 2907 of the statute, then Section 2909 applies. Section 2909 is as follows:

"*Tax aid.* The board of supervisors of any county which has acquired real estate for county or district fair purposes and which has a society using said real estate, may levy a tax of not to exceed one-eighth mill upon all the taxable property of the county, the fund realized therefrom to be known as the fair ground fund."

It is therefore our opinion that it is possible and permissible for the Board of Supervisors, if the statute has been complied with, to levy a tax not to exceed one-eighth mill under the provisions of Section 2905 and a tax not to exceed one-eighth mill under the provisions of Section 2909.

TAXATION: INCOME TAX LAW: SALARIES: EMPLOYEES: FEDERAL LAND BANKS: The salaries and wages of the employees of Federal Land Banks, who are residents of Iowa, are subject to the State Income Tax and should be included in their gross income for tax purposes.

February 18, 1937. *Iowa State Board of Assessment and Review:* This Department is in receipt of your request for an opinion on the following matter:

Are the salaries of the employees of Federal Land Banks subject to the provisions of the income statutes of the state of Iowa?

The income tax law, as found in Chapter 329-F1, Section 6943-f3, par. 2 of the Code of 1935 defines the word "taxpayer" as used in the statute to mean:

"The word 'taxpayer' includes any person, corporation, or fiduciary who is subject to a tax imposed by this chapter."

Paragraph 1, Section 6943-f8 of Chapter 329-F1 likewise defines "gross income" 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, or from professions, vocations, trades, business, * * * and income derived from any source whatever and in whatever form paid. The amount of all such items shall be included in the gross income of the tax year * * * "

The statute excludes from gross income certain sources of income and provides that such income so excluded shall not be required to be included in the gross income of the taxpayer.

Paragraph 2 of Section 6943-f8 is as follows:

"The term 'gross income' does not include the following items, which shall be exempted from taxation under this division. * * *

"e. Salaries, wages, pensions and other compensation received from the United States by officials, employees or veterans thereof which are or shall be exempt from state taxation by federal law."

The exemption allowed under subsection "e" above quoted applies to salaries, wages, pensions of officials, employees or veterans of the United States which are or shall be exempt from state taxation by Federal law.

Therefore, employees of Federal Land Banks residing in the State of Iowa must include their salaries or wages in their gross income for the purpose of determining their income tax payable unless they come within the excepted class of those enumerated in subdivision "e" above quoted.

At the outset, the following premises may be stated as facts about which there can be no controversy:

1. That the state has an inherent right to impose an income tax;
2. That a corporation is a legal entity;
3. That a corporation is separate and distinct from its stockholders;
4. That Federal Land Banks are creatures of the Federal Government;
5. That the organization of Federal Land Banks was within the Constitutional rights of the Federal Government;
6. That Federal Land Banks were organized to meet a national demand for a rural credit system;
7. That the Federal Government has the right to exempt from taxation certain classes of persons or property.

The Farm Loan Act of the Federal Congress, which became effective July 17, 1916, established the Farm Loan Board, and the various Federal Land Banks of the country were chartered by that board under the provisions of that act. These banks were organized and commenced business under the supervision of the Farm Loan Board. The Farm Loan Board was abolished by the provisions of an executive order of the President of the United States, dated March 27, 1933, and the functions of said board were taken over by the terms of that executive order by the Farm Credit Administration. Twelve district banks had been established by the Farm Loan Board. The Omaha Federal Land Bank is the one concerned in this request for our opinion.

The original capital stock of each of the twelve Federal Land Banks was $750,000.00. Of the $9,000,000.00 total original capital of the twelve banks, $8,892,130.00 was subscribed for by the United States government. The stock held by the government was gradually retired until on December 31, 1931, it held only $204,698.00 of the total capital stock then outstanding.

By an amendment to the Farm Loan Act, approved January 23, 1932, the secretary of the treasury was authorized to subscribe to additional capital of the banks in the aggregate amount of $25,000,000.00. Appropriation was made for the purpose. As a consequence of this legislation, on December 31, 1932, the United States government held $125,046,410.50, out of a total of $189,047,-843.00 capital stock. On December 31, 1936, $14,933,865.00 of the additional issue had been retired. The law provided that all repayments on account of stock subscribed should be held in the treasury of the United States as a revolving fund, to which fund subscriptions from capital stock should be made, and during the year 1936 an additional $14,000,000.00 of capital stock of the banks had been re-subscribed from the amount which had been returned to the revolving fund. At the end of the year 1936, the total outstanding capital stock of the Federal Land Banks owned by the United States government amounted to $124,066,135.00 or 52 per cent. In addition to this amount, the United States government has invested in the Federal Land Bank paid-in surplus in the total sum of $128,016,019.00. This subscription to paid-in surplus was authorized by an amendment to the Farm Loan Act.

However, we do not consider the organization of the Federal Land Banks as a controlling feature. The Federal Land Bank is a separate and distinct corporation. Nor do we consider the ownership of the stock of the Federal Land Bank as a controlling feature for the reason that the corporation is a separate and distinct entity from the stockholder. Nor do we consider the fact that the Federal Land Bank is a creature of the Government organized under its Constitutional right as controlling, for the reason that the Government may constitute and create organizations which have nothing whatever to do with the operation of the Government itself. Nor do we consider that the Federal Land Banks were organized to meet a National demand for a rural credit system as controlling for the reason that the great majority of the Acts of Congress are for the purpose of meeting some National demand. Nor do we consider that the Federal Government has the right to exempt from taxation certain persons and property as controlling for the reason that under the Act of Congress creating the Farm Credit Administration under which Federal Land Banks were organized, definite specific exemptions were set out and we may assume that it was the intention of Congress that a tax could be assessed and collected, save and except as exempted by it. The exemption as enacted by Congress applies to "every Federal Land Bank including the capital and reserve or surplus therein and the income derived therefrom." It will be noted that in this exemption the salaries, wages and compensation of the employees of the bank are not included.

At the outset we are faced with the opinion of Mr. Justice Sutherland recently rendered in the United States Supreme Court in the case of the *People of the State of New York upon the Relation of Richard Reid Rogers, Appellant, vs. Mark Graves, et al.*, constituting the State Tax Commission of the State of New York. It would appear from a reading of the opinion in the above case that the question presented for our determination is conclusively answered in the negative. However, there are facts and circumstances in connection with the Rogers case which are worthy of close consideration. Briefly, the facts in the Rogers case are as follows:

Richard Reid Rogers was general counsel for the Panama Rail Road Com-

pany, a corporation created under the statutes of the State of New York. In making state income tax returns for the years 1927, 1928 and 1929 Mr. Rogers reported the receipt of salary from the Panama Rail Road Company for those years, but claimed the salary was exempt from taxation and paid no tax. The State Tax Commission, however, sustained the tax, and the Court of Appeals of the State of New York upheld its ruling. Mr. Rogers having paid the tax under protest, carried the case to the United States Supreme Court.

The Panama Rail Road Company constructed and operated a railroad across the Isthmus of Panama. In 1904, the United States Government in its acquisition of the Canal Zone, secured the entire capital stock of the Panama Rail Road Company. In the acquisition of the Canal Zone, the Government secured the right to construct and maintain the Panama Canal, and in connection with its operation of the Canal, it operated the railroad, a dairy, a commissary, and other enterprises.

The Rail Road Company, since its acquisition by the Government has been operated by a Board of Directors elected by the Secretary of War who is the sole stockholder of record, with the exception of one share of stock to each director in order to qualify him as a director.

We think it pertinent to note the following facts as found by the Court as the basis for its opinion in the Rogers case. During the construction of the Canal, the railroad was employed almost exclusively as an adjunct to such construction, although it was incidentally used also for commercial transportation across the Isthmus. For many years before the World War, the Government had employed the Panama Rail Road Company as its instrumentality in connection with the Canal. In order to reach a correct determination of the question whether the railroad company is exercising functions of a governmental character, the railroad and ships are to be considered not as things apart, but in their relation to the Panama Canal; and it is clear that the railroad and ships, after the completion of the canal, continued to be used chiefly as adjuncts to its management and operation. The question, therefore, to be answered is whether the canal is such an instrumentality of the federal government as to be immune from state taxation; and, if so, are the operations of the railroad company so connected with the canal as to confer upon the company a like immunity?

The Act of Congress authorizing the construction of the canal, and the acquisition of the rights in connection therewith, provided for the acquisition of all the rights and property of the new Panama Canal Company of France, also the capital stock of the Panama Rail Road Company; to acquire from the Republic of Columbia perpetual control of the Panama Canal Zone, a strip of land six miles in width and extending across the Isthmus; and to construct and perpetually maintain, operate, and protect thereon a ship canal, including the right to perpetually maintain and operate the Panama Railroad, including the jurisdiction over the zone and the Ports at the ends thereof; the power to make police and sanitary rules and regulations necessary to preserve order and preserve the public health thereon; the establishment of judicial tribunals necessary to enforce such rules and regulations. The Act of Congress created a commission to carry out the purpose of the Act. This Commission was at all times under the direction and control of the President and must make full report of all its transactions to the President.

Summarizing the above facts from the opinion, we therein find the facts for

the Court's ruling. Justice Sutherland, after stating the facts, summarized them in his opinion in the following language:

"Such being the status of the canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and which have that effect, partake of its nature and are themselves cooperating regulators—or perhaps more accurately speaking, constitute, with the canal, a single great regulator—of national and international commerce. And this, we think, is the effect of the interrelation of the railroad company's activities with the management and operation of the canal. If support for this view were thought necessary, it could be found in the contemporaneous and long continued administrative practice. On April 27, 1928, the Secretary of War, in a letter to the President, said: 'The (steamship) Line is an integral part of the Panama Canal and indispensable to its discharge of its normal responsibilities. The successful operation of this great enterprise, which is of vital importance to the United States, demands absolute security as to its line of supply to this country.' "

When the facts upon which the opinion of Justice Sutherland is based are taken into consideration, it may be analyzed as denying to the State of New York the right to tax the salary received by Mr. Rogers as general counsel for the Panama Rail Road Company on the ground that the railroad was a necessary adjunct to the canal, and that the canal was a necessary instrumentality engaged in a government function and that the successful operation of the enterprise was necessary to the United States commerce and to the national defense; that the salary of Mr. Rogers was paid from the United States Treasury from the funds derived from the operation of the enterprise in the Canal Zone, if such ènterprise produced sufficient funds to pay operating expenses, otherwise from public revenues produced and raised by means of taxation. It can, therefore, be readily seen that a tax levied and assessed against the salary of Mr. Rogers would affect the public reserves and would be laying a tax against an enterprise that was an instrumentality of the Government, used and maintained for the furtherance of national commerce and national defense.

In the case of *Metcalf vs. Mitchell*, 269 U. S. 513, Justice Stone said:

"Just what instrumentalities of either a state or the Federal Government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other. Thus, the employment of officers who are agents to administer its laws, its obligations sold to raise public funds, its investments of public funds in the securities of private corporations, for public purposes, surety bonds exacted by it in the exercise of its police power, are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself, but to income derived from it. When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule."

And again:

"It seems to us extravagant to say that an independent private corporation for gain created by a state is exempt from state taxation either in its corporate person or its property because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In the case of *United States vs. Strang*, 254 U. S. 491, the defendant, an

inspector employed by the United States Shipping Board Emergency Fleet Corporation, was indicted under Section 41 of the Criminal Code which is as follows:

"No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, or association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm."

The trial court sustained a demurrer to the indictment and upon appeal to the United States Supreme Court from such ruling, counsel for the Government took the position that:

"The Fleet Corporation is an agency or instrumentality of the United States formed only as an arm for executing purely governmental powers and duties vested by Congress in the President and by him delegated to it; that the acts of the Corporation within its delegated authority are the acts of the United States; that therefore in placing orders with the Duval Company in behalf of the Fleet Corporation while performing the duties as inspector Strang necessarily acted as agent of the United States."

Justice McReynolds in reviewing the order of the trial court in sustaining the demurrer stated:

"The Corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only and they were not agents of the United States within the true intendment of Section 41."

In the case of *Pomeroy vs. State Board of Equalization of Montana*, 45 Pa. (2d Series) 316, the Supreme Court of Montana had before it a question of whether or not an employee of the Reconstruction Finance Corporation was required to include the salary received by him from the Corporation in his income tax return. The court said:

"The fact that the plaintiff received his pay check from the United States Treasury is not controlling, as the funds of the corporation are directed to be deposited there and paid out by the treasurer upon warrants issued to him by a duly authorized agent of the corporation. Section 607 of the act, 15 USCA. On the face of the check issued for plaintiff's salary, and in evidence here, appear the words 'Reconstruction Finance Corporation.' Checks of this nature are issued monthly to many persons not employees of the United States, including pensioners of all our wars and their surviving dependents.

"In all of the government-owned corporations under consideration the United States is the stockholder, but the employees of the corporation are, as in other corporations privately owned, the agents and employees of the corporation and not of the stockholder or stockholders."

The court held that the salary of Pomeroy should be included in his gross income for income tax purposes under the statutes of the State of Montana.

In the case of *Helvering vs. Powers*, 293 U. S. 214, the plaintiff who was the Commissioner of Internal Revenue sought to subject the salary of the defendant to the Federal Income Tax. Immunity from the tax was sought upon the grounds that the defendants were trustees and officers of the State of Massachusetts and instrumentalities of its government. The statute of Massachusetts provided for the public operation of an elevated railway. The Act created a Board of Trustees to be appointed by the Governor with the advice and consent of the council. The act provided that the trustees should

take an oath before entering upon their duties. They were not required to own stock in the company and were to receive an annual salary from the company. The trustees were subject to removal at any time by the Governor. They were charged with the management of the company and of its properties, and had possession of the properties on behalf of the State. This Board of Trustees was authorized to select a President and other officers of the company; determine the character of service and fix fares. The Federal Board of Tax Appeals denied the defendants an exemption of their salaries. Upon appeal to the United States Circuit Court of Appeals, the ruling of the Tax Board was reversed. The case went to the United States Supreme Court under Writ of Certiorari. Chief Justice Hughes in reversing the decree of the Circuit Court of appeals reviewed the facts and stated the main question to be considered as follows:

"We come then to the question whether the Congress had the constitutional power to impose an income tax upon the compensation of public officers of the character here involved."

In answering that question he stated:

"We do not regard that question as answered by mere terminology. The roots of the constitutional restriction strike deeper than that. The term 'public office' undoubtedly implies a definite assignment of public activity, fixed by appointment, tenure and duties. But whether that field of activity in relation to a State, carries immunity from federal taxation is a question which compels consideration of the nature of the activity, apart from the mere creation of offices for conducting it, and of the fundamental reason for denying federal authority to tax. That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system. And one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity."

In the case of *Films Co. vs. Ward*, 282 U. S. 379, and *Fox Film Co. vs. Doyle*, 286 U. S. 123, the ruling is stated that a tax, even if it affects governmental functions must do so directly and not remotely and its propriety depends not upon the consequences to the taxpayer, but only in regard to its consequences to the Government.

The officers and employees of the Federal Land Banks are selected and chosen by the Board of Directors or the managing officers of the bank without restriction on the part of the Government, or without requirements on the part of the Government. The salaries are fixed and determined, the duties prescribed, the tenure of employment are all fixed and determined by the officers of the bank; the method of transacting business is wholly within the discretion of the bank's officers, albeit the Farm Credit Administration retains a supervisory control. While the United States government created these banks and subscribed to the capital stock and paid-in surplus, yet, as stated hereinbefore, this fact is not persuasive with us in determining whether or not the salaries of employees of a Federal Land Bank, who are residents of this state, are exempt from taxation. It may well be that these banks as fiscal agents and public depositories of the government are deemed to be instrumentalities of the federal government (*Smith vs. Kansas City Title and Trust Company*, 255 U. S. 180). This conclusion, however, is only important to the extent to

which the government immediately and directly exercises its sworn powers through the agency of the Federal Land Banks. That is the test of immunity. *Metcalf vs. Mitchell, supra.*

The United States government is in no way obligated to pay any part of the salaries and wages of the employees of the Omaha Federal Land Bank. Such employees are paid from a fund created wholly from the earnings of the bank. The Federal Land Banks are not in any manner necessary to the protection of the independence of the Government, nor do they aid and assist in those matters and things necessary in the carrying on of the National Government.

In all of the cases which have come under our observation in which the courts have held that corporations created under Congressional Enactments were immune from taxation, the findings have been based upon one of two propositions: (1) That they were so exempted from taxation by the Act creating them, or (2) they were directed to a governmental program; that they were necessary adjuncts to the successful carrying out of a governmental program; that they were necessary in the carrying on of national commerce or national defense.

With due respect and regard to the opinion of Justice Sutherland in the recent Rogers case, we nevertheless are of the opinion that the salaries and wages of the employees of the Federal Land Banks, who are residents of Iowa, are subject to the State Income Tax and should be included in their gross income for tax purposes.

CITIES AND TOWNS: MUNICIPAL SWIMMING POOLS: FUNDS FOR: ELECTION HELD FOR: An election must be held and the proposition be submitted before a swimming pool may be constructed.

February 18, 1937. *Hon. C. B. Murtagh, State Comptroller:* We are submitting herewith an opinion in response to your request covering the following proposition:

May a city transfer from the surplus earnings fund, derived from the operation of municipally owned utilities, money with which to build a municipal swimming pool and build the pool from said fund without submitting the same to the voters?

Section 5746 of the 1935 Code states in regard to cities and towns:

"They shall have power to establish and regulate: * * *
4. Swimming pools and to build or purchase the same."

Sections 6151-b1 and 6151-b2 state as follows:

"6151-b1. *Transfer of surplus earnings.* Where waterworks, gasworks, heating plants, or electric plants have been purchased or erected by any city or town, including cities under special charter, and the original purchase bonds or bonds issued for the improvement thereof are paid, or where an adequate sinking fund has been provided for the payment of such bonds, such city or town may, upon the approval of the state comptroller, appropriate and transfer any surplus earnings in excess of the amount required for the retirement of all bonds and interest due in the current year and the succeeding year, from any municipal heating plant, waterworks, gasworks, or electric plant, for the purpose of retiring existing bonded indebtedness of said city or town which is payable by general taxation or for the purpose of making any municipal improvement authorized by law and ordered by the city council.

"6151-b2. *General transfer.* Any city or town, including cities under special charter, having a surplus earned from the operation of a municipal heating plant, waterworks, gasworks, or electric plant, and which has no bonded indebtedness against any such plant or which has sufficient funds on hand to provide for the current year's interest and principal and the succeeding year's

interest and principal may on approval of the state comptroller transfer the surplus earnings of such utilities to any other fund of the municipality."

Chapter 319 of the 1935 Code deals with the amount of indebtedness that any county or municipal corporation can incur. Section 6239 of that chapter states:

"Cities and towns when authorized to acquire the following named public utilities and other improvements may incur indebtedness for the purpose of: * * *

4. Acquiring lands and establishing juvenile playgrounds, swimming pools, and recreation centers thereon or on lands already owned or to be leased by the city or town."

Section 6241 states: "No such indebtedness shall be incurred until authorized by an election."

Section 5746 of the Code was enacted by the Forty-third General Assembly. The last part of Section 6151-b1 of the Code hereinbefore set out, which is as follows:

"or for the improvement authorized by law and ordered by the City Council" was enacted by the Forty-fourth General Assembly. The question to be decided is whether or not Chapter 319 is applicable where the funds are on hand and it is just a question of using the surplus for the construction of the swimming pool.

It will be noted that said chapter is applicable to the incurring of an indebtedness. If a city lets a contract for the construction of a swimming pool or constructs the same with its own labor and purchases the material, it is creating an indebtedness within the meaning of the law, even though the existence of the indebtedness may be for a short period.

Swanson vs. Ottumwa, 118 Iowa 161; 91 N. W. 1048
Burlington Water Co. vs. Woodward, 49 Iowa 58
Carter vs. Dubuque, 35 Iowa 416
Allen vs. Davenport, 107 Iowa 90; 77 N. W. 532.

When it is classed as an indebtedness, it is clear that an election is required as set out in Section 6241.

But assume for the sake of argument that this cannot be classed as an indebtedness under the above theory; nevertheless, it is subject to the vote of the people. It is well settled that in computing the total indebtedness of a city that the same is not based solely upon the outstanding obligations, but a credit on those obligations is given for * * * cash on hand. That is to say that if the total indebtedness allowed for a city was $100,000.00 and that city had outstanding obligations of $150,000.00 with cash on hand in the sum of $50,000.00 that those outstanding obligations would not be above the limitations prescribed by law. Under such circumstances the dissipation of the $50,000.00 cash on hand means that the indebtedness of the city is augmented. For cases supporting the proposition that cash on hand is deductible, see *Miller vs. City*, 188 Iowa 514; 176 N. W. 373; *French vs. Burlington*, 42 Iowa 614; *Swanson vs. Ottumwa*, 118 Iowa 161, 91 N. W. 1048; *Windsor vs. Des Moines*, 110 Iowa 175, 81 N. W. 476. In other words, the using of the surplus earnings from a municipally owned utility is in effect raising the outstanding indebtedness of the city where there are outstanding obligations, it making no difference in what amount.

A transfer then of these funds clearly comes within the purview of Chapter 319, and when such is the case it is a prerequisite to the action of the city council that an election be had. Had the legislature intended that a city council, without a vote of the people, could erect swimming pools, they would

have said so in either Sections 5746, 6151-b1 or 6151-b2. Having failed to do so, it is assumed that they also intended Chapter 319 to apply. It is a well settled law in this state that if by any fair and reasonable construction prior and later statutes can be reconciled, both shall stand. If it can be avoided, no court can conclude that a statute is repealed by implication. *Casey vs. Harned*, 5 Iowa 1; *Baker & Griffin vs. The Steamboat Milwaukee*, 14 Iowa 214; *Burke vs. Jeffries*, 20 Iowa 146; *Risdon vs. Shank*, 37 Iowa 82; *State vs. Brandt*, 41 Iowa 593; *Ogilvie vs. City of Des Moines*, 212 Iowa 117.

The statutes cited are not in conflict and can be easily reconciled. Section 5746 gives the city the authority to build or purchase a swimming pool, and Sections 6151-b1 and 6151-b2 only state that under certain conditions the surplus may be used by a city for any municipal improvement *authorized by law* and ordered by the City Council. It is our opinion that the construction of a swimming pool can only be authorized by law after a vote on the proposition has been taken by the people.

The case of *Saltzman vs. City of Council Bluffs*, 243 N. W. 161 (Iowa 1932), although not directly in point on this matter, involved the right of the city council to use the surplus earned from the operation of a municipal water plant under Chapter 312 of the 1927 Code for the purpose of purchasing real estate constructing thereon a building to be used for the housing of prisoners, and the court, after deciding that the words "surplus earned" do not mean the funds on hand accumulated from the earnings of the plant and also from direct taxation, said on page 164 thereof, after reprimanding the trustees for accumulating such a large surplusage, the following:

"Realizing that these estimates cannot be made with accuracy, and that there may be surplus earnings each year, the Legislature granted certain authority to dispose of said earnings; *but this does not permit such surplus earnings to be accumulated over a long period of time and then used for purposes which ordinarily are to be accomplished through the medium of taxation.*"

Our conclusion, therefore, is that it is necessary that an election be held and the proposition be submitted to the people as to whether or not a swimming pool should be constructed.

TAXATION: TAX SALE CERTIFICATES: If taxes upon fixtures, being delinquent personal taxes, were not carried forward in the delinquent tax list and the board should for that reason cancel the tax sale certificate and refund the money, it would become the duty of the County Treasurer to either cause said taxes to be entered in the delinquent tax list and thereby be established as a lien against the real estate, or to issue a distress warrant to the sheriff for the sale of sufficient property to make such taxes.

February 18, 1937. *Mr. Melvin L. Baker, County Attorney, Humboldt, Iowa:* Your letter requests an opinion of this department on the following question:

On October 10, 1932 A. R. Martin purchased Lot 10 in Block 7 from one Nissen. The 1932 tax assessment on this property was as follows: $850.00 taxable value on the real estate and $225.00 on the fixtures in the building. The fixtures were later removed and installed on Lots 13 and 14 in Block 7 owned by Nissen.

In May, 1933, Martin appeared before the City Council and secured from the Council a recommendation to the County Auditor that the 1932 assessment be divided in the amounts as above stated, and that the assessment on fixtures be levied against Lots 13 and 14 in Block 7. This recommendation was ap-

proved by the County Board on October 2, 1933, and the Auditor directed to set up the personal tax against Lots 13 and 14 in Block 7.

During the May, 1935 meeting of the Board of Supervisors, Nissen appeared and a resolution was passed by the Board rescinding the action taken on the 2nd day of October, 1933, and placing the taxes against the property the same as before the resolution of October 2, 1933. This action of the Board in 1935 was never carried out by the County Treasurer, and at the December, 1935 tax sale, Lots 13 and 14, Block 7 were sold for the delinquent personal taxes. Can the Board of Supervisors now refund to the purchaser of the tax sale certificate the amount paid therefor and cancel the certificate?

As we understand the facts in the above matter, Nissen was originally the owner of Lot 10 in Block 7 in which he had certain fixtures, the lot being assessed at $850.00 and the fixtures at $225.00. This property was later sold by Nissen to A. R. Martin, Nissen being at the time the owner also of Lots 13 and 14 in Block 7, all in the town of Renwick, Iowa.

Based upon the facts as thus paraphrased, it would appear that Nissen was assessed $850.00 on Lot 10 in Block 7 and $225.00 on fixtures which were personal property. Taxes on personal property are a lien upon any and all real estate owned by the owner of the personal property, situated in the county wherein the personal taxes are levied for a period of one year and for an additional period of nine years providing said taxes are entered upon the delinquent personal tax list. Section 7203 of the statute.

Therefore, the taxes upon the fixtures valued at $225.00 would be a lien upon Lots 13 and 14 in Block 7, the property of Nissen during all the time in question, the same as it would be against Lot 10 in Block 7 which was owned by him at the time of the assessment. If he sold and disposed of Lot 10 in Block 7 and the same were transferred without a payment of personal taxes, the personal tax would remain a lien upon any other real estate owned by him, and if such personal taxes were carried forward into the delinquent list as provided for in Section 7203 of the statute the County Treasurer would have a right to sell Lots 13 and 14 in Block 7 for the delinquent personal taxes owned by Nissen. However, if the delinquent personal taxes were not carried forward into the delinquent list, they would not be a lien upon the real estate owned by Nissen. We do not have sufficient information upon that question to state as a fact whether they were or were not.

In answering the question, it must first be determined whether or not the personal taxes levied against the fixtures in 1932 were carried forward in the delinquent tax list against Nissen. If they were, the sale of Lots 13 and 14 in Block 7 for those delinquent personal taxes would be valid. If they were not carried forward in the delinquent tax list, the sale of Lots 13 and 14 in Block 7 for the delinquent personal taxes would be void. Where a county sells property for an erroneous tax, Section 7236 of the statute authorizes the cancellation of the tax sale and the return of the money. So, in the matter under consideration, if the taxes against the fixtures being personal taxes were not carried forward in the delinquent tax list, the sale of Nissen's real estate would be void, and having been sold for an erroneous tax, the Board of Supervisors should cancel the tax sale certificate and return the money to the purchaser.

BOARD OF CONTROL: NON-RESIDENT PATIENT: EXPENSES: Clothing for a non-resident of the State committed to Woodward Hospital from Scott County would not be chargeable to Scott County.

February 18, 1937. *Mr. Robert B. Miller, Secretary, Board of Control:* We are in receipt of your letter in which you ask an opinion upon certain facts stated in an enclosed letter from A. R. Schier, M. D., Superintendent of the hospital for epileptics at Woodward. A digest of the facts contained in Dr. Schier's letter is as follows:

On February 10, 1936, there was committed to the hospital for epileptics and school for feebleminded from Scott County, Iowa, a patient found by the Board of Commissioners for the Insane of Scott County, Iowa, to be a non-resident of this state. It will be necessary within a short time to supply this patient with clothing. Is this charge for clothing to be entered against Scott County, Iowa?

Section 3471, 1935 Code, provides that laws relating to the commitment of insane persons are to be applied to the commitment of epileptics insofar as the same are applicable. For the purpose of this question, therefore, the provisions of Chapter 178 relating to the support of insane persons will govern the answer to your question.

Section 3581, Code of 1935, provides as follows:

"3581. *Liability of county and state.* The necessary and legal costs and expenses attending the arrest, care, investigation, commitment, and support of an insane person committed to a state hospital shall be paid:

1. By the county in which such person has a legal settlement, or
2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.

"The residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto."

Since, in this case there has been a finding that this patient has no legal settlement in this state, the state, and not the county from which the patient was committed, is to be charged for his support.

Section 3587, 1935 Code, provides as follows:

"3587. *Removal of non-residents.* If at any time the board of control discovers that an insane patient in a state hospital was, at the time of commitment, a non-resident of this state, it may cause said patient to be conveyed to his place of residence if his condition permits of such transfer and other reasons do not render such transfer inadvisable."

It appears from the above section that a mode is provided to relieve the state of the costs and expenses incurred as a result of the commitment of this non-resident.

It is therefore the opinion of this department that the expense of clothing furnished, or to be furnished this patient, while an inmate at the hospital at Woodward, is not chargeable to the county from which he was committed.

BOARD OF SUPERVISORS: DRAINAGE DISTRICT WARRANTS: STATUTE OF LIMITATIONS: The statute of limitations is a complete bar to the right to recover on drainage warrants. The Board of Supervisors is without authority to issue new warrants to replace warrants previously issued against drainage districts.

February 19, 1937. *Mr. J. J. Foarde, Deputy Auditor:* This department is in receipt of your request for an opinion on the following questions:

1. Is the statute of limitations a bar to the payment of drainage warrants?

In a prior opinion from this department found on page 232 of the 1932 Attorney General's Report, it was stated:

"* * * we are of the opinion that the Board would not have authority to forego the statute of limitations and could not pay an obligation which has been barred by the statute of limitations."

In the case of *Bodman vs. Johnson County*, 88 N. W. 331, an action was brought upon two ditch warrants. The statute of limitations was interposed as a defense. The court sustained the defense and held that the warrants were barred by the statute of limitations. This case was later cited with approval in the case of *Lenehan, et al. vs. Drainage District*, 258 N. W. 91.

It would therefore be our opinion that the statute of limitations is a complete bar to the right to recover on drainage warrants.

2. What is the liability of the Board of Supervisors in levying assessments for paying drainage warrants barred by the statute?

The foregoing question is so problematical that it is hardly susceptible of a definite answer. If a Board of Supervisors should levy an assessment for the payment of drainage warrants barred by the statute of limitations, a taxpayer would have his remedy by injunction to restrain the collection of the tax. The tax would be an illegal tax and void. Under those circumstances if a taxpayer did not avail himself of the remedy he had to protect his property, and permitted the tax to stand and then paid it, he would be estopped from claiming any liability against the members of the Board of Supervisors. He would have no remedy for damages against the Board of Supervisors as an organization for the reason that the Board of Supervisors acts only in a representative capacity in drainage matters.

3. Where the statute is about to run on an old warrant and a new warrant is issued, does the new warrant assume the status of the old as to priority of call by the county treasurer?

We do not find any provision in the statute authorizing the issuance of new warrants to replace warrants previously issued, except in cases where a partial payment is being made upon a warrant. In such case the statute provides that the county treasurer shall endorse such payment upon the original warrant and cancel the same and issue a new warrant for the balance which shall show upon its face that it is a renewal warrant and shall bear the same serial number and take its place upon the roll for call in the same order as that accorded the one which it replaced. The statute provides a method for refunding outstanding indebtedness against drainage districts, but in the method pointed out, it does not authorize the issuance of new warrants.

It is therefore the opinion of this department that the Board of Supervisors would be without authority to issue new warrants to replace warrants previously issued against drainage districts.

TAXATION: NOTICE OF INTENTION TO TAKE DEED: Under the provisions of Section 7279 it is required that notice be served upon the person in whose name the property is taxed. Under the provisions of the Code the holder of a tax sale certificate must cause notice to be served upon the person in possession of the real estate.

February 19, 1937. *Mr. Leon P. Molloy, County Attorney, Clinton, Iowa:* This office is in receipt of your request for an opinion on the following matter:

1. Clinton County has purchased property at tax sale under the Public Bidder Act. One of such properties was at the time of sale owned by John Jones who, since the sale, has died. Henry Brown was appointed administrator of his estate. The estate has since been closed. The property is taxed in the name of the *estate*. Upon whom should notice of the expiration of the time of redemption be served?

Under the provision of the statute, Section 7279, it is required that notice be served upon the person in whose name the property is taxed. In this case the

property is taxed in the name of the estate of John Jones, deceased. The estate has been closed, hence there is now no estate in existence. The statute does not contemplate doing the impossible. Therefore, there being no one upon whom notice could be served, an affidavit setting forth such facts and filed with the county treasurer would eliminate the necessity of notice.

2. Assuming the property was at the time of the sale owned by John Jones, who has since died; that an administrator was appointed; that the administrator is now dead, but the estate is still open. The property is taxed in the name of the estate. Upon whom do you serve notice?

In the above question, the estate being still open, but the administrator being dead, it would require the appointment of a new administrator *de bonis non* to close the estate. A new administrator may be appointed upon the petition of any person interested in the estate. The county, being the holder of the tax certificate, would be entitled to apply for the appointment of an administrator for the purpose of having notice of the expiration of right of redemption from tax sale served.

It would therefore be our opinion that the county should apply for and have an administrator appointed and that service of notice should be had upon him.

3. The county is the purchaser of a tax sale certificate against the property owned by Henry Brown. John Jones and his wife Mary Jones are in possession of the property. Is it necessary to get service of notice upon both John Jones and Mary Jones?

Section 7279 of the statute provides that a holder of a tax sale certificate may cause notice to be served upon the person in possession of the real estate. While it is true that under the statutes of Iowa the husband is the head of the family, and ordinarily, unless there was a written lease in which John Jones and Mary Jones had joined as lessees of the property, the service upon John Jones, the head of the family, would be all that would be required, yet the statute providing for notice upon those in possession means exactly what it says, and it would be unsafe and unwise to attempt to determine the possession of the real estate arbitrarily.

Therefore, the safer plan would be to serve your notice of expiration upon both the husband and wife or any other adult found in possession of the real estate covered by the tax sale certificate.

SCHOOLS: SCHOOL DISTRICT: RESIDENCE: TUITION: Where a student establishes an independent residence and attends school in the district of such residence all the surrounding facts will determine whether or not a residence for school purposes is established. Particular facts held sufficient to establish such residence for school purposes.

February 19, 1937. *Mr. Willis A. Glassgow, County Attorney, Clarinda, Iowa:* We acknowledge your letter in which you ask for an opinion under the following circumstances:

"A boy by the name of Reynold Webster moved to Shenandoah, Iowa, with his father, during the school year of 1934-35; the mother of the said boy did not move with them. The father of the boy remained in Shenandoah only a few weeks and then abandoned the boy and moved on to Falls City, Nebraska. The boy stayed in Shenandoah and became more or less a self-supporting student throughout the school year of 1935-36. However, just before school opened in August, 1936, this boy began working for his board and room for a man who lived in the country and in a different school district, and in turn the school board of Shenandoah started sending the tuition expenses to that district, and a few weeks ago the president of the school district called us and

said that they would not pay the tuition for this boy as he was not a resident of that district.

"* * * I would like to know which district is his residence, and who is liable for the tuition of said boy."

We assume that the boy mentioned attends high school, and that the district in which the boy lives does not maintain a high school.

The following provisions of the 1935 Code are pertinent to this question:

"4273. *Tuition.* Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years * * *"

"4275. *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 * * *"

"4277. *Tuition fees—payment.* The school corporation in which such a 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 * * *"

The problem here is to determine the residence of this boy for school purposes. A minor may have a residence for school purposes other than that of his parents, and the test of residence for this purpose is not the same as the test for taxation or for voting—see cases cited in *Mt. Hope School District vs. Hendrickson,* 197 Iowa 191. This same case points out by way of dicta that if a minor leaves the home of his father to reside in another place for the sole purpose of securing free schooling, without bringing with him an actual residence, and with the intent to return to his former residence, he does not become an actual resident within the provisions of the statute first quoted above.

The Iowa case which has been cited above seems to be the only one which is at all closely in point with the matter which you have submitted. It is evident that the intention of the boy is an important factor. The case last cited holds that—

"In the acquisition of a school domicile two facts concur—actual residence and intention * * * The principle of free education is the richest legacy of our Puritan civilization, and a liberal construction of our statutes must be given in order that its benefits may inure to those who claim its privileges.

It appears from the facts you have submitted that the boy is now self-supporting, and that it is his apparent intention to remain at the place where he now resides. His domicile, therefore, for school purposes, is established at the latter place.

Therefore, it is the opinion of this department that the residence for school purposes of the boy in this case is in the district in which he now resides.

BOARD OF EDUCATION: BONDS: If principal and interest are used to retire bond issue, said fund may be invested as provided by Section 7420-b3, 1935 Code.

February 22, 1937. *Mr. Ed. C. Tschudi, Assistant County Attorney, Dubuque, Iowa:* We have your request for an opinion on the following question:

"We have a bloc of School House Bonds coming due in the year 1942 in the sum of $490,000.00. We levy an additional amount of taxes every year in the School House Fund for the purpose of retiring these bonds when they mature. At the present time we have accumulated in the School House Fund for this purpose the sum of approximately $75,000.00.

"Is it permissible for the Board of Education to invest these funds in accordance with Section 12775-b1 of the 1935 Code of Iowa as these are nonactive funds and they will not be used until the year 1942?"

Section 12775-b1 is as follows:

"12775-b1. *Nonactive funds.* The governing council or board who by law are authorized to direct the depositing of funds shall be authorized to direct the treasurer to invest any fund not an active fund needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest of which is used for the same purpose, in the certificates provided by Section 7420-b3, or in United States government bonds, or in local certificates or warrants issued by any municipality or school district within the county, or in municipal bonds which constitute a general liability, and the treasurer when so directed shall so invest such fund."

If the principal and interest of the fund in question are being accumulated and used for the same purpose, that is, to retire the issue of bonds, which will be due in the year 1942, and this fund can be invested in certificates as provided by Section 7420-b3 of the Code, or United States government bonds or any local certificates or warrants, issued by any municipality or school district, within the county, or any municipal bonds which constitute a general liability, it is the opinion of this department that it would be permissible for the Board of Education to direct its treasurer to invest this fund in accordance with Section 12775-b1.

NOTARIES PUBLIC: AGE LIMIT OF APPLICANT: By law there is no age requirement for an applicant for notary commission; must have reached legal majority to sign bond.

February 22, 1937. *Mr. G. W. Kirtley, Executive Secretary, Office of Governor:* This department is in receipt of your request for an opinion on the following question:

"Must an applicant for a notary commission be twenty-one years of age?"

Chapter 65 of the 1935 Code of Iowa deals with the topic of notaries public, and under Section 1200 of that chapter there are certain conditions which must be complied with before the commission can be delivered by the governor, and under Section 1197 of that chapter, the governor may at any time appoint one or more notaries public in each county, and may at any time revoke such appointments.

The eligibility of a notary is largely a matter of legislation or constitutional provision. Our constitution has not declared that only those who have attained the age of twenty-one years shall be eligible to any public or civil office, and further, Chapter 65 of our Code does not require an applicant for a notary commission to be twenty-one years of age.

In the case of *U. S. vs. Bixby*, 9 Fed. 78, it was held that since the duties of a notary public are purely ministerial and not the administration of justice, that a minor would be eligible to the office of a notary. Under the law of this state, the duties of a notary public are of a ministerial character and call for the exercise of skill and diligence only, and do not require a notary to administer justice.

It is the opinion of this department that there are no provisions in the constitution or the statutes of this state making minors ineligible to the office of notary, and therefore an applicant for a notary's commission need not be twenty-one years of age, but must have reached his legal majority in order to execute a bond absolutely enforceable against himself as required by sub-section 2 of Section 1200, Chapter 65, 1935 Code of Iowa.

MORTGAGE RENEWAL: Joseph A. Hrdlicka can renew mortgage on his own

signature so far as estate or dower of his wife is concerned; since wife predeceased her husband, her dower would not be operative.

February 22, 1937. *Mr. M. R. Pierson, Secretary, State Board of Education:* We have your request for an official opinion on the following question:

"Joseph A. Hrdlicka gave us a mortgage on 167 acres for a loan of $9,000.00. Mr. Hrdlicka received a warranty deed from his mother prior to giving us the mortgage.

"Although the title to the farm rests in the name of Joseph A. Hrdlicka, his wife, Mary L. Hrdlicka, entered into the mortgage and signed the note. This note and mortgage was given in 1931.

"In 1932 Mary L. Hrdlicka, wife of Joseph A. Hrdlicka, died. Now the mortgage comes up for renewal. The question arises, can Joseph A. Hrdlicka renew without some record of will of Mary L. Hrdlicka being on file or without the estate of Mary L. Hrdlicka being probated? In other words, would she have a dower interest only so long as she was living? The records do not show that she ever had title in all or in part to any of the land mortgaged. Before I proceed with the renewal papers, I should like to get an opinion on this. I would, also, like your approval to proceed with the renewal when the above item is straightened out."

In answer to your question—"* * * can Joseph A. Hrdlicka renew without some record of will of Mary L. Hrdlicka being on file or without the estate of Mary L. Hrdlicka being probated?", it is the opinion of this department that Joseph A. Hrdlicka can renew said mortgage on his own signature so far as the estate or dower of his deceased wife, Mary L. Hrdlicka, is concerned.

In answer to your second question, it is the further opinion of this department that the interest of Mary L. Hrdlicka was that of dower only, and since she predeceased her husband, Joseph A. Hrdlicka, her dower would not become operative, and Joseph A. Hrdlicka, the holder of the fee could renew the mortgage as above stated.

BOARD OF CONTROL: BONDING COMPANY: RELEASE: Form as submitted would not release bonding company for acts of employees during time bond was in force.

February 23, 1937. *Mr. Robert B. Miller, Secretary, Board of Control:* We have received your letter in which you state that bonding companies are demanding release from liability on bonds which have expired and which have been renewed in other bonding companies, or where the insured has left the employ of the state.

You further state that the release requested is set out in the following form:

"We hereby release the said bonding company from liability for any and all acts of the said (insured) committed on and after (expiration) date."

You ask this question—would the above release the bonding company for any acts of the employee during the time the bond was in force and effect?

It is the opinion of this department that the form of release above set out would not release the bonding company for acts of the employee during the time the bond was in force.

TAXATION: SALES TAX: MOTOR VEHICLE FUEL TAX: REFUND OF MOTOR VEHICLE FUEL TAX: In granting a refund of motor vehicle fuel tax, the state treasurer should deduct therefrom any sales tax due on said refund.

February 23, 1937. *Honorable Leo J. Wegman, Treasurer of State:* This department is in receipt of your request for an opinion on the following matter:

The Warner Construction Company has filed a claim with the State Treasurer

for refund of motor vehicle fuel license fee paid upon gasoline used in the construction of the Bellevue Dam, a Government project. In granting the refund of the motor vehicle fuel tax, should the State Treasurer deduct therefrom the sales tax?

This question is not without its difficulties.

Mr. Louis E. Roddewig, Chairman of the State Board of Assessment and Review has previously advised the Warner Construction Company as follows:

"In reply will say that this is your authority that the Sales Tax will not apply for supplies purchased by them at Bellevue, in the construction of this Dam, due to the fact that it is a Government project, and the money is being supplied by the Federal Government and superintended by their engineers. For that reason it is exempt from the Iowa Sales Tax."

The Iowa statute imposing a fee or tax on gasoline is as follows:

"5093-f3. *Tax imposed.* A license fee of three cents per gallon or a fraction of a gallon is hereby imposed on the sale or use of all motor vehicle fuel sold or used in this state for any purpose whatsoever, except that no license fee shall be imposed on motor vehicle fuel sold and exported from the state, or on motor vehicle fuel sold to the United States or any of its instrumentalities or agencies, unless now or hereafter permitted by the Constitution and laws of the United States. * * *"

The above statute imposing the gasoline fee or tax specifically and concisely excepts from the provision of the statute "motor vehicle fuel sold to the United States or any of its instrumentalities or agencies unless now or hereafter permitted by the Constitution and laws of the United States."

Under the facts submitted to us, it must be determined whether or not the Warner Brothers Construction Company comes within the exception specified in the above statute, regardless of the fact that the Warner Brothers Construction Company was engaged in constructing a Government project for which the money was supplied by said Government. Under the motor vehicle fuel statute it is required that the distributor or person who first receives such motor vehicle fuel in this State must pay the tax to the State and may then pass the tax on to the consumer of the gasoline. The consumer who has paid the tax to the distributor may, if he or the use to which the gas was put, comes within the excepted class, file an application with the State Treasurer for a refund. Section 5093-f29 is as follows:

"*Refund.* Any person who shall use any motor vehicle fuel for the purpose of operating or propelling stationary gas engines, farm tractors, air crafts or boats, or for cleaning or dyeing purposes or for any other purpose except in motor vehicles operated or intended to be operated upon the public highways of the state and who shall have paid the license fee for such motor vehicle fuel imposed by this chapter, either directly to the treasurer or indirectly by having the same added to the price of such fuel, and who shall have obtained a permit therefor as provided in this chapter, shall be reimbursed and repaid the amount of such license fees so paid, upon presenting to the treasurer a claim for refund, * * *"

This section of the statute makes special reference to those classes of persons and uses of the gasoline upon which refunds shall be allowed. This section of the statute contains this further provision:

"No tax refund shall be paid to any person, firm, or corporation on any motor vehicle fuel used in any construction or maintenance work which is paid for from public funds."

We are assuming without deciding that the State Treasurer has ruled that the Warner Construction Company is entitled to a refund of the vehicle fuel tax paid by it upon gasoline used by it, in the construction of the Bellevue Dam,

and that the controverted proposition is whether or not the State Treasurer in making his refund should withhold therefrom the Iowa sales tax.

Chapter 329-F1 of the Code imposes a retail sales tax. Section 6943-f39:

"*Tax imposed.* There is hereby imposed, beginning the first day of April, 1934, and ending April 1, 1937, a tax of two per cent upon the gross receipts from all sales of tangible personal property, * * * except as otherwise provided in this division, sold at retail in the state to consumers or users; * * *"

Section 6943-f40 provides for certain exemptions:

"*Exemptions.* There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:

a. The gross receipts from sales of tangible personal property which this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state."

The statute makes further provision for the payment of the sales tax imposed under this chapter. The provisions for payment of the tax are set out in Section 6943-f47 of the Code, Subdivision 4 thereof being as follows:

"The tax by this division imposed upon those sales of motor vehicle fuel which are subject to tax and refund under Chapter 251-F1 shall be collected by the state treasurer by way of deduction from refunds otherwise allowable under said chapter. The amount of such deductions he shall transfer from the motor vehicle fuel fund to the special tax fund."

Under the above quoted subdivision of Section 6943-f47 it is made the duty of the State Treasurer to deduct the sales tax from the amount of any refund made on motor vehicle fuel tax.

It is therefore not a question of whether the Warner Brothers Construction Company is entitled to a refund of the motor vehicle fuel tax, but whether they are entitled to be exempted from the payment of a sales tax. While the words "sales tax" are used in the statute and are of common usage by the public, the imposition under the statute is in reality not a tax on property but an excise tax, that is, the tax is not one laid upon the property sold, but upon the privilege of selling the property. The tax levied upon sales is a good deal in the same category as that levied upon inheritances. In the case of *U. S. vs. Perkins*, 163 U. S. p. 625, one Merriam, a resident of New York bequeathed certain properties to the Federal Government. Under the inheritance laws of the State of New York "all property which shall pass by will or by the intestate laws of this State * * * to any person or persons or to any body politic or corporate * * * shall be subject to a tax." The Federal Government sought exemption from this tax on the grounds that it was an attempt to tax the property of the Government. Justice Brown delivered the opinion of the court, using this language:

"Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."

"The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

In the case of *City of Portland vs. Kozer*, 108 Oregon 375, the Supreme Court of the State of Oregon stated:

"There is no constitutional limitation upon the right of the Legislature to enact a law requiring a tax on a privilege for revenue purposes. What property shall be taxed and what shall be exempt except as restricted by the Constitution, is a question that rests with the Legislature."

Cooley in his *Work on Taxation*, 3d Ed., p. 357, states:

"Exemption from property tax does not include exemption from excise tax. The rule that property of the state is exempt from taxation does not apply to privilege taxes."

Our own Supreme Court in the case of *State vs. City of Des Moines*, 266 N. W. 41, wherein the present motor vehicle fuel tax statute was before the court stated:

"The motor vehicle fuel tax is not a general tax for general purposes, but an excise tax in the nature of a privilege tax, exacted of all users of motor vehicle fuel to propel vehicles upon the highways of this state, for a specific purpose, that of building and maintaining public highways within the state, and should be construed in a way and manner to accomplish the ends which the Legislature intended should be attained."

In view of the position taken by the various courts with reference to the special taxes which have been imposed by the various Legislatures, our court among them, that these special taxes so referred to are not in fact a property tax in the general acceptation of that term, but are in fact excise taxes in the nature of privilege taxes, we are of the opinion that the Warner Construction Company is not entitled to be exempted from the Iowa Sales Tax, even though it was imposed upon purchases made of gasoline used in the construction of a Federal project.

It is therefore our opinion that the State Treasurer should deduct from any refund made to the Warner Construction Company the amount of sales tax due upon such refund.

TAXATION: SCAVENGER TAX SALES: REDEMPTION: In order to make redemption from property sold for the preceding year, it would be necessary that the party making redemption pay all taxes against the real estate together with statutory penalty and interest.

February 23, 1937. *Mr. R. N. Johnson, Jr., County Attorney, Ft. Madison, Iowa:* This office is in receipt of your recent letter asking an opinion on the following matter:

Property was sold at scavenger sale at a regular tax sale; one piece to a stranger to the title, for the full amount of the regular taxes, penalty, interest and costs, and one piece to the Board of Supervisors for the full amount of the regular taxes, penalty and costs. In making the redemption, must the owner pay the amount of the bid and no more, or must he pay the amount of the regular taxes, penalty, interest and costs for which the property was sold and all other delinquent taxes against the same?

Section 7275 of the statute provides for the redemption from tax sales where the property is sold for a part of the tax. The last sentence of the above section of the statute is as follows:

"Real estate so sold shall be redeemable in the same manner and with the same penalties as that sold for the taxes of the preceding year."

Real estate sold for the preceding year could only be sold for the full amount of the taxes against the same. Consequently, in order to make redemption from property sold for the preceding year, it would be necessary that the party making redemption pay all taxes against the real estate together with the statutory penalty and interest. Applying that procedure to sales for a portion of the tax, it would necessarily follow that the party making redemption should pay all delinquent taxes, interest and penalties. This position is further fortified by the fact that the same section of the statute provides that the holder of the tax certificate shall be entitled to interest and penalty in the proportion

to the amount of the taxes and that the remaining interest and penalty be apportioned among the various funds entitled to the taxes. If redemption were to be made by simply paying the amount of the bid, plus interest and penalty, the holder of the certificate would be entitled to the full amount of the interest and penalties paid and there would be nothing to apportion among the funds entitled to the taxes.

It is therefore our opinion that in making redemption from sales for part of the tax that the county treasurer should collect the full amount of the delinquent taxes against the property together with interest and costs.

Reference is made to the case of *Ferguson vs. Atkins*, 220 Iowa 1154. That case does not apply to the facts stated in your letter for the reason that in the Ferguson case, the property went to tax deed on tax sale certificate which had been issued where the property had been sold for a part of the tax. The court held that the tax deed created a new title and cut off any prior tax liens.

LANDLORD'S LIEN: MORTGAGED PROPERTY: If a landlord permits a tenant to move mortgaged property onto his land, it takes priority over lien of landlord. If livestock, the increase from such would become subject to landlord's lien immediately upon birth and lien thereon would be prior to that of chattel mortgage.

February 24, 1937. *Mr. H. W. Anway, State Farm Debt Adjustment Supervisor, Resettlement Administration:* We are in receipt of your letter asking an opinion of this department upon the following question:

> The Resettlement Administration has made loans to farmers and taken chattel mortgages on personal property as security. They have also sold livestock to farmers on conditional sale contracts. In instances where these borrowers have been tenants the landlords are attaching the young stock raised on the farm for payment of cash rent. The conditional sales contracts were executed prior to the borrower moving on the farm and covered all the livestock and increase therefrom. Does the landlord's lien take priority over the chattel mortgages and conditional sales contracts?

As to the increase of the animals born after the tenant moved onto the farm, Section 10261 of the 1935 Code provides as follows:

> "*Nature of landlord's lien.* A landlord shall have a lien for his rent upon all crops grown upon the leased premises, and upon any other personal property of the tenant which has been used or kept thereon during the term and which is not exempt from execution."

The above quoted statute provides for a statutory lien in favor of the landlord upon all crops grown and upon any other personal property of the tenant which has been used or kept upon the leased premises during the term of the lease. The words "during the term" do not mean a term which might be stated in a lease between landlord and tenant, but means the actual time the farm is occupied by the tenant. During such time the statute gives to the landlord his lien. However, if a landlord permits a tenant to move mortgaged property onto the land the property comes onto the farm impressed with the mortgage and such mortgage takes priority over the lien of the landlord. If that property be livestock, while the identical property covered by the mortgage and moved onto the farm would be liable for the mortgage debt prior to the rights of the landlord, yet the increase from such livestock would become subject to the landlord's lien immediately upon birth and the landlord's lien upon the increase would be prior to that of the chattel mortgage. See:

Dilenbeck vs. Security Sav. Bank, 169 N. W. 675;
Mau vs. Rice Bros., 249 N. W. 206;

Wunder vs. Schram, 251 N. W. 762;
Corydon State Bank vs. Scott, 252 N. W. 536.

In the case of *Wunder vs. Schram, supra*, the court used this language:

"As soon as the term of the tenancy began, the landlord's lien was superior so far as the hogs and calves born thereafter are concerned. But if the calves and hogs were born before the term of the tenancy began, the mortgage lien attached to them without any interference from the landlord's lien which might arise thereafter under a tenancy to be subsequently created by contract."

It is therefore the opinion of this department that the increase of mortgaged livestock or the increase of livestock sold on conditional sales contract born or foaled after the livestock was taken upon the leased premises would be subject to the landlord's lien for his rent and that such landlord's lien would be senior and superior to the lien of the chattel mortgage or conditional sales contract.

REAL ESTATE COMMISSIONER: EXPENSES OF: No provision in statute allowing real estate commissioner to conduct an educational program and money cannot be drawn from the state treasury therefor without a special appropriation by the legislature.

February 25, 1937. *Mr. H. H. Crenshaw, Secretary to Real Estate Commissioner:* This office is in receipt of your request for an opinion upon the proper procedure to be pursued by your department to secure an appropriation of $2,500.00 to defray the expenses of conducting an educational program in the nature of short courses throughout the State during the next two years.

Chapter 91-C2 of the Code creates the real estate commissioner of the State. The statute, Section 1905-c29, provides that all fees and charges collected by the Commissioner shall be paid into the general fund in the state treasury. All expenses incurred by the Commissioner, under the provisions of the chapter, shall be paid out of the general fund in the state treasury, upon approval by the State Board of Audit. The statute provides what the expenses of the Commissioner's office shall consist of. It makes no provision for defraying the expenses of an educational program in the nature of short courses. The real estate commissioner has only the authority and duty specifically given him by statute and can only exercise such rights and perform such duties and those incident to it as are given. Moneys to be used for any special purpose must be secured by an appropriation therefor from the Legislature.

As the statute now stands, it is our opinion that there is no provision made therein for the real estate commissioner to conduct such educational program in the nature of short courses and that money could not be drawn from the state treasury therefor without a special appropriation being made by the Legislature.

COUNTIES: FUNDS: TRANSFER OF: Boards of Supervisors may not allow claims which are in excess of the receipts from taxation, and county auditors may not issue warrants in excess of receipts from taxation without becoming personally liable therefor and being guilty of a misdemeanor.

February 25, 1937. *Mr. John E. Miller, County Attorney, Albia, Iowa:* This department is in receipt of your request for an opinion upon the following matter:

The one-mill Poor Fund levy in this county raises the sum of $13,240.00. During the year 1936 the county issued Poor Fund Warrants to the extent of $13,362.33. Refund warrants in the amount of $12.70 were issued and the sum of $277.73 was transferred to the State, which overdrew this account $462.76

which shortage was made up by transfer from the county farm fund. The county has an overquota at Iowa City in the sum of $775.41 and is indebted to the Iowa Emergency Relief Association in the sum of $508.52. The county has a bonded indebtedness of 101 per cent of its limit. May the Board of Supervisors allow the claims of the State of Iowa in the sum of $775.41 and the claim of the Iowa Emergency Relief Association in the sum of $508.52 and the Auditor issue warrants on the Poor Fund in payment thereof?

We assume in answering the foregoing question that you have heretofore levied your maximum rate. Under Section 7162 of the statute it is provided that those officers whose duty it is to provide for the raising of money by taxation shall estimate and determine the amount of money required for any public purpose. Section 7163 of the statute provides that when any authorized tax in any county has been thus determined, as provided by law, the officer whose duty it is to certify the same shall compute the amount of money that can be raised by the rate of tax imposed and shall certify the amount in dollars to the County Auditor. Thus is set up the method by which the amount of taxes to be levied, assessed, and collected in the county is determined.

Section 6238 of the statute fixes the statutory limitation beyond which counties may not go.

Chapter 264-C1 of the statute provides for the county budget. Under this chapter of the statute county officials intrusted with the expenditure of public funds are required to file with the County Auditor on or before the thirty-first day of December of each year an annual itemized estimate of the amount of their expenditures for the coming year. During the month of January it becomes the duty of the Board of Supervisors by resolution, to make an appropriation to each county officer of funds sufficient to cover the itemized estimate of expenditures.

Section 5260-c10 of the statute is as follows:

"*Expenditures exceeding appropriation.* It shall be unlawful for any county official, the expenditures of whose office comes under the provisions of this chapter, to authorize the expenditure of a sum for his department larger than the amount which has been appropriated by the county board of supervisors. Any county official in charge of any department or office who violates this law shall be guilty of a misdemeanor and punished accordingly."

Section 5258 of the statute is as follows:

"*Expenditures confined to receipts.* It shall be unlawful for any county, or 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 law is plain, simple and explicit with reference to the filing of the estimated amount necessary to conduct the affairs of each office in the county; that an appropriation be made therefor and that all expenditures shall be kept within those limitations. The statute goes so far as to make those responsible for expenditures in excess of the appropriation guilty of a misdemeanor, and also makes any officer personally liable who allows a claim, issues a warrant or makes a contract which creates an expenditure in excess of the fund received from taxation.

Therefore, your Board of Supervisors may not allow claims in excess of the amount of their available funds from which the claim must be paid without

making themselves personally liable therefor, and also subject to punishment for the commission of a misdemeanor. The same thing applies to your County Auditor.

It is therefore the opinion of this department that your Board of Supervisors may not allow the claims which are in excess of the receipts from taxation, and your County Auditor may not issue warrants in excess of the receipts from taxation without becoming personally liable therefor and likewise being guilty of a misdemeanor.

BANKS AND BANKING: PAVING CERTIFICATES: No liability of city for paving certificates held by bank as bills receivable.

February 25, 1937. *Mr. D. W. Bates, Receiver, Cedar Rapids, Iowa:* This department is in receipt of your request for an opinion upon the following matter:

The Cedar Rapids Savings Bank and Trust Company, now in receivership was the depository of certain funds belonging to the city of Cedar Rapids at the time of its suspension. Claim for such deposit has been made by the city of Cedar Rapids against the state sinking fund. At the time of the suspension of the Cedar Rapids Savings Bank and Trust Company it held as bills receivable certain paving certificates issued by authority of the city council of the city of Cedar Rapids, Iowa. Can the paving certificates issued by the city council of Cedar Rapids and held as bills receivable by the Cedar Rapids Savings Bank and Trust Company be offset against the deposit liability of the Cedar Rapids Savings Bank and Trust Company to the city of Cedar Rapids for public funds on deposit at the time of suspension, claims for which have been filed against the state sinking fund?

In answering the foregoing question, it will first be necessary to determine the liability of the city of Cedar Rapids with reference to the paving certificates held by the Cedar Rapids Savings Bank and Trust Company as bills receivable, and having reached the conclusion that there is no liability on the part of the city, it then becomes unnecessary to determine the question of the right of an offset.

Under the provisions of the paving certificates issued by the city of Cedar Rapids and which were held by the Cedar Rapids Savings Bank and Trust Company as bills receivable (a copy of the paving certificate having been submitted to us) it is provided:

"It is hereby certified and recited that all acts, conditions and things required to be done precedent to, and in the issuing of this certificate have been done, happened and performed in regular and due form as required by law and ordinance; and for the assessment, collection and payments hereon of said special tax, the full faith and diligence of said City of Cedar Rapids are hereby irrevocably pledged."

Such a provision, however, does not create a direct liability on the part of the city. Our courts have made a distinction between paving certificates and bonds, and have held that a city is not liable on paving certificates. In the case of *Stockholders' Inv. Co. vs. Town of Brooklyn*, 246 N. W. 826 the court had before it paving certificates practically identical with the ones issued by the city of Cedar Rapids, and in that case held that there was no liability on the part of the town which issued the certificates. The above case was cited with approval in the case of *Inter-Ocean Reinsurance Co. vs. Sioux City*, 258 N. W. 907, wherein paving certificates practically identical with those under consideration were issued by the city of Sioux City, and the court in that case held that there was no liability on the part of the city.

We therefore reach the conclusion that there is no direct liability on the part of the city of Cedar Rapids on the certificates held by the Cedar Rapids Savings Bank and Trust Company as bills receivable.

Inasmuch as there is no liability, the question of the right of offset need not be answered.

EMERGENCY FEED LOAN ACT: CONSTITUTIONALITY: Discussion of constitutionality of said act. Decision: CONSTITUTIONAL.

February 25, 1937. *Mr. Ralph C. Prichard, Counsel, Board of Supervisors of Woodbury County, Sioux City, Iowa:* On February 9th you wrote us on behalf of the board of supervisors and the county treasurer's office of Woodbury County, Iowa, with reference to Chapter 149, Laws of the 47th General Assembly, the emergency feed loan act, and requested that we render an opinion with reference to the constitutionality of the act, and particularly with reference to Section 1 of Article VII of the constitution of the state of Iowa.

You enclosed a copy of the letter received from Chapman and Cutler, Chicago lawyers, in which they discussed this constitutional question and in which they refrain from reaching any conclusion after a review of a few cases. We were not particularly concerned over the constitutionality of this act at the time it was originally presented to us and, therefore, we shall confine our discussion to the questions raised by Chapman and Cutler. We delayed answering your letter because we felt that upon a further consideration of the matter, Chapman and Cutler would reach the conclusion that the legislature was well within its rights in passing this legislation. However, we have not been so advised and feel this matter should not be held up any longer.

A reading of their opinion would seem to indicate that their only concern was whether or not Section 1 of Article VII of the constitution was such a prohibition as would prevent the legislature taking the action involved in Chapter 149, supra. This section of the constitution provides:

"The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the State shall never assume, or become responsible for, the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the State."

This section refers to the credit of the state, but such provisions have been held to apply to all taxes whether they are state, county or municipal, and, therefore, it would seem that the provisions applied to the counties of the state of Iowa.

61 *Corpus Juris*, page 89, section 19.

It is also a recognized fact that the legislature cannot rightfully impose taxes for the benefit of private persons or in aid of private uses or enterprises. They are prevented from raising money from taxes for private objects or purposes.

61 *Corpus Juris*, page 89, section 19.

In view of this constitutional provision and its interpretation by the courts, it becomes necessary for us to determine whether or not Chapter 149, supra, imposes a tax for a public purpose as this purpose has been defined by the courts of this and other states. We do not feel it necessary to attempt to engage in any lengthy discussion of this question because we feel the authorities are quite in accord in this respect and for the purposes of this opinion, we will refer to but a few of them.

"A tax is for a public purpose where it is for the support of government, or for any of the recognized objects of government, or where it will directly promote the welfare of the community in equal measure. Although the term as used in the constitutions has been held to be synonymous with governmental purpose, it is often extremely difficult to define with accuracy what is a public purpose; and it has been held to be difficult and perhaps impossible to frame a definition which will readily and with unfailing certainty include every case which ought properly to be included, and exclude all others."

61 *Corpus Juris*, page 90, section 20.

"In case of doubt as to whether a purpose is public or private, the courts, are largely influenced by the public policy of the state, and all reasonable doubts on the question should be resolved in favor of the legislative declaration of such question. Generally speaking, the question of whether a tax is levied for a public or private purpose is to be determined by the course or usage of the government, the object for which such a tax has been customarily and by long course of legislation levied, and what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal, and by the essential character of its direct object; but the courts are mindful of the fact that new customs may be formed, and new usages may prevail, and that a purpose formerly private may become public. Prior decisions have been held to be of little weight. Neither the element of profit nor the novelty are determinative of whether a purpose is public; the true test is whether the work is essentially public and for the general good of all the inhabitants, irrespective, it is said, of the urgency of the public need or the extent of the public benefit that may follow."

61 *Corpus Juris*, page 90, section 20.

"The tax is not rendered invalid by the fact that private interests are incidentally benefited, or by the fact that some members of the public may derive more benefit than others, or that the money raised will go to an individual, it being sufficient if it is used to promote the general welfare and prosperity of the people. Where the object of a tax is to conserve the public health, comfort, and convenience in a particular community, the mere fact that persons who do not share the burden of taxation may also be benefited by the undertaking does not affect the governmental power."

61 *Corpus Juris*, page 91, section 20.

"Although difficult to determine, and one of fact, the question as to whether a particular purpose is public in the sense of being a legitimate object of taxation is to be determined in the first instance by the legislature."

61 *Corpus Juris*, page 91, section 20.

"It has been held, however, that the power of taxation is exerted for a public purpose when the money raised is to be applied: To the assumption of liability for the negligence of a state's agent. To the construction, maintenance, operation, support, aid, or encouragement, as the case may be, of cemeteries, forest preserves, interstate or international expositions; public charitable and reformatory institutions; public parks or pleasure grounds; * * *. To the creation of a pension system for civil employees, or of a state bonding fund. To the development and conservation of water resources for domestic use, irrigation, and light and power. To the manufacture, distribution and sale of cement. To the promotion of agricultural work, or of land settlement. To the protection of property by means of police and fire departments; to the relief of needy blind. To the supplying of water, including the irrigation of arid lands. To the support of the poor."

61 *Corpus Juris*, page 92, section 21.

An examination of the act in question discloses that it is legislation creating an emergency fund for the purpose of taking care of the live stock in certain drought sections of the state of Iowa and is for the purpose of providing certain farmers of the state of Iowa with funds for buying feed for this purpose. The legislature obviously recognized the fact that in certain sections of the state

farmers were without feed or without funds with which to purchase it. In the light of the foregoing statements it certainly seems that this is legislation which promotes the public welfare, and if the question of what constitutes a public purpose is one to be determined by the legislature, then the constitutionality of this act can certainly be sustained because the Iowa legislature has, by the passage of the act, declared that the furnishing of this aid constituted a public purpose.

We next desire to refer to the fact that it is a well settled rule of law in all courts, and especially in this court, that a statute is presumed to be constitutional unless it clearly appears to be contrary to some plain and unambiguous provision of the Constitution, and that the legislature is not prevented from adopting any law it sees fit, unless it is clearly prohibited by some plain provision of the constitution.

Carroll vs. City of Cedar Falls, (Iowa) 261 N. W. 652.

The legislature in this state, therefore, has power to enact any kind of legislation it sees fit, providing it is not clearly prohibited by some plain provision of the constitution.

It is also a well settled rule that any doubt of the legislature's power to adopt an act will be resolved in favor of its constitutionality.

Carroll vs. City of Cedar Falls, 261 N. W. (Iowa) 652.

In view of the foregoing quotations, it would certainly appear that the legislature had a right to pass the act in question unless it was clearly in violation of the constitution. In view of the authorities heretofore cited, it certainly can hardly be said that the enactment of House File No. 1 was clearly and plainly prohibited by the constitution. We call further attention to the fact that in the *Carroll Case,* our supreme court made a statement that "all presumptions are in its favor, and a statute will not be held unconstitutional unless its contravention is so clear, plain, and palpable as to leave no reasonable doubt on the subject." Again this should clearly indicate that this act would be sustained in our courts.

We desire at this time to call attention to the case of *Denver & Rio Grande Railroad Company vs. Grand County,* 170 Pac. 74, 3 A. L. R. 1224. This case involved the constitutionality of a mother's pension tax and as to whether or not it violated the constitution because it was not a tax for a public purpose. We quote from the opinion:

"It is the duty of the courts to uphold a legislative act unless it plainly and clearly violates the Constitution, and, if its language is susceptible of a meaning that will remove the objections to its validity, such interpretation should be adopted. A legislative intent to violate the Constitution is never to be assumed, if the language of the statute can be satisfied by a contrary construction. It is our duty to uphold the act unless it plainly and clearly violates the fundamental law of the state, and if its language is susceptible of a meaning that will remove the objections to its validity, such interpretation should be adopted." (Citing *Booth vs. Woodbury.*)

The court said:

"In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property, or of a sum of money to be raised by taxation, where no possible benefit, direct or indirect, can be derived therefrom, such exercise of the legislative power must be of an extraordinary character to justify the interference of the judiciary. Second, *if there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the legislature is conclusive.*"

Citing *Broadhead vs. Milwaukee*, 19 Wisc. 624, the supreme court said:

"To justify the court in arresting the proceedings and declaring the tax void, the *absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at the first blush.*

"*For the judiciary to dictate in matters of policy and expediency, and seek to nullify acts of the lawmaking body because it conceives that such acts are impolitic or unnecessary, would be just as flagrant a violation of the Constitution as would be an act of the legislature which would deprive a person of life, liberty, or property without due process of law.*"

In connection with the present act, it is a well known fact that the drought did exist in the state of Iowa, and that its effects have been of a very serious nature. Therefore, it would seem to us that there is a definite public interest in the purpose for which the funds under the act are to be used and yet the courts have held that the act can only be held unconstitutional where there is an absence of all public interest. As set forth in the foregoing decision, the questions of policy are for the legislature. It is not for the judiciary to dictate in matters of policy of this kind. Again we feel that this foregoing definite authority would sustain the constitutionality of this act.

We would like to call attention to the case of *Schlesinger vs. Wisconsin*, a case which went to the supreme court of the United States. It is reported in 70 L. ed. and 46 Sup. Ct. Rep. 260, and appears in 43 A. L. R. at page 1224. Mr. Justice Holmes, in that case, stated:

"If the 14th Amendment were now before us for the first time I should think that it ought to be construed more narrowly than it has been construed in the past. But even now, it seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate.

"* * * I think that with the states as with Congress when the means are not prohibited and are calculated to effect the object we ought not to inquire into the degree of the necessity for resorting to them."

We next want to call attention to the case of *Shelby County vs. Tennessee Centennial Exposition Co.*, 96 Tenn. 653, 36 S. W. 694, which we find reported in 33 L.R.A. 717 (1896). In that case there is a quotation by Judge Cooley with reference to the legislative power to impose a burden of taxation for a public purpose. Judge Cooley says:

"I do not understand that the word 'public' when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the legislature from taking broad views of state interest, necessity, or policy, or from giving those views effect by means of the public revenues. Necessity alone is not the test by which the limits of state authorities in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people."

The court further said in the Tennessee case, after holding constitutional an appropriation for a county for a state expenditure, that the appropriation was "well calculated to advance the material interests and promote the general welfare of the people of the county making it" and tended to the permanent betterment and prosperity of her whole people.

We also want to refer to the note found in L. R. A. Book 8, at page 284, where it is said:

"It is for the Legislature to determine whether a particular purpose concerns the public sufficiently to justify taxation. (Citing cases.)

"A tax law must be considered valid unless it be for a purpose in which the community taxes has no interest, and the absence of all possible public interest is so clear and palpable as to be perceptible by every mind at the first blush."

We could go on and cite innumerable authorities which, we believe, sustain the constitutionality of the act in question. Again we call attention to the fact that the authorities which we have just cited hold that it is a question for the legislature to determine whether or not the public have an interest in such legislation, and that the tax law must be considered valid unless it is for a purpose in which the community taxed has no interest. We do not believe that it can be said that the community has no interest in having feed for its livestock or in having credit made available to the farmers in these stricken areas. On the contrary we feel that the public and the community have a very definite interest in this litigation.

At this time we feel we should refer to the case of *State vs. Nelson County,* which was decided by the supreme court of North Dakota. It is reported in 45 N. W. 33. This case is cited in the opinion of Chapman and Cutler, and we believe, follows the best line of reasoning and the weight of authority in this country. The court in that case said:

"Difficulty has frequently arisen in discriminating between public and private objects; but where the object is primarily to foster private enterprises, and the only benefit to be derived by the public is incidental and secondary, the tax will be annulled by the courts as an abuse of the legislative prerogative. In the first instance the duty devolves upon the legislative branch of the government to determine whether a proposed tax is or is not for a public purpose; and courts are loath to interpose and declare any tax unlawful, and will only do so in case of a palpable disregard of the wise limitation, express and implied, restricting the power of taxation.

"The test to be applied to the seed-grain statute is this: Is the tax provided for in the statute laid for a public purpose?

"* * * In our opinion, this power is conferred in the organic law expressly to meet the exigencies of the situation then existing, and that it is our duty to give it that effect. We believe, and so hold, that the class referred to in the exception contained in Section 185 of the state constitution is the poor and destitute farmers of the state, and that the first legislature which met after the state was admitted has, by the seed-grain statute, put a proper construction upon the language in question."

The court also said:

"It will be presumed that the legislature, in passing the seed-grain statute, acted upon the fullest knowledge of the necessities of the situation, and also presumed that they have passed the statute after due deliberation and with the clearest apprehension of the scope of the constitution."

We are also familiar with the South Dakota case, cited in the Chapman and Cutler opinion, appearing in 240 N. W. 600. This was an advisory opinion rendered by the court, and without any actual legislation before it. The legislature had made no declaration of necessity. We believe the South Dakota case was decided against the weight of authority, but certainly the circumstances were indefinite in that no actual legislation was before the court.

Our supreme court has extensively discussed the questions involved in Chapter 149, supra, and at least two important cases have been before it. First in the case of *Grout vs. Kendall,* 195 Iowa 467, 192 N. W. 529. This was a suit in equity by a taxpayer to enjoin the governor of Iowa from undertaking certain proceedings proposed by them, known as the soldiers' bonus act, whereby such

defendant officers proposed to issue and sell the bonds of the state of Iowa, and levy a tax pursuant to the act for the purpose of paying and retiring such bonds. It was urged that this act violated the constitution of the state of Iowa, and particularly Section 1 of Article VII. Our court said in that opinion:

"The great body of the obligations of a state are moral rather than legal. Legislative appropriations are made voluntarily either in response to moral obligation or to public expediency. In either event, they may be made for a public purpose. They are gratuitous in the sense that they are not compulsory. Whether a particular purpose is a public purpose, and whether it has the sanction of a moral obligation of the state, are questions which have never been definitely answered or defined. It has been quite uniformly held by the courts that the determination of such questions inheres largely in the legislative power. Within the zone of doubt that is a moral obligation of the state, and that is a public purpose, which the Legislature deems to be such.

"* * * To hold now judicially that the act in question serves no public purpose and responds to no moral obligation would be not only to belie our legislative history, but would be a judicial interference with the prerogative of the Legislature and contrary to the weight of judicial precedent."

The Iowa Supreme Court quoted from the case of *U. S. vs. Realty Co.*, 163 U. S., 427, 41 L. ed. 215, in which the supreme court of the United States said:

"In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must be in its nature one for Congress to decide for itself."

The supreme court of the state of Iowa discussed this question at considerable length in the case of *Hunter vs. Colfax Coal Company*, 175 Iowa 245, 154 N. W. 1037. This was the case which questioned the constitutionality of the workmen's compensation act because it involved a tax not for a public purpose. It seems to us that this case completely determines the problem of whether or not House File No. 1 is constitutional or unconstitutional. On page 299 of the opinion, the court says:

"To paraphrase the inquiry, is such requirement a means of promoting the public welfare; is the premium to be paid an exaction for public use when exacted in order to make more certain that an injured employee shall receive the compensation provided by the legislature? That, in a sense, this is a provision for the benefit of the employee rather than one directly for the benefit of the public at large may be conceded. But does the concession present a case of improper exercise of the police power? True, it has been held that the taxing power may not be invoked to aid a private enterprise upon the ground that its establishment would be a benefit to the people of the community.

"* * *

"But when all is said, rules of law that such taxes are not sanctioned, and that certain instances of taxation were, therefore, unwarranted, and beyond the power of the legislature, do not settle whether some other attempt at taxation is or is not within the ban. The quarrel is not over the rule that the tax must be for a public use, but over whether its exercise in this case exacts a tax for other than public use. On this problem, ascertaining how far the courts may inquire into the character of the use for which the tax is intended, and of the cases wherein taxation has been sustained, will be found more helpful than the study of cases in which the right to tax has been denied. At the outset, we find the clearly established rule that the courts must not interfere unless the exercise of the police power is an arbitrary invasion of substantial private rights, by means of 'illegal or palpably unjust hostile and oppressive exactions, burdens, discriminations or deprivations'; that the legislature, being familiar with local conditions, is primarily the judge of the necessity of such enactments; and that the court should not interfere, no matter what its opinion of the wisdom or necessity of the act, unless the same 'is unmistakably and palpably

in excess of legislative powers, * * * and has no reasonable relation to the protection of the public health, safety or welfare'."

Further:

"If a tax raised aids in a scheme to prevent the vast economic waste which arises from personal injury litigation, and if it be to the interest of the public to care for the victims of industrial accidents to the extent, at least, of making compensation sure and free from expense, then such tax is for the benefit of the public, though it be at the same time beneficial to a class of citizens. * * *

"To this we are moved to add that the test is not whether these conditions do exist, but that the courts may not avoid such taxation unless it is palpable that the legislature had no right to assume that such conditions existed and that being passed, that the legislature palpably exceeded its powers to deal with these conditions, if they do exist, or may reasonably have been held to exist.

"We think the authorities and sound reasoning leave no room for doubt as to how we shall answer whether this was a justified exercise of the police power. That what the act does in this regard is a valid exercise of the police power is decided. * * *

"The support of paupers and the giving assistance to those who, by reason of age, infirmity or disability, are likely to become such, is, by the practice and the common consent of civilized countries, a public purpose."

We could go on and quote further from the *Hunter case* but we believe that in the light of the conclusion which the court reached and its discussion of this question, that there can be little doubt that the legislature has the right to pass such legislation as the emergency feed loan act, and that the court would not interfere because clearly the legislature did not go beyond its legislative power. Therefore, we feel that in the light of the foregoing discussions, the final question to be determined is whether or not the legislation in question has any reasonable relation to the protection of the public health, safety and welfare. The Iowa legislature in its wisdom has declared that the Iowa emergency feed loan act has a definite relation to the public welfare, and, therefore, we feel that the courts could not override the determination of the legislature, and that the constitutionality of the act would be upheld the same as it was in the *Hunter case* and as it was in the *soldiers' bonus case*.

Consequently we feel that Chapman and Cutler might well reach the conclusion, if they examine the foregoing authorities, that this act was clearly within constitutional limits and were the matter presented directly to us, we would hold that Chapter 149, supra, is constitutional.

HIGHWAYS: ROADS: BOARD OF APPROVAL: SECTION 4644-c34: It is entirely up to the Board of Approval and no other tribunal has any authority to direct the board in the exercise of the wide discretion given to it in carrying out the general plan specified in the statute.

February 25, 1937. *Mr. Ray A. Potter, County Attorney, Tipton, Iowa:* Replying to your letter of February 17, 1937, in which you refer to our letter of February 16th, with reference to Section 4644-c34 of the Code, would say that as we understand your additional question, you are inquiring whether your present Board of Approval can take into consideration the disproportionate mileage improved in the various townships since the enactment of Chapter 20 of the 43rd General Assembly.

The Legislature did not see fit to prescribe any limits in the exercise of the Board of Approval's discretion except the provisions prohibiting discrimination against townships that had theretofore improved their roads. The board is required to "distribute the improvements in such manner as will give to each

township, as soon as may be, an equitable mileage of improved roads." There is no hard and fast rule that can be applied in the exercise of the Board's discretion. Its action is final so far as concerns the expenditure of the 35 per cent of the secondary road construction fund which is dedicated to local county roads. Your present Board of Approval can take into consideration the excess improvements in some townships.

In passing on the plan to be adopted, doubtless that is one of the factors that any board would take into consideration, but as this office views the matter, it is entirely up to the board, and no other tribunal has any authority to direct the board in the exercise of the wide discretion given to it in carrying out the general plan specified in the statute.

PROCLAMATIONS: SEAL OF SECRETARY OF STATE: Attestation of Secretary of State is not required upon a proclamation by the governor.

February 26, 1937. *Mr. Robert Burlingame, Assistant to Executive Secretary, Office of Governor:* We acknowledge your letter in which the following question is asked—

"In preparing proclamations for the Governor's signature I note that there was no uniformity during the Herring Administration in attaching thereto the attestation of the Secretary of State. Will you be good enough to advise me whether the Secretary's signature is necessary on all proclamations, and if not, on what particular types it is required?"

A proclamation is an official public notification by some executive authority of the occurrence of an event important to the public, or of command, caution, or warning in relation to a matter impending. See 50 Corpus Juris 624.

Chapter 29 of the 1935 Code provides that the governor may issue proclamations in connection with the observance of certain days of commemoration such as Mother's Day, Independence Day and Columbus Day. Sections 73, 75, 506-509, and 550, 1935 Code, relate to election proclamations to be issued by the governor.

Neither the constitution nor the statutes provide any form of attestation of a proclamation.

It is, therefore, the opinion of this department that the attestation of the Secretary of State is not required upon a proclamation by the governor.

BOARD OF SUPERVISORS: COUNTY OFFICERS: SHERIFF: In order for a sheriff to make a trip to another state for a prisoner and collect expenses therefor, he must secure an order from the judge of the district court; matrons or lady attendants may accompanying sheriff for female law violator with necessary and reasonable expenses paid.

February 26, 1937. *Mr. Ross Henry, County Auditor, Clarion, Iowa:* This office is in receipt of a request for an opinion of this department for your Board of Supervisors on the following questions:

1. If it is desired that a sheriff go to another state after a prisoner, must he have a court order, or permission from the supervisors before making such a trip, or does he need either?

We interpret your question as applying where an indictment or an information has been returned and it is the desire of the sheriff to go to another state to secure the prisoner. Section 1225-e1 of the statute provides:

"*Warrants prohibited.* No warrant shall be issued requiring any peace officer to go beyond the boundaries of the state at public expense except with the approval of a judge of the district court."

Therefore, applying the above statute to your question, the warrant of arrest

should not issue where the prisoner is beyond the jurisdiction of this state except with the approval of a judge of the district court. In order for the sheriff to make such trip and to collect expenses therefor, it would first be necessary that he secure an order from the judge of the district court. Then and in that event he would be justified in making the trip beyond the boundaries of the state to secure his prisoner and be reimbursed by the county for any expenses incurred in connection with such trip.

If there has been no indictment returned or information filed and warrant issued for the apprehension of a person who is then beyond the jurisdiction of the state, the peace officer should secure permission from the Board of Supervisors to incur the necessary and actual expenses of going after the party or making an investigation.

What has just been said is not to be confused with the process involved in extradition proceedings. In this connection Section 13497 of the 1935 Code of Iowa provides:

"13497. *Agents in extradition cases.* 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."

In the next two succeeding sections provision is made for fees and expenses and the payment of claims therefore as follows:

"13498. *Fees and expenses.* The expenses to be allowed such agent shall be: fees paid the officers of the state upon whose governor the requisition is made; all necessary and actual traveling expenses paid on account of the agent and fugitive, including the necessary and actual railroad fare of the agent and that paid for transportation of the fugitive."

"13499. *Payment of claims.* Bills for such expenses shall be made out, itemized so as to show each day's expenses, sworn to and filed with the county auditor of the proper county, the county making application for the requisition, and shall be by said county auditor audited and paid out of the county treasury."

2. If the prisoner be a woman, must he take a lady attendant with him?

In answer to the above question, we do not find any statute governing in all cases. However, Section 3730 is as follows:

"3730. *Manner of committing females.* Females committed to said reformatory (women's reformatory) shall be taken thereto by some woman, or by some peace officer accompanied by some woman, appointed by the court."

In addition to the above, the statute provides that in transferring insane females to state hospitals, there shall be a lady attendant. The statute also provides that jails and places of confinement shall be equipped with separate apartments for women prisoners, and under the law applicable to cities and towns, cities of first class are required to have matrons in charge of places of detention for female violators.

It would therefore seem that although there is no direct statutory provision requiring the sheriff to have a lady attendant when conveying a female prisoner, that it is more of an oversight than the lack of a requirement. It is the opinion of this department that a peace officer conveying a woman prisoner, unless it be from a jail to a court in the same city or town, should be accompanied by a lady attendant.

3. If it is deemed advisable that a lady attendant should be used, and the sheriff takes his wife as that attendant, can he bill the county for her expenses and also bill the county for a per diem for her?

In answer to the above question, reference may be made to the provisions of Section 5191, subsection 14, of the Code, wherein it is provided that the sheriff is entitled to collect the necessary expenses for himself and such person or persons employed in going to and from a state, county or private institution incident to the conveyance of one or more persons to any such institution. Therefore, if the sheriff's wife accompanies him as such attendant, he would be permitted to bill the county for the necessary expenses incurred by his wife as such attendant.

4. If he takes some lady other than his wife as an attendant, just how far is the county liable for claims for this attendant?

The sheriff in this instance should be kept within the limits provided in the event he had his own wife, and base the attendant's expenses and compensation under sub-division 14 of Section 5191 of the statute.

PAROLE: JURISDICTION: BOARD OF CONTROL: The rules of the Board of Control govern a woman paroled even though since said parole she has married, and the Board may order her recommitted.

February 26, 1937. *Mr. Robert B. Miller, Secretary, Board of Control:* This department is in receipt of your request for an opinion on the following question—

"Could you please kindly tell me what would be the status of a girl who was paroled from Mitchellville, and married, with her parents' consent before she was 18, and who, since her marriage has been conducting herself in such a way as to violate the conditions of the parole by frequenting taverns and habitually using alcoholic beverages."

First, we will assume that her parole has not expired; then the rules of the Board would govern as designated in Section 3696 of the 1935 Code, which reads as follows, to-wit:

"3696. *Discharge or parole.* The board of control may at any time after one year's service order the discharge or parole of any inmate as a reward for good conduct, and may, in exceptional cases, discharge or parole inmates without regard to the length of their service or conduct, when satisfied that the reasons therefor are urgent and sufficient. If paroled upon satisfactory evidence of reformation, the order may remain in effect or terminate under such rules as the board may prescribe."

The fact that she has since married is not material except that in some respects she has attained her majority, but this would not exempt her from the rules of the Board of Control or the law of the state of Iowa so long as she remained a subject and/or ward of the state.

Section 3649 reads as follows:

"3649. *Term of commitment—warrant.* Commitments shall be until the child attains the age of twenty-one years, but the board of control may release or discharge the child at any time after it has attained the age of eighteen years if such action will, in the judgment of the board, be best for the child.

"A warrant of commitment shall consist of a copy of the order of commitment, certified to by the clerk, and shall be in duplicate, one of which shall be delivered to the executive head of the receiving institution and shall constitute sufficient authority to hold in custody the party committed."

In view of the above mentioned sections of our law, it is the opinion of this department that the Board of Control still retains jurisdiction over the girl in question, and may order her recommitted to the institution from which she was paroled.

COUNTIES: CITIES AND TOWNS: SCHOOL DISTRICTS: ASSIGNMENTS: Hancock County, town of Crystal Lake, and those school districts holding receiver's certificate may assign them without recourse on the basis of 100 cents on the dollar.

February 27, 1937. *Mr. W. D. Daly, County Attorney, Garner, Iowa:* We acknowledge receipt of your letter in which you ask for an opinion as to whether the public depositors in the Farmers National Bank of Crystal Lake, Iowa, may make an assignment of their claims upon a basis of one hundred cents on the dollar. The facts which have been submitted in connection with your inquiry, and upon which this opinion is based, are as follows:

Guy George Gabrielson of New York City has purchased all deposit claims and all claims of every kind held by the receiver except public deposits, and has paid one hundred cents on the dollar for all claims thus purchased. He now proposes to purchase the public deposit claims, aggregating about nine thousand dollars, on the same basis as he purchased other claims, i. e., one hundred cents on the dollar. It is stated by the receiver of the bank that in his opinion this is about twenty cents more on the dollar than would be paid on these claims if depending upon liquidation of the assets.

The public bodies having these deposits are Hancock County, the town of Crystal Lake, and two or three school districts in the county. Claims submitted by the various municipalities against the state sinking fund have not been established and allowed by the Treasurer of State for the reason that no interest was paid into said fund during the period the bank was under a conservator.

Section 5130, paragraph 6, 1935 Code, provides:

"5130. *General powers.*

* * *

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. * * *"

In this instance it is proposed that the county assign a receiver's certificate held by it for a consideration equal to face value, or one hundred cents on the dollar of said certificate. The certificate represents a debt owing the county. It is stated that if liquidation of assets of the bank is to be depended upon, only about eighty cents on the dollar can be reasonably anticipated. If the county should succeed in establishing its claim under the sinking fund law, the most it could receive, and this in the future, would be an amount not in excess of that now offered.

It is the opinion of this department that under the general power granted to county Boards of Supervisors as above set out, they undoubtedly have the power to accept payment of a debt owing the county upon the basis of a one hundred per cent payment, and to assign the certificate of indebtedness, which they hold, in order to obtain such payment.

The next question involved is whether or not the town of Crystal Lake, a municipal corporation, has the power to make an assignment of the receiver's certificate held by it under the circumstances stated above. With respect to the general powers possessed by the governing bodies of cities and towns, Section 5738, Code of 1935, provides:

"5738. *Bodies corporate—name—authority.* 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."

In our opinion, all of which has been stated above with respect to powers of counties to accept payments of indebtedness upon the basis of a settlement of one hundred per cent applies to municipal corporations.

Further than this, it frequently has been held that a municipal corporation may compromise its indebtedness in proper cases.

"Power to compromise doubtful claims is inherent in the common council as the representative of the municipality." Corpus Juris, Mun. Corp. Section 4644. This same power has been recognized by the courts of this state.

"Furthermore, it is conclusively shown that there was a compromise and an accord and satisfaction, and this was 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 555, at page 568.

If the power to compromise an indebtedness is possessed by the municipality, then it is our opinion that there can be no question of the power of the city or town to accept payment of its claim in full and assign the receiver's certificate in consideration of such payment.

The general powers and jurisdiction of school districts is set out in Section 4123, 1935 Code, which provides 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."

A school district is a corporation. It has exclusive jurisdiction over all school school matters within its territory. The liquidation of indebtedness owing to a school district is certainly a school matter. In the case of *Rural Independent School District vs. Daly*, 201 Iowa 286, it was held that the Boards of Directors of school corporations have implied power to employ an attorney to defend an action against the district and to contract for reasonable compensation for payment of the services, notwithstanding the fact that one of the duties of the county attorney under the statute is to furnish legal advice to school boards.

It is our opinion that school districts have the powers of counties and municipalities to collect an outstanding debt. Here it is contemplated that full payment of the debt is to be made, and we conclude that the school districts have the power to assign their receiver's certificates when payment of one hundred cents on the dollar is made therefor.

These public bodies, we understand, submitted claims to the Treasurer of State under the provisions of Chapter 352-A1, 1935 Code, which provides for a state sinking fund for public deposits. We understand further that these said claims have not been filed by the Treasurer of State for the reason that interest upon the said deposits has not been paid into the fund during the period of conservatorship. The provisions of Chapter 352-A1, Code 1935, do not restrict the powers of public depositors to assign receiver's certificates. The public depositors here, of course, would surrender any and all claims against the state sinking fund upon making such assignment. The assignment to be made by the public depositors should be made without recourse upon either or any of them.

It is therefore the opinion of this department that Hancock County, the town of Crystal Lake, and those school districts which hold receiver's certificates issued by the receiver of the Farmers National Bank of Crystal Lake, Iowa, have the right to assign without recourse said certificates on the basis of one hundred cents on the dollar to be received.

SECURITIES: EXEMPTION FROM REGISTRATION: Security offered by H. F. Wilcox Oil and Gas Company herein referred to is not exempt from registration.

March 1, 1937. *Mr. John F. Brady, Superintendent, Securities Department:* We acknowledge your letter in which you ask whether a certain purported security, proposed to be offered by the H. F. Wilcox Oil and Gas Company, is exempt from registration under the provisions of Section 8581-c4 of the 1935 Code. The file which you have submitted in connection with your letter sets out the following facts:

The common stock of H. F. Wilcox Oil and Gas Company is listed and dealt in upon the New York stock exchange. Said corporation holds a lease running for a period of ten years, covering four thousand acres of Texas land. Under the terms of this lease one thousand dollars annual rental is agreed to be paid by the corporation.

The offering now proposed to be made is designated Exhibit B, "Acreage and Drilling Agreement," whereunder the corporation agrees to drill, or cause to be drilled, a test well upon the leased acreage; also, which provides an assignment to the purchaser of an undivided interest of all the right, title, and interest of the corporation in the lease mentioned above; also, which contains an agreement whereby the purchaser under the lease makes the corporation its agent to receive all monies derived from the sale of oil and to repay net proceeds to the purchaser.

Section 8581-c3 of the 1935 Code includes in the definition of "security," "certificate of interest in an oil, gas, or mining lease * * * or beneficial interest in title to property, interest in or under a profit-sharing or participating agreement, etc."

Section 8581-c4, paragraph (e) exempts from the provisions of the said act "* * * all securities senior to or on a parity with any security so listed * * *."

It is stated in the file that the purchaser of an undivided interest in a lease from the H. F. Wilcox Oil and Gas Company obtains in addition to an undivided interest in the lease, the obligation of the H. F. Wilcox Oil and Gas Company to drill for oil and gas, to receive all monies derived from the sale of the same, and to remit to the purchaser the profits thereof to the extent of the interest of the purchaser.

The question here to be determined is whether this security is senior to the common stock of the said corporation.

It may be granted that the obligation of the corporation to drill a test well and to remit to purchaser his rightful share of the net proceeds in case production is obtained, must be performed before common stockholders may share in the assets. However, the test of seniority cannot be placed upon the basis of the obligation of the corporation to perform certain acts before the right of stockholders to share in assets arises. If under the "Acreage and Drilling Agreement," designated Exhibit B, the liability of the purchaser may be greater than the liability of a common stockholder, then it cannot be said that the security is senior or on a parity with the common stock of the issuing

corporation. If the test well is not drilled or is a failure, or if it produces less than enough to meet the claims made on the accruing obligations under the lease, then the liability of each purchaser under the agreement will become a personal obligation. At the same time, the liability of the common stockholder in the corporation will be limited to the value of his interest, if any, in the H. F. Wilcox Oil and Gas Company.

Reference is made to the statement appearing on page one of the offering sheet submitted by the corporation under requirements of the Securities and Exchange Commission, "The purchaser should be aware that he may be liable for at least his portion of claims and costs arising out of the development and operation of the property * * *."

Since the security under examination may subject the purchaser thereof to an obligation superior to that of a common stockholder, it is our opinion that such security cannot be said to be senior to or on a parity with the common stock of the corporation. It follows, therefore, that the security referred to is not exempt under Section 8581-c4, subsection (e).

ELECTIONS: CANDIDATES: EXPENSE ACCOUNTS: Expense accounts of candidates as filed in recorder's office shall be open to the public at all times.

March 1, 1937. *Hon. W. Mighell, Senate Chamber:* In answer to your inquiry of recent date which reads as follows:

"In view of the fact that certain county officials have claimed that there is no law to compel public officials to show public records, and have refused to show representatives of the press the expense account of candidates for office within said counties, I would appreciate an expression of your opinion in regard to the law, if any, covering such cases."

Chapter 46 entitled "Statement of Expenses" and Section 972 of said chapter, which reads:

"972. *Statement.* Every candidate for any office voted for at any primary, municipal, or general election shall, within thirty days after the holding of such election, file a true, detailed, and sworn statement showing all sums of money or other things of value disbursed, expended, or promised, directly or indirectly, by him, and to the best of his knowledge and belief by any other person or persons in his behalf, for the purpose of aiding or securing his nomination or election."

and Section 977 of the same chapter which reads as follows:

"977. *Public inspection.* Said statements shall be open at all times to the inspection of the public, and remain on file and be a part of the permanent records in the office where filed."

very clearly states the law in regard to your inquiry.

It is the opinion of this department that expense accounts as filed under this chapter shall, at all times, be open to the public for inspection.

BOARD OF CONTROL: DRUG ADDICTS: TREATMENT: Statutes applicable to insane patients are also applicable to drug addicts.

March 1, 1937. *Mr. Robert B. Miller, Secretary, Board of Control:* This department is in receipt of your request for an opinion submitted by Doctor Ristine, Superintendent of the State Hospital for the Insane, Mount Pleasant, Iowa. The request is for an interpretation of Section 3479, Code of Iowa, 1935.

The cited section is embraced within Chapter 173 of the Code entitled "Drug Addicts," and reads as follows:

"3479. *Statutes applicable.* All statutes governing the commitment, custody,

treatment, and maintenance of the insane shall, so far as applicable, govern the commitment, custody, treatment, and maintenance of those addicted to the excessive use of such drugs and intoxicating liquors."

Aside from this provision in the statute, Chapter 173, *supra,* contains no specific and express direction as to the care and treatment of drug addicts who may be committed to one or another of the state hospitals for the insane. Hence, by virtue of Section 3479, *supra,* it is necessary to read into Chapter 173, supra, the applicable provisions of Chapter 174, Code of Iowa, 1935, entitled "State Hospitals for Insane" and other statutes of the Code relative to insane patients. Among the applicable sections of other statutes is Section 3488 which, at paragraph 1, reads as follows:

"3488. *Duties of superintendent.* The superintendent shall:

1. Have the entire control of the medical, mental, moral, and dietetic treatment of the patients in his custody. * * *"

It is accordingly the opinion of this department that the treatment, care, custody, etc. of the persons referred to in Chapter 173, supra, who are committed to any one of the state hospitals for the insane would be governed by the provisions of Chapter 174, supra, and such other statutes pertaining to the insane as may be applicable. See: *Albert Maher vs. Grover W. Brown, Judge of the District Court*—(decision rendered June 21, 1938).

It is the further opinion of this department that if the treatment outlined by Doctor Ristine in his opinion and judgment is for the benefit of the patient, he is empowered to proceed to treat and care for such patient under the broad general authority vested in him by the statutes relating to the insane.

BOARD OF CONTROL: PRISONERS: PROPERTY RIGHTS: MISSOURI STATE PENITENTIARY: Miller, 14469, who escaped from the stone quarry in 1932, and who later was sent to the Missouri State Penitentiary, and was returned to the penitentiary here upon the expiration of his sentence at Jefferson City, is asking for $18.19 that he had to his credit at this institution at the time of his escape in 1932. This $18.19 was remitted to Des Moines, November 22, 1934.

March 1, 1937. *Mr. Robert Miller, Secretary, Board of Control of State Institutions:* This department is in receipt of your request for an official opinion on the following question:

"Miller, No. 14469, who escaped from the stone quarry in 1932, and who later was sent to the Missouri State Penitentiary, and was returned to the penitentiary here upon the expiration of his sentence at Jefferson City, is asking for $18.19 that he had to his credit at this institution at the time of his escape in 1932. This $18.19 was remitted to Des Moines, November 22, 1934, and the question is, should this money be returned to him?"

Section 3325, Code of Iowa, 1935, provides:

"3325. *Wages of inmates.* When an inmate performs services for the state at an institution, the board of control may, when it deems such course practicable, pay such inmate such wage as it deems proper in view of the circumstances, and in view of the cost attending the maintenance of such inmate. In no case shall such wage exceed the amount paid to free labor for a like service or its equivalent."

Section 3326, Code of Iowa, 1935, provides:

"3326. *Deduction to pay court costs.* If such wage be paid, the board may deduct therefrom an amount sufficient to pay all or a part of the costs taxed to such inmate by reason of his commitment to said institution. In such case the amount so deducted shall be forwarded to the clerk of the district court or proper official."

Section 3772, Code of Iowa, 1935, provides:

"3772. *Property of convict.* The warden shall receive and care for any property any convict may have on his person upon entering, and, if convenient, place the same, if money, at interest for the owner's use, keeping an account thereof, and on the discharge of the convict, return, and if money, repay the same with the interest so earned, to him or his legal representatives, unless in the meantime it has been previously disposed of according to law."

Section 13355, Code of Iowa, 1935, provides:

"13555. *Costs and fees.* All costs and fees hereafter incurred in prosecutions for violations of Sections 13351 to 13354, inclusive, shall be paid out of the state treasury from the general fund, in any case where the prosecution fails, or where such fees and costs cannot be collected from the person liable to pay the same, the facts being certified by the clerk of the district court and verified by the county attorney of the county.

Conviction of a crime does not necessarily carry with it the loss or relinquishment of property rights, although under the constitution of Iowa one convicted of an infamous crime is deprived of his right of suffrage. Article II, Section 5, Constitution of Iowa.

While in any given case the Board of Control may deduct from any wages earned by an inmate an amount sufficient to pay all or a part of the costs taxed to said inmate by reason of his commitment to said institution, yet in this inquiry no showing having been made that there are outstanding costs unpaid incident to either the prosecution of the named inmate for the crime for which he was serving time on the occasion of his escape, or for the prosecution of his escape, it is our opinion that the sum in question should be returned to him as his property.

SCHOOLS: TUITION: WESTFIELD SCHOOL DISTRICT: A school district is required to pay non-resident tuition for four school years regardless of the fact that student's total period of attendance at a high school exceeds four years.

March 1, 1937. *Mr. E. P. Murray, County Attorney, LeMars, Iowa:* This department is in receipt of your recent inquiry which reads as follows:

"Inquiry was made of the writer relative to the right of a school district to pay tuition for a pupil who had attended high school in Union County, South Dakota, for one year, and which tuition was paid by South Dakota, and who from September to March of another school year attended school at Akron, Iowa, which tuition during that time was paid by Union County, South Dakota. In addition to this, he has attended high school at Akron, Iowa, for two years and four months, which tuition was paid by Westfield Township, Plymouth County, Iowa. It will be necessary for him to spend from September to January, being equivalent to one semester in Akron High School. The question asked is whether the Westfield School District will have to pay for this semester?"

Your question appears to be as to whether or not the Westfield School District should pay tuition to the Akron High School since the pupil in question had received while a resident of South Dakota, some high school work in that state, and his total attendance in all of the high schools which he has attended amounting to more than four years.

Section 4273 reads as follows, to-wit:

"*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."

and the first sentence of Section 4277 reads as follows:

"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."

In view of the above quoted sections it is the opinion of this department that the Westfield School District shall pay the tuition for this semester. There is no provision or exemption in our school law that permits the state of Iowa to take advantage of the attendance of a pupil at a high school in a neighboring state while a resident there, and such pupil is entitled to four years of high school under the provisions of Section 4277, supra.

We conclude further that the "four school years," as expressed in Section 4277, supra, is a phrase of limitation which restricts the amount which any particular district may expend for a non-resident student's tuition. Since in paying the last semester's tuition the Westfield District will be within such limitation, such district should pay such charges.

SCHOOLS: ELECTIONS: MADISON SCHOOL DISTRICT (POWESHIEK COUNTY): It is not necessary for Madison School District to hold an election (Section 4217, paragraph 5, Code of Iowa) to transfer the fund in question (school house fund).

March 1, 1937. *Mr. Charles P. Vogel, County Attorney, Grinnell, Iowa:* This department is in receipt of your recent request for an opinion upon the following question:

"Madison Township is one of the rural townships in Poweshiek County, Iowa, and has within its borders, nine rural schools. These rural schools are governed by one board of directors and they have but one secretary for the entire township. The secretary advises me that a number of years ago Madison Township voted a bond issue for the purpose of building nine new school houses and that bonds were issued for that purpose. The last of these bonds which were executed for this indebtedness was paid approximately two years ago and there then remained a balance of approximately $1,100 within the schoolhouse fund.

"At the present time there is no necessity for maintaining a school house fund and the $1,100 should be transferred to the general fund and the school officers desire to know if this can be done without the necessity of a township election as set out in Code Section 4217, paragraph 5."

Chapter 24 of the 1935 Code, and more particularly, Section 369, paragraph 1, which reads as follows:

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

and Section 387 of the same chapter which reads as follows:

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

in our opinion, answer your question.

It is the opinion of this department that it is not necessary for Madison School District to hold an election as specified in Section 4217 of paragraph 5 of the Code to transfer the fund in question, since we are of the opinion that the school district is a municipality as defined in Section 369, and therefore they could transfer the fund in accordance with that chapter.

TAXATION: PUBLIC BIDDER LAW: TAX SALE CERTIFICATES: Holder of a tax sale certificate issued under provisions of public bidder statute would be a volunteer if he paid special assessments against property prior to date of its sale and would not be protected for the amount of such special assessments paid by him in the event of a redemption of the property by an original owner.

March 1, 1937. *Mr. John Corcoran, Jr., County Treasurer, Independence, Iowa:* Your letter of recent date to the Iowa State Board of Assessment and Review for an opinion upon the following matter has been referred to this department.

Property against which there are both special assessments and general taxes has been sold to the county under the public bidder law for the amount of the general taxes only. The county has assigned the tax sale certificate to an individual. Can the individual pay the special assessment tax as subsequent tax and be protected against the possibility of the city demanding an assignment of his certificate and also be protected in case of redemption by the original owner?

Under the public bidder law, Section 7255-b1 of the Code of 1935, the County, through its Board of Supervisors, is required to bid the total amount of the delinquent general taxes, interest, penalty and costs for which there is issued a certificate of sale to the County for all property which has been twice advertised at tax sales and unsold for the want of bidders. The purpose of this law was to procure to the counties the amount of general taxes, interest, penalty and costs delinquent against the property.

Subsequent to such sale the holder of any special assessment certificate against the property has the right to demand of and receive from the county such certificate by paying to the County Auditor the full amount of the general taxes, interest, penalty and costs and any subsequent taxes paid by the county against the property. This right is confined to those holding a special assessment certificate or bonds which are to be paid by a special tax against the property. This privilege does not inure to an individual. The tax sale certificate will, unless the property is redeemed in the regular way, ripen into a tax deed. When a tax deed is issued, it will create a new title and will eliminate and extinguish any special assessment levied against the property prior to its sale.

Therefore, the holder of a tax sale certificate issued under the provisions of the public bidder statute, would be a volunteer if he paid special assessments against the property prior to the date of its sale, and would not be protected from a demand for an assignment of his certificate by the holder of a special assessment certificate, nor would he be protected for the amount of such special assessment paid by him in the event of a redemption of the property by an original owner.

STATE INSTITUTIONS: COST OF CARE AND KEEP OF INMATES: EXPENSES OF: The costs and expenses of treating patients at the various state Institutions and Sanatoriums are payable by the state in the first in-

stance and then charged back to the counties, under the provisions of the statute.

March 1, 1937. *Hon. C. W. Storms, Auditor of State:* This office is in receipt of your request for an opinion upon the following matter:

Against what fund shall the expenses of inmates in the following state institutions be charged?

1. Oakdale Tuberculosis Sanatorium
2. Soldiers' Orphans' Home at Davenport
3. State Juvenile Home at Toledo
4. Institution for Epileptics at Woodward
5. State Institution for Feeble-minded at Glenwood.

1. By virtue of the provisions of Section 3395, Code of Iowa, 1935, the actual and necessary expense incurred in the transportation and treatment of an accepted applicant for admission to the State Sanatorium is in the first instance payable by the state. This section provides as follows:

"3395. *Indigent patients.* The state shall, on certificate of the superintendent approved by the board of control, pay, out of any money in the state treasury not otherwise appropriated, the actual and necessary expense attending the transportation of an accepted applicant for admission, to and from the sanatorium, and the expense of treating said applicant at said institution, if said applicant is unable to pay the same and such fact is certified to by the board of health of the city, town, or township, as the case may be, depending on the residence of said applicant."

The manner and method of advancing transportation expense is provided for in Section 3396, Code of Iowa, 1935. On the first day of each month the superintendent of the Sanatorium is required to certify to the boards of supervisors of the various counties the average number of inmates supported by the state at the Sanatorium for the preceding month. Section 3397, Code of Iowa, 1935. Thereafter the boards of supervisors are required to certify to the state comptroller and treasurer the total amount payable for the care, treatment and maintenance of the patients supported by the state for the preceding month, and for which expense the county is liable. Section 3398, Code of Iowa, 1935. The liability of the county is established by Section 3399, Code of Iowa, 1935, which provides as follows:

"3399. *Liability of county.* Each county shall be liable to the state for the support of all patients from that county in the state sanatorium. The amounts due shall be certified by the superintendent to the state comptroller, who shall collect the same from the counties liable, at the times and in the manner required for the certification and collection of money from counties for the support of insane patients."

While the manner of collection, as provided in the aforequoted section, specifies that such expense shall be collected as in the case of support of the insane patients, yet in the opinion of this department the quoted section relates solely to "the manner of certification." The section, in our opinion, is not authority for the payment by counties for the support of those tuberculosis patients at Oakdale from the county insane fund. This is inhibited by Section 3604, Code of Iowa, 1935.

Therefore, it is the opinion of this department that the expense for transportation and treatment of indigent patients in the State Sanatorium, where such expense is properly chargeable to the county from which the patient is admitted, is payable from that county's poor fund. In this connection reference may be made to Section 5337, Code of Iowa, 1935, which provides 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."

In the case of those patients admitted to the Sanatorium who are not indigent patients, as contemplated by Section 3395, supra, but the expense of transportation and treatment in the first instance has been defrayed by the state,—the state is entitled to reimbursement from the county from which such patient is admitted,—such reimbursement to be made from the county general fund.

It should be borne in mind, however, that patients in the Sanatorium and persons legally bound for their support are primarily liable for the maintenance of such patients in the Sanatorium. Sections 3400 and 3401, Code of Iowa, 1935.

2. The expense incurred by the state for the support of children in the Iowa Soldiers' Orphans' Home is chargeable to the counties liable therefor, as provided in Section 3720, Code of Iowa, 1935. Said section provides:

3720. *Counties liable.* Each county shall be liable for sums paid by the home in support of all its children, other than the children of soldiers, to the extent of a sum equal to one-half of the net cost of the support and maintenance of its children. The sums for which each county is so liable shall be charged to the county and collected as a part of the taxes due the state, and paid by the county at the same time state taxes are paid."

This expense would be payable by the counties from their general funds.

3. The expense for the support of children committed to and received at the Iowa Juvenile Home incurred in the first instance by the state is chargeable to the counties liable therefor, as provided in Section 3703, Code of Iowa, 1935. The language of said section is 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."

This expense is payable from the county general fund.

The conclusion that the expenses incurred as set forth in paragraphs number two and three above are chargeable to the county general fund is inescapable, in view of the language contained in the applicable sections of the statute reading in part "the sum for which each county is so liable shall be charged to the county." There being no specific designation of the fund from which such expenses are payable, it necessarily follows that they must be charged against the county general fund.

4. Section 3406, Code of Iowa, 1935, provides as follows:

"3406. *Clothing.* The superintendent shall supply all inmates with clothing when not otherwise supplied. The actual cost thereof, together with the cost of transporting said inmate shall be certified by the superintendent to the auditor of the county of the inmate's residence, and the board of supervisors shall allow the same and cause the amount to be remitted to the treasurer of state. Said certificate shall be presumed to be correct."

This section is a part of Chapter 170 entitled "Institution for Feeble Minded." In addition, said chapter provides as follows:

"3409. *Liability of inmate.* Said inmate and those legally liable for his sup-

port shall be liable to the county for all clothing aforesaid and for all costs of transporting said inmate."

"3410. *Release from liability.* The board of supervisors, on proper showing of the financial condition of the parties named in Section 3409, may release any of said parties from said liability."

In Chapter 172 entitled "Hospital for Epileptics and School for Feeble Minded" it is provided at Section 3474 as follows:

"3474. *Clothing.* The superintendent of the hospital shall furnish each inmate afflicted with epilepsy with suitable clothing, unless said clothing is otherwise provided, the cost of which shall be certified and paid in the same manner in which clothing for inmates of the institution for feeble minded is certified and paid."

These are the only statutory provisions with respect to the liability of counties for any expense incurred incident to the commitment of persons to either the institution, hospital or school for feeble minded and epileptics. These expenses are likewise chargeable against the county general fund.

BUILDING AND LOAN ASSOCIATIONS: BY-LAWS, AMENDMENTS TO: MORTGAGES AND CONTRACTS: CHARTER, CANCELLATION OF: MATURED SHARES: Amendments to by-laws, upon adoption, become as much a part of by-law as though contained in original and should be approved and filed in the office of State Auditor. In foreclosure proceedings brought upon mortgages executed after January 1, 1936, the moratorium does not apply: If Secretary of State has complied with the statute with reference to notice of delinquency, the corporate existence of the Association has ended. Matured stock in a building and loan association does not have a prior lien upon the assets of the association.

March 1, 1937. *Hon. C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following questions:

1. Is it necessary for a Building and Loan Association to submit to the Executive Council an amendment to their by-laws?

Under Section 9315 of the Code of 1935 it is required that the Articles of Incorporation together with a copy of the by-laws of Building and Loan Associations shall be presented to the Executive Council for its approval, and if the Articles of Incorporation and by-laws are approved by the Executive Council, they should be filed in the office of the Auditor of State. Section 9316 of the Code is as follows:

"*Amendments—approval.* Amendments to such articles may be made from time to time at any regular or special meeting of the stockholders, and shall in like manner be submitted to the executive council and approved by it."

Section 9316 above quoted does not in specific terms require that the amendment to by-laws should be submitted to the Executive Council for approval. However, an amendment to a by-law upon its adoption, becomes as much a part of the by-law as though it had been contained in the original. After an adoption of an amendment to the by-laws of an Association, if the same be not approved by the Executive Council and filed in the office of the Auditor of State, it cannot be said that the by-laws of the Association are so on file.

It is our opinion that amendments to the by-laws of such an Association must be submitted to the Executive Council for approval and be filed in the office of the State Auditor.

2. Are mortgages and contracts entered into subsequent to January 1, 1936 covered by the recently enacted Emergency Moratory Act?

Section 5 of Senate File 15 (Chapter 80, Laws of the 47th General Assembly) as finally adopted provides:

"The provisions of this act shall not apply to any mortgages or deeds of trust executed subsequent to January 1, 1936, nor shall it apply to a mortgagor or mortgagors under deeds of trust who acquired the real estate subsequent to January 1, 1936, except only in cases where continuances have already been granted by the court under Chapter 182 of the Acts of the 45th General Assembly of Iowa, or Chapter 115 of the Acts of the 46th General Assembly of Iowa.

Therefore, in foreclosure proceedings brought upon mortgages executed subsequent to January 1, 1936 the moratorium does not apply and the mortgagor or the titleholder of the property would not be entitled to a continuance unless such continuance has already been granted under either Chapter 182 of the Acts of the 45th General Assembly or Chapter 115 of the Acts of the 46th General Assembly.

There has been no act passed by the present Legislature granting a moratorium on land sale contracts. Therefore, all moratoriums on land sale contracts expire on March 1, 1937.

3. A Building and Loan Association having failed to file its annual report and pay the annual fee required by law, the Secretary of State forfeited and cancelled its Charter on April 2, 1934. What is the status of such an Association at this time?

If the Secretary of State has complied with the statute with reference to the notice of delinquency and the service of notice, then the corporate existence of such an Association has ended. Section 8450 of the Code is as follows:

"*Forfeiture of right to do business.* After such declaration and forfeiture shall have been entered by the secretary of state on the records of his office such corporation shall not be entitled to exercise the rights of a corporate body, except, it may be allowed a reasonable time to close up its business and wind up its affairs, but no new business shall be transacted."

Therefore, under the above statute, such an Association would be entitled to a reasonable time within which to wind up its business, but would not be entitled to transact any new business after the forfeiture of its Charter.

Nearly three years have elapsed since the cancellation of the Charter referred to in your question, which would appear to be a reasonable time in which to have closed up the business of the Association. The Association is transacting business unlawfully and in violation of the statute at this time. This Association should be placed under receivership under the provisions of Section 9362 of the statute and the receiver directed to wind up the affairs of the Association.

4. Are matured shares in a building and loan association a prior lien on the assets of the association?

In answering the above question, we are not informed as to the condition of the association. In the event of the insolvency of the association, the statute, Section 9365 of the 1935 Code, prescribes the plan of liquidation, and the affairs of the association would necessarily have to be liquidated under the terms and provisions of the above section unless a plan of liquidation is otherwise agreed upon by the shareholders.

In the event of the solvency of the association, a different procedure would prevail. The statute, Section 9352 provides for the withdrawal of members from such association and prescribes the method to be followed with reference to such withdrawals. Further provision for such withdrawal is usually contained in the articles of incorporation and in the by-laws. Such provisions in the articles of incorporation and by-laws would control if they were reasonable and in accordance with the provisions of the statute. Most associations

require that notice of intention to withdraw shall be given a prescribed number of days in advance and from and after receipt of such notice the association proceeds to create a fund or to replenish a fund already created with which to retire such stock, and in associations which are solvent those who first perfect their notice of withdrawal are entitled to be paid in the order in which such notices are perfected. However, the above ruling only applies to solvent corporations. The ordinary rules and laws applicable to corporations generally do not apply to building and loan associations.

However, the holder of matured stock does not have any priority over other stock and does not have any lien on the assets of the association. In the case of *Sumrall vs. Columbia F. & T. Co.*, 44 L. R. A. 659, certain stockholders of guaranteed stock sought to obtain a preference in the distribution of the assets of a building and loan association. The Supreme Court of Kentucky, in denying a preference stated:

"When we bear in mind that the corporation we are dealing with is a building and loan association, with certain underlying principles of co-operation, equality, and mutuality in its make-up, not common to ordinary corporations, and which may be termed the common law of its existence, the objection to upholding preferential contracts among members becomes apparent. All such attempts are absolutely void, as contrary to the natural law of such associations."

We do not find where the question has been before the courts of Iowa. The statute is silent upon the question, but our court, in the case of *Winegardner vs. Equitable Loan Co.*, 94 N. W. 1110, quoted the above from the Kentucky court with approval.

It is therefore our opinion that matured stock in a building and loan association does not have a prior lien on the assets of the association, or in fact a lien of any kind upon such assets.

TAXATION: UNPAID TAXES ON CAPITAL STOCK OF BANKS: Whenever a bank operated within the state 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.

March 4, 1937. *Mr. A. J. Hill, County Attorney, Forest City, Iowa:* This office is in receipt of your request for an opinion upon the following question:

The First National Bank of Buffalo Center was placed in the hands of a receiver. The 1932 assessment on capital stock is unpaid and the responsibility for collecting the tax was at that time on the bank. By proper court order the bank was in 1935 released from the collection of this tax, but the tax was transferred from the bank and entered in the delinquent personal tax list against the individual stockholders. Does the statute release the individual stockholders from their liability for the 1932 tax?

There is no statutory liability on the bank for the collection of the tax levied against its stock. Section 7000 of the statute is as follows:

"*Listing to stockholders.* The assessor shall list to each stockholder under the head of corporation stock the total value of such shares."

Banks did however, by custom, pay the tax upon the shares of its stock and then charged the same back to the stockholders, but the statute requires that the stock be assessed in the name of the stockholder and it is a personal tax against him.

We assume that your reference to a court order releasing the bank from the payment of the tax does not imply that the court entered judgment against the stockholders for such assessment. The court would be without jurisdiction

to enter such judgment or an order directing that the tax be entered on the delinquent tax list against the stockholders unless each and every stockholder were properly before the court in response to notice duly and legally served. However, the entry of the tax in the delinquent personal tax list, whether in response to an order or direction from the court or by the county auditor or county treasurer, would not in our opinion affect the matter one way or the other. Section 7004-g1 provides:

"*Stock of insolvent bank—remission.* Whenever a bank operated within the state 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."

The provisions of the above quoted section of the statute are sweeping and refer to banks which have been heretofore or shall hereafter be closed and placed in the hands of a receiver. Two things are necessary: that the bank be closed; and placed in the hands of a receiver. If those two things concur, the statute directs that the board of supervisors remit all unpaid taxes on the capital stock. The amount of taxes or the year for which assessed is immaterial, as the statute specifies all unpaid taxes.

It is therefore our opinion that it is the duty of the board of supervisors to remit or cancel all unpaid taxes on the capital stock of the First National Bank of Buffalo Center.

TAXATION: SCAVENGER TAX SALES: REAL ESTATE: Property must previously be advertised for two years or more and remain unsold before it can be offered at scavenger sale.

March 4, 1937. *Mr. Wallace F. Snyder, County Attorney, Belle Plaine, Iowa:* This department is in receipt of your letter requesting an opinion upon the following matter:

Benton County has been holding its scavenger tax sale at the second annual sale and has been selling property at scavenger sale at the second sale at which the same has been advertised. And has sold property under the provisions of the scavenger tax sale statute to individuals and has purchased some of it itself. Are such sales legal?

The statutory provision authorizing scavenger sales is contained in Section 7255 of the statute and is as follows:

"*Scavenger sale—notice.* Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained 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."

Our court has held that every provision of the tax sale statute is mandatory and must be complied with. There are no presumptions with reference to tax sales and tax titles. The law being drastic in its character, the courts have held that a strict compliance with the statute must be had. The above quoted section of the statute is specific in requiring that property must previously have been advertised for two years or more and remain unsold before it can be offered at scavenger sale.

Therefore, under the facts as stated herein, where the property was sold at the second sale at which it was advertised, it could not be said to have been previously advertised and unsold for two years. Under the facts as outlined

herein the property in fact had only been advertised and unsold for one year, it having been sold upon the second advertisement. Such sales are not in compliance with the statute, and are therefore void.

BOARD OF SUPERVISORS: BOUNTIES: Board of Supervisors may include other animals for bounty payment, but cannot increase bounty as designated in Sections 5413-5414.

March 4, 1937. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa:* This department is in receipt of your request for an opinion in which you state—

"Our local Board of Supervisors has before it a proposal made by one of the members, to increase the bounty on gophers provided for in Section 5413 of the Code, from five to ten cents.

It is the thought of this member of the Board that this is permissible under the terms of Section 5415 and his information is that other counties have done so."

We further note that you have given them an opinion on this which failed to satisfy them.

Section 5415 of the Code reads as follows:

"5415. *Additional bounties.* The board may determine what bounties, in addition to those named in Sections 5413 and 5414, if any, shall be offered and paid by the county on the scalps of such wild animals taken and killed within the county as it may deem it expedient to exterminate, but no such bounty shall exceed five dollars."

The two preceding Sections 5413 and 5414 designate the animals and reptiles for the extermination of which a board of supervisors may now pay a bounty. Section 5415 above quoted gives the local board of supervisors a right to increase or add to those designated in Sections 5413 and 5414 which in their opinion should be exterminated, and they may fix a bounty not to exceed five dollars.

In the case of *Bourrett vs. Palo Alto County*, 104 Iowa, page 350, the court stated on page 354:

"So long as the facts are open to question, it is a matter within the discretion of the board but that discretion cannot overrule undisputed facts in favor of the claimant."

It would appear from the court's holding in the above mentioned case, and in view of Section 5415, that the board of supervisors might include other animals or require additional proof before bounty is paid, and it is the opinion of this department that the above mentioned is the only discretion given the board of supervisors under this chapter, and it is our further opinion that the board of supervisors does not have authority to increase the bounty as designated in Sections 5413 and 5414.

SCHOOL FUNDS: REAL ESTATE: SECTION 4505: Proposed leislation repealing Section 4505, 1935 Code, constitutionally objectionable as legislature is without power to enact legislation to permit dissipation of permanent school fund.

March 4, 1937. *Mr. L. H. Doran, Senate Chamber:* We acknowledge receipt of your letter in which is contained the following statement—

"Several counties have requested that a change be made in the law which now requires counties to stand good for all losses on school funds loaned on real estate. * * * I would like your opinion as to whether such a change would be legal and constitutional."

Provisions for a permanent school fund are set out in the constitution of the state. This provision is to be found in Article 9 (2d), Section 3, which is as follows:

"*Perpetual support fund.* Section 3. The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this State, for the support of schools, which may have been, or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new States, under an act of Congress, distributing the proceeds of the public lands among the several States of the Union, approved in the year of our Lord one thousand eight hundred and forty-one, and all estates of deceased persons who may have died without leaving a will or heir, and also such per cent. as has been or may hereafter be granted by Congress, on the sale of lands in this State, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the General Assembly may provide, shall be inviolably appropriated to the support of Common schools throughout the State."

Article VII, Section 3, of the constitution provides for the state's making good amounts of losses to the fund occurred through defalcation, mismanagement or fraud, and this provision is as follows:

"*Losses to school funds.* Section 3. All losses to the permanent, School, or University fund of this State, which shall have been occasioned by the defalcation, mismanagement or fraud of the agents or officers controlling and managing the same, shall be audited by the proper authorities of the State. The amount so audited shall be a permanent funded debt against the State, in favor of the respective fund, sustaining the loss, upon which not less than six per cent. annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized by the second section of this article."

In accordance with the provisions above set out, the legislature has seen fit to enact statutes for the purpose of carrying out the expressed intent of the constitution. The particular section to which it is believed your letter refers is Section 4505, 1935 Code, which is as follows:

"4505. *Excess—loss borne by county.* Any excess over the amount of the unpaid portion of the principal, costs of foreclosure, and interest on the principal as above provided, shall inure to the county and be credited to the general county fund. If the lands shall be sold for a less amount than the unpaid portion of the principal, the loss shall be sustained by the county, and the board of supervisors shall at once order the amount of such loss transferred from the general fund of the county to the permanent school fund account."

It is to be observed that the constitution provides for a *perpetual* (italics ours) support fund for the maintenance of the common schools. We believe it is pertinent to inquire into the meaning of the word "perpetual" as it appears in this provision. The meaning of the word is to be construed according to the relation in which it is used and the surrounding facts and circumstances. In view of the language of the above quoted sections of the constitution, we see no reason why any other than the usual and ordinary meaning of the word was intended. This word has been defined as follows—"never ceasing, continuing for an unlimited time; unfailing; everlasting; continuous."—Webster's New International Dictionary. Another definition of "perpetual" follows: "continuing forever in future time; destined to continue or to be continued through the ages."—Century Dictionary and Encyclopedia, volume 7.

The provision for the county's making good losses occurring to the fund has been substantially in the same form since 1860. If the legislature does not provide by appropriate action that losses suffered by said fund are made good, then it is our opinion that the constitutional requirement that the fund be perpetual will not be met. The constitutional requirement is that the permanent school fund be in the nature of a trust fund, the principal of which is to

be maintained unimpaired. The constitution does not prescribe the manner in which this permanence is to be accomplished.

If the legislature deems it advisable to substitute the existing guaranty by counties to some other form of guaranty against losses, we see no objection to such legislation. However, if the legislature repeals the provision of law which guarantees the permanence of the fund, and if nothing is provided that would insure such permanence, it is to be questioned whether the act of repeal would be constitutional.

It is, therefore, our opinion that an act repealing Section 4505, 1935 Code, would be open to the constitutional objection that the legislature is without power to enact legislation which would permit the dissipation of the permanent school fund provided for in the constitution.

BOARD OF CONTROL: WOODWARD INSTITUTION: SPUR TRACK: MILWAUKEE RAILROAD: It is the opinion of this department that the board of control COULD enter into such an agreement.

March 5, 1937. *Mr. Robert B. Miller, Secretary, Board of Control:* This department is in receipt of your request for an official opinion on the following question:

"From time to time controversy has arisen as to the maintenance of our spur track from the Milwaukee railroad to the institution at Woodward.

"We are desirous of knowing if the Board can legally enter into an agreement whereby we are to furnish the common labor and the Milwaukee railroad to furnish a foreman, supplies and equipment for the upkeep of this spur track."

We are assuming that the spur track in question is owned by the state, and further that the common labor referred to is that of inmates of our state institutions. The government of the state institutions is vested in the board of control as stated in Section 3287 of the 1935 Code of Iowa which reads as follows:

"*Institutions controlled.* 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: * * *"

The above section gives full power to the board of control to manage, control and govern the state institutions and property connected therewith. The board of control has further power to require services of inmates of the institutions as stated in the following section of the Code:

"3323. *Services required.* Inmates of said institutions subject to the provisions hereinafter provided, may be required to render any proper and reasonable service either in the institutions proper or in the industries established in connection therewith."

It is the opinion of this department that the board of control could enter into such agreement. However, in doing so, they should keep in mind the law governing the letting of contracts for improvement and maintenance of state institutions, and this contract in question must be handled accordingly.

MORTGAGES: MORATORIUM ACT: WAIVER OF BENEFITS OF MORATORIUM ACT: Ordinarily the rights of parties are governed by the provisions of the instrument which they execute and a waiver of benefits would ordinarily defeat a mortgagor's right to benefits of moratorium act. However such waiver clause is between the mortgagor and mortgagee and would be contractual. Therefore, if circumstances justified it, a court could grant to a mortgagor the benefit of moratorium act irrespective of fact that mortgage contained a clause waiving such benefits.

March 5, 1937. *Mr. C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following matter:

Would the insertion of the following clause in a mortgage defeat the mortgagor's rights under the present moratorium:

"All right of dower and distributive shares and rights of exemption under Homestead Moratorium, and other laws now in force or hereafter enacted during the time of this mortgage is in force is being hereby released and waived."

Ordinarily the rights of parties are governed by the provisions of the instrument which they execute, and under ordinary circumstances the above clause would defeat a mortgagor's right to petition the court for the benefit of the moratorium act the same as his waiver of rights under the homestead statute. However, under the power reserved to the State in the Constitution, the Legislature has set up the moratorium act. The waiver of the benefits of the moratorium act contained in the above clause as between the mortgagor and mortgagee is contractual.

Our Supreme Court, in construing mortgages providing for the appointment of a receiver and in which the rents and profits have been pledged for the payment of the mortgage debt, ruled that the appointment of the receiver regardless of the provisions of the mortgage rests in the sound discretion of a Court of Chancery. *Sheakley vs. Mechler*, 203 N. W. 929; *Young vs. Stewart*, 207 N. W. 401; *Equitable Life Ins. Co. vs. Carpenter*, 214 N. W. 485.

Pomeroy in his work on Equity has stated the law as follows:

"The debtor or mortgagor cannot in the inception of the instrument, as a part or collateral to its execution, in any manner deprive himself of his equitable right to come in after default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and incumbrance of the mortgage; the equitable right of redemption, after default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right."

3 Pomeroy's Eq. 3d Ed., page 1192.

The above rule as announced by Pomeroy has been approved and followed by the Supreme Court of this State. *Fort vs. Colby*, 165 Iowa 95.

Our own Supreme Court has passed upon the constitutionality of the moratorium statutes in the case of *Des Moines Joint Stock Land Bank vs. Nordholm*, 253 N. W. 701. The opinion in that case is exhaustive and refers to opinions from the United States Supreme Court and other state courts where the same question or similar ones have been before the courts. Our court quotes from the case of *Nebbia vs. People of the State of New York*, 89 A. L. R. 1469, the following:

"Such police power 'is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.' "

And again:

"But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

We are therefore of the opinion that the clause heretofore quoted would not in all cases be binding upon the mortgagor. We feel that if the circumstances justified it that a court would grant to a mortgagor the benefit of the mora-

torium statute irrespective of the fact that the mortgage contained the clause heretofore quoted.

TAXATION: TAX DEEDS: SPECIAL ASSESSMENTS: If a tax deed is issued to property on which are unpaid special assessments and which are cancelled because of such deed, treasurer's records should be endorsed to show "tax deed issued" with date of issue, and thereafter the special assessments should not be entered against such property.

March 5, 1937. *Mr. Arthur Louk, County Treasurer, Greenfield, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Property sold under the public bidder statute for the regular taxes assessed against the same is also subject to special assessments for public improvements which are unpaid. Does the execution of a tax deed to such property convey the property free from such special assessments? If so, how should the same be shown upon the records to release the property from the lien?

A tax deed vests in the purchaser all the right, title and estate of the former owner in and to the land conveyed and all right, title and estate of the state and county thereto. The lien of ordinary taxes takes precedence over the lien of special assessments. Therefore, when property is sold for the ordinary or regular taxes, it is sold for taxes which have a priority over special assessments and after it goes to tax deed upon such certificate, all special assessments are wiped out. A title based upon a tax deed is a new title emanating from the county. See *Means vs. City of Boone*, 241 N. W. 671.

If a tax deed is issued to property upon which there are unpaid special assessments which are cancelled by reason of such deed, your records should be endorsed to show "tax deed issued" with the date of issue, and from then on the special assessments should not be entered against such property.

CRIMINAL LAW: POOL HALL: HIRE: Device as herein stated is a subterfuge and an attempt to evade the purposes of the ordinance.

March 6, 1937. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* We acknowledge your letter in which you ask for an opinion based upon the following statement of facts:

A beer parlor in Dallas Center has two pool tables in the back part of the parlor. The proprietor has told his patrons that if they will pay 5 cents for a 1-cent candy bar, they can play a game of pool free. He thereby informs them that he is not operating a pool hall for hire and does not come within the town ordinances of Dallas Center which prohibit the operation of a pool table for hire.

Under the above circumstances is this an operation of pool tables or pool hall for hire?

The term "hire" has been defined as follows:

"A price or compensation for labor and services or for the temporary possession and use of another's property." Hiring—"A contract by which one gives to another temporary possession and use of property other than money for reward, and the latter agrees to return the same to the former at a future time."

Schlosser vs. Railroad Company, 127 N. W. 502, 20 N. Dak. 406.

"Hire is a reward or compensation paid for the possession or use of personalty."

Leaned-Letcher Lumber Company vs. Fowler, 19 So. 396, 109 Ala. 169.

It is evident from the statement of facts set out that the use of these tables by the patrons is not gratuitous; that before the person is permitted to play he is asked to furnish a reward or a consideration for the privilege of playing.

Under these circumstances it seems clear that the arrangement under which the playing is permitted constitutes a hiring of the tables and the fact that something additional is given to the player is purely incidental to the main purpose of the operator of the tables.

It is therefore the opinion of this department that the device used by the operator as stated above is simply a subterfuge and an attempt to evade the purposes of the ordinances, and that the operator of the tables under such circumstances violates the ordinances.

TAXATION: SCHOOLS: TAX SALE CERTIFICATES: The purchaser of property at tax sale covered by a school fund mortgage acquires only the interest of the mortgagor.

March 6, 1937. *Mr. R. A. Knudson, County Attorney, Fort Dodge, Iowa:* This department is in receipt of your letter requesting an opinion upon the following questions:

1. A piece of property on which a school fund loan is outstanding has been sold by the county at tax sale to an innocent purchaser. The purchaser has served notice of the expiration of the period of redemption from this tax sale. Must the county redeem the property from the tax sale in order to protect its rights under the school fund mortgage?

The answer to your question is found in Section 7268 of the 1935 Code of Iowa. Without quoting the statute, the wording of which is plain, it is evident that the purchaser of property at tax sale covered by a school fund mortgage acquires only the interest of the mortgagor. Therefore it would not be necessary for the county to make redemption from the tax sale certificate. If such tax sale certificate ripens into a tax deed, the grantee therein would acquire the property subject to the lien of the school fund mortgage.

2. The Board of Assessment and Review has recently reduced the valuation of the Princess Theater Building for the past three years. There is already a tax sale certificate outstanding on this property. What is the proper procedure to follow in order to adjust the taxes on this property?

Section 6943-c27, sub-division 9 of the 1935 Code authorizes the State Board of Assessment and Review "to order and direct any county board of equalization to raise or lower the valuation of any class or classes of property in any township, town, city, or taxing district, and generally to make any order or direction to any county board of equalization as to the valuation of any property or any class of property." Under the provisions of that section of the statute, the State Board of Assessment and Review had the authority to reduce the valuation of the Princess Theater Building for the purpose of taxation. Having so reduced the valuation over a period of three years, we assume that the board of supervisors, which is the county board of equalization, has been notified of the action taken by the State Board of Assessment and Review. It therefore becomes the duty of the County Board of Equalization to direct the county auditor to correct his records as to the valuation of this property to conform with that fixed by the State Board of Assessment and Review. Having so corrected his record, the county auditor should direct the county treasurer with reference thereto the same as is required of original assessments, and should credit the county treasurer with the amount of taxes computed on the amount by which the valuation is reduced. The county treasurer should correct his records accordingly. Section 7235 of the statute is as follows:

"*Refunding erroneous tax.* The board of supervisors shall direct the treas-

urer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

Section 7236 is as follows:

"*Sale for erroneous tax.* In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter, but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale."

The owner of the property can follow either of the following methods:

a. He may redeem the property from tax sale in the regular manner through the county auditor's office, and after making such redemption, file his application for a refund of the amount of the erroneous taxes which have been exacted from him, and could enforce such payment by an action in mandamus against the Board of Supervisors for an order requiring it to order the refund paid.

b. Upon a tender by the property owner of the amount of valid taxes due against the property together with interest and penalty thereon to the county auditor, the board of supervisors could order the tax sale certificate cancelled and direct the county auditor to pay the purchaser thereof the amount due upon said tax sale certificate and make up any difference between the amount paid by the property owner and the amount necessary to make such redemption by charging each tax fund with its pro rata share thereof.

BEER PERMITS: CITY COUNCILS: Unless cities and towns avail themselves of the power granted to them to limit the number of Class "B" permits to be issued, there is no limitation upon the permits that may be granted in cities and towns.

March 8, 1937. *Mr. Leland C. White, City Attorney, Harlan, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. Can the city council provide for a less number of Class "B" permits than the number provided for in Section 1921-f126?

The issuance of beer permits is governed by Chapter 93-F2 of the statute. Cities and towns possess only such powers, rights and authorities as are specifically given to them by statute. The issuance of beer permits being contained in the above noted chapter of the statute, therefore, the authority and power of cities and towns with reference to the issuance of such permits are found in the above chapter. Under Section 1921-f126 of the Code, contained in the above chapter, it is provided:

"Cities and towns, including cities under special charter, are hereby empowered to adopt ordinances for the enforcement of this chapter and are further empowered to adopt ordinances providing for the limitation of Class "B" permits as follows:

Allowing only one Class "B" permit to be issued upon application meeting the requirements of this chapter, for each five hundred population, or fractional part thereof, up to twenty-five hundred and allowing only one additional permit for each seven hundred fifty population, or fractional part thereof, over and above twenty-five hundred, providing, however, that in towns having a population of one thousand or less, two permits shall be allowed if proper application is made therefor. * * *"

The foregoing quote from Section 1921-f126 conferring the power upon cities and towns to adopt ordinances for the limitation of Class "B" permits specifically specifies the extent to which the city or town may go in such limitation.

The statute making the authorization likewise makes the limitation. Cities and towns in availing themselves of the authorization must accept the limitations. To permit cities and towns to limit to a less number of Class "B" permits than those specified in the statute would be in contravention of the statute and void.

Therefore, cities and towns acting through their councils are without authority to limit Class "B" permits to a number less than specified in the statute.

2. If no attempt is made to limit the number of permits, must the city council grant a permit to any proper applicant, providing he possesses the qualifications specified by statute?

Under Section 1921-f126, hereinbefore quoted, cities and towns are authorized to limit Class "B" permits to the number specified in the statute. If cities and towns fail to avail themselves of the right to so limit Class "B" permits as provided for in the statute, there is then no limit to the number of Class "B" permits which may be issued in cities and towns. In the case of *Madsen vs. Town of Oakland*, 257 N. W. 549, the town council rejected plaintiff's application for a Class "B" permit. The action was brought in mandamus and the District Court ordered such permit issued. The Supreme Court reversed the order of the District Court but based its ruling upon the unfitness of the applicant, as shown by the testimony. The court in this opinion indicates that if the applicant meets the requirements set forth in the statute a permit should be issued.

Therefore, unless cities and towns avail themselves of the power granted to them to limit the number of Class "B" permits to be issued by their council, there is no limitation upon the number of permits that may be granted in cities and towns.

TAXATION: BOARD OF SUPERVISORS: SCAVENGER TAX SALES: Under the statute the Board of Supervisors could in its discretion, designate one of its own members as its representative to attend upon scavenger sales, or it could designate auditor to represent it and make bids for and on behalf of the county.

March 8, 1937. *Mr. Gerald F. Harrington, Assistant County Attorney, Sioux City, Iowa:* This department is in receipt of your letter requesting an opinion upon the following matter:

Does the Board of Supervisors have the right and the authority to employ someone to serve as public bidder to attend scavenger sales?

Under Section 7255-b1 counties are required to bid the total amount of the delinquent general taxes, interest, penalties and costs on any property in the county which has been twice previously advertised and unsold for want of bidders. The same section provides:

"* * *, the county in which said real estate is located, through its board of supervisors, shall bid for the said real estate * * *"

Section 7258, Code of Iowa 1935, requires the county auditor to attend all sales of real estate for taxes and keep a record thereof, among other matters.

In view of these statutory provisions, it is the opinion of this department that a board of supervisors could, in its discretion, designate one of its own members as its representative to attend upon scavenger sales, or it could instruct the county auditor, who is required to be present, to represent it and make bids for and on behalf of the county. It is our further opinion that the board would have no authority to employ someone to serve as public bidder to attend scavenger sales.

2. Can the Board of Supervisors employ an agent or representative to bid for it or the county on property offered for sale under execution?

Under Chapter 449 of the Code counties may become bidders at execution sale when it becomes necessary to protect the interest of the county. Section 10247 of the statute is as follows:

"*Bidding in at execution sale.* Such real estate shall be bid in, * * * if for the county, by the county attorney * * *"

It would therefore appear that it is not the duty of the Board of Supervisors to represent the county at execution sale, but that it is the duty of the county attorney, and it is our opinion that only the county attorney, or his duly appointed deputy would be authorized to represent the county as a bidder at an execution sale of property where it was necessary to protect the interest of the county. Where the statute is specific and designates some particular officer to represent it, such authority cannot be delegated except to a legally appointed and commissioned deputy or assistant.

It is therefore our opinion that it would be illegal for the Board of Supervisors to employ someone to represent it at an execution sale.

COUNTY OFFICERS: MILEAGE: BOARDS OF SUPERVISORS: Members of boards of supervisors would not be entitled to per diem, mileage and expenses while attending a meeting in Des Moines called by the President of the State Board of Supervisors Association.

March 12, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following question:

Can members of boards of supervisors attending a meeting in the City of Des Moines to discuss the proposed farm to market road bill charge per diem, mileage and expenses while attending such meeting called by the President of the State Board of Supervisors Association?

Members of boards of supervisors are county officials. Section 5260, Code 1935 provides:

"*Unallowable claims.* No claim shall be allowed or warrant issued or paid for the expense incurred by any county officer in attending any convention of county officials."

The above quoted section of the statute makes no exception as to what such convention or meeting is called for. The members of the board of supervisors being county officials, the allowance of per diem and expenses incurred in the attendance of such meeting would be a direct violation of the above statute.

It is therefore the opinion of this department that the members of boards of supervisors would not be entitled to per diem, mileage and expenses while attending such meeting.

CHARTER CITIES: POWERS AND DUTIES: CIVIL SERVICE: Statutes relating to powers and duties of cities and towns must be made specifically applicable if said statutes are to be effective as to charter cities.

March 12, 1937. *Hon. D. W. Kimberly, Senate Chamber:* We acknowledge the receipt of your letter dated March 10, in which is requested the opinion of this department. The facts submitted in said letter are as follows:

"Under Section 6758 of the Code, Chapter 329 relating to civil service is made applicable to the city of Davenport, a special charter city, except those parts of said chapter applicable to cities having a population of more than one hundred thousand. Senate File 26 which was passed by the Senate makes Section 5694 apply to cities under the commission form of government having a population of more than 50,000.

"At the present time the city of Davenport operates under the last half of Section 5694 and the civil service provisions apply only to the police and firemen. My question is whether Senate File 26 would bring the city of Davenport, which of course has a population of more than 50,000, under the first half of Section 5694. I have been told that unless Senate File 26 was made specially applicable to cities under special charter, it would not change the situation in Davenport. I would like to have your opinion as to whether this is the fact or not."

Section 6758 of the 1935 Code provides that special charter cities are included in the provisions of Section 5694 except as the provisions of the latter refer to cities over one hundred thousand population. That portion of Section 5694 which thus is made applicable to special charter cities reads as follows:

"5694. *Applicability—exceptions.* The provisions of this chapter shall apply to all appointive officers and employees, including deputy clerks and bailiffs of the municipal court, in cities under the commission form of government having a population of more than one hundred thousand, except: * * *

"In all other cities, the provisions of this chapter shall apply only to members of the police and fire departments, except: * * *"

Therefore, under the present law, the civil service provisions of Section 5694 are limited to police and fire departments in special charter cities.

Senate File 26, which has passed the Senate, provides that the one hundred thousand limitation be reduced to a limitation of fifty thousand. In other words, Senate File 26 amends Section 5694 in such a manner that all the provisions of said section are made applicable to cities under the commission form of government having a population of more than fifty thousand. This provision in Senate File 26 is as follows:

"Section 1. Section five thousand six hundred ninety-four (5694), Code, 1935, is amended by striking the words 'one hundred thousand' after the word 'than' found in the sixth line of the section, and substituting therefor the words 'fifty thousand.'"

The question involved in this inquiry is this—Would a special charter city of fifty thousand or more, if Senate File 26 becomes a law, be subject to all the provisions of Section 5694?

Section 6730 provides as follows:

"6730. *Applicability of provisions.* The provisions of this chapter shall apply only to cities acting under special charters. No provisions of this code, nor laws hereafter enacted, relating to the powers, duties, liabilities, or obligations of cities, or towns, shall in any manner affect, or be construed to affect, cities while acting under special charters, unless the same have special reference or are made applicable to such cities.

"In all laws hereafter enacted such reference or application shall be in a separate section in the act."

It is to be noted that the above section provides that "laws hereafter enacted" shall be made specially applicable to special charter cities and that such application shall be in a separate section in the act.

Senate File 26 is now a bill, but before it becomes effective it must be a law. Its title indicates the fact that it relates to "powers, duties, liabilities or obligations of cities or towns." The fact that it is in the form of an amendment to a section of Code does not make it any less a law, if it passes, than any other form of act. The legislature has said that laws affecting cities and towns must be made specially applicable to special charter cities if such cities are to be bound by such laws. By the amending process statutes now applicable to special charter cities could be changed to an almost unlimited extent. If bills proposing such amendments are not also required to be made specifically

applicable, the provisions of Section 6730 could be rendered virtually inoperative.

It is therefore the opinion of this department that since Senate File 26 relates to the powers and duties of cities and towns, that the provisions thereof must be made specially applicable, as provided in Section 6730, to special charter cities if the provisions of the said File are to be effective as to special charter cities.

TAXATION: POLL TAXES: Only those male persons who are 21 years of age and under 45 years of age of January 1st are subject to the levy of a poll tax. It was the intention of our legislature to levy such taxes as of January 1st.

March 12, 1937. *Mr. Carl F. Conway, County Attorney, Osage, Iowa:* This department is in receipt of your recent request for an opinion on the following question:

"The Mitchell County Board of Supervisors has asked me as County Attorney whether a man who becomes of age after January 1st in any year is liable for a poll tax during that year. We seem to have several cases where a party will become 21 in September or October and does not feel that he should pay a poll tax."

Your inquiry presents a question which has been many times debated and we have been unable to find an exact quotation in the law that covers the same. We are further aware of the fact that there have been many former opinions on the question from this office. Section 4644-c58 of the Code of 1935 reads as follows:

"*Poll tax.* A road poll tax of three dollars is hereby annually levied on every male person, including the male officers and employees of any state institution, if any (but not including any committed inmate of such institution) over the age of twenty-one years and under forty-five years, who are residents of the county outside the corporate limits of cities and towns."

It is to be noted that this section gives authority for the levy of a road poll tax.

Section 4644-c59 of the Code gives the township assessor, while making the assessment for his township, the right to collect such a tax from every person *subject* thereto.

Section 4644-c61 of the Code reads as follows:

"The assessor, upon the completion of his work, shall prepare a list of all persons subject to said tax in his township, and clearly indicate thereon those who have paid said tax, and promptly forward said list to the county treasurer. * * *"

Section 4644-c64 states that on October fifteenth of each year, the county treasurer must file with the county auditor a list of all persons who have not paid said poll tax; the county auditor in making up tax books for the ensuing year shall enter said unpaid poll tax as delinquent taxes, and the same shall become a lien on real estate January first following.

We believe, from the above quoted sections, that it is the intent of the law that the assessor must list and in reality make the levy and report all persons subject to the levy of a poll tax. Accordingly, if the assessor has this responsibility, we believe that we should consider him the assessor in this matter.

Section 7106 of the Code states that the assessor takes office the second Monday of January, and Section 6956 reads as follows:

"Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed. * * *"

It will be noted in this particular section that those persons who are called upon by the assessor are to be "of full age." The question of full age has been well established in this state. In the case of *De Sonora vs. Bankers' Mutual Casualty Company*, 124 Iowa 576, Justice Ladd, on page 584, said:

"So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law. Thereafter they are adults. And, this is the conclusion of the lexicographers and the courts generally concerning the term in its legal conception."

Section 6959 of the Code reads as follows:

"Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *"

It would appear to us, since the matter of poll tax is for the assessor, and that it must be considered in connection with his other duties, that he assesses the owners of personal property as of January first and at the same time he lists and makes the official records of those persons against whom a poll tax shall be levied, and the above quoted sections very specifically outline the procedure as to a poll tax in that when it becomes delinquent and made a lien on real estate, considering the above it is beyond the elasticity of our imagination to think or state that a male person whose anniversary of birth is on the first day of November is not a subject of the levy of a poll tax, and in the next breath to say that a male person, who becomes twenty-one years of age on March first, is subject to such a levy. And further, we do not believe that the assessor who is paid on a per diem basis is required or even allowed to daily place on his books and records those male persons who become twenty-one years of age during that year. Thus, if allowed, the assessor would never complete his work.

It is the opinion of this department that only those male persons who are twenty-one years of age and under forty-five years of age as of January first are subject to the levy of a poll tax, and we are of the further opinion that it was the intention of our legislature to levy such taxes as of January first.

BOARD OF SUPERVISORS: BRIDGES: WIDTH OF BRIDGES: BIDS: Bridges must have a clear width of roadway of at least 16 ft. (Section 4667, Code, 1935.) If cost of re-erecting bridge exceeds $1,500, the work and materials therefor must be advertised and let at public letting. Then, it is board's prerogative to reject all bids, in which event, it may pursue any one of the alternatives provided in second sentence of Section 4644-c42.

March 15, 1937. *Mr. W. R. Fimmen, County Attorney, Bloomfield, Iowa:* This department acknowledges receipt of your letter wherein you request an opinion on certain questions which may be enumerated as follows:

1. Where a Board of Supervisors has purchased bridges that are fourteen feet wide, may it then re-erect said bridges as fourteen foot bridges, or must they be sixteen feet or over?

2. Where the cost of re-erecting each of these bridges is more than $1,500, must there be a letting, or may the Board of Supervisors with its own men re-erect these bridges without any letting?

3. Where the cost of lumber purchased for maintenance work is more than $1,500, must there be a letting for this maintenance material?

4. If there must be a letting for maintenance material when the cost thereof is in excess of $1,500, is it proper and legal for the Board of Supervisors to purchase one carload each week for five weeks, each carload being under the $1,500 limit?

As to the first question, it is the opinion of this department that under the provision of Section 4667, Code, 1935, it is mandatory that bridges have a clear width of roadway of at least sixteen feet. The statute is clear, plain and unambiguous and the Supreme Court of Iowa has gone so far as to hold that township trustees have no authority to resolve that bridges erected or maintained should be less than sixteen feet in width and the fact that they did so would be no excuse or justification to the road supervisor to construct or erect bridges of a less width. *Gould vs. Schermer*, 101 Iowa 582.

This case did not involve the construction of the statute pertaining to the width of bridges, rather it was an action at law to recover damages for injuries sustained by reason of the negligence of the road supervisor in constructing the bridge, but the court held it reversible error for the trial court to instruct the jury that if the defendant-road supervisor constructed the bridge the width prescribed by the township trustees, the degree of carelessness and negligence would be a question for the jury to determine. The court in its opinion said:

"* * * The law (Code, Section 1001) provides that bridges erected or maintained by the public, must not be less than sixteen feet in width. The township trustees had no authority to resolve that they should be less, and the fact that they did so would be no excuse or justification to the defendant. * * *."

It is clear that it is not a matter of the board's discretion.

It is the further opinion of this department that the fact the bridges referred to are being reconstructed rather than newly erected has no bearing on the question whether the bridges shall be at least sixteen feet in width of roadway, in view of the provision of Section 4667, supra.

In view of Section 4644-c42, Code, 1935, which provides:

"*Advertisement and letting.* All contracts for road or bridge construction work and materials therefor of which the engineer's estimate exceeds fifteen hundred dollars, except surfacing materials obtained from local pits or quarries, shall be advertised and let at a public letting. The board may reject all bids, in which event, it may readvertise, or may let the work privately, at a cost not exceeding the lowest bid received, or build by day labor."

the second question, in the opinion of this department may be answered to the following effect: that if the cost of re-erecting each of the bridges, exceeds, in the estimate of the engineer, the sum of $1,500.00, the work and materials therefor must be advertised and let at public letting. This having been done, it is the board's prerogative to reject all bids, in which event, it may pursue any one of the alternatives provided in the second sentence of the above quoted section, the last of which is "or build by day labor." But there must first be an advertising and all bids received must be rejected.

Further, it is the opinion of this department that where the board rejects all bids received, or in event no bids are received and it elects to build by day labor as by statute provided, it is charged with the duty to see that the cost thereof does not exceed the lowest bid received or if there were no bids, the engineer's estimate. This was the apparent intent of the legislature in enacting Section 4644-c42 supra, the spirit of the statutory requirements being to insure a county the best price obtainable.

While it might possibly be contended that Section 4644-c42 supra, pertains only to materials necessary for and incident to a particular road or bridge construction project, and that materials unrelated to a particular project come within the purview of Section 4644-c43 providing:

"*Optional advertisement and letting.* Contracts not embraced within the provisions of Section 4644-c42 may be advertised and let at a public letting, or may be let privately at a cost not to exceed the engineer's estimate, or may be built by day labor."

yet it is the opinion of this department that it was the intention of the legislature to give the language "materials therefor" a meaning in its broad sense, viz., material for road and bridge construction work generally (unless within the express exception provided in Section 4644-c42), and not simply to confine its meaning to material for a particular project. In this connection, reference may be here made to the Report of the Attorney General 1934, page 81, wherein an opinion was given that gasoline to be used in road and bridge construction work in excess of $1,500, though bought as needed and paid for monthly, shall be purchased in compliance with the provisions of Section 4644-c42.

It is accordingly the opinion of this department that where the cost of lumber for maintenance work exceeds, in the engineer's estimate, the sum of $1,500, the board must comply with the provisions of said section.

It is the further opinion of this department that it is both improper and illegal for the board of supervisors to purchase lumber for maintenance work, where the cost thereof is in excess of 1,500, in car load lots, each car load being under the $1,500 limit, if such action is undertaken to obviate the necessity of complying with the provisions of Section 4644-c42. The requirements of the statute cannot be evaded by a division of the original contract. It was so held in the case of *State vs. Garretson*, 207 Iowa 627, the court stating in its opinion that "subsequent division of the original contract is nothing more than a subterfuge, to avoid an express statute." While the case involved a construction of Sections 4646 to 4650, inclusive, Code, 1931, which were repealed by the Forty-third General Assembly, yet it is submitted that the underlying principle remains the same.

STATE FUNDS: OLD AGE PENSION FUND: AUDIT EXPENSE: Old Age Assistance Commission does not have authority to pay audit expense out of old age pension fund.

March 15, 1937. *Mr. Byron G. Allen, Superintendent, Old Age Assistance Commission*, and *Mr. G. S. Worden, Supervisor, Office of Auditor of State:* This office is in receipt of your letter in which the following statement of facts is set out:

"The Iowa Old Age Assistance Commission has been presented with a bill for approximately $2,500.00, which is the expense of auditing the Commission's records and accounts for the period from March 29, 1934 to July 1, 1935.

"The question has arisen whether or not the general appropriation to the State Auditor's office should bear the expense of this audit, or whether the administration funds of the Old Age Assistance Commission should bear the expense of said audit. As a protection to both the State Auditor's office and the Commission we desire to have an opinion from your department on this matter.

"It is the understanding of the State Auditor's staff that the general appropriation made for the biennium ending June 30, 1937 was made with the expectation that payment of audit expenses would be made by such departments as the Old Age Assistance Commission, the Liquor Commission, the State Board of Assessment and Review, all of which have other independent sources of revenue outside of the appropriations provided by the biennial Appropriations Bill."

Section 101-a1, of the 1935 Code, defines department as follows:

"101-a1. *Definition.* The term 'department' shall be construed to mean any authority charged by law with official responsibility for the expenditure of public money of the state and any agency receiving money from the general revenues of the state."

Section 101-a2 provides among other things that—

"The auditor of state shall * * * annually make a complete audit of the books and accounts of every department of the state."

It thus appears that the Old Age Assistance Commission is clearly a "department" within the purview of Chapter 10; further, that by statute it is made the duty of the auditor of state to make an annual audit of this department.

The question presented here is whether or not the provisions of the Old Age Assistance Act as found in Chapter 266-F1 of the 1935 Code authorizes the Commission to pay the expense incurred by reason of the audit.

Authority to pay the expense of such audit must be found in the provisions of the law. There would be no presumption that the Commission would have authority to pay this expense of this audit, which by statute is made a duty of the state auditor, unless authority for paying the same can be found in the chapter.

Section 5296-f4 of said chapter provides as follows:

"5296-f4. *Rules and regulations.* The commission shall have authority to make such rules and regulations as are necessary to carry out the provisions of this chapter."

Section 5296-f34 of said chapter, among other things provides as follows:

"5296-f34. *Pension fund created.* There is hereby created a fund to be known as the old age pension fund to be administered by the commission, the proceeds of which shall be used to pay the expenditures incurred under this chapter.

* * *

"All taxes collected under the provisions of this section and chapter shall be deposited to the credit of the old age pension fund, and shall be kept separate from the general fund of the state. On receipt of written order from the commission, the state comptroller shall draw warrants, and/or warrant checks against the old age pension fund for any and all old age assistance payments and other expenditures provided for in this chapter."

The statute provides that the proceeds of the Old Age Pension fund shall be used to pay the *expenditures incurred under this act.* It is to be noted also that "upon receipt of written order from the commission, the state comptroller shall draw warrants and/or warrant checks against the old age pension fund for any and all old age assistance payments *and other expenditures provided for in this chapter.*"

We find but one reported case which interprets the provisions of the chapter pertaining to old age assistance. This is the case of *Jones vs. Dunkelberg,* reported at 260 N. W. page 717, and 265 N. W. page 157. In this case the court decided that the expense incurred by a member of a county old age assistance board might properly be paid by the commission as an expenditure incurred under the act. However, the act itself provided for the compensation for expenses of members of county boards in the following language:

"5296-f6. *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 expenses incurred by them in properly discharging their official duties."

The act itself provides for the payment of the above expenses.

In the Jones case cited above, the contest was between the county and the

commission to determine which was liable for the expense incurred by the performance of a duty which was created by the old age assistance law. There can be no doubt that the case above cited limited the scope of the phrase "expenditures incurred under this chapter." To support this statement we quote from the opinion at 265 N. W., page 159:

"* * * What are the expenditures under this act that come within this phase? Certain it is that an expenditure made necessary by the members of the county board 'in their actual and necessary traveling expenses incurred by them in properly discharging their official duties' comes within the term of 'expenditures' under this act. When we come to some other expenditures that may have been claimed, we perhaps reach a different question. For instance, the assessors were directed to return the names of all persons over the age of 21 years who are residents of the state. This is simply a new duty added to an office already in existence, and it has never been held that the adding of a new duty to an office already in existence adds to the pay for the office, unless there is some provision in the law for so doing, and we have none. 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 * * *"

There being no duty imposed upon the county to pay said expenses, the court held that the county was not liable for the same, and that the payment of the expense by the commission would be warranted as an expenditure under the old age assistance law.

It is true that new state departments having independent revenue sources of their own, and with extensive and complex duties to perform, demand of the auditor's office increased and increasing services. New duties are placed upon an office already in existence. It is significant that the above opinion points out that the adding of such new duties does not add to the pay of such office unless there is some provision in the law for so doing.

Is such provision to be implied from the language "expenditures incurred under this act?" An analogy may be drawn in this instance to the Iowa Liquor Control Act, Chapter 93-F1, 1935 Code. Under this act a fund is created in Section 1921-f50 of said chapter, which provides as follows:

"1921-f50. *Fund.* For the purpose of enabling the commission to carry out the provisions of this chapter, 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 chapter and to perform such other duties as are imposed upon it by this chapter.

"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 chapter 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."

In the above statute the money is made available "to carry out the provisions of this chapter * * *"

Thus it seems that the general provisions relating to the expenditure of money from the fund in this case are substantially the same as in the old age assistance act. In addition to this general grant of authority to expend money to carry out the provisions of the act, the liquor control act in Section 1921-f58

makes specific provisions for the payment of the expense of auditing the commission's business, the said section providing as follows:

"1921-f58. *Auditing.* All provisions of Sections 113, 114, 116, 117, 120, 124, 126, and 130-a3 of the Code, relating to auditing of financial records of governmental subdivisions which are not inconsistent herewith are hereby made applicable to the liquor control commission, the liquor transactions of its special distributors and any of its offices, stores, warehouses and depots."

In conclusion, it is our opinion that Section 101-a1, 1935 Code, makes it a duty of the auditor of state annually to make a complete audit of the old age assistance commission as a department of the state; that there is no definite provision in the act creating the commission that permits payment of such expense out of the old age pension fund; that in the case of the Iowa liquor control commission, after granting similar general powers, the legislature has seen fit to provide specifically for the payment of the auditing expense out of the funds of the commission.

It is therefore the opinion of this department that in view of the foregoing, and under the existing provisions of the law, the old age assistance commission does not have authority to pay such audit expense out of the old age pension fund.

RURAL ELECTRIFICATION: ASSOCIATIONS: Associations incorporated under Chapter 390-G1, Code, 1935, may organize an association to carry out objects and are endowed with powers provided in Sections 8512-g6 and 8512-g7.

March 15, 1937. *Senator Frank E. Ellis:* This department acknowledges receipt of your request for an opinion on a question stated in your letter as follows:

"It is my earnest request that your office render an opinion as to whether the Maquoketa Valley Rural Electrification set up at Maquoketa, Jackson County, Iowa, can join in with Clinton, Dubuque, Jones and perhaps other counties in a Rural Electrification Association and still retain their identity and members as a separate unit.

"In other words the Jackson County Organization wish to become a part of the Four County Organization and still retain their identity as a Jackson County group."

It is assumed that these associations are incorporated under the provisions of Chapter 390-G1, Code, 1935, entitled "Cooperative Associations."

Section 8512-g5 of said chapter provides as follows: "Five or more individuals, *or two or more associations*, may organize an association. * * *"

Section 8512-g13 of said chapter provides among other matters that "Other associations engaged in any directly or indirectly related activity may be made eligible to membership." This section pertains to membership eligibility in any association.

Section 8512-g36 provides that the affairs of each association shall be managed by a board of not less than five directors who must be members of the association or *officers or members of a member-association.* Section 8512-g29 of said chapter provides that the vote of a member-association shall be cast only by its representative duly authorized in writing.

It is the opinion of this department that under the provisions of said chapter, two or more associations incorporated thereunder may organize an association to carry out the objects of and which may be endowed with the powers provided in Sections 8512-g6 and 8512-g7 respectively. In other words, an association could be incorporated under the provisions of this chapter, the member-

ship of which would be composed of two or more associations in turn incorporated under the provisions of said chapter.

The question of preserving the existing rights, privileges, powers, and so forth, unto each member-association would be, of course, a matter of contract between the associations as established in the articles of incorporation of the association to be organized.

Whether or not the particular associations referred to in your letter may avail themselves of the provisions of Section 8512-g5 supra, is beyond the scope of this opinion for the reason that such question can only be determined upon an examination of the articles of incorporation of each of said associations.

While not pertinent to your inquiry, yet your attention is called to the following two sections of Chapter 390-G1:

"8510-g10. *Cooperative agreements.* Any association may make any agreement or arrangement with any other association or cooperative organization for the cooperative or more economical carrying on of any of its business. Any number of such associations or organizations may unite to employ or use, or may separately employ or use, the same methods, means or agencies for conducting their respective businesses."

"8512-g11. *Legality declared.* No association, contract, method or act which complies with this chapter shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly or an attempt to lessen business or fix prices arbitrarily, or to accomplish any improper or illegal purpose."

COUNTY OFFICERS: SALARIES: Deputy county officers who have been receiving less salary than the amount fixed by statute would be entitled to recover the difference from the county.

March 20, 1937. *Mr. Hillis W. Noon, County Attorney, West Union, Iowa:* This department is in receipt of your letter asking an opinion upon the following matter:

Are deputy county officers entitled to the annual salary as provided by statute and are they entitled to recover from the county where the board of supervisors has reduced the salary below that fixed by statute and the deputies have worked for and accepted the reduced salary?

Chapter 261 of the Code of 1935 fixes the compensation of county officers and in each instance in the chapter above referred to the provisions of the section applicable to the particular deputy officer are worded as follows:

"Each deputy .... shall receive as his annual salary in counties having a population of ....* * *"

The compensation of all deputies is expressly provided in said chapter of the Code. The Legislature thus has specifically fixed the compensation of deputy county officers and has prescribed the amount of such deputy's annual salary, depending upon the population of the county. In so fixing the compensation, we may assume that the Legislature did so with the thought in mind that the amount prescribed by it for the annual salary of deputy county officers was the amount sufficient to pay such deputy officers for their services. The amount having thus been fixed by statute, it is the amount which the deputy officer is entitled to receive for his services.

In numerous cases which have been before our courts, the courts have held that a contract by which one accepts employment at a salary less than that fixed by statute is against public policy and void. In *Dodson vs. McCurnin*, 160 N. W. 927, the court stated:

"The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance."

In the above case the court has reviewed the questions at some length and has expressed itself as above stated. To the same effect see *Bodenhofer vs. Hogan*, 120 N. W. 659.

It is therefore the opinion of this department that the deputy county officers who have been receiving less salary than the amount fixed by statute would be entitled to recover the difference from the county.

SCHOOLS: RESIDENCE: All pupils, whether of elementary or high school age, residing in one corporation may attend school in another in the same or adjoining county, if the two boards so agree.

March 22, 1937. *Mr. Fred L. Mahannah, Deputy, Department of Public Instruction:* This department is in receipt of your letter which reads as follows:

"Will you please give this department an official ruling as to the correct interpretation of the first sentence in Section 4274, reading as follows:

'A child residing in one corporation may attend school in another in the same or adjoining county, if the two boards so agree.'

Is such agreement confined to children of the corporation who are enrolled below the ninth grade, or may it include children of the corporation who are enrolled in the secondary grades, nine to twelve inclusive, if the two boards agree?"

It is the opinion of this department that Section 4274 of the Code includes all pupils, whether of elementary or high school age.

TAXATION: REDEMPTION: NOTICE OF RIGHT OF REDEMPTION: When the person in whose name the property is assessed is dead, no notice of the expiration of the right of redemption is necessary. The law does not require the doing of the impossible. If the owner of property is a non-resident, the notice may be served by publication as provided by Section 7280 of the Code.

March 24, 1937. *Mr. William J. Kennedy, County Attorney, New Hampton, Iowa:* This department is in receipt of your request for an opinion upon the following question:

In serving a notice of the expiration of the right of redemption from tax sale where the person in whose name the property is taxed is dead or outside of the county and there is no person in actual possession of the real estate, what are the requirements for notice?

1. Where the owner in whose name the property is assessed is dead, no notice of the expiration of the right of redemption is necessary. The law does not require the doing of the impossible. The person in whose name the property is assessed being dead, notice could not be served upon him. See *Nugent vs. Cook*, 105 N. W. 421; *Grimes vs. Ellyson*, 105 N. W. 418.

2. Where the person in whose name the property is assessed is a non-resident of the county, Section 7280 of the Code of 1935 provides as follows:

"*Service of notice.* Service may be made upon non-residents of the county by publishing the same once each week, for three consecutive weeks, in some newspaper of said county, or by personal service thereof elsewhere in the same manner as original notices may be served."

Under the provisions of the foregoing section of the statute, if the owner in whose name the property is assessed is a non-resident of the county, the notice may be served by publication or by securing personal service outside the county in the same manner as is provided in the service of original notices.

3. Service upon the party in possession. The service of notice upon the party in possession may be made in the same manner and in the same way as

original notices are served. If, however, the property is actually and really vacant and there is no one in possession, an affidavit as to that fact should be filed with the county treasurer, which affidavit would then dispense with the necessity of service of notice.

TAXATION: TAX ON PERSONAL PROPERTY: BOARD OF SUPERVISORS: The taxes on personal property having become a lien against real estate, the Board of Supervisors would be without right or authority to compromise such taxes.

March 25, 1937. *Mr. R. A. Knudson, County Attorney, Fort Dodge, Iowa:* This department is in receipt of your request for an opinion upon the following question:

A purchased certain fixtures from B and as a part of the consideration agreed to pay B's personal taxes which had become a lien against real estate owned by B. B's assignees have now deeded the real estate to the mortgage holder and A has offered to pay the personal taxes, which are delinquent, in full, asking, however, that interest and penalties be waived.

Has the Board of Supervisors the right to so compromise the taxes?

Section 7193-b1 of the Code of 1935 is as follows:

"*Compromising tax on personal property.* When personal property taxes are not a lien upon any real estate and are delinquent for one or more years, the board, may, when it is evident that such tax is not collectible in the usual manner, compromise such tax as provided in Sections 7193-a1 to 7193-a3, inclusive."

It will be noted from an examination of the above section of the statute that in order to secure a compromise of the tax on personal property there must be a showing made to the Board of Supervisors covering three things:

1. That such personal taxes are not a lien upon any real estate.
2. That said personal taxes are delinquent for one or more years.
3. That such personal taxes are not collectible in the usual manner.

In the question submitted, the personal taxes on the fixtures purchased have become a lien against the real estate owned by B. Therefore under the facts as submitted and in view of Section 7193-b1, supra, the Board of Supervisors would be without right or authority to compromise such taxes.

TOWNSHIP ASSESSORS: COMPENSATION OF ASSESSORS: Chapter 89 of the Acts of the 45th General Assembly having been declared void by our court, the assessors would therefore be entitled to have their compensation computed under the provisions of Section 5573 of the Code and on the basis of $4.00 per day as fixed by statute.

March 25, 1937. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* This department is in receipt of your letter asking an opinion upon the following matter:

Are township assessors entitled to be paid upon the basis of $4.00 per day for their services in 1934 and 1935, or should the pay be on the basis of $3.00 as fixed by Section 45 of Chapter 89 of the laws of the 45th General Assembly?

Section 5573 of the statute provides for the compensation of township assessors and is as follows:

"*Compensation of assessor.* Each township assessor shall receive in full for all services required of him by law, a sum to be paid out of the county treasury, and fixed annually by the board of supervisors at its January session, for the current year, on the basis of four dollars for each day of eight hours which said board determines may necessarily be required in the discharge of all official duties of such assessor. * * *"

Section 5669 fixes the compensation of township assessors and assessors of cities of second class, and in that section of the statute it is provided that town assessors and assessors in cities of the second class shall "receive the same compensation as township assessors which shall be determined in the same manner."

The 45th General Assembly by Section 45 of Chapter 89 amended Section 5573 by substituting the words "three dollars" for the words four dollars and determined the pay of assessors on the basis of three dollars per day.

Subsequent to the passage of Chapter 89 of the Acts of the 45th General Assembly, the validity of that act was contested, and in the case of *Smith vs. Thompson*, 258 N. W. 190, the Supreme Court of this State held that Chapter 89 of the 45th General Assembly had never been legally adopted, was unconstitutional and void. The act having been by our court declared void never, therefore, in fact had any real existence and did not in fact amend or change the provisions of Section 5573 of the Code.

The assessors would therefore be entitled to have their compensation computed under the provisions of Section 5573 of the statute and on the basis of $4.00 per day as fixed by the statute.

COUNTY OFFICERS: BOARD OF SUPERVISORS: CLERK OF DISTRICT COURT: VACANCY IN OFFICE: Power to fill vacancy in office of Clerk of District Court lies with Board of Supervisors. Only power of District Court is to appoint someone to take charge of office until Board has acted.

March 25, 1937. *Mr. Geo. Nedderman, Chairman, Board of Supervisors, Albia, Iowa:* This department is in receipt of your request for an opinion upon the following question:

The Clerk of the District Court having resigned, does the Board of Supervisors have authority to fill the vacancy caused by such resignation?

Section 1152 of the 1935 Code provides:

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

"4. *County offices.* In county offices, including justices of the peace and constables, by the board of supervisors.

* * *

"6. *Clerk of the district court.* In the office of the clerk of the district court, by the said court or by a judge thereof, by order entered of record in the court journal which order shall be effective until the vacancy shall be filled in the manner provided by law."

So far as we have been able to find, the question has never been before our court under the statute as it now is. The question of the right to make an appointment to fill a vacancy caused by the resignation of the Clerk of the District Court was before the Supreme Court of this state in the case of *State vs. Brown*, 144 Iowa 739, but at the time the Brown case was before the court the statute was different than it is at the present time. The statute at that time provided:

"* * * a vacancy occurs in the office of the Clerk of the District Court, said court, or judge thereof, may, by order entered of record in the court journal, appoint a suitable and proper person to act as clerk until the vacancy shall be filled in the manner provided by law; * * *"

The court in the Brown case construing the above provision of the statute took the position that the authority of the court or the Judge was to appoint a suitable person to "act as clerk" and not to fill the vacancy, and that the court

having appointed a person to act as clerk, such appointment only continued until such time as the Board of Supervisors filled the vacancy by proper appointment and ruled that the Board of Supervisors was the body clothed with the authority to fill the vacancy.

The Clerk of the District Court is a county officer. Therefore the Clerk of the District Court would be one of those persons included in the term "County offices" in paragraph 4 of Section 1152, and under the provisions of paragraph 4 of the section, it would be the duty of the Board of Supervisors to make the appointment to fill the vacancy caused by the resignation of the Clerk of the District Court.

In the case of *State vs. Brown*, heretofore cited, the appellant advanced the theory that the effect of the statute (Code Section 1272) was to give the District Court exclusive power to fill a vacancy in the Clerk's office, or at least to give the District Court and the Board of Supervisors concurrent authority to make such appointment and that when the court had once acted, and named a proper and suitable person for the place, the Board had no lawful power to supersede it by appointing another person. The trial court in *State vs. Brown* construed the statute as conferring authority to fill the vacancy upon the Board of Supervisors alone and that the authority given to the court in such a case was not to fill the vacancy, but to appoint a person to act as Clerk until the vacancy had been filled according to law. The Supreme Court held that the finding of the lower court was the correct exposition of the Legislative meaning as expressed in the statute.

We find that Section 1272 appeared in the same form in the Code of 1897 and in the Supplement of 1913. But in the Code of 1924 and 1935 we find the provision:

"Vacancies shall be filled by the officer or board named, and in the manner, and under the conditions, following:

* * *

"6. *Clerk of the district court.* In the office of the clerk of the district court, by said court or by a judge thereof, by order entered of record in the court journal which order shall be effective until the vacancy shall be filled in the manner provided by law. * * *"

In other words, there was a change in the statute. The old statute provided that the court should "appoint a suitable and proper person to act as clerk until the vacancy shall be filled in the manner provided by law." The new statute provides:

"by the court, or by a Judge thereof by order entered of record in the court journal which order shall be effective until the vacancy shall be filled in the manner provided by law."

Our opinion is that the effect of the two statutes is the same and the intent of the Legislature was that the District Court should have the right to appoint someone to act as clerk until the vacancy should be filled in the manner provided by law. This same statute, Section 1152 of the 1935 Code, provides that vacancies in county offices shall be filled by the Board of Supervisors. Consequently, the power of the District Court to act is limited by the general provision with reference to the filling of vacancies, and the actual right to fill a vacancy in the office of the Clerk of the District Court lies with the Board of Supervisors. The other provision, in our opinion, is again placed in the statute in order that someone may act as clerk between the time the vacancy

occurs and the time the Board fills the vacancy under the statute. Again referring to the case of *State vs. Brown*, we quote:

"To confer concurrent powers of appointment upon different boards and tribunals would be a clumsy expedient and one sure to give rise to unseemly scrambles and intrigues which it is the policy of the law to discourage, and, as we read it, the statute is not fairly capable of that construction. Still less is it open to the interpretation which clothes the court with exclusive jurisdiction to fill the vacancy. Indeed, when carefully read it will be seen that the court is not authorized to 'fill the vacancy' at all, either temporarily or otherwise. 'Vacancies in county offices' are to be 'filled' by the board of supervisors. When, however, a vacancy occurs in the office of clerk (a county office), the court or judge 'may appoint' a suitable person, not to fill the vacancy, but to 'act as clerk' until the 'vacancy shall be filled as provided by law.' The propriety of this provision can be readily appreciated. Without a clerk all judicial business of the county, practically speaking, comes to a standstill. The board of supervisors is not continually in session, and various circumstances may arise to prevent prompt action on its part. Court may be in session, and, if not, the need of an authorized person in charge of the clerk's office daily during business hours, even in vacation, is a matter of great public importance. The time of appointee's service is necessarily indefinite; the board of supervisors may not soon meet in official session, and when they do meet may be 'deadlocked' between rival candidates; or they may postpone action from time to time, and until they do exercise their statutory power, or until an election intervenes and the place is filled by the voice of the people lawfully expressed, the court's appointment holds good. But when the vacancy is filled in one way or the other the authority of such person to 'act as clerk' is revoked."

Therefore, in view of the decision in this case, we are of the opinion that under the present statute the power of the court is to appoint someone to act as clerk only until the vacancy is filled by the Board of Supervisors. When the Board of Supervisors duly acts and appoints someone to fill the vacancy, the power of the person appointed by the court is revoked. If, in the present case, the Board of Supervisors has acted and has selected someone to fill the vacancy, then, in the opinion of this department, the power of any person appointed by the court is revoked.

We are therefore of the opinion that the power to fill the vacancy lies with the Board of Supervisors under Section 1152 of the Code of 1935, and that the only power of the District Court is to appoint someone to take charge of the office until the Board has acted.

TAXATION: SOLDIER'S EXEMPTION: Soldier entitled to exemption for time he owns property. Note representing moneys and credits of mortgaged property should be taxed and also real estate upon which mortgage is a lien.

March 25, 1937. *Mr. Harry E. Coffie, County Attorney, Estherville, Iowa:* This department is in receipt of your letter requesting an opinion upon the following questions:

On January 1, 1936, a taxpayer was assessed for $1,200.00, moneys and credits which represented a real estate mortgage. The property covered by this mortgage was deeded in satisfaction of the mortgage on March 1, 1936. At that time the owner of the real estate, the mortgagor, was entitled to a soldier's exemption.

1. Is the exemption good for the whole year?

Section 6946 of the 1935 Code grants to soldiers certain specific exemptions of property from taxation. Section 6947 is as follows:

"*Reduction—limitation.* All persons named in Section 6946 shall receive a reduction equal to their exemption, to be made from the homestead, if any; otherwise from other property owned by said persons. Such exemption shall

extend only to the period during which such persons remain the owners of such property."

Ordinarily the status of a taxpayer is fixed as of January 1st of the year in which he is assessed. If that rule is to be followed and the person entitled to a soldier's exemption was the owner of the property on the first day of January, he would be entitled to have deducted from the valuation thereof his exemption and the remainder would be the basis for taxation for the year. However, the statute is specific in its wording and limits the exemption to the period during which such person remains the owner of such property. We think the limitation placed by statute applies to the duration of time and that such person is entitled to his exemption during the time he owns the property and if that time be less than the full year his exemption would be determined by dividing the amount of his exemption by the proportionate part of the year during which he had been the owner of the property and that the exemption does not apply for the full year where such person did not own the property during all of the year.

2. Must the taxpayer pay taxes on both the moneys and credits and the property for the year 1936?

As stated above, the status of the taxpayer is fixed as of January 1st of the taxable year. On January 1st there was a mortgage of $1,200.00 which represented a tax unit of that amount for which the taxpayer was properly assessed. On January 1st there was also the mortgaged property which was of itself a tax unit and for which the owner was properly and legally assessed. The fact that during the taxable year the property was deeded in satisfaction of the mortgage would not change the status of the units.

It is therefore our opinion that the note representing moneys and credits should be taxed and that the real estate upon which the mortgage was a lien should likewise be taxed.

3. If both the moneys and credits and real estate should not be taxed, which one of such properties should be taxed?

Our answer to the previous question disposes of question No. 3.

TAXATION: CITIES AND TOWNS: LOTS: Use of word "lots" in Section 6210 refers to cutting up of property into small tracts of 10 acres or less for purpose of disposing of same as city property. No land in city limits which has not been laid off into lots of 10 acres or less or which has not been divided into 10 acres or less by streets and alleys, and which is used for agricultural purposes shall be taxable for city purposes.

March 26, 1937. *Mr. Harold Bickford, County Attorney, Villisca, Iowa:* This department is in receipt of your letter asking an opinion upon the following questions:

There are two tracts of land located within the town limits of the town of Stanton, the legal description of which is as follows: Sub-lot 1 of Lot 1, 5.17 acres; Sub-lot 4 of Lot 1, 19.07 acres. Both properties are owned by the same person. Sub-lot 1 of Lot 1 joins the other property on the northeast corner thereof and extends out to highway No. 120. The owner's residence is located upon sub-lot 1 of lot 1. All of the land involved, except the portion occupied by the dwelling house and outbuildings, is used for agricultural purposes.

1. Should sub-lot 1 of lot 1, being 5.17 acres, be assessed for city purposes under the facts as set out above?

In answering the above question, we direct your attention to Section 6210 of the 1935 Code. Without quoting this section, it is there stated that no land included within the limits of any city or town which shall not have been laid

off into lots of ten acres or less, or which have not been divided into ten acres or less by streets and alleys and which is in good faith used for agricultural purposes shall be taxable for city purposes.

Therefore, under the facts submitted, sub-lot 1 of lot 1, standing alone, being less than ten acres, and in fact only 5.17 acres, would be subject to city taxes as other real estate is taxed. However, inasmuch as the two tracts of land hereinbefore described are contiguous and constitute a tract of more than ten acres used exclusively for agricultural purposes, it is our opinion that the owner would be entitled to have sub-lot 1 of lot 1 and sub-lot 4 of lot 1 taxed as one tract and that it should not be subject to the city taxes.

2. Does the word "lots" in Section 6210 mean parcels of land legally described, or does it mean parcels of land of certain physical dimensions, regardless of how many legally described lots it is made up of?

The word "lots" when used with reference to real estate is often and can properly be used to designate more than one thing. A tract of land is frequently referred to as a lot of land. The statute authorizes the county auditor, for convenience, to cause a tract of land to be lotted for the purpose of taxation. Therefore under the official platting upon the request of the county auditor, a tract of land would be lotted and such lots contain any number of acres which the surveyor doing the work might see fit to put into a certain description for the convenience of the county auditor. Again when land is laid out and dedicated to public use the same is, as a rule, divided into blocks and lots with certain designated dimensions such as business lots and city lots.

In view of the fact that in a large number of instances arising under Section 6210 the right to tax is determined by the use to which the property is put, the benefits which it derives from city improvement, and matters of like character, it is our opinion that the use of the word "lots" in Section 6210 refers to the cutting up of property into small tracts of ten acres or less for the purpose of disposing of the same as city property and does not refer to property that is described, for the sake of convenience, as a lot or a sub-division of a lot.

TAXATION: SOLDIERS' EXEMPTION: One who was inducted into the military service on November 11, 1918 and later given a discharge from draft and did not actually serve in the War with Germany never in fact became a part of the United States Military forces and would not be entitled to the soldiers' exemption on his property.

March 26, 1937. *Mr. Joseph P. Hand, County Attorney, Emmetsburg, Iowa:* This department is in receipt of your request for an opinion upon the following matter:

Clarence McCullough was inducted into the military service of the United States from Emmetsburg on the 11th day of November, 1918 and was given a "Discharge from Draft" at Fort MacArthur, California on the 29th day of January, 1919 and was paid $1.00 in full of his compensation at the time of discharge.

Is Mr. McCullough, under the facts stated, entitled to a tax exemption on his property on the grounds of having been a soldier in the war with Germany?

Actual hostilities between the United States, Germany and Austria ceased on November 11, 1918 and an armistice was agreed upon between the warring factions. The peace treaty, however was not agreed to until July 2, 1921. Following November 11, 1918 the United States' Military forces served in France, and also the Army of Occupation in Germany. The facts as stated above would

indicate however that the applicant did not serve with either of these organizations.

It is apparent from the facts stated and the "discharge from draft" submitted that Mr. McCullough did not actually serve in the war with Germany. It is therefore our opinion that Mr. McCullough is not entitled to the benefits of the soldier's exemption on his property.

COUNTY OFFICERS: COUNTY RECORDER: The county recorder is a ministerial officer, not expected to determine the legal effect of instruments appearing of record in his office. There are no provisions in the statute which authorize the county recorder to determine the validity, effect or priority of the instruments tendered to him.

March 26, 1937. *Mr. Harold J. Fleck, County Attorney, Oskaloosa, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Individuals, corporations, and Government Agencies are asking that the county recorder issue certificates with reference to incumbrances and all priorities thereof as they appear of record in the recorder's office. The particular certificate up for consideration at this time is as follows:

"I hereby certify .... that I have carefully examined the proper lien records of this county and have found at the same date and hour written above no prior liens or incumbrances on the 1937 and 1938 crops or livestock covered by said lien instrument which have not been waived in favor of the lien created by said instrument or otherwise made subordinate thereto."

Section 5171 of the Code of 1935 fixes the duties of the county recorder and is as follows:

"*General duties.* The recorder shall keep his office at the county seat, and shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law."

The duties of the county recorder being thus described, it would follow that the duty of the county recorder is primarily that of placing of record instruments presented to him for that purpose. He must, however, be clothed with such additional authority as would enable him to determine the proper place in which to record such instruments and to furnish to the public such aid as is necessary in getting information from the records of his office.

The certificate enclosed with the question goes beyond what we feel are the duties of a county recorder. In such certificate the county recorder is asked to certify over his official signature that there are no prior liens or incumbrances on the 1937 and 1938 crops or livestock covered by the instrument which he is recording.

The county recorder is a ministerial officer, not selected for the position on account of his qualifications to determine the legal effect of instruments appearing of record in his office. It is a matter of common knowledge, particularly among the members of the Bar, that the determination of the priority of liens upon chattels is a very technical matter and one hard to determine, and in a great many instances turns upon the facts peculiar to each particular case. There are no provisions in the statute which authorize the county recorder to determine the validity, effect or priority of the instruments tendered to him.

We are therefore of the opinion that the county recorder is not required to execute such certificate as the above and that in so doing he is going beyond the duties imposed upon him by law.

TAXATION: VETERANS: HOMESTEAD: TAX EXEMPTION: A World War veteran who is entitled to an exemption of $500.00 on the value of his property for taxation purposes may claim under the same to the extent of the actual value of his homestead of $500.00 or if the homestead be less, he may then apply the remainder upon any property owned by him.

March 26, 1937. *Mr. J. J. Miller, Executive Secretary, Bonus Board:* This department is in receipt of your letter asking an opinion upon the following facts:

A world war veteran owns a piece of property in Albia, the assessed value of which is $400.00. A short time ago he moved to Oskaloosa and purchased a property. The veteran now wishes to claim an exemption for the full amount of the assessed value of the property at Albia, to-wit, $400.00 and the balance of $100.00 as an exemption on the property at Oskaloosa.

Is this veteran entitled to claim exemption in both counties?

The statute, Section 6946, makes provisions for exemptions in the following language:

"The following exemptions from taxation shall be allowed:

* * *

3. The property, not to exceed five hundred dollars in actual value, of any honorably discharged soldier, sailor, marine, or nurse of the war with Germany."

Section 6947 of the Code is as follows:

"*Reduction—limitation.* All persons named in Section 6946 shall receive a reduction equal to their exemption, to be made from the homestead, if any; otherwise from other property owned by said persons. * * *"

The exemption allowed by Section 6946 is fixed at not to exceed $500.00, but Section 6947 places a limitation upon such exemption and specifically provides that the exemption is "to be made from the homestead." That is the first instance wherein the exemption is to be taken and in the event of a veteran owning a homestead, he would be required to take his exemption from the valuation of his homestead. The statute then provides that if there is no homestead, the exemption may be taken from other property owned by such veteran.

It is apparent from the wording of the statute that a world war veteran is entitled to have property of the value of $500.00 exempted from taxation. The purpose of requiring the exemption in the first instance to be taken from the homestead was no doubt an effort on the part of the Legislature to protect the homestead for the benefit of the veteran and his family. If one so unfortunate as to own a homestead of an actual value of less than $500.00 was not permitted to take the remainder from other properties, there would be a discrimination among those entitled to such exemption. Therefore, if a veteran owns a homestead and other property, it would appear that the exemption must first be claimed on the homestead property, and the taxpayer permitted to claim the remainder of the exemption, if any, against any other property owned by him.

It is therefore the opinion of this department that a world war veteran who is entitled to an exemption of $500.00 on the value of his property for taxation purposes may claim under the same to the extent of the actual value of his homestead in the amount of $500.00, or if the value of the homestead be less than $500.00 that he may then apply the remainder or overplus upon any property owned by him.

STATE FUNDS: APPROPRIATION OF FUNDS: COMPTROLLER: Any funds on hand by the different departments, except otherwise specifically provided by law, during the biennium beginning July 1, 1935, and ending June 30, 1937, are not to be turned over to the state treasurer until 6 months after

expiration of the biennium, which is at close of business on December 31, 1937.

March 26, 1937. *Mr. C. B. Murtagh, State Comptroller:* We are in receipt of your request for an opinion on the following proposition: Should the unexpended and unencumbered balance for the biennium ending June 30, 1937, be turned over to the general fund of the state treasury at the expiration of each fiscal year?

Section 84-e26 of the Code of 1935 states as follows:

"All unincumbered balances of annual administration, operation and maintenance appropriations except those of the state conservation commission and except those for the state fair board shall revert to the state treasury at the end of each fiscal year of a given biennium and to the credit of the general fund or special funds from which the appropriation and/or appropriations were made; except that capital expenditures for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made; provided, that this section shall not be construed to repeal the provisions of Sections 290 to 293, inclusive."

and Section 84-a1 states as follows:

"Except when otherwise provided by law, the comptroller shall transfer to the general fund of the state any unexpended balance of any annual or biennial appropriation remaining at the expiration of six months after the close of the fiscal period for which the appropriation was made. At the time the transfer is made on the books of his office he shall certify such fact to the treasurer of state, who shall make corresponding entries on the books of the treasurer's office."

Chapter 126 of the laws of the 46th General Assembly is the appropriation act for the biennium, and Section 1, in part thereof, states as follows:

"is hereby appropriated for the biennium beginning July 1, 1935, and ending June 30, 1937, in the following manner, and for the following uses, to-wit: * * *"

It will be noted that Section 62 of said chapter 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."

Section 54 of said act reads as follows:

"No obligation of any kind, whatsoever, shall be incurred or created subsequent to June 30, 1937, against any appropriation made by this act, unless otherwise specifically provided by law, and, on June 30, 1937, it shall be the duty of the head of each department, board or commission, receiving appropriations under the provisions of this act, to file with the state comptroller a list of all expenditures for which warrants have not been drawn."

and Section 55 thereof reads as follows:

"Except where otherwise specifically provided by law, all appropriations made by this act, remaining unexpended or unobligated, at the close of business on December 31, 1937, shall revert to and become a part of the general fund in the state treasury."

We understand that it has been the policy of the comptroller's office to allow the different departments to retain the unexpended balance remaining at the expiration of the first fiscal year of the biennium, and to use the same, if necessary, during the second fiscal year of the biennium. The question is whether the comptroller should require the different departments to turn over to the state treasurer the unexpended balance at the expiration of the first fiscal year due to the fact that their second appropriation begins on July 1st.

The legislature saw fit in this appropriation to set out exactly what should be done under such circumstances. The intent is quite clear from Section 54

thereof, which requires heads of departments to file with the comptroller a list of all expenditures for which warrants have not been drawn on June 30, 1937. It will be noted that nothing is said therein about filing the same at the end of the first fiscal year, to-wit: June 30, 1936. Had the legislature intended that the same was to be done at the end of the first fiscal year, they certainly would have said so, and according to that section there is no duty on the part of the department to file with the state comptroller a list of the expenditures for which warrants have not been drawn.

Of course the purpose of filing the list with the comptroller is so that warrants can be drawn on the funds appropriated to June 30, 1937, for the six months' period for the filing of claims as is provided by law. Section 55 states that unexpended or unobligated funds at the close of business on December 31, 1937, shall revert to and become part of the general fund in the state treasury. No such provision is contained in the act for funds to so revert that were appropriated for the first fiscal year of the biennium and, therefor, it is only logical to say that the intention of the legislature was that those funds were appropriated for the biennium and none of them were to revert to the state treasury until December 31, 1937.

In that same section it will be noted that the wording in part is "except where otherwise specifically provided by law." The legislature, in including that phrase in the paragraph, is speaking about the exception of the state conservation commission and the state fair board, and also those classes of cases as are set out in Sections 290 to 294, inclusive, of the Code of 1935, and the exception contained in the last part of Section 84-e26.

The part of the act under consideration is a legislative act, and not an administrative one. Possibly it can be said, although it has never been held as such in Iowa, that the act of making appropriations by the legislature is the performance of an administrative act and not a legislative one. Be that as it may, the part of this act that deals with the subject matter contained in this opinion is clearly a legislative function and a legislative act. Laws of the state in conflict with this act were suspended for the purpose of this act, and with such a section in it was not necessary to in any way repeal or modify Sections 84-e26 and 84-a1, as they stand unimpaired except only so far as this act is in conflict therewith. It is therefore our opinion that any funds on hand by the different departments, except only the state conservation commission, state fair board, those set out in the last part of Section 84-e26, or any commissions that are provided in Sections 290 to 294, inclusive, during the biennium beginning July 1, 1935, and ending June 30, 1937, are not to be turned over to the state treasurer until six months after the expiration of the biennium which is at the close of the business on December 31, 1937. And further, that unexpended balances from the first fiscal year may be used during the second fiscal year of the biennium.

COUNTIES: POOR RELIEF: LEGAL SETTLEMENT: Family had legal settlement in Dallas County and moved to farm in Madison County where they were granted a farm loan through government agency and remained there 2 years without relief or a non-resident notice. Rural Resettlement Administration foreclosed its loan. Sections 5311-16, inclusive, Code. Family acquired legal settlement in Madison County and since it is the statutory duty of each county to assist poor persons having settlement in that county, that duty in this case devolves upon Madison County.

March 27, 1937. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* This department acknowledges receipt of your request for an opinion on the question raised by the following statement of facts:

"The Dallas County Relief Office has asked me to secure an opinion from you as to the legal settlement of a family now residing in Madison County, Iowa. The Madison County Relief officials refuse to grant this family relief until an opinion has been given by your office.

"The facts are as follows:

"The family had a legal settlement in Dallas County, Iowa before they moved to Madison County in March, 1935. In March, 1935, they were granted a farm loan through the Rural Resettlement Administration, a government loan agency, and moved to a farm in Madison County. They lived there until March, 1937, a period of two years, without relief or a non-resident notice. The Rural Resettlement Administration has foreclosed on their loan and repossessed their stock and farm equipment so that the family is in need of relief. Madison County claims that because of the government assistance granted this family through the loan that the residence of the family is Dallas County.

"I feel that the two years' residence in Madison County has established their legal settlement there.

"I will appreciate your advice on this matter as soon as convenient."

Section 5311, Code, 1935, provides in part as follows:

"*Settlement—how acquired.* 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.

"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."

Section 5312 provides:

"*Settlement continues.* 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."

Section 5313 provides in part:

"*Foreign paupers.*

1. Any person who is a county charge or likely to become such, coming from another state and not having acquired a settlement in any county of this state or any such person having acquired a settlement in any county of this state who removes to another county, may be removed from this state or from the county into which such person has moved, as the case may be, at the expense of the county wherein said person is found, upon the petition of said county to the district or superior court of that county. * * *"

Section 5315 provides:

"*Notice to depart.* Persons coming into the state, or going from one county to aonther, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township, or city in which such persons are found warning them to depart therefrom. After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning."

Section 5316 provides in part:

"*Service of notice.* Such warning shall be in writing, and may be served

upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors, which, if not made by a sworn officer, must be verified by affidavit. * * *"

The foregoing sections from Chapter 267, Code, 1935, entitled "Support of the Poor" are clear, and a careful reading of Section 5311 and 5315 discloses that a person coming from one county to another who is a county charge or likely to become such, *may be prevented from acquiring a settlement* by the authorities of the county in which such person is found, warning him to depart therefrom by service of notice as provided in said Section 5315. One year's continuous residence without being warned to depart establishes a legal settlement. Section 5311 supra.

It is, therefore, the opinion of this department that under the stated facts and without a showing that the authorities of Madison County served or caused to be served, the notice referred to in Section 5315, supra, and as provided in Section 5316, supra, the family concerned acquired a legal settlement in Madison County. Parenthetically, it should be stated that the legal settlement of a married woman and that of minor children is the same as that of the husband and the father. Section 5311, subsections 4 and 5.

The fact that the family involved was rehabilitated by reason of a loan procured through the Rural Resettlement Administration, a federal agency, would not bring the family within the purview of subsection 3 of Section 5311, supra, which subsection 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."

The grant from that agency is an outright loan secured or unsecured as the case may be, and cannot be construed to be support by public funds within the meaning of the aforesaid subsection.

It is the further opinion of this department that since it is the statutory duty of each county to assist poor persons having a settlement in that county, that duty in the instant case devolves upon Madison County. *Cass County vs. Audubon County* (1936), 266 N. W. 293, at 295.

BOARD OF SUPERVISORS: MEETING OF: Section 5118 prescribes the number and dates when meetings of the Board of Supervisors shall be held during the year. Special meetings may be held as provided by law, Section 5119. All meetings of the Board are required to be at the court house. There is no particular or legal way in which committees are appointed, except the record should show that they have been so designated as a committee.

March 27, 1937. *Mr. John E. Myers, County Auditor, Mt. Pleasant, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. How should the meetings of the Board of Supervisors be called?

Section 5118 of the statute requires that the Board of Supervisors shall meet on the second secular day in January and on the first Monday in April and the second Monday in June, September, and November in each year and shall hold such special meetings as are provided by law. Section 5119 provides for special sessions and is as follows:

"*Special sessions.* Special sessions of the board of supervisors shall be held only when requested by the chairman or a majority of the board, which request shall be in writing addressed to the county auditor, shall fix the date of meeting and shall specify the objects thereof, which may include the doing of any act not required by law to be done at a regular meeting."

Section 5120 of the statute then prescribes the notice that is necessary when a special session is requested. Special sessions, however, must not be confused with adjourned sessions. The Board of Supervisors may, at any of its meetings, adjourn until some future date. All meetings of the Board are required to be at the court house in the county seat.

2. Can the Board of Supervisors appoint its various members as a committee of one to look after matters in their respective districts?

The Board of Supervisors has such power, but a member acting as a committee of one is without authority to bind the county and must submit matters to the Board when in session for its consideration. It then becomes the action of the Board of Supervisors and is made of record in the minute book of the Board proceedings. There is no particular way or legal way in which committees are appointed, except the record should show that they have been so designated as a committee. When the various members of the Board are doing committee work, they should make a report of the matters in which they have been investigating and the recommendation with reference thereto. That should be a matter of record in the Board proceedings. Their claims for committee work should designate the particular committee work they have been doing.

The statute is very indefinite with reference to the records to be made by Boards of Supervisors with reference to committee work, but unless some report is made to the Board, or unless the claims for compensation for committee work are itemized to such an extent that one interested could by an investigation thereof determine what such committee work consisted of, it leaves the door open for padded pay rolls and fraud.

TAXATION: A company leasing a building in a city and moving stock of merchandise to said building, making additions thereto and also making sales therefrom and moving stock to some other point during late summer would not be subject to taxation by said city.

March 27, 1937. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* This department is in receipt of your request for an opinion upon the following question:

The Earl May Company leases a building in the city of Cherokee, and on or about the 15th day of January moves a stock of merchandise to said building, making additions thereto from time to time, and also making sales therefrom. As a rule, the remainder of the stock is moved to some other point during the late summer.

Can the property be taxed and the tax collected in Cherokee County?

Section 6966 of the statute provides:

"*Business in different districts.* When a person, firm, or corporation is doing business in more than one assessment district, the property and credits existing in any one of such districts, or arising from business done in such district, shall be listed and taxed in that district, * * *"

It is a matter of common knowledge that the principal store of the Earl May Company is located in the city of Shenandoah. It would, therefore, under the facts stated, be doing business in more than one assessment district. The property and business carried on by it in the city of Cherokee for the purpose

of taxation would be a separate and distinct item from that carried on at its store in Shenandoah.

However, the statute with reference to the taxation of personal property is as follows:

"6959. Personal property * * *. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *"

It appears that the Earl May Company moved its property into a building in the city of Cherokee on or about the 15th day of January. As to where this property originated or who was the owner of the same on the first day of January cannot be determined from the facts submitted. The property could possibly have been transferred from the main store in Shenandoah, or the ownership thereof acquired subsequent to the first day of January last.

In either event, it is the opinion of this department that the property would not be subject to taxation in Cherokee County.

TOWNSHIP ASSESSOR: VACANCIES IN OFFICES: If it is the intention of assessors to move permanently out of their districts, that office becomes vacant.

March 31, 1937. *Mr. J. W. Pattie, County Attorney, Marshalltown, Iowa:* We are in receipt of your request for an opinion on the following proposition:

"Two of our township assessors have moved from the townships for which they were elected. Both have about completed the listing of properties in their roll books, but there are other duties not completed.

"Will you please advise if their removals will constitute vacancies within the meaning of the law, and if appointments to fill vacancies must be made by the Boards of Township Trustees."

Section 1146 states as follows:

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

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

The case of *Independent School District of Manning vs. Miller*, 178 N. W. 323, 189 Iowa 123, dealing with that very point states as follows on page 326 thereof:

"Such is the evidence on which the trial court based its finding that appellant had changed his residence. That he in fact moved from Manning to Denison about June 1, 1919, is not controverted. If this was a mere temporary absence, it was not sufficient to create a vacancy. *State vs. Hemsworth*, 112 Iowa 1, 83 N. W. 728. It is sufficient if he removes from the district where the duties of his office are to be exercised permanently without the intention of returning. *Curry vs. Stewart*, 8 Bush (Ky.) 560; *Inhabitants of Barre vs. Inhabitants of Greenwich*, 18 Mass. (1 Pick.) 129. If he has left such district without intention of returning, and yet not taken up his permanent abode elsewhere, the office will have become vacant, for all that is necessary in order to render the office vacant is that the incumbent cease to be a resident of his district. This may happen without having acquired a domicile elsewhere, as seems to be essential to lose the right to vote. See *State vs. Savre*, 129 Iowa 122, 105 N. W. 387, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452."

It is therefore our opinion that if it was the intention of the assessors to move permanently out of their districts that that office became vacant.

Section 1152 states in part as follows:

"Vacancies shall be filled by the officer or board named and in the manner and under the conditions following: * * *

"7. In township offices, including trustees, by the trustees, but where the offices of the three trustees are all vacant, the county auditor shall appoint."

Township assessors hold a township office as set out in Section 525 of the Code and are elected bi-annually as is provided in Section 504 of the Code.

It is therefore the opinion of this department that, if from all of the facts, it is established that an assessor removes from his district with the intention of establishing his residence elsewhere, that a vacancy in the office of assessor results, and that an appointment to fill such vacancy would be made by the township trustees.

LICENSED PUBLIC SCALES: FEE CHARGED PATROLMEN: Owner of licensed public scales may charge patrolmen a fee for the use thereof.

March 31, 1937. *Mr. Joseph P. Hand, County Attorney, Emmetsburg, Iowa:* We are in receipt of your request for an opinion on the following proposition:

May a person with a licensed public scales charge a state patrolman a fee for weighing trucks brought to said scales by the highway patrolman for the purpose of determining whether or not the truck is overloaded.

It is our opinion that the owner of such a scales may charge a fee for such weighing, and we know of no provision of law requiring him to weigh such trucks without compensation.

SMALL LOAN LICENSES: PARTNERSHIPS: Small loan licenses not transferable or assignable.

April 1, 1937. *Mr. D. W. Bates, Superintendent of Banking:* We are in receipt of a communication from your office asking for an opinion on whether or not either member of a partnership, which dissolved on March 1, 1937, is entitled to the small loan license issued by your department under date of December 30, 1934. Chapter 419-F1 is the chapter that pertains to chattel loans. Section 9438-f5 thereof states as follows:

"Such license shall state the address of the place where the business of making such loans is to be conducted and shall state fully the name of the licensee, and if the licensee is a copartnership or association, the names of the members thereof, and if a corporation, the date and place of its incorporation. Such license shall be kept conspicuously posted in such place of business and shall not be transferable or assignable."

The license, therefore, is not transferable or assignable.

The only other question left is whether or not a member or the members of a partnership are one and the same thing as the partnership itself. The law is well settled that a partnership is a separate and distinct entity. *Smith vs. Smith*, 160 N. W. 756, 179 Iowa 1365; *Jensen vs. Wiersma*, 170 N. W. 780, 185 Iowa 551; *State vs. Pierson*, 216 N. W. 43, 204 Iowa 837; *Bankers Trust Company vs. Knee*, 263 N. W. 549, * * * Iowa.

In the *Jensen vs. Wiersma* case, supra, the defendant, being the sheriff, levied on partnership property. Two members of the partnership filed their individual exemption, and the court held that a partnership was a legal entity, and the members thereof could not set up their individual exemption from attachment.

It is therefore our opinion that a small loan license is not transferable or assignable, and that no member of a partnership to which was granted the license is entitled to operate under that license, but must secure a distinct and separate license.

COUNTY OFFICERS: CORONER: FEES: The facts and circumstances of each case as shown by the certified report returned by the coroner should govern in determining and fixing the amount of compensation to which he is entitled.

April 1, 1937. *Mr. Arthur F. Janssen, County Attorney, Maquoketa, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Is the coroner entitled to a fee of $10.00 for viewing a body where a report is made but no inquest held, or would the fee be limited to $5.00?

In answering the foregoing question your attention is called to Section 5237 of the statute:

"*Coroner—fees.* The coroner is entitled to charge and receive as his compensation the following fees, which shall be paid out of the county treasury, * * *

1. For examining each dead body upon which no inquest is held, where there is no medical attendant at death and where such examination is necessary to comply with Chapter 110, the sum of five dollars.
2. For examining each dead body upon which an inquest is held or where the death occurred under such suspicious circumstances as to make advisable prompt investigation of the facts and the preservation of weapons and finger prints, including investigating, preserving weapons, finger prints and evidence of crime and tragic death and making a permanent memoranda of any important identification marks, evidence, conditions, suspicious circumstances and other significant facts observed by the coroner in viewing the dead body and the location where found, the sum of ten dollars. * * *"

The question of the compensation of the county coroner for his services in connection with the matters recited in the above statute must rest and be determined upon the peculiar facts presented in each instance. The payment of the fees is not within the discretion of the board of supervisors. The obligation of the board of supervisors is a mandatory one. Likewise, the duties required of the coroner are to a large extent mandatory.

In the first instance recited in the statute heretofore quoted, the coroner is called upon to view a dead body where there was no medical attendant present at the time of the death in order that the proper death certificates required by law may be executed by the coroner. For this service he is entitled to the sum of $5.00. Under the second provision of the quoted statute, the coroner is clothed with a discretion. He may call an inquest. If he does, he is entitled to receive $10.00. On the other hand, the circumstances might be such that it would be useless to hold an inquest, yet there might be present such suspicious circumstances as to make it advisable to investigate the facts with a view of ascertaining whether the decedent had met with foul play and whether there was present any evidence of such foul play. Also if the decedent be unknown whether there are any marks of identification upon the body or clothing. Such cases might be classed as emergencies and call for the prompt action and attention of the coroner. It is a matter in which the utmost good faith is required of the coroner. It is also one in which he is given a discretion of holding an inquest or making the investigation himself.

It is therefore the opinion of this department that the facts and circumstances of each case as shown by the certified report returned by the coroner should govern in determining and fixing the amount of compensation to which he is entitled.

COUNTY OFFICERS: SHERIFFS: FEES: A sheriff is allowed a total of sixty cents per day for feeding each prisoner. There is no statute providing for the manner in which such prisoner shall be fed. Regardless of the manner in which such food is given to the prisoners, the sheriff's compensation therefor is fixed at twenty cents per meal per prisoner.

April 1, 1937. *Mr. Geo. B. Aden, County Attorney, Webster City, Iowa:* This department is in receipt of your request for an opinion upon the following question:

The Hamilton County jail is a separate construction apart from the court house and also apart from the sheriff's residence. It has been the custom of the sheriff to take provisions to the jail and permit the prisoners to cook their own meals. The cooking is done with gas for which the county has been billed and which the county has paid. Should the cost of the gas consumed in the preparation of the meals by the prisoners have been paid by the sheriff or by the county? The custom has been for the county to pay this expense.

In addition to the compensation fixed by law for sheriffs, they are entitled to receive fees in addition to such salary under certain conditions. Section 5191 of the 1935 Code provides:

"*Fees.* The sheriff shall charge and be entitled to collect the following fees: * * *

"11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; * * *"

It will thus be seen that the sheriff is allowed a total of sixty cents per day for feeding each prisoner entrusted to his care. There is no statute providing for the manner in which such prisoners shall be fed, whether the sheriff should have the food prepared and taken in to them or whether they be taken out some place to eat, or whether the prisoners prepare the food themselves. Regardless of the manner in which such food is given to the prisoners, the sheriff's compensation therefore is fixed at twenty cents per meal per prisoner.

If the sheriffs in the past and the present sheriff have elected to furnish the provisions and permit the prisoners to do their own cooking and prepare their own meals, it would necessarily follow that the sheriff should furnish everything necessary to be used in the preparation of such food for consumption. If the sheriff is not to be charged with the gas with which the food is cooked, it might well be said that he should not be charged with certain items of provisions entering into the meals of the prisoners. It cannot be assumed that the prisoners are to eat raw food. The element which is used in the cooking of the food is as much an expense of the preparation of the food as is the substance that goes into the food. The fact that the present sheriff has followed a precedent which is in violation of the statute is no excuse.

It is therefore our opinion that the sheriff is liable for the expense of the gas consumed in the preparation of the meals for the prisoners and that it would make no difference if the prior sheriffs have followed the custom of having the gas consumed charged to the county or that the meals served by the sheriff cost him more than the amount allowed by statute.

BLIND PENSION: RESIDENCE REQUIREMENTS: Relief furnished to blind persons is not in same category as relief to poor. If applicant for blind pension fulfills residence requirements of statutes pertaining to blind, determination as to whether or not such aid is to be authorized should be made by Board of Supervisors of county of residence.

April 2, 1937. *Mr. Guy C. Richardson, County Attorney, Jefferson, Iowa:*

We acknowledge receipt of your letter in which you ask for an opinion under the following statement of facts—

About three years ago a family moved from Greene County to Guthrie County, taking with them their blind son. About a year after the family went to Guthrie County a notice was served on the boy himself to keep him from obtaining a residence in Guthrie County.

Last year during the summer the boy made application to the auditor in Guthrie County for a blind pension. The matter was referred to the Examiner of the Blind who found the applicant to be blind. The application was accompanied by the necessary affidavits and the board referred the matter to the Overseer of the Poor in Guthrie County.

Aid has been refused for the reason that Guthrie County claims the applicant is not a charge of said county.

For the purpose of the blind pension, is the boy entitled to the benefit in Guthrie County or in Greene County?

The age of the blind person is not given. If the notice to depart was served upon the boy when he was a minor, and in the absence of a notice being served upon his father, he could acquire a settlement in Guthrie County by virtue of the provisions of Section 5311, paragraph 5, 1935 Code, which provides—

"5311. *Settlement—how acquired.* A legal settlement in this state may be acquired as follows:

* * *

"5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother. * * *"

If the boy was under twenty-one for a period of one year after residing in Guthrie County and no notice to depart was served on his father, then his legal settlement is Guthrie County, and the question may be disposed of upon that basis.

We shall assume that the blind person was not a minor, and that the notice was served upon him within a year after his coming to Guthrie County. Under these circumstances it seems clear that Guthrie County would not be chargeable with the expense if such expense is for the "relief and care of a poor person."

"5315. *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."

"5319. *County of settlement liable.* The county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person, and for the charges of removal and expenses of support incurred."

The question to be determined is whether or not the aid for the blind, provided in Chapter 272, 1935 Code, is subject to the general provisions of Chapter 267 dealing with the support of the poor.

"5379. *Aid authorized.* Any person declared to be blind, under the provisions of this chapter, if male over twenty-one and if female over eighteen years of age, who is not a charge of any charitable institution, and has not an income of over three hundred dollars per annum, and who has resided in Iowa five years and *in the county one year immediately before applying therefor,* may receive as a benefit the sum of not more than three hundred dollars per annum as the board of supervisors may determine."

"5382. *Application for relief.* Any person claiming benefits under the provisions of this chapter may go before the auditor *of the county of his residence* and make affidavit to the facts which bring him within its provisions, which

shall be deemed an application for the benefit. The affidavit shall be accompanied by the affidavits of two reputable citizens, residents of the county, that they have known said applicant to be a resident of the state for five years and of the county for one year immediately preceding the filing of the application. The auditor shall present the matter to the board of supervisors, which shall refer the application to the examiner of the blind."

It is to be noted that the above sections pertaining to aid for the blind make no reference to the county of settlement. They provide that such aid may be granted upon the basis of the applicant's residence in the county. Regardless of the county of settlement of this applicant, Greene County cannot allow the relief since the applicant cannot meet the requirement of the one year's residence, which must immediately precede the making of the application.

In view of the foregoing, it is the opinion of this department that the relief furnished to blind persons, as provided in Chapter 272, is not in the same category as the relief furnished to poor persons as contemplated by Chapter 267; that this applicant, by residing in Guthrie County for one year immediately preceding his application, fulfilled the residence requirements of the statutes pertaining to aid for the blind; that the application for the blind pension was properly made in Guthrie County, and the determination as to whether or not such aid is to be authorized should be made by the Board of Supervisors of Guthrie County.

BOARD OF SUPERVISORS: BOARD OF APPROVAL: ROADS: TOWNSHIP REPRESENTATIVES: RIGHT OF VOTE: It is the opinion of this department that township representatives appointed on the board of approval should have equal voice with the board of supervisors. Sections 4644-c33, 4644-c24, 4644-c32.

April 2, 1937. *Mr. Frank D. Riley, County Attorney, Clarion, Iowa:* This department acknowledges receipt of your letter wherein you request an opinion on the question whether the township representatives when meeting with the board of supervisors, as provided in Section 4644-c33 of the 1935 Code, have a vote.

Said section from Chapter 240, Code, 1935, provides as follows:

"*Provisional determination and hearing.* Upon the filing of said report the board shall together with a representative from each township, who shall be named by the board of trustees, at their January meeting, convene as a board of approval.

"The township representatives shall receive the same per diem and mileage for attendance at said meeting as received by the members of the board of supervisors, and shall be paid from the construction fund."

It is following the preliminary procedure prescribed in Sections 4644-c24 to 4644-c32, inclusive, and upon the filing of the report by the county engineer, as provided in Section 4644-c29, that the board of supervisors *together with a representative from each township* convene as a board of approval to proceed to the final adoption of the secondary road construction program or project. Section 4644-c34 of Chapter 240 provides in part as follows:

"*Board's action final.* At this meeting this board of approval shall proceed to the final adoption of the program as it pertains to the local county roads to be paid for from the thirty-five per cent of the secondary road construction fund which is dedicated to local county roads.

"The proposed program or project may be approved without change or may be amended and approved but the action of this board shall be final except as it applies to the sixty-five per cent of the secondary road construction fund to be expended under the direction of the board of supervisors."

To say that only those members of the board of approval, who are in turn members of the board of supervisors, may move the adoption of the program or project as it pertains to local county roads, would be to endow the board of supervisors with the power which the mandate of the legislature expressly conferred upon the board of approval. It is accordingly the opinion of this department that each duly selected representative from each township named by the board of trustees of such township, at its January meeting, who sits as a member of the board of approval, has an equal voice with each other member of the board of approval whether such other member be a supervisor or another named township representative, and that the action taken by this board of approval so composed is final insofar as it pertains to the local county roads to be paid for from the thirty-five per cent of the secondary road construction fund dedicated to local county roads, as provided in Section 4644-c9, Code, 1935.

LEGAL SETTLEMENT: VETERANS: A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state. It would seem that the Legislature in limiting the absence to that from the state that one who was absent from the county of his settlement and remained within the state would not thereby lose his settlement wihin the county unless he did so by acquiring a settlement at some other point.

April 2, 1937. *Mr. M. C. Williams, County Attorney, Boone, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. Can a veteran be prohibited from acquiring a legal settlement in the county by the service of notice to depart?

In answering the foregoing question reference is had to Sections 5311 and 5315 of the statute. In each of these sections of the statute the wording is "any person." There are no exceptions made, and unless the statutes are made to read "any person except veterans," then the statute must apply to all persons. It is therefore our opinion that there is no exception made in the case of a veteran.

2. Does a person lose his legal settlement in a county by an absence from such county for one year if he remains within the state?

Section 5312 provides as follows:

"*Settlement continues.* 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."

Under the provisions of the above statute the legal settlement continues unless it is terminated by one of two things:

1. An absence from the state for more than one year;
2. The acquiring of a legal settlement in some other county or state.

The statute is specific with reference to the first, that is, that the absence must be from the state. It is likewise specific with reference to the second instance, that is, that there has been a settlement acquired at some other point.

It would seem that the Legislature in limiting the absence to that from the state the fact that one was merely absent from the county of his settlement but remained within the state would not thereby lose his settlement within the county unless he did so by acquiring a settlement at some other point within the state.

LAND OFFICE: ABSTRACTS OF TITLE: Land Office Department of Secretary of State's office not the one and only proper repository for abstracts of title of all lands belonging to state.

April 2, 1937. *Hon. James P. McKean, Deputy Superintendent, Securities Department:* You have called attention to the opinion of Attorney General Edward L. O'Connor, dated August 20, 1936, and addressed to Mr. C. B. Murtagh, State Comptroller, on the subject of custody of deeds of lands belonging to the State of Iowa, and have asked that that opinion be supplemented or clarified in respect to the following question:

In view of the fact that Attorney General O'Connor's opinion refers only to "deeds of land belonging to the State of Iowa" in the first paragraph, and closes with a general conclusion that all documents pertaining to land be transferred out of the office of the State Comptroller and to the Land Office Department in the Secretary of State's office, is it to be regarded as an opinion that the Land Office Department of the Secretary of State's office is the one and only proper repository for *abstracts of title* of all lands belonging to the State of Iowa and otherwise for administrative purposes under the jurisdiction of the State Highway Commission, the Conservation Commission, the Board of Control, the Board of Education, etc.?

It will be noted by reading the opinion of Attorney General O'Connor above referred to, that he does not deal specifically with "abstracts of title." Indeed, they are not mentioned by specific denomination anywhere in his opinion.

"Abstract of title" has been defined in Bouvier's Dictionary, as "an epitome, or brief statement of the evidences of ownership of real estate." Bouvier further says:

"An abstract should set forth briefly but clearly, every deed, will, or other instrument, every recital or fact relating to the devolution of the title, which will enable a purchaser, or mortgagee, or his counsel, to form an opinion as to the exact state of the title."

The above definition has not been repeated, nor has its equivalent appeared in any Iowa decision. The Iowa Supreme Court has on several occasions, however, quite evidently presupposed a similar definition to that quoted. See *Young vs. Lohr*, 118 Iowa 624 (1902); *Russell and Company vs. Abstract Company*, 87 Iowa 233 (1893); and *Roberts vs. Leon Loan and Abstract Company, et al.*, 63 Iowa 76 (1884).

It is important to bear in mind that the abstract of title is not an operative document, resulting in transfer of title or the creation or suppression of liens or incorporeal rights, but is simply a history or index of the same. Operative documents such as deeds, mortgages, releases, etc. will ordinarily be recorded under the laws of Iowa, and while the documents themselves will be the primary evidence of the transaction which they recite, the record in the proper official offices will constitute a type of secondary evidence. The abstract of title, however, is in its most meager form, little more than an index showing the volumes and pages therein at which record copies of operative documents appear. In its most voluminous form the abstract of title will include verbatim copies of deeds, mortgages, releases, judgments, and sometimes other court records.

This is information which is needed from time to time in the management of the business of the department, commission, board, bureau or institution using and occupying the land. Disputes may arise with respect to incorporeal rights, with respect to boundary lines when new buildings are proposed, and when the need may arise from time to time to purchase adjacent lands. It

would be assumed, therefore, that nothing contrary appearing in the statutes, abstracts of title would be subject to the disposition of the particular department, board, commission or officer having, under the law, the power to manage or control the affairs of state in respect to which the particular land is used.

Such duties and powers of control and management with respect to state roads vest in the State Highway Commission under the provisions of Chapter 238 and especially the provisions of Section 4626. It is understood that abstracts of title of lands owned and occupied in relation to the affairs of the State Highway Commission are now and have continued to be since obtained, in the hands of that body.

Under Section 1703-g20 (3), the State Conservation Commission is required to maintain a "division of administration" to keep "accounts, records" etc. Under Section 1703-d12 the numerous specific powers given to the Conservation Commission necessarily include all the usual responsibilities and details of management. This conclusion would be fortified by other sections in the Code, as for example, Sections 1804, 1805, 1819, etc.

Under Section 3287 the Board of Control is given, "full power to contract for, manage, control and govern, subject only to the limitations imposed by law," some fifteen institutions.

The Iowa State Board of Education, under Section 3921, paragraphs 4 and 5, are directed to,

"4. Manage and control the property, both real and personal, belonging to the institutions under its jurisdiction, and

"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."

Under the above provisions, the State boards and commissions named, and others similarly situated, have not only the power, but also the duty and responsibility for retaining full, useful and workable records of the real property under their jurisdiction and management. It would be entirely competent for any such official body to designate a particular office or employee to have custody of and be responsible for such records as abstracts of title.

The question remains whether any provision of the Iowa statutes requires that abstracts of title be kept at any place other than those places which may from time to time be selected and designated by the several managing boards and commissions. In respect to this question the only provisions of the Code which appear to have any possible relevance are the sections in Chapter 9, dealing with the "Land Office." It will be recalled that this office, the history of which runs clear back to the dawn of Iowa statehood, was originally organized for the purpose of distributing titles to lands and thereby recruiting population and increasing the economic wealth of the State. It might be possible, therefore, to construe all of the statutes imposing duties upon the Land Office as referring only to records of public lands owned by the State as a part of the public domain, or by the State transferred from such domain to private purchasers.

Section 89 requires the keeping of "books and records of the Land Office" so as to show "and preserve an accurate chain of title from the general government to the purchaser of each smallest subdivision of land"; this section has no limited reference to State-owned land, and, if construed to require the Land Office to have an abstract of title as to each piece of land now occupied by

State departments or institutions, it would also require the keeping of an abstract of title of "each smallest subdivision of land" ever owned by the "general government" as a part of the public domain. This would mean all of the land in Iowa. No such duty to undertake the enormous expense of obtaining and storing such a vast number of abstracts of title could have been contemplated or intended by the General Assembly.

Section 96 reads as follows:

"96. *Maps—field notes—records—papers.* The Secretary of State shall receive and safely keep in his office, as public records, any field notes, maps, records, or other papers relating to the public survey of this state, whenever turned over to the state in pursuance of law; the United States at all times to have free access thereto for the purpose of taking extracts therefrom or making copies thereof."

In view of its historical setting this section falls far short of denominating the Land Office as a proper repository for any and all muniments of title of lands owned and occupied now by State institutions, departments, etc. Official custom and usage, however, are important factors in deciding upon the legal duties of officers and the functions of departments and offices, and it has for several decades been customary to construe the section in question as involving a duty of the Land Office to retain a deed register of State-owned lands. This practice has been so long-standing, uniform and useful that it should not now be disturbed.

On the other hand, there has been no fixed or uniform custom of State boards, commissions, or officers to deposit abstracts of title with the Land Office. The Highway Commission has not done so, and it is understood that other boards and commissions and officers have done so in part only. Efficient administration, management and control of property would seem to require that abstracts of title so far as they have been deposited with the Land Office, be tendered by the Deputy Superintendent there in charge to the respective boards and commissions having jurisdiction over the lands described in them, and that the various state boards and commissions assume responsibility for the same and direct their officers and employees with respect to their future use and preservation, if said board or commission desires the keeping of the abstract. The Land Office shall keep possession of all abstracts not desired by a commission or board.

BOARD OF SUPERVISORS: APPROPRIATIONS: FARM BUREAU: A farm bureau could apply for aid at any time during the first six months of the year, and it being mandatory upon the Board of Supervisors to make the appropriation if the Bureau has complied with the statute, such appropriation could be paid out of the general fund.

April 3, 1937. *Mr. Ray A. Potter, County Attorney, Tipton, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. Can the Board of Supervisors appropriate the sum of $3,000.00 at this time to the Farm Bureau, since the budget for this purpose was set up in the sum of $2,500.00 last September, the Farm Bureau having complied with all the requirements of Section 2930 of the 1935 Code?

Your question having embodied therein the fact that the Farm Bureau has complied with Section 2930 with reference to organizations, and so forth, we therefore assume that your organization has at least two hundred bona fide members whose membership dues and pledges to such organization amount

to not less than $1,000.00, those being prerequisites to entitle them to an appropriation. That being true, the Board of Supervisors is required to appropriate from the general fund of the county a sum double the amount of the aggregate of such dues and pledges, limited, however, to a total of $5,000.00 in counties with a population of twenty-five thousand and $3,000.00 in counties with a population of less than twenty-five thousand.

The appropriation to which your Farm Bureau is entitled is therefore based upon the aggregate of the dues and pledges for the year, whether or not the Board of Supervisors can appropriate the sum of $3,000.00 depends entirely upon the aggregate of your dues and pledges. The matter of making such appropriation by the Board of Supervisors, when Section 2930 has been complied with, is not discretionary with the Board, but is mandatory. See *Appanoose County Farm Bureau vs. Board of Supervisors, et al.*, 256 N. W. 687.

2. Does the local budget law, Chapter 24 of the Code, govern or can the appropriation of $3,000.00 be made by the local board direct regardless of the amount stated in the budget?

In answer to the foregoing question we call your attention to Section 2930 of the 1935 Code which provides:

"* * *, the board of supervisors shall appropriate to such organization from the general fund of the county * * *."

As we have stated in the answer to your first question, the matter of making this appropriation is not discretionary with the Board when the provisions of Section 2930 of the statute have been complied with, but is mandatory, and under Section 2926 of the statute prescribing the Articles of Incorporation, Article 4 provides:

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

The membership having been once established and dues paid would carry the members over until the first Monday in January following, and the member having once paid his dues, his membership could not be forfeited until his dues had been in arrears for six months, which would be six months following January 1st.

Therefore, a Farm Bureau could apply for aid at any time during the first six months of the year, and it being mandatory upon the Board of Supervisors to make the appropriation, if the Bureau has complied with the statute, such appropriation could be paid out of the general fund.

It is the opinion of this department that Chapter 24 of the statute relating to budgets is not applicable.

COMMISSIONS: STATE LIBRARIAN: CURATOR OF HISTORICAL DEPARTMENT: Governor should not issue executive commissions to librarian and curator. As president of board of trustees of historical department, he may direct secretary to execute certificates of appointment to these officers.

April 3, 1937. *Mr. G. W. Kirtley, Executive Secretary, Governor's Office:* We acknowledge the receipt of your letter in which the following inquiry appears:

"Will you be good enough to inform me whether commissions should be issued to the recently appointed State Librarian and Curator of the Historical, Memorial and Art Department?"

There is no provision in the constitution or in the statutes which definitely sets out the scope of authority of the governor to issue commissions to appointed officers. The law does provide that in certain instances commissions are to be issued by the governor. Article 4, Section 10, of the constitution provides that commissions are to be issued to appointees to vacancies where no other mode for filling such vacancies is provided. Article 4, Section 21, of the constitution provides as follows:

"*Grants and commissions.* Sec. 21. All grants and commissions shall be in the name and by the authority of the people of the State of Iowa, sealed with the Great Seal of the State, signed by the Governor, and countersigned by the Secretary of State."

Chapter 64, 1935 Code, authorizes the governor to issue commissions to commissioners for Iowa in other states, and Chapter 65 provides for the issuance of commissions to notaries public. Section 87, 1935 Code, relates to the countersigning and registration by the Secretary of State of commissions issued by the governor, providing as follows:

"87. *Commissions.* All commissions issued by the governor shall be countersigned by the secretary, who shall register each commission in a book to be kept for that purpose, specifying the office, name of officer, date of commission, and tenure of office; provided, however, that notarial commissions shall be registered only in the office of the governor."

Chapter 233, 1935 Code, relating to the state librarian and historical department, provides for a board of trustees, constituted as follows:

"4514. *Board of trustees.* The state library and the historical, memorial, and art department shall be under the control of a board of trustees consisting of the governor, who shall be president of the board, the judges of the supreme court, the secretary of state, and the superintendent of public instruction."

Provision for the appointment of the state librarian and the curator is made in the following section:

"4517. *Librarian and curator.* The board shall appoint a state librarian and a curator, whose regular terms of office shall be for six years, and may remove either of them by a two-thirds vote, and fill all vacancies by a majority vote of the board."

We are of the opinion that officers appointed by the governor or by an official board may properly be issued some form of certificate as indicia of their offices. It is the opinion of this department that since the state librarian and the curator of the historical, memorial and art department are not executive appointments, commissions evidencing such appointments should not be issued by the governor. It is our opinion, however, that the governor, as president of said board of trustees, may properly direct the secretary of the board to execute certificates of appointment which evidence the action taken by the board in making the appointments, and to deliver the same to the appointees.

DISPOSAL OF DEAD ANIMALS: LICENSE REQUIRED: SECRETARY OF STATE: Secretary of State having issued a permit to foreign corporation to transact business in this state, and said corporation, by its charter having as one of its objects the disposal of bodies of dead animals, the Department of Agriculture could not deny said corporation a license, it having otherwise complied with the other requirements of law prerequisite to obtaining such license. Chapter 109, 47th General Assembly, amendatory.

April 3, 1937. *Mr. G. W. Kirtley, Executive Secretary, Governor's Office:* This department acknowledges receipt of your request for an opinion on a question which may be stated as follows:

Can a foreign corporation, authorized to transact business in this state, be denied the license provided for in Section 2749 of Chapter 131, Code of Iowa 1935, relating to the use and disposal of dead animals, having otherwise complied with the law?

The pertinent sections of Chapter 131 are as follows:

"2745. *Disposal of dead animals.* 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' 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."

"2747. *Application for license.* Application for such license shall be made to the department on forms provided by it, which application shall be set forth the name and residence of the applicant, his proposed place of business, and the particular method which he intends to employ in disposing of such dead bodies, and such other information as the department may require. Said application shall be accompanied by a fee of twenty-five dollars."

"2748. *Inspection of place.* On receipt of such application, the secretary of agriculture or some person appointed by him, shall at once inspect the building in which the applicant proposes to conduct such business. If the inspector finds that said building complies with the requirements of this chapter, and with the rules of the department, and that the applicant is a responsible and suitable person, he shall so certify in writing to such specific findings, and forward the same to the department."

"2749. *License.* On the receipt of the foregoing certificate, and the additional payment of twenty-five dollars, the department shall issue a license to the applicant to conduct such business at the place specified in the application, for one calendar year."

Section 2746, supra, provides that the license shall be issued to a *person.* Section 2746, supra, that *any person* who shall receive * * * shall be deemed to be engaged in the business of disposing of the bodies of dead animals. Section 2758, Code 1935, provides that *any person* holding a license * * * may haul and transport. Section 63, subsection 13, Code 1935, provides that the word "person" may be extended to bodies corporate, and the Supreme Court of Iowa has held that corporations are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in the statute. *Stewart vs. Waterloo Turn Verein,* 71 Iowa 226, 32 N. W. 275. See also 14 (a) C. J., Section 3938, page 1233, wherein it is stated that "a foreign corporation, like a domestic one, is to be regarded as a 'person,' * * * within the meaning of such terms in a statute, if it is within the reason and purpose of the statute, and is not expressly or impliedly excluded."

It must necessarily be concluded, in view of the foregoing, that under Sections 2745 and 2746, supra, a corporation, as well as a natural person, may engage in the business of disposing of the bodies of dead animals.

The license provided for in Chapter 131 is a license to engage in the business of disposing of bodies of dead animals, which business is defined as engaging in the disposing of such for the purpose of obtaining the hide, skin or grease from such animals. Section 2758, Code 1935, additionally provides that any person holding such license may haul and transport the carcasses of animals that have died from disease. It is clear under these sections that the license is to conduct such business and not to haul or transport carcasses of dead animals, the privilege or right to do the latter being derivative only from the license to conduct the business.

It would, therefore, be necessary in each instance of a corporation applying for a license to examine into its articles of incorporation to determine whether under its charter, its object, or one of its objects, is to engage in the business of disposing of the bodies of dead animals within the meaning of Section 2746, supra. This would be true of a domestic corporation as well as a foreign corporation.

Assuming that the object, or one of the objects, expressed in the charter of a corporation is to engage in such business, does the sole fact that the corporation is a foreign corporation which has been issued a permit by the Secretary of State to transact business in Iowa, bar it from procuring a license under Chapter 131, it having in all other respects complied with the requirements of said chapter?

The answer must necessarily be in the negative. Section 2749, supra, states "on receipt of the foregoing certificate (inspector's certificate, showing that the building complies with the requirements of Chapter 131 and that the applicant is a responsible and suitable person) and the additional payment of $25.00, the department *shall issue a license to the applicant* to conduct such business. * * *"

It is therefore the opinion of this department that the Secretary of State, having issued a permit to a foreign corporation to transact business in this state, as provided in Chapter 386, Code of Iowa 1935, and said corporation by its charter, having as its object, or one of its objects, the business of disposing of the bodies of dead animals, it could not be denied a license under Chapter 131, it having otherwise complied with all of the requirements contained therein prerequisite to obtaining such license.

As to the assumption contained in both the inquiry and the opinion that this potential license will in all other respects comply with the provisions of Chapter 131, it is the further opinion of this department that since the matter of inspection provided for in Section 2748, supra, is a regulatory measure designed to protect the public health of the citizens of the state, and such regulation is of apparent importance only as the public health may be affected by the disposal of bodies of dead animals within the state, the disposal of such bodies without the state was not within the contemplation of the legislature when it enacted said section, and that therefore as regards disposal of bodies of dead animals without the state, such inspections may be dispensed with,—an additional theory to be advanced being that the state of the corporation's creation, or where any person may be engaged in such business, has no doubt prescribed similar safeguards pertaining to the conduct of such business within its jurisdiction. (See, however, Chapter 109, Laws of the 47th General Assembly.)

SCHOOLS: SCHOOL FUND MORTGAGE: Procedure prescribed in Chapter 232 should be followed in disposing of land acquired under a school fund mortgage foreclosure.

April 3, 1937. *Mr. O. J. Wardwell, County Attorney, Northwood, Iowa:* We acknowledge receipt of your letter in which you set out the following facts—

Some years ago Worth County, Iowa, made a loan of school funds upon a school fund mortgage. The board of supervisors subsequently accepted a conveyance of the property in settlement of the mortgage indebtedness and obtained a deed to the land conveying the same to Worth County, Iowa.

At this time there is an opportunity to make an advantageous sale of the said real estate. Should the board of supervisors proceed under the provisions

of Chapter 449 of the Code, or will it be necessary to sell the land under the provisions of Chapter 232, 1935 Code?

Chapter 232, 1935 Code relates to school funds. Section 4503 thereof relates specifically to the resale of school lands and provides as follows:

"4503. *Resale by state.* All lands now acquired under permanent school fund foreclosure proceedings shall be resold within six years from January 1, 1934, and lands acquired after such date shall be resold within six years from date of foreclosure. Such land shall be appraised, advertised, and sold in the manner provided for the appraisement, advertisement, sale and conveyance of the sixteenth section or lands selected in lieu thereof."

In the present case there was no foreclosure but the land in question was taken in satisfaction of a school fund mortgage and is now held in the same manner as though the property had been acquired under foreclosure proceedings.

It is stated in your letter that the title to this land was taken by Worth County, Iowa. The title should have been taken in the name of the State of Iowa, for the use and benefit of the permanent school fund, although this irregularity is cured by the provisions of Section 4476, which are as follows:

"4476. *Sale of lands bid in.* When lands have been sold and bid in by the state in behalf of the school fund upon a judgment in favor of such fund, the land may be sold in like manner as other school lands, and when lands have been conveyed to the counties in which they are situated for the use of the school fund, instead of to the state, such conveyance shall be valid and binding, and upon proper certificates of sales patents shall issue in like manner as in cases where the conveyances were properly made to the state."

Chapter 449, 1935 Code, deals with acquisition of title by state or municipal corporation. Section 10246 provides as follows:

"10246. *Right to receive conveyance.* When it becomes necessary, to secure the state or any county or other municipal corporation thereof from loss, to take real estate on account of a debt by bidding the same in at execution sale or otherwise, the conveyance shall vest in the grantee as complete a title as if it were a natural person."

Section 10260-e1 provides as follows:

"10260-e1. *Management.* When the title to real estate becomes vested in the state, or in a county or municipality under this chapter, or by conveyance under the statutes relating to taxation, the executive council, board of supervisors or other governing body, as the case may be, shall manage, control, protect by insurance, lease or sell said real estate on such terms, conditions, or security as said governing body may deem best."

In the latter section, the board of supervisors is given broad powers in the sale or management of real estate acquired by the county under the provisions of Chapter 449.

In contrast to this, Chapter 232 restricts the powers of the board in disposing of land acquired under a school fund mortgage, making provisions for appraisement, notice of sale, and reports as to sales to be made by county auditors to the state comptroller. Management of the permanent school fund has been placed in the hands of boards of supervisors, but the fund is a trust fund and subject to supervision and control by the state as provided in Chapter 232.

Since Chapter 232 deals specifically with school funds, and since this chapter prescribes in detail the manner in which school lands may be sold, we are of the opinion that the procedure prescribed in Chapter 232 should be followed in disposing of the land in question.

LEGAL SETTLEMENT: A legal settlement is lost when a new one is acquired in some other county or state, or by removing from the state for a period of more than one year.

April 5, 1937. *Mr. C. H. Taylor, County Attorney, Guthrie Center, Iowa:* We are in receipt of your inquiry for an opinion on the following proposition:

A family was a long time resident of Guthrie County, Iowa, until September, 1932, at which time they moved to Burnett County, Wisconsin, where they lived until about January 1, 1937, at which time they were given cash for transportation fares and were returned to Guthrie County, Iowa. During their stay in Wisconsin there was never a full year that they did not receive aid, and also non-resident notices to depart. Wisconsin fails to do anything for them, claiming that they did not establish a legal residence there. Is that family entitled to aid from Guthrie County, Iowa?

Our answer to your inquiry will necessarily be in the negative. The law is well settled that there is no legal obligation at common law upon a county or any of the instrumentalities of government to furnish relief to the poor, and any such duty is predicated solely upon statute. *Wood vs. Boone County,* 153 Iowa 92, 133 N. W. 377; *Coolidge vs. Mahaska County,* 24 Iowa 211; *Mandan Hospital vs. Sioux County,* 248 N. W. 924, 63 N. D. 538.

Section 5312 of the 1931 Code stated as follows:

"A legal settlement once acquired continues until lost by acquiring a new one."

This section was amended by the 45th General Assembly, and now reads:

"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."

In other words, a legal settlement is lost when a new one is acquired in some other county or state, or by removing from the state for a period of more than one year, regardless of whether or not a new legal settlement is made.

Absence from the state for a year terminates legal settlement. *Steele County vs. Waseca County,* 207 N. W. 323, 166 Minn., 180; *City of Willmar vs. Kandiyohi County,* 208 N. W. 648, 167 Minn. 178. *City of Enderlin vs. Pontiac Township,* 242 N. W. 117, 62 N. D. 105.

It is, therefore, our opinion that this family lost their legal settlement in Iowa by removing outside of the state for more than one year, irrespective of the fact that they may not have acquired a legal settlement in the state to which they moved, and, therefore, are not entitled to relief from Guthrie County.

CITY COUNCIL: RESOLUTION OF EMERGENCY: BONUSES: No resolution of emergency or publication required before passage of ordinance. City council may not grant to Health Officer a bonus at the end of the year augmenting his regular salary as specified in his appointment.

April 5, 1937. *Mr. M. C. Williams, County Attorney, Boone, Iowa:* We are in receipt of your request for an opinion on the following proposition:

"I have a request for an interpretation by your office of Section 5716, Code of Iowa, 1935. Can the City Council under this section use the three-fourths of the council vote to reject the three readings required in the section without a resolution of emergency? Is there any necessity for a publication or notice to be given of any kind that any ordinance of a general nature is being considered?"

Your letter does not state under what form of government the city or town referred to is operating or what the specific ordinance under consideration is. Generally speaking then, we will answer your inquiry in the following manner. Section 5716 of the Code 1935, reads as follows:

"Ordinances of a general or permanent nature, and those for the appropri-

ation of money shall be fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rule."

That three-fourths of the council may dispense with the rule requiring an ordinance to be read on three different days, see *City of Bloomfield vs. Blakley*, 184 N. W. 634, 192 Iowa 310; *Collins vs. Iowa Falls*, 125 N. W. 226, 146 Iowa 305.

There is nothing contained in said section which requires that a resolution of emergency be had in order to dispense with the rule. In neither of the cases above cited was there any such resolution of emergency. It is therefore our opinion that none need be had. Section 5720 is the section that deals with the publication of ordinances, and states as follows:

"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 be 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, one of which shall be at 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."

The publication spoken of in that section is the publication of the ordinance after its passage by the city council. It will be noted that in said section it states "it shall take effect from and after its publication." An ordinance which is not passed by the council, of course, could not take effect by publication, and so necessarily it refers to publication after the passage of the ordinance by the council.

It is, therefore, our opinion as your first point that there need be no resolution of necessity, and that there need be no publication or notice to the general public prior to the passage of the ordinance by the city council under Section 5716.

Your next inquiry is as follows:

The City Council has made a practice of fixing the salary of the Health Officer at $300.00 a year, and then voting him a bonus of another $300.00 at the end of the year, and there has also been other increases after they have once fixed the salary. May the City Council do this?

Our answer to this question is in the negative. Section 5672 of the Code 1935 states as follows:

"No member of any city or town council shall during the time for which he has been elected be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected, nor shall the emoluments of any city or town officer be changed during the term for which he has been elected or appointed, unless the office be abolished. No person who shall resign or vacate any office shall be eligible to the same during the time for which he was elected or appointed, when, during the time, the emoluments of the office have been increased."

It is well settled that emoluments for an office during the term for which the party was elected or appointed cannot be increased during that term. See *Ryce vs. Osage*, 88 Iowa 558, 55 N. W. 532; *Purdy vs. City of Independence*, 75 Iowa 359, 39 N. W. 641; *City of Council Bluffs vs. Waterman*, 53 N. W. 289 (Ia.); *Goetzman vs. Whitaker*, 46 N. W. 1058, 81 Iowa 527; *Kellogg vs. Story County*, 257 N. W. 778, 219 Iowa 399.

It is therefore our opinion that the city council may not grant to the Health Officer a bonus at the end of the year augmenting his salary of $300.00 a year as specified in his appointment.

TAXATION: BOARD OF SUPERVISORS: COUNTIES: Before property acquired by county under public bidder's statute can be sold for less than purchase price, plus taxes, interest and costs, county must have approval of maority of tax levying and certifying bodies having an interest therein, state being one of interested bodies would have to approve.

April 5, 1937. *Mr. Luther M. Carr, County Attorney, Newton, Iowa:* This department is in receipt of your request for an opinion on the following questions as set out:

1. Under the public bidder law, does the Board of Supervisors have power to compromise tax for less than amount of certificate, after certificate is issued to county and before deed is taken? If so, under what conditions, or can penalty and interest be cancelled or compromised?

The statute in Section 7255-b1 creating the public bidder law sets out what is required of the county under that section of the statute. It does not authorize any compromise of the tax after the propery has been sold. The Boards of Supervisors only have such powers as are given to them by statute and such other powers as are necessary to carry into effect those powers that are specified. The statute does not in any way authorize counties to compromise the tax after the property has been sold at public bidder's sale and prior to the execution of a deed.

2. Is it necessary to have written consent from the State of Iowa for its portion of tax in case the County sells real estate acquired under the public bidder law for less than the original amount of tax?

Section 10260-g1 of the statute provides that after the county acquired property sold under the public bidder's statute that the same be sold, but that before a sale can be made for a sum less than the total amount for which the property was purchased plus all subsequent general taxes, interest and costs, the county must secure the written approval of the majority of all the tax levying and tax certifying bodies having an interest therein. The state being one of the tax levying and certifying bodies interested in such property would be one from which written approval of a sale for less than the full amount must be secured, if such consent were necessary to constitute a majority.

3. Can the County sell a tax certificate bought at scavenger sale under the public bidder law, to any individual, for whatever amount they deem sufficient?

The answer to this question must be, no. What has been heretofore stated in answer to question 2 applies with the same force and effect to this question.

ACCOUNTANTS: EXAMINATIONS: Applicant for accountancy examinations must meet requirements set out in statutes. Board of accountancy has no authority to substitute other type of work for that specifically required by the statute.

April 5, 1937. *Mr. L. H. Keightley, Iowa Board of Accountancy, Sioux City, Iowa:* We acknowledge receipt of your letter in which you request an opinion of this department upon the following statement of facts—

An applicant for the certified public accountant examination is a graduate of the college of commerce of the University of Iowa. He has had eight months of experience with professional public accountants. He has also had approximately two and one-half years' experience on the staff of the auditor of the state of Iowa.

Has the Iowa board of accountancy authority to permit this individual to sit for the examination?

Section 10 of the Iowa Accountancy Law to which you refer now appears as Section 1905-c9 of the 1935 Code, and provides as follows:

"1905-c9. *Qualification for examination.* Every applicant for the examination provided for in Section 1905-c8 must be over twenty-one years of age, a resident of this state, a citizen of the United States or have declared his or her intention to become such, of good moral character, a graduate of a high school having at least a four-year course of study or its equivalent as determined by the board of accountancy, or shall pass a preliminary examination to be given by the board at least thirty days before the regular examination; and a graduate of a college or university commerce course of at least three years, majoring in accounting, and in addition shall have had at least one year's service as a staff accountant in the employ of a practitioner entitled to registration under this chapter.

"The following shall, however, be accepted in lieu of the college or university commerce course and the one year of service:

1. Three years continuous practical accounting experience as a public accountant or as a staff accountant.
2. Three years continuous employment as a field examiner under a revenue agent-in-charge of the income tax bureau of the treasury department of the United States, or as a field examiner in the auditors, budget directors, banking or insurance department of this state."

In the above case the applicant clearly has completed the required collegiate work. The question to be determined is whether or not the applicant has completed the required practice work. He has had eight months' experience with a registered practitioner. This does not fulfill the statutory requirement of one year of such experience.

It appears that this applicant has not had the three years' continuous experience required in paragraph 1 and paragraph 2 set out above, which might be substituted for the college work and the one year's experience. If while employed on the staff of the auditor of state, the applicant was "in the employ of a practitioner entitled to registration," then so much of this period could be tacked on to the eight months' period mentioned above as would qualify the applicant to sit for the examination. Whether his employment in the auditor's office was of this character must be determined by the facts as found by the board of accountancy. If the experience was not of this nature, then the applicant has not met the requirements of the statute.

Since the statute definitely sets out the practice requirements, it is our opinion that the board of accountancy would not have authority to substitute some other type or kind of experience for that specifically required by the statute.

SCHOOLS: FINANCIAL STATEMENT: Published financial statements of independent school districts must show itemized list of expenditures. SAMPLE submitted does not comply with statute.

April 5, 1937. *Mr. Robert B. Organ, County Attorney, Council Bluffs, Iowa:* We acknowledge receipt of your letter of March 8 in which you ask for an opinion as to whether the published financial statements made by two independent school districts in Pottawattamie County comply with the requirements of the statute. You have inclosed a tear sheet showing the form of this publication as it appeared in the Council Bluffs Nonpareil as of date of July 8, 1936.

Section 4242, 1935 Code, has reference to the matter under consideration, and provides as follows:

"4242. *Financial statement—publication.* In each consolidated district and in each independent city or town school district, the board shall, during the first week of July of each year, publish by one insertion in at least one news-

paper, if there is a newspaper published in said district, a summarized statement verified by affidavit of the secretary of the board showing the receipts and disbursements of all funds for the preceding school year, the statement of disbursements to show the names of the persons, firms, or corporations, and the total amount paid to each during the school year."

In each of the published financial statements submitted, the items of disbursement are not particularized to show payments made to persons, firms, or corporations. The expenditures have been set up in a condensed form showing total amounts expended for various classifications of items. The statute above quoted clearly requires that in city or town consolidated or independent school districts, such financial statements shall show the names of the persons, firms, or corporations receiving disbursements, and the total amount paid to each.

This department, therefore, is of the opinion that the specimen financial statements submitted do not comply with the requirements of the statute in that the names of the persons, firms, or corporations to whom or to which disbursements were made are not set out.

STATE INSTITUTIONS: HOSPITAL: TUBERCULAR PATIENT: RECOVERY OF ACCOUNT: COUNTY: Tubercular patient at hospital for indigent is liable for expenses incurred for treatment. In instance cited, county's right to bring action has expired by limitation.

April 6, 1937. *Mr. Robert B. Organ, County Attorney, Council Bluffs, Iowa:* We acknowledge receipt of your letter in which you request an opinion of this department. The facts set out in your letter are as follows—

Sometime in the year 1930 or 1931 a person was committed to the state hospital for indigent tubercular patients. He remained there until January 2, 1932, at which time he left. At the time of his commitment and at the time of his discharge he had nothing with which to maintain himself, and the account for his care amounted to approximately $775.00. He now has some funds and the county seeks to collect. Is he now liable for this amount, and has the statute of limitations run against the county's right to be reimbursed?

Section 5369, 1935 Code, confers authority upon boards of supervisors to provide for the care and treatment of indigent tubercular patients, and provides as follows—

"5369. *Care and treatment.* The board of supervisors of each county shall provide suitable care and treatment for indigent persons suffering from tuberculosis, and where no other suitable provision has been made, they may contract for such care and treatment with the board of trustees of any hospital, not maintained for pecuniary profit."

Section 5372, 1935 Code, provides for the allowance for this support out of the poor fund—

"5372. *Allowance for support.* The board of supervisors may allow, from the poor fund of the county, for the care and support of each tuberculosis patient cared for in any such institution, a sum not exceeding twenty dollars per week."

The above quoted sections are found in Chapter 270, 1935 Code, relating to indigent tubercular patients. It is to be noted that there is no specific provision made in this chapter permitting recovery by the county of the expense incurred by reason of furnishing such hospitalization.

In the absence of some express statutory provision, where public authorities relieve a poor person pursuant to their statutory obligation, neither the person nor his estate is under any obligation to make any reimbursement. See 48 Corpus Juris, page 520, and also *Bremer County vs. Curtis*, 54 Iowa 72. See

also *Jones County vs. Norton*, 91 Iowa 680, which holds that there is no express contract between the county and a dependent person, and that in the absence of a statute fixing a liability, no common law liability exists. In further support of this view, the case of *State vs. Colligan*, 128 Iowa 536, holds—

"The uniform rule seems to be that there is no liability on the part of the person who receives such benefit, or on the part of his relatives, to make compensation save as such compensation may be expressly required and provided for by statute. No such obligation is to be implied."

Section 5309, 1935 Code, makes provision for recovery by the county of money expended for relief or support of the poor, furnished under that chapter.

"5309. *Recovery by county.* Any county having expended any money for the relief or support of a poor person, under the provisions of this chapter, may recover the same from any of his kindred mentioned herein, from such poor person should he become able, or from his estate; from relatives by action brought within two years from the payment of such expenses, from such poor person by action brought within two years after becoming able, and from such person's estate by filing the claim as provided by law."

The case of *Hamilton County vs. Hollis*, 141 Iowa 477, holds that a county may recover under Section 5309 supra for care furnished at a county home. Provision for the setting up and maintaining of county homes is found in the succeeding chapter in which the above quoted section is contained. The court after quoting the above section in the Hollis case, states—

"It is the money expended in furnishing support or relief which may be recovered under the section quoted. If it has been expended by the county for the relief or the support at the poor farm or elsewhere, it is plainly within the language of the statute as though paid directly to the indigent person."

Section 5322 provides that medical attendance is to be included in the form of relief prescribed by Chapter 267, providing as follows—

"5322. *Form of relief—condition.* The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance. * * *"

We are, therefore, of the opinion that there does exist a statutory liability on the part of a recipient to pay for the expenses incurred by reason of treatment at a hospital for the indigent since this treatment or care is medical attendance within the contemplation of Chapter 267, and since the court has held that the statute is not confined in its application to said Chapter 267.

It is next necessary to inquire whether the statute of limitations may or may not have run upon the claim of the county. The statute in question provides that action may be brought to recover such money "from such person within two years after becoming able." This provision has, so far as we can determine, never been judicially construed. It appears that the most reasonable interpretation that can be given to this phrase is that such action must be brought within two years after the time of discontinuance of relief or support to the poor person. We believe that the word "able" as used in this section means "able to exist without relief" rather than "able to pay for past assistance furnished."

Under these circumstances, and assuming that no further aid was extended after the patient's discharge from the hospital, the county's right to bring an action against this person for the recovery of the amount expended has expired by limitation.

OLD AGE ASSISTANCE: UNEMPLOYMENT INSURANCE: ALIEN RESIDENTS: The citizenship of the employee is immaterial, and employers are required to pay the contribution provided for in Section 7(a) of the Unemployment Insurance Act, provided employer comes within definitions in Section 19(f), and that employment comes within definitions in Section 19(g) of the Act.

April 8, 1937. *Mr. Roger F. Warin, County Attorney, Bedford, Iowa:* This department acknowledges receipt of your letter requesting an opinion on the following questions:

1. Under the provisions of the Old Age Assistance Act and the Unemployment Compensation Act are employers required to pay a tax on alien residents in this country?
2. Would it make any difference if said aliens have made application for naturalization papers?

First giving consideration to the provisions of the Old Age Assistance Act as embodied in Chapter 266-F1, Code of Iowa, 1935, our opinion may be prefaced with the remark that your inquiry is of importance in retrospect only for the reason that Senate File 2, Acts of the Forty-seventh General Assembly, approved April 2, 1937, Chapter 139, Laws of the 47th General Assembly, to take effect on publication, provides for the termination of further levy of the annual per capita tax after December 31, 1936.

Section 5296-f34 of Chapter 266-F1 provides among other matters as follows:

"*Pension fund created.* There is hereby created a fund to be known as the old age pension fund to be administered by the commission, the proceeds of which shall be used to pay the expenditures incurred under this chapter. To provide money for said fund, *there is hereby levied on all persons residing in this state and who are citizens of the United States* and of twenty-one years of age and upwards, except inmates of state and county institutions, an annual tax of two dollars. * * *"

Section 5296-f34 further provides:

"* * * In any subsequent year to that in which any tax is due and payable, the county treasurer shall charge any unpaid tax and/or penalty against the property owned by the person by whom said tax is payable; or said county treasurer, when such delinquent person is not the owner of real estate, shall cause to be served a notice, which shall be served in the same manner as an original notice, upon the delinquent taxpayer's spouse or employer, if either, of the amount of the tax and penalties due and costs of collection and said spouse or employer shall pay the same, and thereupon the employer may subsequently withhold the amount thus paid in tax, penalty and cost of collection from any wages or salary then or in the future due said employee but costs of collection shall not be chargeable unless the tax and penalties are collected.

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 chapter 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 chapter, 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. * * *"

Section 5296-f12 of said chapter provides that old age assistance may be

granted only to an applicant who has, among other requirements (1) obtained a legal residence and has domicile in the county from which he applies; (2) *is a citizen of the United States.*

Reading the provisions of this section together with the quoted portion from Section 5296-f34 it will be seen that:

1. The recipient of benefits must be a *citizen of the United States* and have obtained legal residence, and have domicile in the county from which he applies.
2. That the tax to be collected to create the pension fund *is levied on all persons residing in this state* and *who are citizens of the United States.*
3. That any person, firm, association, or corporation, having in their employ continually 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 chapter applies, and who has not paid the tax provided for in this section shall deduct said tax from the earnings of such employee.

It is accordingly the opinion of this department that under the provision of Section 5296-f34 an employer was not required to pay the per capita tax on alien employees.

With reference to the first question as it pertains to the Unemployment Compensation Act enacted by the Forty-sixth General Assembly, Extra Session, being Senate File 1, Chapter 4, Laws of the 46th General Assembly, Extra Session, the pertinent sections of the Act may be enumerated and quoted as follows:

"Section 19(f) 'Employer' means:

(1) Any employing unit which for some portion of a day in each of fifteen different weeks within either the current or preceding calendar year, excepting the calendar year 1935 (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such day);

(2) Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Act;

(3) Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection;

(4) Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection;

(5) Any employing unit which, having become an employer under paragraph (1), (2), (3), or (4), has not, under Section 8, ceased to be an employer subject to this Act; or

(6) For the effective period of its election pursuant to Section (8) (c) any other employing unit which has elected to become fully subject to this Act."

Section 19(g), Senate File 1, defines "Employment," insofar as the definition is material to the inquiry, as follows:

(1) "Except as otherwise provided in this subsection (g), 'Employment' means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

(2) The term 'employment' shall include *an individual's entire service, performed within or both within and without this state if:*

(a) the service is localized in this state, or

(b) the service is not localized in any state but some of the service is performed in this state and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled,

is in this state; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state."

In the exclusion provision, being subsection (7) of Section 19(g), nowhere are aliens as a class excluded from the term "employment."

Section 7(a), Senate File 1, under the subtitle "Contributions" makes the following provision:

"(1) On and after July 1, 1936, contributions shall accrue and become payable *by each employer with respect to wages payable for employment as defined in Section 19(g)* occurring during such calendar year except that for the six months period beginning July 1, 1936, *such contributions shall accrue and become payable solely from employers with respect to wages payable for employment* occurring on and after July 1, 1936. Such contributions shall become due and be paid to the Commission for the fund at such time and in such manner as the Commission may prescribe. Contributions required from an employer shall not be deducted, in whole or in part, from the wages of individuals in his employ."

Section 4 of Senate File 1, under the subtitle "Benefit Eligibility Conditions" provides:

"*An unemployed individual* shall be eligible to receive benefits with respect to any week only if the commission finds that:"

Analyzing the quoted portions of the Act, we are unable to find aliens expressly or by implication, excepted, either in the definition of the term "employment" or in the conditions respecting eligibility for benefits. Furthermore the definition given "employer" contains such all inclusive language as "*has or had in employment eight or more individuals*."

Apparently the motivating factor behind the enactment of Senate File 1, as stated in the title to the Act, was the need for creation of a system of unemployment compensation and to provide for an unemployment compensation fund. Further the declaration of state public policy embodied in Section 2 of the Act was set out as follows:

"The legislature * * * declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves *to be used for the benefit of persons unemployed through no fault of their own*."

and it was the obvious intent of the legislature in the creation of a system of unemployment compensation to provide means of relieving the steadily increasing burden placed on poor relief assistance, particularly during the recurring cycles of depression when unemployment reaches a near precipitation point.

Aliens, all of whom we may suppose are potential citizens, are as much susceptible to the adversities of declining periods of industrial, agricultural or other employment, and proportionately the mortality of unemployment is as great among alien "residents" of the state as citizens of the state.

On analogy to the status of aliens who are subjects of relief under the poor law it may be said that no discrimination is made between citizens and aliens in determining the question of legal settlement. In this respect the supreme court of Minnesota in a case entitled

Village of Litchfield vs. County of Meeker, 1930, 233 N. W. 804:

under a statute that in language is substantially the same as the Iowa Law relating to continuous residence had the following to say:

"The charity of our poor law makes no discrimination upon the grounds

of nationality. Aliens are as much entitled to relief as are our own citizens, and in proportion to their numbers get it as commonly and as freely. The statutory definition of 'settlement' therefore applies to aliens in the same way as it does to our own citizens."

It would appear therefore that the citizenship of the employee is immaterial, and it is accordingly the opinion of this department that employers are required to pay the contribution provided for in Section 7(a) of the Unemployment Compensation Act on aliens in their employ provided, however, such employers come within the definitions set out in Section 19(f), and that the employment is such as comes within the definitions set out in Section 19(g) of the Act.

You inquire what bearing the fact naturalization papers have been applied for has on the status of alien employees. Under the provisions of the Old Age Assistance Act it would have had no effect for the reason that an alien is advanced to citizenship only upon final papers being granted and the taking of the required oath. Under the Unemployment Compensation Act it would have no effect whatsoever.

LEGAL SETTLEMENT OF: WPA: CCC: VETERANS: Veterans must be residents of county to receive aid. Inmates of state institutions retain settlement of county from which they went to institution. A person must reside in a county for a year without being served with notice to depart before he acquires legal settlement. No responsibility on part of county for transients. Care and treatment of indigent persons shall be charged back to county from which they are admitted.

April 8, 1937. *Iowa Emergency Relief Administration, Des Moines, Iowa:* This department is in receipt of your request for an opinion with reference to the construction of Section 5322, subsection 3, Code of Iowa, 1935, as the same may or may not relate to WPA employees, CCC and soil conservation enrollees, recipients of resettlement grants, soldiers' relief and veterans' disability compensation.

Section 5311, supra, provides in part as follows:

"5311. *Settlement—how acquired.* A legal settlement in this state may be acquired 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. * * *"

It should be stated at the outset that in each of the enumerated cases, except those receiving soldiers' relief or veterans' disability compensation, the recipients of public funds cannot be classed as charity persons. Employees of the WPA, enrollees of the CCC and soil conservation and recipients of resettlement grants are either returning service for compensation or are borrowers. Thus, such persons would be in the same category as employees of a private corporation or individual or a mortgagor. Should such persons choose to establish a residence at the point of their employment, or in the case of mortgagors of the resettlement administration choose to establish a residence anywhere in the state of Iowa,—the fact that they are employed by or are enrollees of federal governmental agencies or borrowers of a federal agency would not prevent them from establishing a residence. However, your inquiry pertains to legal settlement in contradistinction to residence. Residence and legal settlement are not

synonymous terms. *State ex rel. Gibson vs. Story County*, 207 Iowa 1117. Thus, while a person may have a residence at one place for the purpose of exercising his elective franchise or for the purpose of taxation, yet his legal settlement may be at another place,—all for the reason that under the statute quoted hereinbefore at subsection 1 it is provided:

"5311. *Settlement—how acquired.* * * *

"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. * * *"

For example, a CCC enrollee who may be stationed at a camp in "A" county may establish a residence in said county if two things concur, namely, the animus manendi coupled with the overt act of residing in the county. *Dodd vs. Lorenz*, 210 Iowa 513; *In re Geis*, 162 Misc. 398, 293 N. Y. S. 577; *McBeth vs. Streib*, (Tex. 96 S. W. (2d) 992. However, if such enrollee has been prevented by the proper authorities from establishing a legal settlement in "A" county by following the procedure outlined in Chapter 267 styled "Support of the Poor," he would not be entitled to relief from said "A" county under the law of Iowa governing the support of the poor. The same may be said for enrollees of the soil conservation and employees of the WPA, and also recipients of resettlement grants,—the latter being in the same position as any other person who procures either a secured or unsecured loan. In other words, Section 5311, subsection 3, supra, has no application to such persons insofar as their WPA, CCC, soil conservation or resettlement administration connections are concerned.

With reference to those receiving soldiers' relief and veterans' disability compensation it may be stated at the outset that such persons are within a class for which the legislature has provided relief assistance from public funds. See Chapter 273, Code of Iowa, 1935, and Chapter 332, Section 8, Laws of the 39th General Assembly. In the case of relief administered and disbursed under Chapter 273, supra, the recipients enumerated in Section 5385 thereof must have a legal residence in the county. The county soldiers' relief commission created under said chapter is required by Section 5392-b1 thereof to furnish data to the state bonus board concerning eligible applicants for additional bonus and disability awards, as provided for under Chapter 332, Laws of the 39th General Assembly. Under Section 8 of Chapter 332, Laws of the 39th General Assembly payments of additional bonus or disability awards are required to be made to residents of the state of Iowa. Residence was determined as of the time of entering military service, limited, however, to the dates between April 6, 1917, and November 11, 1918. In the case of soldiers' relief and veterans' disability compensation the requirements of the law as to residence should not be confused with the law of Iowa as to legal settlement. Recipients of soldiers' relief or disability compensation would, of course, be residents of the county from which they receive such aid, and they would retain their residence in such county until such time as it is abandoned by them and a new one selected.

The question of the legal settlement of inmates supported by institutions, within the meaning of the term institution as used in Section 5311, subsection 3, *supra*, is one not without its difficulties. We are of the opinion that the legislature, in using this language, had in mind the various state institutions which are supported by public revenues, and institutions of similar character operated privately. No distinction was made by the legislature, for it referred to any institution whether organized for pecuniary profit or not, or any institution supported by charitable or public funds. It is, therefore, the opinion of this department that a person either committed or admitted to a state institution or private institution retains a legal settlement had at the time of such commitment or admission; that such person would not acquire a new legal settlement in the county in which the institution is located. See *State ex rel. Gibson v. Story County, supra; Scott County v. Townsley*, 174 Iowa 192.

Can an enrollee in a CCC camp gain a settlement in the county in which the camp is located? Would his marriage to a local girl change the situation either during or immediately after his enrollment?

The age of the enrollee is an important factor in reaching a conclusion as to the foregoing questions. If the enrollee be a minor the statute fixes the settlement as that of his parents. Section 5311, subsection 5, Code of Iowa, 1935. If the enrollee be twenty-one years of age or over he could, of course, select any residence he might choose, whether it be in the county where the camp is located or elsewhere. The selection of such a residence, however, would not constitute the selection of a legal settlement. See discussion, *supra*. In other words, even though he chose the county where the camp in which he is enrolled is located, nevertheless the county authorities could prevent his acquiring a legal settlement there by service of a non-resident notice, as provided in Chapter 273, *supra*.

With reference to the marriage of such enrollee to a girl who is a resident of the county wherein the camp is located, it may be said that the consummation of the marriage contract would elevate the enrollee to the age of maturity, if he be a minor. Thereupon he would have the right to select such residence as he chose. His residence, however, could ripen into a legal settlement only if he continuously resided in such county for the period of one year without being warned to depart. He could be prevented from acquiring such legal settlement by the service of a non-resident notice.

Your request also involves the interpretation and procedure to be followed under Sections 5311 and 5315, Code of Iowa, 1935. Section 5311 provides in part:

"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, * * *"

Therefore, under the provisions of the above quoted section, a person who has complied therewith, namely, "has resided in any one county continuously for one year without being warned to depart" has acquired a settlement in such county. And such settlement would then continue until the party abandoned his settlement. However, if before the year has expired, such person has been warned to depart "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 person shall have filed with the board of supervisors of such county an

affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county." It will thus be seen that if a person coming into a county is warned to depart before he has resided there one year continuously, he may then acquire a settlement only by residing there continuously for one year from and after the filing of the affidavit above referred to.

Section 5315 is substantially the same as 5311, but pertains to persons coming into the state or going from one county to another who are county charges or likely to become such. They may be prevented from acquiring a settlement in any county by the service of a notice upon them warning them to depart. After the service of notice they cannot acquire a settlement until they have resided continuously in one place after the filing of an affidavit as hereinbefore stated.

What is the county's responsibility, if any, for transient families and for transient single persons? Whose responsibility is a family or a person who has lost settlement?

There is no responsibility on the part of the county for either transient families or single persons. Section 5313 of the statute provides for the procedure to remove such transient families or single persons from the state or the county into which such person has moved. The proper authorities should, in the event of transient families or single persons coming into the county, follow the procedure as outlined in Section 5313.

Under Section 5312 of the Code, does a person lose his settlement after a year's absence from the state or must he acquire a settlement elsewhere before losing his settlement in the state?

The provisions of Section 5312 are as follows:

"*Settlement continues.* 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."

Of course a person who has acquired a legal settlement somewhere else necessarily abandons his prior settlement. But where one has a legal settlement and removes from the state and is absent for more than one year, regardless of whether he has obtained a settlement elsewhere and regardless of the fact that he may have intended to return, loses such settlement.

Under Sections 4005 and 4018-f1 of the Code, in the case of a person found in "A" county whose settlement is in "B" county and who needs immediate emergency treatment at the State University Hospital, is it the duty of "A" county or "B" county to execute the necessary papers to enter the patient in the hospital and against which county quota should such patient be charged?

In the above question you have, in designating the patient, referred to his settlement, that is, you have stated that the patient's settlement was in "B" county. The statute with reference to medical and surgical treatment of patient could be a resident of a county and not have a settlement in the county. See *State ex rel. Fletcher vs. Story County*, supra. Under the provisions of Section 4005 of the Code it is provided that a complaint for admission to the University Hospital be filed in the juvenile court in the county in which the patient resides. Such court, if satisfied with the sufficiency of the complaint enters an order for the patient's treatment at the State University Hospital.

In Section 4018-f1 it is provided that the care and treatment of indigent persons shall be charged back to the county from which they are admitted.

There is no provision of the statute, so far as we have been able to find, for the admission of non-residents of the State of Iowa to the University Hospital

for treatment. The statute specifically sets out that the complaint shall charge that the patient "is a legal resident of Iowa residing in the county where the complaint is filed."

Therefore, if the patient be found in "A" county and some citizens of the county files a complaint with the juvenile court of "A" county and the court of "A" county commits such patient for treatment, the charges therefor should be charged against "A" county. Such charges could not be charged against "B" county because "B" county perhaps has no notice of the procedure and cannot be made liable for a charge or expense except in accordance with the provisions of law.

COUNTIES: COUNTY JAIL: SHERIFF'S HOME: ERECTION OF: Election must be held on question of building county jail, and must carry majority vote. County, through board of supervisors, may then submit to voters question of bonds. Bond issue must carry 60 per cent vote if submitted to voters.

April 9, 1937. *Mr. John F. Wilson, County Attorney, Sac City, Iowa:* We are in receipt of your letter requesting an opinion from this department upon the following matter:

Advise the procedure to be followed with reference to the construction of a county jail and sheriff's residence.

Section 5261 of the statute provides:

"*Expenditures—when vote necessary.* The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a courthouse, jail, or county home when the probable cost will exceed ten thousand dollars, * * * until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections."

Under the provisions of the above statute it is first necessary that the question of whether or not the county shall build a jail and sheriff's residence at a cost of $25,000.00 be submitted to the voters of the county at an election held for that purpose and carried by a majority of the voters thereof.

If the proposition to construct such jail is carried by a majority vote, the county, through its board of supervisors may then submit to the voters the question of whether or not bonds of the county shall be issued to the extent of the amount necessary to construct such jail and a tax levied for the purpose of paying such bonds. However, where the question of issuing bonds is submitted to the voters, the bond issue must carry by 60 per cent vote. See Section 1171-d4 of the statute.

The Board may, if it desires, submit the proposition at one election and upon one ballot. That is, they may submit a question embodying the construction of such jail and the issuance of bonds to raise money with which to pay for such construction, and the levying of a tax in payment of such bonds at one election.

If the matter is submitted at one election, it would therefore have to carry by a 60 per cent vote.

COUNTY OFFICERS: SHERIFF'S FEES: Where sheriff sells personal property to make delinquent taxes thereon, he is entitled to receive fees in amount of 5 per cent and compensation allowed constables for sale of personal property on execution, which is 5 per cent, or a total of 10 per cent of amount received.

April 9, 1937. *Mr. J. R. Ewing, Sheriff, Creston, Iowa:* This department is in receipt of your request for an opinion with reference to the fees to which a sheriff is entitled for selling personal property in payment of delinquent taxes thereon.

The statute, Section 7223 provides:

"*Compensation and accounting.* Each collector appointed shall receive for his services and expenses the sum of five per cent on the amount of all taxes collected and paid over by him, which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes and interest; and pay the same to the treasurer at the end of each month."

Section 7224 provides:

"*Sheriff or constable as collector.* In the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff, or a constable, who shall proceed to collect the same, and either shall be entitled to receive the same compensation, in addition to the five per cent, as constables are entitled to receive for the sale of property on execution."

Under Section 10637 of the statute fixing the fees of constables, sub-section 17, it is provided:

"For all money collected on execution and paid over, except costs, five per cent, which shall constitute part of the costs."

It will be observed that Section 7224 provides "in addition to the five per cent." The reference is to the five per cent provided in Section 7223.

Where the sheriff sells personal property to make the delinquent taxes thereon, he is entitled to receive the fees authorized by Section 7223 to collectors in the amount of five per cent and the compensation allowed constables for the sale of personal property on execution, which is five per cent, or a total of ten per cent of the amount received.

Would the sheriff be entitled to the same fees as above mentioned on distress warrants for the collection of delinquent sales tax and income tax?

Under the provisions of Section 6943-f22 with reference to the collection of delinquent income tax, the procedure outlined in Sections 7189 and 7189-d1 is made applicable, and with reference to the collection of delinquent sales tax, Section 6943-f51 applies.

Therefore, the procedure for the collection of delinquent sales tax and delinquent income tax is the same as that outlined in Section 7189 and Section 7189-d1 of the statute.

The only fees allowed to sheriffs, constables, or collectors executing distress warrants are those provided for in Section 7224 of the statute hereinbefore quoted. It would therefore appear from an examination of the statutes with reference to the collection of delinquent income tax and sales tax that the fees provided for in Section 7224 would govern and that the officers executing such distress warrants would be entitled to receive, first, five per cent of the amount collected as provided for in Section 7223 and an additional five per cent as provided for in Section 10637.

It is therefore our opinion that in the execution of distress warrants for the collection of delinquent income tax and sales tax that the officer issuing such distress warrant would be entitled to receive a total of ten per cent of the money received as his fee.

COUNTY OFFICERS: BOARD OF SUPERVISORS: CLERK'S OFFICE: EXPENSES OF: Installation of steel filing cases in Clerk's office is in nature of permanent improvement to county property and should be charged against general fund.

April 10, 1937. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

The Board of Supervisors desires to purchase additional steel filing cases for the Clerk's office. Should the expense thereof be charged to the court expense fund or to the county general fund?

Section 7172 of the statute authorizes the levying of a tax not exceeding three-fourths mill for court expenses. This levy, however, is supposedly only made by reason of extraordinary or unusual litigation. "Such fund shall be used for no other purpose and the levy therefor shall be dispensed with when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures including such court expenses."

The court expense fund is more in the nature of an emergency fund to be levied and used in the event of a heavy drain upon the general fund. The installation of steel filing cases in the Clerk's office is in the nature of a permanent improvement and betterment to county property, and should, therefore, be charged against the general fund.

From what fund should the expenses of coroner's inquests and the fees of coroner for examining dead bodies and so forth be paid?

There is no direct provision of the statute directing the fund to which the fees of the coroner's inquests and coroner's fees should be charged. However, Section 5151 of the statute requiring the county auditor to make an annual report provides:

"*Financial report.* * * *

1. The amount of the various classes of warrants drawn on the county fund, except for court expenses, * * *

* * *

5. The expenses of the coroner's court, stating amount paid coroner, coroner's clerk, constable fees, witness fees, and items of like nature."

The above would indicate that such fees should be paid from the county general fund.

It is therefore our opinion that the fees for holding inquests and the coroner's fees should be paid from the county general fund.

BOARD OF CONTROL: SOLDIERS' ORPHANS' HOME: PROFITS AND EARNINGS: Interest may be computed on the total amount but cannot be diverted to other use than that to which the principal is put—to pay discharged wards in proportion to what their labor contributed to the principal fund. Legislature did intend for profits to be placed in common funds. Chapter 185, Section 3711.

April 10, 1937. *Mr. Robert B. Miller, Secretary, Board of Control:* We acknowledge receipt of your letter wherein you request an opinion on the question involved in the following statement of facts:

The Iowa soldiers' orphans' home has some three hundred accounts amounting to approximately $5,000.00, which money belongs to wards of the state of Iowa, in various Davenport banks. The superintendent of the home has inquired whether or not the interest on the total amount may be turned over to the amusement or Christmas fund to be used for the general benefit of all the children in the institution.

Section 3711 of Chapter 185, Code, 1935, provides:

"*Profits and earnings.* Any profits arising from labor at the home shall be placed at interest in some savings bank, and each child paid, when discharged, in proportion as his labor contributed to the fund. The earnings of a child who is placed with others under contract shall be used, held, or otherwise applied for the exclusive benefit of said child."

In the first instance it is assumed that the accounts referred to are made up of profits arising from labor in the home.

On this assumption it appears that the cited section is the controlling one, and that the construction to be placed thereon is, in our opinion, as follows:

Since the first sentence pertains only to *profits arising from labor at the home*, and each child, (ward), when discharged, is to be paid from such fund in proportion as his labor contributed thereto, it was the apparent intent of the legislature that these profits be accumulated in a common fund and deposited at interest in some savings bank, and not that the profits identified with a particular ward's labor be placed at interest to the credit of that particular ward, as has presumably been done in the instant case.

Further, since the legislature required such profits to be deposited at interest, it apparently intended that each ward should receive the benefit of interest earnings in like proportion as the principal of the fund.

On the other hand, earnings of a child who is placed with others under contract must be used, held or otherwise applied for the *exclusive benefit* of such child. While there is no express direction that such earnings, when held, be placed at interest in some savings bank, yet it may be said that such earnings could not be pooled in a common fund with the profits arising from labor at the home.

Notwithstanding that profits arising from labor at the home have been deposited to the individual credit of state wards, as we gather to be the case from the facts set out in your letter, and interest regularly credited thereon, it is the opinion of this department that there has been a substantial compliance with the provisions of the cited section, and that no inequality has or will result from payment of each entire account, principal plus interest, to the ward, when discharged.

Inquiry is now made, however, as to whether or not interest may be computed on the total of all of said accounts and turned over to the amusement or Christmas fund.

It is the opinion of this department that interest may be computed on the total amount, but that it cannot be diverted to any other use than that to which the principal is put, namely, to pay discharged wards in proportion to which their labor contributed to the principal fund. If the interest is computed as a single sum it must be held intact for this purpose.

As to whether or not it could be expedient at this time to lump all of the individual accounts in one and to have the interest computed on the total amount and credited to such account as earned, the home, however, preserving its record as to the amount each ward may be at present entitled to, this department expresses no opinion, but it is manifest that the legislature did intend these profits to be placed in a common fund.

SCHOOLS: EXPENDITURES OF: School funds shall be used for no other purpose than those for which raised, unless matter is submitted to electors of their district for vote thereon.

April 14, 1937. *Mr. Frank S. Cooley, President, Independent School District, Fort Dodge, Iowa:* This department is in receipt of your request for an opinion based upon the following facts:

The Independent School District had funds on deposit in various banks belonging to the general fund of the school district. The depositories of these funds suspended business and claims for such funds were filed by the school district against the state sinking fund. There has heretofore been received by the school district from the state sinking fund an amount of approximately $100,000.00, which has been deposited by the school treasurer to the credit of the general fund of the district.

Can the board of directors of the school district transfer such fund from the general fund into the schoolhouse fund and use the same for the construction of a new school building or an addition to their present school building without submitting the question of constructing such new building, or addition to the present building, to a vote of the electors of the district?

A solution of the question involved must depend wholly upon the construction of the various statutes applicable, as the matter has never been before our court for adjudication.

In the first instance, as disclosed from the facts set out, the funds received from the state sinking fund in the sum of approximately $100,000.00 are now in the general fund of the district.

The statute, Section 4240 provides for a transfer of funds from the general fund to the schoolhouse fund. Section 4240 is as follows:

"*Annual settlements.* On the first secular day in July, the board of each school township, and with it the members of the board who retired in the preceding March, and the board of each independent school corporation, shall meet, examine the books of and settle with the secretary and treasurer for the year ending on the thirtieth day of June preceding, and transact such other business as may properly come before it. The treasurer at the time of such settlement shall furnish the board with a sworn statement from each depository showing the balance then on deposit in such depository. Should the secretary or treasurer fail to make proper reports for such settlement, the board shall take action to secure the same."

At the annual July meeting of the board of directors, as provided for in the section above quoted, it is the duty of the board of directors to make settlement with the secretary and treasurer covering the transactions of the preceding year's business.

In the use of the word "settlement" the Legislature has no doubt used the word in a broader sense than to merely require a settlement between the board of directors and the secretary and treasurer. It is the contemplation of the statute that at such meeting there shall be an auditing of the acts of the secretary and treasurer covering the business of the past year, and that after such acts have been audited and the receipts and disbursements of the offices approved by the board of directors, a balance struck and compared with the sworn statements of the balances shown in the depositories of the district's funds. After such auditing the board of directors makes settlement with the secretary and treasurer. That is, they give approval or disapproval to the end that proper credits and debits shall be made against the school funds. After the audit and settlement are made if it appears that there is a surplus in the general fund, the board of directors may proceed as provided in Section 4241 which is as follows:

"*Transfer of funds.* If after the annual settlement it shall appear that there is a surplus in the general fund, the board may, in its discretion, transfer any or all of such surplus to the schoolhouse fund."

It is not necessary that such fund be transferred at the July meeting immediately following such audit and settlement between the board of directors and the secretary and treasurer, but may be done at some future date, if it has in fact appeared at the annual meeting in July that such balance actually existed. Therefore, if the board of directors have, following the audit and settlement with the secretary and treasurer at the annual July meeting, determined that a surplus exists in the general fund, it may at some future date transfer the same into the schoolhouse fund. The provisions for making the transfer of the surplus in the general fund to the school house fund, as hereinbefore pointed out, do not require the approval of the comptroller as specified in Section 388 of the statute and is not a temporary transfer but is a permanent one and the fund cannot be again transferred from the school house fund to the general fund except by a vote of the electors of the school corporation as provided for in sub-division 5 of Section 4217 of the statute.

Chapter 213 of the Code prescribes the powers and duties conferred upon boards of directors and confines or limits the powers and duties of such boards of directors to such as are therein given to them and such other powers and duties as are necessarily incident thereto in order to carry out the delegated powers and duties conferred upon such boards. All other powers and duties with reference to the management, operation and control of the schools and the affairs in connection therewith are retained by the electors of such school districts. Chapter 212 of the statute specifies the powers of the electors of school districts. Section 4217 which is contained in Chapter 212 is as follows:

"*Enumeration.* The voters at the regular election shall have power to:

* * *

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

We do not have before us, nor do the facts embodied in the question give us the actual value of the taxable property in your school district. However, under Section 4354 of the Code it is provided:

"*Petition for election.* Before such indebtedness can be contracted in excess of one and one-quarter per cent of the actual value of the taxable property, a petition signed by a number equal to twenty-five per cent of those voting at the last regular school election shall be filed with the president of the board of directors, asking that an election be called, stating the amount of bonds proposed to be issued and the purpose for which the indebtedness is to be created, and that the necessary schoolhouse or schoolhouses cannot be built and equipped, or that sufficient land cannot be purchased to add to a site already owned, within the limit of one and one-quarter per cent of the valuation."

The next section of the statute provides for the calling of an election upon the filing of such petition. Therefore, if the expenditure proposed by the board of directors of the school corporation exceeded one and one-fourth per cent of the actual value of the taxable property of the school district, it would be necessary that such proposition be submitted to the voters of the district. It may, however, appear from the above statute that such an election would only be necessary in the event that the district was issuing bonds. We do not feel that the statute will bear such restricted interpretation. The purpose of the statute in requiring the submission of the question to the voters is to ascer-

tain the will of the people as to whether or not they want to assume the additional burden of a schoolhouse tax, and while the expenditure of money on hand would not require the levying of an additional tax, it would be the use of money or funds which by a vote of the electors could be transferred to the general fund and used for general school purposes and thereby reduce the burden of taxation placed upon the property owners for the support of the schools.

The general policy of the law is to permit the taxpayers to have a voice in the obligations to be assumed by them and to permit the taxpayers to vote upon the questions of the expenditure of the fund raised by taxation. The incurring of indebtedness, the issuance of bonds and the levying of taxes are matters which the statute has required should be submitted to the electors.

The facts involved in the question are peculiar in that the money now on hand was tied up so that the same could not be spent by the school district and an additional tax burden was placed upon the taxpayers to raise funds to replace those deposited in closed banks, and this fund on hand accumulated and came back to the school district by reason of the repayment by the state sinking fund.

The statute provides that school funds shall be used for no other purposes than those for which they were raised. The funds in question were not raised for the purpose of constructing a building, or repairing a building, or building an addition to a building, but were raised for the purpose of defraying the ordinary and usual expenses of the school. To now permit such funds to be used in the construction of a building or addition to a building would be to permit them to be used for a purpose other than that for which they were raised, and would in our opinion be in violation of the statute.

As we have heretofore said, the facts in this matter are extraordinary, but the same condition might arise if school districts levied excessive taxes for their general purposes thereby creating a surplus during the year which at the annual meeting could be transferred to the schoolhouse fund, and in a few years create a balance in the schoolhouse fund sufficient to construct a building, thereby permitting the board of directors to do indirectly what they could not do directly, namely, construct a building and tax the property of the district therefor without submitting such matter to the vote of the electors.

It is therefore our opinion that although there is sufficient money in the schoolhouse fund with which to erect a building, or an addition to one already in existence, boards of directors are without authority to erect such building and make the expenditure therefor without submitting the proposition to the electors of their districts for a vote thereon.

PHARMACY INSPECTORS: ARRESTS: DELEGATION OF AUTHORITY: Pharmacy inspectors have only the authority of private persons in making arrests. (See Section 13469, 1935 Code.) They cannot be specially designated as special agents by the Department of Justice.

April 16, 1937. *Mr. W. F. Meads, Secretary, Iowa Pharmacy Examiners:* We acknowledge receipt of your request for an opinion as to whether two inspectors of your department may, either by appointment by the Department of Justice or by delegation of authority in some way, be given the power to make arrests in the performance of their duties.

The powers of inspectors employed by the Board of Pharmacy Examiners

are set out in Sections 2530 and 2531, 1935 Code, which sections provide as follows—

"2530. *Enforcement.* The provisions of this title in so far as they affect the practice of pharmacy shall be enforced by the pharmacy examiners and the provisions of Sections 2523 and 2524 shall not apply to said profession."

"2531. *Pharmacy examiners.* In discharging the duties and exercising the powers provided for in Section 2529 and 2530, the pharmacy examiners and their secretary shall be governed by all the provisions of this chapter which govern the department of health when discharging a similar duty or exercising a similar power with reference to any of the professions regulated by this title."

The powers and duties, therefore, of such inspectors correspond to the powers and duties of health officers. It is obvious that the maximum authority of such officers was intended to be limited by the statutes. Health department investigators and your inspectors are therefore authorized to file information against violators of the statutes, but they are not authorized or empowered to make arrests as peace officers.

For your information, it is stated that private persons have the power to make arrests under the provisions of Section 13469, Code 1935, which provides as follows:

"13469. *Arrests by private persons.* A private person may make an arrest:

"1. For a public offense committed or attempted in his presence.

"2. When a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

In connection with this general power to arrest, which, of course, is possessed by your inspectors, the provisions of Section 13478 should also be considered * * * "

"13478. *Arrests by private person—disposition of prisoner.* A private person who has arrested another for the commission of an offense must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer, who may take the arrested person before a magistrate, but the person making the arrest must also accompany the officer before the magistrate."

Special officers appointed by the Attorney General act under the direction of the Attorney General. Therefore, it would not be possible for the Attorney General to make appointment or to designate your inspectors as special agents since he would not have the requisite control of such officers as is contemplated by Section 13407, 1935 Code.

JUSTICE OF PEACE: FEES OF: BOARD OF SUPERVISORS: Board of Supervisors is without authority to change a prior resolution of the Board in fixing fees of Justices of the Peace for previous years.

April 17, 1937. *Mr. R. N. Johnson, Jr., County Attorney, Ft. Madison, Iowa:* This department is in receipt of your request for an opinion upon the following matter:

The Lee County Board of Supervisors on May 24, 1933, passed a resolution fixing a limitation of the fees in civil matters of the Justices of the Peace of Madison and Keokuk Townships at not to exceed $100.00 for the years 1933, 1934 and thereafter until changed. On January 2, 1936, the Board passed a resolution fixing the fees of Justices of the Peace in civil matters in the above townships at not to exceed $200.00, the resolution stating: "This resolution to apply for the year 1935 and subsequent years until changed by the Board." It appears that Justices of the Peace in the above townships have retained fees in excess of $100.00 for services during the year 1935.

Can the Board of Supervisors by the resolution of January 2, 1936, fix and

prescribe the fees for Justices of the Peace covering the year 1935 at an amount different from that prescribed by the resolution of May 24, 1933?

We are not advised as to the population of either Madison or Keokuk Townships and our answer to the foregoing question is made without reference to the population of such townships, and is based upon the effect to be given to the resolution of the Board of Supervisors passed on May 24, 1933, and on the resolution passed on January 2, 1936. The Board of Supervisors in its resolution passed on May 24, 1933, provided a limitation upon the amount of fees in civil cases to be retained by Justices of the Peace during the years 1933 and 1934 *and thereafter until changed.* The effect of such resolution was to establish a limit to the amount of fees in civil cases Justices of the Peace in those townships might retain during the years 1933, 1934 and 1935. No further action of the Board was taken until January 2, 1936, thereby extending the resolution of May 24, 1933, until that date. On January 2, 1936, the Board by resolution attempted to change the basis of the fees, not only for the year 1936, but for the year 1935. The resolution of January 2, 1936, was ineffective as far as the year 1935 was concerned. Whether it was the same Board of Supervisors or a different Board would make no difference. The Board, acting as such on January 2, 1936, could only end or terminate the period of time fixed by the resolution of May 24, 1933, and could not by a retroactive act change the same. The statute, Section 10639 provides that Justices of the Peace "shall retain such civil fees as may be allowed by the Board of Supervisors." This does not mean that they may retain such fees as may later be approved by the Board of Supervisors, but such fees as the Board of Supervisors by appropriate action shall allow them as their compensation. There is a distinction between allowing and approving. In the instant case the Board of Supervisors as constituted in May, 1933, allowed fees to be retained by the Justices of the Peace during the year 1935. The Board of Supervisors as constituted on January 2, 1936, was without right or authority to rescind, modify, or change the action of the prior Board in fixing and allowing the fees for the year 1935.

It is therefore the opinion of this department that the Board of Supervisors was, on January 2, 1936, without authority to change the prior resolution of the Board in fixing the fees to be retained by such Justices during the year 1935.

TAXATION: Where property was sold at scavenger tax sale in 1935, holder of such certificate is not entitled to tax deed until after three years from date of sale.

April 17, 1937. *Mr. Geo. E. Allen, County Attorney, Onawa, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Where property was sold at scavenger tax sale held on the 11th day of February, 1935, is the holder of such certificate entitled to a tax deed at the expiration of one year if the ninety days' notice of the expiration of the right of redemption has been given, or must such certificate holder await the expiration of three years from the date of such tax sale?

The requirements for the giving of notice of the expiration of the period of the right of redemption from tax sales are contained in Section 7279 of the statute and are as follows:

"*Notice of expiration of right of redemption.* After two years and nine

months from the date of sale, or after nine months from the date of a sale made under the provisions of Section 7255, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate, and also upon the person in whose name the same is taxed, * * * a notice signed by him, * * * stating the date of the sale, * * * and that the right of redemption will expire and a deed for the land be made unless redemption is made within ninety days from the completed service thereof."

Under the facts submitted, it will be observed that the property in question was sold on February 11, 1935. At the time and at the date of the sale of this property, Section 7279, so far as pertinent, reads as follows:

"*Notice of expiration of right of redemption.* After two years and nine months from the date of the sale, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate; * * * a notice signed by him, * * *"

The provision contained in Section 7279 as it appears in the Code of 1935 "or after nine months from the date of a sale made under the provisions of Section 7255" went into the law by amendment. See Chapter 83 of the Laws of the 46th General Assembly which became effective on March 30, 1935, by publication. Chapter 83 of the Laws of the 46th General Assembly did not repeal Section 7279 as it appeared in the Code of 1931 but amended the section by inserting the provision above quoted. Therefore, at the time of the sale, to wit, February 11, 1935, the statute permitted and provided for a three year period of redemption. Chapter 83 of the Laws of the 46th General Assembly was not passed as an emergency measure or for the purpose of providing relief for an oppressed land owner.

In the case of *State ex rel. Clevering vs. Klein*, 249 N. W. 118, the Supreme Court of North Dakota stated:

"The law existing at the time a mortgage is executed, fixing the period of redemption after foreclosure is a part of the contract of the mortgage, the obligation of which may not be impaired by changing the period of redemption."

Cooley in his work on Taxation, Vol. 2, page 1054, states:

"Now the purchase at a tax sale is clearly a contract. It is made under the law as it then exists, and upon the terms prescribed by the law. No subsequent statute can import new terms into the contract, or add to those before expressed. If it could be changed in one particular, it could be in all; if subject to legislative control at all, it is wholly at the legislative mercy."

Our own Supreme Court in the case of *Negus vs. Yancey & Smith*, 22 Iowa 57, stated:

"The right of redemption is secured only from the sale; this occurred for the taxes in question under the law of 1860, which fixes the time of redemption at three years."

The Supreme Court of Arkansas in the case of *Northern Road Improvement District vs. Meyermann*, 168 Ark. 383, 275 S. W. 762, stated:

"The rights of persons purchasing at tax sale are governed by the law as it exists at the time of the sale."

It is evident that at the time of the sale of this property there was no thought in the minds of the person who sold the property, of the purchaser, or of the owner, that the same was being sold, save and except upon a three year period of redemption. The purchasers bought it with that thought in mind, and the owner permitted the same to be sold under the statute as it then existed. As stated by Cooley in his work on Taxation, if a legislature at a subsequent time could cut down the period of redemption from three years to one year, it might likewise cut out entirely the period of redemption,—which, if attempted by the

legislature, would amount to the taking of property without due process of law.

The original statute under consideration was not repealed, but was amended by an addition thereto. A statute not repealed remains in full force and effect. As a general rule, where statutes are conflicting, the later enactment will govern, but where the original statute, and the amendment, pertain to a remedy, consideration must be given to the older enactment.

It is therefore the opinion of this department that the legislature by the enactment of Chapter 83, Laws of the 46th General Assembly, wherein Section 7279 of the Code was amended, did not intend that such amendment should apply to tax sales held previous to the time of the amendment, and it is our further opinion that the holders of the certificate issued at the sale held on February 11, 1935, are not entitled to deeds until after three years from the date of the sale.

TAXATION: Amount paid in satisfaction of an illegal tax may be recovered back by the taxpayer. Excessive taxes are not illegal and once paid, cannot be recovered back.

April 17, 1937. *Mr. Louis H. Severson, County Attorney, Rock Rapids, Iowa:* This department is in receipt of your request for an opinion upon the following matter:

The Chicago, Rock Island and Pacific Railway Company has paid the first half of its 1936 tax under protest, claiming such tax to be illegal and excessive, and that said tax is being paid under duress of the pains, penalties, burdens, fines, and forfeitures created and imposed by the statutes of Iowa, and that said Railway Company will institute suit for the recovery of such sum and have notified the county treasurer not to pay out, or distribute or apportion any part of such taxes.

Under the facts outlined in the foregoing proposition, it is our opinion that the protest filed on behalf of the railway company is ineffectual, except in such respects only as the railway company might, in a suit, be able to substantiate its claim that the tax is illegal. The principal of law is well settled in this state by numerous rulings of our Supreme Court that the amount paid in satisfaction of an illegal tax may be recovered by the taxpayer. On the proposition of an excessive tax, we have a wholly different situation. Excessive taxes are not illegal and once paid cannot be recovered back.

Section 7235 of the 1935 Code provides:

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

Chapter 337 of the Code provides the method of taxing railway companies, and in the event such taxpayer is dissatisfied with the valuation fixed, the State Board of Assessment and Review is given the power and authority to correct such assessment and make such changes therein as are deemed equitable and just. The taxpayer, by failing to avail himself of the methods pointed out by statute for correcting errors and mistakes in his assessment, is deemed to have estopped himself from objecting to the tax. The Supreme Court in the case of *Cedar Rapids Hotel Co. vs. Stirm, et al.*, 268 N. W. 562, quoted with approval from the case of *Van Wagenen vs. Supervisors of Lyon County*, 39 N. W. 105, as follows:

"If a person pays taxes without availing himself of the remedy provided by

law, it cannot be regarded as an illegal exaction, provided the power and jurisdiction existed to make the assessment and levy."

Further on in the same opinion the court stated the ruling as follows:

"This court has repeatedly held that the tax based on an excessive valuation, is not 'erroneously or illegally exacted or paid' where the taxpayer has failed to make use of the administrative body in having the correction made at the proper time. His failure to take advantage of the means provided by the statute for correcting an erroneous assessment of this character amounts to a waiver. So long as the taxes remain unpaid and within the five-year period of limitation on proper application, the assessment may be corrected by the state board of assessment and review, but this remedy must be resorted to (in the case of an otherwise valid but over or excessive assessment) before voluntary payment of the tax."

It is therefore our opinion that although the tax referred to was paid under an alleged protest, the same was voluntarily paid before delinquent and without any attempt being made by the taxpayer to enjoin the collection of such tax or the righting of the alleged excessive assessment, and is therefore not an erroneous tax within the meaning of the statute and could not be recovered by the taxpayer. It is not, therefore, necessary that the county treasurer hold the same intact.

TAXATION: TOWNSHIP PROPERTY: Assessed valuation of upper story of a building owned by a township and leased to a telephone company for their use, should be estimated and the same returned for taxation.

April 17, 1937. *Mr. Ralph H. Goeldner, County Attorney, Sigourney, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Adams Township is the owner of a two-story building which has been purchased for the purpose and use as a town hall. The upper story of the building has been leased by the township to the Mutual Telephone Company from which the township receives a rental of $10.00 per month. Is the upper story of the building subject to taxation?

The statute exempts certain properties from taxation. Section 6944 provides:

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

"2. *Municipal and military property.* The property of a county, township, city, town, school district, or military company, when devoted to public use and not held for pecuniary profit. * * *"

Under the foregoing section of the statute properties of the municipality enumerated therein are exempt from taxation only in the event they are "devoted to public use and not held for pecuniary profit."

Under the facts in the above question, the second story of the building cannot be considered as devoted to public use for the reason that the property has been leased to a telephone company. Under such circumstances the telephone company is the proprietor of the property during the term of its lease and the property is therefore being used in a private nature. It cannot be said that the upper story of the building is not held for pecuniary profit for the reason that under the facts stated, the township is receiving a monthly rental of $10.00 from the telephone company. Our Supreme Court in the case of *Fort Des Moines Lodge vs. Polk County*, 56 Iowa 34, stated the rule as follows:

"Keeping in view the rule above stated, this section of the statute must be construed as requiring the property in question to be taxed. Indeed, it, in effect, declares that leased property shall not be exempt from taxation. Under the statute it is immaterial to what the income from leased property is devoted.

The property being leased for business purposes, and an income obtained therefrom, its status as taxable property is thereby fixed."

Also in the case of *The Town of Mitchellville vs. The Board of Supervisors*, 64 Iowa 554, the court said:

"Now, it appears that the property is not devoted to public use, but an income is derived therefrom. The condition of the trust imposed by the donor is that the property itself shall not be devoted to public use, but the profit arising therefrom shall be. It is therefore obvious that a pecuniary profit is derived from the property. It is, therefore, not exempt."

The assessed valuation of the upper story of the building in question should be estimated and the same returned for taxation.

TAXATION: CHURCHES: EXEMPTION OF: Property of religious institutions must be used solely for their appropriate objects and not leased or otherwise used with a view to pecuniary profit.

April 17, 1937. *Mr. Emery F. Nefstead, City Attorney, Emmetsburg, Iowa:* This department is in receipt of your request for an opinion upon the following question:

One of our churches here receives the income from a business building located in Emmetsburg, the building being rented for offices. The offices have no connection with the church activities or affairs. This church also receives rent from a residence property. The properties are not owned by the church organization but are owned by an estate which is being administered by trustees, the trustees being authorized to turn the rentals from the properties over to the church organization. Are the above properties subject to taxation?

The statute grants to certain classes of property exemption from taxation. Section 6944 of the 1935 Code is as follows:

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

"9. Property of religious, literary and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. * * *"

It will be observed that the exemptions by the above statute to religious institutions provides that the property must be used "solely for their appropriate objects" and "not leased or otherwise used with a view to pecuniary profit."

The foregoing question states that the property is leased and revenue derived from the tenants. This of itself would deprive the property of its right to exemption under the foregoing statute. However, the properties in question, based upon the foregoing facts, are not properties belonging to the church organization, but are privately owned from which the church derives a benefit by gift from the owner of the property. The disposition of the income from property does not change the character of the property. The property being individually owned is subject to taxation and the fact that the owner has been charitable enough to give the income therefrom to the church does not entitle the property to be classed as exempt.

It is therefore the opinion of this department that the property is subject to taxation.

MINORS: BOWLING ALLEYS: POOL HALLS: By statute a minor may not be employed in a pool hall or bowling alley. Neither may a minor remain in such hall or engage in such games.

April 17, 1937. *Mr. J. W. Thompson, County Attorney, Iowa Falls, Iowa:* We acknowledge receipt of your letter in which you request an opinion upon the following question—

Can a minor who is over sixteen years of age work in a nine or ten pin alley or a billiard hall?

Attention is called to two sections of the 1935 Code, each of which has a bearing on the question asked, and which provide as follows:

"1536. *Life, health, or morals endangered.* No person under sixteen years of age shall be employed at any work or occupation which, by reason of its nature or the place of employment, the health of such person may be injured, or morals depraved, or at any work in which the handling or use of gunpowder, dynamite, or other like explosive is required, or in or about any mine during the school term, or in or about any hotel, cafe, restaurant, bowling alley, pool or billiard room, cigar store, barber shop, or in any occupation dangerous to life or limb."

"13219. *Minors in billiard rooms—duty of owner.* No person who keeps a billiard hall, or nine or ten pin alley, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, or alley, shall permit any minor to remain in such hall, or alley, or to take part in any of the games known as billiards or nine or ten pins."

The first section set out above was enacted in 1915 as a part of child labor legislation. The safe-guarding of the health and morals of the child is apparently the chief purpose of the above section.

Section 1540, 1935 Code, provides that either the parent or guardian of such child or any employer of such child may be subject to the penalties imposed by the said section.

Section 13219 above set out is specific in its provisions that no person who keeps a nine or ten pin alley or billiard hall, or the agent, clerk, or servant of any such person, shall permit any minor to remain in such hall, or alley, or to take part in any of the games known as billiards or nine or ten pins.

In the case of *State vs. Johnson*, 108 Iowa 246, the court had occasion to construe the section last referred to. The section has been changed since the decision in this case only by the omission therefrom of a "beer parlor" as one of the prohibited places. In the case the court said—

"It is quite immaterial whether the minor indulges in any game whatsoever. If he is permitted to enter the room and remain there for any purpose and that room is a billiard hall, the keeper is amenable to the penalties of the law."

It is therefore the opinion of this department that the two sections first quoted above are not inconsistent. The first statute prohibits the employing of a child under sixteen in or about any bowling alley or billiard room and certain other designated places. The second statute requires that the keeper of a billiard hall or a nine or ten pin alley shall not permit a minor to remain in any such hall or alley. So far as billiard halls and bowling alleys are concerned, therefore, minors may neither be employed therein nor permitted to remain in such places under the statutes.

COUNTY AUDITOR: PLATS: CHANGES IN: Auditor should make the changes on the plats in his office upon the filing of a quit claim deed.

April 21, 1937. *Mr. Willis A. Glasgow, County Attorney, Shenandoah, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Should the county auditor change the plat in his office when only a quit claim deed is filed?

Section 10122 of the statute provides as follows:

"*Book of plats—how kept.* The auditor shall keep the book of plats so as to show the number of lot and block, or township and range, divided into sections and subdivisions as occasion may require, and shall designate thereon each piece of real estate, and mark in pencil the name of the owner thereon, in a legible manner, which plats shall be lettered or numbered so that they may be conveniently referred to by the memoranda of the transfer book, and shall be drawn on the scale of not less than four inches to the mile."

Section 10123 is as follows:

"*Entries of transfers.* When a deed of unconditional conveyance of real estate or transcript of decree in a partition proceeding is presented, the auditor shall enter in the index book, in alphabetical order, the name of the grantee, and opposite thereto the number of the page of the transfer book on which such transfer is made; and upon the transfer book he shall enter in the proper columns the name of the grantee, the grantor, date, and character of the instrument, the description of the real estate, and the number or letter of the plat on which the same is marked."

Under the provisions of the two sections of the statute quoted herein, it is made the duty of the auditor to keep the book of plats and the transfer book and to at all times show upon the plats the name of the owner of each described tract of land. Section 10123 heretofore quoted requires the auditor to enter the transfers and to show them upon the plat book. The wording of the statute is as follows:

"When a deed of unconditional conveyance of real estate is * * * presented, * * *"

A quit claim deed is as much an unconditional conveyance of real estate as is a warranty deed and is as effective in transferring the title to real estate as is a warranty deed, and in order for the county auditor to keep his plat book up to date, it would be necessary for him to make the proper change thereon upon the filing of any instrument which effectively transfers the title to real estate.

It is therefore the opinion of this department that the auditor should make the changes on the plats in his office upon the filing of a quit claim deed.

BEER PERMIT: PARTNERSHIP: A class B beer permit issued to a partnership is of no validity after dissolution of such partnership.

April 21, 1937. *Hon. G. R. Hill, Senate Chamber:* We acknowledge receipt of your request for an opinion of this department in which is set out the following statement of facts:

"A and B operate a cafe with a class B beer permit. A purchases the half owned by B and is now the sole owner. Is it possible under the law for the sole owner, now A, to operate and sell beer under the permit issued to A and B? Is a new permit needed by A?"

Section 1921-f97, 1935 Code, provides that the term "person" as used in the chapter pertaining to beer and malt liquors includes a co-partnership.

Section 1921-f100 provides as follows:

"1921-f100. *Tenure—character of permittee.* 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. Permits hereunder defined shall be issued only to persons who are citizens of the state of Iowa, who are of good moral character and repute, provided, however, that in the case of a corporation the word 'citizen' as used in this section shall be construed to mean a corporation organized and existing or permitted and authorized to do business under the laws of this state."

Section 1921-f103 prescribes the conditions upon which a permit may be granted and further provides:

"1921-f103. *Class 'B' application.* Except as otherwise provided in this chapter a class 'B' permit shall be issued by the authority so empowered in this chapter to any person who:

* * *

2. Establishes:

a. That he is a person of good moral character.

b. That the place or building where he intends to operate conforms to all laws, health and fire regulations applicable thereto, and is a safe and proper place or building. * * *"

It is also provided in the last mentioned section that the person making an application shall furnish proper bond in the sum of $1,000.

The provisions of the foregoing sections indicate that a permit or license to sell beer confers upon a permittee a personal privilege. Such permittee must meet certain specific personal requirements and for this reason such permit is not transferable or assignable to another person or corporation.

The permit in this case was issued to a partnership. The owner's rights acquired under this permit accrued to the partnership as a legal entity. Upon the withdrawal of A from the partnership this entity ceased to exist since the partnership was then dissolved. The permit conferred no privileges except as to the partnership. Neither A nor B was granted a license to operate as an individual. The result is that neither A nor B, after the dissolution of the partnership, holds a valid permit to sell beer. The law makes no provision for a refund on permits which are surrendered before they expire.

It is therefore our opinion that a class B beer permit issued to a partnership is of no validity after a dissolution of such partnership, and that a new permit would need to be issued to one of the former partners if he continues in the business of selling beer.

BOARD OF SUPERVISORS: PROJECT: GRAVEL CONSTRUCTION PROGRAM: Board of Supervisors has no authority to split major project, and major project exceeding $1,500.00 shall be subject to letting on sealed bids. Board then has the right to reject all bids, and may then either re-advertise or let the work privately at a cost not exceeding the low bid, or do the work by day labor. Section 4622-c42.

April 21, 1937. *Mr. R. A. Knudson, County Attorney, Fort Dodge, Iowa:* We have your letter of the 19th instant, in which you inquire as to the right of the Board of Supervisors to handle your project of graveling, some twenty-two miles, by day labor. You state that the entire twenty-two mile project was approved in one motion by the Board of Supervisors, and that by splitting it into a number of projects, none of these will exceed $1,500.00 in cost. You do not say whether the board had advertised for bids and had rejected the bids received.

This Department is of the opinion that the Board of Supervisors has no authority to split a major project that according to the engineer's estimate would exceed $1,500.00 into a number of smaller projects, none of which exceed $1,500.00 in cost. The intent of the law is that these major projects exceeding $1,500.00 in cost shall be subject to letting on sealed bids. See: *State vs. Garretson,* 207 Iowa 627. In other words, the Board of Supervisors, in the instance that you cite, is under the obligation to advertise for bids. Of course, having advertised for bids, the board has the right to reject all bids, and after rejecting

them they may either re-advertise or let the work privately at a cost not exceeding the low bid, or they may then do the work by day labor; this under Section 4644-c42.

We call your attention to Section 4644-c45 requiring a record of bids received, and the further provision that the engineer shall report in detail as to the cost when it is done by day labor. This accounting proposition is open to public inspection and it seems clear that the Legislature intended that anyone interested would have the right to know whether the Board of Supervisors had actually saved the county money by doing the work by day labor, or whether their rejection of the bids had resulted in increased cost to the county.

TAXATION: HOMESTEAD EXEMPTION: SOLDIER'S EXEMPTION: When a soldier acquires property subsequent to the first of January he is not entitled to any exemption of tax on preceding year's taxes. The homestead exemption and soldier's exemption both apply to the homestead; the homestead exemption to the extent of exemption on homesteads and the soldier's exemption to the extent of the soldier's exemption. Unless the homestead, for the purpose of taxation exceeds the aggregate value of the two exemptions, the soldier will be deprived of the full benefit of one or the other exemptions.

April 22, 1937. *Mr. M. C. Williams, County Attorney, Boone, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

Would a soldier who acquired property subsequent to the first day of January be entitled to any exemption on the tax payable during the year in which the property was acquired?

Under the circumstances as outlined in the foregoing question, a soldier would not be entitled to any exemption of the tax on the property. Under the facts stated in the question, the soldier acquired the property subsequent to the first day of January. The taxes which the soldier would be paying would be for the preceding year and for a time when the property was owned by the grantor, and for a time when the property was not entitled to be exempted. In short, the soldier is simply paying the taxes of his grantor and not those of a soldier. Therefore, he would not be entitled to have this exemption apply upon such taxes.

Under the facts as stated in the prior question, would the soldier in the following year be entitled to have his full exemption set off against such property or would his exemption apply only to the proportionate part of the year during which he has owned the property?

Section 6947 of the statute is as follows:

"*Reduction—limitation.* * * * Such exemption shall extend only to the period during which such persons remain the owners of such property."

Under the facts in the foregoing question, we will assume that the soldier acquired the property on the first day of March. He was, therefore, the owner of the property on the following January at which time the ownership of the property is determined for taxation purposes. The soldier would, therefore, when he was assessed, report such property for taxation and against such property claim his soldier's exemption. However, under the statute, his exemption extends only to the period during which he owned the property. He owned the property during five-sixths of the taxable year and would therefore be entitled to have five-sixths of his exemption set off against the taxable value of such property.

How are soldiers' exemptions and the homestead tax exemptions to be applied

where the person is entitled to both a soldier's exemption and a homestead tax exemption?

Section 6946 of the statute provides:

"*Military service—exemptions.* The following exemptions shall be allowed: * * *"

There follows an enumeration of the various amounts of exemption allowed to the soldiers, sailors, nurses, and so forth, of the different wars. The exemption allowed to be applied as provided in Section 6947 of the statute which is as follows:

"*Reduction—limitation.* All persons named in Section 6946 shall receive a reduction equal to their exemption, to be made from the homestead, if any; otherwise from other property owned by said persons. * * *"

It will thus be seen from a reading of the foregoing section of the statute that a person entitled to a soldier's exemption must take his exemption from the homestead, if any. That is, a person entitled to a soldier's exemption in the first instance takes his exemption from his homestead.

Under the recently enacted homestead bill the taxpayer is authorized to claim and receive a refund or credit to the extent of twenty-five hundred dollars valuation upon his homestead. Under the provisions of the homestead tax exemption act the word "homestead" as used in the act is defined and must embrace the dwelling house in which the person claiming the exemption resides. It will be observed that in each instance, that is, under the soldier's exemption and under the homestead tax exemption act the taxpayer is required to claim the exemption against the homestead. While it is true the homestead tax exemption act fixes its own definition of a homestead, the definition and requirements of the homestead tax exemption act are so nearly analogous to the general statute defining a homestead that one can hardly conceive the ordinary taxpayer having two homesteads.

Therefore, as the law now stands, it is evident that the two exemptions apply to the same property, that is, the soldier's exemption to the extent of the statutory allowance upon the homestead; the homestead exemption to the extent of a refund or credit of twenty-five mills on twenty-five hundred dollars valuation on the homestead; and unless such homestead for the purpose of taxation should exceed the aggregate value of the two exemptions, the soldier will be deprived of the full benefit of one or the other of the exemptions.

What procedure should a property owner take whose land has been encroached upon by the Des Moines River to such an extent that only about one-third of the original acreage as shown by the auditor's plat book remains?

In answering the foregoing question will say that the State Board of Assessment and Review has the power, right, and authority, upon application to it, to adjust the assessed value of property upon proper showing, and where land has been eroded and washed away by the action of a river, the State Board of Assessment and Review would be authorized and empowered to reduce the valuation accordingly. Such application should be made to the State Board of Assessment and Review with the request that the valuation be reduced and that the tax already levied should be reduced accordingly.

After such reduction is made by the Board of Assessment and Review, the taxpayer should, in the future, report the property at the reduced acreage.

COUNTIES: BOARD OF SUPERVISORS: COUNTY JUVENILE HOME: Board does not have authority to establish and maintain a county juvenile home, unless said county has population of 40,000 or more.

April 23, 1937. *Mr. Harold W. Vestermark, County Attorney, Iowa City, Iowa:* This department acknowledges receipt of your request for an opinion upon questions arising from the following statement of facts:

The board of supervisors of Johnson County have a number of juvenile wards, whom they are taking care of in rented property. The board has an opportunity to purchase for $9,500.00 a very desirable property with adequate grounds to sufficiently house and take care of all these delinquent children, and it is very favorably located. What the board wants to know is (1) whether or not it has the power to purchase this property if not in excess of $10,000.00, and (2) from what source it may procure funds with which to make the purchase of this property, and whether the same can be purchased on contract, the price therefor being paid in installments of $100.00 per month.

Section 5130 of the Code, 1935, provides:

"The board of supervisors at any regular meeting shall have power: * * *
"12. To purchase, for the use of the county, any real estate necessary for county purposes; to change the site of, or designate a new site for any building required to be at the county seat, when such site shall not be beyond the limits of the city or town at which the county seat is located at the time of such change; and to change the site of and designate a new site for the erection of any building for the care and support of the poor. * * *

"15. To build, equip, and keep in repair the necessary buildings for the use of the county and of the courts."

Section 5261 of the Code 1935 provides:

"The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a courthouse, jail, or county home when the probable cost will exceed ten thousand dollars or any other building, except as otherwise provided, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections."

There is no question under the cited provisions but what a board of supervisors has expressed power to purchase real estate necessary for county purposes with the restriction that when the cost thereof is in excess of $10,000.00 the proposition must be submitted to a vote of the county electorate.

However, the facts upon which your first question is predicated disclose that the use to which the property your board has in mind is to be put is provision for juvenile wards of the county. Your question, then, may well be restated as follows:

What authority does a board of supervisors have to establish and maintain a county juvenile home, and, if there be such authority, may it purchase real estate for such purpose?

The question is not without its difficulties. In the first instance, it is well established in our law that a Board of Supervisors has only such powers as are expressly conferred by statute, or necessarily implied from the powers so conferred. *Hilgers vs. Woodbury County* (1925) 200 Iowa 1318, 1320.

Nowhere in Section 5130, supra, which prescribes the general powers of boards, is there to be found express authority to establish and maintain a county juvenile home. Nor is there such express authority in any separate chapter of the code such as there is in the case of the establishment of a county home, Chapter 268, county public hospital, Chapter 269, indigent tubercular facilities, Chapter 270, and a detention hospital, Chapter 271. Court houses and jails are admittedly buildings necessary for the use of the county

and of the courts, and there can be no question as to the board's authority to establish and maintain a county court house and/or county jail.

On the other hand, in Section 5130, subsection 12, express power is given to purchase, for the use of the county, any real estate necessary for county purposes, and in subsection 15 express power is given to build, equip, etc., the necessary buildings *for the use of the county and of the courts.* Therefore, in the absence of express authorization to establish and maintain a county juvenile home, can the authority necessarily be implied from the provisions of the cited sections?

It is the opinion of this department that the board's authority to establish and maintain a county juvenile home, and to purchase real estate for such purpose cannot be implied from these express powers for the reasons hereinafter stated.

Chapter 180, Code 1935, entitled "Care of Neglected Dependent and Delinquent Children," embodies the entire legislative mandate on the subject matter stated in the title. It is therein provided at Section 3617 as follows:

"This chapter shall not apply to any child who is accused of an offense which is punishable by life imprisonment or death, but shall otherwise apply to all children who are not feeble-minded and who are under eighteen years of age and who are not inmates of any state institution or of any institution incorporated under the laws of this state."

Elsewhere in the chapter the terms "neglected," "dependent" and "delinquent" children are defined, and the manner and place of commitment by the juvenile court is specifically set out. Further, Section 3653 of said chapter specifically provides as follows:

"In counties having a population of more than forty thousand, the board of supervisors shall provide and maintain, separate, apart, and outside the inclosure of any jail or police station, a suitable detention home and school for dependent, neglected and delinquent children."

and by Section 3654 authority is given the board to levy a tax for the maintenance of the home provided for in Section 3653.

It is our opinion that this is a limitation section on counties having a population of forty thousand or less, and that the legislature, in expressly providing for a detention home in counties having a population of more than forty thousand, and making further provision for the levy of a tax to maintain the same, withheld such authority from the boards of counties having a population of forty thousand or under.

Had the legislature intended that all counties might provide such facilities but that counties over forty thousand must provide and maintain a detention home, surely it would have used apt language to express such an intention. By appropriate language, Chapter 180 is made to apply "to all children" not feeble minded, not inmates of any state institution, not accused of infamous crime, and we take it that the legislature intended that juvenile delinquents and dependents should be cared for as therein provided.

By reason of Section 5346, contained within Chapter 268, entitled "County Homes," it might be contended that Chapter 180 is not so all-inclusive. Said section provides as follows:

"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."

This section is, in our opinion, simply a legislative direction that "poor children, *when cared for at the county home* (not county juvenile home) shall attend the district school for the district in which such home is situated." From this, the implication cannot be drawn that a board has authority to establish and maintain a county juvenile home.

In view of the answer given to your first question, it becomes unnecessary to answer the second.

BOARD OF SUPERVISORS: POWERS AND DUTIES: HIGHWAY: Section 4644-c46 prohibits cutting of trees by road which do not obstruct road or tile drainage. Section 4644-c41—no traveled roadway less than 22 feet in width. Aside from these, there are no laws or regulations governing such matters. Section 4644-c1, duty to construct, repair and maintain roads is imposed on board of supervisors. A wide discretion is given them in their duties and their judgment is conclusive if exercised within the limits of the law.

April 23, 1937. *Mr. L. A. Winkel, County Attorney, Algona, Iowa:* We have your letter of April 15, 1937, in relation to the width of the grade of county roads, depth of excavation, etc., and we note the complaints that have been made to you concerning the actions of those engaged in road construction interfering with the fence line and lateral support of abutting lands. In reply will say, that in Section 4644-c41 of the Code it is provided that no traveled roadway shall be less than twenty-two feet in width from shoulder to shoulder. Aside from that provision as to width there is no law, so far as we know, concerning how the grade shall be constructed, nor are there any regulations governing such matters. In Section 4644-c1 of the Code, the duty to construct, repair and maintain the secondary road systems is imposed on the board of supervisors. And a wide discretion is given to them in the performance of their duties. The State Highway Commission has not undertaken to provide any regulations, but stands ready to advise with the officers of any county in working out their problems.

Your letter in its general phases raises two questions:

1. As to the power of the supervisors, and
2. As to the manner of the exercise of the power.

In the matter of digging the ditch so close to the fence line that the fence will be interfered with, this department in an opinion found in the 1925-26 Attorney General's report, on page 62, expressed the conclusion that in the improvement of a highway the county is under no obligation to purchase additional right of way for the purpose of taking care of the fences of the abutting owners. The question under consideration in that case resulted from an excavation in the road so close to the line that the fences were destroyed by the soil sliding into the roadway. That opinion was largely based on the authority of *Talcott vs. City of Des Moines*, 134 Iowa, 113. Of course, that was a case involving streets, and is not necessarily conclusive, but we call your attention to the case of *Pillings vs. Pottawattamie County*, 176 N. W. 314, 188 Iowa 567.

As to the destruction of trees, or affecting the abutting owner's drainage, we call your attention to Section 4644-c46 prohibiting the cutting down or injuring of any tree growing by the wayside which does not obstruct the road or tile drains, and further requiring that those building the road use strict diligence in draining the surface water from the public road in its natural

channel. While the board of supervisors has the right to remove trees that are located in the right of way (see Sections 4833 and 7649 of the Code), such right of removal is not arbitrary, *Bell vs. Belknap*, 36 Iowa, 583; *Quenton vs. Burton*, 61 Iowa, 471; *Crisman vs. Dick*, 84 Iowa, 344. These sections and cases relate to trees in the highway, while your question as to trees involves trees that are on the owner's premises adjoining the highway. Since the Legislature has seen fit to prohibit the cutting down of trees in the highway which do not obstruct the road, it would seem by analogy that the prohibition would apply with added force to trees outside the right of way.

It is appreciated that in many of the counties there is a tendency on the part of the officers whose duty it is to construct roads, to use as much of the width of the highway as they can for the purpose of building a high grade, which frequently leaves deep ditches at the sides of the road. It has been found that these high grades are easier to maintain, especially with regard to keeping them cleared of snow, and further these high grades seem to stand up better when the roads are breaking up in a wet season. This experience probably explains the action of the road officials in cutting so close to the line of the road, as happened in one or two of the cases that you refer to.

The question as to what shall be done in the matter of the depth of the ditches on any particular road, is for the road authorities to decide, and their discretion seems to be limited only by the implied prohibition against injuring trees, above referred to, and the implied, if not express, prohibition against interfering with drainage.

In connection with the possible construction of the road so as to cause destruction of a line of evergreen trees on the owner's premises, it is sufficient to say that the State Highway Commission in its control over primary roads has adopted a plan for roadside improvement contemplating the preservation of ornamental trees, even though in the highway. In fact, the federal appropriations for aid in highway construction contemplate that this be done. Even without such a program on the part of the department having charge of the primary roads, it would seem that any road authority would be anxious to preserve ornamental shade trees that do not interfere with the construction and maintenance of the road.

We take it that the matters that you refer to are complaints only, and that you have not investigated them, and it may be that what has been done in all cases referred to, was necessary in view of the particular circumstances. The solution of such matters depends upon the good judgment of the road authorities exercised within wide limits, subject to certain restrictions imposed by law. Necessarily, the judgment of the road authorities as to the necessity in the case is conclusive if exercised within the limits of the law.

SCHOOLS AND SCHOOL DISTRICTS: PURCHASES FROM DIRECTOR: Board of Education cannot purchase supplies from a firm, a co-partner or executive officer of which is a member of the board.

April 23, 1937. *Mr. Ed. C. Tschudi, Assistant County Attorney, Dubuque, Iowa:* We acknowledge receipt of your request for an opinion of this department, which is as follows—

Is it permissible or not for the Board of Education to purchase supplies from a firm in which a member of the Board of Education has an interest

1. as a co-partner,

2. as a stockholder in a corporation,
3. as a stockholder and executive officer in a corporation?

The supplies are purchased by bids on specification but no contract is entered into for the purchase of the items.

If supplies are furnished to the board by bid upon specification or otherwise, it appears that a contract is entered into by and between the vendor and purchaser even though such contract may not be formal in its nature.

Section 4468, 1935 Code, provides as follows:

"4468. *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 education who shall act as agent or dealer in school textbooks or 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."

It is to be noted that this section does not by its terms provide that any particular contracts are invalid. The statute provides that it shall be unlawful for any director to act as a dealer in school supplies during the term of his office.

We have been able to find but one Iowa case which construes the provisions of the section above quoted. This is the case of *State vs. Wick*, 130 Iowa 31. Here a dealer in school books and supplies sold the same during his term as director. The court in this case points out that the school board might, during the term of this director, have adopted a plan for purchasing textbooks to be furnished at cost to students. Thus the director had a pecuniary interest distinct from the interests of the patrons of the school. The court, in sustaining the judgment of the lower court holding defendant guilty of a violation of the above quoted section, said—

"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 prohibit such dealer from being a member of a school board of directors."

Public policy insists that officers should have no part as individuals in commercial dealings with the public bodies they as officials represent. The following sections of the 1935 Code prohibit various public officers or employees from having any interest in public contracts: 180, Chapter 14, State Printing Board; 275, Chapter 17, Custodian of Public Buildings; 3922, Chapter 195, State Board of Education; 4685, Chapter 240, Secondary Roads; 4755-b10, Chapter 241-B1, Improvement of Primary Roads; 5324, Chapter 267, Support of Poor; 5361, Chapter 269, County Public Hospitals; 5673, Chapter 287, Cities and Towns—Organization and Officers; 5828, Chapter 294, Cities and Towns—River Front Commission; 6534, Chapter 326, Government of Cities by Commission—Council; 6710, Chapter 329, Special Charter Cities—Officers and Employees; 13324, Chapter 608, Gratuities and Tips; 13327, also Chapter 608.

Aside from the general policy as expressed in the statutes, we are of the opinion that all attempts which tend to place public officers in a position where they may be tempted to act from motives other than a wholly honest discharge of their duties are against public policy.

The case of *James vs. The City of Hamburg*, 174 Iowa 301, involved an assignment to a private bank owned by a partnership. One of the partners was a member of the city council. The assignment covered a certificate to be

issued by the city for certain public construction work. Priority of the claim of the bank under its assignment as against a claim of a materialman for materials furnished after the execution of said assignment was to be determined. The court in holding the assignment void said—

"The courts cannot approve these contracts because they are against public policy and open the door through which fraud may enter and corrupting influences come, that embarrass the public officer in the discharge of his public duty."

In the case of *Bay vs. Davidson*, 133 Iowa 688, an employee of the city council, while in office, sold certain materials to the city for use in repairing sidewalks. A taxpayer brought an injunction to restrain the city from paying for the materials. Defendant alleged the sale was in good faith, in the open market, and for reasonable value, and that no other dealer in such materials was readily available. The trial court sustained a demurrer to this answer and in sustaining this ruling the supreme court said—

"Now, by general law contracts of sale as here shown cannot be upheld because they are not only violative of the fundamental law of agency, but are contrary to public policy. The defendant Binning was an officer and agent of the town, and the duty and obligation which the law cast upon him in such relation forbade him from acting in any transaction for himself as an individual on the one part, and as an officer and agent of the town on the other part. And it can make no difference that in the particular transaction he refrained from voting for the purchase of goods as made. It was his duty to vote, and he could not reap an advantage by avoiding that duty."

In view of the foregoing, this department is of the opinion that it is not permissible for a Board of Directors of a school district to purchase supplies from a firm, a co-partner of which is a member of the board. The same rule must extend to dealings by the board with a corporation when an executive officer of such corporation is a member of the board.

If a member of such board is a stockholder in a corporation, but as such has no voice in the active management or direction of such corporation, we believe the board would not be required to forego dealing with such corporation. For example, if a member holds some General Motors stock but asserts no part in the active management of such corporation other than to vote such stock, we believe the board could properly purchase General Motors' products. In such cases the individual is far enough removed from any controlling interest in such corporation to permit this conclusion.

SCHOOL BONDS: REDEMPTION: ARMORIES: TAXATION: School bonds not callable prior to maturity unless such provision is made in bond. Private property used for armory purposes is exempt from taxation.

April 23, 1937. *Mr. Luther M. Carr, County Attorney, Newton, Iowa:* We acknowledge receipt of your request for opinions upon two questions. The first question is whether a school bond is now callable by the issuing district. The bond contains the following provisions—

"The Consolidated School District of Newburg, in the Counties of Jasper and Poweshiek, State of Iowa, for value received, promises to pay to bearer One Thousand Dollars, lawful money of the United States of America, on the First Day of May, 1945, with interest on said sum from the date hereof, until paid, at the rate of Four and One-quarter per centum per annum, payable on the First Day of November, 1925, and semi-annually thereafter on the First Days of May and November, in each year, upon presentation and surrender of the interest coupons hereto attached as they severally become due. This bond is one of a series of bonds issued by the Board of Directors of said Consolidated

School District, pursuant to and in strict compliance with the provisions of Section 4353 et seq. of Chapter 225 of the Code of Iowa, 1924............."

Section 4408, 1935 Code, provides as follows:

"4408. *Redemption.* Whenever the amount in the hands of the treasurer, belonging to the funds set aside to pay bonds, is sufficient to redeem one or more of the bonds which by their terms are subject to redemption, he shall give the owner of said bonds thirty days' written notice of the readiness of the district to pay and the amount it desires to pay. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bonds shall cease and the amount due thereon shall be set aside for its payment whenever it is presented."

Since the terms of the bonds in question make no provisions for a call prior to maturity, it is our opinion that such bond is not callable under the provisions of the section above quoted. We know of no other provision of law that would require the holder of the bond to surrender the same upon payment prior to maturity. We therefore conclude that bonds containing the provisions set out above are not callable at this time.

Your next question is as follows:

"Can we assess property for taxation which is owned by private parties but is used by the Federal Government under a lease with these private parties for an armory?"

This question is answered by the provisions of Section 467-f48, 1935 Code, which provides as follows:

"467-f48. *Tax exemptions of armories—use of public utilities.* All personal and real property held and used for armory or military purposes shall be exempt from taxation; and it shall be lawful for any county or city or town which owns public utilities to grant to any organization or unit of the national guard, which is stationed in such place, the free use of such public utilities."

It is our understanding that such armory leases are entered into by and between the lessor and the State of Iowa, and that the federal government contributes proportionately to the rentals. It is further our understanding that the lessee acquires entire control of the leased premises and that any gain derived from the sub-leasing or hire of such property accrues to the benefit of the military organization. Application of the exemption contemplated by the statute would have the result of encouraging the leasing of premises for armory purposes and would naturally result in the securing of more favorable terms by the lessee.

It is therefore our opinion that if the property in question is used for armory purposes as outlined above, that the same is exempt from taxation and should not be assessed.

COUNTIES: ROAD CONSTRUCTION: Section 4644-c42 of Code contemplates construction work only and does not cover road construction and maintenance.

April 26, 1937. *Mr. Richard A. Stewart, County Attorney, Washington, Iowa:* Replying to your inquiry of this date as to whether Section 4644-c42 of the Code contemplates construction work only, or is intended to cover road construction and maintenance, it is our opinion that said section applies to construction only.

However, you say that the project contemplates the expenditure of approximately $18,000.00 for additional gravel on a road constructed some years ago. You do not say how many miles of road is to be improved with this gravel, and it is impossible to determine from your letter whether the project would be in fact a construction program or a maintenance program.

The distinction between construction and maintenance is not set out in the law, but the ordinary meaning of the word "maintain" is "to hold or to keep in any particular state." It would seem that the word "maintenance" would refer to ordinary repairs from time to time, while the regraveling of a road generally would come under the head of "reconstruction."

In other words it may be said: If it was such a program that your engineer had surveyed and planned in accordance with the provisions of Chapter 240, it would be construction work; whereas, if it is a mere matter of repairing certain sections of the road in which the gravel has largely disappeared, it would be maintenance.

MUNICIPALITIES: BOARD OF SUPERVISORS: ROADS: Board may permit private parties or municipal corporations to take materials from gravel beds acquired by the county for improvement of any street or highway in county.

April 27, 1937. *Mr. Ray G. Walter, County Attorney, Ida Grove, Iowa:* We are in receipt of your request for an opinion on the following proposition:

If the county board of supervisors allow gravel to be used from the county pit for road improvement by a city or town or an individual, must the county board of supervisors charge a reasonable sum for the same?

Section 4659 states as follows:

"The board of supervisors may permit private parties or municipal corporations to take materials from such acquired lands in order to improve any street or highway in the county, but it shall be a misdemeanor for any person to use or for the board of supervisors to dispose of any such material for any purpose other than for the improvement of such streets or highways."

It is the opinion of this department that it was the intent of the legislature that the board of supervisors may permit such materials to be used for that purpose without cost to the municipality or to the individual. It will be noted that the phraseology is "may permit * * * to take materials" and it does not say "may sell." Had the thought been that remuneration was to be charged for such material, unquestionably the legislature would have so stated and probably would have set out a criterion as to the cost of the same. Had the intent been to sell instead of to give away, there would be no justification for restricting the use of the same to road improvement.

It is therefore our opinion that the board of supervisors may permit private parties or municipal corporations to take materials from gravel beds acquired by the county for the improvement of any street or highway in the county.

MOTOR VEHICLE: REVOCATION OF LICENSES: Suspension or revocation of licenses by Motor Vehicle Department is not unlawful delegation of authority.

April 27, 1937. *Mr. Harry E. Coffee, County Attorney, Estherville, Iowa:* We are in receipt of your communication wherein you inquire as to the constitutionality of Section 4960-d33 of the Code, particularly in the light of whether or not the provisions thereof take property or rights without due process of law and whether or not a department has the power to make and exercise such regulations. Unfortunately, the Supreme Court of Iowa has not passed on this question, as our Act is relatively a new one, but the states of New York, California and Rhode Island have laws similar to ours and each of the states has upheld the constitutionality of the same.

Iowa holds that the use of the highways in this state is a mere privilege

and not an inherent or natural right. Citing *Solberg vs. Davenport*, 232 N. W. 477, 211 Iowa 612; *Houston vs. City of Des Moines*, 156 N. W. 883, 176 Iowa 455.

As the use of the highways is a privilege and not a right, the legislature can prescribe under what conditions that privilege will be granted and under what conditions it will be revoked, and the revocation of that privilege is not taking property without due process of law. *La Plante vs. State Board of Public Roads*, 131 Atl. 641, 47 R. I. 258; *People vs. Stryker*, 206 N. Y. S. 146; *People vs. Cohen*, 217 N. Y. S. 726, 128 Misc. 29.

The suspension or revocation of a driver's license by the Motor Vehicle Department is not an unlawful delegation of power, and therefore unconstitutional. *Keck vs. Superior Court*, 293 Pac. 128, 109 Cal. App. 251; *People ex rel Albrecht vs. Hartnett*, 224 N. Y. S. 97, 271 Appeal Division 487.

It is our conclusion, therefore, that Section 4960-d33 is not unconstitutional for the reason that the use of the highways is a privilege and not an inherent right, and the legislature can prescribe under what conditions that privilege will be granted and under what conditions that privilege will be suspended or revoked. Suspension or revocation of a license by the Motor Vehicle Department is not an unlawful delegation of authority.

SOLDIERS' PREFERENCE: CIVIL SERVICE: Civil Service Commission does not have authority to add extra ten per cent to grades of soldiers, sailors or marines who take examination for a position.

April 28, 1937. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa:* We are in receipt of your communication for an opinion on the following proposition:

The Civil Service Commission of Cedar Rapids, in giving examinations, allows honorably discharged soldiers, sailors or marines an additional 10 per cent over their actual grade; that is, if an applicant's grade is 70 per cent he is allowed an additional 7 per cent if he is an honorably discharged soldier, sailor or marine. This is followed up after the examinations are taken by giving discharged soldiers, sailors or marines who have passed the examination, even though with the aid of the extra 10 per cent, the preference over other qualified applicants. The point is raised that this is giving to such soldiers, sailors or marines a double preference. First by allowing them the extra 10 per cent and second, by giving them preference in appointment after they have passed. Your question is whether or not this procedure is legal.

Chapter 289, Code 1935, deals with civil service in cities and towns, and Section 5697 states as follows:

"In all examinations and appointments 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."

We, of course, have Chapter 60, which is the Soldiers' Preference Law of this state. It is our opinion that the Civil Service Commission is acting beyond its authority when it gives an extra ten percent to soldiers, sailors or marines in their examinations. Section 5697 was inserted for the purpose of definitely making applicable soldiers' preference to civil service. Nowhere therein does it authorize the commission to add the ten per cent on the grading. The soldiers' preference, as is set out in Section 1159, is a preference over "other applicants of no greater qualifications." To add a ten per cent to the examination then may have the effect of raising a soldier, sailor or marine to the same plane with another applicant, when clearly by reason of the grades in the examinations the other applicant has greater qualifications.

The court in the case of *McBride vs. City*, 134 Iowa 501, 110 N. W. 157, in speaking of the soldiers' preference in regard to an ex-soldier who had applied for and been refused a job as city collector, states as follows:

"This does not deny to the public the benefit of superior service, nor the advantage of having the best qualified men in the service of the public; for the veteran's qualifications to discharge the particular duties exacted must at least equal those of his competitors to entitle him to preference."

It is therefore our opinion that if the qualifications of the soldiers, sailors or marines are equal to those of other applicants, and he is of good moral character and can perform the duties of said position applied for as is set out in Section 1161 of the Code, then and in that event he is entitled to the preference for said position, but the Civil Service Commission is exceeding its authority in adding an extra ten per cent in his examination for a position.

OLD AGE ASSISTANCE: FUNERAL EXPENSES: Should death occur before person receives his first warrant for old age assistance, the same does not preclude payment of funeral benefits.

April 28, 1937. *Mr. John F. Porterfield, Commissioner, Old Age Assistance Commission:* This department acknowledges receipt of your request for an opinion on the question set out immediately following the statement of facts:

"An applicant for old age assistance filed in the office of the Commission at Des Moines, Iowa, his application which was approved and his name placed on the pension list to become effective by way of granting assistance on the first day of the following month after receipt and approval of said application. The said applicant dies before receiving his first warrant of assistance. Is he entitled to the funeral benefits under the Old Age Assistance Act?"

Section 5296-f25 provides as follows:

"5296-f25. *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 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."

Section 5296-f22 provides:

"5296-f22. *When assistance commences.* The assistance, if allowed, shall commence on the date named in the certificate, which shall be the first day of the calendar month following that on which the application is approved by the commission."

The sole question to determine is whether or not the intervention of death interim, the date of approval of the application, and the date upon which the first payment of benefits is to be made precludes the payment of funeral expenses under Section 5296-f25, supra, on the theory that the deceased was not receiving old age assistance on the date of death, he not having received his first warrant of assistance.

It is true that the first cited section refers to a person "receiving" assistance at the date of death, and technically, under Section 5296-f22, such person could not be said to be receiving assistance until on or after the first day of the calendar month following the approval of the application by the commission.

However, in view of Section 5296-f40, which provides at subsection 2 that "This chapter (Old Age Assistance) shall be liberally construed," it is the opinion of this department that the legislature intended no such constrained construction, but, to all the intents and purposes of Section 5296-f25, a person may be said to be receiving assistance from the date the application allowing assistance is approved by the commission, and that what the legislature had in mind when enacting Section 5296-f22 was simply that the enjoyment of benefits should be postponed until commencing the first day of the calendar month succeeding the date of approval of the application allowing assistance.

It is accordingly the opinion of this department that the fact of death before receiving the first warrant of assistance would not preclude payment of funeral benefits as provided in said chapter.

FIRE MARSHAL: TAXATION OF CONDEMNED PROPERTY: Unless expenses incurred in the destruction or removal of buildings or other objectionable matter from property were paid out by fire marshal or his deputy, same could not be certified as tax against property.

April 29, 1937. *Mr. J. Vincent Pyle, State Fire Marshal:* This department is in receipt of your letter asking an opinion upon the following question:

A property which was considered hazardous has been condemned by the State Fire Marshal. The order of the Fire Marshal has not been complied with. If the property is torn down or removed in compliance with the order of condemnation, what steps are necessary to recover the cost incurred?

Section 1633 of the statute is as follows:

"*Removal or repair.* 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."

The above section of the statute is the authority for the fire marshal, or his deputy, to order the removal of any building found to be in such dilapidated condition as to be a fire hazard.

Subsequent sections of the statute provide for a review of the order of the fire marshal and appeals therefrom. If there is no appeal from the order of the fire marshal within the time prescribed by statute or the same is sustained on appeal, the order then becomes a final order. Section 1647 of the statute provides as follows:

"*Refusal to obey orders.* If any person fails to comply with a final order of the marshal or his deputy or of a court on appeal and within the time fixed, then such officers are empowered and authorized to cause such building or premises to be repaired, torn down, demolished, materials and all dangerous conditions removed, as the case may be, and at the expense of such person, and if such person within thirty days thereafter fails, neglects, or refuses to repay said officers the expense thereby incurred by them, such officers shall certify said expenses, together with twenty-five per cent penalty thereon, to the auditor of the county in which said property is situated."

Section 1648 of the statute provides for notice of a hearing upon the amount so certified to the county auditor, said section being as follows:

"*Notice.* Notice of the reasonableness and amount of assessment shall be given in a manner as provided for giving notice in ordinary actions by the

marshal or his deputy to the property owner, also notifying the property owner that a hearing thereon shall be had before the auditor of said county on a day not less than ten nor more than fifteen days from the date of completed service of notice upon the property owner and if no appeal is taken therefrom to the district court at the time fixed in said notice the auditor shall hear and determine the matter. Any person aggrieved by the order and determination of the auditor may appeal therefrom to the district court of the county by serving notice within twenty days thereafter upon said auditor; and such appeal shall be heard and determined by the court as in cases of appeals from the order of the fire marshal as provided in this chapter."

Under the foregoing section of the statute it is necessary that after the filing of the expense account with the county auditor that a notice be served upon the owner of the property of a hearing upon said expense account. This notice must state the time and place of hearing and the amount of expense certified to the auditor, and must be served upon the property owner ten full days before such hearing. If, before the day of hearing the property owner desires, he may cause said matter to be transferred to the District Court for hearing. Otherwise, the hearing shall be conducted before the county auditor. The statute provides for an appeal from the county auditor to the District Court any time within twenty days following the entry of the order by the county auditor.

Section 1649 of the statute is as follows:

"*Entry of tax.* Said auditor shall enter said expense on the tax records of said county as a special charge against the real estate on which said building is or was situated, if in the name of such person, otherwise as a personal tax against such person, and the same shall be collected as other taxes and, when collected, shall, together with the penalty thereon, be refunded to the fire marshal, and by him paid into the state treasury where it shall be credited to the appropriation for expenses of the fire marshal's office."

It will thus be seen from the foregoing sections of the statute that the expenses incurred by the fire marshal in the destruction or removal of any building which he has condemned are to be assessed by the auditor against the property or person to whom such order was given and collected as ordinary taxes. But after the collection thereof, they are to be paid over to the state fire marshal and by him paid to the state treasurer who shall credit them to the appropriation made to the state fire marshal's office.

There is no provision of the statute for recovering any expenses incurred in the destruction or removal of buildings or other objectionable matter from property under the order of the fire marshal unless such expenses were incurred by the fire marshal or his deputy.

Therefore, unless the expenses incurred are actually paid out by the state fire marshal or his deputy, the same could not be certified as a tax against the property.

TAXATION: HOMESTEAD EXEMPTION: An occupant, although his ownership is limited to a life estate, the remainder being in a blood relative, is entitled to the benefit of the homestead exemption act. His surviving spouse is also entitled to the benefit of the homestead exemption act.

April 29, 1937. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

A, the owner of the fee title to a homestead property deeds same to B, his son, reserving unto himself and his wife a life estate in the same, B agreeing to pay all taxes assessed against the property from the time of conveyance to

the time of the death of the grantors. Can a homestead exemption be claimed?

In answering the foregoing question, we have the homestead character of the property settled. The answer to the question then turns upon ownership. The recently enacted homestead law (Chapter 195) in sub-section 2 of Section 19 defines the word "owner." In the instant case the fee title, by reason of the deed mentioned, is in B. However, A has reserved unto himself and his wife a life estate in the property. A life estate is an interest in property, but not a fee simple title. However, under sub-section 2 of Section 19 of the act, the Legislature has, in addition to those holding fee simple titles, designated owners for the purpose of the homestead exemption as including "the person occupying the homestead * * * where the divided interest is shared only by blood relatives, or by legally adopted children, or where a person is occupying a homestead under a deed which conveys a divided interest where the other interests are owned by blood relatives or by legally adopted children." In the instant case, the occupancy of the homestead was presumably by a fee simple owner, prior to the execution of a deed to the premises by such owner to his son "B," and in which deed the occupant, grantor, reserved unto himself and his wife, life interests in the property. Therefore, upon the execution of the deed to the son "B," containing the reservation of life estates, it may be said that the present occupant is occupying and in possession of the real estate under such deed. The occupant's interest in said real estate is a divided interest. That is, the occupant and his wife are the owners of the life use of said property and the son is the owner of the remainder. Therefore, the ownership of the property, by virtue of the deed mentioned, is brought within the provisions of sub-section 2 of Section 19 defining an owner to be one in possession of real estate "where the divided interest is shared only by blood relatives."

The purpose of the homestead exemption act was to encourage ownership and to make it easier for people to own their own homes. Under the facts as stated above, the property is primarily liable for the tax and while it is true the occupant only has a life use, a failure to pay the tax upon such property by either the occupant or the son would result in a sale of the property for delinquent taxes and would divest the occupant of the ownership thereof and would deprive him of his home.

We are therefore of the opinion that the occupant, although his ownership is limited to a life estate, the remainder being in a blood relative, is entitled to the benefit of the homestead exemption act.

A, in his last Will and Testament devised his homestead property unto B, C, and D, his children, reserving a life estate unto his surviving spouse. Can the homestead exemption be claimed, and if so, by whom?

The surviving spouse in the above question is entitled to the benefit of the homestead exemption act. Sub-section 2 of Section 19 in construing the word "owner" and designating the persons to whom the benefit of the exemption act inures specifically provides that "the person occupying the homestead under devise, or by operation of the inheritance tax laws where the whole interest passes or where the divided interest is shared only by blood relatives." In the instant case the surviving spouse is occupying the homestead under a devise contained in the will of her deceased husband, the remainder or divided interest in said property being shared only by blood relatives.

We are therefore of the opinion that the surviving spouse is entitled to the benefit of the homestead exemption act.

TAXATION: SOLDIERS' EXEMPTION: In the absence of any showing that a soldier was in any way connected with the world war, he is not entitled to the benefits of the exemption in subdivision 3 of Section 6946 of the statute.

April 30, 1937. *Mr. J. W. Thompson, County Attorney, Iowa Falls, Iowa:* This department is in receipt of your letter requesting an opinion upon the following question:

"A" enlisted in the United States Army on November 19, 1920 and received his honorable discharge on November 19, 1923. Is he entitled to World War tax exemption?

The statute, Section 6946 grants exemptions to certain people. Section 6946 reads as follows:

"*Military service—exemptions.* The following exemptions from taxation shall be allowed:

* * *

3. The property, not to exceed five hundred dollars in actual value, of any honorably discharged soldier, sailor, marine, or nurse of the war with Germany. * * *"

Under the statute the exemption is allowed to "any honorably discharged soldier * * * of the war with Germany.'

Under the facts outlined in your question, the soldier enlisted November 19, 1920, and served until November 19, 1923. Hostilities between the United States and Germany ceased with the signing of the Armistice on November 11, 1918. However, the actual treaty of peace was not consummated until July 2, 1921. But it cannot be assumed that this soldier in any way participated in the war with Germany, under the facts as stated in the question. There is no provision of the statute granting exemptions to discharged soldiers of the United States Army unless they bring themselves within the requirements of the statute.

In the absence of any showing that the soldier was in any way connected with the world war, it is the opinion of this department that he is not entitled to the benefits of the exemption provided in subdivision 3 of Section 6946 of the statute.

TAXATION: HOMESTEAD TAX EXEMPTION ACT: Spouse is entitled to benefit of homestead exemption act regardless of fact that will of her deceased husband required that executor of estate pay tax on homestead.

April 30, 1937. *Mr. J. W. Thompson, County Attorney, Iowa Falls, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Is the surviving spouse occupying a homestead entitled to the tax exemption notwithstanding the fact that the will provides that the executor shall pay the tax on the homestead during the life of the surviving spouse?

We are of the opinion that the surviving spouse, under the facts stated above, is entitled to the benefit of the homestead tax exemption. While it is true, under the facts stated, the executor is charged with the duty of paying the tax upon the homestead, yet a failure on the part of the executor to pay such tax might result in depriving the surviving spouse of her homestead.

The recently enacted homestead exemption act (Chapter 195) is sweeping in its character and grants to those persons who qualify under its provisions the benefit of such exemptions. Neither the state nor any of the tax levying or certifying bodies could avail themselves of the provisions of the will requiring

the executor to pay the tax upon the homestead. The only remedy the state or other tax levying bodies have for the collection of real estate taxes is by a sale of the property. The homestead exemption act is for the purpose of encouraging ownership and protecting the owners of homesteads against taxation and would lose its effectiveness if one were to be deprived of such exemption on account of there having been provisions previously made for the payment of such taxes.

It is therefore our opinion that the surviving spouse is entitled to the benefit of the homestead exemption act regardless of the fact that the will of her deceased husband required that the executor of the estate pay the tax upon the homestead.

COUNTY OFFICERS: CORONERS: PHYSICIANS: INQUESTS: Coroner has authority to call physician or surgeon to assist him in making scientific examination of dead bodies which coroner has been called upon to view, even though no inquest was held and nothing more than inquisition or examination was had by coroner. Previous opinions distinguished or overruled.

April 30, 1937. *Mr. Robert B. Organ, County Attorney, Council Bluffs, Iowa:* This department is in receipt of your request for an opinion on the following question:

Is a physician summoned by a coroner to make a scientific examination of a dead body entitled to compensation only where a coroner's inquest is had?

An answer to the foregoing question depends upon the interpretation to be given the applicable statute as it is at the present time. Section 5200 of the 1935 Code provides:

"*Inquest—jury.* The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means, and in such other cases as are required by law. * * *"

The above section of the statute makes it the duty of the coroner to hold an inquest upon the bodies of persons supposed to have met death by unlawful means, and Section 5201 makes it mandatory that an inquest be held upon the body of any person killed in connection with the working of or in any mine. The wording of the statute, Section 5200 is that an inquest shall be held; that a jury be summoned, and a determination of the cause of death made by the verdict of the jury. Now a coroner's inquest is a judicial investigation by the coroner with the aid of a jury as to the cause of death. In addition to requiring the coroner to hold an inquest upon the dead bodies of those persons who are supposed to have died by unlawful means and those who have met death while being connected with the working of, or in, any mine, the statute requires the coroner to make certain reports. For instance, Section 5214 provides:

"*Reports.* The coroner shall report to the clerk of the district court all cases of death which may call for the exercise of his jurisdiction; with the cause or mode of death, in accordance with forms furnished by the state department of health."

Section 5214-c1 provides:

"*Violent deaths.* The coroner shall also immediately report to the state bureau of investigation, all deaths coming within his jurisdiction due to accidental or violent means, and said report shall be upon such forms as shall be prescribed and furnished by the state bureau of investigation."

Many cases may come before the coroner in which it would not be suspected that death was by unlawful means or that the person had met death while connected with the working of, or in, any mine. In such cases the duty is imposed upon the coroner to make an investigation; that is, he is called upon

to view the body and the circumstances, so far as may be learned, causing the death and to make a report thereof to the clerk of the district court and to the state bureau of investigation. In such instances, the work and duties of the coroner are in the nature of an inquisition; that is, an inquiry in which he may, if he deems it expedient, summon a jury. Section 5218 of the statute is as follows:

"*Physician employed—fees.* 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. * * *"

In such cases the coroner is clothed with a discretion. He may either hold an inquest or an inquisition. While the term "inquisition" might be broad enough to cover an inquest, the word "inquest" would not and is not broad enough to cover inquisitions. Therefore, in the inquisition by a coroner, if he feels, or has reason to believe that a scientific examination by a physician or surgeon will disclose the cause of death, he may summon such physician or surgeon to make such scientific examination without holding an inquest and summoning a jury. The coroner's report, as provided for in Section 5214 and Section 5214-c1 may be based upon the report made to him by the examining physician as well as upon the verdict of a jury based upon such scientific examination and reported to them by such examining physician. It is apparent that the Legislature intended that there should be two methods available to the coroner in determining the cause of death, namely, inquests and inquisitions.

The opinion reported at page 197 of the 1928 Report of the Attorney General was based upon a different statute than we have at the present time, and under the facts before the Attorney General at that time the question was whether the coroner, who was a physician, was entitled to compensation for making a scientific examination. The statute at that time contained no provision for compensating a physician for making such scientific examination, and the opinion was bottomed upon the theory that no compensation could be allowed unless specifically authorized by statute. In the opinion found at page 300 of the 1928 Report of the Attorney General, the writer of the opinion has confused inquest with inquisition, and has based his opinion upon the fact that fees for a scientific examination by a physician could not be paid where no inquisition was held.

The opinion found at page 119 of the 1934 Report of the Attorney General is based upon the ruling of the Supreme Court in the case of *Sanford vs. Lee County*, 49 Iowa 148, and upon the Attorney General's ruling set out at page 197 of the 1928 Report. The case of *Sanford vs. Lee County*, supra, was one in which a claim was made for compensation due a reporter for reporting the proceedings of an inquest. The court denied the recovery upon the grounds that the statute did not provide for any compensation for a reporter. Hence, where no compensation was allowed, none could be recovered.

The opinion reported at page 337 of the 1936 Report of the Attorney General is based upon the prior ruling of the department and is likewise based upon a confusion of the words "inquest" and "inquisition." In the concluding paragraph the opinion states:

"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."

Thus the writer of the opinion interpreted the statute as though the third word thereof had been inquest instead of inquisition.

After studying the foregoing opinions and the statute, we find ourselves unable to agree with our predecessors upon the point involved.

It is therefore our opinion that the coroner has the authority to call to his assistance a physician or surgeon to make a scientific examination of dead bodies which the coroner has been called upon to view, even though no inquest was held and nothing more than an inquisition or examination was had by the coroner.

TAXATION: Not only has owner of property sold at tax sale right to redeem, but anyone who has an interest in said property may redeem, as—holder of a contract to purchase.

April 30, 1937. *Mr. W. O. Weaver, County Attorney, Wapello, Iowa:* We are in receipt of your request for an opinion on the following proposition:

In the year 1931 a certain property was put for tax sale and sold to "A" and tax certificate issued therefore. After such time "A" caused the taxes on such property to again go delinquent and the property was resold at a subsequent tax sale, and was purchased by "B" and a second tax certificate was issued. "B," proceeds to serve notice and files affidavit for a tax deed. "A," then paying in to the County Auditor's office the full amount of all taxes, together with interest and costs, and the County Auditor calls in the tax certificate of "B." The intent of "A" is to prove up on his prior tax certificate. "B," refuses to accept the money or surrender the subsequent ticket upon the theory that "A" has slept on his rights in allowing the taxes to go delinquent, subsequent to obtaining his certificate.

Will you kindly advise me who should prevail in this case, and I would like to have this opinion as soon as possible.

The inquiry above set forth turns upon the proposition of who is entitled to redeem. Our courts have held that not only has the owner of the property the right to redeem, but anyone who has an interest in said property may redeem, as for instance, the holder of a contract to purchase. (*Lynn vs. Morse*, 76 Iowa 665, 39 N. W. 203; Purchasers at Execution Sale, *Byington vs. Walsh*, 11 Iowa 27; Mortgagees, *Busch vs. Hall*, 119 Iowa 279, 93 N. W. 356; Life Tenant, *Hushaw vs. Wood*, 178 Iowa 752, 160 N. W. 274; Lessees, *Byington vs. Ryder*, 9 Iowa 566; Judgment and Creditors, *Swan vs. Harvey*, 117 Iowa 58, 90 N. W. 489.)

When "A" acquired the tax certificate, he either acquired at that time a lien upon the property sold for taxes, which lien might ripen into title if redemption was not had and the proper procedure was carried out, or else he acquired the title at that time subject to the right of redemption by the owner or other parties who had an interest in the property. Iowa has not passed directly on this point, but in either event "A" had a redeemable interest. That being the case, he could protect his interest by paying to the county auditor the subsequent taxes plus interest, plus penalties, and when the money was tendered to "B," his interest in the certificate was at that time terminated. We need not decide in this opinion whether or not "B" could redeem from "A."

TAXATION: FOREST RESERVATION EXEMPTION: If taxpayer desires to obtain benefits allowed by forest reservation law, he must strictly observe statute requirements. Animals specified are not to be permitted upon such reservation.

April 30, 1937. *Mr. Waldo E. Don Carlos, County Attorney, Greenfield, Iowa:*

We acknowledge receipt of your letter and request for an opinion. The facts are stated as follows:

A farmer in the county has an established forest reservation. During the growing season no livestock is allowed upon the tract. After the corn is harvested, livestock is turned into the field. There is no fence maintained between the forest tract and the corn field, and the animals go into the timber tract for shelter.

May such timber tract be allowed tax exemption under the forest preservation provisions when livestock have access to such tract only during the winter season when trees and other plant life are not growing.

Chapter 126, 1935 Code, provides for the establishing of forest and fruit-tree reservations. The apparent purpose of the chapter is to encourage cultivation of desirable trees, which are designated in Section 2609 of said chapter.

Section 2614 provides as follows:

"2614. *Restraint of live stock.* Cattle, horses, mules, sheep, goats, and hogs shall not be permitted upon a fruit-tree or forest reservation."

The provisions of the tax preference which is allowed such forest reservations is found in Section 7110, 1935 Code, which provides in part as follows:

"7110. *Forest and fruit-tree reservations.* Forest reservations fulfilling the conditions of Sections 2605 to 2617, inclusive, shall be assessed on a taxable valuation of four dollars per acre. * * *"

The section last quoted directs that the preference is to be given to such reservations fulfilling the requirements of Section 2605 to Section 2617. Section 2614 above quoted is clear in its provision that cattle, horses, mules, sheep, goats, and hogs shall not be permitted upon such reservation. Taxation is the rule, and exemption from taxation should not be extended beyond the clear authority of the statute granting the exemption. Section 2615 provides as follows:

"2615. *Penalty.* If the owner or owners of a fruit-tree or forest reservation violate any provision of this chapter within the two years preceding the making of an assessment, the assessor shall not list any tract belonging to such owner or owners, as reservation within the meaning of this chapter, for the ensuing two years."

It is our opinion that if a taxpayer desires to obtain the benefits allowed by the forest reservation law, he must strictly observe the requirements of the statutes. The animals specified in the statute are not to be permitted upon such reservation at any time. We are of the opinion that the assessor should not list a tract as a forest reservation where the requirement of Section 2614 has not been observed.

PRIMARY ROADS—EXTENSION: SALVAGE: Where primary road system is extended by highway commission, salvage section is in effect.

April 30, 1937. *Mr. Roscoe S. Jones, County Attorney, Atlantic, Iowa:* We are in receipt of your request for an opinion on the following proposition:

The town of Anita has consented that the Highway Commission should place through the town on present Highway No. 6 a new paving, twenty feet wide, concrete construction. There is to be taken from that street the present brick paving, which will constitute salvage.

The question arises as to who is entitled to this salvaged material, and as to whether the abutting property owners have a right to demand a proportionate share, or even a cash pro-rated disbursement, or whether this salvage will become the property of the town to be disposed of by the council as they direct by resolution and the proceeds used for the benefit of the town.

Attention is called to the fact that Anita has a population of 1,106, so that it comes within the provisions of Section 4765-b26 of the Code, whereby the

Highway Commission takes over certain streets as extensions of the Highway Commission.

In the determination of this question, three sections of the 1935 Code are involved. Section 5979 states as follows:

"5979. *Use of old material.* Upon repaving, they may use the old material for such repair and dispose of the waste material and salvage from the old pavement as the council may by resolution direct. The value of the salvage so used or the proceeds derived from the sale thereof shall be equitably applied upon the cost of the new improvement."

Section 5980 says:

"5980. *Sale of salvage.* No salvage may be sold until the owner of property assessed for the original construction of the paving shall have been given ten days' notice in writing requiring him to elect whether he desires such salvage, which notice shall be personally served on the owner or his agent, or, if neither be found, by posting in a conspicuous place on the property. The election, if made, shall be in writing and filed with the clerk. No owner electing to take salvage shall be entitled to a pro rata distribution derived from the proceeds of sale of salvage."

Section 4755-b26 reads:

"4755-b26. *Improvements in cities and towns.* The state highway commission is hereby given plenary jurisdiction, subject to the approval of the council, to purchase or condemn right of way therefor, and grade, drain, bridge, eliminate danger at railroad crossings, gravel, or hard surface any road or street which is a continuation of the primary road system and which is (1) within any town, or (2) within any city, including cities under special charter having a population of less than twenty-five hundred, or (3) within that part of any city, including cities acting under special charter where the houses or business houses average not less than two hundred feet apart and make payment therefor out of any funds available for the improvement of primary roads in said county.

"The phrase 'subject to the approval of the council' as it appears in this section, shall be construed as authorizing the council to consider said proposed improvement only in its relationship to municipal improvements such as sewers, water lines, establishing grades, change of established street grades, sidewalks and other public improvements. The location of such primary road extensions shall be determined by the state highway commission.

"The primary road fund shall not be charged with the cost of hard surfacing within cities and towns specified above in excess of the cost of hard surfacing which is twenty feet in width."

Sections 5979 and 5980 were part of Section 792 of the Supplemental Code of Iowa 1913, and Section 4755-b26 was first found in Code 1934, which is to say that the section pertaining to the extension of the primary road system through cities and towns was enacted subsequent to the salvaging sections. To hold that Sections 5979 and 5980 do not apply when the highway commission is permitted to extend the primary road system through a city or town is in effect repealing Section 4755-b26 by implication under those facts.

Of course the courts disapprove of repeal by implication and where two sections can be reconciled, that should be done. There is nothing inconsistent between the salvaging section and the extension section, and it is therefore our holding that even though the primary road system is extended by the highway commission, the salvaging sections are still in full force and effect, and the town of Anita is obliged to follow the procedure therein set out.

SCHOOL BONDS: REDEMPTION: PREMIUMS: School bonds may be redeemed before redemption date if provision for such is made in bond. No authority to permit payment of premium upon redemption is conferred.

April 30, 1937. *Mr. Louis H. Severson, County Attorney, Rock Rapids, Iowa:* We acknowledge receipt of your letter in which you make a request for an opinion of this department. The facts stated in your letter are as follows:

A bank owns certain school bonds not yet matured, bearing 3½ per cent interest. No provision is made in these bonds for redemption prior to maturity. The district has sufficient money on hands to redeem the bonds. The holder demands a premium if redemption is made at this time.

Does the board have authority to pay a premium in making redemption of these bonds?

Section 4408, 1935 Code, deals with the redemption of bonds by a school district and provides as follows:

"4408. *Redemption.* Whenever the amount in the hands of the treasurer, belonging to the funds set aside to pay bonds, is sufficient to redeem one or more of the bonds which by their terms are subject to redemption, he shall give the owner of said bonds thirty days' written notice of the readiness of the district to pay and the amount it desires to pay. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bonds shall cease and the amount due thereon shall be set aside for its payment whenever it is presented."

Section 4407, 1935 Code, relates to the form, duration, and rate of interest on such bonds, and among other things provides that bonds "shall run for not more than twenty years, and may be sooner paid if so nominated in the bond."

Boards of directors of school districts are limited to those powers expressed in the statutes and such additional powers as may be implied to permit the execution of the powers so conferred. The statute provides that redemption may be made if provision for such is included in the terms of the bond. There is no authority conferred which would permit the payment of a premium upon redemption, and it is our opinion that such power is not implied in the law.

SCHOOLS: EXAMINATION: FEES FOR NORMAL COURSE GRADUATES: All applicants for graduation from the normal course are required to pay fee of $2.00 (S. F. 297) before writing examinations. If fee of $1.00 has been paid, this amount may be credited on total fee.

April 30, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We are in receipt of your request for an opinion. In your letter you have set out the following facts:

Senate File 297, passed by the Forty-seventh General Assembly, became effective by publication on April 16, 1937.

Senate File 297 raises the fee required from each applicant for a certificate of graduation from the normal course from $1.00 to $2.00.

May an applicant for a certificate of graduation from such normal training course who paid a fee of $1.00 prior to April 16, 1937, as required by the old law, complete his examination after April 16 without paying the additional fee of $1.00 under the new law?

A determination of the question presented will depend upon the construction given the language of Section 3908. This section now provides as follows:

"3908. *Fees.* Each applicant for a certificate of graduation from the normal course in a county shall pay a fee of two dollars, which shall entitle him to one examination in each subject required; provided, however, that applicants rewriting the examination in one or more subjects at the July teachers' examination as herein provided shall pay an additional fee of one dollar."

Section 3906, 1935 Code, makes provision for the examinations to be given for graduates from the normal course, and provides as follows:

"3906. *Examination for graduation.* On the third Friday in January and the Wednesday and Thursday immediately preceding and on the third Friday in May and the Wednesday and Thursday immediately preceding, each year, in each high school, and private or denominational school, approved under this chapter, an examination for graduation from the normal course shall be conducted under such rules as the state board of examiners shall prescribe, but the county superintendent of the county in which an approved high school, and private or denominational school may be located shall be designated as the conductor of said examination."

It is our understanding that certain candidates made application to write the examinations prior to the effective date of the act which raised the application fee from $1.00 to $2.00. Also, that certain of these candidates have already completed a part of their written examinations at the January period referred to in Section 3906, and now propose to complete the examination at the May period.

The statute is clear in its provision that "each applicant for a certificate of graduation from the normal course in a county shall pay a fee of $2.00 * * *."

Does the fact that applications were accepted upon the old basis of a $1.00 fee exclude such applicants from the operation of the law as changed? This fee is fixed by the legislature. Payment of the fee confers certain privileges upon the applicant and in this respect it may be likened to a license. A license is a formal or official permit or permission to do some act which without the license would be unlawful. The requirement here is that a fee be paid before the applicant is entitled to take certain examinations. Such a license or permit is not a contract between the one granting authority and the person granted, nor is any fixed right created. The amount of a license fee or permit fee ordinarily may be increased or decreased at any time at the discretion of the body imposing it.

The legislature might have provided that candidates for such examinations who had made prior application be excepted from the payment of the increased fee, or, if no publication clause had been added to the bill, these particular candidates would not have been affected by the raised fee. It appears that the purpose of the publication clause was to make the change effective as to candidates who will write the May examinations.

It is therefore our opinion that all applicants for certificates of graduation from the normal course should be required to pay the fee of $2.00 as prescribed by the legislature before writing the examinations. If a fee of $1.00 has already been paid by the applicant, this amount may be credited on the total fee prescribed.

BEER PERMIT: PROPRIETARY CLUB: No club can be granted a permit unless it complies with *all* the requirements of 1921-f100.

April 30, 1937. *Mr. Edward P. Powers, County Attorney, Centerville, Iowa:* We acknowledge receipt of your request for an opinion of this department upon the following questions:

1. Can a proprietary club, located outside city limits, obtain a class B beer permit by being incorporated?
2. Are all the requirements set out as subsections c, d, e and f of Section 1921-f110, 1935 Code, to be complied with before the issuance of a class B permit to clubs, or can such permit be issued if any one of the requirements is met?

Section 1921-f110 prescribes the conditions under which permits to sell beer may be granted to clubs, providing as follows:

"1921-f110. *Conditions.* No club shall be granted a class 'B' permit under this chapter:

a. If the buildings occupied by such club are not wholly within the territorial limits of the city, town or special charter city to which such application is made; provided, however, that a golf or country club whose buildings are located outside the territorial limits of the city, town or special charter city, may be issued a class 'B' permit by the local board of supervisors, and further provided, that all of the permit fees authorized under this paragraph shall be collected and retained by the county in which such golf or country club is located and credited to the general fund of said county and provided, further, that such golf or country club shall comply with the restrictions contained in the succeeding paragraphs of this section.

b. If it is a proprietary club, or operated for pecuniary profit.

c. Unless it is incorporated under the laws of the state of Iowa, and its charter is in full force and effect, and/or excepting regularly chartered branches of nationally incorporated organizations.

d. Unless such club has a permanent local membership of not less than fifty adult members.

e. Unless the application for such permit is approved by a majority of the bona fide members of such club who are present at a regular meeting, or a special meeting called to consider the same.

f. Unless it was in operation as a club on the first day of January, A. D., 1934, or being thereafter formed, was in continuous operation as a club for at least two years immediately prior to the date of its application for a class 'B' permit."

It is our opinion that no club can be granted a class B permit under the existing beer law unless it complies with all the requirements set out in sub-sections a, b, c, d, e, and f of the above quoted section. The language of the statute is clear in its requirement that each of the above sub-sections is to be met.

For example, if sub-section "e" were considered to be an independent requirement, it is apparent that any small number of persons could qualify for a club permit, provided that a meeting was called by them and a favorable vote of the members resulted. We believe that the statute clearly will not permit such a construction.

The conclusion that all of the requirements of the above mentioned sub-sections must be complied with, we believe, answers both questions which you have submitted. An organization such as described in your letter could not qualify for a permit since (1) it is a proprietary club.

TAXATION: COUNTY ATTORNEY, DUTIES OF: PUBLIC BIDDER STATUTE: The state, county, school and township are all interested in properties sold under public bidder statute for delinquent regular taxes. It therefore becomes the duty of the county attorney (Section 5180) to render to the board of supervisors, or any other officer, such advice or service as is necessary in procuring tax deeds at tax sales held under the public bidder's law.

May 1, 1937. *Mr. Jas. E. Coonley, County Attorney, Hampton, Iowa:* This department is in receipt of your letter requesting an opinion upon the following question:

Is the county attorney entitled to extra compensation in addition to his regular salary for services rendered in connection with obtaining tax deeds for the county for property sold at scavenger tax sale, and which has been purchased by the county?

In answering the foregoing question we are assuming that your reference to the scavenger tax sale applies to properties purchased by the county under

the provisions of Section 7255-b1 of the statute commonly known as the public bidder statute, it being the only provision of the statute authorizing the county to become a purchaser at tax sale.

Section 5228 of the statute fixes the compensation of county attorneys, the salary being fixed by statute according to the population of the county. In addition to the salary fixed by statute, the statute authorizes payment to the county attorney of additional compensation in the nature of commissions on fines collected and fees for the foreclosure of school fund mortgages, but limits the fees whether the annual fee fixed by statute or commission on fines and so forth to those matters specifically mentioned in the statute and the salary fixed by law and the commissions allowed upon fines and fees for foreclosure of school fund mortgages is supposed to compensate the county attorney for all of the services rendered by him to the county.

Under Section 7255-b1 of the 1935 Code, the public bidder statute, the county is required through its board of supervisors to purchase all property subject to sale under the section and not sold to others. If the county should subsequently secure title to such property sold under the public bidder law, it holds the property in trust for all of the tax levying and tax certifying bodies and must manage and control, through its board of supervisors, such property and eventually sell the same. All revenue derived from the use of such property, or the sale thereof, is received by the county for the use of all the tax levying and tax certifying bodies. The tax levying and certifying bodies includes the county, cities and towns within the county, school districts, and so forth.

Under Section 5180 of the 1935 Code the duties of the county attorney are defined. The pertinent part of Section 5180 is as follows:

"*Duties.* It shall be the duty of the county attorney to:

* * *

7. Give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers and to school and township officers, when requested so to do by such board or officer, upon all matters in which the state, county, school, or township is interested, or relating to the duty of the board or officer in which the state, county, school or township may have an interest; * * *"

It will thus be seen that under subdivision 7 of Section 5180 it is made the duty of the county attorney to advise the board of supervisors, the county officers, school and township officers, upon all matters in which the state, county, school or township is interested without additional compensation.

The state, county, school and township are all interested in properties sold under the public bidder statute, for the delinquent regular taxes. It therefore becomes the duty of the county attorney, under the foregoing section of the statute, to render to the board of supervisors, or any other officer, such advice or service as is necessary in procuring tax deeds upon certificates of purchase issued at tax sales held under the public bidder's law.

OLD AGE ASSISTANCE: Where board of supervisors finds recipient of old age assistance is entitled to medical attention and he is confined to County Home for such aid, county must defray expense thereof.

May 3, 1937. *Mr. John F. Porterfield, Commissioner, Old Age Assistance Commission:* We acknowledge receipt of your request for an opinion on the following questions:

1. The Woodbury County Old Age Assistance Board, by and with the consent

of the Board of Supervisors of Woodbury County, have set apart a certain part of the Woodbury County Home for the purpose of conducting a convalescent hospital, old age assistance recipients to be placed in said convalescent hospital when in need of special medical care and hospitalization. Does confinement in said hospital make the recipient of old age assistance ineligible while confined therein?

2. If the above question is determined in the negative, can the Old Age Assistance Board of said county deduct from the warrant of the old age assistance recipient any part of said warrant to apply on the expense of said hospitalization of said recipient while thus confined?

The stated fact that the Woodbury County Old Age Assistance Board, by and with the consent of the board of supervisors of Woodbury County, has set apart a certain portion of the Woodbury County Home for the purpose of conducting a convalescent hospital for old age assistance recipients, when in need of special medical care and hospitalization, causes us to preface this opinion with the statement that this is not a function of the local Old Age Assistance Board. However, we assume that it was the board of supervisors of Woodbury County which in fact set apart a portion of the County Home for the purpose stated, and that admittance for the purpose of receiving medical attendance will be determined by the board of supervisors on the same basis as any other form of poor relief furnished by the county as will more fully be brought to light in this opinion.

Section 5297 provides:

"5297. *'Poor person' defined.* The words 'poor' and 'poor person' as used in this chapter shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public."

This section is embraced within Chapter 267, Code 1935, entitled "Support of Poor," which chapter, the Iowa Supreme Court has taken occasion to state, establishes a statutory duty on the part of the county to support its poor. *Cooledge vs. Mahaska County*, 24 Iowa 211; *Cass County vs. Audubon County*, 266 N. W. 293. The support of the poor *includes as a form of relief* "medical attendance" (Section 5322), in regard to which our court, as early as 1897, in *Scott vs. Winneshiek County*, 52 Iowa 579, remarked there is no reason to suppose the legislature used the words "medical attendance" with the design that any narrow or technical meaning should be put upon them incident to holding that township trustees should be allowed in all proper cases to do whatever constitutes a part of medical treatment. It may be presumed, therefore, that "medical attendance" as used in Section 5322, could embrace treatment, attendance, hospitalization, surgical assistance, etc., important to this inquiry for the reason that the Old Age Assistance Law uses the broader terms "medical or surgical assistance" and "hospitalization."

However, whether the form of relief be in the nature of commodities, rent, etc., or medical attendance, yet, it is subject to such limitations as the law prescribes, such limitations being embraced in Sections 5323, 5326, 5328 and 5329 of Chapter 267, and eligibility for any such relief is grounded in the first instance upon Section 5297 above set out.

The Old Age Assistance Law, embodied in Chapter 266-f1, was designed to provide for the protection, welfare and assistance of aged persons, residents of

Iowa, who are in need, and by virtue of Section 5296-f27 thereof, at paragraph one, wherein it is provided:

"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."

it seems clear that a person could not *at the same time* receive assistance under both Chapter 266-F1 and Chapter 267, or both Chapter 266-F1 or any other source of public funds except that medical or surgical assistance and hospitalization is expressly excepted from such restriction.

Therefore, the fact that one is a recipient of old age assistance would not preclude such person from receiving "medical attendance" under Chapter 267 when the board of supervisors, exercising a wise discretion under Section 5297, supra, determines that the person is in need of medical attendance and that same will be conducive to his welfare and the best interests of the public.

Under the stated facts, it appears that there has been set apart a portion of the Woodbury County Home as a convalescent ward or unit wherein old age assistance recipients may be confined when in need of special medical care and hospitalization, and, further, as we assume, when the board of supervisors, in a given case, has determined that the person is entitled to such aid. In other words, it is our opinion that under Section 5297, supra, the board of supervisors has a discretion to exercise in the first instance as to whether or not the person is a subject for poor relief as therein defined, meaning in the use of such term, relief in the form of medical assistance. Having exercised a wise discretion in a given case, and determined the person to be such and entitled to medical assistance, it would appear that such assistance may be given to be defrayed from county funds, notwithstanding the person is a recipient of old age assistance.

Thus showing it to be (1) the board's duty to provide medical services to its poor incident to and as a part of its statutory duty to support its poor, (2) that such relief is part of the poor relief payable from public funds in the county treasury, and (3) that the receipt of old age assistance benefits under Chapter 266-F1 does not preclude the person receiving the said benefits from receiving, in addition, medical assistance, the expense of which is defrayed from other funds, it is the opinion of this department that a recipient of old age assistance is not rendered ineligible for assistance benefit payments by reason of confinement in the convalescent ward or unit of the Woodbury County Home, provided, however, that by such confinement it is the intent and purpose to provide medical assistance and hospitalization and not for the purposes that admittance to the County Home usually intends, namely: as one means of supporting county poor. It is clear that one cannot be supported at the county home (something different from confinement for medical attendance or hospitalization), and at the same time receive old age assistance. One or the other form of relief must necessarily be foregone. (Section 5296-f27, supra.)

In view of the foregoing, your second question must be answered to the effect that the local Old Age Assistance Board could not deduct from the warrant for old age assistance, all or any part of the proceeds thereof, to apply on the expense of such hospitalization or confinement for medical service. It is apparent that it was in the mind of the legislature that old age assistance would not in many cases be equal to the extraordinary expense of necessary medical service and at the same time support the recipient, and it, therefore,

excepted such relief when payable from public funds from the restriction imposed in Section 5296-f27, supra.

It is our opinion that where the board of supervisors has exercised its sound discretion and determined that a recipient of old age assistance is entitled to medical attendance, and that it will be conducive to such person's welfare and the best interests of the public, that such aid be given, and it is undertaken by confinement in the convalescent ward or unit of the County Home, or in some other manner, the county must defray the expense thereof from the county treasury, and it could not look to the warrant for old age assistance for either total or partial reimbursement.

It is our further opinion that the county Old Age Assistance Board would have no authority to convert any part of the proceeds of such warrant to defray such expense. An independent selection of medical assistance by an old age assistance recipient would, of course, impose no burden on the county to pay for such treatment.

COUNTIES: CITY JAILS: If sheriff keeps part of county prisoners in city jail during construction of new county jail, he may file claim against county for lodging of prisoners in city jail, and county is not entitled to recover from sheriff the amount paid him for such lodging.

May 5, 1937. *Mr. C. W. Storms, State Auditor:* This department is in receipt of your request for an opinion based upon the following facts:

From March 12, 1934 until the end of the year the sheriff kept a part of the county prisoners in the city jail. This was during the period of construction of a new county jail. The city charged neither the sheriff nor the county for the use of the city jail. The sheriff filed regular claims against the county for lodging of county prisoners at the rate of fifteen cents per lodging per person. These claims were allowed by the board of supervisors and paid to the sheriff in the total sum of $184.20. Is the county entitled to recover back from the sheriff the sum of $184.20, the amount paid by it on the claims filed by the sheriff?

The question does not arise in a county having a population in excess of eighty thousand, and therefore Chapter 259-D1 of the 1935 Code is not applicable. The question to be determined is governed by Section 5191 of the Code of 1935. Section 5191 is as follows:

"*Fees.* The sheriff shall charge and be entitled to collect the following fees:
* * *

11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and fifteen cents for each night's lodging. But the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for any calendar year. * * *"

It will be noted from a reading of subdivision 11 of Section 5191 that the sheriff is entitled to receive fifteen cents for each night's lodging. The statute does not limit the charge to a lodging in the county jail, but allows to the sheriff the sum of fifteen cents for each night's lodging furnished to his prisoners. In the facts stated in the question, this lodging was had at the city jail. Whether the arrangement was made by the sheriff or the county with the city for such lodging is immaterial, and as to why the city was willing to furnish such lodging without compensation is likewise immaterial. The sheriff furnished such lodging to his prisoners and the same was evidently satisfactory, as there is no complaint to the contrary. It would appear to be one of those cases in which it was the sheriff's good fortune to secure such

lodging for which he was not required to pay. The statute requires the sheriff to furnish such lodging and to look after and care for the prisoners while they are under his control, and no doubt such care and attention could have been furnished with less trouble and effort had such prisoners been in a well kept county jail near the residence of the sheriff.

A similar question was before this department in an opinion rendered December 10, 1934, and which appears in the 1934 Report of the Attorney General at page 747. The opinion therein expressed with reference to the question herein involved is in accord with our opinion.

It is therefore the opinion of this department that the sheriff, under the circumstances stated, was entitled to charge for the lodging of county prisoners in the city jail and that the county is not entitled to recover from the sheriff the amount paid him for such lodging.

COUNTY: DEPUTY CLERK: FEES OF: Where deputy clerk is appointed referee in probate matters, any fee received by him for such services should be reported and paid over to the county.

May 5, 1937. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* This department is in receipt of your recent request for an opinion upon the following question:

> The District Court has appointed the deputy clerk as referee in probate. May the deputy clerk, as referee under such appointment retain the fees allowed to him for his services, or must he account for such fees to the county?

The authorization for the appointment of a referee in probate matters is contained in Section 12041 of the statute which reads as follows:

> "*Reference—examination of accounts—fees.* In matters of accounts of executors and administrators, the court may appoint a referee, which referee, in all counties having a population of less than one hundred thousand shall, whenever in the opinion of the court it seems fit and proper, be the clerk of the district court of the county in which the estate is being probated, as referee, who shall have the powers and perform all the duties therein of referees appointed by the court in a civil action. All fees received by any county officer as such referee shall become a part of the fees of his office and shall be accounted for as such."

It will be noted that the court is given a discretion in selecting the referee, the matter of the choice of such referee being for the court to determine.

It will be further observed that under the foregoing section "all fees received by any county officer as such referee shall become a part of the fees of his office and shall be accounted for as such." The requirement that such referee's fees shall become a part of the fees of the office is not limited to fees received by the clerk in such cases wherein he is appointed referee, but applies to any county officer who receives such appointment. Section 5238 of the statute reads as follows:

> "*Appointment.* Each county auditor, * * * clerk of the district court, * * * may, with the approval of the board of supervisors, appoint one or more deputies or assistants, * * *."

The above section of the statute provides for authorizing the appointment of a deputy clerk. The rule is that where the statute makes provision for the position of a deputy, such deputy is a county officer. The deputy who receives his appointment from his principal acts for and on behalf and instead of his principal. His acts are those of the principal. One appointed or elected to a county office is not entitled to any compensation or emolument from such office save and except that provided for by statute.

Section 5245 of the Code is as follows:

"*Fees belong to county.* Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county."

It is therefore the opinion of this department that where the deputy clerk is appointed referee in probate matters any fee received by him for such services should be reported and paid over to the county. We hereby overrule the opinion rendered by this department and found in the 1934 Attorney General's Report at page 309.

PUBLIC DEPOSITORS: NONACTIVE FUNDS: SINKING FUND: Public depositors may invest nonactive funds not needed for current use, and which are not being accumulated as sinking funds for definite purposes. Investments limited to securities set out in 12775-b1.

May 5, 1937. *Honorable C. W. Storms, Auditor of State:* We are in receipt of your letter in which you make reference to an opinion of this department dated February 22, 1937, which opinion deals with the authority of a school board to invest non-active funds under the provisions of Section 12775-b1, 1935 Code. You also refer to an opinion of this department dated April 27, 1932, which opinion deals with the investment of funds of municipal waterworks and electric light plants. The last mentioned opinion holds that if such waterworks system is owned by the city and managed by the city council and the funds are in the hands of the city treasurer, then such funds must be deposited in the bank in accordance with the provisions of the Brookhart-Lovrien law, and the interest thereon diverted accordingly.

The question raised in your letter is this:

Do the provisions of Section 12775-b1, 1935 Code, authorize a public body to invest its public funds in the securities designated in said section, or is it mandatory, under the provisions of Chapter 352-D1, that such public funds be deposited in banks?

Section 12775-b1 provides as follows:

"12775-b1. *Nonactive funds.* The governing council or board who by law are authorized to direct the depositing of funds shall be authorized to direct the treasurer to invest any fund not an active fund needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest of which is used for the same purpose, in the certificates provided by Section 7420-b3, or in United States government bonds, or in local certificates or warrants issued by any municipality or school district within the county, or in municipal bonds which constitute a general liability, and the treasurer when so directed shall so invest such fund."

For some reason unexplained, the above quoted section appears in the Code as a part of a chapter not related to the matter of public fund deposits. This provision, however, was included as a part of House File 42 of the Acts of the Forty-second General Assembly, which file dealt directly with the Brookhart-Lovrien law. This being the fact, we conclude that the provisions of Section 12775-b1 were intended to apply to non-active funds accumulated for the purpose of a sinking fund in the hands of public bodies. To hold otherwise would result in the giving of no effect to the provisions of the statute, when it was clearly intended that the provisions of the statute were a part of the law pertaining to the sinking fund.

It is, therefore, our opinion that the provisions of Section 12775-b1 are applicable to public depositors, and that such public depositors may invest

non-active funds not needed for current use, and which are being accumulated as sinking funds for definite purposes. Such investments must, of course, be limited to those securities which are set out in the said section.

This holding confirms the opinion of this department dated February 22, 1937.

STATE PERMIT BOARD: It is duty of state permit board to hold meeting first Monday each month. Board may employ necessary employees and provide necessary office supplies and equipment.

May 6, 1937. *Mr. Robert E. O'Brian, Secretary of State:* We acknowledge your request for an opinion of this department upon three questions as follows:

1. Is it the duty of the state permit board to hold regular meetings?
2. Is it within the power of the board to employ necessary employees?
3. Is it the duty of the board to provide office space and equipment for its employees to perform their duties?

The first question submitted is answered by the provision found in Section 1921-f98, 1935 Code, which is as follows:

"* * * The permit board shall meet on the first Monday in each month for a regular meeting and upon call at any time.* * *"

It is our opinion, therefore, that the terms of the statute require the meeting of the board on the first Monday in each month.

In answer to your second and third questions, the provisions set out in Section 1921-f99, 1935 Code, are applicable.

"1921-f99. *Power to issue permits.*

* * *

"Each applicant applying for a class 'B' or 'C' permit, shall, in addition to procuring a permit from a city or town council, or board of supervisors, as provided in this chapter, obtain a state permit from the state permit board upon application made to the board and upon payment of a fee of three dollars. Such fees collected shall be placed in a special fund by the treasurer of state to be used by the state permit board for the purpose of enforcing the provisions of this chapter. * * *"

Under the above provisions the funds accruing from the issuance of state beer permits are to be used by the board for the purpose of enforcing the provisions of Chapter 93-F2 relating to beer and malt liquors.

The state permit board is composed of the treasurer of state, the secretary of state, and the auditor of state, to serve without additional compensation. Certain duties and powers are conferred upon the board by statute in order to promote uniform compliance with the provisions of the law.

It is our opinion that the board has the power to employ such assistants as may be necessary to permit it to perform its proper functions. Such authority is necessarily implied in the language which authorizes the board to use the funds for the enforcement of the provisions of the chapter.

It is further our opinion that the board has power to provide such office space and equipment for the use of employees as is necessary to carry on the work of the board.

SCHOOL HOUSE FUND: EXPENDITURES: IMPROVEMENTS: School district may not use proceeds from general fund for improvement unless authorized by election. Funds may not be transferred from general fund to school house fund to be used for improvements.

May 7, 1937. *Mr. Willis A. Glassgow, County Attorney, Clarinda, Iowa:* We are in receipt of your request for an opinion of this department in which you set out the following statement of facts:

The Independent School District of Essex, Iowa, wishes to purchase land to be used as a football field and play ground. The board of directors maintains only one fund known as the "general fund." The expenditure in question will require $600.00, and there will be a surplus at the close of the present school year sufficient to make this purchase.

Can the school district make this expenditure from the general fund?

Section 4317, 1935 Code, makes provisions for the school house fund and the general fund of school districts as follows:

"4317. *General and school house funds.* The money collected by a tax authorized by the electors or the proceeds of the sale of bonds authorized by law or the proceeds of a tax estimated and certified by the board for the purpose of paying interest and principal on lawful bonded indebtedness or for the purchase of sites as authorized by law, shall be called the schoolhouse fund and, except when authorized by the electors, may be used only for the purpose for which originally authorized or certified. All other moneys received for any other purpose shall be called the general fund. The treasurer shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied."

It is contemplated by the above section that money raised for the purchase of sites is to be a part of the schoolhouse fund. The proposed expenditure for a playground site is for capital improvement and is not in the nature of ordinary expense. Therefore, it is our opinion that such expenditure should be made out of the schoolhouse fund rather than out of the general fund.

Section 4241, 1935 Code, provides for a transfer of funds from the general fund to the schoolhouse fund as follows:

"4241. *Transfer of funds.* If after the annual settlement it shall appear that there is a surplus in the general fund, the board may, in its discretion, transfer any or all of such surplus to the schoolhouse fund."

We have held heretofore that such a transfer of funds from the general fund to the schoolhouse fund need not necessarily be made at the time of the annual settlement as set out in Section 4240, but may be done at a later date if the fact of the existence of the surplus was determined upon the annual settlement. It is therefore our opinion that the board has authority to transfer a bona fide surplus from the general fund to the schoolhouse fund.

The next question to be determined is whether or not this school board has authority to use proceeds so transferred to the schoolhouse fund for the purchase of a playground site without a vote of the electors of the district. At this point reference should be made to Section 4363, 1935 Code, which provides as follows:

"4363. *Tax.* The directors in any independent district whose territory is composed wholly or in part of territory occupied by any city or city under special charter may, at their regular meeting in July, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in August, certify an amount not exceeding one mill to the board of supervisors, who shall levy the amount so certified, and the tax so levied shall be placed in the schoolhouse fund and used only for the purchase of sites in and for said school district."

The foregoing section is limited in its application to districts which include in their areas a city or a part thereof. Since the Independent School District of Essex does not contain a city (which, by Section 5263, is designated as a municipal corporation having at least two thousand inhabitants) the provisions of this section are not applicable to your inquiry. Therefore, the Essex board has no authority to certify a levy for the benefit of the schoolhouse fund as is provided in the section last quoted.

Section 4361, 1935 Code, provides as follows:

"4361. *Five-acre limitation.* Any school corporation including a city, town, village, or city under special charter, may take and hold an area equal to two blocks exclusive of the street or highway, for a schoolhouse site, and not exceeding five acres for school playground or other purposes for each such site."

This section authorizes a board to take and hold a playground tract of not exceeding five acres in extent. How is the money to be provided for the purchase of such site? Section 4217, sub-section 7, of the 1935 Code provides as follows:

"4217. *Enumeration.* The voters at the regular election shall have power to:

* * *

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

This section indicates that the electors have power to vote a schoolhouse tax for the purchase of grounds, construction of building, etc.

Section 4354, 1935 Code, requires that if the indebtedness to be contracted in the purchase of grounds exceeds one and one-fourth per cent of the valuation of the taxable property of the district, such election can be had only upon petition to be filed with the board.

"4354. *Petition for election.* Before such indebtedness can be contracted in excess of one and one-quarter per cent of the actual value of the taxable property, a petition signed by a number equal to twenty-five per cent of those voting at the last regular school election shall be filed with the president of the board of directors, asking that an election be called, stating the amount of bonds proposed to be issued and the purpose for which the indebtedness is to be created, and that the necessary schoolhouse or schoolhouses cannot be built and equipped, or that sufficient land cannot be purchased to add to a site already owned, within the limit of one and one-quarter per cent of the valuation."

In the present case no tax or bond issue is involved since the necessary amount is supplied to the schoolhouse fund by virtue of a transfer of money thereto from the general fund. The foregoing two sections, it is true, refer to the voting of a tax or the voting of bonds for the acquisition of real estate. Does it follow that since no new indebtedness is contemplated, that the board can purchase without an election? The surplus funds now on hand in the general fund were not raised for the purpose of acquiring a playground site. In the absence of the vote of the electors, school funds may be used only for the purpose for which they were originally authorized or certified. While no new tax or indebtedness is contemplated, we are of the opinion that such a transfer of funds in practical effect, accomplishes the increasing of taxes. If the money were not so transferred, to the extent of the surplus, the tax levy for the general fund could be reduced. It is apparent that a board could, by levying an excessive amount for the general fund, acquire a surplus in such fund. Transfer of this surplus could then be made to the schoolhouse fund as stated above. If these proceeds could then be expended without a vote of the electors, the board would thus be permitted to accomplish indirectly a result that could not be accomplished directly.

It is therefore our opinion that although there are funds on hand which may be transferred to the schoolhouse fund in sufficient amount to purchase the playground site, it is nevertheless necessary that the question of acquiring

a site be submitted to the electors. Such submission may be at a regular election as provided in Section 4217 or at a special election as provided in Section 4216-c2.

TAXATION: BOARD OF SUPERVISORS: The statute authorizes the board of supervisors to accept and sell property acquired under the public bidder law for the amount invested in such property or represented by the delinquencies against the same.

May 7, 1937. *Harlan J. Williamson, County Attorney, Manchester, Iowa:* This department is in receipt of your request for an opinion upon the following matter:

A property in Manchester of the probable value of $500.00 or $600.00 was bid in at scavenger sale by the public bidder. Notice for deed has been served and deed executed and delivered to the county under date of April 15, 1937. The deed has not been recorded. The amount of taxes, penalty, interest and costs against this property is approximately $300.00. The taxpayer who was the original owner now wishes the board of supervisors to cancel the treasurer's deed without recording it or to convey the property to him upon the payment of the amount that would be required to redeem if deed had not issued. No homestead question is involved. The board of supervisors is willing to accept this full payment of taxes, penalty, interest and costs if it can be done by return of deed or by conveyance. Has the board of supervisors such rights?

The above facts present two questions. The property involved was purchased by the public bidder who served notice of the expiration of the right of redemption. The redemption period has expired and a deed for the property has been made to the county. Under those facts the title to the property is now vested in the county even though the deed has not been recorded. The property owner or taxpayer loses his interest in the property upon expiration of the period of redemption whether deed be made at that time or later. Therefore, under the facts stated in the above question, a destruction of the tax deed which has been made by the county treasurer to the county would not revest the title in the previous owner. The title having once vested in the county can only be revested in the owner by the methods provided by law. Under Section 10260-g1 the Legislature has provided the method by which such properties as the one in question may be disposed of by the county which acquires title thereto under tax deed. The above section, so far as pertinent to this inquiry is as follows:

"*Title under tax deed—sale—apportionment of proceeds.* When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the board of supervisors as provided in this chapter, except that any sale thereof shall be for cash and for a sum not less than the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interests and costs, without the written approval of a majority of all the tax levying and tax certifying bodies having any interest in said general taxes. * * *"

Under the foregoing statute the board of supervisors is authorized and empowered to sell such property but the sale must be for cash and for a sum not less than the total amount invested therein unless a majority of the tax levying and tax certifying bodies give written approval of a sale for less. In the instant case the offer made to the county for the property in question is the full amount represented by the tax sale plus interest, costs, penalties and subsequent payments, which if accepted by the county, would be a payment in full of all investments of the county in the property. By the acceptance of such offer, the county and tax levying and tax certifying bodies would be made whole by reason of such transaction.

It is therefore our opinion that the statute authorizes the board of supervisors to accept and sell property acquired under the public bidder law for the amount invested in such property or represented by the delinquencies against the same.

SECURITIES: FEES FOR REGISTERING OF: If a person's application to have securities registered is pending in the securities department at the time an amendment becomes effective as law, his fee should be based on the fees which were in effect prior to the enactment of such law.

May 7, 1937. *Mr. John F. Brady, Superintendent Securities Department:* We acknowledge receipt of your request for an opinion on the question presented in the following statement of facts:

Certain applications to have securities registered by qualification were pending in the Securities Department at the time the amendments embodied in House File 193 became effective as law. The fees required under the law as it existed prior to amendment, to-wit: Section 8581-c8, Code 1935, had been paid by the applicants at the time the applications were filed, and were in amounts based upon the aggregate par value of the securities as required under the provisions of said section instead of the sale price as provided by the amendments. The pending applications are now being considered subsequent to the effective date of the amendment.

The question presented is whether or not in view of the wording of the law previous to amendment, registration may be granted upon the fee as provided in the statute prior to amendment, or is it necessary for the Securities Department to require the applicant to pay a fee upon the basis as set out in the law after amendment.

Section 8581-c8, supra, provides in part as follows:

"All securities required by this chapter to be registered before being sold in this state shall be registered only by qualification in the manner provided by this section.

"The secretary of state shall receive and act upon applications to have securities registered by qualification, and may prescribe forms on which he may require such applications to be submitted. Applications shall be in writing and shall be fully signed by the applicant and sworn to by any person having knowledge of the facts, and filed in the office of the secretary of state and may be made either by the issuer of the securities for which registration is applied or by any registered dealer desiring to sell the same within this state.

"The secretary of state may require the applicant to submit to him the following information respecting the issuer and such other information as he may in his judgment deem necessary to enable him to ascertain whether such securities shall be registered pursuant to the provisions of this section: * * *

"At the time of filing the information, as hereinbefore prescribed in this section, the applicant shall pay to the secretary of state a fee of one-tenth of one per cent of the aggregate par value of the securities to be sold in this state, for which the applicant is seeking registration, but in no case shall such fee be less than twenty-five dollars or more than two hundred dollars. In case of stock having no par value the price at which such stock is to be offered to the public shall be deemed to be the par value of such stock.

"If upon examination of any application the secretary of state shall find the sale of security referred to therein would not be fraudulent or would not work or tend to work a fraud upon the purchaser, or that the enterprise or business of the issuer is not based upon unsound business principles, then upon the payment of the fee provided in this section, he shall record the registration of such security in the register of securities, and thereupon such security so registered may be sold by the issuer or by any registered dealer, subject, however, to the further order of the secretary of state as hereinafter provided. * * *"

House File 193 (Chapter 209) passed by the 47th General Assembly to take

effect upon publication and now the law, amended said section by substituting in lieu of the fourth quoted paragraph the following:

"The applicant shall pay to the Secretary of State at the time of filing the information as hereinbefore prescribed in this section, a fee of one-tenth of one (1) per cent of the aggregate par value of the securities to be sold in this state for which the applicant is seeking registration. Such fee shall not be less than twenty-five dollars ($25.00) nor more than three hundred dollars ($300.00) where the amount of the securities to be sold is not in excess of one million dollars ($1,000,000.00). In case the amount to be sold exceeds one million dollars ($1,000,000.00) the fee shall be five hundred dollars ($500.00). Par value as used in this section for the purpose of computing fees shall be construed:

"In case of stock of no par value to be the price at which the stock is to be offered to the public;

"The price at which the security is to be sold or offered for sale to the public in cases where the security is to be sold or offered for sale at a price greater than the stipulated par value."

and further amended said section by striking from the last quoted paragraph the words "then upon the payment of the fee provided in this section."

It is apparent that the law as it existed prior to amendment contained a possible ambiguity in that the statute required the fee to be paid at the time the information (application, etc.) was filed, and then went on to direct the Secretary of State to record the registration of securities "upon payment of the fee." As a matter of practice, and in keeping with the language of the law, the Securities Department required the fee to be paid at the time of filing the information required in Section 8581-c8.

Since the fee payable by the applicant is now based on the sale price of the security to be offered for sale rather than the aggregate par value, and it is conceivable that many, if not all, of the pending applications would, under the law as amended, require a larger fee than was tendered by the applicants at the time the required information was furnished, the question arises whether or not the amendment applies to all pending as well as future applications to have securities registered by qualification.

Our law is replete with the decisions on the proposition that courts will construe a statute as prospective *only*, in the absence of language indicating an intention that it shall be retrospective. *Galusha vs. Wendt*, 114 Iowa 597, 602, and cases cited therein.

One exception to this rule, equally well settled as the rule itself, is that remedial statutes will be construed retroactively as applicable to a pre-existing and continuing condition. It is clear this exception has no application in the instant case.

However, even conceding that the legislature has the power to enact retrospective laws, nevertheless, such effect will not be given unless it is distinctly expressed or clearly and necessarily implied that the statute is to operate in retrospect. *25 R. C. L. 787*. The amendment here under consideration is not retroactive in terms.

We look to the wording of the statute (before amendment) itself to decide the question. The fee was payable then, as now, *at the time* the information required under the law was filed. It is our opinion that the applicant's right, of whatever nature it might be, and which we find unnecessary to determine, was fixed as of that time, namely: a right to have this application investigated, and unless found wanting, or for some reason ineligible, approved and record of the registration made.

It is not unlike the situation that existed in the case of *Lamb & Sons vs. Dobson*, 117 Iowa 124, wherein a corporation, whose charter had expired, extended its duration by an amendment to its Articles of Incorporation, as the law then provided, whereupon it tendered the amended article, together with a recording fee of fifty cents to the defendant Secretary of State, who refused to record or file the amendment in his office unless a further fee was paid him. The fee that he required was the original incorporation fee. At the time the only provision with respect to renewal fees was the one imposing a recording charge of fifty cents.

The 28th General Assembly enacted an amendment to the corporation law of the state to take effect March 16, 1900, and provided that "the fees herein provided shall be due from all corporations applying for a renewal since the first day of January, 1898." By its terms, it was retroactive and applied to the plaintiff corporation, whose action to renew its corporate existence had been undertaken in February, 1898. The court, at page 129, et seq., of 117 Iowa, said:

"It was under this act that defendant insisted upon the payment of a fee of $715 when demand was made upon him the second time to record the amended article. We have now to consider the effect of this act on plaintiff's rights. In express terms, it is retroactive. Is that feature of the act valid? If the secretary of state had recorded this article when first presented, and issued a certificate to defendant, still this fee could be recovered under the provisions of that act as construed by appellee. From February 21, 1898, to March 16, 1900, it would have been doing business lawfully under the statute existing at that time. On what principle can this arbitrary exaction, then, be supported? Counsel for defendant say that plaintiff's charter had not been renewed when this act went into effect, and for that reason the law is valid and applicable. But it was only because an officer of the state refused to perform his duty that it was not in fact renewed, or, rather, recognized by him as renewed; for we believe the charter was extended when the corporation did all that was required of it under the law to effect that end.

"As the defendant does not discuss the constitutional phase of the question, we shall not enlarge upon it. If plaintiff had a right to a renewal certificate on February 21, 1898,—and we have found it had,—its situation is not different now from what it would be if such certificate had been issued at that time. Having thus a fixed legal status, so far as its own acts were concerned, and a status that no officer had power to interfere with or to destroy by his refusal to act, it is apparent that the exaction of the amount fixed in the act was not a fee; for the renewal had, in legal effect, been accomplished before the imposition was made. As to this plaintiff it is a penalty, and, being such, it could not lawfully be imposed retrospectively. *Galusha vs. Wendt*, 114 Iowa 597."

There the court recognized the corporation's status as one legally fixed when it had done everything within its power that the law required. The distinction between that case and the instant one is this. In *Lamb & Sons vs. Dobson*, the renewal had been effected; here, the person is still an applicant. He cannot pursue the business of selling securities until his application is approved and registration made by the secretary of state. There the corporation was a legal entity authorized to do business without regard to affirmative action on the part of the secretary of state. Here the applicant is not so authorized. There is absolutely required an affirmative act on the part of the secretary of state. But on principle the cases are identical. The corporation had a fixed legal status so far as its own acts were concerned. Here the applicant has a fixed status by virtue of his having complied with the law as it existed at the time

he furnished the required information. He had gone as far as he could insofar as his own acts were concerned.

There is a dearth of authority on the particular question although it is stated in *37 C. J. 190* that:

"The amount of the license fee may be increased pending an application for a license and the applicant compelled to pay the increased fee."

The digest editor cites but two cases, i. e. *Commonwealth ex rel. Johnson vs. Wagner*, et al., 9 Pa. Co. 625, in support of the proposition, and *The State ex rel. vs. Baker*, 32 Mo. App. 98, to the contrary. Both involved the issuance of a license, the former to operate omnibuses, the latter to open and operate a tram shop. The Pennsylvania court assumed the applicant had to pay the increased fee (increased by ordinance subsequent to the making of application) without discussing the proposition. The Missouri court held, on the other hand, the rule in that state to be that a license is a privilege purchased from the state, and confers a right which does not exist without it, that this "right" when once vested, cannot be affected by subsequent acts. A subsequent annotation reveals a comparatively recent Circuit Court of Appeals case in *Alaska Consolidated Canneries vs. Territory of Alaska* (1926) 16 Fed. (2nd) 256, wherein the court alluded to the Corpus Juris citation set out above, quoting it verbatim. In that case, however, the fee under both the original statute and the amendment was in some instances a fixed sum, but generally depended upon the amount of the business transacted during the year and was not ascertainable until the end of the year. The amending statute provided that if the tax for the license applied for was a fixed sum, the amount should accompany the application when filed, but if not a fixed sum the applicant in his application agreed to pay the license tax on or before the next ensuing January 15th. The Canneries were operating under provisional licenses, and had agreed to pay the license tax on the basis of the amount of business transacted when the amendment became effective as an emergency act, which materially increased the fee. In holding the amendment constitutional despite its retroactive effect, (it was not expressly retroactive in terms) the court went on the theory that *where the amount of the tax was not ascertainable at the time the provisional license was applied for and granted*, the question of whether the new schedule of fees should be made applicable to licenses for the present year was one of legislative discretion and expediency, over which the courts have no control, that it was doubtful whether any tax could be collected in the absence of a savings clause under the law before amendment for the reason that the old schedule of fees was superseded and repealed, and that the legislature intended that taxes for 1923 should be calculated or computed on the basis of the schedule adopted for that year, *where the taxes were not a fixed sum*, and that as thus construed, the act was free from constitutional objection.

We feel that this case strengthens our final conclusion in that inferentially the court seemed to be of the opinion that were the tax a fixed and ascertainable sum to accompany the application when filed the holding would have been otherwise.

For the reason that House File 193 (Chapter 209) contained no expression that it should operate retroactively, that the statute expressly established the time of payment of the fee, i. e. at the time of filing the information, and on analogy to *Lamb & Sons vs. Dobson*, supra, we hold that the applications pending

prior to the effective date of the amendment must be considered, and, if approved, registration be granted upon the fee as provided in the statute prior to amendment.

COUNTY OFFICERS: CORONERS: Where the coroner's duty begins and ends is largely a matter within the sound discretion of the coroner.

May 8, 1937. *Mr. Maurice E. Rawlings, County Attorney, Sioux City, Iowa:* Your letter of recent date to this department makes inquiry as to the class of cases wherein a coroner is required to act.

Sections 5200 and 5201, Code 1935, clearly define the situation wherein the coroner is required to hold an inquest. Section 5237 of the Code 1935 prescribes:

"5237. *Coroner—fees.* The coroner is entitled to charge and receive as his compensation the following fees, which shall be paid out of the county treasury, and the county shall be permitted to file and collect a claim against the estate of said decedent for said fees.

"1. For examining each dead body upon which no inquest is held, where there is no medical attendant at death and where such examination is necessary to comply with Chapter 110, the sum of five dollars.

"2. For examining each dead body upon which an inquest is held *or where the death occurred under such suspicious circumstances* as to make the preservation of weapons and finger prints, including investigating, preserving weapons, finger prints and evidence of crime and tragic death and making a permanent memoranda of any important identification marks, evidence, conditions, suspicious circumstances and other significant facts observed by the coroner in viewing the dead body and the location where found, the sum of ten dollars.

"3. For issuing each subpoena, warrant, or order for a jury, twenty-five cents."

It is to be necessarily implied that the situations contemplated by Section 5237, subsection 1, and the italicized quoted portion of Section 5237, subsection 2, are ones requiring an investigation. Beyond this we refrain from venturing, it being our opinion that where the coroner's duty begins and ends is largely a matter within the sound discretion of the coroner. This exercise of discretion obtains even in the case of holding an inquest, for as our Supreme Court said in *Finarty vs. Marion County*, 127 Iowa 543, 544:

"From the simple reading thereof (Sections 5200-5218) it seems clear enough that the supposition upon which jurisdiction to act is made to rest must be one which arises—and for that matter exclusively so—in the mind of the coroner. He certainly could not justify himself for acting in any given case if the facts presented to him were such as that his own mind rejected the supposition that death had been caused by unlawful means."

In a related opinion, dated April 30, 1937, we had occasion to state:

"Many cases may come before the coroner in which it would not be suspected that death was by unlawful means or that the person had met death while connected with the working of, or in, any mine. In such cases the duty is imposed upon the coroner to make an investigation; that is, he is called upon to view the body and the circumstances, so far as may be learned, causing the death and to make a report thereof to the clerk of the district court and to the state bureau of investigation. In such instances, the work and duties of the coroner are in the nature of an inquisition; * * *"

See also 1932 Report of Attorney General, 263, et seq.

SOLDIERS' RELIEF COMMISSION: A member of Soldiers' Relief Commission is not eligible to participate personally in relief. Other members of Commission are not liable for extending said member relief.

May 11, 1937. *Mr. Raphael R. R. Dvorak, County Attorney, Tama, Iowa:* We are in receipt of your request for an opinion on two questions—

1. Can a member of the Soldiers' Relief Commission legally provide relief and receive payment from the relief fund?
2. If such practice has been customary, are the other members of the Relief Commission personally liable and if so to what extent?

Chapter 273 of the Code 1935 is the chapter providing for the Soldiers' Relief Commission and prescribing its duties. There is nothing in the Code that expressly prohibits a member of the Commission from receiving relief personally. On the other hand, the opinion of the Relief Commission as to who is entitled to relief is final and pursuant to their decision the tax is levied and collected.

As a matter of sound public policy, it is our opinion that a member of the Relief Commission may not receive relief himself. Such a situation puts the commissioner in a position where he is not entirely representing the public in dispensing relief but is also representing his own personal interest in the matter. A situation might arise where a commissioner's vote would be the controlling one in determining whether or not he was to receive relief personally, where the other two commissioners were divided on the proposition. Certainly to allow a commissioner to be in such a position is against public policy.

It is therefore our opinion that a member of the Soldiers' Relief Commission is not eligible to participate personally in the relief.

In answer to your second question, it is our opinion that if the commissioner acted in good faith in the matter, that there is no personal liability on the part of the other members of the Relief Commission who allowed one of their members to be the recipient of relief while serving on the Commission.

OLD AGE ASSISTANCE: PER CAPITA TAX: REFUND: Funds, made up of old age assistance per capita tax, in treasurer's office received prior to April 9, 1937, should be turned over to the comptroller who should remit same to county treasurers in respective counties for remittance to the taxpayers.

May 12, 1937. *Mr. Byron G. Allen, Superintendent, Old Age Assistance Commission:* This department is in receipt of your communication of April 30th in which you request an opinion on the following set of facts:

Section 5296-f34 of the 1935 Code was amended by the acts of the 47th General Assembly (Chapter 139) to terminate the collection of the annual two dollar per capita levy for the old age pension fund, the new act going into effect as of April 9, 1937, and repealing the per capita levy as of December 31, 1936.

Between January 1, 1937, and April 9, 1937, considerable money was paid directly to the state treasurer by employers who collected the 1937 levy from their employees under the provisions of the old act. Under the usual procedure followed during the past, the treasurer received this money and the individual receipts to the employees were written in the office of the old age assistance commission for the state treasurer. The remittances were handled in the usual manner of all state funds and turned over by the treasurer to the state comptroller. The state comptroller desires now to return to each employer the money in the hands of the treasurer which has been received from employers for the 1937 tax and has refused to accept the checks now in the hands of the treasurer.

You contend that the comptroller should clear these checks and return the funds to the county treasurers for refund to the employees who paid them.

In answer to your question it must be assumed that all of the funds in controversy were received prior to the repeal of this act on April 9, 1937. Therefore, we feel that the provisions of the old act should apply.

The act provided, in Section 5296-f34, that the employer should deduct the per capita tax from the earnings of the employee and deliver to the employees a receipt for the same and remit the money to the treasurer of state, together with a report showing the amount and name of the person from whom collected; that the treasurer of state should credit said tax and report to the county treasurer of the county from which the remittance was received, the name of the employees paying and the amount of the tax collected and when the report was received by the county treasurer, he was required to credit the employee on his books with said payment.

It would seem, therefore, that up until the date of April 9, 1937, the provisions of this old statute should be followed, and the treasurer and comptroller have no right to refuse to accept the tax nor to do anything different than was provided for in the old statute. It is our opinion, therefore, that all moneys received prior to April 9, 1937, and all checks representing said money should be deposited in the usual way and the report made to the county treasurer of the county, showing the payment of the tax and that the money should be returned to the county treasurer by the state comptroller, in accordance with said statute.

After the money has been received by the county treasurer, he will be required to proceed to make the refund of the 1937 tax in accordance with the new law when he is requested to do so by any taxpayer who paid the 1937 tax, unless the individual is delinquent in the payment of the previous year's taxes, in which event the treasurer has the right to credit the refund upon any such delinquencies. The new law required that the state comptroller return to the county treasurers any of the 1937 tax which has been delivered to the comptroller.

Therefore, up until April 9, 1937, we believe that there was an absolute requirement that the provisions of statute be followed and consequently the funds now on hand in the treasurer's office which were received prior to April 9, 1937, should be turned over to the state comptroller and he, in turn, should remit the same to the county treasurers in their respective counties for remittance to the taxpayers in accordance with the provisions of the new act. We feel that any different procedure would be a violation of the old statute and that as a result, the state might lose a considerable amount of money in the collection of delinquent taxes which they would be unable to collect if the funds now on hand were remitted back to the employer. We also suggest that such a procedure might present some other difficulties in view of the fact that the money of the employee is now in the hands of the state, and if his employer failed to refund it to him, he might well have a claim against the state, and it might involve conflicts and litigation which can be avoided by following the regular statutory procedure.

BARBERS: APPRENTICE EXAMINATION: $10.00 FEE: The practice and policy of the board of barbering examiners of charging a $10.00 fee for the apprentice examination is within the meaning of the law.

May 12, 1937. *Mr. W. B. Wilson, Director, Barber Division, Department of Health:* This department acknowledges the receipt of your letter of April 23rd in which you request the opinion of this department as to the legality of your policy of charging a $10.00 fee for the apprentice examination for barbers, provided for in Section 2585-b14 of the 1935 Code of Iowa. This section pro-

vides that an applicant for the right to practice barbering as an apprentice must take an examination to be given by the board of examiners of the division of barbering. The statute further provides that at the end of the period of eighteen months, he shall be permitted to take the regular examination providing he has met the provisions of the statutes.

The section relating to the fee to be charged for an examination is Section 2516 of the 1935 Code, which provides that a fee of $10.00 shall be collected by the state department of health for a license to practice barbering issued upon the basis of an examination given by an examining board. No reference is made in this section to any fee for giving the examination to an applicant seeking to register as a barber's apprentice under Section 2585-b14. Therefore, the statutes are not entirely clear on this particular question, but we feel, in view of the fact that a license fee may be charged for the examination for a regular license, that it probably was the intention of the legislature to permit a charge for the examination of the apprentice and, therefore, it is the opinion of this department that your practice and policy of charging a $10.00 fee for the apprentice examination is within the meaning of the two sections above referred to.

TAXATION: HOMESTEAD TAX EXEMPTION: In allowing the homestead tax exemption credit to one entitled to the exemptions enumerated in Section 6946 of the statute, the value taken should be that arrived at after deducting specific exemption to which taxpayer is entitled.

May 13, 1937. *Mr. Howard M. Hall, Assistant County Attorney, Des Moines, Iowa:* This department is in receipt of your letter asking an opinion upon the following question:

Should the board of supervisors of Polk County in allowing the homestead tax exemption credit on a home owned by a soldier, or one entitled to a similar exemption, take as the assessed valuation the value as fixed by the assessors, or such value less the soldier's exemption?

Under Section 6946 of the 1935 Code the veterans of our various wars have been granted exemptions in certain amounts to be applied upon the property of such veteran when returned for taxation, the pertinent part of the section being as follows:

"*Military service—exemptions.* The following exemptions from taxation shall be allowed:

The property not to exceed .... dollars in actual value. * * *"

Under the foregoing section of the statute, one qualified by military service to be entitled to the exemption is permitted to deduct from the value of his property certain amounts, depending upon which war he participated in, returning only the overplus above such exemption for taxation purposes.

Section 6947 of the 1935 Code provides:

"*Reduction—limitation.* All persons named in Section 6946 shall receive a reduction equal to their exemption, to be made from the homestead, if any; * * *"

Therefore, the property returned for taxation by a veteran has a taxable value only to the extent to which the value exceeds the exemption. That is, only the overplus above the exemption is subject to taxation. Sub-section 1 of Section 4 of the recently enacted Homestead Tax Exemption Act is as follows:

"The Homestead Credit Fund shall be apportioned each year as hereinafter provided so as to give a credit against the tax on each eligible homestead in the State, as defined herein; the amount of such credit to be in the same pro-

portion that the assessed valuation of each eligible homestead in the State in an amount not to exceed $2,500.00 bears to the total assessed valuation of all eligible homesteads in the State in an amount not to exceed $2,500.00 for each homestead."

Under the foregoing section of the homestead tax exemption act the credit allowed against the tax on eligible homesteads is in the same proportion that the assessed valuation of each eligible homestead in the State and not to exceed $2,500.00 bears to the total assessed valuation of all homesteads in the State. The homestead credit being given against the tax and in the proportion that the assessed value of the homestead bears to the total assessed valuations of all the eligible homesteads in the State is arrived at by taking into consideration the valuation upon which the veteran pays taxes. The valuation upon which the veteran pays tax can only be determined by first deducting from the assessed valuation of his homestead the specific exemption to which he is entitled under Section 6946 of the statute. If the specific exemption to which the veteran is entitled is not deducted, then the homestead credit is not given against the assessed value of the veteran's property, but is given against the value in excess thereof equal to his specific tax. The assessed valuation is determined in the case of a veteran only after the specific exemption to which he is entitled has been deducted.

It is therefore the opinion of this department that in allowing the homestead tax exemption credit to one entitled to the exemptions enumerated in Section 6946 of the statute that the value to be taken is that arrived at after deducting the specific exemption to which the taxpayer is entitled.

UNEMPLOYMENT COMPENSATION COMMISSION: MEMBER: APPOINTMENT TO FILL VACANCY: GOVERNOR: Governor had right to appoint Mr. Walter Scholes to the unemployment compensation commission and because of that appointment, he is a legally appointed member of the commission.

May 14, 1937. *Honorable Leo J. Wegman, Treasurer of State:* This department is in receipt of your communication of May 11, 1937, requesting an opinion upon the following set of facts:

Mr. Walter F. Scholes was appointed a member of the unemployment compensation commission by Governor Kraschel during the time that the Forty-seventh General Assembly was in session and after the passage and approval of Senate File No. 447 (Chapter 102) on April 13, 1937, but his appointment was not approved by two-thirds vote of the members of the senate. Following the adjournment of the members of the senate, Governor Kraschel again appointed said Walter F. Scholes as a member of the commission.

Your question is whether or not his appointment is legal.

Section 10 (a) of Senate File 447 provides as follows:

"The commission shall consist of three (3) members, etc. Each of the three (3) members of the commission shall be appointed by the Governor immediately after the effective date of this act, subject to approval by a two-thirds vote of the members of the Senate in executive session, * * *."

Subsection (1) of Section 10 provides:

"Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term."

Subsection (2) of Section 10 of the act provides:

"* * * Any vacancy occurring for any cause in the membership of this commission shall be filled for the unexpired term by appointment by the Governor subject to approval by a two-thirds vote of the members of the Senate in executive session at the next regular session of the Legislature."

The evident intent of the legislature was that the act referred to should become effective immediately upon its passage and after its publication, as provided for in Section 26, and the publication has been had. It is further very evident that the intention of the legislature was that the board, provided for in the act, should function at once, and should continue to function at all times. Therefore, there was written into the act the provisions above referred to for the filling of any vacancy that might occur on the board. It is provided that these vacancies should be filled by the governor, subject to the approval of the senate at its next regular session, and if the functioning of this board were to be defeated by the inability of the governor to appoint the third member, then the functioning of the whole act would be crippled and the rights of thousands of people in the state of Iowa to participate in its benefits might be withheld. Certainly this was not the intention of the legislature. This is the evident intention of our law generally, because we find that Chapter 59 of the 1935 Code of Iowa, which has been in our statutes ever since Iowa became a state, provides for the filling of a vacancy which may occur in any office, either elective or appointive, either by the holding over of the incumbent or by appointment by the governor to fill the vacancy. All of the authorities we have examined hold that every presumption will be indulged to eliminate a vacancy and permit a board to function, and as said in *46 Corpus Juris*, Section 117, at page 971:

"THE LAW ABHORS VACANCIES IN PUBLIC OFFICES."

The framers of our constitution had this in mind when they wrote Section 10 of Article IV, which provides:

"*Vacancies*. Section 10. When any office shall, for any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy, 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."

All of the authorities are agreed that no vacancy should stop the operation of any department of government, and, consequently, the provision for filling vacancies has been written into the statutes and the constitution of this state and the other states.

As far as the board, provided for in Senate File No. 447, is concerned, if the governor may not appoint someone to fill a vacancy on the board, then the board may not function fully because in the section heretofore quoted, the provision is mandatory and definite that *the commission shall consist of three members*. To quote from the case of *State vs. Kuhl*, 17 Atlantic 102 (a New Jersey case, and one of the leading authorities on this question):

"A system which provided no remedy for such an emergency would be conspicuously defective and could not receive the approbation of the experienced men who framed the legislation. We must consequently look therefore for some provision to meet an emergency which, I have shown, must have been anticipated and foreseen."

This circumstance was anticipated by the members of the Forty-seventh General Assembly when they provided that in the case of a vacancy, the governor should have the right to fill it.

Therefore, on the broad grounds of public policy, it is our opinion that the governor had the right to fill the vacancy which existed on this board after the legislature had adjourned. Consequently the question, in our opinion, narrows itself to this:

Whether or not, in view of the fact that the appointment of Walter F. Scholes did not receive the approval of the senate, it makes him ineligible for appointment to fill the vacancy.

To state the question another way, it is:

Whether or not the governor had the power to appoint Walter F. Scholes to fill the vacancy which existed after the senate had failed to approve his appointment for the regular term.

We have examined a number of authorities on this particular question but do not find that our Iowa courts have had this particular question before them. We do find the case of *Commonwealth ex rel. Lafean, Commissioner of Banking, vs. Snyder*, 104 Atlantic 494 (a case decided by the supreme court of Pennsylvania in April of 1918). Lefean was appointed commissioner of banking during a session of the state senate and the senate rejected the nomination and shortly after its adjournment the governor reappointed him to fill the vacancy and to serve until the end of the next session of the senate. The appointee entered upon the duties of his office and his requisition for salary was challenged on the ground that he did not legally hold the office. The question that came before the supreme court of Pennsylvania, as stated by the supreme court, was:

"The right of the Governor to appoint to fill a vacancy one whom the Senate has rejected for appointment for the regular term."

Article IV, Section 8, of the Constitution of Pennsylvania provided that the governor:

"shall nominate, and, by and with the advice and consent of two-thirds of all the members of the Senate, appoint * * * such * * * officers of the commonwealth as he is or may be authorized by the Constitution or law, to appoint; he shall have power to fill all vacancies that may happen, in offices to which he may appoint, during the recess of the Senate, by granting commissions which shall expire at the end of their next session; * * * if the vacancy shall happen during the session of the Senate, the Governor shall nominate to the Senate, before their final adjournment, a proper person to fill said vacancy."

The provision in the Constitution of the state of Pennsylvania is almost the same provision heretofore quoted, which appears in Section 10 (a) of the act under consideration. We quote from the Pennsylvania case:

"The constitutional provision places no express limitation upon the choice of the Governor in appointing to fill vacancies. He is accordingly the sole judge of the qualifications of the appointee, unless an implied restriction is placed upon this power by reason of the grant of power to the Senate to reject an appointee to fill a regular or unexpired term. Did the people, in adopting the constitutional provision in question, place an implied limitation upon the power of the Governor to fill vacancies by reason of also having provided that appointments for regular terms of service, or for unexpired terms, should require the approval of the Senate? Or, to state the question in different form, does it follow that the people, in requiring the consent of the Senate to appointments for regular or unexpired terms of service, intended that a rejection by the Senate of an appointee necessarily eliminated him from the list of possible appointments for filling the temporary vacancy created by such rejection without express words to that effect? If this question be answered in the affirmative it is pertinent to inquire, How long must the disqualification of the rejected person continue? Is it for the succeeding vacancy only, or does it disqualify him and consequently limit the power of the Governor for all time? The existence of these further questions which would follow a construction in favor of appellants' contention, and the failure of the Constitution to provide an answer to them, must necessarily have a bearing on the interpretation of the intent of the people as indicated in the language of the provision in question.

"A constitution is to be construed in the popular and ordinary sense of the language used, and in the light of the circumstances attending its formation, so as to give effect to the intent of the framers and of the people in adopting it, and also with a view to carry out the general principles of government. *Commonwealth vs. Clark*, 7 Watts & S. 127; *Cronise vs. Cronise*, 54 Pa. 260; *Commonwealth vs. Bell*, 145 Pa. 374, 22 Atl. 641, 644.

"In construing particular clauses of the Constitution it is but reasonable to assume that in inserting such provisions the convention representing the people had before it similar provisions in earlier Constitutions, not only in our own state, but in other states which it used as a guide, and, in adding to, or subtracting from, the language of such other Constitutions the change was made deliberately, and was not merely accidental. A consideration of the earlier Constitutions of this state throws no light on the subject. The Constitution of 1790 gave the governor no power to fill vacancies, while the Constitution of 1838 contained a provision quite similar to that inserted in the present organic law. Turning to the Constitutions of other states for assistance, we find a majority of them, like our own, do not contain restrictions on the power to fill vacancies. On the other hand, the Constitutions of seven states, namely, Illinois, Georgia, Louisiana, Maryland, West Virginia, Nebraska and Texas have expressed provisions to the effect that the Governor shall not, during the same session of the Senate, appoint to fill a vacancy a person who has been rejected by the Senate, thus impliedly recognizing the necessity of such provision if power to make such appointment is to be withheld. No case has been cited which holds authoritatively that, in absence of such express restriction on the power of the Governor, he cannot appoint to fill a vacancy a person who has been rejected by the Senate, by granting commissions which shall expire at the end of their next session,' Congress recognized the power of the President to reappoint to fill a vacancy, after rejection of the appointee by the Senate, for a full term by adding to the army appropriation bill of February 9, 1863 (4 U. S. Comp. St. 1916, Sec. 3228) a clause that:

"'No money shall be paid from the treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate'

—"the reason for this being, no doubt, as stated in the debate in the Senate, that while it may not be within the power of the Senate to prevent such appointment, it had the power to prevent payment of the salary incident to the office, which would probably put an end to the habit of making such appointments. In 1886 President Cleveland nominated a person for office in the District of Columbia, and, after his rejection by the Senate, appointed the same person to fill the vacancy, and in our own state Governor Pattison in 1891 reappointed two persons following their rejection by the Senate, which action was upheld by the then Attorney General of the commonwealth, Hon. William U. Hensel, as indicated in an opinion to Hon. Henry K. Boyer, state treasurer, as follows:

"'I am in receipt of your favor of July 29th, inquiring whether you are authorized and justified in paying the salaries and expenses of the factory inspector and his appointees, and suggesting that the validity of such payments might be questioned because, you say, Robert Watchorn, the present factory inspector, was appointed by the Governor during the session of the Senate and rejected by that body and again appointed after its adjournment.' In reply I beg leave to say that, in my opinion, the appointment of Robert Watchorn as factory inspector by Gov. Pattison, was a valid appointment; that he holds and exercises said office rightfully; that his official acts are valid and binding, and certainly that the validity of his appointment cannot be questioned collaterally by you; and that you are justified and authorized in recognizing him and his warrants as those of a de facto and de jure officer.'

"That case is identical in all respects with the one now before us, and, while the opinion of the Attorney General is not binding upon this court, his interpretation of the question is strongly persuasive.

"There are no Pennsylvania decisions which give material assistance with respect to the question before us. *Lane vs. Commonwealth*, 103 Pa. 481, is

cited by appellants. The question in that case was as to the power of the Governor to name an officer. No question of appointment was before the court, much less a question of appointment of a person who had been rejected by the Senate for a full term. In the course of the opinion of the court it is said, in discussing the respective powers and duties of the Governor and the Senate (103 Pa. page 485):

" 'As already shown, the Constitution declares in Section 8 cited, the Governor shall nominate and he shall appoint. Before he completes the appointment the Senate shall consent to his appointing the person whom he has named. It may prevent an appointment by the Governor, but it cannot appoint. It may either consent or dissent. That is the extent of its power. There its action ends. It cannot suggest the name of another. If it dissent the Governor cannot appoint the person named. If it consent he may or may not, at his option, make the appointment. If for any reason his views as to the propriety of the proposed appointment change, he may decline to make it. That option is not subject to the will of the Senate. Until the Governor executes the commission, the appointment is not made. Prior to that time, at his mere will, he may supersede all action had in the case. *Marbury vs. Madison*, 1 Cranch, 137 (2 L. Ed. 60); Story's Con., Sec. 1540.'

"The above statement that, 'If it (the Senate) dissent the Governor cannot appoint the person named,' viewed in the light of the question under discussion, undoubtedly referred to the regular or unexpired term for which the appointment was made. The question of the subsequent appointment of the rejected person was not before the court.

"In *Commonwealth vs. Waller*, 145 Pa. 235, 23 Atl. 382, also relied upon by appellants, the question was whether one whose appointment had been confirmed by the Senate had a right to hold office, though not commissioned previous to the expiration of the term of office of the Governor who appointed him. While it appeared the succeeding Governor appointed another person for the same office, and, upon his rejection by the Senate, reappointed him for the full term, the court said (145 Pa. 256, 23 Atl. 382):

" 'With the validity of the latter appointment we have nothing to do. Our inquiry is merely as to the right of the respondent to hold the office.'

"The lower court, in discussing the right of the subsequent appointee, said (145 Pa. 246, 23 Atl. 382):

" 'We have not been referred to any case which decides that the Governor has power to appoint one who has been rejected by the Senate, to the same office and for the same period for which he was nominated and rejected, or any part of such period; and, in the absence of authority we think the spirit and intent of the constitution forbids this to be done.'

"The question was not discussed by the appellate court, and, furthermore, as the reappointment was for the full term, even the language of the lower court was in part dictum.

"*Fritts vs. Kuhl*, 51 N. J. Law, 191, 17 Atl. 102, appears to be the only decision directly in point, although in that case the discussion in the opinion is based mainly on the meaning of the phrase, 'vacancy happening during the recess of the Legislature.' The Governor nominated a judge to fill a vacancy occurring while the Senate was in session. That body refused to confirm the nomination, and, subsequently, during the recess of the Legislature, the rejected person was appointed to fill the vacancy. In holding this appointment valid it was said (51 N. J. Law, 208, 17 Atl. 108):

" 'The propriety of the appointment of Mr. Kuhl, after his rejection by the Senate, was a question for the Governor alone. This court has no right to instruct the Governor as to matters which involve his duty only and not his power. We cannot know the circumstances which influenced his action, and must presume that he acted rightly.'

"A careful consideration of the argument and authorities cited by counsel for appellants fails to convince us that in framing the Constitution it was intended to limit by implication the choice of the Governor in filling vacancies. It is of no avail to say that to permit the appointment of one who has been rejected for a full term would in effect enable the Governor to evade the constitutional requirements. *We cannot assume a public official will abuse his*

trust (*Lane vs. Commonwealth*, supra, *or act with a view to evade the duties of his office. The presumption is to the contrary. Mansel vs. Nicely,* 175 Pa. 375, 34 Atl. 793. In *Fritts vs. Kuhl,* supra, it is said (51 N. J. Law, 205, 17 Atl. 107):

"'The argument of those who deny the power, that it will tend to deprive the Senate of their just participation in appointments to office, is not of controlling force. It is not logical to argue from an abuse of power to a negation of it. Every authority, however indispensable, may be the subject of abuse. Undoubtedly the Governor may abuse this, as he may any other power intrusted to him, but the argument is equally cogent that the Senate may arbitrarily refuse to consent to every nomination made by the Governor, and leave him powerless to execute the laws, unless he will accede to its demands. The consequences likely to flow from a denial of the Governor's power are much more to be deprecated than those that can result from conceding it.'

"On page 206 of 51 N. J. Law (17 Atl. 107), in the same opinion, the court further says:

"'The possibility of abuse loses its significance the moment we distinguish between power and duty. The question of power alone can be considered by this court. For willful breach of official duty, or abuse of the power committed to him, the Governor is, like other civil officers, liable to impeachment, and must answer to the tribunal erected under the Constitution for the trial of such cases. Even though the Governor should be guilty of a breach of duty in refusing to send any nomination at all to the Senate, during its session, it would be none the less within his power and his duty after the adjournment, to fill the vacancy. In that case, the impeachable conduct would be his willful refusal to advise with the Senate, and not his act in filling the vacancy in the after recess.'"

Upon the broad grounds of public policy and the statutes of the state of Iowa, the particular statute in the act under consideration and the well-considered opinion of the supreme court of Pennsylvania in the case cited, we are of the opinion that the governor of this state had the right to appoint Mr. Walter Scholes to the unemployment compensation commission, and because of that appointment, he is legally appointed a member of the commission.

TAXATION: TAX SALES: SUSPENDED TAXES: The purpose in suspending taxes is to aid those persons who are unable to contribute to the public revenue and if such person has been unable to contribute to the public revenue and has secured a suspension of taxes, it would be unequitable and unjust to carry such suspended taxes against the property at an annual tax sale and force such person to pay, not only the current taxes, but such suspended taxes, or permit the property to be sold.

May 14, 1937. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa:* This department is in receipt of your letter requesting an opinion upon the following:

In preparing the list of properties, against which there are delinquent taxes, for sale at the annual tax sale should the property be offered for sale for the total amount of both the suspended and unsuspended tax against the same?

Section 7244 of the statute provides:

"*Annual tax sale.* Annually, on the first Monday in December, the treasurer shall offer at his office at public sale all lands, town lots, or other real property on which taxes of any description for the preceding year or years are delinquent, which sale shall be made for the total amount of taxes, interest, and costs due and unpaid thereon, * * *"

The above quoted section of the statute describes and enumerates the lands which are to be sold by the county treasurer at the annual tax sale. Such properties as are enumerated in the above section to be included in the annual

tax list are: All lands, town lots, or other real estate on which taxes of any description for the preceding year or years are delinquent.

Section 6950 of the statute provides for the suspension of the collection of taxes and upon the filing of a petition with the board of supervisors the statute provides:

"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."

The suspension provided for in Section 6950-g1 of the statute applies to the recipient of old age assistance, and under the provisions of 6950-g1 it is the duty of the Old Age Assistance Commission, upon the issuance of a certificate of old age assistance, to notify the board of supervisors, of the county in which the assisted person owns property, of the fact of such assistance. It shall then be the duty of the board of supervisors so notified to order the county treasurer to suspend the collection of the taxes assessed against the property for that time as such person shall remain the owner of the property and during the time such person receives old age assistance. Therefore we may eliminate from the question any suspended taxes as have been granted to recipients of the old age assistance.

Section 6950 provides for the suspension of the collection of taxes for the current year. The word "suspend" means to cease temporarily from operation, to cause to cease for a time, to delay. Suspend is not synonymous with vacate or cancel. The tax, therefore, which has been suspended under Section 6950 does not cease to exist but is held in abeyance until some future time. The statute makes no provision for reinstating, relevying or carrying forward a suspended tax. The only provision of the statute with reference to the collection of a suspended tax is found in Section 6952 of the statute which is as follows:

"*Grantee or devisee to pay tax.* In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance to any person other than the surviving spouse or minor child of such infirm person, the taxes, without any accrued penalty, that have been thus suspended shall all become due and payable, with six per cent interest per annum from the date of such suspension, except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old age assistance, and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child."

The properties which the county treasurer is authorized to sell at the annual tax sale are those upon which the taxes are delinquent. Delinquent taxes are those which are past due and unpaid.

Inasmuch as the Legislature has provided for the terminating or ending of suspension only upon the happening of those things enumerated in Section 6952 of the statute, it cannot be said that taxes carried in suspension are delinquent until the happening of the events enumerated in Section 6952.

Therefore, if at the time the tax list is prepared by the county treasurer for the annual tax sale, the matters and things enumerated and specified in Section 6952 have not happened, it cannot be then said that suspended taxes are delinquent, and they should not be included in the amounts for which the properties are being offered for sale at the annual tax sale.

TAXATION: COUNTY WARRANTS: HOMESTEAD TAX EXEMPTION: County warrants are not negotiable instruments and one purchasing a county

warrant, even though for value, does not acquire such title thereto as he would if the same were a negotiable instrument. Adjoining or contiguous properties within a city or town can be contained in the homestead exemption to the extent of $2,500 regardless of the land area contained therein.

May 15, 1937. *Mr. Joseph W. Newbold, County Attorney, Keosauqua, Iowa:* This department is in receipt of your letter requesting an opinion upon the following question:

The county auditor issued a warrant in the sum of $50.00 to 'A.' The warrant contained the usual provision written on its face that it was to be paid only to the extent that the payee did not owe taxes to Van Buren County. 'A' transferred the warrant to 'B' who paid him the face amount. 'B' presented the warrant to the County Treasurer and the County Treasurer refused to pay it because 'A' owed delinquent taxes. Is the County Treasurer authorized to deduct such delinquent taxes owed by 'A' from the amount of such warrant?

County warrants are not negotiable instruments and one purchasing a county warrant, even though for value, does not acquire such title thereto as he would if the same were a negotiable instrument. Such warrants, however, are assignable. Section 1171-f4, of the statute, reads as follows:

"*Assignment of warrant.* When any warrant shall be assigned or transferred after being so indorsed, the assignee or transferee shall be under duty, for his own protection, to notify the treasurer in writing of such assignment or transfer and of his post-office address. Upon receiving such notification, the treasurer shall correct the aforesaid record accordingly."

An assignee acquires only such interest in the instrument as was held by his assignor. That is, by the transfer the transferee's interest or title cannot arise to any greater height than that of the transferor. The warrant in question contains a provision that it will be paid only to the extent that the payee did not owe taxes. The assignee of such warrant took the same with the knowledge that the county treasurer would claim the right to offset delinquent taxes against such warrant. However, the provisions contained in the warrant that the county treasurer would claim the right to offset any delinquent taxes against the payee of such warrant is not, in our opinion, controlling. Delinquent personal taxes are by statute made a lien against the real estate of the taxpayer, but not against his personal property. Our Supreme Court in the case of *Jaffray vs. Anderson*, 24 N. W. 527, said:

"It is a general principle appertaining to the law of taxation that taxes are not a lien upon the property of the taxpayer unless a lien is expressly created or provided for by statute."

In the later case of *Andrew vs. Munn*, 205 Iowa 723, it is said:

"That a legislative intent to this effect (to create a tax lien) must be clearly manifest in the statute, because a lien will neither be created by implication nor enlarged by construction, is another rule well settled."

However, the warrant in question contains the provision that "it was to be paid only to the extent that the payee did not owe taxes to Van Buren County." "B" in the acceptance of said warrant by assignment from "A" impliedly consents to the provisions of the warrant and particularly to that part herein quoted.

The answer to your question then, in the opinion of this department, is in the affirmative.

'A' owns four lots within the platted portion of the town of Milton. He also owns forty acres of land adjoining the lots and within the corporate limits of Milton, but outside of the platted portion of the town. His house is on one of the lots. The house and lots within the platted portion have an assessed valuation of $750.00. The total assessed valuation of the house, lots, and other

land is less than $2,500.00. Is 'A' entitled to join the properties in asking for a homestead exemption upon the entire tract?

The Homestead Exemption Act defines a homestead for the purpose of the exemption, subdivision (b) of Section 19 being as follows:

"It may contain one or more contiguous lots or tracts of land with the buildings or other appurtenances thereon habitually, and in good faith, used as a part of the homestead."

Subdivision c:

"If within a city or town plat, it must not exceed one-half (½) acre in extent; if, however, its assessed valuation is less than twenty-five hundred dollars ($2,500.00), the land area may be enlarged until its assessed valuation reaches that amount."

In the foregoing question it is stated that "A" owns four lots within the platted portion of the town and also forty acres of land adjoining the lots and within the corporate limits of the town, but outside of the platted portion of the town. Subdivision (b) permits the inclusion of "one or more contiguous lots or tracts of land." The properties of "A" are contiguous. Under subdivision (c) the taxpayer, if the property is located within a city or town plat is limited in extent to one-half acre, but if the assessed value of the one-half acre is less than $2,500.00 is permitted to increase the land area until its assessed value reaches the amount of $2,500.00. Subdivision (c) does not in any way limit the area to be claimed for homestead purposes except by the assessed valuation.

It is therefore the opinion of this department that adjoining or contiguous properties within a city or town can be contained in the homestead exemption to the extent of an assessed valuation of $2,500.00 regardless of the land area contained therein.

Does "within a city or town plat" mean within the platted portion of the town?

It is our opinion that the quoted provision, namely "within a city or town plat" does not mean within the platted portion of the town. It is our opinion that the word "plat" in the first line of subdivision (c) in the act is surplusage and that it was the intention of the Legislature to grant the applicants an exemption on property within a city or town to the extent of $2,500.00 regardless of area so long as said properties were contiguous and contained but one dwelling house thereon.

SCHOOLS: RESIDENCE: BOARDS OF DIRECTORS: Rules of board of directors requiring year's residence work before graduation not enforceable against a bona fide resident student otherwise qualified for graduation.

May 17, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for an opinion of this department upon the following question:

"In a school district where thirty-two accepted credits are required to graduate from high school, can the board in such district legally enforce a rule requiring a year of residence before graduation, in a case where a bona fide resident pupil presents thirty-two accepted credits, twenty-eight of which were accepted from another approved high school, from which school student came, and four of which were earned in the high school in which he is now enrolled as a resident pupil and from which he wishes to graduate?"

The question submitted involves the rule-making power of the board of directors. Section 4224, 1935 Code, confers upon school boards of directors general powers to make rules for the administration of schools.

"4224. *General rules.* The board shall make rules for its own government

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

Under the statute, the power to prescribe courses of study is vested in the board, Section 4250, 1935 Code, providing as follows:

"4250. *Right to prescribe.* The board shall prescribe courses of study for the schools of the corporation."

The law provides (Section 4273, 1935 Code) that every school shall be free of tuition to all actual residents between the ages of five and twenty-one years.

Boards of directors of school corporations possess only those powers conferred by statute and such implied powers as are necessary to carry out the express powers granted. It must be determined in this inquiry whether the rule of the board requiring a year's residence before graduation of a bona fide resident pupil is a reasonable exercise of the rule-making power of the board. It must be kept in mind that in this instance we are dealing with the rights of a resident pupil. Under the provisions of Section 4268, boards have power to determine the conditions under which non-resident children may attend school within the district, the statute, in part, providing as follows:

"* * * Non resident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine."

Rules imposed by school boards must be reasonable in character. In the case of *Valentine vs. School District*, 187 Iowa, 555, a high school student had completed her full four year course and had passed all required examinations. A rule was invoked that required prospective graduates to wear caps and gowns at the graduation exercises. The plaintiff refused to do this and the board refused to issue a diploma. The court held that the completion of the prescribed work entitled plaintiff to her diploma, and that mandamus would lie to compel the board to deliver the same to plaintiff.

In the case of *State vs. Wilson*, (Mo.) 297 S. W., 419, the school board passed a rule requiring that a $20.00 tuition fee be charged high school students, and that from the proceeds of such fees certain extra expense, which had been entered into by the board, should be paid. The board refused to issue a diploma to a student who refused to pay the tuition fee aforesaid. The Missouri statute provided in substance that schools should be free of tuition to resident pupils of the district. In this case it was held that the requirement of the board was unreasonable, and that the pupil, having completed her work, was entitled to receive her diploma.

In this case, the board has accepted the credits of the student which were earned at another school. In so accepting the credits the board determined the status of this student so far as her school work was concerned. The student is a bona fide resident of the school district. Therefore, she is in the same position so far as earned school credits are concerned as any other resident pupil.

It is our opinion that public schools of a district should be available to resident students of such district, free of tuition and upon an equal basis to all such resident students. The rule adopted by the board as set out above operates as a discrimination against a resident student who has completed the required amount of school work for graduation. No specific authority is given by statute to a school board to adopt rules which set up residence requirements

of study as applied to actual residents within the districts. School boards by statute are given broad rule-making powers with respect to non-resident students who may attend the schools within the district, but this same power cannot be extended to actual bona fide residents within the district in such a way as to discriminate against certain of such residents.

It is, therefore, our opinion that the rules of a board of directors requiring a year of residence work before graduation is not enforceable as against a bona fide resident student who has satisfactorily completed the school work of the course required for graduation.

BEER PERMIT: AMANA SOCIETY: Amana Society may not sell beer in the different villages of the society under the authority of a single permit.

May 17, 1937. *Mr. Harold B. Claypool, County Attorney, Williamsburg, Iowa:* We acknowledge receipt of your letter and your request for an opinion of this department upon the following question:

"The Amana Society, a corporation for pecuniary profit, owns and operates several thousand acres of land in Iowa County. There are eight platted villages where the society operates various enterprises such as stores, and in some of the villages factories. Some of the individuals own their own homes but the business enterprise is all conducted by the corporation. The corporation has asked the board of supervisors to issue one Class B permit to sell beer and contends it would have the right under such a permit to sell beer in the various villages. * * *"

Section 1921-f122 of the 1935 Code, which makes provision for separate permits for each separate place of business is pertinent to the inquiry at hand. The above section provides as follows:

"1921-f122. *Separate locations—class 'B' or 'C.'* Every person holding a class 'B' or class 'C' permit having more than one place of business wherein such beer is sold shall be required to have a separate license for each separate place of business, except as otherwise herein provided."

The question involved in this discussion is this: What is the meaning of "separate place of business" within the intendment of Chapter 93-F2, relative to beer and malt liquors? The factual situation here presented is unique and arises out of ownership and control by the incorporated society of so large an area of land. Can it be said that the entire area owned or controlled by the corporation constitutes one "separate place of business"?

The phrase "place of business" has no fixed definition and its meaning must be determined from the circumstances which occasion its usage. "Place of business" in the case of a farmer has been held to include the whole farm or plantation occupied by him. *Idelett vs. State*, 81 S. E. 379 (Ga.).

We understand that heretofore separate Class "C" permits have been issued to the separate places where beer has been sold by the society. While this is not determinative of the question here presented, it furnishes support for the view that each of these separate places where beer has been sold has been considered a separate place of business in the past.

In order to determine what "place of business" means for the purpose of this inquiry, reference will be made to other provisions of the chapter wherein the phrase is employed. Section 1921-f103 deals with Class "B" applications, and among other things provides that such permit shall be issued to any person who:

"1921-f103. *Class 'B' application.* * * *

1. Submits a written application for a permit, which application shall state under oath:

* * *

d. The location of the place or building where the applicant intends to operate.

e. The name of the owner of the building and if such owner is not the applicant, that such applicant is the actual lessee of the premises.

f. That the place of business for which the permit is sought is and will continue to be equipped with sufficient tables and seats to accommodate twenty-five persons at one time, and is located within a business district or an area now or hereafter zoned as a business district. * * *."

The above provisions indicate that Class "B" applicants are required to furnish specific information as to the location and condition of the premises where they propose to operate.

If the "place of business" of the society is the entire territory owned and controlled by it, it is difficult to see how any particular place could be located or described in the application. Also, if "place of business" is construed to apply to the whole territory, the requirement of sub-section "f," cited above, is difficult, if not impossible, to apply.

Section 1921-g4 of said chapter provides as follows:

"1921-g4. *Alcoholic content.* No liquor for beverage purposes having an alcoholic content greater than four per cent by weight, shall be used, or kept for any purpose in the place of business of class 'B' permittees, or on the premises of such class 'B' permittees, at any time. A violation of any provision of this section shall be grounds for revocation of the permit. This section shall not apply in any manner or in any way, to drug stores regularly and continuously employing a registered pharmacist, from having alcohol in stock for medicinal and compounding purposes."

If we say that the "place of business" of the society is the entire territory controlled by the society, then this section would bar any such alcoholic liquors from any part of such area and a violation would be cause for revocation of the permit.

Boards of supervisors have authority to grant Class "B" and Class "C" permits in their respective counties in villages platted prior to January 1, 1934. If the entire territory of the society is construed as a "separate place of business" then it would be possible to sell beer at places other than in the villages and in effect the board would be granting authority to sell at places other than in platted villages. This conclusion would indicate that the legislature could not have intended to give such a broad meaning to the phrase "place of business."

We are of the opinion that the term "separate place of business" for the purposes of Chapter 93-F2 cannot be so extended as to include places which, in fact, are independently operated entities although they may have a common ownership. In this connection it may be observed that if the permit provisions of the beer law had contained some such provision as was incorporated in the chain store tax law, as the same applies to the society, a different conclusion might be reached in this case.

In view of the foregoing, it is the opinion of this department that for the purposes of Chapter 93-F2, a "place of business wherein beer is sold" refers to a definitely described lot or area where the beer is to be sold, and that such definite designation of location must appear upon the application for permit. It is further our opinion that beer may not be sold in the different villages of the society under the authority of a single permit.

SCHOOLS: MANAGEMENT: CONSTRUCTION: Electors of school district empowered to authorize issuance of bonds for construction of school building. Control and management of school building may not be placed in any other agency than that directed by statute.

May 17, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* This office is in receipt of your request for an opinion upon a question stated as follows:

"Do the electors of a school district have power to authorize the issuance of bonds for the construction and equipment of a school building, and to provide further that the building when thus constructed and equipped shall be under the control and management of a board other than the school board, but on which the school board has representation?"

The electors of a school district are given the power to authorize the issuance of bonds for the construction and equipment of a school building by the provisions of Section 4406, 1935 Code, which provide as follows:

"4406. *School bonds.* The board of directors of any school corporation when authorized by the voters at the regular election or at a special election called for that purpose, may issue the negotiable, interest-bearing school bonds of said corporation for borrowing money for any or all of the following purposes:

1. To acquire sites for school purposes.
2. To erect, complete, or improve buildings authorized for school purposes.
3. To acquire equipment for schools, sites, and buildings."

The question as to whether the electors have authority to direct that such school building be under the control and management of a board other than the school board must be answered in the negative. Section 4123, 1935 Code, provides 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."

It is provided in the above section that the school corporation shall have exclusive jurisdiction in all school matters within the district.

Section 4125, 1935 Code, provides as follows:

"4125. *Directors.* The affairs of each school corporation shall be conducted by a board of directors, the members of which in all independent school districts shall be chosen for a term of three years, except that in independent school districts which embrace a city and which have a population of one hundred twenty-five thousand or more, the term of directors shall be six years, and in all subdistricts of school townships for a term of one year."

Under this provision the board of directors is constituted the agency which shall conduct the affairs of the corporation. Thus the law is clear that the school corporation has exclusive jurisdiction over all school matters in the district, which would necessarily include the control and management of a school house. Therefore the duty of exercising such exclusive control and management under the provisions of 4125, supra, is placed upon the board. It follows, therefore, that the control and management of a school building may not be placed in any other agency than that which the statute has directed.

SCHOOLS: TRANSPORTATION: DISTANCE—HOW MEASURED: In determining distance of residence from school for transportation purposes, measurement is to be made from entrance to "dwelling house."

May 19, 1937. *Mr. Carl F. Conway, County Attorney, Osage, Iowa:* We are in receipt of your request for an opinion upon the construction to be given Section 4233-e5, 1935 Code, which provides as follows:

"4233-e5. *Distance—how measured.* Distance to school shall in all cases be measured on the public highway only and by the most practicable route, starting on the roadway opposite the private entrance to the residence of the pupil and ending on the roadway opposite the entrance to the school grounds."

You inquire as to what construction is to be given the phrase "opposite the private entrance to the residence of the pupil," asking whether this means:

(1) The point on the highway opposite the private driveway leading to the pupil's residence, or

(2) The point on the highway opposite the door of the house in which the pupil resides.

You state that if (1) above is the rule, this pupil then lives less than 2½ miles from the school, and that if (2) above obtains, then that the pupil lives more than 2½ miles from the school.

Section 4233-e4, 1935 Code, makes it mandatory for such board as is designated in the section to provide transportation for elementary pupils in the district who live 2½ or more miles from the school, providing as follows:

"4233-e4. *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 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."

That this duty imposed upon boards is purely statutory and is, therefore, to be strictly construed, see *Riecks vs. School District*, 219 Iowa, 101; 257 N. W. 546.

We find no cases which define positively the meaning of "private entrance to the residence." The primary definition of the term "residence" as given in Webster's Standard Dictionary is "the place or house where one resides."

It is not uncommon to find a rural home which may have more than one private driveway opening upon the highway. In such cases the locus for measurement for the purpose of determining distance to school would not be fixed.

On the other hand, the "private entrance to the residence," if the same is determined to be the main doorway to the dwelling, is generally easily and definitely determinable.

In view of the foregoing, it is the opinion of this department that for the purpose of the statute under consideration, the term "residence" means dwelling house, and that the measurement is to be made with respect to the entrance to such residence.

TAXATION: USE TAX: SALES TAX: INCOME TAX: Three per cent of all revenues collected under the provisions of the use tax, sales tax, income tax, and corporation tax shall be placed in a special fund for the purpose of paying the expenses incident to the collection of such taxes; any balance remaining in said fund should be returned to the State Treasurer, etc.

May 19, 1937. *Iowa State Board of Assessment and Review:* We have your request for an opinion as to the correct method of handling the collection and administrative expenses incurred in carrying out the provisions of Chapter 329-F1 of the Code of 1935 and Senate File 316 and Senate File 317, Acts of the 47th General Assembly (Chapters 196 and 197, respectively).

Chapter 329-F1 or the statute was enacted into a law by the Extra Session of the 45th General Assembly. It created and imposed the income, corporation, and sales tax. The chapter provided for the collection and allocation of the tax and made provision for the expense of the administration of the law. It placed the administration of the law relative to the income, corporation, and sales tax upon the State Board of Assessment and Review.

Under the provisions of Chapter 329-F1 of the 1935 Code, Division IV imposed a retail sales tax beginning on the first day of April, 1934, and ending on the first day of April, 1937. All of the provisions with reference to the laying of a sales tax were contained in Division IV of the Chapter and expired by operation of the law on April 1, 1937.

Senate File 316 re-enacted the law imposing the sales tax. The act contained a publication clause and became effective by publication on April 1, 1937, and thereby continued the retail sales tax as originally enacted in Division IV of Chapter 329-F1 of the 1935 Code.

Division V of Chapter 329-F1 of the 1935 Code contains the provisions of the law relative to the administration thereof. Under the provisions of Senate File 316 enacted by the 47th General Assembly the administrative provisions of Chapter 329-F1 of the Code are made applicable to the new act.

Senate File 317 passed by the 47th General Assembly contained a publication clause and became effective by publication on April 16, 1937. Under the provisions of Senate File 317, a use tax is imposed and the duty of administering the provisions of the Act is imposed upon the State Board of Assessment and Review, to be by said Board administered under the provisions of Division V of Chapter 329-F1 of the 1935 Code as amended by Senate File 317.

Under Section 6943-f56, which is a part of Division V of Chapter 329-F1, provisions are made for the handling of the funds derived from the taxes imposed under Chapter 329-F1 of the 1935 Code, Senate File 316 and Senate File 317 of the Acts of the 47th General Assembly, the section being as follows:

"*Funds.* All fees, taxes, interest, and penalties imposed under this chapter must be paid to the board in the form of remittances payable to the treasurer of the state, and said board shall transmit each payment daily to the state treasurer to be deposited in the state treasury to the credit of a *special tax fund*, which fund is hereby created."

Under Division VI of Chapter 329-f1 provisions were made for defraying the expense of carrying out the provisions of the law relative to the collection of the tax imposed. This provision is set out in Section 6943-f65 and is as follows:

"*Appropriation.* For expenditure by the board in carrying out the provisions of this chapter, there is hereby appropriated from the general fund of the state, not otherwise appropriated, a sum of seventy-five thousand dollars for the year 1934 and in addition thereto, for the year 1934 and thereafter, an amount equal to three per cent of the amount of taxes collected under this chapter; provided, however, that any balance of said amount equal to said three per cent remaining after the payment of administrative expenses, shall be transferred back to the special tax fund."

However, Section 6943-f65 quoted above was amended by Senate File 316 and Senate File 317 and as amended reads as follows:

"*Appropriation.* For expenditure by the board in carrying out the provisions of this chapter, and Senate File 316 and Senate File 317 of the Acts of the 47th General Assembly, there is hereby appropriated from the general fund of the State, not otherwise appropriated, a sum of seventy-five thousand dollars for the year 1934 and in addition for the year 1934 and thereafter, an amount equal to three per cent of the amount of tax collected under this chapter and

under Senate File 316 and Senate File 317 of the Acts of the 47th General Assembly, provided however, that any balance of said amount equal to said three per cent remaining after the payment of administrative expense, shall be transferred back to the special tax fund."

Division V of Chapter 329-F1 as amended by Senate File 316 and Senate File 317 of the Acts of the 47th General Assembly therefore contains all of the provisions relative to the administrative features of the law.

The funds derived from the personal income tax, corporation income tax, and sales tax, less administrative costs of three per cent thereof go into the special tax fund created by Section 6943-f56 hereinbefore quoted, and the funds derived from the use tax, under the provisions of Senate File 317, less cost of collection and administration are to be paid into the general fund of the state under the provisions of Section 23 of Senate File 317 which is as follows:

"All revenues arising under the operation of this Act, less cost of collection and administration, shall be paid into the general fund of the State of Iowa."

Three per cent of the funds derived from the foregoing mentioned taxes is appropriated for administrative expenses as provided for in Section 6943-f65 as amended by Senate File 316 and Senate File 317.

Inasmuch as the Legislature has imposed upon the State Board of Assessment and Review the duties of collecting the personal income tax, the corporation income tax, the sales tax and the use tax and has authorized the use of three per cent of the tax collected for administrative expenses, it is to be assumed that the three per cent authorized to be so used shall create a fund for the purpose of defraying the expenses of collection. The statute does not require that the administrative expenses of collecting each particular tax be charged against the three per cent deduction from such fund, that is, there is no requirement that specific items of expense incident to the collection of sales tax, for instance, should be charged against a fund derived wholly from the authorized deduction of three per cent from the sales tax collected. To so hold would require the board to set up within its administrative department four separate and distinct departments or divisions and to maintain four separate and distinct expense accounts, that is one department and expense account for the income tax, one for the corporation tax, one for the sales tax, and one for the use tax. The only distinction made in the law relative to the four taxes, namely, personal income tax, corporation tax, sales tax, and use tax is to be found in Section 6943-f56 and Section 23 of Senate File 317. Under Section 6943-f56 hereinbefore quoted, the Legislature provided that all fees, taxes, interest, and penalties imposed under Chapter 329-F1 shall be deposited in the State Treasury to the credit of a *special tax fund*, created by Section 6943-f56 which is a part of the chapter. The personal income tax and corporation income tax are imposed by Chapter 329-F1.

Senate File 316 of the Acts of the 47th General Assembly re-enacting the sales tax law, by reference, incorporates therein the administrative features of Chapter 329-F1 contained in Division V thereof which includes Section 6943-f56 heretofore quoted. Therefore, the revenue derived from the Personal Income Tax, Corporation Tax, and Sales Tax is directed by said section to be placed in the special tax fund thereby created.

Under Section 23 of Senate File 317 the revenue derived from the use tax is directed, after the deduction of the cost of collection and administration, to be paid into the general fund of the State. Section 23 is as follows:

"All revenue arising under the operation of this Act less cost of collection and administration shall be paid into the general fund of the State of Iowa."

After an analysis of Chapter 329-F1 of the 1935 Code as amended by Senate File 316 and Senate File 317, and the provisions of Senate File 316 and Senate File 317, it is the opinion of this department that three per cent of all revenues collected under the provisions of the personal income tax act, the corporation income tax act, the sales tax act, and the use tax act should be deducted and placed in a special administrative fund for the purpose of defraying the cost and expenses incident to the collection of such taxes; that the statute does not require that separate accounts be kept of the cost of collection of each particular tax; that any balance remaining in said special administrative fund after deducting the cost of collection and retaining a workable balance in such fund should be returned by the board to the State Treasurer and by him deposited as follows: to the special tax fund created by Section 6943-f56 a part of said balance in the same ratio which the total amount of tax collected from the personal income tax, corporation income tax, and sales tax bears to the total amount of tax collected, and to the general fund in the same ratio which the amount of tax collected from the use tax bears to the total amount of tax collected.

PEDDLER'S LICENSE: COMMUNITY SALES: A person who brings merchandise to public auction held outside city limits to be sold by auctioneer is not required to have peddler's license.

May 20, 1937. *Mr. Ray A. Potter, County Attorney, Tipton, Iowa:* We acknowledge your request for an opinion of this department upon the question set out below, which arises out of these facts:

Weekly community sales are conducted outside the city limits at the fair grounds. A public auctioneer cries the sales. All sales are made to bidders, and the amounts are collected by a clerk. Those persons having commodities for sale have no active part as vendors.

A saddlery company drives its truck into the sales pavilion and the company's harness and accessories are sold at the auction.

Is the company required to obtain a peddler's license?

Section 7174 of the 1935 Code provides for the payment of an annual county tax by peddlers who ply their vocation outside cities and towns.

"7174. *Peddlers.* Peddlers plying their vocation in any county in this state outside of a city or incorporated town shall pay an annual county tax of twenty-five dollars for each pack peddler or hawker on foot, fifty dollars for each one-horse or two-wheeled conveyance, and seventy-five dollars for each two-horse conveyance, automobile, or any motor vehicle having attached thereto or made a part thereof a conveyance for merchandise or samples."

The term peddler has been defined as follows: "A traveling trader; one who carries about commodities on his back, or in a cart or wagon and sells them," Webster's Dictionary; "An itinerant individual, ordinarily without local habitation or place of business, who travels about the country carrying commodities for sale," *Davenport vs. Rice*, 75 Iowa, 74.

Cities and towns under the general powers granted to them by Section 5743, 1935 Code, are given certain powers to regulate and license. Among these powers are:

"5743. *Power to regulate and license.* They shall have power to regulate and license:

* * *

3. Peddlers. Peddlers, house movers, billposters, itinerant doctors, itinerant

physicians and surgeons, junk dealers, scavengers, pawnbrokers, and persons receiving actual possession of personal property as security for loans, with or without a mortgage or bill of sale thereon.

* * *

5. Sales. Sales of auctioneers, bankrupt and dollar stores, and the like, and those of transient merchants, and to define by ordinance who shall be considered transient merchants; but the exercise of such power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors or bankrupts, or any other person required by law to sell real or personal property."

The above provisions are set out for the purpose of showing that the regulation by cities and towns of peddlers is dealt with independently of the regulation of sales by auctioneers, and that sales by the latter have been distinguished from sales of transient merchants. The legislature has not provided for the regulation of auction sales as such outside cities and towns.

We are of the opinion that a person who brings property to a public auction for sale by an auctioneer does not come within the scope of the definition of "peddler" as the word is used in Section 7174, supra.

Section 7176, 1935 Code, enlarges the scope of the definition of "peddler" as the same appears in Section 7174, providing as follows:

"7176. *'Peddlers' defined.* The word 'peddlers' under the provisions of Sections 7174 and 7175, and wherever found in the Code, shall be held to include and apply to all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or future delivery."

Under the above section, all transient merchants and itinerant vendors selling by sample or taking orders, whether for immediate or future delivery, are peddlers and are subject to the county tax, except as interstate commerce may be affected. Do the acts of the company in trucking in merchandise to be sold at the auction sale, and selling same through the agency of the auctioneer, make it a transient merchant taking orders for immediate or future delivery?

It is our opinion that the statute in question is not broad enough to cover sales made at public auctions in the manner outlined in your letter. The legislature has seen fit to extend to cities and towns power to regulate auction sales, distinguishing such transactions from the sales of transient merchants and peddlers. Such extension of regulatory power has not been granted to boards of supervisors. Penal statutes are to be strictly construed and it is our opinion that the "selling by sample" or "taking orders" cannot be said to include sales made through the agency of auctioneers at sales pavilions.

TAXATION: HOMESTEAD TAX EXEMPTION: Unmarried persons who own property in which they live and maintain a home are entitled to the benefit of the Homestead Exemption Act.

May 21, 1937. *Mr. J. Berkley Wilson, County Attorney, Indianola, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Are unmarried persons who own property in which they live and maintain a home entitled to the benefit of the Homestead Exemption Act?

Senate File 184 (Chapter 195, Laws of the 47th General Assembly), being the Homestead Exemption Act has defined the word "homestead," and the word, "owner." The act provides that the owner of property who occupies the same as a homestead, as the words "owner" and "homestead" are defined in the act, are entitled to the benefit of the provisions of the Homestead Exemption Act.

There is no requirement in the law that the claimant must be a married person or the head of a family. The provisions of Section 10175 of the Code of 1935 have no application to the Homestead Tax Exemption Act.

Therefore, inasmuch as the Legislature has not required that the claimant be a married person or the head of a family, this department is of the opinion that if an unmarried person brings himself or herself within the provisions of Senate File 184 with reference to ownership and occupancy, such person is entitled to the benefit of the tax credit or refund therein provided for.

TAXATION: HOMESTEAD TAX EXEMPTION: If a homestead is located on a lot which is more than one-half acre, owner is entitled to claim exemption on the entire tract unless its valuation would exceed $2,500, in which event he would be limited to so much of the property as did not exceed such value.

May 21, 1937. *Mr. Guy C. Richardson, County Attorney, Jefferson, Iowa:* This department is in receipt of your request for an opinion upon the following question:

"A" owns a lot in Jefferson on which his homestead is located. The lot contains more than one-half acre and is described as Lot 5 in Block 1, Russell's Addition to Jefferson. The house is located on the east half of the lot. Is the owner entitled to the benefits of the homestead exemption on the entire tract, being more than one-half acre, or is he limited to the east half of the lot upon which he lives, being less than one-half acre?

Section 19 of Senate File 184 (Chapter 195, Laws of the 47th General Assembly) places its own definition upon the word, "homestead." Subdivision (c) of Section 19 is as follows:

"If within a city or town plat, it must not exceed one-half acre in extent; if, however, its assessed valuation is less than twenty-five hundred dollars ($2,500), the land area may be enlarged until its assessed valuation reaches that amount."

It would appear from the provisions of subdivision (c) of Section 19 that the Legislature had in mind, when it enacted the law, problems such as set out above, and with reference to city or town property located within the platted portion of the city or town fixed the assessed valuation of the property as a means of limiting the extent of the homestead rather than the area of the homestead.

It is therefore our opinion that under the facts stated herein, the property owner is entitled to claim his exemption on the entire tract unless its valuation would exceed $2,500.00 in which event he would be limited to so much of the property as did not exceed such value.

COUNTY OFFICERS: SHERIFF: JAIL EQUIPMENT: BOARD OF SUPERVISORS: Cost of refrigeration of food for county prisoners must be paid out of sheriff's fees for such food. Board of Supervisors not authorized to furnish sheriff refrigeration for keeping prisoner's food.

May 21, 1937. *Mr. Willis A. Glasgow, County Attorney, Clarinda, Iowa:* We are in receipt of your request for an opinion of this department. In your letter you have set out the following facts:

The sheriff of your county, who has charge of the jail and lives in a house adjoining the jail, has requested the board of supervisors to buy a Frigidaire ice box for the purpose of placing the same in his home in order to keep and preserve the food that will be used in the jail to feed the prisoners and will naturally be used by the sheriff himself. Naturally this ice box will be kept

in the sheriff's house and will be used by the sheriffs as they are elected every two years.

Is this a proper item for which the board can spend the money of the county?

The statutes make no provision whereby a board of supervisors is authorized to supply furnishings for the residence of a sheriff. Under the provisions of Section 5226, paragraph 12, an additional sum of $300.00 is added to the salary of the sheriff who is not furnished a residence by the county. It is our opinion that the board does not have authority to purchase a refrigerator for the private use of a county officer.

Under the provisions of Section 5191, paragraph 11, the county sheriff is allowed certain fees for boarding prisoners, this compensation being fixed at twenty cents for each meal furnished. This department has ruled heretofore that gas used as fuel in preparing the meals furnished to prisoners in county jails is an expense which should not be borne by the county, but that such expense is a part of the cost of supplying the food for which the sheriff is compensated by the above mentioned fees.

It is our opinion that the cost of refrigeration of food which is to be furnished to prisoners in a county jail must be considered as a part of the cost of such food. Since the statute contemplates that the fees paid to the sheriff for furnishing such food are to be his entire compensation therefor, we believe that a board of supervisors is not authorized to purchase a refrigerator which is to be used by the sheriff in connection with the furnishing of food for prisoners in the county jail.

SCHOOLS: CONTRACT: BOARD OF DIRECTORS: Power of a sub-director to enter into contract with teacher on behalf of the district must rest upon a specific delegation of such authority by the board.

May 21, 1937. *Mr. J. F. Wilson, County Attorney, Sac City, Iowa:* We acknowledge the receipt of your request for an opinion of this department as to whether or not a board of school directors in your county have entered into a valid contract with a teacher. A digest of the facts submitted by you in your inquiry follows:

On April 8, 1936, the board adopted a motion that each sub-director appoint his own teacher after date. On March 15, 1937, the board adopted a motion that the board pass on each teacher hired for the district.

On April 22, 1937, the board met and voted that certain sub-directors hire their teachers for the year, but in this action the sub-director of this particular sub-district was not included. At this same meeting the board voted to take a ballot on the hiring of the teacher under consideration. The vote was favorable and motion was made that the president sign a contract with the teacher for the coming year, which motion was carried. This contract has been executed by the president of the board and by the teacher.

Differences have arisen between the teacher so employed and her sub-director and the patrons of said sub-district. The sub-director and the patron claim that the sub-director should have had the right to select his own teacher for the sub-district.

Does the above contract constitute a binding obligation or can the board rescind said contract?

Section 4228, 1935 Code, relates to the election of teachers by the board and provides as follows:

"4228. *Contracts—election of teachers.* The board shall carry into effect any instruction from the regular election upon matters within the control of the voters, and shall elect all teachers and make all contracts necessary or proper for exercising the powers granted and performing the duties required

by law, but the board may authorize any subdirector to employ teachers for the school in his subdistrict; but no such employment by a subdirector shall authorize a contract, the entire period of which is wholly beyond his term of office."

Up to the time of the adoption of the Code of 1897, the law provided that each sub-director, under rules and restrictions prescribed by the board, should negotiate and make contracts with teachers in his district, subject to the approval of the president of the board, and that the board was left responsible for the performance of the contract on the part of the school township. The Code of 1897 changed this procedure by providing (Section 2778) that the board should elect teachers as is provided in Section 4228 quoted above. In 1900 this law was amended by adding these words: "but the board may authorize any subdirector to employ teachers for the school in his subdistrict."

Under the provisions of Section 4228, supra, a board may delegate to a subdirector the authority to employ teachers for the school in his sub-district, but the power of a sub-director to so act in employing a teacher must rest upon such specific delegation of power to him by the board. See *Hoffa vs. Saupe*, 199 Iowa 515.

In the absence of such power vested in a sub-director by the action of the board, the power to employ a teacher rests in the board itself, and if the board proceeds to elect a duly qualified teacher and the president and the teacher thereafter sign the contract, the same is a binding obligation of the district. Pertinent to the above is Section 4229, 1935 Code, which provides as follows:

"4229. *Contracts with teachers.* Contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five days, or month of four weeks, and that the same shall be invalid if the teacher is under contract with another board of directors in the state of Iowa to teach covering the same period of time, until such contract shall have been released, and such other matters as may be agreed upon, which may include employment for a term not exceeding the ensuing school year, except as otherwise authorized, and payment by the calendar or school month, signed by the president and teacher, and shall be filed with the secretary before the teacher enters upon performance of the contract but no such contract shall be entered into with any teacher for the ensuing year or any part thereof until after the organization of the board."

In the present case it appears that the board in April of 1936 voted to permit each sub-director to hire his own teacher. Subsequent action of the board taken on March 15, 1937, in effect rescinded the 1936 action by providing that the board should pass on each teacher hired for the district. So far as this particular sub-district was concerned, this last mentioned rule of the board remained in force, and the board proceeded on April 22, 1937, to elect the teacher for this particular sub-district as provided by the statute.

Under the above circumstances, it is the opinion of this department that the school board proceeded in a lawful manner in electing the teacher in question; that if the formal requirements pertaining to the consummation of the contract, as set out in Section 4229, supra, have been observed, that a valid contract exists between this teacher and the school district.

TAXATION: HOMESTEAD TAX EXEMPTION: One claiming the benefits of Homestead Tax Exemption Act may select any land owned by him if the tract selected is in one body or the parts are contiguous. One cannot erect a shack on land and move a few pieces of furniture into it, or into a loft of a barn

on the land and call that a homestead. Such occupancy would not be in good faith and would not constitute a homestead.

BUILDING AND LOAN ASSOCIATIONS: An option to purchase would not entitle one to homestead tax exemption.

May 21, 1937. *Mr. J. W. Pattie, County Attorney, Marshalltown, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. Farm properties are being assessed in Governmental subdivisions of 40 acres as nearly as possible. Can the owner of two 40-acre tracts which are contiguous claim a homestead exemption on land carved out of the combined tracts or must he confine it to a Governmental 40-acre tract?

Senate File 184, being the Homestead Tax Exemption Act, places its own construction upon the word "homestead" and designates what shall be considered a homestead for the purposes of the Act. Section 19 of the Act is as follows:

"For the purpose of this act and wherever used in this act:

1. The word, 'homestead,' shall have the following meaning:

a. The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this act actually lives six (6) months or more in the year * * *

b. It may contain one or more contiguous lots or tracts of land with the buildings or other appurtenances thereon habitually, and in good faith, used as a part of the homestead.

* * *

d. If outside of a city or town, it must not contain more than forty (40) acres.

e. It must not embrace more than one dwelling house, but where a homestead outside of a city or town has more than one dwelling house situated thereon, the millage credit provided for in this act, shall apply to forty (40) acres, the home and buildings used by the owner, but shall not apply to any other dwelling house and buildings appurtenant thereto situated upon said forty (40) acres."

It is apparent from the definition placed upon the word, "homestead," by the Legislature that one claiming the benefits of the Homestead Tax Exemption Act may select any land owned by him so long as the tract selected is in one body or the parts are contiguous and do not exceed forty acres in extent, including therein the portion upon which the dwelling house is located in which the owner actually lives.

2. A farmer owns land in the county on which there is no dwelling, and he rents a dwelling on an adjacent piece of land, or rents an additional piece of land on which all the farm buildings are located, and farms that in conjunction with his farm which has no improvements on except the outbuildings. He is considering building a shack on his own land, or moving his furniture into the loft of a barn for the purpose of living there and claiming that place as a homestead. Would that entitle him to the benefits under the Homestead Exemption Act?

In answering the foregoing question, two things must be taken into consideration, first, the refund on the 1936 tax payable in 1937 and second the credit on the 1937 tax payable in 1938 and all taxes subsequent to the 1936 tax. Section 14 of Senate File 184 is as follows:

"The county treasurer of each county shall enter a credit against the tax levied on each eligible homestead, being the tax for the year 1936, payable in 1937, said credit to be made as provided in Section 4 of this Act. The county treasurer shall show on each tax receipt that said credit is received from the Homestead Credit Fund. In the event that a taxpayer has paid one

or both of the installments of the 1936 tax payable in 1937 on such eligible homestead, prior to the time of entering such credit, the county treasurer shall, at the time he enters such credit, remit to such taxpayer the amount of such credit less unpaid portion of tax, if any."

The act therefore provides for either a credit or refund on the 1936 tax.

The act defines a homestead for the purpose thereof and in so far as it applies to the 1936 tax, as follows:

"The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this act actually lives six (6) months or more in the year * * *"

So far as the credit or refund on the 1936 tax is concerned, the facts set out in the foregoing question would not entitle the owner to such credit or refund. The owner has not in fact lived upon such land during the year 1936. He has never brought himself within the requirements of the definition of a homestead as set out in the act.

So far as taxes subsequent to the 1936 taxes are concerned, the definition of a homestead set out in the act requires the owner to live upon such land and to use the same as a homestead, and his occupancy thereof must be in good faith. Therefore, if a person, having and maintaining a home on rented ground, should erect a shack or small building on his own land and move a few pieces of furniture into it, or move such furniture into the loft of the barn, he would not be entitled to the benefits of the act while maintaining a home at another place. The intention of the law is that the occupancy must be in good faith, and a good faith occupancy could not be said to have been made out under such circumstances.

It would, therefore, be our opinion that the facts above set out would constitute a mere subterfuge for the purpose of gaining the credit allowed under the Homestead Exemption Act and that the occupancy would not be in good faith and would not therefore constitute a homestead.

3. Building and Loan Associations in order to avoid complications growing out of the Moratorium Act execute leases to purchasers of property and give them in a separate instrument an irrevocable option of purchase which is placed of record. The terms of the lease require the lessee to pay the taxes and a stipulated rental. Under the optional contract the purchaser is given credit upon the purchase price for the rents paid under the lease and upon payment of the stipulated amount is entitled to exercise the option and take a deed to the property. Are the purchasers under such contracts entitled to the benefits of the Homestead Exemption Act?

Subsection 2 of Section 19 of the Homestead Act defines the word "owner" and among those designated as owner are "persons occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located."

Under the facts set out above there are really two contracts existing between the Building and Loan Association and the individual. In the first contract the Building and Loan Association has entered into a contract of lease. Under such contract the individual or lessee cannot be said to have any interest in the fee title. His contract has to do with the possession and right of possession of the demised premises and no more. The lease would cover a term of years or months at a stipulated rental for the use of the premises, a breach of which would entitle the lessor to terminate the lease,

upon notice, and dispossess the lessee. The second contract is one in which the Building and Loan Association has granted to the individual an option to purchase the property involved upon certain terms and conditions. One holding an option on property is not an owner within the purview of the act. His contract goes no further than the right to purchase the property at some future time by exercising the option contained in his contract. One holding an option has no interest in the fee and cannot be said to be an owner. Under such contract the individual would be required to exercise his option and comply with the terms and conditions contained in his option agreement before he would acquire any interest in the real estate involved. Until the option to purchase has been exercised and ten percent of the purchase price actually paid, one holding an option contract cannot be said to be an owner or have any interest in the real estate, and therefore could not qualify as an owner under the provisions of the Homestead Tax Exemption Act.

4. In case a party sells his homestead between the present time and the time tax exemption is received, can he get the benefit of the exemption personally, or does it remain with the real property? In other words, must the vendor of a homestead try to compute the homestead tax rebate and add it to his purchase price in order to get the benefit of it, or is he entitled to have the refund come to him?

The answer to the foregoing question depends upon which particular tax is involved. If a person who is now entitled to the benefit of the homestead tax exemption credit or refund on his 1936 tax should sell the property, he would be entitled to the credit or refund made on the 1936 tax paid in 1937, providing however, that such person has filed a verified statement of his claim of ownership and occupancy with the county auditor on or before June 1, 1937. The homestead exemption act requires that to be entitled to the benefit of a refund or credit on the 1936 tax one must have occupied the property for six months during the year, that is during the year of 1936. Therefore the vendor would be entitled to the credit or refund on the 1936 tax.

If the contract of sale is entered into during the year 1937, a different situation arises so far as the 1937 tax is concerned. The homestead tax exemption act, paragraph (a) subsection 1 of Section 19 requires that the claimant of a millage credit or refund on the tax against a homestead must have actually lived in such property six months or more in the year. Exception is made to those persons who make application for the millage credit or refund during the first year of ownership. Those persons making application during the first year of ownership are required to make an affidavit setting forth that the affiant is living in the dwelling house and of his intention to occupy such dwelling house in good faith as a home. Section 11 of the act is as follows:

"Any person who is the owner of a homestead, as defined in this Act, and who desires to avail himself of the benefits provided hereunder for the 1936 taxes payable in 1937 and for the *1937* taxes payable in *1938* may do so by filing a verified statement with the county auditor of the county in which the claimed homestead is located on or before June 1, 1937, and the claim of the owner must be supported by the affidavits of at least two disinterested freeholders of the taxing district in which the claimed homestead is located."

Under the provisions of Section 11 above quoted, the verified statement required of those desiring to avail themselves of the homestead exemption act must be filed on or before June 1, 1937. Section 9 of the Act is as follows:

"If any person fails to make claim for the credits provided for under this

act as herein required, he shall be deemed to have waived the homestead credit for the year in which he failed to make claim."

A strict construction of the provisions of Sections 9 and 11 of the Act, as herein quoted, would require us to say that one, either previous owner or purchaser under contract, who had failed to file the verified statement on or before June 1, 1937, waived the benefits of the homestead credit on the 1937 tax. The vendor in such contract could not qualify for the reason that his ownership of the property would not be for a period of six months during the taxable year, but such holding by this department would result in eliminating from the benefits of the act all properties which were sold during the first five months of 1937 unless the purchaser had filed the verified statement on or before June 1, 1937, for the following reasons: The vendor could not file such statement because he would not have owned the property for six months during the taxable year, and for the reason that the purchaser had not filed such statement on or before June 1, 1937, which is the dead-line fixed in Section 11. As to contracts of sale made subsequent to June 1, 1937, neither vendor nor vendee could claim the benefits of the Act for the reason that no verified statement of ownership and occupancy has been filed on or before June 1, 1937.

Section 9 above quoted provides that if the verified statement is not filed within the time prescribed by the act that the claimant will be deemed to have waived the homestead credit. One cannot waive something which he does not have. The purchaser not having had title prior to June 1, 1937, could not waive his rights to file for the reason that it did not exist. Section 5 of the act is as follows:

"Any person who desires to avail himself of the benefits provided hereunder shall *each year commencing January 1, 1938*, deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement and designation of homestead as claimed by him * * * provided, that if the said verified statement and designation of homestead is not delivered to the assessor, the person may, on or before June 1 of any year, file with the county auditor such verified statement and designation * * *."

The 1937 tax is payable in 1938 and there is an apparent conflict between the provisions of Section 5 and Section 11 of the act, Section 11 providing that "any person * * * who desires to avail himself of the benefits provided hereunder * * * for the 1937 tax payable in 1938 may do so by filing a verified statement with the county auditor of the county in which the claimed homestead is located on or before June 1, 1937," and Section 5 providing that "any person who desires to avail himself of the benefits provided hereunder *shall each year commencing January 1*, 1938, deliver to the assessor * * * a verified statement and designation of homestead as claimed by him * * * provided, that if the said verified statement and designation of homestead is not delivered to the assessor, the person may, on or before June 1 of any year, file with the county auditor such verified statement and designation * * *."

The further provisions of the act require that persons desiring to avail themselves of the benefits thereof must actually have lived in such property six months of the year. Such occupancy could not, under any circumstances, be determined as early as June 1st for the simple reason that upon that date only five months of the year would have elapsed and to construe Section 11 as applying to the 1937 tax payable in 1938 would defeat the purpose of the act as far as the 1937 tax is concerned. As to the first year of ownership under contract of purchase, the six months of occupancy is not required.

Under well established rules of statutory construction where the language of a statute is of doubtful meaning or where adherence to the strict letter thereof would lead to injustice, absurdity or contradiction, there is a duty to ascertain the true meaning. On the other hand, where the language employed is plain and unambiguous, there is no occasion for construction. Now then, to determine the legislative intent, reference should be made primarily to the language used. If the intention of the Legislature cannot be readily discovered, it is incumbent upon the court to give the statute a reasonable construction consistent with general principles of law. Courts should not attribute to the Legislature the enactment of a statute devoid of purpose, but where the language is clear and unambiguous, but at the same time incapable of reasonable meaning, the court cannot construe the statute to give it a meaning. See 59 *C. J.* 652, 952, sec. 659; *Smith vs. Sioux City Stock Yards Co.*, 219 Iowa 1142, 260 N. W. 531.

The purpose and the intent of the Legislature can readily be determined and ascertained from the act, namely, that a tax refund and credit is to be given to those persons who are within the definition of the word "owner," as defined in the act, upon their homestead, as the word "homestead" is defined in the act, beginning with the 1936 tax.

The difficulty encountered in construing the act is in the method of securing the benefits of such credit for the 1937 tax by persons who otherwise bring themselves within the definition of owner and acquire property which is within the definition of the word "homestead" by purchase during the year 1937. As heretofore pointed out, a literal adherence to the provisions of the law as set out in Section 11 would deprive all persons who acquired property subsequent to June 1, 1937, of the benefit of such credit. To that extent this department is unwilling to go.

We are of the opinion that full consideration should be given to Section 5 of the Act and that the provisions of Section 5 should be held applicable to persons acquiring property subsequent to June 1, 1937.

This department is therefore of the opinion that a person who acquired property by sale subsequent to June 1, 1937, if such person comes within the definition of owner as set out in said act and qualifies the property as a homestead as defined by the act, is entitled to the credit upon the 1937 tax and is entitled to file the verified statement asking the benefit of such credit up to and including June 1, 1938, and that the vendee or purchaser would be entitled to the benefit of the homestead tax credit on the 1937 tax.

TAXATION: HOMESTEAD TAX EXEMPTION: If a man owns a building, lives in the rear of same, operates a business on the ground floor and rents the second story of said building, he is entitled to a homestead exemption credit on said property to the extent of an assessed value of $2,500.

May 22, 1937. *Mr. James E. Coonley, County Attorney, Hampton, Iowa:* This department is in receipt of your request for an opinion upon the following question:

A man owns a building, and on the ground floor he operates a business. In the rear of the building he has his living quarters in a space about twenty-five feet square where he lives at all times the year around. The second story of the building is composed of flats which he rents and collects the rents therefrom. Is he entitled to a homestead tax credit upon the taxes for the entire building?

Under Senate File 184 the Legislature has designated those persons and prop-

erties to which the tax exemption applies. Subdivision (f) of Section 19 of the Act is as follows:

"The words 'dwelling house' shall embrace any building occupied wholly or *in part* by the claimant as a home."

Under the foregoing facts, it is stated that the claimant "in the rear end of his building has his living quarters in a space about twenty-five feet square where he lives at all times the year around." He is therefore occupying the building, in part, as a home.

It is therefore the opinion of this department that under the circumstances the claimant is entitled to a homestead exemption credit on said property to the extent of an assessed value of $2,500.00.

SCHOOLS: ELECTIONS: PENSION SYSTEM: Question of pension system can be submitted only at regular school election. If pension system is adopted, retired teachers are not included in benefits.

May 22, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for an opinion of this department upon two questions:

"May the board in an independent school district, located in whole or in part within a city having a population of 25,100 or more, but less than 75,000, hold an election at any time to vote on the adoption of a pension system for teachers, as provided in Sections 4345-4347, or may such proposition be submitted at the regular school election only?

If a pension system is authorized by the voters in such a district, can teachers who have been retired from service prior to a favorable vote on a pension system be included in its benefits?"

Section 4345 of the 1935 Code makes provision for the establishment of a pension and annuity retirement system and provides for the ratification of the same by a vote of the people, the said section providing as follows:

"4345. *Pension system.* Any independent school district located in whole or in part within a city having a population of twenty-five thousand one hundred or more may establish a pension and annuity retirement system for the public school teachers of such district provided said system, in cities having a population less than seventy-five thousand, be ratified by a vote of the people at a general election."

It is to be noted that the statute provides that the vote upon such system is to be at a general election. Chapter 40, 1935 Code, relates to the method of conducting general elections and Section 719 thereof provides as follows:

"719. *Elections included.* The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections."

Section 720, paragraph 1, defines the term "general election" as follows:

"720. *Terms defined.* For the purposes of this chapter:

1. The term 'general election' means any election held for the choice of national, state, judicial, district, county, or township officers. * * *"

In view of the above provisions, it is our opinion that the term "general election" for the purpose of Section 4345 means "regular election" as the same is provided for in Section 4216-c1, which section reads as follows:

"4216-c1. *Regular election.* The regular election shall be held annually on the second Monday in March in each school corporation and in each subdistrict for the purpose of submitting to the voters thereof any matter authorized by law, except that in all independent school districts which embrace a city and which have a population of one hundred twenty-five thousand or more such election shall be held biennially on the second Monday in March of odd-numbered years."

It is next necessary to determine whether or not such propositions may be voted on at a special election called for that purpose. If such may be done, authority therefor would need to be found in the following provision of the 1935 Code:

"4216-c2. *Special election.* The board of directors in any school corporation may call a special election at which election the voters shall have the powers exercised at the regular election with reference to the sale of school property and the application to be made of the proceeds, the authorization of a schoolhouse tax or indebtedness, as provided by law, for the purchase of a site and the construction of a necessary schoolhouse, and for obtaining roads thereto."

It is well established that the electors of a school district can exercise only such powers as are conferred by statute, either expressly or by reasonable implication. To this effect, see *District Township of Washington vs. Thomas*, 59 Iowa, 50; also *Hibbs vs. Board of Directors*, 110 Iowa, 306. It is to be noted that the power of electors of the district at a special election to vote a tax or to incur indebtedness is limited by the following language of the section, "for the purpose of a site and the construction of a necessary schoolhouse and for obtaining roads thereto."

It is therefore our opinion, in answer to your first question, that under the statutes the question of the establishment of a pension and annuity retirement system can be submitted to the voters of the district only at a regular school election.

In discussing your second question, reference again must be made to Section 4345, which makes provisions for the establishment of a pension and annuity retirement system for public school teachers. Several other states have adopted teachers' pension systems or have enacted legislation enabling districts to adopt pension programs. The cases interpreting such legislation are in general agreement that such laws are remedial in character and are to be liberally construed. Boards of directors of school corporations, however, have only those powers conferred upon them by the statutes, and such implied powers as may be necessary to properly execute the expressed powers.

An examination of the language of the section above quoted discloses that independent school districts may establish a pension and annuity retirement system for *the public school teachers of such districts.* Are retired teachers public school teachers within the meaning of the above statute? We find no decision in this state which is helpful in interpreting the meaning of these terms. The case of *Lewis vs. Board of Education*, (Conn.) 91 Atlantic, 529, is a case which discusses a problem similar to that raised by this inquiry. On July 18, 1911, the City of New Haven, Connecticut, by an amendment to its charter, established a teachers' retirement system, which in part provided as follows:

"Upon a majority vote of the Board of Retirement and a majority vote of the Board of Education, any teacher who has taught in the public day schools for a period of thirty years, of which period the last twenty years shall have been in the public day schools of the New Haven City School District, shall be placed on the retired list."

Plaintiff had been a teacher in the New Haven schools for a period of nearly fifty years, but had retired from active teaching three years before the pension system became effective. The plaintiff was granted a pension of $800.00 for a period of one year by the boards, but the same was discontinued at the end of that period. Plaintiff applied for a writ of mandamus to compel the board

to continue the payments. Holding this teacher not entitled to the benefits of the law, the Supreme Court of Errors of Connecticut said:

"The relator ceased to be a teacher in the New Haven schools when his resignation was accepted. He could no more with propriety be called a teacher than one who has retired from business could be called a businessman. * * * We find nothing in the act which can give this section a retroactive effect and nothing in the act which was intended to form a class of the retired teachers."

The Iowa law is clear in designating public school teachers as those for whom the districts may establish such pension systems. While the Connecticut decision is not necessarily controlling in this case, it is persuasive in its view that such language cannot be extended so as to include retired teachers.

Section 4346 of the 1935 Code provides for the creation of a pension fund as follows:

"4346. *Fund.* The fund for such retirement system shall be created from the following sources:

1. From the proceeds of an assessment of teachers in the school district not exceeding one per cent of their salaries in a given school year, or such greater percentage as the board of directors of such school district may authorize and a majority of such teachers shall, at the time of such authorization by the board, agree to pay;
2. From the proceeds of an annual tax levy, not exceeding the amount produced in the current school year by the assessment of teachers as provided in the preceding paragraph of this section;
3. From the interest on any permanent fund which may be created by gift, bequest, or otherwise."

Paragraphs 1 and 2 of the above section contemplate that the fund is to be made up in part from contributions by teachers from their salaries in an amount agreed, which is further indication that the system was intended to have application only to teachers and not to retired teachers. The provisions of the statute do not permit of an interpretation which would allow benefits from the fund to a person who has retired prior to the creation of the fund. While teachers' pension statutes are to be liberally construed in their application, it is our opinion that the language of the Iowa statute will not permit the extension of such system to include retired teachers.

It is therefore our opinion that authority has not been conferred upon school district to include retired teachers in the pension and annuity retirement system contemplated by the statute.

CORPORATIONS: RENEWAL CERTIFICATES: The provision that a corporation must file a renewal certificate and articles within ten days after stockholders' renewal meeting with the Secretary of State is mandatory.

May 22, 1937. *Mr. Robert E. O'Brian, Secretary of State:* This department is in receipt of your request for an opinion on the following question:

Are the provisions found in Section 8367 in the 1935 Code requiring a corporation to file renewal certificate and articles with the Secretary of State within ten days after the stockholders' renewal meeting to be interpreted as a mandatory or a directory provision?

The provisions of Section 8367 of the 1935 Code are as follows:

"*Execution of renewal—record required.* Within ten days after the said action of the stockholders for the renewal of any corporation, a certificate, showing the proceedings resulting in such renewal, sworn to by the president and secretary of the corporation, or by such other officers as may be designated by the stockholders, together with the articles of incorporation, which may be the original articles of incorporation or amended and substituted articles,

shall be filed with the secretary of state and be by him recorded in a book kept for that purpose. * * *"

The Legislature has required that the renewal record shall be filed with the Secretary of State within ten days. The statute does not use the term, "may be filed," or "must be filed," but states that the record shall be filed within ten days. The evident intent of the Legislature in prescribing a time within which such renewal record should be filed was in order to give the Secretary of State an opportunity to check from the records in his office the corporations authorized to do business in the state and to ascertain whether or not they were in all respects complying with the law. Common experience teaches that unless a time limit is set within which a thing is to be done that the disposition of the ordinary person is to delay. We are not concerned with whether or not ten days is sufficient time to comply with the statute, and whether the time is reasonable, but whether or not it is permissive on the part of the corporation to so file within ten days or whether it is mandatory that they should file within such period of ten days.

We are of the opinion that the provision is mandatory and that the filing must be within ten days. If not so construed, there would be no limitation within which such record should be filed, and consequently, one neglecting to file his record could do so indefinitely.

We are of the opinion that the Legislature having fixed a ten day period and having used the word, "shall" intended that the provisions of the statute should be mandatory and that they should be complied with within the time specified therein.

COUNTY HOSPITALS: BOARD OF SUPERVISORS: INDIGENT PATIENTS: Bills for medicines furnished to indigent patients at county hospitals should be taken care of out of the maintenance fund of said hospital.

May 22, 1937. *Mr. Dio S. McGinnis, County Attorney, Leon, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Should the bills for medicines for indigent patients cared for at the county hospital be paid out of the hospital funds or from county funds on presentation of bills and claims therefor, approved by the hospital trustees and presented to the board of supervisors for payment?

Section 5362 of the statute is as follows:

"*Hospital benefits—terms.* Any resident of the county who is sick or injured shall be entitled to the benefits of such hospital, but every such person, except such as may have been found to be indigent and entitled to free care and treatment, shall pay to the board of hospital trustes reasonable compensation for care and treatment according to the rules and regulations established by the board. * * *"

Section 5353 is as follows:

"*Tax levy.* If the hospital be established, the board of supervisors, at the time of levying ordinary taxes, shall levy a tax at the rate voted not to exceed one-half mill in any one year for the erection and equipment thereof, and also a tax not to exceed one-half mill for the improvement and maintenance of the hospital, as certified by the board of hospital trustees; * * *"

Under the provisions of Section 5362 hereinbefore quoted, persons who are found to be indigent are entitled to free care and treatment at county hospitals. Under Section 5353, the board of supervisors is required to levy an annual tax for the improvement and maintenance of the hospital. It surely

could not have been the intent of the Legislature that after the establishment of a county hospital and a tax levied for its improvement and maintenance that the county should be called upon to pay from a different fund for supplies furnished to indigent patients who are entitled to free care and treatment at such hospital.

It is therefore the opinion of this department that bills for medicines furnished to indigent patients at county hospitals should be defrayed from the maintenance fund of said hospital.

COUNTY OFFICERS: CORONER: It is proper for the coroner of a county wherein a person dies to turn the body over to the coroner of the county in which the accident or crime occurred and have the inquest conducted in the latter county. To make the inquest valid the coroner and the jury must have a view of the body.

May 24, 1937. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* This department acknowledges receipt of your request for an opinion as to the jurisdiction of the Dallas County Coroner in the following situations:

A man is shot in Dallas County. Relatives remove him to a Des Moines hospital where he dies a few days later. The case is one where the coroner would in the exercise of a sound discretion determine an inquest in order. Does the Dallas County or Polk County coroner have jurisdiction?

A mine accident occurs in Dallas County. One of the victims is taken to a Des Moines hospital where he subsequently expires. Which coroner has jurisdiction?

Section 5200 of the Code, 1935, provides:

"*Inquest—jury.* The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means, and in such other cases as are required by law. When he has notice of the dead body of a person, supposed to have died by unlawful means found or being in his county, he is required to issue his warrant to a constable of his county, requiring him to summon forthwith three electors of the county to appear before him at the time and place named in the warrant."

Section 5201 of the Code provides:

"*Person killed in mine.* When a person shall come to his death by accident or otherwise, in any manner connected with the working of, or in, any mine, or by an explosion therein, an inquest shall be held, and the coroner shall make careful inquiry into the cause thereof, and return a copy of the verdict in said proceeding, with the minutes of all testimony taken thereat, to the state inspector of mines; and no person shall be qualified to serve as a juror at said inquest who has a personal interest in, or is employed in or about, the mine in which or at which the deceased came to his death, or by any of its proprietors."

Attention is first directed to the fact that it is only in Section 5200, supra, applicable to the first situation, that reference is made to "* * * dead bodies * * * found or being in his county * * *." No such language appears in the succeeding section, and yet it is clear that the holding of an inquest in each instance is mandatory on the coroner. It is the very nature of the coroner's proceedings that leads us to the conclusion that the jurisdiction in both cases is that of the Dallas county coroner. The object of a coroner's inquest is to ascertain the cause of death, to obtain and secure evidence in the case of death by violence or other undue means; it extends to circumstances attending the acts and tending to characterize them. 13 *Corpus Juris*, 1245. The coroner's jury is required to return "when, how, by what person, means, weapon, or accident" the deceased came to his death," and whether feloniously. *Section 5208, Code, 1935.*

Further, jurisdiction of the offense, if there be one, is in the county where the act occurred. Upon what theory then can jurisdiction obtain in Polk County? True, the dead bodies are there, but not under the circumstances, as we believe, as were within the contemplation of the legislature when it used the words "found or being in his county." It is our opinion that the legislature had in mind the ordinary situation, namely, where the coroner receives notice that the body of a dead person supposed to have died by unlawful means is found in his county, and not the situation where a living person is removed to his county for the purpose of medical attendance, dies there, and his death is attributed to violence or other undue means. To hold otherwise would place a burden upon the tax payers of Polk County neither reasonable nor logical, a burden that could become oppressive in view of Polk County's greater medical facilities. This is very apparent in view of the fact that the scene or vicinity of the crime or mine accident must needs be visited by coroner and jury, and the mileage or per diem expense incident thereto would be chargeable to Polk County, this despite the fact Polk County would have no jurisdiction, in fact no interest, in prosecuting the criminal act from which death ensued.

It is stated in the 13 *Corpus Juris*, 1248, that an inquest is properly held in the territory of the coroner *in whose jurisdiction the body is found,* without regard to where the death occurred or where the injury was received. As hereinbefore stated, it is our interpretation of the law that in neither of the given cases were the "bodies" found in Polk County within the meaning of either the Iowa statute or the rule as announced in Corpus Juris.

The Iowa statute is, however, framed in alternative language, namely, "found or being in his county." A literal interpretation of "or being in his county" would seem to include both of the illustrations set out in your letter, but we are of the opinion that the same construction should be placed on the words "being in his county" as was placed on the words "found * * * in his county," for the reasons hereinbefore set forth.

This brings us to a consideration of your last question stated by you as follows:

Is it proper for the coroner of a county wherein a person dies to turn the body over to the coroner of the county in which the accident or crime occurred and have the inquest conducted in the latter county?

We assume that this question is based upon the illustrations set out at page one of this opinion. We are aware of no rule of law compelling an answer, in the negative. The inquest is upon the dead body, Section 5200, supra. The jurors must inspect the body, Section 5208, supra.

The rule is stated in *13 Corpus Juris, 1249*, as follows:

"The inquest, to be valid, must be held super visum corporis, that is, the coroner and the jury must have a view of the body."

Consistent with our holding that the Dallas County coroner has jurisdiction, we are of the further opinion that it would not only be permissible for the Polk County coroner to turn the body over to the coroner of Dallas County in situations analogous to those described by you, for removal to Dallas County, in order that an inquest may be held in that county, but that the Dallas County coroner and his jury could view the body in Polk County. The Dallas County coroner having jurisdiction in the first instance, would not be precluded, in our opinion, from going outside the boundary of his county, when

necessary, to acquire information or ascertain facts surrounding a death reasonably supposed to have been occasioned by unlawful means or by accident or otherwise in any manner connected with the working of or in any mine, and upon which facts the verdict of the coroner's jury may be wholly or in part founded.

COUNTY HOSPITALS: INDIGENT PATIENTS: A person in an asylum in another county does not change her residence during the period of commitment. Section 5311. The patient having been under observation during tenure of employment and in absence of showing she was discharged and readmitted as patient of Johnson County, remains a charge of Cerro Gordo County. Sections 3390-3391.

May 24, 1937. *Mr. C. B. Murtagh, Comptroller of State:* Briefly, the facts upon which you base your question for an opinion from this department are as follows:

In November, 1930, a patient from Cerro Gordo County was admitted to the state sanatorium at Oakdale, Iowa, in Johnson County. As her condition improved the superintendent of the institution gave her part time work in the sanatorium, and eventually full time work, so that from the period September 30, 1933, to and including July 10, 1936, she was able to defray the entire expense of her keep and care at the sanatorium.

The patient was under observation all the while and shortly before July 10, 1936, signs of active tubercular trouble again appearing, she was removed from employment and sent to the patients' quarters where treatment was again given her. At the time the superintendent notified the Cerro Gordo County Board of Supervisors that she was being removed to patients' quarters, and that the expense for care and treatment would be charged to Cerro Gordo County.

Cerro Gordo County claims that the patient lost her residence in that county when she ceased to be an indigent patient in the sanatorium, and in the abstract sent to the comptroller for the expense of the indigent patient Cerro Gordo County deducted the expense for care and treatment incident to the patient in question.

The question is this:

When she started working full time at the sanatorium did she lose her residence in Cerro Gordo County and become a resident of Johnson County, and what county would be charged with the expense after she was committed the second time as an indigent patient?

In expressing our opinion on the foregoing question, we assume that the statement that the patient was committed a second time as an indigent patient is not in the technical sense, that in fact the party was admitted, under the procedure prescribed by law, but once, to-wit, in November, 1930, and that she was never discharged from the sanatorium.

Predicating our conclusions on this premise, we are of the opinion that the patient is a charge of Cerro Gordo County for the reasons hereinafter set forth. Section 3386 of the Code, 1935, provides:

"*Object and purposes.* The state sanatorium shall be devoted solely to the care and treatment of pulmonary tuberculosis, both in its incipient and advanced stages, of residents of this state."

Sections 3390 and 3391 of the Code prescribe the admission requirements, the latter section providing among other matters that:

"If the applicant appears to be a bona fide resident of this state."

There is no dispute as to the patient's residence at the date of her admittance to the state sanatorium. Cerro Gordo County reimbursed the state, as by law provided, from the period November, 1930, down to and including September, 1933. The facts are not clear as to whether during a part of that

time the patient worked in the hospital, but in any event, after September, 1933, she presumably worked full time and was thereby enabled to defray the entire expense of her care and keep in the sanatorium. The fact remains, however, that all the while she was under the surveillance of the hospital superintendent and the staff apparently as respected her condition of health. On July 10, 1936, she was removed from employment by the superintendent and sent to the patients' quarters for treatment.

Cerro Gordo County now disclaims liability for her care on the theory that she is no longer a resident of that county, for the reason that during the period September, 1933, to July, 1936, the patient, so to speak, was "on her own" and was no longer an indigent patient at the sanatorium.

While it is not so stated, we assume that its position is tantamount to contending that the patient has acquired a legal settlement in Johnson County, the site of the sanatorium, or at least no longer has a settlement in Cerro Gordo County. And while we deem it unnecessary, for the purpose of this opinion, to determine whether or not the provisions contained in Chapter 267, Code, 1935, entitled "Support of Poor," with particular reference to the sections relating to legal settlement, apply to the case of a patient admitted to the State Sanatorium at Oakdale as a county charge, yet brief consideration will be given the specific sections upon which such contention may be based.

Section 5311, in part provides:

"*Settlement—how acquired.* 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, * * *

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."

Section 5312 provides:

"*Settlement continues.* 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."

Section 5315 provides:

"*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."

It has been held by the Supreme Court of Iowa that the mere fact a person is in an asylum in another county does not change his residence during the period of commitment.

Scott County vs. Townsley, 174 Iowa 192;
Polk County vs. Clarke County, 171 Iowa 558;
State ex rel. Gibson vs. Story County, 207 Iowa 1117, 1120.

Further cited Section 5311, at subsection 3 provides:

"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."

The rule is stated to be that the abandonment of residence and acquiring a new residence (here using the term synonymously with domicile) is dependent upon the concurrence of the "factum of removal and the animus to remain" in the new location. Cerro Gordo County would not for a moment contend that it would have availed Johnson County anything to have served notice to depart as by Section 5315, supra, provided, for the reason that the patient in question, even while working, was under observation by the hospital superintendent and the hospital staff.

It might well be proved that the patient in question intended to abandon her residence in Cerro Gordo County and to make Johnson County her new residence, but we are inclined toward the view that the patient having been under close observation even during the tenure of her employment and in the absence of a showing that she was discharged and then readmitted, as by Sections 3390 and 3391, supra, provided, as a patient of Johnson County, remains a charge of Cerro Gordo County.

The language of the supreme court in *Polk County vs. Clarke County*, 171 Iowa, 558-563, a case involving an insane woman whose husband acquired a legal settlement in another county subsequent to the committing of his wife to the asylum from the county where settlement was at the time, so appeals to us as in spirit applicable to the instant case that we feel constrained to set it forth. There the court said:

"It is proper to note in conclusion that the adoption of the theory urged by counsel for plaintiff would be so prolific of hardship and injustice to counties to which the worse than widowed husband in such case might wander that the court would unhesitatingly reject it unless it be found justified by some clear expression of legislative authority. The county to which the husband goes would be practically helpless to protect itself against liability. It cannot be presumed to inquire into or know the family history of every person proposing to make a home within its borders, and if, as in the case at bar, such bills may accumulate for more than twenty-six years without notice, express or implied, and then the collection thereof be enforced, it might well become a source of embarrassment to many counties. Indeed, if argumentum ad hominem is a proper consideration in disposing of a question of law, Polk County, having within its jurisdiction the state's largest city, to which much of the human wreck and driftwood of the state at large naturally centers, might easily find a favorable decision of this controversy furnishing a precedent upon the question of the legal settlement of insane wives and family dependents, of which it would gladly be relieved in the future."

We do not apply the law of that case to the instant one for the reason that it is not an analogous situation, but the quoted language of the court where reference is made to Polk County as being in a strategic position to accumulate persons who are or may become public charges may in like manner apply to counties the situs of state institutions.

PEDDLERS' LICENSES: SENATE FILE 450. Fish peddlers and wholesale fish market operators are required to obtain state license. Fish peddlers exempted from county license assessment.

May 25, 1937. *Mr. M. L. Hutton, State Conservation Commission:* We acknowledge receipt of your request for an opinion of this department on two questions which are as follows:

"Does Section 106, Senate File No. 450, as passed by the 47th General Assembly, apply to wholesale marketing and distributing of fish only, or does it apply to fish markets and stores engaged in retail business also?

Does Section 106, Senate File No. 450, as passed by the 47th General Assem-

bly, conflict with Section 7177, Code of Iowa, pertaining to tax levies and exceptions of fees for peddling or distributing fresh fish. If so, does it make Section 106, Senate File No. 450, void by reason of the fact that Section 7177, Code of Iowa, is prior legislation?

Senate File No. 450, enacted by the 47th General Assembly, was approved April 27, 1937. Section 106 of said File provides as follows:

"Section 106. It shall be unlawful for any person, firm or corporation to peddle fish or to operate a wholesale fish market, jobbing house, or other place for the wholesale marketing of fish, or distribution of fish, without first procuring a license. The commission shall upon application and the payment of the required fee furnish a license to wholesale fish markets or fish peddlers. The commission may upon application and the payment of the required fee issue a certificate to each person who as a representative of a wholesale fish market is engaged in peddling fish."

It is the opinion of this department that Section 106 of Senate File No. 450 does not apply to the retail marketing of fish, except the peddling of fish. The certain acts stated in the section are made unlawful "without first procuring a license." A reference to Chapter 86-E1 pertaining to licenses, indicates that the following licenses are provided for and required: wholesale fish market or fish peddlers license, ten dollars; peddlers employed by wholesale fish market licenses, one dollar. It is our opinion that the legislature has said that the sale and distribution of fish, under certain circumstances, requires a license, and that a sale under such circumstances without a license is unlawful. Thus, under the provisions of section 106 quoted above, a license is required for (1) peddling fish; (2) operating a wholesale fish market, jobbing house, or other place for the wholesale distribution of fish; or (3) peddling fish as a representative of a wholesale fish market.

With reference to your second question, Section 7177, 1935 Code, excepts from the payment of a *county* peddler's license, "persons selling and distributing fish." Section 7177 aforesaid operates to exempt peddlers of fresh fish from the procuring a county license to sell the same outside cities and towns. Section 106 of Senate File No. 450, being subsequent legislation, is controlling, and its effect is to now require the state licenses mentioned above from all fish peddlers, wholesale fish market operators, and their representatives. No county licenses would be required of such operators or peddlers since they are exempted therefrom as aforesaid, but the license provided in Section 106 of the new act is a separate and different license and needs to be procured from the State Conservation Commission by those merchants governed by the statute.

STATE FUNDS: ENDOWMENT FUND—INTEREST: BOARD OF EDUCATION: STATE COLLEGE, AMES: Interest accumulating from investment of permanent endowment fund to be applied only to *endowment, support* and *maintenance* of land grant college.

May 25, 1937. *Mr. M. R. Pierson, Secretary, Iowa State Board of Education:* We acknowledge receipt of your request for an opinion of this department upon a question which is set out below. The facts which give rise to your question are as follows:

Section 3926 of the 1935 Code, paragraph 3, authorizes the Finance Committee to invest, on order of the Board of Education, any portion of the Endowment Fund in bonds of the United States, or the state, or some county thereof.

A part of the Endowment Funds have been so invested. The reason was that there were not enough applications for good farm loans to keep the Endowment Funds invested in farm mortgages. Uninvested funds, of course, returned

no interest. Honorable Lehan T. Ryan, Assistant Attorney General, on May 8, 1934, wrote an opinion that the Finance Committee would not have the legal right and authority to pay a premium for such bonds. At that time county bonds and others bearing a high rate of interest were selling above par. Therefore, the Finance Committee was limited in its purchases to those bonds bearing such a low rate of interest that the market quotation was not above par. Some of the bonds so purchased are returning only 1¾ interest. Maturities are as far distant as 1943 to 1946.

At the present time the money invested in bonds could be placed in good farm mortgages returning at least 4 per cent instead of 1¾ per cent. However, the market value of some of our bonds is a little below the cost price. To dispose of them at a lower price than cost would reduce the principal of the Endowment Fund, which we are pledged to save from diminution. Over the period of years from the present to the maturity of the bonds, the income of a 4 per cent investment would far more than offset the small loss to the principal incurred by selling the bonds at market price now.

May the accumulated interest from these bonds, without violation of the provisions governing the management of the Permanent Endowment Fund established by the Morrill Act, be applied to make up a possible deficit that might result from their sale now instead of holding them to the date of maturity?

The first Morrill Act, approved July 2, 1862, granted to each state thirty thousand acres, or its equivalent in land scrip, for each Senator and Representative in Congress, as of date of 1860. Section 4 of said act (as amended March 3, 1883) provides as follows:

"Sec. 4. (as amended March 3, 1883). That all moneys derived from the sale of lands aforesaid by the States to which lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States or of the States, or some other safe stocks; or the same may be invested by the States having no State stocks in any other manner after the legislatures of such States shall have assented thereto, and engaged that such funds shall yield not less than five per centum upon the amount so invested and that the principal thereof shall forever remain unimpaired: PROVIDED, That the moneys so invested or loaned shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in Section five of this act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

This section was subsequently amended in 1926 to provide that instead of the required 5% interest yield, the investment must yield a fair and reasonable return.

The said grants were made to the states upon certain conditions. The condition which is particularly pertinent to this inquiry is as follows:

Sec. 5. AND BE IT FURTHER ENACTED, That the grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative acts:

First. If any portion of the fund invested, as provided by the foregoing section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in the fourth section of this act, except that a sum, not exceeding ten per centum upon the amount received by any State under the

provisions of this act, may be expended for the purchase of lands for sites or experimental farms whenever authorized by the respective legislatures and States. * * *"

The State of Iowa has accepted the above grants upon the conditions set out in the aforesaid act of Congress by enacting legislation found in Section 4031, 1935 Code, which provides as follows:

"4031. *Grants accepted.* Legislative assent is given to the purposes of the various congressional grants to the state for the endowment and support of a college of agriculture and mechanic arts, and an agricultural experiment station as a department thereof, upon the terms, conditions, and restrictions contained in all acts of congress relating thereto, and the state assumes the duties, obligations, and responsibilities thereby imposed. All moneys appropriated by the state because of the obligations thus assumed, and all funds arising from said congressional grants, shall be invested or expended in accordance with the provision of such grant, for the use and support of said college located at Ames."

The foregoing provisions, therefore, contemplate that the following rules are to be applied in the administration of this permanent endowment fund:

(1) The money in said fund shall constitute a perpetual fund which shall forever remain unimpaired, and this perpetuity is guaranteed by the state which has pledged itself to replace any impairment thereof.

(2) The principal fund is to be invested by the Finance Committee of the Board of Education, is accordance with Section 3926.

(3) If investment is made in securities other than farm mortgages, the rate of interest on such investments is to be determined by the State Board of Education.

(4) The interest on such invested fund "shall be inviolably appropriated * * * to the endowment, support, and maintenance * * * of at least one college * * * related to agriculture and mechanic arts."

The question asked in your letter is this: May interest which has accumulated from investment of the permanent endowment fund be used to offset a possible deficit in the principal fund?

It is our opinion that the interest accumulating from the permanent endowment fund must be applied to the *endowment, support and maintenance* of the land grant college. It is further our opinion that the word "endowment" as used above does not contemplate the original endowment fund but refers to additions to that fund. This conclusion seems to be inevitable since the act itself provides that any impairment of the principal fund "shall be replaced by the State to which it belongs."

Therefore, interest accumulated from investment of such permanent fund is to be used for the support, maintenance or increased endowment of such college. If loss occurs to the permanent fund, such deficit must be supplied either by appropriation by the state or from sources other than the interest earnings of the fund itself.

BOARD OF CONTROL: PRISON-MADE GOODS: SHIPMENT: The law neither requires nor contemplates that prison-made goods shipped into "open" states be branded, labeled or marked.

May 27, 1937. *Mr. Robert B. Miller, Secretary, Board of Control of State Institutions:* This department acknowledges receipt of your request for an opinion on the question hereinafter set out.

The Hawes-Cooper Act (January 19, 1929), (45 Stat. 1084) (49 U. S. C. A., Sec. 60) was enacted by congress and was designed to divest convict or prison made goods of their interstate character so that upon arrival at destination such goods are thereafter subject to the regulation of the state into which they

are shipped as though they originated there. It was provided by congress that:

"Five years after January 19, 1929, all goods, wares, and merchandise, manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."

Prior to this enactment, a few eastern states had adopted legislation relating to convict or prison made goods, most of which statutes were successfully attacked on the ground that they constituted an unlawful interference with interstate commerce. (See note to *Whitfield vs. Ohio* (1935) 297 U. S. 431, 80 L. ed. 778, 785.)

The State of Iowa entered the field of such legislation in 1933, the Forty-fifth session of the General Assembly having enacted what is now recorded in the 1935 Code as Chapter 165-E1 entitled "Prison-Made Goods." This enactment took effect January 19, 1934.

It was provided:

"3274-e1. *Branding, labeling and marking.* Beginning January 19, 1934, all goods, wares and merchandise made by convict labor in any penitentiary, prison, reformatory or other establishment in which convict labor is employed in the state, and all such goods, wares and merchandise so made by convict labor in any penitentiary, prison, reformatory or any institution outside the state of Iowa in which convict labor is so employed, and which is imported, brought or introduced into this state shall, before being exposed for sale, be branded, labeled or marked as herein provided, and shall not be exposed for sale in this state without such brand, label or mark. Such brand, label or mark shall contain at the head or top thereof the words, 'prison-made' followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering, of the style and size known as great primer roman condensed capitals. The brand or mark shall in all cases, where the nature of the article will permit, be placed upon the same, and only where such branding or marking is impossible shall a label be used, and where a label is used it shall be in the form of a paper tag, which shall be attached by wire to each article, where the nature of the article will permit, and placed securely upon the box, crate or other covering in which such goods, wares or merchandise may be packed, shipped or exposed for sale. Said brand, mark or label shall be placed upon the outside of and upon the most conspicuous part of the finished article and its box, crate or covering."

3274-e2. *Penalty—effectiveness of act.* A person knowingly having in his possession for the purpose of sale or offering for sale any prison-made goods, wares or merchandise manufactured in any state without the brand, mark or label required by law, or who removes or defaces such brand, mark or label shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars. Provided, however, that the provision of this chapter shall not be effective unless and until the Hawes-Cooper act becomes effective."

Pursuant to Section 3360, Code 1935, there has been established by the Board of Control of State Institutions a chair and furniture industry at the state penitentiary at Fort Madison. It is as to this industry that you make your inquiry, namely:

"Whether or not by law we (Board of Control in control and management

of the state penitentiary at Fort Madison) must label shipments of furniture which are shipped into 'open' states."

In contradistinction to "closed" states, it may be said that "open" states are those which have not passed legislation relating to the sale or possession with intent to sell or otherwise regulatory or prohibitory of the sale of convict or prison-made goods, either simultaneously with or subsequent to the passage of the Hawes-Cooper Act hereinbefore referred to.

It is the opinion of this department that Chapter 165-E1 imposes no duty on the Board of Control to brand, label or mark shipments of furniture shipped into "open" states. At this point, however, it is important to give attention to the July 24, 1935, enactment of the Federal Congress (49 Stat. 494) (49 U. S. C. A. Sec. 62) requiring:

"All packages containing any goods, wares and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package."

and held a valid exercise of power to regulate interstate commerce in *Kentucky Whip & Collar Co. vs. Illinois Central R. R. Co.* (1936) 84 Fed. (2nd) 168.

It is to be noted that the Iowa law provides:

"* * * all such goods, * * * shall before being exposed for sale, be branded, labeled or marked * * * and shall not be exposed for sale in this state, without such brand, label or mark * * *."

and makes the possession for the purpose of sale or offering for sale of any prison-made goods, etc., without the brand, label or mark, or the removing or defacing of any such brand, label or mark a misdemeanor.

What is the intendment behind such legislation? The law in our opinion has the two-fold purpose of preventing free labor in this state from being forced to compete with convict labor, and to prevent the consuming public in this state from being deceived by "prison-made goods" not labeled as such. The law was an exercise of that power inherent in every sovereignty known as the police power. It is well settled in our law that it can be used to promote the public welfare in every particular which includes health, morals, public safety, peace and good order. It can also be used to prevent fraud, deceit, to prohibit all things hurtful to the comfort, safety and welfare of society, and add to the general public convenience, prosperity and welfare. *State vs. U. S. Express Co.*, 145 N. W. 45, 164 Iowa 112; *State vs. Holton Gray & Co.*, 126 N. W. 1125, 148 Iowa 724; *State vs. Hutchinson*, 147 N. W. 195, 168 Iowa 1; affirmed 37 S. Ct. 28, 242 U. S. 153, 61 L. ed. 217.

This type of legislation, though in more drastic form in that it altogether prohibited the sale of prison-made goods, (Sec. 2228-l Ohio General Code) was held not violative of the 14th Amendment to the Federal Constitution in *Whitfield vs. Ohio*, supra. The Supreme Court of the United States, quoting from its decision at page 784 of 80 L. ed. had the following to say:

"All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by non-discriminating legislation to preserve its policy from

impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument. * * *"

Having pointed out that the Iowa law is an exercise of the police power of this state, and that the constitutionality of such legislation is not to be successfully assailed under the 14th Amendment to the Federal Constitution, it remains but to consider the extent of its operation. It is an exercise of sovereign power and necessarily cannot operate beyond the physical boundaries of the sovereignty. Beyond the four walls of Iowa the law can have no operation, for there the sovereign power ends and the invoking of the police power to promote the economic welfare of its citizens and prevent fraud, deceit, unfair competition and imposition as respects them, must in like manner stop there. Neither the sovereign power nor the exercise by it of its police power can go beyond these boundaries.

In view of the foregoing discussion, it is our opinion that Chapter 165-E1, being a valid exercise of the police power of the state, can have no extra territorial effect, and that the law neither requires nor contemplates that prison-made goods shipped into "open" states be branded, labeled or marked.

INSURANCE: A casualty insurance company may not, in addition to covering an entire fleet of automobiles and trucks of a business concern, include automobiles individually owned by employees and officers of such business concern at a lesser rate than is charged persons within the same class who were not employees or officers of such concern.

May 27, 1937. *Hon. Ray Murphy, Commissioner of Insurance:* We are in receipt of your request for an opinion on the following proposition:

Whether an automobile liability policy covering the entire fleet of automobiles and trucks of a business concern, and covering also at the fleet insurance rate, which is a lesser rate than is charged for individual vehicles, the automobiles individually belonging to employees and officers of such business concern is in violation of the provisions of Section 8666 of the Code of Iowa relating to discriminations.

Section 8666 provides as follows:

"8666. *Discriminations.* No life or casualty, health or accident insurance company or association shall make or permit any distinction or discrimination between persons insured of the same class and equal expectancy of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms or conditions of the contract it makes; nor shall any such company or association or agent thereof make any contract of insurance agreement other than as plainly expressed in the policy issued; nor shall any such company or association or agent pay or allow, directly or indirectly, as an inducement to insurance, 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."

This section was originally enacted by the 23d General Assembly, and it pertained only to life insurance companies. The 27th General Assembly amended it by including "or associations." The 34th General Assembly amended it by including "or casualty, health or accident." The 34th General Assembly, in amending the law as it then existed, enacted Chapter 18, Section 13, and captioned that particular section with these words "Discrimination by Casualty Companies Prohibited."

The language of Section 8666 is ambiguous. It is readily understood in relation to life insurance, but some of the provisions cannot be construed in rela-

tionship to casualty insurance. In short, the part of the Act in question, being the first part, provides in substance as follows: that no life, health or accident insurance company or association shall make or permit any distinction or discrimination between persons insured of the same class and equal expectancy of life in the (1) amount or payment of premiums or rates charged for policies of life or endowment insurance; (2) or in the dividends or other benefits payable thereon; (3) or in any other of the terms or conditions of the contract it makes. The third is more or less a blanket restriction. It prohibits discrimination in any other of the terms or conditions of the contract it makes.

The words "terms" and "conditions" include rates as much as they include any other of the provisions of the contract. The first two prohibitions heretofore mentioned are clearly inapplicable to casualty insurance, but the third condition is so broad in its scope that it does for casualty insurance what all three prohibitions do for life insurance. To put any other meaning upon the statute would be to disregard the plain terms inhibiting discrimination in the terms or conditions of the contract.

It is well settled law that effect should be given to all the provisions of a statute whenever possible. *Anderson vs. Jester*, 206 Iowa 452, 221 N. W. 354.

It is also a well settled rule that statutes intended for public benefit are taken most strongly against those who claim rights or powers under them and most favorably to the public. *Hawkeye Portland Cement Co. vs. Chicago R. I. & P. Ry. Co.*, 201 N. W. 16, 198 Iowa 1250; *Curtis vs. Michaelson*, 219 N. W. 49, 206 Iowa 111.

The Iowa court in the recent case of *Smith vs. Sioux City Stock Yards Co.*, 219 Iowa 1142, 260 N. W. 531, affirmed its prior holdings and restated the rule in this state in interpreting statutes which are ambiguous, by saying:

"'In order to correctly interpret these statutes, we must consider what was the law before the mischief against which it did not provide, the nature of the remedy proposed, and the true reason of the remedy; and this mischief we may learn from knowledge of the state of the law at the time and of the practical grievances generally complained of.'"

Prior to the amendment of that section to include casualty companies, it was possible for those companies to discriminate in their rates to different policy holders. It is well known that the solvency of an insurance company depends upon its receipts and disbursements. That is to say to a large extent the solvency of the company depends upon the premiums paid in and the amount of the losses paid out. A lower premium exacted from one policy holder by necessity imposes a larger premium upon other policy holders in order for the company to maintain its solvency. In assessment companies, those paying the larger premium may be called upon to pay additional premiums for a loss sustained by one paying a smaller premium, but if a loss is sustained by one paying the larger premium the assessment against the party paying the smaller premium is in accordance with the premium that he pays.

It is our interpretation of this statute that the Legislature intended to prevent just such discriminations for the reason that such discrimination by necessity throws a greater burden upon those without the favored class. The caption of that particular section of the Act of the 34th General Assembly said: "Discrimination by Casualty Companies Prohibited." That caption may be used by the courts in determining the intent of the Legislature. *Seigel vs. C. R. I. P. Ry.*, 208 N. W. 78, 201 Iowa 712.

In arriving at this conclusion we are not adding anything to the statute that is not therein contained. We are only placing a broad construction on the same to conform to what the Legislative intent must have been.

It is, therefore, our opinion that a casualty insurance company may not, in addition to covering an entire fleet of automobiles and trucks of a business concern, include automobiles individually owned by employees and officers of such business concern at a lesser rate than is charged to persons within the same class who were not employees or officers of such concern.

CIVIL SERVICE: Librarians, assistants and employees in cities having a population of more than 15,000 do not come within the provisions of the civil service bill.

May 28, 1937. *Miss Julia A. Robinson, Executive Secretary, Library Commission:* We have your inquiry requesting an opinion as to whether or not librarians, assistants or employees are included under the new civil service bill passed by the 47th General Assembly. We assume that your inquiry pertains only to librarians serving in cities which come under the new civil service bill.

Section 5694 of the new bill provides in part as follows:

"The provisions of this chapter shall apply to all appointive officers and employees, including deputy clerks and deputy bailiffs of the municipal court in cities under any form of government having a population of more than 15,000, except: * * *."

The exceptions to the above provision do not include employees of a library. Chapter 299 of the Code pertains to public libraries, and provides for the appointment of trustees, known as library trustees, and Section 5858 thereof states as follows:

"Said board of library trustees shall have and exercise the following powers: * * *

"3. To employ a librarian, such assistants and employees as may be necessary for the proper management of said library, and fix their compensation; but, prior to such employment, the compensation of such librarian, assistants, and employees shall be fixed for the term of employment by a majority of the members of said board voting in favor thereof.

"4. To remove such librarian, assistants, or employees by a vote of two-thirds of such board for misdemeanor, incompetency, or inattention to the duties of such employment."

Section 5699-h1 of the new civil service bill provides in part as follows:

"All appointments or promotions to positions within the scope of this chapter * * * shall be made:

"In cities under the commission form of government, by the superintendents of the respective departments, with the approval of the city council; in cities under the city manager plan, by the city manager; in all other cities with the approval of the city council, and in the police and fire departments by the chiefs of the respective departments; and in the case of deputy clerks or deputy bailiffs of the municipal court, such appointments shall be made by the clerk or bailiff thereof, respectively."

Section 5712 of the new civil service bill provides in part as follows:

"Whenever the public interests may require a diminution of employees in any classification or grade under civil service, the city council, by resolution and acting in good faith, and after notifying the commission of such action, may either:

"1. Abolish the office and remove the employee from his classification or grade thereunder, or

"2. Reduce the number of employees in any classification or grade by suspending the necessary number. * * *"

Chapter 299, being the chapter on public libraries, also provides for something of a consolidation between schools, townships, counties and cities in the maintenance of a library, and provides for separate taxes to be levied by those different subdivisions for the maintenance of such library. Whether or not the fact that the library was being maintained by those different subdivisions precludes the party from being an employee of the city within the meaning of this chapter, we need not decide, although the above facts throw some light on the intention of the Legislature. The fact that appointments and discharges are made by the library trustees without the requirement of approval or any action whatsoever by the mayor, department head or city council, shows that the new civil service bill has no application to city librarians, assistants and employees. The management and control over libraries is solely in the hands of the trustees, and the mayor, department head and council have no authority to interfere therewith.

It is therefore our opinion that librarians, assistants and employees in cities included under the provisions of this Act do not come within the provisions of the civil service bill passed by the 47th General Assembly.

CITIES AND TOWNS: CITY CLERK: Under a statute providing that the compensation of an officer cannot be changed during his term, his salary cannot be affected by an ordinance which does not become effective until after the beginning of his term.

May 28, 1937. *Senator Hugh Lundy, Albia, Iowa:* You have submitted to us for an opinion the following proposition:

The salary of the city clerk was originally fixed at $115 per month, and on April 1, 1937 a new ordinance was enacted reducing it to $50 per month. The ordinance was published on the 5th day of April, 1937, and the paper was first put out for distribution at approximately four o'clock in the afternoon. The new council, who had previously been elected to office on April 5, 1937, at noon, and shortly after noon and long prior to four o'clock in the afternoon, appointed one Ray Smith as city clerk. The new council in their ordinance of appointment made no provision for the fixing of his salary. The question arises whether the new clerk is entitled to a salary of $115.00 per month or a salary of $50.00 per month. The clerk who served under the old council was transferred to a different department.

Section 5672 of the 1935 Code, in part, states as follows:

"* * * Nor shall the emoluments of any city or town officer be changed during the term for which he has been elected or appointed, unless the office is abolished."

Section 5633 provides that in all cities and towns the council at its first meeting after the biennial election shall appoint a clerk and may appoint a city solicitor, a city engineer and an auditor.

Section 5720 of the Code, providing that ordinances shall be published, states:

"When the ordinance is published in a newspaper, it shall take effect from and after its publication."

The publication of an ordinance is mandatory and not directory. *Dubuque vs. Wooten*, 28 Iowa 571; *Starr vs. Burlington*, 45 Iowa 87; *State vs. O. & C. Co.*, 113 Iowa 30, 84 N. W. 983; *Village of Durand vs. Love*, 236 N. W. 855, 254 Mich. 538.

It is clear under the law in these cases that after an appointment which comes within the provisions of the law is made, the council cannot at a

subsequent date change the salary of that appointee. At the time the clerk in question took office, the new ordinance was not in force and effect for the reason that the same had not been published, and to hold that he was only entitled to a $50.00 salary would be to allow his compensation to be changed during the term for which he was appointed. The effect is the same in the case at bar as the passing of an ordinance subsequent to his appointment changing his compensation. The fact that the ordinance was not published until after he had been appointed for his term does not mean that the ordinance was illegal or void, but means only that, as pertaining to him, it has no application.

The case of *Chicago vs. Wolf*, 221 Ill. 130, 77 N. E. 414, held that, under a statute providing that the compensation of an officer cannot be changed during his term, his salary cannot be affected by an ordinance which does not become effective until after the beginning of his term.

McQuillan on Municipal Corporations, Vol. 2, paragraph 548, at page 264, states:

"On the other hand laws providing that the change of salary shall not take effect during the term for which the officer was elected or appointed are often construed to prohibit any change of salary after election or appointment to take effect during the term for which the officer was elected or appointed."

It is therefore our conclusion that, as the law did not become effective until after its publication, the ordinance, if held applicable to the new clerk, would in fact be changing the emoluments of his office during the term for which he was appointed, which is prohibited by statute. Accordingly, the new clerk is entitled to a salary of $115 per month.

TAXATION: DELINQUENT TAXES: SPECIAL ASSESSMENT CERTIFICATES: *Senate File 167.* When an application is filed by a person having the right to redeem property sold for taxes, it is the duty of the county auditor to compose the taxes for which such property had been sold and all subsequent taxes added to the tax sale into one unit or item and to grant such applicant the provisions of the Act. (S. F. 167.) There is no provision in S. F. 167 including special assessments in the agreement made with the applicant or owner of the property for a right to redeem such property.

May 28, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following questions arising under Senate File 167 passed by the 47th General Assembly:

1. Section 1 of the Act provides that delinquent taxes *may* be composed into one item or amount. Does the use of the word "may" leave it optional with Boards of Supervisors as to whether or not they shall place this Act into effect in their particular county?

The question of whether or not the provisions of Senate File 167 shall be put in operation is not left discretionary with the Board of Supervisors regardless of the fact that the Legislature has used the word "may" in Section 1 of the Act.

In the first paragraph of Section 1, in referring to the delinquent taxes for which property has been bid in by the county and subsequent taxes added to the tax sale, the Act states that these items "may be composed into one item or amount," and in the second paragraph of Section 1, in referring to the owner of property sold to the county under Section 7255-b1 of the statute and other persons who have been given the right to redeem, the Act states that they "may make and file with the county auditor * * * a written offer to pay the current taxes * * *." In construing the word "may" as used by

the Legislature in paragraphs 1 and 2 of Section 1, the usual and ordinary method of construction must be adopted. In the case of *Smalley vs. Paine*, 116 S. W. 38, the Supreme Court of Texas stated:

"The word 'may' means 'must' whenever third persons or the public have an interest in having the act done or have a claim de jure that the power shall be exercised."

In the case of *Montgomery vs. Henry*, 39 So. 507, the Supreme Court of Alabama stated:

"The word 'may' is construed to mean 'shall,' whenever the right of the public or third persons depends upon the exercise of the power or performance of the duty to which it refers."

Therefore, in line with the holdings in the cases above cited, the word "may" in paragraph 1 of Section 1 should be construed as "must" or "shall," and whenever an application is filed with the county auditor by a person having the right to redeem property so sold, it would be the duty of the county auditor to compose the taxes for which such property had been sold and all subsequent taxes added to the tax sale into one unit or item and to grant to such applicant the provisions of the Act.

2. Section 1 of the Act further provides that delinquent taxes may be composed into one item or amount for the entire amount of all such taxes and costs, excluding penalties and interest. Does this mean that the penalties and interest accumulating since the sale are to be eliminated, or does it mean that all penalties added to the taxes by the county treasurer at the time of holding the sale are also to be excluded?

In paragraph 1 of Section 1 the act provides:

"Delinquent taxes * * * may be composed into one item or amount for the entire amount of all such taxes and costs, excluding penalties and interest, as hereinafter provided."

And in paragraph 2 of Section 1 the Act provides:

"including all subsequent taxes added affecting the particular property sold appearing on the tax sale record in the office of the County Auditor, but excluding penalties and interest, as certified by the County Auditor,"

The items which are to be "composed into one item or amount" are the delinquent taxes upon any parcel of real estate for which it has been bid in by the county and the subsequent taxes added to the tax sale. The amount for which the county is required to bid in the property is all of the delinquent taxes due at the time of the sale. The subsequent taxes referred to in the Act are taxes accruing subsequent to the sale which the county treasurer has shown paid and carried against the tax sale. The Act provides that on these items the interest and penalties shall be excluded.

Therefore, in answer to the above question, it is the opinion of this department that Senate File 167 provides for the exclusion of all interest and penalties on the delinquent taxes for which the property was sold and also on such subsequent delinquent taxes as the county treasurer has shown paid and carried against the tax sale certificate.

3. Section 1 of the Act provides that all delinquent taxes may be composed into one item. On some of the sales held under Section 7255-b1, special assessments were also included on the tax sale certificate. The county, however, bid only the amount of the general taxes, interest, and penalty. The question is whether or not the total of such special assessments included on the certificate should be included in the composing of all delinquent taxes into one item? If so, does this Act eliminate penalty and interest on such special assessments?

The facts stated in the foregoing question are inconsistent. For instance the question states:

"On some of the sales held under Section 7255-b1, special assessments were also included on the tax sale certificate. The county, however, bid only the amount of the general taxes, interest and penalty."

The tax sale certificate represents the amount for which the property was sold and if the county bid only the amount of the general taxes, interest and penalty, there would be no authority for issuing a tax sale certificate including special assessments.

The only statutory provision authorizing counties to become bidders at tax sales is contained in Section 7255-b1. Section 7255-b1 limits the authority of counties in the purchase of properties at tax sales to the delinquent general taxes, interest, penalties and costs, and does not extend to counties the right to include special assessments in their bids. Therefore, if the county, in making the purchase under Section 7255-b1 of the statute, has included special assessments in its bid and a certificate has been issued accordingly, the sale is invalid and should be cancelled on the records of the county auditor's office, and resold.

4. If special assessments are to be excluded from the contract, what disposition shall be made of these special assessments? If the owner of the property enters into an agreement with the county under this Act and the special assessments are not included in the proposal, should the owner be required to pay the special assessments in full with accrued penalties at the time of entering into the agreement?

There is no provision in Senate File 167 for including special assessments in the agreement made with the applicant or owner of the property for a right to redeem such property on the installment plan. The Act requires that the applicant shall file "a written offer to pay the current taxes each year before they become delinquent" in addition to one-tenth of the composed item or amount represented by the tax sale certificate and subsequent taxes paid by the county. Under Section 6227 of the statute provision is made for the levying of special assessments, the section being as follows:

"*Certification of taxes and assessments—collection.* All assessments and taxes of every kind and nature levied by the council, except as otherwise provided by law, shall be certified by the clerk on or before the first day of September to the county auditor, and by him placed upon the tax list for the current year, 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 6228 provides for the sale of property for delinquent special assessments, the section being as follows:

"*Tax sales.* Sales for such assessments and taxes when delinquent shall be made at the same time and in the same manner as such sales are made for other taxes, and should there be other delinquent taxes or assessments due from the same person, and collectible by the county treasurer, the sale shall be for all such delinquent assessments and taxes, and all the provisions of law relating to the sale of property for delinquent taxes shall be applicable so far as may be to such sales."

The Act provides that the applicant offer to pay the current taxes each year. The current taxes are not limited to general taxes but include special assessments as well as general taxes, and when the applicant is required to pay the current taxes each year, he would be required to pay the current installments of special assessments in order to avail himself of the provisions of the Act. The applicant would only be required to pay such special assessments as would

be due or delinquent at the time of his offer together with such interest and penalties as were lawfully charged against the same.

5. What information should be given to county officials on the right of special assessment certificate holders, etc., under Section 6041 of the Code? Are such certificate holders precluded from assignment as long as the contract is in existence and valid?

Section 6041 of the 1935 Code is 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."

Section 6041 is contained in Chapter 308 of the 1935 Code. Senate File 167 recently enacted does not amend or repeal Section 6041. Therefore, a special assessment certificate holder, or the holder of a bond payable out of a special assessment, or a city or town in which any parcel of ground was located, which has been sold to the county for taxes, would be entitled to an assignment of the certificate upon tendering to the county auditor the amount which the county would be entitled to upon redemption if such tender were made to the county auditor before the owner or person having the right to pay such taxes has availed himself of the provisions of Senate File 167. In that event, upon assignment of the tax sale certificate to the holder of a special assessment certificate or the holder of a bond payable out of a special assessment, or a city or town within which city or town is situated such parcel of ground, would be entitled to exercise their rights under such certificate of sale without reference to Senate File 167. The property owner, or one entitled to redeem from such tax sale would thereby lose his right to the benefits of Senate File 167. The property owner or one entitled to redeem from such tax sale would thereby lose his right to the benefits of Senate File 167 unless such right was exercised before the assignment of the tax sale certificate to the holder of a special assessment certificate.

6. If a special assessment certificate holder comes into the office before the owner elects to take advantage of Senate File 167, and demands assignment since effective date of the Act, under Section 6041, is the owner estopped from the benefits of this Act? If not, what is the status of a special certificate holder?

The answer to the above question is embodied in the answer to Question No. 5.

7. If you should rule that the rights of the special assessment certificate holder under Section 6041 have not been invalidated by this Act, and such certificate holder deposits with the county auditor the necessary funds and demands assignment, would this invalidate the rights of the owner under his contract with the county to make payments on installments and force him to pay the entire amount due in order to estop the certificate holder from taking deed?

In answering your question on the facts stated therein, attention is called to what has heretofore been said in answer to questions 5 and 6. However, if a special assessment certificate holder does not attempt to make redemption under the provisions of Section 6041 until after the property owner has availed himself of the privileges granted to him under Senate File 167, then and in that event the special assessment certificate holder would be entitled to an

assignment of the tax sale certificate held by the county and issued under the provisions of Section 7255-b1 of the statute. However, the holder of a special assessment certificate who acquired an assignment of the tax sale certificate would be compelled and would be bound by the agreement made by the taxpayer with the county for the right to pay the taxes, which has been compounded into one item or amount by the county auditor, in installments. The special assessment certificate holder being an assignee of the county's interest in the tax sale certificate would take the same bound by the same terms and conditions as its assignor, and such special assessment certificate holder would, under an assignment of the tax sale certificate, hold the same subject to the taxpayer's right to pay the same in installments with the same rights to proceed with the serving of a notice of the expiration of the right of redemption upon default of payment of subsequent installments by the taxpayer, as is embodied in Sections 4 and 5 of Senate File 167. However, if the county has already obtained a tax deed to the property, the holder of a special assessment certificate against such property would have no rights therein save and except in the event that the previous owner of the property should make redemption thereof in accordance with and in compliance with Section 6 of the Act, in which event upon the repossession and revesting of the title in such previous owner, all pre-existing liens are reinstated and upon such reinstatement of the liens against the property the holder of a special assessment certificate would then be entitled to avail himself of the provisions of Section 6041 of the statute, subject however to the property owner's right to pay the taxes, which have been compounded into a single unit or amount in installments as provided for in Senate File 167.

8. Section 1 of the Act also provides that subsequent delinquent taxes not already entered on the tax sale record in the office of the county auditor, with accrued interest, penalties and costs, and current taxes due but not delinquent, shall be paid by the owner. Does this require the owner to pay special assessments as well as general taxes?

An owner availing himself of the provisions of Senate File 167 would be required to pay special assessments then due at the time he filed his application, as provided in Section 1 of the Act, and to pay subsequent special assessments as they became due the same as regular or general taxes.

9. Section 6 of the Act provides that where the period of redemption has expired and the county has taken a tax deed to a piece of property, the owner shall not sell such property until six months after the effective date of the Act, and that any owner or owners of such property may during the said six month period enter into a contract with the county for the payment of such taxes or the repurchase of said property from the county. This section further provides that all liens of every kind which existed prior to the issuance of a tax deed shall be reinstated and take the order of preference they had prior to the issuance of the tax deed, as though no tax deed had been issued. Will this section of the Act authorize the Board of Supervisors to cancel such tax deeds of record? If not, can the Legislature by this Act restore the tax liens cancelled by the tax deed, in view of the many decisions by the Supreme Court of Iowa that a tax deed wipes out all liens against the real estate?

Our Court has many times held that a tax deed is a new and independent title and that upon the expiration of the period of redemption the interest of the prior owner is thereby wiped out, so in the event of the issuance of a tax deed under ordinary circumstances the title would be vested in the county and it could only be reinvested in the taxpayer by conveyance of the property by a valid deed from the county to the taxpayer. Therefore in instances where

the tax deeds have already issued, it would be necessary for the county to reconvey the property to the taxpayer upon the taxpayer's compliance with the provisions of the Act with reference to his right to redemption upon the installment plan.

With reference to the restoration of liens upon the property antedating the tax deed to the county, it is true that our Supreme Court has held that such liens are wiped out by the execution of a tax deed; that a tax deed creates a new and independent title, and that the property passing thereby passes free and clear of prior liens. However, the Act grants to the taxpayer, or the previous owner of the property, the right to repossess his property upon certain conditions, among which is that the liens divested by the tax deed shall be restored in the order of their priority as they existed prior to the tax deed. That is a contractual right existing between the taxpayer and the county. The law imposes that obligation upon the taxpayer, and if the taxpayer after having lost his property wishes to repossess and re-own the property, the Legislature has imposed as a condition precedent to his repossessing the property from the county, the obligation that he consent that the liens extinguished by the tax deed be reinstated against the title in the same manner and in the same priority as they existed prior to the tax deed.

10. In many cases the counties have already served notice of expiration of the time of redemption. Under this Act, will it be necessary for the counties to again serve notices after October 23, this being six months from the date that the Act went into effect?

Section 2 of the Act provides:

"Upon the filing of said agreement (the one required in Section 1) all the accrued penalties and interest on the taxes embraced in said agreement shall be waived and further proceedings shall be suspended as long as no default exists. * * *"

Therefore, when the taxpayer seeks to avail himself of the provisions of the act and files the agreement referred to in Section 2 of the act, further proceedings with reference to the tax certificate are suspended as long as no default exists.

Under the provisions of Section 4 of the Act it is provided that in the event of a default occurring in the payments to be made in the agreement above referred to or under Section 6 of the Act and such default continue for a period of sixty days, the county auditor is then authorized to proceed, Section 4, in part, being as follows:

"* * *, the county auditor shall forthwith serve notice of the termination of the right of redemption."

It is therefore apparent that the Legislature intended that the agreement, once entered into, suspend all proceedings with reference to the tax sale certificate and that only upon the condition of such default continuing for sixty days would the county be permitted further proceedings, and in the event of a continuing default for sixty days, the portion of Section 4 heretofore quoted requires that the county auditor "shall forthwith serve notice of the termination of the right of redemption," which under the statute is a ninety day notice.

Therefore, in the event of a default the county will be required to serve notice of the expiration of the right of redemption regardless of whether a notice had been previously served or not.

11. If your answer to the foregoing question is "no," should counties continue with service of notices during the six-month period?

In view of the fact that counties are only permitted to serve the notice of the termination of the right to redeem after a continuing default of sixty days, it would appear to be a useless procedure for counties to continue serving notices, as set out in the above question, at this time.

TAXATION: HOMESTEAD EXEMPTION ACT: If the heirs live on a homestead which is part of an estate in process of administration, said homestead is entitled to homestead tax exemption.

May 29, 1937. *Mr. G. H. Meyer, Clerk of the Court, Elkader, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. A homestead is part of an estate in process of administration. The heirs live on it. Is the homestead entitled to an exemption under the Homestead Exemption Act?

Under the foregoing facts the homestead is entitled to a tax credit to the extent of twenty-five mills on a twenty-five hundred dollar valuation. The fact that the estate is in process of administration is immaterial. The real estate passes directly to the heirs and only becomes a part of the estate in the event it is necessary to take charge of the real estate on account of the absence of heirs to look after it, or for the purpose of selling the same to pay debts. Under the facts stated, the heirs are living upon the homestead. The entire interest is owned by blood relatives, and a full twenty-five hundred dollar credit allowance should be made.

2. An estate consisting of a homestead only, no administration having been had, is occupied by the heirs. Are they entitled to a homestead tax credit under the Homestead Exemption Act?

The facts embodied in question No. 2 are the same as those in your first question with the exception of administration. As stated in answer to question No. 1, the real estate does not pass to the administrator except in the instances mentioned in the answer to that question.

Therefore, the heirs, under the facts stated in your second question, would be entitled to the benefit of the homestead exemption credit the same as are those in question No. 1.

JUSTICE OF THE PEACE: COUNTIES: A judgment transcripted from the justice of the peace to the district court must be recovered in a court of record.

May 29, 1937. *Mr. Leon A. Grapes, County Attorney, Davenport, Iowa:* We are in receipt of your request for an opinion on the following proposition:

Is a judgment transcripted from the justice of the peace to the district court entitled to the benefits of Section 5079-c4 of the 1935 Code of Iowa?

Section 5079-c4 provides in part as follows:

"Whenever a final judgment is recovered in any court of record in this state in an action for damages for injury or death of a person, or for injury to property caused by the operation or ownership of any motor vehicle on the highways of the state * * * a transcript * * * 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 * * * to operate a motor vehicle on the highways of the state * * *."

Section 10574 states as follows:

"The clerk shall file the transcript as soon as received, and enter a memorandum thereof and the time of filing in the judgment docket and lien index.

and from such entry it shall be treated in all respects and in its enforcement as a judgment obtained in the district court. No execution shall issue from the justice's court after the filing of such transcript."

The latter statute pertains to transcripts from the justice of the peace court to the district court.

Section 5079-c4 was enacted subsequent to the other section. Under Section 5079-c4 it is expressly provided that in order to procure the benefits of that section it is necessary that the "judgment is recovered in a court of record." Even though a judgment is transcripted to a district court from the justice court, it was not recovered in a court of record. To put any other interpretation on the statute would be to widen the scope of the provisions of Section 5079-c4.

It is our opinion and interpretation that Section 5079-c4 means just what it says, as it is plain and unambiguous, and that is that the judgment must be recovered in a court of record.

STATE INSTITUTIONS: SUPERINTENDENT'S RIGHTS: SERVICE OF NOTICE: Superintendent of a state hospital has authority to acknowledge service for a person confined in any state hospital for insane or county home. Section 11068, Code. Personal service on patient obtained only if provisions of Section 11059 are followed.

May 29, 1937. *Mr. George F. Mikesh, County Attorney, Cresco, Iowa:* This department acknowledges receipt of your request for an opinion on the following question:

Has the superintendent of the Independence State Hospital, Dr. Stewart, the right to accept and waive service of notice upon a patient being in the hospital at Independence, Iowa, said patient being in a physical condition such that notice should not be served upon the patient, this acceptance being relative to the notice upon said patient of the hearing of the final report and application for discharge of a sister of said patient, which sister is the administratrix in the estate of the deceased mother of said patient?

The proposed form of acceptance of service of notice, deleted as to names, is as follows:

IN RE: ....

ESTATE OF * * *: ....

DECEASED: * * *

IN THE MATTER OF FINAL REPORT OF .... AS ADMINISTRATRIX AND APPLICATION FOR DISCHARGE

IN THE ABOVE MATTERS: ....

The undersigned being the SUPERINTENDENT of the hospital for the insane of Iowa, hereby accepts due legal sufficient and timely service of proper notice of the hearing of final report and application for discharge as therein averred and hereby submits same for action at the convenience of the DISTRICT COURT OF HOWARD COUNTY, IOWA, and for such disposition thereof as deemed best by said court and this acceptance is relative to one............ ....(a patient at the above named hospital for the insane in Iowa—said..........................being in a mental condition such that service of notice upon him would be injurious to him) and, the undersigned waives time and all formalities herein in said matters.

Dated at Independence, Iowa, this..........day of.................., 1937.

....

SUPERINTENDENT OF THE HOSPITAL
for the insane in Iowa.

At Section 11060, Code, 1935, provision is made for the acknowledgment of service, said section providing as follows:

"Method of service. The notice shall be served as follows: * * *

"3. By taking an acknowledgment of the service indorsed thereon, dated and signed by the defendant."

Section 11068, Code, 1935, provides:

"*Acknowledgment of service.* When it becomes necessary to serve personally with a notice or process of any kind a person who is confined in any state hospital for the insane, or county home, the superintendent thereof shall acknowledge service for such person, whenever in his opinion personal service would injuriously affect such person, which fact shall be stated in the acknowledgment of service. A service thus made shall be held a personal one on the defendant."

Section 12073, Code, 1935, provides:

"*Notice of application for discharge.* Unless notice be waived in writing, no administrator, executor, guardian, or trustee shall be discharged from further duty or responsibility upon final settlement, *until notice of the application shall have been served upon all persons interested* as required for the commencement of a civil action, unless a different service be ordered by the court or judge, which order may be made before or after filing the final report."

Section 11068, supra, gives the superintendent authority to acknowledge service for a person confined in any state hospital for the insane or county home. It is our opinion that such is the extent of his authority, and that he has no authority, either express or implied, to waive time for hearing on the application incident to which service of notice is made or to waive other "formality."

Under Section 12073, supra, where the court has not prescribed the form and manner of service of notice, it is required that service be the same as is required in the commencement of a civil action, and it is our opinion that service on the superintendent and his acknowledgment of service, as by Section 11068, supra, provided, would constitute personal service on the patient only if the provisions of Section 11059, Code, 1935, respecting time within which service may be made, are followed.

This does not preclude the securing of jurisdiction; it only requires that the niceties of the law be complied with.

TAXATION: HOMESTEAD EXEMPTION ACT: VETERAN'S EXEMPTION: SOLDIER'S EXEMPTION: Under the homestead exemption act, veteran retains exemption provided for by statute. Is entitled to additional homestead relief, to be applied against the value of his property less his soldier's exemption.

May 29, 1937. *Mr. Ray O. Garber, Judge Advocate, American Legion, Des Moines, Iowa:* We are in receipt of your letter of May 5 with reference to the statutory exemption of World War Veterans as it may be affected by Senate File No. 184, known as the Homestead Tax Exemption Act (Chapter 195, Laws of the 47th General Assembly).

We are well aware of the fact that there are many veterans in Iowa owning homesteads with an assessed valuation of less than $2,500.00. We believe the question you ask may be stated as follows:

Is the homestead tax relief to be given a veteran upon the valuation of his property or upon the valuation of his property less his soldier's exemption?

In answering this question we have noted the suggestions made in your letter of May 5, in which you state:

"Inasmuch as it was the intention of the legislature to preserve the principle of the soldiers' exemption statute, and in addition thereto, enable the veteran to derive such benefits as are provided in Senate File 184, it occurs to us that the intent should be carried out."

It was with this idea in mind that we asked you to meet with the members of the staff of this office on Monday, May 24, and with certain members of the legislature who were here at that time.

The result of that conference seemed to be that a majority of the committee were of the opinion that the homestead relief was to be returned to the veteran on the basis of the value of his property less his soldier's exemption. You will recall that one of the Senators who was active in drafting the Act so expressed himself in writing, and subsequently I talked to the other Senator who aided in drafting the Act, and who was not present at the meeting, and he very definitely expressed himself as of the same opinion.

In other words, they seemed to think that the clear intention of the legislature was not to preclude any veteran from the veteran's benefit already granted him under the law, and that the exemption of the veteran should first be deducted from the value of the property, and that the value certified for homestead exemption should be whatever balance there is. Consequently the intent of the legislature to which you refer in your letter has been definitely expressed by the men who drafted the act, most of whom are ex-service men.

We call your attention to our opinion of May 13, rendered by Mr. N. S. Genung and concurred in by the members of the staff of this office, written to Mr. Howard M. Hall, Assistant County Attorney of Polk County, in which we said:

"It is therefore the opinion of this department that in allowing homestead tax exemption credit to one entitled to the exemption in Section 6946 of the statute, that the value to be taken is that arrived at after deducting the specific exemptions to which the taxpayer is entitled."

We also refer you to an opinion from this office dated March 25, 1937, written by Mr. N. S. Genung and concurred in by the members of the staff, from which we quote:

"The exemption allowed by Section 6946 is fixed at not to exceed $500.00, but Section 6947 puts a limitation upon such exemption and specifically provides that the exemption is 'to be made from the homestead.' That is the first instance of where the exemption is to be taken from, and in the event of a veteran owning a homestead, he would be required to take his exemption from the valuation of his homestead. The statute then provides that if there is no homestead, his exemption may be taken from other property owned by such veteran."

We call your attention to the fact that the provisions of Section 6947 are mandatory and that any change in the provisions of the section would have to be made by the legislature.

It is therefore our opinion that after a further consideration of the questions contained in your letter, and after consulting with the members of the committee in an attempt to determine the legislative intent, that the former rulings of this department must be reaffirmed, and they are

(1) that the soldiers' exemption provided for by statute still stand unimpaired;

(2) that the soldier is definitely entitled to the additional relief which will be given him under the Homestead Tax Exemption Act, to be applied, however, against the value of his property less his soldier's exemption.

NOTARIES PUBLIC: COMMISSION: The legislature having limited the power to the county of appointment, which we hold to be county of residence, and providing power may extend to any adjoining county, it is our opinion that county engineers or other applicants cannot receive appointment as notaries public in counties other than that of residence. Code, Sections 1197, 1200, 1201, 1203, 1204, 1212.

June 1, 1937. *Mr. G. W. Kirtley, Executive Secretary, Governor's Office:* We acknowledge receipt of your request for an opinion on the question following the statement of facts.

The question has arisen because the Highway Commission desires to have many of their county engineers take out notary commissions. In many instances, they do not live either in the county where they work or in one which adjoins it, so they could have their appointment certified from the county of their residence.

Can a notary commission be issued to one who is not a resident of the county for which he is making application?

In this state the appointment of notaries public is regulated by statute. Chapter 65, Code, 1935. Under Section 1197 thereof the authority to appoint or revoke is vested in the Governor. While there is no specific statutory requirement as to the residence of an applicant contained in the cited chapter, yet in our opinion such a requirement is necessarily to be implied from the express provisions thereof.

In this connection your attention is respectfully referred to the following provisions:

"1197. *Appointment.* The governor may at any time appoint one or more notaries public in each county and may at any time revoke such appointment.

"1200. *Conditions.* Before any such commission is delivered to the person appointed, he shall: * * *

"2. Execute a bond to the state of Iowa in the sum of five hundred dollars conditioned for the true and faithful execution of the duties of his office, which bond, when secured by personal surety, *shall be approved by the clerk of the district court of the county of his residence;* all other bonds shall be approved by the governor. * * *"

"1201. *Certificate filed.* When the governor delivers a commission to the person appointed, he or his secretary shall make a certificate of such appointment and forward the same to the clerk of the district court of the proper county, who shall file and preserve the same in his office, and it shall be deemed sufficient evidence to enable such clerk to certify that the person so commissioned is a notary public during the time such commission is in force."

"1203. *Powers within county of appointment.* Each notary is invested, within the county of his appointment, with the powers and shall perform the duties which pertain to that office by the custom and law of merchants."

"1212. *Change of residence.* If a notary remove his residence from the county for which he was appointed, such removal shall be taken as a resignation."

The prevailing statutory law in this state on the subject "notaries public" was augmented by the Thirty-fourth General Assembly when it enacted what first appeared in the 1913 Supplement to the Code of Iowa as Section 377, now Section 1204, Code, 1935. This section provides:

"*Powers within adjoining county.* Such notary public is also invested with the powers specified in Section 1203 in any county adjoining the county of his appointment, providing he has filed in such adjoining county, with the clerk of the district court, a certified copy of his certificate of appointment."

Your attention is directed to the fact that the power incident to appointment as notary public may be extended to "any county adjoining the county of his

appointment," and the provisions of this section are not to be enlarged and construed to embrace a second or third tier of counties on the theory that such counties are adjacent, adjoining or contiguous to the county actually or physically adjoining the county of appointment. The word "adjoining" is unambiguous and must be given a literal interpretation. In other words, there can be no such public officer in this state as an itinerant notary public. Resignation by removal of residence from the county for which appointment was made clearly leads to the conclusion that residence in the county of appointment is an essential requirement in securing the appointment.

The legislature having seen fit to limit the power to the county of appointment, which we hold to be the county of residence, and specifically providing that the power may be extended to any adjoining county, it necessarily follows and it is our opinion that county engineers or other applicants similarly situated cannot receive appointment as notaries public in counties other than that of their residence.

STATUTES: IOWA LIQUOR CONTROL COMMISSION: LEGISLATURE: COMMITTEE ON RETRENCHMENT AND REFORM: OFFICES: Committee on retrenchment and reform and executive council are authorized to approve any leases which the liquor commission may wish to extend or enter into for its administrative offices. Above two bodies have no authority to approve leases of liquor commission for buildings used in the conduct of its business, regardless of where situated.

June 1, 1937. *Senator Leo Elthon, Fertile, Iowa:* In your letter of May 20th you ask the following two questions:

1. Does Section 2 of House File 550 of the 47th General Assembly authorize or require the joint committee on retrenchment and reform to approve leases of liquor stores situated outside the city of Des Moines?
2. Does Section 2 of House File 550 of the 47th General Assembly authorize or require the joint committee on retrenchment and reform to approve any leases which may be made covering premises occupied by the Iowa Liquor Control Commission at the seat of government?

We will attempt to answer your questions in the order in which they are stated above.

I.

Section 2 of House File 550, as passed by the 47th General Assembly, reads:

"The executive council and the joint legislative committee on retrenchment and reform are hereby authorized to consider the advisability of consolidating the housing of all state departments located in Des Moines and now housed in buildings rented or leased by the state and the said executive council and joint legislative committee on retrenchment and reform are further authorized and directed to investigate as to repairs and improvements on all state property and shall report their findings with reference to the housing of the various state departments now housed in leased buildings, and shall further make such recommendations as they consider advisable to the next session of the General Assembly of the State of Iowa as to the manner of providing for necessary office space and shall also make recommendations as to the improvements and the amount thereof that are necessary on the various buildings under the control of the State of Iowa. All leases leasing any buildings or office space for state purposes hereafter executed or leased shall be subject to the approval of the state executive council and the joint legislative committee on retrenchment and reform."

The last sentence of the section quoted above is the basis for the questions asked in this opinion, "All leases leasing any buildings or office space for state purposes hereafter executed or leased shall be subject to the approval of the

state executive council and the joint legislative committee on retrenchment and reform."

A statute is the will of the legislature, and a fundamental rule of interpretation, to which all other rules are subordinate, is that a statute is to be interpreted according to the intent of those that made it.

The words used in the statute itself are the best guide to legislative intent. Where the words used are capable of more than one interpretation, the purpose to be accomplished by the statute may be used as a guide in arriving at the intention of the legislature. In order to arrive at the real intention of the legislature, attention must not be confined to the one particular section to be construed, but must be examined in the light of the entire act, as passed. *State vs. Bert Sall*, 186 Iowa 129, 169 N. W. 453; *Des Moines Railroad Co. vs. City of Des Moines*, 205 Iowa 495, 216 N. W. 284; *Oliphant vs. Hawkinson*, 192 Iowa 1259, 183 N. W. 805; *Drazich vs. Hollowell*, 207 Iowa 427, 223 N. W. 253.

In other words, the courts have repeatedly said that you cannot take a section out of its context and interpret it alone, but that the entire act must be interpreted as a whole. In the same way, a sentence cannot be taken out of a section and interpreted alone. Words, phrases and sentences cannot be taken out of their context, but must be interpreted as a part of the section to which they belong, just as the section must be interpreted as a part of the act to which it belongs. Therefore, it is impossible to interpret the last sentence of Section 2 of House File 550 of the 47th General Assembly without taking into account that it is a part of the entire section. In arriving at the intention of the legislature in passing this section, we should first look at the words used, in an attempt to find out if the legislature did not in those very words declare its intent.

Such an examination will show that the legislature in unmistakable language did declare its intention in passing this particular section. The thing it intended to do was to authorize the executive council and the joint legislative committee on retrenchment and reform to make a study of the housing of state offices in the city of Des Moines, and to make a recommendation to the next legislature, based upon that study. They stated their purpose in these words: "The executive council and the joint legislative committee on retrenchment and reform are hereby *authorized to consider the advisability of consolidating the housing of all state departments located in Des Moines* and now housed in buildings rented or leased by the state * * * and *shall report their findings* with reference to the various state departments now housed in leased buildings, and shall further *make such recommendations* as they consider advisable to the next session of the general assembly. * * *"

In other words, the legislature by this section authorized an interim committee to investigate a matter that is uppermost in the minds of a large number of people in the state of Iowa, namely the question of housing state administrative offices in rented buildings, and the advisability of either building or buying some one building to consolidate these offices and thus save the state money which is now being spent for rent. That being the intent of the legislature in this particular section, every word, phrase and sentence of this section must be read in that light. Bearing in mind that declared intention of the legislature, the last sentence of this section can very readily be interpreted. The only purpose the legislature had in adding this sentence was to prevent state officers

from renting or leasing office space in the city of Des Moines during the time that the executive council and joint legislative committee on retrenchment and reform were making their investigations. The legislature added this last sentence in order to prevent some state officer from nullifying the investigation authorized by this section, and the recommendation made as a result of that investigation. Without this last sentence it would have been possible for some officer of the state, whose office is now housed in a rented building, to have entered into a long term lease in the interim between the meeting of the 47th general assembly and the next general assembly. The entering of such a lease would, of course, nullify the entire complexion of the study that the executive council and the joint committee on retrenchment and reform are now conducting.

The renting of liquor stores throughout the state of Iowa is specifically provided for in the Iowa Liquor Control Act, in the following:

"1921-f16. 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.

"5. To lease all plants, and lease and buy equipment it may consider necessary and useful in carrying into effect the objects and purposes of this chapter. * * *"

When there are general words in a later act capable of reasonable and sensible application, without extending them to subjects especially dealt with by earlier legislation, it is not to be held that such special legislation is either indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so. This subject is very thoroughly dealt with in 59 Corpus Juris, page 1056:

"623. General and Special Statutes. Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, unless it appears that the legislature intended to make the general act controlling; and this is true a fortiori when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage. It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication. Other statements in regard to the construction of general and special statutes relating to the same subject matter are, that a special statute shall not be construed as an exception to a general law, unless the two acts cannot otherwise be reconciled; that the functioning of public institutions of the state, operating under special statutes, is not generally affected by general restrictive laws governing the revenue collecting bureaus of the state; that when a general act has established a system of law covering a vital field in government, an exception to such general system will not readily be implied, and that where it is sought to show that provisions of a general law do not apply to a city adopting it in its entirety, and that provisions of the special charter apply, language relied on to express such intent should be reasonably plain."

In the instant case, the subject of renting liquor stores is especially and specifically dealt with in the Iowa Liquor Control Act, as set forth above. Applying the rule of law, that a general law gives way to a special law where the general law can readily be interpreted without reference to the special law, to Section 2 of House File 550 of the 47th General Assembly, we conclude that this section does not give the executive council and the joint committee on retrenchment and reform authorization over the renting of liquor stores outside of the city of Des Moines.

In order to hold that the section which we are attempting to interpret, and particularly the last sentence of that section grants to the joint committee on retrenchment and reform authority to approve or disapprove liquor store leases, would be to hold that the sections of the Iowa Liquor Control Act dealing with the leasing of buildings had been in effect repealed. Since this repeal is not in express terms, it would have to be by the only other method known in the law, namely by implication. Repeals by implication, however, are not favored by the courts. *Snell vs. Dubuque, et al.*, 78 Iowa 88, 42 N. W. 588; *State vs. Higgins*, 121 Iowa 19, 95 N. W. 244; *Brooks vs. Brooklyn*, 146 Iowa 136, 124 N. W. 868; *Eckerson vs. Des Moines*, 137 Iowa 452, 489, 115 N. W. 177; *Perry Sav. Bank vs. Fitzgerald*, 167 Iowa 446, 149 N. W. 497; *State vs. Iowa Tel. Co.*, 175 Iowa 607, 154 N. W. 678; *In re Ensign's Estate*, 181 Iowa 1081, 165 N. W. 319; *Chrisman vs. Brandes*, 137 Iowa 433, 112 N. W. 833; *Harriman vs. State*, 2 G. Gr. 270; *Hummer vs. Hummer*, 3 G. Gr. 42; *Casey vs. Harned*, 5 Iowa 1; *Cole vs. Board of Supervisors;* 11 Iowa 552; *Baker vs. Steamboat Milwaukee*, 14 Iowa 214; *Burke vs. Jeffries*, 20 Iowa 145; *State vs. Shaw*, 28 Iowa 67; *Dubuque vs. Harrison*, 34 Iowa 163; *Casey vs. Harned*, 5 Iowa 1; *Davey vs. Burlington, C. R. & M. R. Co.*, 31 Iowa 553; *Risdon vs. Shank*, 37 Iowa 82; *State vs. Brandt*, 41 Iowa 593; *Co. Bluffs vs. Waterman*, 86 Iowa 688, 53 N. W. 289; et cetera, ad infinitum.

In fact, all of the above cited cases are authority for the principle of law that repeals by implication will not be indulged in where it is possible to give a reasonable construction to the statutes involved, and thus avoid a repeal.

In the instant case, we have seen that the intent of the legislature was to provide for an investigation of the housing conditions of state administrative offices in the city of Des Moines and to prevent state officers from nullifying the effects of this study and the recommendations based upon it, by extending leases already in existence, or leasing new buildings. This very reasonable interpretation is the only one that can be placed upon Section 2 of House File 550 when it is read in its entirety. This interpretation would leave intact the sections of the Iowa Liquor Control Act which grant the Iowa Liquor Control Commission the power, "4. To rent, lease, and/or equip any building or any land necessary to carry out the purpose of this chapter. "5. To lease all plants, and lease or buy equipment it may consider necessary and useful in carrying into effect the objects and purposes of this chapter."

As an added reason why we do not feel that it was the intention of the legislature to repeal the provisions of the Iowa Liquor Control Act, relative to the leasing of buildings for the purpose of conducting a state liquor store system, we wish to add that the Iowa Liquor Control Act is an act of a permanent nature, whereas House File 550 is merely interim legislation. It is not legislation of such a permanent character as to be considered the law of the

state other than for the interim between the 47th General Assembly and the next general assembly.

II.

The legislature intended to prevent any state officer or commission from either leasing or extending an already existing lease on an office building in the city of Des Moines during the time in which the executive council and the joint committee on retrenchment and reform were studying the subject of housing of state offices. This prohibition in Section 2 extends to the Iowa Liquor Control Commission, as well as to any other commission, in respect to the offices leased by the Liquor Commission to house their administrative offices. This is particularly true when we take into account that the housing of the liquor commission offices is not covered by the sections of the law relative to the renting of buildings which we have quoted above. The housing of the liquor commission is taken care of by the following section of the Code:

"1921-f15. *Place of business.* 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."

In other words, the legislature which created the Iowa Liquor Control Commission recognized a difference between the housing of state offices and the buildings that are necessary to carry on the business of the liquor commission. It made it the duty of the executive council to take care of securing office space for the liquor commission, and then it granted to the commission the specific power of leasing buildings, land and plants for the purpose of conducting that business.

Therefore, in answer to your questions it is the conclusion of this office that the executive council and the joint committee on retrenchment and reform are neither required nor authorized to approve the leases of the Iowa Liquor Control Commission for buildings used in the conduct of its business, regardless of where situated, but that the executive council and the joint committee on retrenchment and reform are required and authorized to approve any leases which the Iowa Liquor Control Commission may either wish to extend or enter into for the purpose of housing its administrative offices.

STATE INSTITUTIONS: PENITENTIARY: COURTS: MITTIMUS: If a man, whose sentence was pronounced March 15, 1937 was received into custody at the penitentiary on March 19, and subsequently on April 27, 1937, the warden received a mittimus for another offense, sentence having been pronounced on January 13, 1937, the date of the receipt of the mittimus in the first conviction (April 27, 1937) must be taken as the date of commencement of sentence pronounced January 13, 1937. Date of sentence imposed March 15, 1937 is March 19, 1937.

June 4, 1937. *Board of Control:* This department acknowledges receipt of your request for an opinion on the following matter:

On March 19, 1937, the warden at the state penitentiary at Fort Madison received into custody a man convicted in the District Court of Linn County of the offense of illegal possession of alcoholic liquor, and sentenced by that court to serve three years. Sentence was pronounced March 15, 1937.

Subsequently, to-wit, on April 27, 1937, the warden was in receipt of a letter from the clerk of the District Court of Linn County, wherein he enclosed a mittimus issued after judgment against and sentence of the same party for the offense of illegal possession of alcoholic liquor for a term of three years, said sentence having been pronounced by the District Court, Linn County, on January 13, 1937.

You inquire whether or not the sentences run concurrently and whether or not sentence should commence to run on the date of admittance, March 19, 1937, or on the date the second commitment was received, April 27, 1937.

At the outset it should be stated that no showing has been made in the letter of inquiry as to whether or not mittimus issued immediately upon sentence being pronounced on January 13, 1937, the sheriff at that time either retaining or taking the man into custody, or what disposition was made interim this date and the date sentence was imposed in the second conviction, namely, March 15, 1937. In any event, he was not incarcerated in the state penitentiary until March 19, 1937, and then by virtue of a mittimus issued after judgment in the second conviction.

Section 13959, Code 1935, provides:

"*Cumulative sentences.* If the defendant is convicted of two or more offenses, the punishment of each of which is or may be imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses."

Ordinarily two or more sentences run concurrently in the absence of specific provisions in the judgment to the contrary. *Dickerson vs. Perkins,* 182 Iowa 871, 166 N. W. 293, 5 A. L. R. 374; *State vs. Van Klaveren,* 208 Iowa 867, 226 N. W. 81; *Zerbst vs. Lyman,* 255 Fed. 609 (C. C. A. Ga.) 5 A. L. R. 377. On this point the Supreme Court of Iowa in the Dickerson case, supra, had the following to say, quoting from the opinion of the court at page 873 et seq. of 182 Iowa:

"* * * The clear implication of this section (Section 13959) is that terms of imprisonment may be concurrent. Power is therein conferred upon the court to so render the judgment as to make them otherwise. * * * (In *Mieir vs. McMillan,* 51 Iowa 240, a similar question arose, under Section 4508 of the Code of 1873. It was there held that the sentence did not run concurrently. That holding might, perhaps, have been safely put upon the ground that, in that case, the mittimus issued by the court did not specify that imprisonment upon one sentence was to begin at the expiration of the term of imprisonment upon another. But the holding was, in fact, put upon the ground 'that two terms of imprisonment cannot, in the nature of things, run concurrently.' If such was a tenable ground at that time, it has long ceased to be such ere now.) Terms of imprisonment upon separate convictions can and do run concurrently. We think this proposition is recognized in practically all jurisdictions * * *."

A somewhat analogous situation to the instant one confronted the U. S. Circuit Court of Appeals of the Fifth District in *Zerbst vs. Lyman,* supra. There, pending an appeal from a judgment of conviction in the Southern District of California, the defendant was convicted of another crime in the Southern District of New York and committed to the U. S. penitentiary at Atlanta. The judgment of the California court was subsequently affirmed and a commitment was issued which the U. S. Marshal transmitted to the warden at Atlanta with a letter to the effect that he was enclosing the official commitment of the defendant "to become effective upon completion of his present term." The commitment was for a term of one year and three months. There was nothing in the commitment which indicated a time for the commencement of the term, and the court found among other matters that the U. S. Marshal had no authority to change the terms of the commitment or determine when the punishment should begin.

At the time the commitment was received, defendant was serving the New York sentence. Upon the expiration of fifteen months, dating from the day

of the receipt of the commitment, at which time the New York sentence had expired, but one year and three months had not elapsed from the date of expiration of the New York sentence, defendant sued out a writ of habeas corpus. The trial judge and the Circuit Court on appeal held that the sentence ran concurrently and that defendant was entitled to be released.

The foregoing authorities support the conclusion, and it is our opinion, that in the instant case the sentences run concurrently for the reason that judgment of conviction upon the second offense did not provide that the term of imprisonment thereunder should begin at the expiration of the term of imprisonment upon the other conviction.

The second question is more difficult of answer for the reason that it is the reverse of the usual situation in that the actual incarceration of the party was made under the second conviction. On the date of receipt of the mittimus issued in the first conviction, the party had already served approximately seven weeks of the sentence imposed in the second conviction.

Section 13971, Code 1935, provides:

"*Copy of judgment as execution.* When a judgment of imprisonment, either in the penitentiary or county jail, is pronounced, an execution, consisting of a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution."

Your second question is specifically whether or not the commencement of the sentence pronounced in the first conviction shall be the date of incarceration under the second conviction, namely, March 19, 1937, or the date mittimus issued pursuant to the first conviction was received, namely April 27, 1937.

It is said in 16 C. J. 1372, Section 3228:

"When not otherwise directed by statute, or by the sentences of the court, as a general rule the term of *imprisonment for which defendant is sentenced begins with the first day of actual incarceration in the prison,* unless actual imprisonment is prevented by some cause other than the fault or wrong of defendant. * * *."

In support of this proposition there is cited in the footnote to Section 3228 the early Iowa case of *Miller vs. Evans*, 115 Iowa 101, wherein the defendant was sentenced to pay a fine and on omission to do so to stand committed to the county jail for ninety days. Sentence was pronounced November 23, 1899; mittimus did not issue until January 2, 1900, and the sheriff neglected to take the defendant into custody until February 22, 1900, a date subsequent to the expiration of the 90-day sentence computing the time from the date of judgment. The court, in its opinion said:

"* * * He (the defendant) was present in court when sentence was pronounced, and remained in the county during the entire period, interposing no obstacle to carrying out the sentence. There appears to have been no excuse whatever for the delay of the officer. * * * It was undoubtedly the duty of the clerk to issue mittimus and of the sheriff to execute the same promptly upon the rendition of judgment; but can it be said that the neglect of these officers shall defeat the very object of the prosecution, i. e. punishment for violation of the criminal laws? * * * We are unable to discover any reason for allowing the convict to thus profit by a delay to which he has assented, or in which he has acquiesced without objection. The time at which the sentence is to be carried out is ordinarily directory only, and forms no part of the judgment of the court. * * * The time for its execution was not of the essence of the judgment, unless the prisoner, by demanding that it be immediately carried out, made it such. It was his duty to surrender himself

and submit to the penalty of the law, as well as that of the sheriff to inflict it; and, by taking advantage of the neglect of the latter and of the clerk, he cannot avoid the punishment which his wrongdoing will be assumed to have justly required. * * *."

There does not appear to be an Iowa decision precisely in point since the Miller case, which however was cited with approval by the Supreme Court of Nebraska in *Ex parte Volker*, 233 N. W. 890, wherein it was held that where a person is convicted or sentenced to a term of imprisonment and on appeal judgment is affirmed and a mandate issued, but in the same proceedings a delay occurs before the person is taken into custody, such delay will not invalidate the sentence, and the term of imprisonment does not begin until the person is taken into custody *on the mittimus or incarcerated under the sentence.* See also *Ex Parte Brott* (Nebr.) 235 N. W. 449, where, however, the delay was occasioned solely by the defendant's prosecution of error to the Supreme Court.

Reference may also be made to *State vs. Vasaly* (Minn.) 225 N. W. 154. While this case did not involve the exact proposition here under consideration, yet the language of the court tends to confirm our ultimate conclusion. In that case the relator was convicted of a felony by the District Court of Hennepin County on August 12, 1926, and sentenced to St. Cloud for an indeterminate term, said sentence being pronounced by Judge Baldwin. Execution was stayed until August 12, 1927, the relator being remanded to the custody of a probation officer. Thereafter he committed a similar felony and on September 30, 1926, was convicted and sentenced by the Hennepin County District Court, Judge Montgomery presiding, to serve an indeterminate sentence at St. Cloud. Commitment issued and he was received into the institution on October 1, 1926, whereupon the probation officer reported to Judge Baldwin, who revoked the stay of execution in the first conviction and ordered that commitment issue forthwith and that the sentence be served concurrently with that imposed in the second conviction. Commitment issued on October 2, 1926, and the relator was received at the institution on October 6, 1926, or five days after he had commenced serving his sentence under the second conviction. The court, among other matters, stated:

"Our attention has not been called to any authority, and we know of none, holding that, if a sentence is directed to be served concurrently with another, it will terminate when such other terminates. On the contrary it is the universal rule in such cases that the defendant must serve until all the sentences have terminated, and that *the service of a sentence does not begin until he is actually in the custody of the prison officials under that particular sentence.* In other words the length of the period of confinement under one sentence is in no way dependent upon or affected by the period of confinement under a sentence for another distinct crime."

Other cases dealing generally with the proposition, though in most instances turning upon the construction of statutes, are *Keyes vs. Chapman* (Ore.), 247 Pac. 807; *Egbert vs. Tauer* (Ind.), 134 N. E. 199; *In re Hall* (Vermont), 136 Atl. 24; *Ex Parte Neisler* (Tex.), 69 S. W. (2d) 422.

It is clear that had the party in question been incarcerated immediately upon conviction and the pronouncement of sentence in the first prosecution and was subsequently taken from the penitentiary in March, 1927, convicted and sentenced, and pursuant to a mittimus issued on the judgment was redelivered to the warden of the penitentiary, his incarceration would continue until March, 1940 if, as in the stated facts, the sentence were for three years, not-

withstanding that the first sentence would expire in January, 1940. See *State vs. Vasley*, supra.

Logic and reason, therefore, dictate that since the commitment was for three years, and the only way of satisfying a judgment judicially is by fulfilling its requirements, it follows, and it is the opinion of this department, that unless it affirmatively appear that the delay in carrying out the judgment of the court in the first conviction was occasioned by other than the wrong or fault of the person convicted and that he did not acquiesce in such delay, then the date of the receipt of the mittimus in the first conviction, namely, April 27, 1937, must be taken as the date of commencement of the sentence pronounced January 13, 1937. There can be no dispute but what the date of commencement of the sentence imposed March 15, 1937, is March 19, 1937, the date of commitment in the second conviction.

STATE FUNDS: APPROPRIATIONS: STATE FAIR BOARD: HOUSE FILE NO. 550, SECTION 6: No such fund as capital improvement and repair fund. For this reason, and in view of other provisions of the act, we think the intention of the legislature is to make the appropriation from the general fund.

June 5, 1937. *Mr. C. B. Murtagh, Comptroller of State:* This will acknowledge receipt of your request of May 19th for an opinion on the following set of facts:

House File 550 (Chapter 7) of the Forty-seventh General Assembly is somewhat confusing in the language of Section 6 in that it provides the appropriation out of capital improvement and repair fund, to the State Fair Board, for the construction of a poultry building.

The appropriation as carried in the title of the act is the same as other appropriations, but it should be noted that the other appropriations are from the general fund of the State Treasury. Evidently Section 6 was not amended as were the other sections.

The capital improvement and repair fund was originally set up from the profits of the Iowa Liquor Control Commission, and subsequently the various sections were amended to make the appropriations from the general fund, consequently, is there no capital improvement and repair fund, as originally contemplated?

In answer to this inquiry we are assuming that the facts stated in your letter are correct and that this particular legislation was originally an act providing for appropriations to the various state institutions and the State Board of Education for repairs, buildings and equipment at the state schools, and appropriations to the State Fair Board for the construction of a poultry building,—all to be made from a fund which was called the capital improvement and repair fund made up in turn from the profits from the Iowa Liquor Control Commission. We assume further that subsequently the act was amended to provide that these appropriations were to be made from the general fund of the state, but that apparently because of some oversight Section 6 of the bill which provides for the appropriations for the poultry building was not changed and provides for an appropriation out of the capital improvement and repair fund, when as a matter of fact there is no such fund.

An examination of the title to the act discloses that House File 550 is a bill for an act "to appropriate to the State Board of Control, to appropriate to the State Board of Education, and to appropriate *to the State Fair Board for the construction of a poultry industries building*, for each year of the biennium, July 1, 1937 to June 30, 1939. There is no distinction between these

various appropriations in the title of the act. In Section 4 we find an appropriation from the general fund of the state to the Board of Control. In Section 5 we find an appropriation from the general fund to the Board of Education. In Section 6 the appropriation is out of the capital improvement and repair fund, and under the circumstances we believe that this was merely an oversight or clerical error and that the intention of the legislature was to make the appropriation for the State Fair Board and the construction of the poultry building out of the general fund of the state, and that the appropriation should be set up payable from the general fund of the state.

We refer to the fact that all of the funds appropriated under House File 550 are to be expended only with the express approval of the State Executive Council and the joint legislative committee on retrenchment and reform, and any claims arising under any plans or contracts can be paid only after they are expressly approved by the State Executive Council and the joint legislative committee. Therefore, there is a close check on the expenditure of these funds, and certainly the legislature intended to include the appropriation for the poultry building in this set-up.

While we think, from an examination of this act, the intention of the legislature is clear, yet we call your attention to a fundamental rule of interpretation in construing statutes, i. e., that a statute is to be interpreted according to the intent of those who enacted it, and that the words used in the statute are the best guide to legislative intent. In order to arrive at the real intent of the legislature, attention must not be confined to one particular section to be construed but must be examined in the light of the entire act, if possible.

> *State vs. Birdsall*, 186 Iowa 129, 169 N. W. 453;
> *Des Moines City Ry. vs. City of Des Moines*, 205 Iowa 495, 216 N. W. 284;
> *Oliphant vs. Hawkinson*, 192 Iowa 1259, 183 N. W. 805;
> *Drazich vs. Hollowell*, 207 Iowa 429, 223 N. W. 253.

In other words, the entire act must be interpreted as a whole, and in House File 550 we must examine the whole act and not only Section 6, and when we do, the intention of the legislature is quite obvious.

One of the leading discussions on the construction of statutes is found in a recent Iowa case, *Smith vs. Sioux City Stock Yards Company*, 219 Iowa 1142; 260 N. W. 531, where the court, in an opinion by Judge Parsons, quoted from 59 Corpus Juris, Section 659, page 952, as follows:

"The intention of the legislature is to be obtained primarily from the language used in the statute. * * * Where, however, the language is of doubtful meaning or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning. 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. Courts should not attribute to the legislature the enactment of a statute devoid of purpose, but where the language is clear and unambiguous but at the same time incapable of reasonable meaning, the court cannot construe the statute to give it a meaning. The court cannot attribute to the legislature an intent which is not in any way expressed in the statute."

In the present case, if we were to hold that Section 6 meant that this appropriation could not be made from the general fund but must be made from the capital improvement and repair fund, it would lead to an absurdity because there is no such fund in existence, and the legislature would have passed a statute which would be meaningless and devoid of purpose. For this reason,

and in view of the other provisions of the act, we think the clear intention of the legislature is to make the appropriation from the general fund.

TAXATION: BOARD OF SUPERVISORS: County not permitted to abate or exclude accrued interest and penalties due those persons interested in special assessments, and therefore could not comply with provisions of S. F. 167. In event property owner makes redemption in full of property sold under Section 7255-b1, the Board of Supervisors would be without authority to exclude from the amount necessary to redeem, interest and penalties.

June 5, 1937. *Mr. Louis H. Severson, County Attorney, Rock Rapids, Iowa:* This department is in receipt of your letter requesting an opinion upon the following question:

1. Can a taxpayer, whose property has been bid in by the county for delinquent taxes prior to the public bidder law, take advantage of Senate File 167 of the 47th General Assembly?

Under the provisions of Senate File 167, the privilege of the advantages contained in the act is extended to the owner of property sold under Section 7255-b1 of the Code only. The provisions of Senate File 167 do not apply to properties purchased by the county except under the provisions of the public bidder statute. The act itself places the limitation upon those who may avail themselves of the benefits of the act.

The public bidder law was amended into the statute by the 46th General Assembly. Prior to that time counties were authorized to become purchasers of property offered at the annual tax sale, but they made purchases and held the certificates of purchase the same as individuals. Certificates issued to the county prior to the amendment by the 46th General Assembly were purchased under the scavenger statute and in order to redeem from such certificates it is necessary that the taxpayer pay the full amount of taxes, interest, and penalties accruing. In such interest, taxes, and penalties, persons interested in special assessments against the property have an interest in the amount required to redeem. The county would therefore not be permitted to abate or exclude the accrued interest and penalties due to those persons interested in special assessments, and therefore could not comply with the provisions of Senate File 167. The Legislature in the enactment of Senate File 167 has made it plain that the act applies only to those purchases made under Section 7255-b1 of the statute.

2. Upon a taxpayer's effecting redemption of property, sold under Section 7255-b1 to the county, by paying all of the delinquent taxes in cash at one time, can the county auditor exclude penalties and interest as provided in Senate File 167, or is this right only available if the delinquent taxpayer pays the taxes in ten installments as provided in the act?

The act itself is plain and unambiguous. It does not grant to the Board of Supervisors the right or authority to make any compromise of the taxes, interest, or penalties, except that the county auditor is directed to exclude interest and penalties in computing the amount for which the property owner is liable in the event he takes advantage of the provisions of the act and makes redemption in ten installments.

Therefore, in the event the property owner makes redemption in full of property sold under Section 7255-b1, the Board of Supervisors would be without authority to exclude from the amount necessary to redeem, interest and penalties.

TAXATION: HOMESTEAD EXEMPTION ACT: Credit should be given upon the levies made against suspended taxes, if the owner and property have qualified under the Homestead Exemption Act, the same as on any other property.

June 5, 1937. *Mr. J. H. Johnson, City Attorney, Knoxville, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Can parties whose taxes have been suspended get the benefit of the homestead tax exemption credit?

Under the statute boards of supervisors are authorized to suspend taxes under certain circumstances. Under Section 6950 of the 1935 Code the board of supervisors may order the county treasurer to suspend the collection of taxes assessed against any person who by reason of age or infirmity is unable to contribute to the public revenue, such suspension being limited to the current year. Under Section 6950-g1 the Old Age Assistance Commission is required to notify the board of supervisors of the county in which any recipient of old age assistance lives and the board of supervisors is then required to order the suspension of the taxes against such recipient's property. In either event, after the suspension of taxes such taxes are not collectible, except as provided for in Section 6952 of the Code which is as follows:

"*Grantee or devisee to pay tax.* In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance to any person other than the surviving spouse or minor child of such infirm person, the taxes, without any accrued penalty, that have been thus suspended shall all become due and payable, with six per cent interest per annum from the date of such suspension, except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old age assistance and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child."

A suspended tax remains a tax, although the same can only be collected in the manner as pointed out in Section 6952 above.

Under the recently enacted Homestead Tax Exemption Act, Senate File 184, the benefit to accrue to an applicant is a credit against the tax levied on the property, except as to the 1936 tax, on which, if paid, the applicant receives a refund. In Section 3 of the Act, after making provisions for the determination of the millage credit and certifying the same to the county auditor of each county, it is provided:

"Each county auditor shall then enter such credit against the tax levied on each eligible homestead in each county and payable during the ensuing year, * * *"

In the case of suspended taxes the levies and assessments of taxes are the same as against other properties. The benefits to be derived under the homestead tax exemption act being credits against the tax levied, those persons who have qualified themselves as owners and their properties as homesteads, would therefore be entitled to have credited against the suspended taxes against their property such an amount as is found to represent the property's proportionate share of the total credits to be given in the county.

It is the opinion of this department that credit should be given upon the levies made against suspended taxes, if the owner and property have qualified under the Homestead Exemption Act, the same as on any other property.

TAXATION: BOARD OF SUPERVISORS: HOMESTEAD EXEMPTION ACT: If owner dies, whose wife died prior to his death, leaving 7 adult children, it would be sufficient if one of the heirs make a certified statement or application for the benefit.

June 7, 1937. *Mr. Clarence A. Kading, County Attorney, Knoxville, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. The owner of a bona fide homestead whose wife predeceased him died intestate leaving seven adult children who reside as a family on the homestead. Must each one of the seven children make application for the homestead tax exemption credit on his one-seventh interest?

The homestead tax exemption act provides:

"Sec. 11. Any person who is the owner of a homestead, as defined in this Act, and who desires to avail himself of the benefits provided hereunder for the 1936 taxes payable in 1937 and for the 1937 taxes payable in 1938 may do so by filing a verified statement with the county auditor of the county in which the claimed homestead is located on or before June 1, 1937, * * *."

Section 9 of the Act provides:

"If any person fails to make claim for the credits provided for under this act as herein required, he shall be deemed to have waived the homestead credit for the year in which he failed to make claim."

Under the provisions of Section 11 above quoted the statute is specific in requiring that *any person* desiring to avail himself of the homestead tax credit exemption may do so by *filing a verified statement.* Where the ownership is among several persons, and a verified statement or application is made by one, it is our opinion that such application would be sufficient to enable the undivided owner to avail himself of the benefits of the act, and that it would not be necessary for each and all of such owners to file verified statements of ownership.

CITIES AND TOWNS: BANDS: MAINTENANCE OF: City Council may use Band Tax fund for the maintenance or employment of a band.

June 7, 1937. *Mr. Geo. C. Van Nostrand, County Attorney, Fairfield, Iowa:* This department acknowledges receipt of your request for an opinion on the following question:

"Has the City Council a right to distribute proceeds from a band tax as provided in Chapter 296 of the 1935 Code of Iowa to a regimental band partially supported by the National Guard?"

Section 5835, Code 1935, provides in part as follows:

"*Levy.* Cities having a population of not over forty thousand and towns may, when authorized as hereinafter provided, levy each year a tax of not to exceed one-half mill for the purpose of providing a fund for the maintenance or employment of a band for musical purposes. * * *."

Section 5838, Code 1935, provides:

"*Duty to levy tax.* Said levy shall be deemed authorized if a majority of the votes cast at said election be in favor of said proposition, and the council or commission shall then levy a tax sufficient to support or employ such band, not to exceed one-half mill on the assessed valuation of such municipality."

Section 5840, Code 1935, provides:

"*Disposition of funds.* All funds derived from said levy shall be expended as set out in Section 5835 by the council or commission."

Prior to the enactment of Chapter 296, within which the above sections are embraced, there apparently was doubt as to the authority of cities and towns

to "maintain" a band out of their general fund. See Report of Attorney General 1925-1926, page 366. Hence, the granting by the Legislature of specific authority to levy an annual tax to provide a fund for the purpose of maintaining or employing a band for musical purposes.

While the chapter is labeled "Municipal Bands," yet there is nothing in its terms which dictates what the bands' membership shall be—of whom it shall be composed. The statute is in our opinion broad enough to permit of the employing of a professional group of musicians, whatever their origin may be, and the use of the entire fund raised by a tax levy to defray the cost of such employment.

It is the opinion of this department that the statute vests a wide discretion in a city council or commission of cities and towns within its purview in determining the method of expending the fund created by a tax levy in the manner authorized by Sections 5836 to 5838 inclusive, for Section 5840, supra, requires the fund to be expended as in Section 5835, supra, provided, which section in turn prescribes *"for the maintenance or employment of a band."* If in the exercise of its discretion the city council of Fairfield, Iowa, determines that the maintenance or employment, it is unnecessary for us to decide which, of the regimental band will best serve the purposes for which the tax authorized by Chapter 296 is levied, namely, to avail the city of the facilities of a band for musical purposes, it is acting entirely within the provisions of said chapter.

CIVIL SERVICE: A truck driver is not one whose occupation requires special skill or fitness as is contemplated by the act. Persons now holding non-supervisory positions under the act and who were appointed without competitive examinations and who have served less than 5 years on the date this act became effective must submit to a competitive examination. Electrical, building, plumbing and milk inspectors hold supervisory positions within the meaning of the act. Employees appointed prior to effective date of act not subject to civil service examination for unexpired term. Appointment of Chief of Police to be made from list of all those who have a 5-year record of service as patrolman or higher, regardless of whose service has been longest.

June 8, 1937. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa:* We are in receipt of your request for an opinion on the following propositions:

1. Under Section 5694 and particularly part 2 thereof, are truck drivers laborers whose occupation requires special skill or fitness within the meaning of the act?

Driving a motor vehicle is an art so common to most people that it is in relatively few instances that a person cannot drive. Although somewhat difficult to learn, yet there are a few things we do that have not required practice and concentration, yet one cannot be said to be performing duties which require special skill and fitness whose duties are those which the majority of people can fulfill with no added study or practice.

It is therefore our opinion that a truck driver is not one whose occupation requires special skill or fitness as is contemplated by the new civil service act.

2. Under Section 5695, Paragraph 2, an employee in a non-supervisory position within the scope of this act, having less than five years' experience, must submit to an examination in order to retain his position. Is this examination a competitive examination, or an examination of such employee only to determine his qualifications to hold his position?

Paragraph 2 of Section 5695 reads as follows:

"Persons in non-supervisory positions, appointed without competitive exami-

nation, who have served less than five years in such position or positions on said date, shall submit to examination by the commission and if successful in passing such examination they shall retain their positions in preference to all other applicants and shall have full civil service rights therein, but if they fail to pass such examination they shall be replaced by successful applicants."

Paragraph 2 of Section 5695 is speaking of competitive examinations. Competition for the selection of those best qualified for positions is one of the principles behind civil service. Without that the system is a failure. Under this paragraph anyone can submit to the examination. The commission will then certify the ten highest, or such number as may have qualified if less than ten, as those being eligible for the appointment. If the incumbent has a position which comes within the scope of this act and is so successful in that examination and his name is on the list certified by the commission, he can get the appointment, but if he fails, a successful applicant who has passed "such examination" and is on the list certified by the commission will be appointed from the list.

Section 5698, in providing for competitive examination "for original appointment or for promotion" is speaking of appointments under civil service not appointments to positions which were not under civil service when the appointment was made.

It is therefore our opinion that persons now holding non-supervisory positions which come under the civil service act and who were appointed without competitive examinations, and who have served less than five years on the date this act became effective must submit to a competitive examination.

3. What is meant by a "supervisory position"? Are those employees who "inspect with authority," such as Electrical, Building, Plumbing and Milk Inspectors, in "supervisory positions" within the meaning of this act?

Under Section 5695, those holding supervisory positions must submit to a competitive examination regardless of whether or not they have five years of service in the position, which position is now one that comes under the civil service act. The word "supervise" means: "to have a general oversight of; superintend; inspect; to take charge of with the power of direction." The above named employees occupy such positions. They inspect, have authority over with the power of direction, they exercise discretion and judgment. In other words, they supervise building and buildings, electrical installation, plumbing installation, and the dispensation of milk, and therefore hold supervisory positions.

4. Certain employees in a "supervisory position" have been appointed for a definite term, which term expires April 1, 1938. Must these employees take competitive examinations at this time in order to retain their positions, or do they take the competitive examinations at the expiration of their term?

Our statutes prescribe how those appointed to offices and positions in cities and towns may be removed. See Sections 6532, 6533, 5638, 1091, 6630 and 6631. As those statutes were enacted prior to the enactment of the new civil service act, there is no provision in them concerning the removal to make way for civil service. Employees generally in cities must take an examination to be eligible for appointments under civil service.

The new civil service bill says that the commission shall hold examinations for appointments "during the month of April of each year and at such other times as shall be found necessary under such rules * * * for the purpose of determining the qualifications of applicants for positions under civil service

* * *." In speaking of "such other times as shall be found necessary under such rules," the statute has directed at the filling of vacancies that occur in civil service positions. In the holding of examinations for incumbents whose terms have not expired, the civil service law is not authority to discharge persons not as yet under its provisions, but it is authority to discharge only if persons come under its provisions. To hold that incumbents are subject to examination and possible removal by reason of the failure to be certified by the commission would be to run rough-shod over the above enumerated provisions of the Code and to procure removal in a way therein not set out and which at the most could only be implied from the provisions of the new civil service act.

The general rule is, in the absence of provisions in the statutes, a removal from office may be made by the officer or board appointing. No other board or officer possesses that authority. The new civil service act does not afford the necessary authority for removal of employees whose terms have not expired and who are not as yet under civil service.

It is therefore our opinion that the employees, whether occupying supervisory positions or not, who were appointed prior to the effective date of the new civil service act, are not subject to a civil service examination for their unexpired term.

5. In Section 5699 it is provided that the Chief of the Police Department shall be appointed from the active members of the Department who hold Civil Service superiority rights as patrolmen and have had five years' service in the Department, etc. It is contended by some that this means that (except for the possibility of reappointment of the present Chief) the member of the Department holding the longest period of service as patrolman would be entitled to the appointment as Chief.

Part 2 of Section 5698-h1 reads as follows:

"In the event that a civil service employee has more than one classification or grade, the length of his seniority rights shall date in the respective classifications or grades from and after the time he was appointed to or began his employment in each classification or grade. In the event that an employee has been promoted from one classification or grade to another, his civil service seniority rights shall be continuous in any department grade or classification that he formerly held."

Section 5699 reads as follows:

"5699. *Chief of police and chief of fire department.* The Chief of the Fire Department shall be appointed from the chief's civil service eligible list and shall hold full civil service rights as chief, and the chief of the Police Department shall be appointed from the active members of the department who hold civil service seniority rights as patrolman and have had five years' service in the department, but this shall not apply to any person holding the office of chief of police in any city on the date this act becomes effective in such city during his term of office as chief which may include successive reappointments thereto. Any such chief of police, having ten or more years' service, shall be entitled to civil service rights as patrolman for the period of such service as chief with continuing seniority determined as provided in Section 5698-h1 of this chapter.

"In cities under the commission plan of government the superintendent of public safety, with the approval of the city council, shall appoint the chief of the fire department and the chief of the police department. In cities under the city manager plan the city manager shall make such appointments, and in all other cities such appointments shall be made by the mayor."

The latter section does not mean that the person having the longest civil service record is entitled to the appointment, but means that the appointment shall be made from those holding five years' civil service records as patrolmen. If a

person has been a patrolman for two years and then is promoted to a higher classification for three years, he maintains under Section 5698-h1 a civil service record of five years as patrolman and is eligible for appointment. That is to say that the word "patrolman" is used for the purpose of gauging the seniority rights, but does not mean that anyone of a higher ranking is ineligible for that appointment, nor does the word "seniority" refer to one person, but it refers to the group in that classification.

It is therefore our opinion that the appointment is to be made from a list of all those who have a five-year record of service as a patrolman or higher, and the party making the appointment can appoint any person on that eligibility list regardless of whose service has been of the longest duration.

BEER: PERMIT: Duly qualified person may be granted permit to sell beer in proper location although this location has been abandoned by another permittee whose permit has not expired.

June 8, 1937. *Mr. Leo J. Wegman, Treasurer of State:* We are in receipt of your request for an opinion of this department upon a question arising out of the following statement of facts:

The board of supervisors granted a permit to sell beer to A in the village of Montpelier. Some time after the permit was granted, but before it expired, A removed from his business location and from the village. The owner of the building in which A operated now seeks a permit to sell beer.

Does the fact that there exists a "live" permit for this certain location preclude the board of supervisors from issuing a new permit to a person who wishes to operate at the same location?

In the above case, since the permit is for a place of business located outside a city or town, the granting of the same is entirely within the discretion of the board of supervisors.

A permit to sell beer is a personal privilege. The applicant for such permit is required under the statute to furnish information pertaining to the place of business to be established. These requirements are set out in Section 1921-f103, 1935 Code, as the same apply to Class "B" permits, and in Section 1921-f104, as the same apply to Class "C" permits. The statute does not contemplate that the permit is issued to a place. Rather, the permit is issued to a person, who, among other things, must certify as to certain facts concerning the location, the ownership, and condition of his proposed place of business.

If a permit holder vacates his place of business, we see no reason under the statute why such premises may not be used by another duly qualified permittee, if such place of business and building conform to the requirements of the statute. If the holder of a permit to sell beer removes from his place of business, there is no reason to say that such premises, by reason of the occupancy of one permittee, shall be closed to any other until the first permit expires. Such a rule would cast an undue hardship upon the owner of such building, and such a holding, we believe, could have no foundation in the law.

It is, therefore, the opinion of this department that a person duly qualified may be granted a permit to sell beer in a proper location, although this location or place of business has been abandoned by another permittee whose permit has not expired.

MOTOR VEHICLES: TRAILERS: TAX ON: Wagon box trailers used by farmer in operation of his farm, weighing less than 1,000 pounds or having loading capacity of less than 1,000 pounds are not subject to tax, but if it

weighs more than 1,000 pounds or has loading capacity of more than 1,000 pounds, it is subject to $1.00 tax.

June 9, 1937. *Mr. Lew Wallace, Superintendent, Motor Vehicle Department:* We are in receipt of your request for an opinion interpreting Section 154 of Senate File 181 of the Acts of the 47th General Assembly, pertaining to wagon box trailers. That section states as follows:

"Trailers weighing less than one thousand pounds, or with a loading capacity of less than one thousand pounds, shall not be subject to a registration fee.

"All other trailers shall be subject to a registration fee to be fixed in accordance with the following schedule:

"When equipped with pneumatic tires:

"Wagon box trailers used by a farmer in connection with the operation of his farm .... $ 1.00

"Trailers with a capacity of one-half ton, but with a maximum capacity of less than one ton .... $10.00"

etc.

The rest of that section increases the license fee to a maximum of $70.00, which is determined by the capacity of the trailers.

It is our interpretation of this section that wagon box trailers used by a farmer in connection with the operation of his farm, weighing less than one thousand pounds, are not subject to any tax, but if the trailer weighs more than one thousand pounds or has a loading capacity of more than one thousand pounds, it is subject to a $1.00 tax.

MOTOR VEHICLE TAX LAW: COUNTIES: TAXATION: State Treasurer is without authority to remit or cancel penalties imposed by statute upon failure of any distributor, who fails to remit within the time prescribed by statute.

June 11, 1937. *Mr. Leo J. Wegman, Treasurer of State:* This department is in receipt of your request for an opinion upon the following facts:

"Through the revision of the Iowa Motor Vehicle Tax Law which became effective April 1, 1934, sub-divisions of State Government were required to pay the Motor Vehicle Fuel Tax of three cents per gallon. The City of Des Moines resisted, as did several counties of the state, but this law was upheld by the State Supreme Court at least in two instances. The question of penalty now arises since many counties have imported gasoline during the period from April 1, 1934 to date. Settlement has been made with several counties and the penalty of ten per cent collected during that period, or from April 1, 1934 to April 1, 1937. Tama County being one of the last counties to make settlement, and while the tax and penalty were both paid, they insisted that I ask for an opinion as to the legality of this penalty collected. I am likewise desirous of having you advise if in your opinion there is anything in the law that would permit me to waive such penalty."

Concisely your question is as follows:

Can the State Treasurer waive the penalty imposed by statute for non-payment of the motor vehicle fuel tax upon motor vehicle fuel imported by subdivisions of the State between the dates of April 1, 1934 and April 1, 1937?

Chapter 251-F1 of the Code of 1935 provides for the collection of a tax upon motor vehicle fuel imported into the State. That Chapter 251-F1 of the statute is applicable to subdivisions of the State has been established by the decisions of the Supreme Court of this State, see *State vs. City of Des Moines*, 266 N. W. 41; *State vs. Woodbury County*, 269 N. W. 449. With the law established that subdivisions of the State are required to pay the motor vehicle fuel tax, we must look to the law as contained in Chapter 251-F1 of the Code of 1935 to ascertain whether or not the State Treasurer may waive the penalties in-

flicted by the chapter or whether he must exact and demand the penalties from subdivisions of the State subject to the tax imposed by the chapter.

Under the provisions of the chapter and in subdivision 7 of Section 5093-f9, a failure to remit the fees due to the State subjects the distributor to a ten per cent penalty, the provisions being, in part, 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."

In Section 5093-f2 the Legislature has placed its own definition upon certain words and terms used in the statute, the pertinent parts of which are as follows:

"*Definition of terms.* The following words, terms and phrases, for the purpose of this chapter, are defined as follows:

a. The term 'distributor' shall mean any person who receives from outside the state or who produces * * * any motor vehicle fuel to be used within the state or sold or otherwise disposed of within the state for use in the state. * * *

b. The term 'person' shall mean any individual, firm, partnership, joint stock company, association, trust, estate, joint adventure, and/or corporation, and any group or combination acting as a unit, and the plural as well as the singular number. The term 'person' shall also mean any receiver, trustee, conservator or representative appointed by any state or federal court. * * *"

In the case of *State vs. City of Des Moines*, supra, our court construed the word "person" as used in Chapter 251-F1 of the 1935 Code to include subdivisions of the State.

There is no provision of the statute making any exemption of the penalties provided for in subdivision 7 of Section 5093-f9. This, we must consider to indicate that the Legislature did not intend that there should be any waiver of the penalties imposed for a failure to remit the tax on or before the 20th of each month. We find support for this conclusion in the fact that in the following section of the statute, to-wit, 5093-f10 with reference to distributor's license, the Treasurer of State is given authority to remit in whole or in part the penalty provided under this particular section of the statute. In the concluding paragraph of the opinion in the case of *State vs Woodbury County*, supra, the court used the following language:

"It is our conclusion, therefore, that under our own holding the plaintiffs were entitled to recover herein in the amount stipulated as above set out. As to the penalty, we think, under the circumstances of this case, that the conduct of the county was in good faith and that it ought not to be penalized for having defended this action to have the statute construed."

The court thereby and for the reasons stated excluded the penalties in the amount for which it found the State entitled to as against Woodbury County, but the court did not exclude the penalties from the amount of the recovery as a matter of law, or as a matter of right, but more in the nature of a grace based upon the good faith of the county in contesting the suit for the purpose of securing a construction of the statute. We do not understand the court as holding that such penalties are not collectible. The instances wherein subdivisions have failed to remit their tax within the time required by law have not been based upon a desire to have the statute construed, but have been more or less dilatory in nature. The remittances could have been made under protest pending the determination of the Woodbury County case, and if the case had been decided favorably to Woodbury County the tax and penalties could

have, and would have, no doubt, been refunded to the various subdivisions of the State paying them.

Inasmuch as the statute has defined the word "person" and our court has in at least two instances decreed that the word "person" as used includes subdivisions of the State, we can see no distinction between a county or other subdivision of the State asking a cancellation of the penalty and an individual or private corporation asking the same privilege or favor. The State should stand as an impartial collector and should treat one and all the same. If the State Treasurer is authorized to grant such privileges to subdivisions of the State, such privileges should likewise be granted to individuals and private corporations. Unless such privileges are granted to one and all alike, it would result in an unfavorable discrimination.

We are therefore of the opinion that the State Treasurer is without authority to remit or to cancel the penalties imposed by statute upon the failure of any distributor, as defined by the statute, who fails to remit within the time prescribed by statute.

TAXATION: HOMESTEAD EXEMPTION ACT: Upon death of husband, widow becomes owner of homestead and can claim exemption.

June 11, 1937. *Mr. Ray A. Potter, Tipton, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Where a husband dies intestate owning a homestead consisting of a house and two lots and leaves surviving him a widow and four children, the widow continuing to occupy the property as a homestead, and there has been no administration, can she claim a homestead tax exemption and if so, in what amount?

In answering the foregoing question we are assuming that the property is qualified as a homestead under the homestead tax exemption act. Under the provisions of the act the Legislature has designated those persons who may claim the benefit of the act as owner. Subdivision 2 of Section 19 of the act is as follows:

"The word 'owner' shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as the surviving spouse. * * *"

In the above facts it is set out that the husband was the fee simple owner at the time of his death. The property is now occupied by the widow who is the surviving spouse. The widow therefore comes within the definition of owner as set out in the act.

It is therefore the opinion of this department that the widow is entitled to claim the benefit of the act and is entitled to the full credit as provided by the act.

TAXATION: HOMESTEAD EXEMPTION ACT: One must live upon land owned by him in order to get benefit of homestead tax exemption.

June 12, 1937. *Mr. James E. Coonley, County Attorney, Hampton, Iowa:* This department is in receipt of your letter requesting an opinion upon the following question:

A resides on a piece of property belonging to B which is a farm property of 80 acres. Contiguous to the tract belonging to B is an 80-acre tract of unimproved land belonging to A. A works and farms the entire 160 acres as one piece of land. Would A be entitled to claim the benefits of the homestead tax exemption act upon the unimproved piece of land belonging to him?

Under the homestead tax exemption act persons, in order to be entitled to the benefits thereof must bring themselves within the provisions of the act and particularly with reference to ownership and occupancy. The act itself in subdivision a of Section 19 defines the word homestead to be "the dwelling house in which the owner claiming the millage credit or refund under this act actually lives six months or more in the year." Under the facts stated, A is not the owner of the property in which he lives. The property owned by A is contiguous to the land upon which he lives.

Therefore under the provisions of the act, A is not entitled to the benefit of the homestead tax exemption for the reason that he does not live upon land owned by him.

TAXATION: HOMESTEAD EXEMPTION ACT: Owner of 40 acres of land, where his house and 25 acres lie on one side of county road and 15 acres lie on other side of road, may claim exemption on it as one tract. City or town lots separated by streets or alleys cannot be considered as contiguous and that lots so separated cannot be joined in an application for benefit of exemption. Owner may combine two tracts of land separated by drainage ditch in homestead tax exemption application.

June 12, 1937. *Mr. J. Berkley Wilson, County Attorney, Indianola, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. May one claim homestead exemption on 40 acres where his house and 25 acres lie on one side of the county road and 15 acres on the other side of the county road?

The homestead tax exemption act has placed its own definition upon the word homestead. Section 19 of the Act defined the word "homestead." Subdivision b of Section 19 is as follows:

"It may contain one or more contiguous lots or tracts of land with the building or other appurtenances thereon habitually, and in good faith, used as a part of the homestead."

Subdivision d of Section 19 is as follows:

"If outside of a city or town, it must not contain more than forty acres."

It is our opinion that subdivisions b and d must be considered and construed together. We must therefore determine whether or not a tract of land intersected by a county road can be classed as contiguous. So far as we have been able to find there are no decisions of our court defining or interpreting the word "contiguous" with reference to tracts of land. The word "contiguous" as defined in the Century Dictionary is as follows: "Touching; meeting or joining at the surface or border." The Standard Dictionary: "Touching or joining at the edge or boundary; close together; adjacent; adjoining." Webster's Dictionary: "In actual contact; touching; also adjacent; near; neighboring; adjoining."

The Supreme Court of the State of North Dakota in the case of *Griffin vs. Denison Land Co.*, 119 N. W. 1041, in passing upon the question of the meaning of the tax law in describing one tract of land stated:

"Two quarter sections of land which only touch at the corners, no part of the sides being common, do not constitute 'contiguous bodies of land.' "

However, the land under consideration being a 40-acre tract intersected by a county road may well be, in our opinion, considered as one tract of land. The county road is but an easement or servitude across the land, the public having the right to use such strip of land for road purposes only, and in the event of

an abandonment of the road, the roadway would revert to and attach itself to the property from which it was taken. The owner of the property from which such road was taken, in fact, owns to the center of the highway, subject only to the rights of the public to use the same for road purposes.

This department is therefore of the opinion that the above land should be considered as one tract, and that the claimant is entitled to include the same in his application for homestead exemption.

2. Where a property owner's house is located upon a lot on one side of a city street or alley and he owns several lots on the opposite side of the street or alley may all be included in a homestead tax exemption claim?

In answer to question No. 1 we have set out the requirements under the homestead tax exemption act to qualify property as a homestead. In subdivision b it is required that the lots or tracts of land must be contiguous. Subdivision c of the act has reference to city or town properties and limits the amount of property which may be claimed, by value only, namely $2,500.00. However, in dealing with city property where an applicant is making claim for the exemption on several lots separated by city streets or alleys, we have a different proposition than we have where we are dealing with farm properties traversed by a road. As stated in answer to question No. 1, county roads are merely easements or servitudes. The owner of the property abutting upon county roads own to the center of the highway, whereas in cities and towns the streets and alleys are owned by the cities or towns and are dedicated to public use. Persons purchasing lots in cities or towns purchase merely the ground within the boundaries of the lot and have no interest whatever in the street or alley abutting or adjoining the lot except as is enjoyed by the public generally.

It is therefore our opinion that city or town lots separated by streets or alleys cannot be considered as contiguous and that lots so separated cannot be joined in an application for the benefit of the homestead exemption credit.

3. May an applicant join two tracts of land totaling 40 acres or less traversed or separated by a drainage ditch?

What has heretofore been said in answer to question No. 1 likewise applies in answer to this question. A drainage district is not a separate entity. It cannot and does not own property; it is managed and controlled by the board of supervisors or drainage trustees under authority vested in them by the statute. Drainage districts in obtaining right of way for ditches do not secure a fee title, but only an easement for the purpose of constructing its ditches and levees. While the management and control are in the drainage commission, the right to use the right-of-way, so long as it does not interfere with drainage, is left in the property owner.

It is therefore the opinion of this department that the owner may combine two tracts of land separated by a drainage ditch in his homestead tax exemption application.

CRIMINAL LAW: GAMBLING: LOTTERY: It makes no difference whether the game is one of chance or skill or a mixed game of chance or skill, it is the character of the game and not the skill or want of skill of the player that brings it within or excludes it from the prohibitions of the statute.

June 15, 1937. *Mr. Ned B. Turner, County Attorney, Corning, Iowa:* We acknowledge receipt of your request for an opinion as to whether or not the operation as herein described constitutes a violation of the criminal law of the State of Iowa relating to gambling.

A target is placed at the small and low end of a tipped funnel shaped machine which is about 8 or 10 feet in length. The contestant is given a .22 rifle and three cartridges which have a flat or sawed off lead pellet. The target is of a peculiar design which makes it very difficult for even the best of marksmen to accomplish the object of the game, which is to eliminate all of the red color from the target. When the operator starts the game he puts up $5 or $10 or whatever amount he sees fit as a prize. The contestant pays 10 cents for a target and three cartridges, and when four of the targets have been used without a successful score the proprietor adds another 5 cents to the original prize. In other words, for each 40 cents spent by the contestant or contestants the proprietor puts up 5 cents additional to the prize awarded the ultimate winner.

You state as your opinion that a machine of this type, even though a score is necessary to win the prize, is nothing more than a gambling device, but that since the decision that a bank night is not a lottery you would like a considered opinion on the matter before taking any action restraining the operation of such a device in your county.

This department is in accord with your opinion that the foregoing described device comes within the inhibitions of Sections 13198 and 13202 of Chapter 593, Code 1935, entitled "Gambling" and should consequently be restrained from operation.

Section 13202, Code 1935, is as follows:

"*Gaming and betting defined.* If any person play at any game for any sum of money or other property of any value, or make any bet or wager for money or other property of value, he shall be guilty of a misdemeanor."

The Iowa court in *State vs. Miller & Kremling*, 53 Iowa 154, said:

"* * *. As to whether the game is one of skill or chance seems to be immaterial. The statute provides that to 'play at any game for any sum of money or other property of any value,' is gambling. Code, Section 4028."

Said Section 4028, as it appeared in the Code of 1873, read as follows:

"If any person play at any game for any sum of money or other property of any value, or make any bet or wager for money or other property of value, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days."

In view of Section 13202, supra, and the decision in the Miller case, it makes no difference whether the game is one of chance or skill or a mixed game of chance and skill, it is the character of the game and not the skill or want of skill of the player that brings it within or excludes it from the prohibitions of the statute. The illustrated game or operation is of such character as is within the contemplation of Section 13202, supra. Whether we regard it from the angle, namely, that it is the playing at a game where the contestant's compensation is contingent upon his winning, or as a "bet" or "wager" by the proprietor of the prize money against the price of three cartridges and the target, that the contestant cannot successfully efface the red coloring from the target, in either event it comes within the prohibitions of said section. It is such a game or operation as is clearly distinguishable from the professional baseball or football game wherein the player's compensation is no wise dependent upon the outcome of the contest. It falls in the same category as the playing at billiards or pin-pool, with the agreement or understanding that the losing party shall pay for the game, which in *State vs. Miller, et al.*, supra, and *State vs. Book*, 41 Iowa 550, was held to be gambling under Section 13202, then Section 4028.

Not only is the person "playing" guilty of an offense against the state, but so the operator or proprietor under the provisions of Section 13198, Code 1935, which provides:

"*Keeping gambling houses.* If any person keep a house, shop, or place resorted to for the purpose of gambling, or permit or suffer any person in any house, shop, or other place under his control or care to play at cards, dice, faro, roulette, equality, punch board or other game for money or other thing, such offender shall be fined in a sum not less than fifty nor more than three hundred dollars, or be imprisoned in the county jail not exceeding one year, or both."

While the elements of a lottery are present, namely, *consideration* for the *chance* to win a *prize*, yet it is our opinion that we are not here concerned with the question of that species of gambling known as a lottery, and therefore the decision with respect to Bank Night operations, as involved in the case of *State vs. Hundling*, 220 Iowa 1369, has no application.

CRIMINAL LAW: SLOT MACHINES: GAMBLING:

June 15, 1937. *To: Bureau of Criminal Investigation:*

In re: Effect of recent legislation by Forty-seventh General Assembly upon status of slot machines and similar mechanisms, susceptible of, and commonly employed in, gambling operations. HOUSE FILE NO. 4.

Replying to recent inquiry concerning the above-captioned subject, beg leave to advise that responsive to the ever-increasing, public demand for legislation effective to deal with gambling operations carried on by means of slot machines and similar mechanisms particularly alluring to immature youths of school age, the Forty-seventh General Assembly proceeded to amend Code Sections 13198 and 13210. We set out herein said sections in their revised form, the amendments introduced, and effective July 4, 1937, being italicized, in each instance, to-wit:

"13198. *Keeping gambling house.* If any person keep a house, shop or place resorted to for the purpose of gambling, or permit or suffer any person in any house, shop or other place under his control or care to play at cards, dice, faro, roulette, equality, punch board, *slot machine* or other game for money or other thing, such offender shall be fined in a sum not less than fifty nor more than three hundred dollars, or be imprisoned in the county jail not exceeding one year.

"13210. No one shall, in any manner or for any purpose whatever, except under proceedings to destroy the same, have, keep or hold in possession or control any roulette wheel, klondyke table, poker table, punch board, faro or keno layouts, *or any other machine used for gambling, or any slot machine or device with an element of chance attending such operation.*"

It will thus be observed that, as of July 4, 1937, one who operates a place for the purpose of gambling, whereat slot-machines are so employed, can no longer, as heretofore, claim immunity on the score that criminal statutes are to be strictly construed and that slot machines are not gambling devices within the purview of the statute because not specifically named therein. The statutory definition has now been expanded to include this type of instrumentality, and the possession thereof hereafter, except under proceedings to condemn the same, is expressly banned by legislative interdict.

The provisions of the amended Code Section 13210 now put roulette wheels, klondyke tables, poker tables, punch boards, faro layouts, keno layouts, slot machines, and all other gambling machines or devices with an element of chance attending their operation, in the same forbidden category. They are nuisances *per se;* no one has any possessory or property rights therein, in the face of a search and seizure warrant; and they are all subject to legal forfeiture and confiscation, as we shall presently see.

And in an action against one found in possession of a roulette wheel, for

instance, it is no defense against its seizure and lawful destruction that it was used in a wholly innocent manner, solely as an instrument of amusement or skill, and that it was never employed or intended to be employed for the purposes of gambling. Crystallized public sentiment in the form of a clearly expressed statutory prohibition has condemned the possession of such an instrumentality in the hands of any individual, except officers under proceedings to destroy the same, as inimical to public morals because of the facility with which it can be, and the frequency with which it actually is, employed in gambling games. Possession is prohibited upon the same principle that machine guns in the hands of private individuals are forbidden—as an instrumentality dangerous to public health, safety and morals.

This is a proper exercise of police power, and the legislature, which is the sole judge of the wisdom of such laws, has seen fit, out of deference to increasingly insistent demands from the public, to condemn, in the same manner as roulette wheels, slot machines and all other gambling machines or devices with an element of chance in the operation thereof. Our courts have frequently held that the legislative branch of government has power to enact, and the executive branch of government has authority to enforce, penal statutes which may, perchance, in instances interfere with harmless amusements, if thereby the abatement of a social evil otherwise flourishing by means of evasions, may be attained.

Accordingly, you are advised that mere possession of slot machines, punch boards, and all other gambling machines or devices enumerated in Code Section 13210 is unlawful, and that the actual operation thereof for gambling purposes is not necessary to authorize the seizure thereof.

The expression "slot machine" is a generic term and embraces all mechanical devices operated by insertion of a coin or token, exclusive of *bona fides*, mechanical vendors of commodities which are either not susceptible of manipulation as a gambling device, or are commonly not employed for such purpose. A machine essentially a gambling device, but which automatically vends gum or similar articles as an evasive cover for its illegal operation as a gambling mechanism, cannot thereby disguise its intrinsic character, but falls within the prohibited class.

Procedure

1. One who violates Code Section 13198 is guilty of an indictable misdemeanor and the penalty set out in said section is a fine of not less than fifty dollars ($50.00) nor more than three hundred dollars ($300.00); or, imprisonment in the county jail not to exceed one (1) year; or, both such fine and imprisonment.

2. One who violates Code Section 13210 is guilty of an indictable misdemeanor, and the penalty applicable in such case, prescribed by Code Section 12894, is a prison sentence in the county jail not to exceed one year; or, a fine not exceeding five hundred dollars ($500.00); or, both such imprisonment and fine.

3. One who violates *either* Code Section 13198 *or* 13210 may, also, be proceeded against under the provisions of Chapter 617 of the Code of Iowa, pertaining to search and seizure, and the property used for gambling purposes, or the possession of which is prohibited may be forfeited; ordered destroyed; or, pending final destruction, may be temporarily impounded to be used for evidential purposes in any other trial or legal proceedings.

4. One who violates the provisions of Code Section 13198 is, likewise, guilty of maintaining a nuisance, and, in a proper chancery action, is subject to temporary and permanent injunctions, the violation of which carries with it, in each instance, a fine of not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000.00); imprisonment in the county jail not less than three (3) months, nor more than six (6) months; or, both such fine and imprisonment. This procedure is under Chapter 79 of the Code of Iowa 1935.

In addition to the foregoing all personal property, not otherwise required by law to be destroyed, used in connection with the operation of said nuisance, by decree of court will be forfeited to the State of Iowa, ordered sold, the costs first deducted, and the net proceeds paid to the county treasurer of the venue.

Moreover, the owner of real estate and building thereon used for such unlawful purpose, or, in his absence, his agent, may be made party-defendant in such injunction suit, which the statute directs shall be tried immediately at the first term of court thereafter, and if a permanent injunction issues against such owner, or his agent, a mulct tax of three hundred dollars ($300.00) is automatically imposed upon the real estate, which is certified to the county treasurer and becomes a lien upon the realty and is collected as any other tax. The building may be padlocked, also, for all purposes for one (1) year thereafter.

In the trial of such injunction suit, which is always to the judge, and never to a jury, Code Section 1600 applies. This reads as follows:

"**1600.** *Evidence.* In such action evidence of the general reputation of the place shall be competent for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge thereof and of acquiescence and participation therein on the part of the owners, lessors, lessees, users, and all those in possession of or having charge of, as agent or otherwise, or having any interest in any form of property used in conducting or maintaining said nuisance."

This rule of evidence makes it far from difficult to secure abatement of gambling nuisances by injunction process, in proper instances.

Attention is called, also, to Code Section 1588 which provides that such injunction suits may be maintained in the name of the State of Iowa, upon the relation of the county attorney, or of any citizen of the county, or any society, association or body incorporated under the laws of the state of Iowa. If the county attorney fails properly to cooperate, this does not leave the law enforcing agencies helpless, but the injunction procedure, under Chapter 79 of the Code of Iowa, 1935, is still available under the broad terms of Code Section 1588.

In the event of failure on the part of local police officers or the public prosecutor properly to perform their several duties, a detailed report should be promptly made to the attorney general, for appropriate action, in proper instances, under Chapter 56 of the Code of Iowa, 1935. The attorney general by Code Section 149 (7) has general supervision over all county attorneys, and under Code Section 1093 is the proper officer to institute proceedings for removal of officers who are wilfully or habitually neglectful of their duties or refuse to perform the same, all as set out in Code Section 1091.

By reason of space limitations no attempt has been made herein to set forth an exhaustive statement of the law, but merely to give a skeleton outline thereof and to advise as to available remedies. The language of the statutes

is plain and unambiguous, and judicial construction is never required under such circumstances, but if controversial situations arise not heretofore dealt with by court decisions, an early submission thereof, to the supreme court will be sought, to the end that the disputed points may be cleared up speedily.

TAXATION: ROAD POLL TAX: POLL TAX: The Legislative enactment, Senate File 21, which becomes effective July 4, 1937, repeals all of the statute, namely Sections 4644-c58 to 4644-e7 inclusive, relative to the levying of a road poll tax, but under the saving clause in sub-division 1 of Section 63 the authority remains for the collection of the tax and the making of the same a lien on real estate.

June 15, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following facts:

Senate File 21 passed by the recent General Assembly repealed Sections 4644-c58 to 4644-e7 inclusive of the Code of 1935 relating to a levy of a road poll tax. This act of the Legislature does not go into effect until July 4, 1937. What affect does the passage of this act, Senate File 21 have upon the 1937 road poll tax?

The road poll tax law applicable to territory outside of cities and towns is contained in Sections 4644-c58 to 4644-e7 inclusive of the 1935 Code. Section 4644-c58 of the statute is as follows:

"*Poll tax.* A road poll tax of three dollars is hereby annually levied on every male person, including the male officers and employees of any state institution, if any (but not including any committed inmate of such institution) over the age of twenty-one years and under forty-five years, who are residents of the county outside the corporate limits of cities and towns."

It will be noted by an examination of the above section of the statute that the road poll tax of $3.00 is levied by Legislative enactment. Under subsequent sections of the statute, included in those mentioned heretofore, are the provisions for collecting the tax imposed, the claims for exemptions, the return of the list of those subject to the tax to the county treasurer, an authorization to the county treasurer to collect the tax by court proceedings, and the direction to the county treasurer to certify and file a list of the delinquent poll tax payers with the county auditor, the direction to the county auditor to enter all unpaid poll taxes with the other taxes against the delinquent, and the making of such delinquent poll taxes a lien upon the real estate of the delinquent on January 1st following the year of levy. In other words, the sections of the statute heretofore mentioned not only levy the road poll tax, but contain the method of collecting such tax, and the provisions for making the same a lien against the taxpayer's property, and the manner in which the proceeds derived from such tax are to be disposed of. The foregoing sections of the statute were all in full force and effect on January 1, 1937. Therefore, under the provisions of Section 4644-c58, a road poll tax of $3.00 was automatically levied on every male person between the ages of 21 years and 45 years residing outside the corporate limits of cities and towns on the first day of January, 1937. Full provisions for the collection of the tax, the manner of making the same a lien against property, and the disposition of the tax after collection were in operation and were of full force and effect during the time the Legislature was in session.

Under Senate File 21, herein referred to, the Legislature repealed Sections 4644-c58 to Section 4644-e7 inclusive, being all of the statute with reference to the levy, collection, method of making the tax a lien against real property,

and the disposition of the tax after collection of same. This law does not, however, go into effect until July 4, 1937. Senate File 21 does not contain any savings clause. However, the chapter of the statute relative to construction of statutes contains a general savings clause with reference to acts passed by the Legislature of the character of Senate File 21. Section 63 of the statute is as follows:

"*Rules.* In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

1. *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."

The effect of the enactment of Senate File 21 upon the validity of the 1937 road poll tax must then be considered in the light of subdivision 1 of Section 63 above quoted, unless in doing so the same would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute, that is, to the statutory enactment being considered. The 1937 road poll tax had been levied and in fact was being collected at the time of the passage of Senate File 21, and we may assume that those facts were known to the Legislators at the time Senate File 21 was under consideration. No mention is made in Senate File 21 of the 1937 road poll tax, and we may assume that the omission of the same from the act was intentional.

Therefore, with the rule of construction in mind, we may logically assume that the Legislature had in mind that the tax which had accrued prior to the passage of the act would be collected regardless of the act and that those enjoined with the duty of collecting the tax would have authority to so collect it regardless of the affect of Senate File 21, and that therefore, a construction of the statute to the effect that it was passed and enacted without reference to the 1937 road poll tax would seem logical, and that the savings clause contained in Section 63, hereinbefore set out, would be ample authority for the various officers to proceed with the collection of the tax, notwithstanding the fact that the entire law levying the tax, providing for its collection, providing for the establishment of it as a lien, and the disposition of the proceeds, was repealed.

Our Supreme Court in the early case of *Tobin & Neary vs. Hartshorn*, 69 Iowa 648, in considering a situation similar to the one under consideration here, stated:

"The tax in controversy was voted and levied under Chapter 123, Laws 1876. This statute was repealed by Chapter 159, Laws 1884, paragraph 1. There is no provision in the last statute preserving rights accrued under the statute repealed. Counsel for plaintiff insist that by the repeal of the statute all authority for the collection of the tax, or any part of it, is taken away. But Code Section 45, paragraph 1, declares that 'the repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under and by virtue of the statute repealed.' The duty to pay the tax had been imposed, and the right to collect and receive it had accrued, and the penalty upon the tax had been incurred, when the repealing act was passed. These rights and duties were excepted from the operation of that act by this provision, which has the same effect as a saving clause in a repealing act intended to except them would have had. * * * We conclude, therefore, that the tax, and the penalty thereon, due at the time of the repeal of the statute authorizing the tax, may be collected."

To the same effect are the recent cases of *State vs. Shepherd*, 210 N. W. 476; *Thomas vs. Disbrow*, 224 N. W. 36; *Azeltine vs. Lutterman*, 254 N. W. 854.

It therefore appears without any doubt that the Legislative enactment, Senate File 21, which becomes effective July 4, 1937 will repeal all of the statute, namely Section 4644-c58 to Section 4644-e7 inclusive, relative to the levying of a road poll tax, the collection thereof, the making of the same a lien on real estate, the disposition of the proceeds derived therefrom, but that under the savings clause in subdivision 1 of Section 63, the authority remains for the collection of the tax and the making of the same a lien on real estate, and the disposition of the funds derived therefrom, until the tax is fully paid and disposed of.

It is therefore the opinion of this department that county officials should proceed with the collection of the 1937 road poll tax in the same manner as heretofore, regardless of Senate File 21.

HOMESTEAD EXEMPTION ACT: Where land is left to a son subject to the life estate of his mother, and he leases the land from the mother during her lifetime, he is not entitled to benefit of Homestead Exemption Act.

June 15, 1937. *Mr. Waldo E. Don Carlos, County Attorney, Greenfield, Iowa:* This department is in receipt of your request for an opinion upon the following facts:

The Will of a decedent devised 80 acres of land to a son, subject to a life estate in the mother. This son lives upon the land under a contract of lease with the mother, under which he pays a stipulated rental of $200.00 per year together with taxes and upkeep. Is the son entitled to the benefits of the homestead tax exemption act?

Under the homestead tax exemption act persons to be entitled to the benefits thereof must bring themselves within the provisions of the act. The act itself, for the purpose of the benefits thereunder defines the words "homestead" and "owner." Inasmuch as the facts stated above indicate that the claimant resides upon the land, the question of occupancy may be conceded. However, the benefits inuring under the act are to occupant-owners. The act defines an owner as "a person occupying the homestead under devise or by operation of the inheritance tax law where the whole interest passes or where the divided interest is shared only by blood relatives."

The interest held by the son in this case is a remainder, subject to the life use of his mother. During the lifetime of the mother, the interest of the son while vested, is postponed in enjoyment. The son having no present right of occupancy or use of the premises under his devise cannot be said to be occupying the land as an owner. In fact, the mother and son have recognized that the son has no present right of possession and have accordingly entered into a lease for the property at a stipulated annual rental. The relationship of mother and son in this particular instance is that of landlord and tenant, and the son is now occupying the land in question under and by virtue of a lease between himself and his mother and is not occupying the land under the devise from his father and consequently is not entitled to the benefit of the homestead tax exemption act.

TAXATION: CITIES AND TOWNS: Personal property used in the cultivation of agricultural or horticultural lands or tracts of 10 acres or more included within cities or towns, are not exempt from taxation. Section 6210 does not extend that benefit to personal property.

June 15, 1937. *Mr. Guy C. Richardson, County Attorney, Jefferson, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Is the personal property of a tenant occupying tracts of ground of ten acres or more within the limits of a city or town which is in good faith used for agricultural or horticultural purposes exempt from city or town taxes?

Section 6210 of the 1935 Code is as follows:

"*Agricultural lands.* No land included within the limits of any city or town which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that said lands and all personal property necessary to the use and cultivation of said agricultural or horticultural lands shall be liable to taxation for city and town road purposes, at not exceeding one and one-fourth mills, and for library purposes."

It is only by reason of the above statute that land included within the limits of a city or town when used for agricultural or horticultural purposes is exempted from taxation. All property within the State is subject to taxation unless exempted therefrom by statute. Taxation is the rule and exemption is the exception. The foregoing section of the statute is plain and unambiguous so far as it applies to lands within the limits of cities and towns. It only becomes confusing when the exception is taken into consideration. One rule of statutory construction is that where the statute itself is plain and unambiguous it cannot be made ambiguous by some other provision of law. The statute herein quoted is specific in granting the exemption to the real estate without any mention of the exemption applying to the personal property used upon such real estate, the exception referred to applying to the land and all personal property necessary to the use of the land being subject to taxation for city and town road purposes and library purposes.

Inasmuch as the statute does not in terms specifically exempt the personal property used upon such land, we are unable to interpret the exception noted in the foregoing section as granting to such personal property an exemption. Had the Legislature intended to grant an exemption to such personal property, the same would undoubtedly have been included with land in the exemption clause of the section.

It is therefore the opinion of this department that personal property used in the cultivation of agricultural or horticultural lands or tracts of ten acres or more included within cities or towns is not exempt from taxation.

MOTOR VEHICLES: "UD" PLATES: A purchaser may drive a dealer's car with "UD" plates thereon, pending the delivery of the car he purchased.

June 16, 1937. *Mr. Jens Grothe, County Attorney, Charles City, Iowa:* We are in receipt of your communication requesting an opinion on the following proposition:

Is an illegal act being committed by a dealer in motor vehicles in allowing a purchaser of a new vehicle, pending the delivery of the same from the factory, to drive a motor vehicle with UD plates attached thereto?

The privilege of using "D" or "UD" plates is for motor vehicles operated only "in the conduct of the business." The dealer's business was selling new cars, and part of that business requires the "trading in" of the car owned by the purchaser. Situations like the one at hand arise frequently. It has become a part of the automobile business. It is part of the accommodation necessary

to successfully pursue the automobile business. That car then is being used in the conduct of the dealer's business, that is, of selling new cars and taking in second hand ones. The car is not being used "by him" (the dealer) for private use nor is it used "for hire." The user pays nothing for its use.

Certainly a person purchasing a new or second hand car is within the law in taking the car for a limited period of time for demonstration purposes. That is incident to the automobile industry of such dealer. The instant case is in the same category.

It is therefore our opinion that the law was not being violated when the purchaser drove a dealer's car pending the delivery of the car he purchased.

BOARD OF SUPERVISORS: DRAINAGE WARRANTS: Drainage warrants which have been outstanding for more than ten years without qualifying circumstances are vulnerable to the plea of the statute of limitations.

June 16, 1937. *Mr. Robert B. Organ, County Attorney, Council Bluffs, Iowa:* This department is in receipt of your letter asking an opinion upon the following matter:

On January 1, 1937, there was on hand in the Pigeon Creek No. 2 Drainage Fund a balance of $1,852.11. During February, 1937 there was collected on a new levy in this district $5,010.97, and during March an additional collection of $661.97, making a total of $7,524.23.

There are outstanding old warrants against this fund in the sum of $6,330.87. Included among the warrants is one in the sum of $2,271.89, dated May 25, 1925. This warrant was not paid for the reason that there was not enough money prior to the collections made in 1937 with which to pay the same. Does the statute of limitations run against these warrants and may the county auditor lawfully pay such warrants?

The Supreme Court in the early case of *Mills County National Bank vs. County of Mills*, 25 N. W. 884 held that action on ditch warrants could be maintained without regard to the existence of assets in the fund from which they are payable and that the holder of warrants is not justified in waiting for the county to collect the money due to the fund, but may have his judgment and afterwards may take steps for its enforcement.

The foregoing case has been followed by the Supreme Court and is cited with approval in the late case of *Lenahan vs. Drainage District*, 219 Iowa 294. In the later case the statute of limitations was offered as a defense in an action of mandamus brought by the plaintiff to compel the board of supervisors to make a levy for the payment of warrants held by plaintiff, and the court, on the authority of the Mills County National Bank case, heretofore cited, upheld the defense and held that the warrants were barred by the statute of limitations. However, a debt against which the statute of limitations may be pleaded successfully is not extinguished as in the case of payment, but may be enforced if the statute is not relied upon as a defense. The right to plead the statute is ordinarily personal with the debtor, and if he waives it, no one else can rely upon it.

However, in the case of drainage warrants, the board of supervisors and the county officers are but representatives of the drainage district. The property owners within the district and against whose property the tax is levied for the payment of its warrants are the real parties in interest. The debt for which the warrant was issued has not been extinguished, but by lapse of time is, in our opinion, vulnerable to the plea of the statute of limitations.

SCHOOLS, RURAL—OPENING: TEACHERS—CONTRACT: Where there is doubt that attendance requirements for opening rural school will be met, matter should be taken to county superintendent of schools, who may enter into 3 months' contract with teacher.

June 17, 1937. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* We acknowledge receipt of your request for an opinion of this department in which you set out the following facts:

A rural school has been closed for at least the last year. It is apparent that there will be six pupils in attendance at the school if it is opened next year.

The question is whether this automatically gives the board the right to employ a teacher for next year, or whether there must be an affidavit executed by the parents of seven children within the district who would attend such school, if opened, as provided in Section 4231.

Also, is a different rule applicable to a school which has been closed than is applicable to a continuation of a school already open?

Section 4231, 1935 Code, relates to non-employment of teachers, and provides as follows:

"4231. *Nonemployment of teacher—when.* 1. No contract shall be entered into with any teacher to teach an elementary school when the average daily attendance of elementary pupils in such school the last preceding term therein was less than five such pupils of school age, resident of the district or subdistrict, as the case may be, nor shall any contract be entered into with any teacher to teach an elementary school for the next ensuing term when it is apparent that the average daily attendance of elementary pupils in such school will be less than five or the enrollment less than six such pupils of school age, resident of the district or subdistrict, as the case may be, regardless of the average daily attendance in such school during the last preceding term, unless the parents or guardian of seven or more such elementary children subscribe to a written statement sworn to before the county superintendent or a notary public certifying that such children will enroll in and will attend such elementary school if opened and secure from the county superintendent written permission authorizing the board to contract with a teacher for such school for a stated period of time not to exceed three months.

When natural obstacles to transportation of pupils to another school in the same or in another corporation or other conditions make it clearly inadvisable that such elementary school be closed, the county superintendent may authorize the board in writing to contract with a teacher for such school for a stated period of time not to exceed three months.

2. Any contract with any teacher which is made in violation of the provisions of this section shall be null and void from its inception and no compensation shall be due or paid to any teacher who enters into a contract in violation of the provisions of this section."

We are of the opinion that the "last preceding term" as used in the said section refers to the last preceding term in the particular school. This view is supported by the wording of the statute in which the word "therein" follows the phrase "last preceding term" where it first appears in the section.

This section sets out two conditions under either of which the board has no authority to contract for the employment of a teacher for the ensuing term. These two conditions may be stated as follows:

1. The board cannot contract with a teacher to teach a particular elementary school if the average daily attendance in such school the last preceding term therein was less than five elementary pupils of school age who are residents of the district or subdistrict, as the case may be, unless the board first secures the written consent of the county superintendent, which consent cannot cover a period of more than three months.

2. The board cannot contract with a teacher to teach a particular elementary school if it is apparent that the average daily attendance in such school if opened will be less than five or the enrollment less than six elementary pupils

of school age who are residents of the district or subdistrict, as the case may be, unless the board first secures the written consent of the county superintendent, which consent cannot cover a period of more than three months.

The county superintendent has power to consent to the continuance of a particular school even though it cannot be shown that the average daily attendance will not be less than five nor the enrollment less than six if, in the judgment of the county superintendent, it would be clearly inadvisable to close such school.

But his consent to its continuance must be in writing and may cover a period of not more than three months. The consent of the county superintendent to the continuance of a school does not make it mandatory upon the board to continue it; it merely gives to the board an authority it would not have without such consent.

It is to be noted, however, that the county superintendent, under the provisions of the statute above quoted, may authorize the continuance of a school and the employment of a teacher for a period not to exceed three months, where it appears that it would be clearly inadvisable to close such school.

In the present case it will first be necessary to determine whether the particular school can comply with each of the two conditions set out above. It is stated that it is apparent that there will be six pupils in attendance during the ensuing term. The statute further requires that if it be apparent that the average daily attendance in such school will be less than five, then no contract shall be entered into by the board.

It is our opinion that the statute contemplates that the board make the determination as to whether these requirements are fulfilled. The purpose of the statute is to guard against the employment of a teacher for a full year term in a district in which a very few children may attend the school.

Where there is doubt that the number of children who will attend, or that the average daily attendance of such children will not be in number sufficient to comply with the statute, it is our opinion that the board ought to apply to the county superintendent for authority to contract with the teacher upon a three months' basis. In the present case where it appears that only six children will attend the school, it would seem doubtful that the average daily attendance would be five. However, under the statute, if it is clearly inadvisable that such school should be closed, the county superintendent may authorize the board to contract with the teacher for a period not exceeding three months.

MOTOR VEHICLES: DRIVING WHILE INTOXICATED. A city ordinance which prohibits driving a motor vehicle while intoxicated and prescribes penalty of $100 and costs is void as no authority is delegated to cities and towns with certain exceptions to pass ordinances inconsistent with state laws governing use of motor vehicles.

June 18, 1937. *Mr. L. E. Wallace, Superintendent, Motor Vehicle Department:* We are in receipt of your inquiry asking for an opinion upon the following proposition:

Under Senate File 181, Acts of the 47th General Assembly, is a city ordinance valid which prohibits the driving of a motor vehicle while intoxicated and prescribes a penalty for the violation thereof of $100 and costs?

Section 267 of Senate File 181 of the Acts of the 47th General Assembly reads as follows:

"*Powers of local authorities.* Local authorities shall have no power to enact, enforce, or maintain any ordinance rule, or regulation in any way in conflict with, contrary to or inconsistent with the provisions of this chapter, and no such ordinance, rule or regulation of said local authorities heretofore or here-

after enacted shall have any force or effect, however the provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

"1. Regulating the standing or parking of vehicles;

"2. Regulating traffic by means of police officers or traffic control signals;

"3. Regulating or prohibiting processions or assemblages on the highways;

"4. Designating particular highways as one way highways and requiring that all vehicles thereon be moved in one specific direction;

"5. Regulating the speed of vehicles in public parks;

"6. Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersections;

"7. License and regulate the operation of vehicles offered to the public for hire;

"8. Restricting the use of highways as authorized in Sections four hundred ninety-five (495), to four hundred ninety-seven (497) inclusive. (New-uniform act.) Referred to in Section 268."

Section 5714, being under Chapter 290 of the Code 1935, captioned "Ordinances" reads as follows:

"5714. *Power to pass.* Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

Section 6720, pertaining to special charter cities reads as follows:

"6720. *Ordinances—fines.* Such cities shall have power to make and publish, from time to time ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this chapter, and the charters thereof, and such as are necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such cities and the inhabitants thereof; and to enforce obedience to such ordinances by a fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

We have examined the following leading Iowa cases on the matter: *Town of Bloomfield vs. Trimble*, 54 Iowa 399; *Town of Neola vs. Reichert*, 131 Iowa 492; *Blodgett vs. McVey*, 131 Iowa 552; *Iowa City vs. McInnery*, 114 Iowa 586; and cases cited therein. It is difficult to reconcile all phases of the above cited cases. Certainly the reasoning in the different cases differ but the law as it pertains to this question is quite well settled.

In the first place, we have the authority under Sections 5714 and 6720 for cities and towns to pass ordinances "to provide for the safety, preserve the health, etc," and read in conjunction with Section 267 of Senate File 181, the legislature has delegated to cities and towns authority to enact the ordinance in question. An ordinance prohibiting the "driving while intoxicated" preserves health and safety. It is a matter of common knowledge that a person under the influence of intoxicating liquor is more susceptible to accidents as his reflexes act slower and his control over the car is less. Section 267 says that local authorities (which includes cities and towns under Section 1, paragraph 43) shall have no power to enact ordinances, etc., in conflict with this chapter. Reading that in conjunction with the other two cited sections, we come to the conclusion that cities and towns may enact ordinances, etc., cover-

ing the same subject matter, as is covered by that chapter. *Town of Bloomfield vs. Trimble*, 54 Iowa 399; *Town of Neola vs. Reichert*, 131 Iowa 492.

With the authority to enact an ordinance established, we come to the next question of whether or not the city "can enact such an ordinance as this." The three sections hereinbefore set out prohibit the enactment of ordinances etc. in conflict with the state law. Section 312 of Senate File 181 prescribes a punishment for driving while intoxicated by a fine of not less than $300 nor more than $1,000 or by imprisonment in the county jail for a period of not to exceed one year or both, and the penalty is graduated for succeeding offenses. The city ordinance fixes the penalty at $100. Now if the power to punish acts made criminal by the laws of the state has been unqualifiedly conferred upon a city, no question of inconsistency or conflict can arise. See *Blodgett vs. McVey*, supra; *Town of Bloomfield vs. Trimble*, supra; *Foster vs. Brown*, 55 Iowa 686. But here the authority is not unqualifiedly given, but it is given with a definite prohibition attached, and that is that the ordinance etc. must not be in conflict with the state statute. The state statute and the city ordinance are clearly in conflict, as the penalties differ. See *Iowa City vs. McInnery*, supra. The city ordinance will therefore be void under Senate File 181.

TAXATION: HOMESTEAD EXEMPTION ACT: A widow as the surviving spouse of the titleholder is entitled to the benefit of the homestead tax exemption to the full extent of the credit allowed by law.

June 18, 1937. *Mr. George E. Heins, County Attorney, Monona, Iowa:* This department is in receipt of your request for an opinion upon the following question:

A died intestate, leaving a widow, B and two children, C and D. Is B, as the surviving spouse, entitled to file a claim and secure the entire exemption under the homestead tax exemption act where she occupies the property as a homestead?

Assuming that the property has qualified as a homestead, the title having been previously in the husband's name, B, as the surviving spouse, would in the event of her occupancy of the homestead be entitled to make claim for the benefit of the tax exemption credit and would be entitled to the full credit allowed by the act. Subdivision 2 of Section 19 of the act defines an owner as follows:

"The word 'owner,' shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse * * *."

Therefore, the widow, as the surviving spouse of the titleholder is entitled to the benefit of the exemption credit to the full extent.

TAXATION: COUNTIES: A person may redeem from property sold at tax sale within period of six months from April 15, 1937 upon complying with provisions of Senate File 167, and it is immaterial that the county under the public bidder law had become the title owner.

June 19, 1937. *Mr. Grant L. Hayes, County Attorney, Mount Ayr, Iowa:* This department is in receipt of your recent letter asking an opinion upon the following facts:

H acquired title to land situated in a drainage district in 1932 at which time there were unpaid drainage assessments and the general taxes for the year 1932. H did not pay the drainage tax nor the general tax and on December 2, 1935 the land was sold to the county under the public bidder law, and no redemption having been made, the deed was issued to the county on the 8th

day of March, 1937. H now wishes to avail herself of the provisions of Senate File 167 and again acquire ownership of the property by payment of the general taxes for which the property was sold. Does the fact that the county acquired title before the passage of Senate File 167 make any difference?

Under Section 6 of Senate File 167 the property owner is given an extended period of redemption for six months following the effective date of Senate File 167, which was April 14, 1937, in which to make redemption, and the act further provides in Section 6 that the extended period of redemption shall apply even though a tax deed has been made to the county for the property. Therefore, if H should, under the facts in the foregoing question, tender one-tenth of the amount necessary to make redemption to the county auditor, together with an agreement to pay the remainder in nine equal annual installments and the current taxes upon such property, she could re-possess and re-own the land by carrying out the agreement provided for in Section 1 of the act, even though the property has gone to tax deed in favor of the county.

2. If the county is required, under the act in question, to convey the land to H upon payment of the general taxes for which it was sold, what instrument will it use to pass such title?

In the event the property has gone to tax deed in favor of the county and H, the prior owner and person entitled to make redemption complies with Section 2 of Senate File 167, she thereby becomes entitled to re-possess and re-own such land and the county auditor should make conveyance thereof by quit-claim deed.

3. If the county conveys to H, does she take title free and clear of the drainage assessments?

If H complies with the provisions of Section 1 of the act and becomes re-possessed with the title, she does not take such title free and clear of the drainage assessments. Under the provisions of Section 6 of the act it is provided:

"* * * where any piece of property is redeemed after the issuance of a tax deed, all of the liens of every kind which existed prior to the issuance of said tax deed shall be reinstated and take the order of preference they had prior to the issuance of said tax deed as though no tax deed had been issued."

The Legislature has by the inclusion of the foregoing quoted portion of Section 6 in the act established a condition and requirement with which H must comply in order to avail herself of the provisions of the act. The tax deed by which the county holds title to the real estate has divested H of all right, title and interest to the real estate, and the Legislature could and can prescribe the conditions under which H may re-possess and re-own such property by redemption.

TAXATION: HOMESTEAD EXEMPTION ACT: Examination of all applications must be passed upon by board of supervisors while in session. Board cannot delegate its power or authority to any other body or person.

June 19, 1937. *Mr. E. W. Ruppelt, County Attorney, Grundy Center, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

Is it necessary that the applicant live on the property at the time application for the 1936 refund is made?

Under Senate File 184, the Homestead Tax Exemption Act, the Legislature has prescribed and designated those persons and properties which are entitled

to the benefits of the Act. Section 19 of the Act has defined the word "homestead" and likewise "owner."

The Act provides for a refund on the 1936 tax due and payable in 1937. So far as the 1936 tax is concerned, the Act is retroactive and in reality grants, to those who qualify, a bonus. There is no provision in the Act with reference to the necessary status of a claimant for the refund of the 1936 tax. The Act provides that the applicant must actually live in the property six months or more in the year, which we construe to mean six months or more in the taxable year. If a person were an owner of property, as owner is defined in the Act, and actually and in good faith occupied the same as his home for six months during the year of 1936 and was such owner on January 1, 1937 and liable for the taxes upon such property, he would, in our opinion, be entitled to the benefits of the credit or refund provided by the Act on his 1936 tax. We cannot, without reading something into the Act which is not there, interpret the same to require that the applicant must be living in such property, or in fact owning the same, when he makes his application relative to the 1936 tax.

Sections 6 and 11 of the Acts state that the Board of Supervisors shall forthwith examine the claims for homestead exemption credit and pass upon the same. Does this mean that the examination must be made by the full Board of Supervisors in session, or can it be done by committees of the Board?

The provisions of the Act with reference to the examination of the claims for the benefits arising under the homestead tax exemption act require that the county Board of Supervisors of each county shall make the examination. The language is plain and unambiguous. The Act places the duty upon the Board of Supervisors as a body. The Board of Supervisors possess only such powers as are granted to it or imposed upon it by the Act. The Board is without authority to delegate its power or authority to any other body or person.

It is therefore the opinion of this Department that the examination of all claims and applications arising under the Homestead Tax Exemption Act must be passed upon by the Board of Supervisors while in session as a Board of Supervisors.

CIVIL SERVICE: Civil Service Bill applies to cities acting under special charters.

June 19, 1937. *Hon. D. W. Kimberly, State Senator, Davenport:* We are in receipt of your request for an opinion on the following proposition:

Are the provisions pertaining to civil service enacted by the 47th General Assembly applicable to special charter cities?

Chapter 289 of the Code 1935 is the chapter covering civil service, and the 47th General Assembly virtually wiped out the chapter by striking out fifteen sections thereof in toto and enacting substitutes therefor, and by amending six more of the sections by additions thereto, along with striking out certain words and phrases. The amendments, of course, are to Chapter 289.

Prior to the enactments of the 47th General Assembly, there is no question that Chapter 289 was applicable to cities acting under special charters, as Section 6758 of the 1935 Code reads as follows:

"6758. *Civil service.* Chapter 289 shall apply to cities acting under special charters except those parts thereof specially applicable to cities having a population of more than one hundred thousand."

As Chapter 289 heretofore had no separate section stating that it was applicable to special charter cities, a person must rely on the section above quoted to bring them under its provisions, and as it is specific and meets every requirement of the law pertaining to making of acts applicable to special charter cities, there is no question but what those cities came under the provisions of that chapter. Section 6730 provides as follows:

"6730. *Applicability of provisions.* The provisions of this chapter shall apply only to cities acting under special charters. No provisions of this Code, nor laws hereafter enacted, relating to the powers, duties, liabilities, or obligations of cities or towns, shall in any manner affect, or be construed to affect, cities while acting under special charters, unless the same have special reference or are made applicable to such cities.

"In all laws hereafter enacted such reference or application shall be in a separate section in the act."

The amendments passed by the 47th General Assembly say that this chapter shall apply in cities "under any form of government," and also contains such phrases as "in all other cities." Those phrases alone are not enough in themselves to make them applicable to special charter cities. See *Reed vs. City of Cedar Rapids*, 136 Iowa 193. To so hold would be to disregard the provisions of Section 6730.

The title to the new amendments, after stating the sections that are to be amended, states as follows: "Relating to civil service employees of cities including those operating under special charters." Not only does this authorize an enactment broad enough to include cities acting under special charters, but it also indicates what the Legislature anticipated they were doing by the amendments. We do not care to base this opinion upon that fact alone, but to base it upon the proposition that Section 6758 was left intact by the 47th General Assembly, and it is our opinion that by leaving that section intact the Legislature complied with the requirements which are set out in Section 6730 requiring the making of special reference to statutes which are to be applicable to cities acting under special charters.

Had the Legislature enacted a separate section specifically making the amendments applicable to cities acting under special charters, they would have been doing nothing more than reiterating what has already been enacted under Section 6758. The law does not require that to be done. Section 6758 says that Chapter 289 shall apply to cities acting under special charters. The new amendments amended Chapter 289, and we do not believe that it is the correct construction of the statutes to say that Section 6758 meant to apply to those sections of Chapter 289 only that are now in force and effect, but it is also broad enough to say those that are hereinafter enacted. To hold contra to this opinion would be to say that the Legislature repealed the existing civil service laws as they pertain to special charter cities, and enacted nothing in lieu thereof. There can be no question but what this was not the intent of the Legislature, and especially is that true in light of the fact that the civil service amendments widen the scope of civil service instead of narrowing the same.

It is therefore our opinion that the amendments to Chapter 289 enacted by the 47th General Assembly apply to cities acting under special charters.

BOARD OF SUPERVISORS: COUNTIES: Board of supervisors has authority to lease corporate property of a county.

June 21, 1937. *Mr. J. E. Heiserman, County Attorney, Monticello, Iowa:* This department is in receipt of your request for an opinion on a question stated by you as follows:

Can the Jones County Board of Supervisors legally lease or rent a portion of the space in the Jones County Court House to the Jones County Farm Bureau?

Section 5130, Code 1935, provides in part as follows:

"*General powers.* The board of supervisors at any regular meeting shall have power: * * *

"4. To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent with 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. * * *

"12. To purchase, for the use of the county, any real estate necessary for county purposes; to change the site of, or designate a new site for any building required to be at the county seat, when such site shall not be beyond the limits of the city or town at which the county seat is located at the time of such change; and to change the site of and designate a new site for the erection of any building for the care and support of the poor.

"13. When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to sell the same at a fair valuation. * * *

"15. To build, equip, and keep in repair the necessary buildings for the use of the county and of the courts. * * *

"17. To lease or sell to school districts, real estate owned by the county and not needed for county purposes. * * *."

Provision is made in Chapter 449, Code 1935, for the management, lease and sale of real estate acquired by counties pursuant to execution and tax sales. Section 10260-e1 of said chapter provides as follows:

"*Management.* When the title to real estate becomes vested in the state, or in a county or municipality under this chapter, or by conveyance under the statutes relating to taxation, the executive council, board of supervisors or other governing body, as the case may be, shall manage, control, protect by insurance, lease or sell said real estate on such terms, conditions, or security as said governing body may deem best."

The foregoing are among the express powers conferred upon the boards of supervisors by legislative mandate and, with the exception of subsection 17 of Section 5130 and Section 10260-e1, supra, there is no legislative grant of authority to boards of supervisors to lease any of the corporate property of the county. Therefore, in view of the universally acknowledged rule that counties can exercise no powers which are not in express terms or by fair and reasonable intendment conferred upon them, it follows that in the first instance the power to lease or rent a portion of the Jones County court house to the county farm bureau, if there be such power, must necessarily be implied from express powers given. *Hilgers vs. Woodbury County*, 200 Iowa 1318, 15 C. J. 457, Section 103. And in the second place, if there be the implied authority the query necessarily follows as to what limitations are imposed on boards of supervisors in the exercise of such implied power.

While it might successfully be contended that in view of subsections 13 and 17 of Section 5130 and Section 10260-e1, supra, the language being explicit in respect to the instances when boards may lease or sell corporate property of the county, thereby implying a negative of that which is not expressed—expressio unius est exclusio alterius—or stated otherwise, that boards may lease corporate property of the county only where express provision is made

and not otherwise, yet it is our opinion, and common sense dictates, that this rule would not obtain in such case were the case to come before the Supreme Court of Iowa. For example, consider the supposititious case of an abandoned court house building. It seems an untenable theory to say that the board could not lease the premises and must maintain the premises unused and unremunerative during a period when its sale was considered inadvisable. From the express provision that boards shall have the power to "have the care and management of the property" of the county, we believe the court would find implied power in a board of supervisors to lease the property in such a case and under similar circumstances. Not only is such a result consistent with the Iowa case of *Hilgers vs. Woodbury County*, but with the decisions of the many jurisdictions cited copiously in a note to *State of Kansas ex rel. C. W. Mitchell, County Attorney, vs. City of Coffeyville*, 127 Kans. 663, 274 Pac. 258; 63 A. L. R. 614, in the A. L. R. report of the case, and notably with *State ex rel. Scott vs. Hart*, 144 Ind. 107; 33 L. R. A. 118, cited and relied upon by the Iowa court in the *Hilgers vs. Woodbury County* case, for the Indiana court said in its opinion:

"The court-house is erected for the public use, to furnish a place to hold the courts, and for offices for the clerk, sheriff, treasurer, and auditor, and for such other public purposes as may be necessary. The increase in the business of the court may, from time to time, require additional rooms in which to hold court, as well as for juries and grand juries, and for the county officers named; and the board of commissioners cannot by contract prevent themselves or their successors from using or setting apart for the court or the county officers *or other public purposes* rooms in the court-house not before used for such public purpose. * * *

"We think it clear, both upon principle and authority, that the boards of commissioners in this state have no power to rent the court-house, or any part of it, for private use, and that the relation of landlord and tenant cannot exist between the county and any private person as to the court-house, or any part thereof, under the laws now in force. There is no statute in this state authorizing the boards of commissioners to rent the court-house, or any part thereof, for private use. * * *"

In this connection reference might also be made to the case of *Poweshiek County vs. Buttles*, 70 Iowa 246, where the Supreme Court of Iowa with respect to the question of implied authority of a board of supervisors held that in the management and control of the school fund the board had authority to do acts and make settlements for the protection of the fund, which in the exercise of wisdom and care prudent men or men of affairs would do for the purpose of securing or collecting a debt.

It is the opinion of this department that implied power to lease corporate property of a county can be drawn from the express powers given, but that its exercise is limited, in fact, has been expressly limited by the one decision to come before the Supreme Court, namely, *Hilgers vs. Woodbury County*, supra, where the court in considering the liability of Woodbury County to the plaintiff for injuries sustained by reason of the negligent act of one of its employees, the plaintiff at the time the injuries were sustained being engaged in a private mission to the leased quarters of the American Legion in the county court house, applied the rule that obtains in a majority of jurisdictions, namely, that public officers have no power to rent a portion of a public building for a private use in the absence of a legislative grant of such power. The court in its opinion at page 1320, et seq. of 200 Iowa said:

"Counties are recognized as quasi corporations, and it is universally held that the board of supervisors of a county has only such powers as are expressly conferred by statute, or necessarily implied from power so conferred. There is no provision in the statute, as it existed at the time of the accident in question, conferring upon the board of supervisors any express power to rent any portion of the courthouse or other county property for private use. The language of the statute cannot be extended by fair construction to confer such power upon the board of supervisors. Nor is the power to rent a portion of the courthouse to be implied from the power granted the board of supervisors to have general management and care of the county property. The board of supervisors is expressly authorized by statute to purchase real estate necessary for the erection of county buildings, and to build and keep in repair the necessary buildings for the use of the county and courts. This is a public purpose. But the board of supervisors has no power to use or lease the courthouse or any portion thereof for a strictly private purpose, unless the legislature has seen fit by an enactment to grant such power; and no such power has been conferred in this state.

"The authorities are not uniform on the question of the right of public officials to rent a portion of a public building for private use, but we are satisfied that the greater weight of authority and the better reasoning are to the effect that the board of supervisors has no power to so use a courthouse or any portion of it, in the absence of a legislative grant of such power. The question, under statutes somewhat similar to ours, is quite fully discussed in *State ex rel. Scott vs. Hart*, 144 Ind. 107. (Cases cited.)

"It follows that 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."

Lest it be contended that what has been said hereinbefore cannot be reconciled with the opinion, we feel that the expression of the court that "nor is the power to rent a portion of the court house to be implied from the power granted the board of supervisors to have general management and care of the county property" must be read in the light of the facts involved in the *Hilgers vs. Woodbury County* case, namely, the leasing of a part of the court house, which at the time is being used to house county officers, for a strictly private purpose.

The court in the Hilgers case did no more than hold that a board of supervisors has neither the express nor implied power to lease a portion of the court house for a strictly private purpose.

Now a farm bureau, organized under Chapter 138, Code 1935, and for the purpose of this opinion we assume the Jones County Farm Bureau is organized and existent pursuant thereto, is neither strictly private nor public in aspect. It falls into a middle classification which we are pleased to call quasi public for the reason that under said chapter there can be but one such organization in any one county, its incorporators may be farmers, land owners, or business men, pretty much inclusive of the entire county electorate; its object is to advance in the county agriculture, domestic science, horticulture, animal husbandry and the marketing of farm products, all vital to the largest industry in the state, and its members may include any citizen of the county and any non-resident owning land in the county. More important is the further fact that by virtue of Section 2930 of said chapter, provision is made that boards of supervisors shall appropriate to such organizations from the general fund of the county a sum double the amount of the aggregate of the dues and pledges of the members. No dividends may be declared, and annual reports as to receipts and expenditures must be filed with the county auditor, Iowa State

College and the Department of Agriculture. It is a fact that federal funds are available to such organization. Clearly, while private in inception, it is public in purpose.

It is accordingly the opinion of this department that the Jones County Board of Supervisors has the implied power to lease or rent a portion of the Jones County Court House, not needed for the county or the courts, to the Jones County Farm Bureau, provided the organization is established under the provisions of Chapter 138, supra, on the theory that because of its quasi public character it falls outside the operation of the rule announced in the *Hilgers vs. Woodbury County* case.

In passing, we recommend that any such lease be for a short term consistent with the anticipated need of the county for the space so leased to carry on the business of the county, or the courts to carry on their business.

COUNTY OFFICERS: ENGINEER: TRANSMISSION LINES: EXPENSE: Only duty of county engineer, or if there be no engineer, the board of supervisors, is designating location of lines in highway where poles shall be erected. Section 4838. Expense of removal of obstructions borne by owner of property causing obstruction. Sections 4839, 12401, 4841.

June 21, 1937. *Mr. Ray A. Potter, County Attorney, Tipton, Iowa,* and *Mr. James E. Coonley, County Attorney, Hampton, Iowa:* We are in receipt of your requests for an opinion on the following propositions:

1. What are the exact duties required of the County Engineer in locating new lines applied for in the request made by Rural Electrification Associations pursuant to the provisions of Section 4838, Code, 1935?
2. Is the County Engineer only required to make written memoranda of the location of new lines, or is he also required to stake out and make surveys of all proposed new lines?
3. In the event your ruling includes surveys, does the expense incident thereto fall upon the county or upon the association making application?
4. Where shall the expense of removal of obstructions in highways be borne?

Section 4838, Code, 1935, provides:

"*New lines.* 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 the secondary roads, shall designate said location.*"

It is the opinion of this department that under this section the only duty imposed upon the county engineer, or if there be no engineer, on the board of supervisors, is one of designating the location of the lines in the highway where the poles supporting the superstructure shall be erected. That this is the correct construction to be placed upon the italicized wording of the statute is supported by dicta of the Supreme Court of Iowa. See

Central States Electric Company vs. Pocahontas County, 223 N. W., 236, 241;
Iowa Railway and Light Corporation vs. Lindsey, 211 Iowa 544;
Brammer vs. Iowa Telephone Company, 182 Iowa 865.

The established practice, as we are informed, is to designate the location of the lines so many feet from the center line of the highway in the case of improved roads, or one-half the length of the authorized cross-arms from the fence line in the case of unimproved roads, this, in order that the whole of the line, together with the necessary structure and attachments may be within

the confines of the highway. As bearing on this, see the first two cases above cited. The designation of the location should, in our opinion, take the form of written memoranda to be filed with the county auditor.

In view of the foregoing, it is unnecessary to answer your third inquiry. However, should the applicant desire that the engineer stake out and make a survey in connection with the designation of the location of new lines, or parts of lines, he may avail himself of the provisions of Section 5482, Code, 1935, and call upon the engineer to do so at the expense of such applicant.

As to the last question presented, it is our opinion that the expense of the removal of obstructions in highways must be borne by the owners of the property which constitutes such obstructions. This is clear under the provisions of the following sections of the Code:

"4839. *Cost of removal—liability.* Any removal made in compliance with the foregoing sections shall be at the expense of the owners of said fences and poles. All removals shall be without liability on the part of any officer ordering or effecting such removal."

"12401. *Expenses—how collected.* The expense of abating a nuisance by virtue of a warrant can be collected by the officer in the same manner as damages and costs are collected on execution, except that the materials of any buildings, fences or other things that may be removed as a nuisance may be first levied upon and sold by the officer, and if any of the proceeds remain after satisfying the expense of the removal, such balance must be paid by the officer to the defendant, or to the owner of the property levied upon; and if said proceeds are not sufficient to pay such expenses, the officer must collect the residue thereof."

"4841. *Nuisance.* Any person, partnership or corporation who makes, or causes to be made, any obstruction mentioned in Section 4840, in such traveled way, and any officer responsible for the care of such highway who knowingly fails to remove said obstructions, shall be deemed to have created a public nuisance and be punished accordingly."

CIVIL SERVICE: Police judge does not come within provisions of civil service act.

June 23, 1937. *Hon. Roy E. Stevens, Ottumwa, Iowa:* We are in receipt of your inquiry on the following proposition:

Does a police judge come under the provisions of the new civil service act passed by the Forty-seventh General Assembly?

The new civil service act applies to "all appointive officers and employees * * * in cities, etc." In speaking of appointive officers, the legislature is referring to those persons filling positions which are filled by appointment. The position of police judge may be filled by appointment. See Sections 5633-d1, 6530 and 6651. On the other hand, in cities of 15,000 or over the position of police judge may be filled by the electorate. That is to say that a police judge may be elected or may be appointed. He then is not filling a position which is solely an appointive one, but one that may be filled by an election. Civil service does not apply to elective offices, and it is our interpretation of the act that it cannot be extended to include offices which are filled by either appointment or by the electorate.

A person qualifying under civil service can only be discharged for cause by the civil service commission therein set out or by the abolition of the office by the council. To say that police judges come under civil service would be to repeal by implication the provisions of Section 5632 in that a judge's term might be terminated by the electorate at an election. Such a procedure would deprive the civil service commission and council under the civil service act

of their sole power to terminate employment of those under civil service. Courts do not favor repeal by implication and will not so repeal where the statutes can be reconciled. This section can be reconciled with the civil service act by not extending to offices, which may be elective, its provisions.

In addition to that, a police judge occupies a judicial position, not an administrative one. He is not a city officer within the meaning of the civil service act. His duties do not pertain to representing or working for the city. On the other hand, they are part of the state judicial set-up, not only empowered to sit as judges in prosecutions for violations of ordinances, but also in cities of the first class to hold preliminary hearings where the charge is the violation of state statutes. Therefore, as members of the state judiciary, they are not such appointive officers of the city as to come within the scope of the civil service act.

For the above reasons, it is our opinion that police judges do not come within the provisions of the new civil service act.

MOTOR VEHICLE: COUNTY TREASURERS' OFFICES: Motor Vehicle Department has no authority to approve the destruction of records in the county treasurers' offices, having to do with motor vehicle registration.

June 23, 1937. *Mr. L. E. Wallace, Superintendent, Motor Vehicle Department:* We are in receipt of your request for an opinion on the following proposition:

Under Section 24 of Senate File 181, has your department the authority to approve the destruction of records in county treasurers' offices having to do with motor vehicle registration?

Section 24 of Senate File 181 reads as follows:

"*Obsolete records destroyed.* The commissioner may destroy any records of the department which have been maintained on file for three years which he may deem obsolete and of no further service in carrying out the powers and duties of the department." (New uniform act.)

Section 1, paragraph 31 of said Act reads as follows:

"31. *Department* means the department of motor vehicles of this state acting directly or through its duly authorized officers and agents."

A county treasurer's office is not a part of the Motor Vehicle Department of the state. It is set up entirely separate by statute. The county treasurer is solely responsible for his office, and he is not under the direction and control of the state treasurer, nor is he a duly authorized officer or agent of the Motor Vehicle Department.

Section 24 of Senate File 181 gives the "Commissioner" no authority to destroy any obsolete records in any department other than his own. The word "department" is singular, not plural, and therefore it is not to be construed to include ninety-nine county treasurers throughout the state. It is speaking only of the department of motor vehicles under the Secretary of State.

It is therefore our opinion that your department has no authority to approve the destruction of records in the county treasurers' offices, having to do with motor vehicle registration.

PODIATRY: Period of internship cannot run concurrently with third year of study in an accredited school of podiatry.

June 23, 1937. *Dr. Stewart E. Reed, Chairman, Board of Podiatry Examiners:* We are in receipt of your request for an opinion on the following proposition:

May the term of internship, as enacted by House File 388 of the Acts of

the Forty-seventh General Assembly, be served concurrently with the regular senior year's work in a school of podiatry?

Section 4 of House File 388 reads as follows:

"Section 4. Every applicant for a license to practice podiatry shall:

(a) Be a graduate of an accredited high school.

(b) Present a diploma issued by a school of podiatry approved by the Board of Podiatry Examiners. * * *

(d) In addition to the above requirements all applicants after January 1, 1938, shall present to the board of podiatry examiners satisfactory evidence of a completed internship of not less than eight (8) months in a recognized school, hospital, clinic or office, approved by the Board of Podiatry Examiners."

Section 5 reads as follows:

"Section 5. No school of podiatry shall be approved by the Board of Podiatry Examiners as a school of recognized standing unless said school:

"(a) Requires for graduation or the receipt of podiatric degree the completion of a course of study covering a period of at least eight months in each of three (3) calendar years. * * *"

That is to say that in addition to three calendar years of studying in an approved school of podiatry, the applicant (after January 1, 1938) must show to the board that he has served an internship of not less than eight months in a recognized school, hospital, clinic or office approved by the board. The internship cannot run concurrently with the third year of school work. The statute contemplates the necessity of three full years of schooling in an approved school of podiatry along with the eight months' internship. Any other interpretation violates the plain provisions of the act.

Paragraph (d) of Section 4, says that in addition to a diploma from a school of podiatry, all applicants after January 1, 1938, shall present satisfactory evidence of a completed internship of not less than eight months, etc. When it speaks of "in addition to the act" it means exactly what it says, and that is that not only must the applicant have his degree in a course of study covering a period of at least eight months in each of three calendar years, but also the requirement of eight months of internship.

It is therefore our opinion that the period of internship cannot run concurrently with the third year of study in an accredited podiatry school.

CHIROPRACTORS: Chiropractors are not eligible under contract with board of supervisors, and they are not entitled to compensation for care of indigents from county funds. Whether or not chiropractors may care for patients in hospitals supported by taxation is up to the board of hospital trustees.

June 24, 1937. *Mr. H. T. Opsahl, Secretary-Treasurer, Chiropractic Examining Board, Board of Health:* We are in receipt of your request for an opinion on the following propositions:

1. Can chiropractors legally collect for care of indigent sick from boards of supervisors?

Section 5322 of the 1935 Code of Iowa states as follows:

"5322. *Form of relief—condition.* The relief may either be in the form of food, rent or clothing, fuel and lights, medical attendance, or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance. They may require any able-bodied person to labor faithfully on the streets or highways at the prevailing local rate per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways."

Section 5334-c1 of the Code reads as follows:

"5334-c1. *Medical and dental service.* The board of supervisors may make contracts with any reputable and responsible person licensed to practice medicine or dentistry in this state to furnish medical or dental attendance or services required for the poor, for any term not exceeding one year, and shall require all such contractors to give bonds in a company authorized to do business in this state in such sum as it believes sufficient to secure the faithful performance of such contracts."

Clearly under Section 5334-c1 the board of supervisors may not contract for the services of a chiropractor.

Section 2555 defines the word "chiropractic" as follows:

"2555. *Chiropractic defined.* For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of chiropractic:

"1. Persons publicly professing to be chiropractors or publicly professing to assume the duties incident to the practice of chiropractic.

"2. Persons who treat human ailments by the adjustment by hand of the articulations of the spine or by other incidental adjustments."

Section 2559 of the Code reads as follows:

"2559. *Operative surgery—drugs.* A license to practice chiropractic shall not authorize the licensee to practice operative surgery, osteopathy, nor administer or prescribe any drug or medicine included in materia medica."

That is to say, Section 2555 does not define a chiropractor as one who prescribes medicines, and Section 2559 expressly prohibits it.

Section 2538 (2) defines one engaged in the practice of medicine and surgery as "persons who prescribe, or prescribe and furnish medicine for human ailments or treat the same by surgery." That is to say, our licensing statutes have prescribed the scope of practice for the different professions. The right to practice medicine or materia medica is expressly withheld from chiropractors, and, of course, it is within the scope of the powers granted to practitioners of medicine, commonly called "M. D.'s." The legislature has restricted the field of chiropractic, and this opinion must necessarily be controlled by the powers given the chiropractors by the legislature.

More than that, Section 2554-g9 expressly gives boards of supervisors authority to contract with osteopaths for the care and treatment of the indigent sick. The chapter covering chiropractors contains no such provision. The legislature thereby gave osteopaths that privilege, but it has not been granted to chiropractors. As chiropractors do not come within the meaning of the phrases "medical attendance" or "persons licensed to practice medicine," we must look to the statutes for their authority to care for the indigent of the county, and as none is therein provided we must hold that chiropractors are not eligible for employment under contract with the board of supervisors under Section 5334-c1, and that they are not entitled to compensation for the care of indigents from county funds under Section 5322.

2. Can chiropractors care for patients in hospitals supported in whole or in part by taxation?

Section 5364 pertaining to county hospitals reads as follows:

"5364. *Discrimination.* In the management of such hospital, no discrimination shall be made against the practitioners of any recognized school of medicine; and each patient shall have the right to employ at his expense any physician of his choice; and any such physician, when so employed by the patient, shall have exclusive charge of the care and treatment of the patient; and attending nurses shall be subject to the direction of such physician."

Diagnosing the above section, we see that the trustees may not discriminate against "practitioners of any recognized school of medicine." As has here-

tofore been pointed out, chiropractors are not from any school of medicine. Their school is chiropractic. There is nothing contained in the section about chiropractic schools, so there is no prohibition against discrimination as far as chiropractors are concerned. The latter part of that section, authorizing patients to employ physicians of their choice at their own expense, must be read in connection with the first part of that section. The first part prohibits discrimination between practitioners of the different schools of medicine, and the last part says in effect "unless it is at the patient's own cost." The discrimination the patient may make is between "practitioners of any school of medicine," and no authority is granted him to go beyond that field. Section 5364 is found in our 1913 Code, whereas our chapter licensing and recognizing chiropractors was first found in our 1924 Code. That is, Section 5364 was not written to embrace chiropractors as they were not recognized at the time Section 5364 was written. The only way for them to come within its provisions is by the grant of authority the legislature has given them. Their chapter lacks that authority, and our ruling must necessarily be governed by that.

Chapter 300 deals with municipal hospitals and Section 5871 provides as follows:

"5871. *Management.* 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."

Again the prohibition is against discrimination between practitioners of the different schools of medicine. As has been heretofore pointed out, chiropractors are not practitioners of any school of medicine but of the school of chiropractic. They may not prescribe "any drug or medicine included in materia medica" under Section 2559. Their treatment embraces "adjustment by hand of the articulations of the spine or by other incidental adjustment." (Section 2555.) If chiropractors are to be included within this "anti-discrimination" section, their field must be broadened by the legislature or the prohibition must be expressly broadened to include them. We cannot read it into the statute.

Section 5359 (5) provides as follows:

"5359. *Powers and duties.* Said board of hospital trustees shall: * * *

"5. Have control and supervision over the physicians, nurses, attendants, and patients in the hospital."

Section 5360 (1) provides as follows:

"5360. *Optional powers and duties.* The board of hospital trustees may: * * *

"1. Adopt by-laws and rules for its own guidance and for the government of the hospital."

Both are in reference to the trustees of county hospitals. Section 5871 provides as follows:

"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. * * *"

That section is speaking of the trustees of a municipal hospital. By the above sections we see that discretionary power over hospitals and the practitioners therein is granted to the board of trustees of each hospital. They thereby have authority to make rules and regulations excluding or including chiropractors as practitioners empowered to practice in either a county or municipal hospital. It is at the discretion of the trustees.

Our conclusion therefore to your second question is that the anti-discrimination sections do not include chiropractors, and that the trustees may either allow or disallow chiropractors to practice in county and municipal hospitals.

BUILDING AND LOAN ASSOCIATIONS: SURPLUS FUNDS: Building and Loan Associations are not permitted to invest surplus or idle funds in the shares of stock of other Building and Loan Associations. They are limited in their investments to the securities designated by statute.

June 25, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following question:

Can an Iowa building and loan association with surplus funds on hand for which there is small or no demand in its lending territory buy shares of stock in another association?

The powers of building and loan associations are prescribed by statute. Section 9329 of the Code is as follows:

"*Powers.* All building and loan or savings and loan associations, upon receiving the certificate from the auditor, shall have power, subject to the terms and conditions contained in their articles of incorporation and by-laws:

* * *

5. To make loans to members on such terms, conditions, and securities as the articles of incorporation and by-laws provide; said loans to be made only on real estate security, or on the security of their own shares of stock, not to exceed ninety per cent of the withdrawal value thereof."

In addition to the powers granted to building and loan associations in the above quoted section of the statute, we find further limitations placed upon building and loan associations in Section 9340 of the statute with reference to investments:

This section as amended by Sections (3) and (4) of Chapter 220, Laws of the 47th General Assembly, now provides among other matters:

"(a) The funds of a building and loan association not used or needed for other authorized purposes *shall be invested* for the benefit of its shareholders *in loans to its members*, according to the plan or plans specified in its articles of incorporation, on the security of first liens on real estate or on the security of liens on its own shares of stock, or on both such securities."

Thereafter said section of the statute goes on to provide the manner of making loans, etc.

Section 9340-b1 of the statute is as follows:

"*Investments in public securities.* A building and loan or savings and loan association may invest its idle funds, or any part thereof, in bonds or interest-bearing obligations of the United States, or of the State of Iowa, or of any county, municipal corporation, township, school district, or other political subdivision of this state or bonds and obligations of a federal home loan bank established by act of congress known as the federal home loan bank act, approved July 22, 1932. Investments thus made shall at no time exceed ten per cent of the assets of the association. Any building and loan association may accept bonds issued by Home Owners' Loan Corporation, a corporation organized under the act of congress cited and known as 'Home Owners' Loan Act of 1933' at par value in payment for or in exchange for notes and mortgages and may carry such bonds as legal assets."

The above constitutes all of the statutory law with reference to the powers and investments of building and loan associations.

In the case of the *Home Savings & Trust Co. vs. Fidelity & Deposit Co.*, 88 N. W. 821, the court, after setting out the statute with reference to the powers of building and loan associations, stated:

"Thus the plaintiff is limited, in loaning its money, to two classes of security, and thereby prohibited from doing so on any other."

The statute in its present form has granted to building and loan associations, first, the power to make loans to its members secured by real estate mortgages, or the security of their own shares of stock, and second, to invest its idle funds in bonds or interest-bearing obligations of the United States or the State of Iowa, or of any county, municipal corporation, township, school district, or other political subdivision of the State, bonds of a federal home loan bank and bonds of home owners' loan corporations.

The statute having designated the security upon which building and loan associations may make loans, or in which they may invest their funds, it will be presumed that the Legislature intended thereby to exclude all other forms of loans or investments. The statute is plain and explicit, and to add to the classes of loans mentioned or the securities enumerated would be to broaden and extend the statute by interpretation beyond the terms thereof. The statute does not grant to building and loan associations the right or authority to invest its funds in shares of stock of another building and loan association. Having specified and enumerated certain securities in which such funds can be invested, it must be assumed that building and loan associations were intentionally excluded from the list.

It is therefore the opinion of this department that building and loan associations are without right or authority, under the statute, to invest their funds in shares of stock in another building and loan association.

TAXATION: HOMESTEAD TAX EXEMPTION: Where a husband and wife who hold the title to a homestead in common, although not blood relatives, they can claim the benefit of the homestead tax exemption. In the case of property being owned by a man and his mother-in-law, there being no blood relationship between them, neither can claim the benefit of the homestead tax exemption on property owned in common.

June 25, 1937. *Mr. George B. Aden, County Attorney, Webster City, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

Can a husband and wife each owning an undivided one-half interest in a homestead obtain a full exemption credit under the Homestead Tax Exemption Act?

We are assuming that the property involved is qualified as a homestead and that the only question for our consideration is that of ownership.

Under subdivision 2 of Section 19 the Legislature has defined the word "owner" for the purposes of the Homestead Tax Exemption. Under the legislative definition the word "owner" means one who holds the fee simple title to the homestead, or where the person is occupying the homestead under a deed which conveys a divided interest, where the other interests are owned by blood relatives or by legally adopted children. The use by the Legislature of the word "owner" in the singular would indicate that the Legislature intended to limit the benefits of the Act to those persons holding the full fee title to the property unless and except in cases and instances where the title derived by deed, devise or other instrument, is held by blood relatives. Therefore, property held by two persons under joint deed as joint tenants or tenants in common would not be qualified for the benefits of the Act unless such joint owners or tenants in common be blood relatives. That husband and wife are not, as a general rule, blood relatives, see *Flippen vs. Robinson*, 144 S. W. 707.

Therefore, under a strict and literal construction of subdivision 2 of Section

19 of the Act, the property in question would not be entitled to the benefit of the Act. However, we do not believe that it was the intention of the Legislature to exclude from the benefit of the Act husbands and wives who considered it necessary for their own protection to take the title to the homestead in their joint names.

Granting to properties qualified as homesteads the benefits of the Homestead Tax Exemption Act where the title is in the names of the husband and wife, we are to a certain extent influenced by what we consider was the legislative intent, and also the provisions of the statute relating to homesteads. Section 10147 of the 1935 Code provides:

"*Conveyance or incumbrance.* No conveyance or incumbrance of, or contract to convey or incumber the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, * * *"

Section 10149 of the Code is as follows:

"*Removal of spouse or children.* Neither husband nor wife can remove the other nor the children from the homestead without the consent of the other." Under the provisions of the statutes heretofore quoted, either husband or wife is secure in the ownership and occupancy of the homestead regardless of whether the title is in the husband or wife, or jointly in the husband and wife. Regardless of whether the husband or wife owns the homestead or whether it is owned jointly by them, the same cannot be conveyed or incumbered unless by the joint action of husband and wife in the same instrument, nor can either remove the other from the homestead without the consent of the other, the rights of each to ownership and occupancy being fully protected by the marriage relation.

The Homestead Tax Exemption Act grants to the surviving spouse the benefits of the Act where the surviving spouse continues to occupy the homestead, even though such surviving spouse had no interest in the record title. We do not believe that it was the intention of the Legislature to grant to the surviving spouse the benefits derived from the Homestead Tax Exemption Act and deny the same benefits to husbands and wives during the lifetime on account of the homestead property being held in their joint names.

It is therefore our opinion that a property qualified as a homestead owned jointly by husband and wife is entitled to the benefits of the Homestead Tax Exemption Act.

2. A man and his mother-in-law own an undivided tract, each occupying a separate home. The property consists of 160 acres and the homes are located near each other. Can either or both claim homestead exemption. If so, what amount?

The answer to the foregoing question depends upon ownership as defined by the Homestead Tax Exemption Act. Subdivision 2 of Section 19 defines the word "owner" and limits those who may claim the benefit of the Act where the property is held or owned in common or by joint tenants to such persons as are related by blood. In the instant case the property is owned by a man and his mother-in-law. There being no blood relationship between them, neither can claim the benefit of the Homestead Tax Exemption on the property owned in common by them.

CONSTABLES: FEES: A constable, in making service, is limited in his charges to the fees fixed for a constable's services by Section 10637.

June 26, 1937. *Mr. O. E. Anderson, County Attorney, Creston, Iowa:* This department is in receipt of your request for an opinion as to the fees to be charged and allowed a constable as mileage and for serving papers.

The controverted point appears to be whether or not the fees to which a constable is entitled shall be determined under Section 5191 or Section 13479 of the present Code. Section 5191 has reference to the fees to be allowed to the sheriff or his deputies for the performance of certain duties, and specifies therein the fees for service of particular papers and the mileage allowed. Section 10637 fixes the schedule of fees to be charged and received by a constable in the performance of his duties. Section 13479 of the statute is as follows:

"*Conveying prisoner to jail—fees and expenses.* Every officer or person who shall arrest anyone with a warrant or order issued by any court or officer, or who shall be required to convey a prisoner from a place distant from the county jail to such jail on an order of commitment, shall be allowed the same fees and expenses as provided for in case of such services by the sheriff."

The three sections of the statute heretofore referred to, namely Sections 5191, 10637 and 13479 all have reference to the question of fees. Section 5191 pertains to the fees of the sheriff. Section 10637 has reference to the fees of the constable. Section 13479 has reference to fees to be allowed persons serving in the capacity of a peace officer and performing the duties therein prescribed. The only authority a constable has as a peace officer is his badge of office. The statute, in Section 10637, has prescribed and fixes the fees of the constable. Such fees as are fixed therein are the fees to which the constable is entitled, and he is limited to the fees therein fixed for his official acts. Although the constable may serve papers and execute writs pertaining to matters pending in the District Court for which a sheriff for like services would receive the fees as fixed by Section 5191 of the statute, a constable would, however, be limited for such services to the fees fixed and prescribed in Section 10637. The fact that the constable in making service of papers for which the sheriff would receive a higher fee than that fixed for services by the constable is by virtue of the statute, as the constable can only do such things by virtue of his office, and he is limited in his charges therefor for his services as constable, and the fee as fixed by statute, namely Section 10637, governs.

COUNTIES: BOARD OF SUPERVISORS: INDIGENT RELIEF: Neither the county overseer nor the Board of Supervisors can demand an assignment of future wages from an applicant for poor relief as a condition precedent to the granting of such relief.

June 26, 1937. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* This department is in receipt of your letter asking an opinion upon the following question:

Can the county request and demand an assignment of wages from persons applying for relief to be paid from the county poor fund as a condition precedent to granting such relief?

Under the statute, Section 5337, Boards of Supervisors are given authority to levy a tax not exceeding one and one-half mills on the dollar to create a poor fund from which to aid those who are in need, and on account of sickness or other disability, are unable to procure the necessities of life for themselves. In addition to the provisions of Section 5337, Boards of Supervisors are authorized to furnish aid within certain limits from the general fund. Provisions

are made in Section 5309 of the statute for recovering from a poor person who has received aid from the county, should such person become able to repay the same or to recover the same from his estate, if he leaves an estate. Section 5309-c1 makes the homestead of a poor person receiving aid from the county liable for such expenditure when such poor person dies without leaving a husband or wife or minor children. Section 5298 of the Code provides for the liability of parents and children, and Section 5301 of the Code provides for the liability of remote relatives. The enforcement of such liability is specified in Section 5302 of the Code, as amended by Chapter 137, Laws of the 47th General Assembly. We do not find any provision of the statute permitting the overseer of the poor to demand a wage assignment from a poor person as a condition precedent to the furnishing of aid.

The relief of the poor and indigent is a burden placed upon the county to be taken care of by taxation, and it therefore becomes a burden upon the taxpayers of the county. The giving of aid to the poor and indigent is a charity. Charities are not to be bartered or sold and should not be withheld until the recipients or applicants make an assignment of a future wage.

There being no specific provision of the statute authorizing the recovery by the county for aid furnished to indigent or poor people, save and except in the manner heretofore set out, we are of the opinion that it would be against good morals and public policy for any county to withhold aid from its poor, indigent, and needy people until they had assigned away a wage to be earned in the future which, under the statutes of the State of Iowa, would be exempt to them.

It is therefore the opinion of this department that Boards of Supervisors are without right or authority to withhold aid to poor and indigent applicants for relief until such applicant shall have made an assignment of wages to be earned in the future.

TAXATION: BOARD OF SUPERVISORS: TAX SALES: While the statute requires that the management, control, and sale of properties acquired by tax titles are in the Board of Supervisors and that such powers cannot be delegated by such Boards of Supervisors, yet they have authority to employ a person to lease, collect rents, and care for such properties.

June 26, 1937. *Mr. A. J. Braginton, Rockwell City, Iowa:* This department is in receipt of your request for an opinion on the following question:

Can the Board of Supervisors employ a person to look after properties bid in by the county at tax sale?

In answering the foregoing question we are assuming that your inquiry relates to properties to which the county has acquired tax deeds. The county has no supervision or control over properties to which they hold nothing more than a tax sale certificate. After a tax sale certificate has ripened into a deed and the county has acquired title under a tax deed, the statute prescribes the manner in which such property must be handled, Section 10260-g1 of the statute being as follows:

"*Title under tax deed—sale—apportionment of proceeds.* When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the board of supervisors as provided in this chapter, * * *"

The chapter of which Section 10260-g1, above quoted, is a part, is Chapter 449. Included within Chapter 449 is Section 10260-e1, which is as follows:

"*Management.* When the title to real estate becomes vested in the state, or in a county or municipality under this chapter, or by conveyance under the statutes relating to taxation, the executive council, board of supervisors, or other governing body, as the case may be, shall manage, control, protect by insurance, lease or sell said real estate on such terms, conditions, or security as said governing body may deem best."

It will be noted from the sections of the statute above quoted that where real estate is acquired by the county under a tax deed "*such real estate shall be controlled, managed, and sold by the Board of Supervisors.*" The statute is explicit in designating the Board of Supervisors.

The management, control and sale of property are all matters requiring discretion and judgment. The statute does not authorize the Board of Supervisors to designate such authority to any subordinate. Where the statute places a duty involving judgment or discretion, such duty cannot be designated to another. See, *Abrams vs. Ervin*, 9 Iowa 87; *Kinney vs. Howard*, 133 Iowa 94; *Thede vs. Thornburg*, 207 Iowa 639.

Therefore, the statute having placed the management, control and sale of properties acquired by the county under tax deeds upon the Board of Supervisors, it is the opinion of this department that the Board of Supervisors is without authority to delegate to an agent or representative the conrol, management, or sale of any properties acquired by the county by tax deed. However, the general statute, in fixing the hours and duties of Boards of Supervisors, Section 5130, is as follows:

"*General powers.* The board of supervisors at any regular meeting shall have power:

* * *

4. To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent with law. * * *"

We think that the above is sufficient authority for the Board of Supervisors to arrange for the care and management of properties acquired by tax deeds. That is, under the general powers vested in the Board of Supervisors, such Boards are authorized to employ a person to secure tenants, collect rents, care for the repairing and otherwise look after such properties. The Board of Supervisors should, however, be guided by the necessity of the occasion and only make such employment where the number of properties justify the expenditures.

It is therefore our opinion that Boards of Supervisors have the power and authority to delegate and employ a person to perform such duties with reference to properties as herein specified.

TAXATION: CEMETERY ASSOCIATIONS: Land owned by a cemetery association, and income therefrom being used for cemetery purposes, is exempt from taxation.

June 28, 1937. *Mr. J. Berkley Wilson, County Attorney, Indianola, Iowa:* This department acknowledges receipt of your request for an opinion on the following questions:

1. What is meant by the words "cemetery purposes" as used in Section 6944, subsection 7, Code 1935?
2. Does land owned by a cemetery association, and the income therefrom being used for cemetery purposes, come within the meaning of the statute and is therefore exempt?

Until the 35th session of the General Assembly of Iowa (1913) the only provision in the exemption statute relating to cemeteries or burial grounds

was that embraced within what is now subsection 3 of Section 6944, providing that "public grounds, including all places for the burial of the dead; * * * so long as no dividends or profits are derived therefrom" shall not be taxed. At said session there was enacted Chapter 117, which amended what appeared in the Code Supplement of 1907 as subsection 2 of Section 1304 in such respect as the italics hereinafter indicates:

"1304. The following classes of property are not to be taxed:
* * *

"2. All grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations or corporations for public use and not for private profit, *for cemetery associations and societies* and for literary, scientific, charitable, benevolent, agricultural and religious institutions and societies devoted solely to the appropriate objects of these institutions not exceeding one hundred and sixty acres in extent and not leased or otherwise used with a view to pecuniary profit. * * *"

In the 1924 (Acts of the 40th Extraordinary Session of the General Assembly, Senate File 183) amendment, revision and codification of the Code, the present subsection 7 of Section 6944, evolved, providing:

"6944. *Exemptions.* The following classes of property shall not be taxed:
* * *

"7. Property of cemetery associations. All grounds and buildings used by cemetery associations and societies for cemetery purposes."

In other words, the law prior to 1924 now appears in abbreviated form as last above set out. By dropping down to subsection 9 of Section 6944, we find the self-same provision respecting the lease or use to which the property is put. This subsection provides as follows:

"9. Property of religious, literary and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent *and not leased or otherwise used with a view to pecuniary profit.* All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

The law as it appeared in the 1913 Supplement to the Code of Iowa at Section 1304, subsection 2, which embodies the amendment hereinbefore alluded to, leaves no doubt but that it was clearly the intention of the legislature that the exemption afforded cemetery associations and societies was only to the extent to which their property was not used with a view to pecuniary profit. This is further borne out by the fact that at the time of the enactment of Chapter 117, Acts of the 35th General Assembly, the only provision in the Iowa Code relating to "cemetery associations" was to be found in Chapter 2 of Title IX of the Code 1897 entitled "Of Corporations Not for Pecuniary Profit," being present Chapter 394, Code 1935.

With this historical reference in mind, we come to the consideration of the effect of the Code revision of 1924. Senate File 183, Acts of the 40th Extraordinary Session of the General Assembly provided in part as follows:

"Section 1. *Exemptions.* The following classes of property shall not be taxed: * * *

"3. *Benevolent associations.* All grounds and buildings used:

(a) For public libraries, public art galleries, and libraries and art galleries owned and kept by private individuals, associations, or corporations, for public use, and not for private profit.

(b) By cemetery associations and societies for cemetery purposes.

(c) By literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding

three hundred twenty (320) acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

It is to be noted that the revision as it appears in the enrolled bill, which is identical with the last above quoted portion of Senate File 183, does not appear in quite such form in the Code 1935, nor did it in the Codes of 1924 and 1931.

It is a rule of construction that changes made by a revision of the statutes will not be construed as altering the law unless it is clear that such was the intention, and if the revised statute is ambiguous or susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining the intent of the legislature. *Dennis vs. Independent School District of Walker*, 166 Iowa 744; 148 N. W. 1007 and cases cited therein.

It is our opinion that the Act of the 40th Extraordinary Session of the Legislature did not change the fundamental law, but insofar as the tax exemption statute is concerned, constituted a revision for the purpose of convenient classification and that the language contained in subsection 7 of Section 6944, Code 1935, cannot be separated from its context but must be read in the light of the entire act, and the provision "not leased or otherwise used with a view to pecuniary profit" is applicable now to the grounds and buildings of cemetery associations and societies as it was formerly. Support to this contention is lent by the fact that the property exemptions listed in Section 6944, without exception, are based upon the use to which the property is put as one not for pecuniary profit, and at this point we reiterate what has been said hereinbefore, that the only cemetery associations recognized by the law of Iowa are those existent under the provisions of Chapter 394, namely, corporations not for a pecuniary profit. It is to be noted further that the revision of 1924 at paragraph 3 (set out herein above) was entitled "Benevolent Associations."

In view of the foregoing, we need not formulate an exact definition of the words "cemetery purposes," for it is clear that all buildings and grounds of such associations and societies when not "leased or otherwise used with a view to pecuniary profit," are exempt in toto.

As a guide in determining whether or not the exemption is available, we refer to cases of our Supreme Court decided not under subsection 7, but subsections 9 and 3 respectively, the principle of law announced being applicable, however, to the exemption provided by subsection 7.

In *Mulroy vs. Churchman*, 52 Iowa 238, forty acres of land were alleged to be held by a church as a burying ground. Only one acre was actually used for burial purposes and the remainder as farm land. The testimony was uncontroverted that the one acre was at least partially fenced and marked off from the rest of the tract. It was held that the thirty-nine acres were taxable on the ground that such acreage was not devoted to the objects of the church. It is submitted that the court could as well have found the acreage taxable for the reason that its use was in view of deriving pecuniary profit therefrom as it was being farmed. No more could a cemetery association or society in our opinion lease or utilize its grounds, not presently used, but held out for sale as a place of sepulcher, for pecuniary profit.

In *Simcoke vs. Sayre*, 148 Iowa 132, the plaintiff owned the unsold portion of a tract of land platted and dedicated as a cemetery. Approximately five and four-fifths acres comprised the cemetery, all of which had been divided into

lots, some sixty-five having been sold, with something over four hundred lots held for sale. The city council of Stuart, Iowa caused the unsold lots to be added to the assessment role. This was resisted without avail, but no appeal was taken. The action was one to enjoin the collection of the tax on the ground that the property was not assessable or liable for taxation. We quote from the court's opinion at page 133, et seq., of 148 Iowa:

"It is claimed that the land or lots in question are exempt from taxation under this section. There can be no doubt that the lands or lots are within an inclosure for the burial of the dead, but this property is privately owned and is held for profit. The trial court made the following finding with reference to this: 'Plaintiff owned this land prior to and at the time it was platted and dedicated as a cemetery. It was then worth not to exceed $1,160. She was at some expense in platting and fencing said land, the exact amount of which is not shown. She has since sold sixty-five lots at $30 each, for a total sum of $1,950, and still has lots which she values at $13,320. The annual income from hay cut from the lots is insignificant, but the prices at which these lots have been sold and the valuation put upon those unsold by plaintiff make an increase in value over the value of the land as acreage property beyond the expectations of the most avaricious speculative purchaser.'

"*By the express terms of the statute, places for the burial of the dead are not exempt if dividends or profits are derived therefrom.* The word 'dividends' has a peculiar and definite significance. It means a distributive sum, share or percentage arising from some joint venture as a corporation or a proportionate amount arising from a bankrupt or other estate. The term 'profit' has a much larger meaning, however, and covers benefits of any kind, excess of value over cost, acquisition beyond expenditure, gain, or advance. It is broad enough to cover any sort of advantage, advance or gain. The testimony shows not only a large gain or profit to plaintiff in the division and sale of the burial lots, but an income, although small, from the sale of hay produced from the lots. Plaintiff's dedication of the land to cemetery uses was not through philanthropic motives and lacks all elements of charity or benevolence. Her object seems to have been to profit from the transaction. The lots which were sold were not taxed, but those remaining in plaintiff's name were assessed and taxes levied thereon. In our opinion these remaining lots were not exempt from taxation under the statute quoted. Some kind of an implied exemption arising out of public policy is claimed, but in our opinion there is no such exemption. It may be that the lots so laid out and on the strength of which other lots were sold cannot be devoted to other purposes than for the burial of the dead; but with that question we are not concerned. Even though the use be limited, this is no reason why they may not be sold at tax sale. Authorities upon the question are not numerous; but *Brosn vs. Pittsburgh,* (Pa.) 16 Atl. 43, tends to support our conclusion.

"* * * Applying the principle that taxation is the rule and exemption the exception, and that he who claims property is exempt must point out a statute conferring the privilege, we have no hesitation in holding that the unsold lots and land were properly assessed for taxation."

No more could a cemetery association or society in our opinion derive the benefits of the exemption statute than the plaintiff in the Simcoke case where such association or society holds out for sale, burial lots at a profit. See also *Readlyn Hospital vs. Hoth,* (Ia.) 272 N. W. 90.

In *Oak Hill Cemetery Co. vs. Wells,* (Ind.) 78 N. E. 350, in the process of deciding whether the cemetery in question was exempt from taxation under a statute which provided as follows:

"That in all cases where cemeteries have been incorporated under the laws of this state upon such a basis that the corporation cannot derive any pecuniary benefit or profit therefrom, all the property and assets belonging to such corporation used exclusively for cemetery purposes, shall be exempt from taxation for any purpose."

the court had the following to say:

"As appellant is relying upon the exemption of its property from taxation, the burden was upon it to show that its property came within some class of property which the statute says is exempt. A tract of land purchased by an incorporated cemetery association for cemetery purposes and platted into lots for cemetery purposes could properly be said to be used exclusively for cemetery purposes. But this is not equivalent to saying that the lots are used for burial purposes, and that they are now in use for such purposes. But the facts show that appellant was organized for the purpose of selling lots for gain and profit for burial purposes. Whether a part or any of such lots have been sold and are now used by the purchasers for burial purposes does not appear. *The exemption given by the acts of 1891 and 1893 were not intended to relieve from taxation any property that was used by the owner for purposes of gain and profit, and to make this perfectly clear the Legislature passed the act of 1895.* * * *"

In other words, under the general rule that laws and constitutional provisions exempting property from taxation are to be strictly construed (*Readlyn Hospital vs. Hoth*, supra), it is our opinion that unless the buildings and grounds are presently the repository for deceased persons, or have been sold to be used for such, and any unsold lots are not held out for sale at a profit or used for some other purpose from which pecuniary profit will be derived pending their sale, such buildings and grounds are then being used for cemetery purposes within the meaning of the exemption statute.

This much in addition need be said with reference to your second question. Lands from which revenue is derived, owned by a cemetery association or society would be excluded, in view of the foregoing discussion, from the exemptions specified in the statute, but as to that revenue, it is our opinion that it is exempt from taxation under the provisions and within the limitations of subsection 10 of Section 6944, Code 1935, which provides:

"*Moneys and credits—property of students.* Moneys and credits belonging exclusively to the institutions named in subsections 7, 8 and 9 and devoted solely to sustaining them, but not exceeding in amount or income, the amount prescribed by their charters or articles of incorporation; and the books, papers, pictures, works of art, apparatus, and other personal property belonging to such institutions and used solely for the purposes contemplated in said subsections and the like property of students in such institutions used for their education."

SEWERS: CITIES: A city may lengthen its sewer to extend past a cement wall on the river and float a bond issue therefor.

June 28, 1937. *Hon. C. W. Storms, Auditor of State:* We are in receipt of your request for an opinion on the following proposition:

Can a city incur the expense and issue bonds for extending their main sewer line the distance necessary to extend beyond a new concrete wall built on the bank of the river.

Chapter 308 deals with sewers, and authority is given in Section 5985 to construct sewer "outlets"; Section 5986 grants the power to assess for the cost of construction of any main sewer or system of main sewers; and Section 6015 provides from which funds the cost may be paid. These sections, read in conjunction with the whole chapter, clearly give authority for such an extension.

Chapter 311 provides for bond issues, particularly Section 6109 thereof, and the procedure to be followed is therein set out.

It is therefore our opinion that your city may lengthen its sewer to extend past the cement wall on the river and float a bond issue therefor.

STATE INSTITUTIONS: SENTENCE OF HARRY PORTH, NO. 16696, FORT MADISON PENITENTIARY: COMMITMENT "UNTIL LAWFULLY RELEASED THEREFROM": The commitment of Harry Porth in legal effect was a life sentence.

June 28, 1937. *Mr. Arthur J. Braginton, County Attorney, Rockwell City, Iowa,* and *Board of Control, State of Iowa:* In re: Sentence of Harry Porth, No. 16696, Fort Madison Penitentiary. Charge—Burglary with Aggravation.

Replying to letters of Arthur J. Braginton, and oral inquiries by him made with reference to the above captioned matter, it appears that the fact situation as shown by the records is as follows:

1. On February 6, 1935, a true bill was returned by Calhoun County, Iowa, grand jury charging Harry Porth with breaking and entering a dwelling house in nighttime with intent to commit a public offense, to-wit: assault and battery upon Mary Fleming, the indictment fixing the date as January 19, 1935, and charging actual assault upon the person named.

2. On trial to merits a verdict of guilty of crime of burglary with aggravation was returned by the jury.

3. On February 20, 1935, after disposing of preliminary matters the trial court passed judgment on the verdict, the material portions of which are:

"It is therefore Ordered and Adjudged by the Court that the defendant be committed to the penitentiary at Ft. Madison, Iowa, at hard labor, *until lawfully released therefrom,* and that the defendant pay the costs of this action taxed by the clerk at $163.42."

4. Mittimus issued and on February 21, 1935, the prisoner was delivered to Warden G. C. Haynes at Ft. Madison Penitentiary where he was booked as a life-termer.

5. Notice of appeal to Supreme Court of Iowa was duly served as provided by law, and filed on April 18, 1935.

6. On May 17, 1935, the case was submitted in the Supreme Court without argument upon clerk's transcript and affirmed, opinion being reported in 260 N. W. 686.

7. The statute involved is Section 12995, reading as follows:

"*Aggravated offense.* If such offender, at the time of committing such burglary, is armed with a dangerous weapon, or so arm himself after having entered such dwelling house, *or actually assault any person being lawfully therein,* or has any confederate present aiding and abetting such burglary, *he shall be imprisoned in the penitentiary for life or any term of years.*"

Query: What is the legal effect of the judgment pronounced in this case by the trial court, in ordering the prisoner's commitment to the penitentiary "until lawfully released therefrom"?

In answering this question reference must be made to the indeterminate sentence act, Code Section 13960, reading 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 is convicted."

In interpreting the foregoing in *State vs. Korth,* 204 Iowa 667, *loc. cit.* 669, 215 N. W. 706, the Supreme Court said:

"The statute providing the penalty for violation of the act under which appellant was indicted is as follows (Code of 1924, Section 3168):

" 'Any person violating any of the preceding provisions of this chapter shall

be imprisoned in the penitentiary for not more than ten years, or by a fine not to exceed one thousand dollars or by both such fine and imprisonment.'

"* * *

"Under the indeterminate sentence law (Section 13960, Code of 1924), when a person over sixteen years of age is convicted of a felony and the court imposes a sentence of confinement in the penitentiary or woman's reformatory, the statute provides that the court shall not fix the limit or duration of the same, but that the term of imprisonment shall not exceed the maximum term provided by law for the crime. Under this statute, 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 the maximum or minimum period.' *Adams vs. Barr*, 154 Iowa 83. See, also, *State vs. Davenport*, 149 Iowa 294; *State vs. Draden*, 199 Iowa 231."

The case of *State vs. Davenport, supra*, cited in the Korth case pertains to the identical statutes here under discussion, the prisoner having been convicted of burglary with aggravation and sentenced to the penitentiary for life. The Supreme Court held that in undertaking to specify the length of penal service, the trial court exceeded its jurisdiction, but that the error was harmless, and that the period of penal servitude would be regulated by the board of parole, as though accused had been properly sentenced under the indeterminate sentence act.

This case was referred to and approved in the late ruling of the Supreme Court, dated June 19, 1936, in the case of *Cave-Keener vs. Haynes*, 221 Iowa 1207, 268 N. W. 39, where, after reviewing the precedents in this jurisdiction, it was definitely held that, except in cases of murder, treason and rape, if the trial court undertakes to fix the maximum or minimum period of incarceration by its judgment, such limitation will be void, and the prisoner will stand committed to the penitentiary in accordance with the provisions of the indeterminate sentence act, even though sentence be pronounced under a statute which names both a maximum and minimum penalty.

CONCLUSION: It appears upon the strength of the cases indicated, no Iowa precedents being found at variance therewith, that the commitment of Harry Porth in legal effect was a life sentence, which, by appropriate action by the governor and board of parole, under Article IV, Section 16 of the Constitution of Iowa, and Chapters 188 and 189 of the Code of Iowa (1935) may be hereafter modified as the equities of the situation and the good behaviour of the convict may render such change desirable. But it is clear that no court has now any authority to interfere in this matter, under the present state of the record.

BEER PERMITS: CLUBS: FEES: Fee for class "B" club permit is to be determined by authorities empowered to issue permits. Such fee, when fixed, should apply uniformly to all club permits issued within a particular jurisdiction.

June 28, 1937. *Mr. Edward P. Powers, County Attorney, Centerville, Iowa:* We acknowledge receipt of your request for an opinion upon the following question:

"What amount should be charged by a city council for a class 'B' beer permit issued to a club, as contemplated by Section 1921-f109, 1935 Code?"

Section 1921-f117, 1935 Code, relates to permit fees and provides in part as follows:

"1921-f117. *Fees.* The annual permit fee for a class 'A' permit shall be two hundred fifty dollars. The annual permit fee for a class 'B' permit, except class 'B' permits issued to hotels and clubs as contemplated in this chapter,

and golf or country clubs, shall be fixed by the authorities empowered by this chapter to issue permits, but the amount of said permit fee shall not be less than one hundred dollars, nor more than three hundred dollars. For a golf or country club, as defined in Section 1921-f106, subsection (a), the license may be granted for a period of six months, for which the license fee shall be fifty dollars. * * *"

It is to be observed that three classes of permits are included within the terms of the excepting clause which is found in the above section. Hotels were included in the above exception for the obvious reason that the statute definitely fixes the fee to be charged in such cases. The statute does not definitely fix the fee to be charged golf and country clubs, except that it is provided that six months' licenses therefor may be issued at a fee of $50.00. Clearly the statute does not fix a definite fee to be charged for club permits.

In construing this statute, we must give effect, if possible, to the language used in the clause which sets up the exceptions referred to above. It is our opinion that the legislature intended that a fee be charged for permits issued to clubs. Reference to such fee is made in Section 1921-f110 which sets out the conditions under which a club permit may be issued. It is further our opinion that the limitation expressed in the exception clause does not preclude the body authorized to issue such permits from fixing the fee. This conclusion must necessarily follow since the statute does not fix the fee. Since, as stated above, a fee is contemplated, the issuing authority must fix the same, there being no other source of authority for this purpose.

It is our opinion that the legislature intended that "B" permits issued to golf and country clubs and to clubs are not subject to the latter provisions of the sentence in which the exception is made, that is, "but the amount of said permit fee shall not be less than one hundred dollars, nor more than three hundred dollars."

Since clubs are restricted by the statute from the engaging in the sale of beer for profit, it is reasonable to suppose that such organizations were intended to be differently classified than regular class "B" permittees with respect to the amount of the permit fees. The issuing authority, for example, may fix the regular class "B" fee at three hundred dollars. While such authority might determine that the amount to be charged a club for a "B" permit would also be three hundred dollars, we believe that the exception referred to above would permit the fixing of a lesser amount for such club permit.

It is therefore the opinion of this department that the amount to be charged for class "B" beer permits issued to clubs is to be determined by the authorities empowered by the chapter to issue permits. Such fee, when fixed, should apply uniformly to all club permits issued within a particular jurisdiction.

TAXATION: HOMESTEAD TAX EXEMPTION: An applicant for homestead tax credit claiming to have become the owner of homestead property in January, 1918, the deed to which was not executed until May, 1937 is not entitled to homestead tax exemption as the ownership of the property did not change until the execution of the deed in May, 1937. An intention or promise to make a gift does not change ownership of property until the act is consummated by execution of a deed.

June 28, 1937. *Mr. Harlan J. Williamson, County Attorney, Manchester, Iowa:* This department is in receipt of your request for an opinion upon the following question:

An applicant for benefit of the refund and credit under the Homestead Tax Exemption Act claims to have become the owner of the homestead property

by gift on January 1, 1918; that he went into possession of such property at that time and has continued to occupy the same ever since; that said gift has been confirmed by the execution of a warranty deed in May, 1937. Is he such owner as to be entitled to the benefits of the Homestead Tax Exemption Act?

We are assuming that the occupancy of the property has been sufficient to qualify the same for the benefit of the refund or credit under the Homestead Tax Exemption Act, and that the only controverted question is that of ownership.

Under the facts before us, we are unwilling to give to the applicant the status of owner of the property prior to May, 1937. We do not have before us any of the facts or circumstances under which the applicant went into the possession of the property in January, 1918, nor do we have before us any of the facts and circumstances under which the property has been used and operated since that date; in whose name the property has been taxed, nor who has paid the taxes thereon, or what arrangement, if any, was had between the donor and the applicant with reference to any rent or annuities passing between the parties since the alleged gift in 1918. The rule of law in this state with reference to the gift of real estate is well established.

"there is no gift until the intention of giving is fully consummated by the donor transferring all right to and dominion over the thing given to the donee." *In re Estate of Elliott*, 140 N. W. 200.

"Where something remains to be done in carrying out the donor's intent, no matter how unequivocal the intent itself may be, the gift is not complete; for, so long as the contemplated action is not taken, it is to be presumed that the donor intends to retain the title." *Abegg vs. Hirst*, 122 N. W. 838.

The statements from the above cases were cited with approval in the case of *Dolph vs. Wortman*, 168 N. W. 252.

"A mere intention to give in the future, however well proven, gives rise to no obligation which the law will recognize or enforce. Nor will a promise to make a gift inter vivos vest any right or title in the donee, except where the promise is followed by performance in the surrender of possession or dominion over the alleged subject of the gift." *Casady vs. Casady*, 169 N. W. 683.

From the meager facts before us in the above matter, it would appear that the transaction under consideration was probably nothing more than a promise or statement made some time in January, 1918 to make a gift in the future, which was consummated in May, 1937. As we view the facts set out, the offer or promise to make a gift in January, 1918 was not of such nature as to divest the donor of all rights of dominion and control over the property at that time; that such dominion and control were retained during all of the years and that such donor was in truth and in fact the owner of such property up to and including the execution and delivery of a deed to the real estate which occurred in May, 1937, at which time ownership of the property really changed; that during the interim between the offer or promise to make such gift and the actual consummation thereof the grantee, applicant now, was not such owner as to be entitled to the benefit of the Homestead Tax Exemption Act.

BEER: LABELS: GAMBLING: Playing card hands augmented with historical data, printed on back of beer labels, would not be in violation of statute if such hands were in no way used as a means of gambling or for giving away of free beer.

June 29, 1937. *Mr. Leo J. Wegman, Treasurer of State:* We acknowledge receipt of your request for an opinion of this department upon a question raised by the statement of facts contained in your letter, which is as follows:

"Will you please provide this department with an opinion as to whether or not the printing of playing cards on the backs of labels which are affixed to containers of beer sold in Iowa, and which card hands are augmented with data of an historical fact or legend of interest, would be in keeping with the statutes of the State of Iowa.

"As we understand it, the use of such labels is not intended in any manner to promote gambling, or that same would be intended to be used in offering prizes or free articles to the holders of certain combinations of cards displayed on such labels.

"The brewing company who have requested this information advise that the labels are to be used merely to attract the attention of customers, and to determine the holder of certain combinations of cards. The facts appearing thereon are said to contain both historical as well as educational data, interesting to the general public. We believe you have in your files a copy of the lithograph of label bearing such proposed card hands and data on the back thereof."

The controlling factor in the above inquiry is raised by the statement that such device is not intended in any manner to promote gambling or in the offering of prizes or free articles to the holders of certain combinations of cards.

If the labels in every respect conform to the requirements of the statute, as set out in Section 1921-f128, we see no objection to the inclusion of additional data thereon of a historical or educational nature.

We emphasize, however, that such device may not be used if a prize or free article is given away to holders of certain combinations, since such would constitute gambling. Furthermore, the statute prohibits the giving away of beer by any class "B" permittee, and it would be unlawful for any such permittee to give any free beer to the holder of any certain combination.

It is our opinion, therefore, that the use of such labels in the manner indicated under the statement of facts, is not unlawful. The opportunity to employ such labels as a means of gambling appears to be present, and such use is specifically condemned, and this opinion is strictly limited by the statement of facts accompanying your inquiry.

Attention is particularly called to the fact that should such device be used as a basis for a means of gambling, we believe that such use upon the premises of the permittee might be ground for the revocation of a permit.

COUNTY OFFICERS: SHERIFF: BOARD OF SUPERVISORS: The purchasing of supplies for the sheriff's office is a duty placed upon the board of supervisors. There is no statutory provision for furnishing janitor service to the sheriff.

June 30, 1937. *Mr. R. A. Knudson, County Attorney, Fort Dodge, Iowa.* This department is in receipt of your request for an opinion upon the following questions:

1. Does the sheriff's office have the right to buy its own supplies such as sirens for the cars, etc., or must those supplies be purchased by the Board of Supervisors?

Section 5134 of the 1935 Code is as follows:

"*Supplies.* The board of supervisors shall also furnish each of said officers with fuel, lights, blanks, books, and stationery necessary and proper to enable them to discharge the duties of their respective offices * * *."

Section 5130 of the statute is as follows:

"*General powers.* The board of supervisors at any regular meeting shall have power:

* * *

"18. To own and operate automobiles used or needed by the county sheriff and used in the performance of the duties of that office; to operate a service

garage for the purpose of servicing automobiles or other motor vehicles owned and operated by the county in the performance of its duties, and the board may own and service all motorcycles used by the county sheriff in the performance of the duties of that office. The board of supervisors may also make such contracts with the employees of the sheriff's office who use automobiles in the performance of their duties in connection with the use of such automobiles as in their judgment shall be advantageous to the county."

It would appear from the foregoing statutes that the purchasing of supplies for the sheriff's office is a duty placed upon the board of supervisors. The question submitted does not enlighten us as to what arrangements the county has with the sheriff with reference to the use of an automobile. If there is an agreement by which the sheriff is using a county owned automobile, it then becomes the board's duty to furnish to the sheriff such automobile as the board in its discretion deems necessary. If the sheriff is furnishing his own car, operating it on a mileage basis, he may equip the same to suit himself. But any such equipment to be charged to the county must be purchased by the board of supervisors, or at least the purchase thereof must have the approval and authorization of the board.

2. Is it the duty of the janitor, delegated to care for the second and third floors of the court house, to look after the sheriff's apartment furnished to him by the county and perform such duties as changing screens and storm windows, etc.?

The salary of the sheriff is fixed by Section 5226 of the Code and varies with the population of the county. Subdivision 12 of the above section is as follows:

"In any county where the sheriff is not furnished a residence by the county, an additional sum of three hundred dollars per annum."

The statute is plain with reference to the county furnishing a residence, and in lieu thereof, the sum of three hundred dollars. The statute does not require that the county shall furnish janitor service to the sheriff, nor that he shall be furnished heat, light, or water. It merely requires that he be furnished a residence.

Under the facts involved in the foregoing question, the answer might, to some extent, hinge upon the arrangements by which the janitor is employed by the county. However, there is no statutory provision for furnishing janitor service to the sheriff. Under the law the sheriff would be no more entitled to have the screens or storm windows on his apartment attended to than to have his lawn mowed or his furnace attended.

EMBALMER EXAMINERS BOARD: FUNERAL DIRECTORS ASSOCIATION: Board of Embalming Examiners or Iowa Funeral Directors Association may conduct its state-wide meeting by adjourning from time to time and holding the adjourned meeting in a different locality of the state.

June 30, 1937. *Mr. Al Didesch, Secretary Board of Embalmer Examiners, Dubuque, Iowa:* We are in receipt of your request for an opinion on the following proposition:

Under House File 186, is it necessary that the Board of Embalmer Examiners or the Iowa Funeral Directors Association conduct one state-wide educational meeting, or may numerous smaller meetings in the different districts be held in lieu thereof?

It is my understanding that to conduct one meeting for all embalmers in the state will be far less effective and will materially cut down the attendance for the meeting.

Section 2516 (5) reads as follows:

"2516. *License—examination—renewal fees.* The following fees shall be collected by the state department of health: * * *

"5. For a license to practice nursing, dental hygiene, pharmacy, cosmetology, barbering, and embalming, issued upon the basis of an examination given by an examining board, ten dollars. * * *"

Section 2516 (7) reads as follows:

"The following fees shall be collected by the state department of health: * * *

"7. For the renewal of a license to practice any of the professions enumerated in the preceding paragraphs, one dollar; except the renewal fee of a license to practice barbering or cosmetology shall be three dollars."

Section 2 of House File 186 passed by the 47th General Assembly reads as follows:

"The following section is hereby enacted and the code editor is directed to insert the same in the Code immediately following Section twenty-five hundred thirty-four (2534), Chapter 115, Code, 1935, to-wit:

"'The State Department of Health shall annually add four dollars ($4.00) to the renewal fee provided for in subdivision seven (7) of Section twenty-five hundred sixteen (2516), Code 1935, for one licensed to practice embalming, and such additional moneys shall be accepted as a part of the regular renewal fee. The payment of the same shall be prerequisite to the renewal of such licenses. The funds derived by the State Department of Health from the additional renewal fees collected under this section in behalf of the profession of embalming shall be paid to the Board of Embalming Examiners at such time as said Board of Embalming Examiners or the Iowa Funeral Directors Association conducts a state-wide educational meeting for its members, in such amounts as are necessary for such said meeting only and such funds so collected by the State Department of Health shall be used for the advancement of the arts and sciences of the embalming profession.'"

House File 186 says that the four dollars are to be turned over to the Board of Embalming Examiners or the Iowa Funeral Directors Association at such time as either conducts a state-wide educational meeting for its members. A state-wide meeting does not necessarily have to be held on one day, but may be held over a period of days. The meeting may start in Des Moines and then move to a different locality if the success of the endeavor more or less hinges on such a procedure. It is still a state-wide meeting, but has only adjourned to a different locality.

Courts do not favor a strict construction when the same defeats the purpose of the act. In fact, Section 64 of the Code so states where it says:

"Its provisions (meaning the Code's provisions) and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

Authority for liberal construction is therein granted, and it is our opinion that a liberal construction "promotes the objects" of the act and lends to its success in being administered.

It is therefore our opinion that the Board of Embalming Examiners or the Iowa Funeral Directors Association may conduct its state-wide meeting by adjourning from time to time and holding the adjourned meeting in a different locality of the state.

TAXATION: SEWAGE PLANTS: A city constructing an intercepting sewer and sewage treatment plant, which also takes care of another town, may not tax inhabitants of that town.

June 30, 1937. *Hon. D. W. Kimberly, State Senator, Davenport, Iowa:* We are in receipt of your request for an opinion on the following proposition:

The city of Davenport is constructing an intercepting sewer and sewage treatment plant. This is to supplant the old outlet which also takes care of the town of Bettendorf. The new plant will also serve the town of Bettendorf. May Davenport make charges and rates collectable under Chapter 308-D1 covering the inhabitants of Bettendorf?

Section 6066-d1 of the 1935 Code reads as follows:

"6066-d1. *Rentals authorized.* The city or town council of any city or town which has installed or is installing sewerage, a system of sewerage, sewage pumping stations, or sewage treatment or purification works, any and all of which are hereinafter termed sanitary utilities, for public use, and which has by ordinance established one or more sewer districts in compliance with Section 5984, may by ordinance establish just and equitable rates or charges or rentals to be paid to such city or town for the use of such sanitary utilities by every person, firm or corporation whose premises are served by a connection to such sanitary utilities directly or indirectly."

Section 6066-d2 says:

"6066-d2. *Rate.* Such charges shall be as nearly as may be in the judgment of the council, equitable and in proportion to the service rendered and taking into consideration only in the case of each such premises, the quantity of sewage therein or thereby produced and its concentration, strength, or river pollution qualities in general."

Section 6066-d3 says:

"6066-d3. *Lien.* Such charges shall constitute a lien upon the property served by such sanitary utility and if not paid when due as by said ordinance provided, shall be collected in the same manner as other taxes."

The rest of the chapter provides for the change of rates by the council from time to time, for the collection of the charges, authorizing the rentals to supplant in whole or in part taxes levied to finance such sanitary utility, for turning said fund over to the city treasurer to be disbursed only by resolution of the council for purposes of this chapter, and providing for a limitation on the expenditure.

Section 6066-d1 authorizes the city council, under certain circumstances, to charge a rental to "every person, firm or corporation whose premises are served by a connection to such sanitary utilities directly or indirectly." The word "corporation" in its broad sense may include municipal corporations. In its narrower sense it does not include municipal corporations. See *Iowa Electric Medical Ass'n. vs. Schraeder*, 55 N. W. 24, 87 Iowa 659, 20 L. R. A. 355. Its meaning will not be extended where the intent of the legislature is otherwise. The word "corporation" was not intended to embrace "municipal corporations." The whole chapter is repugnant to that interpretation. Such construction would allow one city to make rates or charges governing the inhabitants of another city. Resolutions of the council of one city would bind the inhabitants of another city who had no voice in the election of the officials. The jurisdiction of a city would be extra-territorial. The charges or rates set by Davenport would become a lien on property in Bettendorf, and if not paid would become collectable as other taxes.

These things cannot be done under the authority granted in Chapter 308-D1, and the absurdity of the result reached under the broad interpretation shows that the legislature never intended the word "corporation" to mean "municipal corporation." The above reasons suffice for a determination of this question.

It is therefore our opinion that the city of Davenport may not tax the inhabitants of Bettendorf under Chapter 308-d1.

CITIES AND TOWNS: MAYOR: SALARY: FEES: Cities and towns may adopt ordinances providing that mayor may receive salary and also allow him to retain the fees collected incident to holding court and as justice of peace. Section 5671. Mayor of Indianola is not entitled to compensation other than the annual salary stipulated.

June 30, 1937. *Honorable S. E. Prall, Indianola:* This department acknowledges receipt of your request for an opinion on questions set out in the statement of facts. You state:

A situation has arisen with regard to the salary of the Mayor of the City of Indianola, and also with regard to the fees received by him while sitting as a justice of the peace, and the question involves the construction of Sections 5665 and 5670 of the Code of Iowa, 1935.

The first ordinance passed by the city council provided for a salary, and followed substantially the terms of the statute to the effect that the salary provided for shall be in lieu of all fees. However, as the city grew and it acquired its municipal light and water plants, the duties of the Mayor increased, and the ordinance was changed so as to read that the Mayor should receive a salary and that all fees received by him as mayor should be turned over to the city treasurer, but said nothing about the fees received as justice of peace.

The salary for the Mayor for the next biennium has been fixed at three hundred dollars per year and cannot be modified or changed during that time, and if the Mayor is not permitted to receive these fees amounting to several hundred dollars per year, his salary will be inadequate and not in accordance with the intention of the city council in fixing his salary.

It seems to me that the question involved is whether or not the city has the authority to pass an ordinance providing that the mayor can receive a salary and also receive the fees collected by him as justice of peace, and also whether or not the mayor must reimburse the city for such fees.

Section 5665, Code, 1935, provides:

"*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."

Section 5670, Code, 1935, provides:

"*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."

Section 5671, Code, 1935, provides:

"*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. * * *"

In view of Section 5671, supra, it is the opinion of this department that a city or town may adopt an ordinance providing that its mayor may receive a salary and also allow him to retain the fees collected incident to holding a mayor's or police court, or to discharging the duties of a justice of peace. This is established practice in many cities and towns. See *12 Iowa Law Review, 395.*

The ordinance adopted by the city council of Indianola, Iowa, has fixed a salary in the amount of three hundred dollars per annum, and requires that the mayor shall turn over to the city treasurer all fees received by him as mayor. The ordinance is silent both as to fees received by the mayor when discharging the duties of a justice of the peace, and also as to any expression that the fixed salary shall be in lieu of all other compensation. It is the opinion

of this department, however, that this fact is immaterial, and the mayor of Indianola is not entitled to any compensation other than the annual salary of three hundred dollars. The comparatively recent case of *King vs. City of Eldora*, 220 Iowa 568 is conclusive of this proposition. In that case the city council of Eldora, Iowa, by ordinance fixed the salary of the city marshal at one hundred dollars per month. The ordinance did not express that such salary should be in lieu of all other compensation. The court, having first set out the provision of the statute relating to the fees of marshal and deputy marshal, said:

"This section (5668) clearly provides that the city marshal shall receive certain fees which are intended as compensation for the services he renders. However, the legislature felt that there would be instances where the fees would not be satisfactory or fair compensation, and therefore, under Section 5670 of the 1931 Code, it did permit cities and towns to provide for a salary in lieu of all other compensation. * * *.

"When the city of Eldora passed Ordinance No. 167, which fixed the salary of the city marshal at one hundred dollars per month, it complied with Section 5670, and then at that point the statute takes hold of the matter and says that when the city has done this, the compensation thereby fixed is 'in lieu of all other compensation.' In other words, it was not necessary that the words 'in lieu of all other compensation' be written into the city ordinance. The statute under which the city fixed the salary provided that in case the city saw fit to fix the salary, it was 'in lieu of all other compensation.' So when the city of Eldora fixed the salary of the marshal by ordinance at one hundred dollars per month, he was not entitled to any other compensation."

In the instant case, the city council of Indianola, Iowa, adopted an ordinance in compliance with Section 5670, supra. Under the stated facts, it is disclosed that it was laboring under an apparent mistaken conception of the law. Nevertheless, under the holding in the *King* case, there having been adopted an ordinance establishing the annual salary of the mayor, the provisions of the statute then took "hold of the matter" and the compensation fixed by the ordinance is "in lieu of all other compensation."

It is the further opinion of this department that the fees received by the Mayor of Indianola, Iowa, in discharging the duties of the justice of peace are recoverable, subject to the limitations provided by law, since the mayor, by reason of the ordinance, was not entitled to retain such fees. The question as to whether or not the mayor is accountable for such fees to the city or county is not before us for consideration.

CONSERVATION COMMISSION: LICENSE—SEINE: Holder of seine license may sell to wholesalers or peddlers "at a place on the bank" but would not have authority to purchase fish and resell.

June 30, 1937. *Mr. R. N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* We acknowledge receipt of your request for an opinion of this department, which recites the following facts:

A is the holder of a seine license. He catches his own fish partially and buys the balance from other fishermen. A contends that under his seine license he has the right to sell fish at wholesale prices either to large consumers or to fish peddlers without the necessity of having a wholesale fish dealer's license.

Can such holder of a seine license, by virtue thereof, sell at wholesale to large consumers or to fish peddlers without a wholesale fish dealer's license?

The provisions applicable to the above inquiry are to be found in Section 104 of Senate File 450, acts of the Forty-seventh General Assembly, which provides as follows:

"Section 104. It shall be lawful for the holder of a net or seine license to possess and sell such species and sizes of fish as are lawfully taken and such fish may be delivered to original buyers and/or may be sold by such licensee at a place on the bank to which they are brought from the nets or seines, but any such sales shall be made by the licensee or his agent. Any other sale of fish taken under this section shall require a wholesale fish market or fish peddler's license."

The provisions of the above section were intended to permit the holder of a net or seine license to dispose of the fish he himself has caught. The section contemplates that such licensee may deliver such fish to buyers and maintain a "place on the bank" to which such fish may be brought from the nets or seines and there sold by himself or his agent, without procuring a wholesale fish market license. It appears to us that the effect of the provisions of said Section 104 is to give to the holder of a net or seine license the right to dispose of the fruits of his labor. In so disposing of the fish the licensee has taken, he would not, by virtue of his net or seine license, be permitted to operate as a peddler of fish since such method of disposal would require the peddler's license referred to in Section 106 hereinafter cited. Sale of his catch to wholesalers would not constitute him a peddler nor would a sale at retail be prohibited, provided the sale is made by him or his agent "at a place on the bank" to which such fish are brought from the nets or seines.

It is our opinion that the holder of a net or seine license would not have authority to purchase fish from other fishermen and dispose of same at wholesale. In so doing he would be engaged in the operation of a wholesale fish market and would come within the provisions of Section 106 of Senate File 450, which, in part, provides:

"Section 106. It shall be unlawful for any person, firm or corporation to peddle fish or to operate a wholesale fish market, jobbing house, or other place for the wholesale marketing of fish, or distribution of fish, without first procuring a license. * * *"

It is, therefore, our opinion that the holder of a net or seine license may lawfully dispose of fish which such licensee has lawfully taken in his nets or seines, but that the statutes do not permit the purchase of and dealing in fish at wholesale by such licensee unless he procures the wholesale fish market license.

BEER PERMIT: CLUB: In order to qualify for a class "B" club permit, an organization must show its existence as a bona fide organization for the period required by the statute.

July 1, 1937. *Mr. M. C. Williams, County Attorney, Boone, Iowa:* We acknowledge receipt of your request for an opinion, in connection with which request you have set out the following facts:

A local lodge, a branch of a national organization, organized in our city recently, has established quarters and has a bona fide membership of over two hundred. Such lodge has made application for a class "B" club permit.

The question is whether or not such organization comes within the conditions of the statute relating to the issuance of beer permits to clubs.

It is assumed that all other requirements of Section 1921-f110 can be met by the above organization, and the scope of this opinion will be limited to the question of the period of time for which the club has been active.

Pertinent to this inquiry is sub-section (f) of Section 1921-f110, 1935 Code, which provides as follows:

"1921-f110. *Conditions.* No club shall be granted a class 'B' permit under this chapter:

* * *

"f. Unless it was in operation as a club on the first day of anuary, A. D., 1934, or being thereafter formed, was in continuous operation as a club for at least two years immediately prior to the date of its application for a class 'B' permit."

It is to be noted that the above provision sets out two conditions under which a club permit in a proper case could be granted to an organization: (1) if it was in operation as a club on the first day of January, 1934; or (2) being thereafter formed, was in continuous operation as a club for at least two years immediately prior to the date of its application for a class "B" beer permit.

It is to be further noted that in defining "club" as contemplated by the statute, sub-section (d) of Section 1921-f110 provides:

"d. Unless such club has a permanent local membership of not less than fifty adult members."

To qualify under the first condition set out above, we believe the statute intends that there must be a local organization functioning as a club on the first day of January, 1934. The club permit is a special form of class "B" permit and carries with it certain privileges, among which may be a lower license fee. We do not believe that a newly formed local organization, although affiliated with a nationally incorporated organization which latter organization may have been active on January 1, 1934, can assert that by virtue of such affiliation it was in operation as a club on said date. This conclusion must be reached for the reason that we cannot see that the national organization was "in operation *as a club*" on January 1, 1934.

In view of the foregoing, it is our opinion that in order to qualify for a class "B" club permit, an organization must show its existence as a bona fide local organization for the period required by the statute.

REAL ESTATE COMMISSIONER: DEPUTY SECRETARY OF STATE: Deputy secretary of state may not conduct real estate hearings in p.ace of real estate commissioner.

July 1, 1937. *Hon. Robert E. O'Brian, Secretary of State:* We are in receipt of your request for an opinion on the following proposition:

May the deputy secretary of state conduct a real estate hearing in the place of the Real Estate Commissioner?

Chapter 91-C2 is the chapter dealing with the real estate commission. There are too many pertinent sections involved in the question to set them out in full, so what they contain will be referred to only.

The Secretary of State is the real estate commissioner (1905-c27) and before denying or revoking a license he must set a hearing date thereon (1905-c49), and at such hearing "the commissioner" may require attendance by subpoena, administer oaths, examine witnesses and receive evidence. The commissioner shall, upon request, furnish the applicant with his findings of fact, and if he determines that an applicant is not qualified to receive a license, he shall not grant one and he shall suspend or revoke a license if he finds the licensee is guilty of a violation of this chapter (1905-c56).

From the above sketch of the chapter we find that the commissioner is designated as the Secretary of State, who sits in a quasi judicial capacity exercising judgment and discretion. The law in Iowa is well settled that ministerial work may be delegated, but acts which involve judgment or discretion may

not be delegated. *Kenney vs. Howard*, 133 Iowa 94; *Mulhall vs. Pfannkuck*, 206 Iowa 1139; *Young vs. Black Hawk*, 66 Iowa 460, 23 N. W. 923. The duties imposed upon the commissioner clearly involve the exercise of judgment and discretion in granting or refusing to grant licenses and in revoking licenses.

It is therefore our opinion that the deputy secretary of state may not conduct real estate hearings in place of the commissioner.

PUBLIC HIGHWAY: CORPORATE LINES: BOARD OF SUPERVISORS: No question on liability of city for defects on that portion of the street within its limits, and the county cannot be sued for damages caused by defects on part of the highway without the city.

July 3, 1937. *James E. Coonley, County Attorney, Hampton, Iowa:* Your letter of June 24, 1937, in which you state a public highway is located on the corporation line of a city of over 3,500, and that one-half of the finished grade is in the city and the other half without, and in which you ask the following questions, has been received and considered.

1. Who, the county or city, is liable for accidents due to defects in that half of the said grade lying within the city? (Please disregard the fact that county cannot be sued in such case.)

2. Who, the county or city, is obligated to keep that part of said grade lying within the city in repair?

With reference to Section 4644-c47 of the Code, a former Attorney General, in an opinion rendered June 22, 1930, held that it was mandatory on the part of the supervisors to grade, drain, bridge, gravel or maintain any road or street that is a continuation of the county trunk system, or continuation of a county local road, and which is within any one of the three classes designated in the section.

While the word "town," under the definition given in Section 63, (sub-division 16) of the Code, may mean a city, in Section 5623, under "cities and towns," a town is defined as a municipal corporation having a population of less than 2,000.

Section 4644-c47 makes it mandatory for the board of supervisors to take care of those roads which are:

1. Within or partly within, and located along the corporate limits of any town, or

2. Within or partly within, and located along the corporate limits of any city, including cities under special charter having a population of less than 2,500, or

3. Within that part of any city, including cities under special charter where the houses or business houses average not less than 200 feet apart.

It will be noted that this section leaves out in the third class the expression "within and located along the corporate limits of." We are therefore of the opinion that Section 4644-c47 does not apply.

In 1917, the then Attorney General, considered the question whether the city could share in the expense of repairing a highway along the corporate limits of a city, one-half of which was within the city and the other half outside, where the part to be repaired was along the side of the highway next to the township, and no part of the part to be repaired was within the corporate limits of the city. He was unable to find any authority allowing the city to share in the expense necessary to make the required repairs.

There is statutory authority, Sections 6225 and 6772, authorizing the city to aid in the construction of roads outside the city, but that requires a vote

of the people. There is statutory authority for boards of supervisors of adjoining counties to enter into agreements in relation to inter-county highways, Section 4661, et seq. As to bridges and culverts on roads on city boundary lines, there is statutory authority for the city and county sharing the expense, and the Highway Commission is given power to decide any dispute in relation thereto. Section 4666.

But we are unable to find any authority upon the question as to how such roads are to be maintained. So we have the situation in which the city is under the duty to maintain that part of the street within the city limits and the county under the duty to maintain that part outside the city limits. There seems to be no question on the liability of the city for defects on that portion of the street within its limits, and of course, the county cannot be sued for damages caused by defects in that part of the highway without the city.

Numerous questions, such as criminal liability for violation of speed regulations, and the question of whether there is liability on the part of the city for damage caused by a defect in the road, and evidence in dispute as to whether the defect was within or without the limits of the city, could rise.

From a practical standpoint, so long as such a situation as you have exists, the board and the city should agree as to who should maintain it. It would be better still if the city would change its boundaries and either include or exclude the whole road.

CIVIL SERVICE: Foremen of work done on street and sewer department are not engaged in such work as requires special skill and fitness within the meaning of the civil service act.

July 3, 1937. *Mr. John L. Duffy, County Attorney, Dubuque, Iowa:* We are in receipt of your request for an opinion on the following proposition:

Are A and B, as foremen of work done on the street and sewer department, engaged in such work as requires special skill and fitness?

The City of Dubuque is under the City Manager form of government. You inform me that A is in charge of the streets under the direction of the City Manager and B is in charge of sewer cleaning and maintenance. Your letter reads in part as follows:

The duties of A and B are to carry out the orders of the City Manager, under the inspection and direction of the City Engineer, on the repair of streets, sidewalks and sewers. Insofar as the said A and B acting in the position and capacity of a foreman as to work being done, men do work under them. A in his capacity and duties as a foreman, working under the City Manager and the City Engineer, has a force of about thirty men, and the said B has a force of about eight men.

In answer to your question whether the men in question work under the direction and control of the said A and B, you are advised that the men do work under their direction and control, insofar as A and B act as their foreman in work being done under the plans and directions and authority of the City Manager and the City Engineer.

In regard to your inquiry as to the discretionary power lodged in the said A and B, you are advised that they have no discretionary power as to the contract or work being done. They are told what to do by the City Manager and the City Engineer, and the only discretion lodged in them is to see that the men, acting as foremen, do what they are told to do in the discharge of the work involved.

Section 5694 (2) of the civil service act excludes "laborers whose occupation requires no special skill or fitness." We have heretofore ruled that truck drivers come within that category. The information given us shows that these

men have no authority to hire or fire those who work under them but that right rests solely with the City Manager. That they work under the technical instruction of the City Engineer, who tells them how the work is to be done and that they have "no discretionary power as to the contract or work being done." In other words, they are told what to do and how to do it. The question then is whether the running of a group of men constitutes work which requires special skill or fitness in the absence of other facts.

We have heretofore said that "one cannot be said to be performing duties which require special skill or fitness whose duties are those which the majority of people can fulfill with no added study or practice." The statute refers to "special skill or fitness," which implies more than just ordinary skill, and although the party filling the position may himself be highly skilled, yet if his occupation or work does not require that special skill, he is not within the terms of the civil service act.

Under the facts given us in this question, any man under A or B would act in their stead if they had the ability to make men work. What to do and how to do it is no problem of any of these men. That is all determined by the City Engineer. The repair of streets under those conditions, and the repair and cleaning of sewers require no special skill. Certainly no particular schooling or study is required, nor is any preparation essential for the fulfilling of these positions. These men are engaged in the same work as are all of the men under them, except only that they have the duty and responsibility of seeing that these men work. The manner, methods and materials to be used are designated by the City Manager or City Engineer.

Under these facts, it is our opinion that the two men are not performing work that requires special skill or fitness, and that therefore they do not come under the new civil service act.

This opinion is not authority that all foremen are not engaged in an occupation which requires special skill and fitness, as the duties of some may be such that it takes them within the scope of the act.

CRIMINAL LAW: EXTRADITION: GOVERNOR: HEARING: Sheriff required to transport prisoner to seat of government for hearing called by governor. Costs incurred in apprehending, securing and transmitting a fugitive from justice held in another state are to be paid by demanding state.

July 6, 1937. *Mr. Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* We acknowledge receipt of your letter in which you request the opinion of this department upon the questions set out below:

Where a prisoner is held in a county under a fugitive complaint, the following questions arise which pertain to extradition proceedings and to the duty of the sheriff of the county wherein such prisoner is held:

1. If a hearing is ordered by the Executive, is the sheriff required or authorized to transport the prisoner to the seat of government?
2. Where should the burden of the expense of transporting such prisoner fall?

Interstate rendition is provided for by Article 2, Section 4 of the Constitution of the United States, which provides as follows:

"Article IV. * * * If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense. * * *"

The above constitutional provision was held to be not self-executing. See

Kentucky vs. Dennison, 24 U. S. 66, 16 L. ed. 717, and Congress enacted thereunder the following statute, U. S. Code, Title 18, Section 662:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

The duties which devolve upon the executives of the states have been discussed in several United States Supreme Court decisions as well as by various text writers. With reference to this matter, the following comment is made by Hughes in his text, Criminal Law and Procedure, at page 603:

"Though the language of the constitutional provision which requires governors to deliver up fugitives from justice is mandatory, it is in fact not obligatory, for there is no means of compelling a governor to issue a warrant of requisition if he refuses. The governor is not presumed to base his decision on the merits of the case, but if he believes that the object in seeking requisition of a fugitive is private gain instead of public interest, or in some cases in which the crime with which the fugitive is charged bears a political aspect, he will refuse to issue a warrant."

In the leading case, *Kentucky vs. Dennison*, cited above, it was held that a moral obligation to deliver a prisoner rested upon the demandee state "without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled." But this case also held that "if the Governor of Ohio refuses to discharge this, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him."

The foregoing discussion, while not bearing directly upon the questions submitted by you, has been set forth for the purpose of illustrating the position of the executive power in extradition matters with respect to the requirements of the Federal Constitution.

The case of *Marbles vs. Creecy*, 215 U. S. 63, is authority for the proposition that a governor may act on the papers submitted to him by the demanding officer, in the absence of and without notice to the accused, stating at page 68 of said report:

"The contention that the governor of Missouri could not act at all on the requisition papers in the absence of the accused and without previous notice to him is unsupported by reason or authority and need only to be stated to be rejected as unsound."

The above case explains that the duty of determining two questions devolves upon a governor in concluding whether or not, in a particular case, extradition is to be granted or refused. These two questions to be determined by the executive are stated as follows:

1. That the accused is charged with what constituted a crime against the laws of the demanding state;

2. That the accused was in fact a fugitive from justice.

The executive may, if he deems it proper to do so, hear additional evidence apart from the formal matter presented to him for the purpose of aiding him in reaching a determination of the two issues above stated. In this connection, the court, in the last mentioned case, referring to the governor said:

"He was, no doubt, at liberty to hear independent evidence showing that the act with which the accused was charged by indictment was not made criminal by the laws of Mississippi and that he was not a fugitive from justice."

In view of the foregoing, it is our conclusion, in answer to your first inquiry, that a defendant held under a fugitive warrant is not, of right, entitled to a hearing before the governor, nor is his presence at such hearing required. It is, however, further our opinion that the governor may require the presence of the defendant or others upon such hearing. Whichever proceeding is followed in this connection is within the discretion of the executive who is charged with the duty of issuing a warrant. Therefore, since the power and duty of determination is lodged with the executive, he necessarily must have the power upon proper order to require that such defendant be brought before him for the hearing. Since the governor may determine in any case that the presence of the accused is desirable, and since such requirement is within the scope of the power of the executive, the costs incident to the delivery of the prisoner to the seat of government become a part of the costs of the extradition proceedings and should be dealt with in the same manner as other costs or fees arising out of proceedings. Such costs, we believe, are properly chargeable to the office of the demanding state and should be included in the fee bill rendered such demanding officer.

Section 13503, 1935 Code, makes provision for the filing of a fugitive warrant before a magistrate. In the second question asked by you it is contemplated that the prisoner is held under such warrant. Succeeding sections make provision for the commitment or the admitting to bail of such defendant. Section 13509, 1935 Code, deals with the liability of complainant for costs, and provides as follows:

"13509. *Liability of complainant—costs.* The complainant in any such case is answerable for all the costs and charges, and for the support in prison of any person so committed; and the magistrate, before issuing his warrant or hearing the cause, must require the complainant to give security for the payment of all such costs, or may require them in advance."

It is thus contemplated that the costs incurred in apprehending, securing, and transmitting a fugitive from justice held in another state are to be paid by the demanding state.

It is therefore our conclusion, in answer to your second question, that an officer may demand the reasonable fees and costs incurred in the delivery to the seat of government of a prisoner held under a fugitive warrant when such delivery of the prisoner is ordered by the governor. It is further our opinion that such costs constitute a part of the expense incident to the extradition proceedings and should be paid by the demanding authority.

BEER PERMITS: HOTELS: FEES: Permit fee for hotel specifically provided for by statute. Whether or not business is hotel should be determined by issuing authority. Sliding scale of fees for permits should be avoided if fees for particular class of permit would vary in one jurisdiction.

July 7, 1937. *Mr. R. A. Knudson, County Attorney, Fort Dodge, Iowa:* We acknowledge receipt of your request for an opinion of this department, in con-

nection with which you have set out facts which are summarized as follows:

A town in your county has provided by ordinance that the scale of beer permit fees shall be as follows: if *three* permits are issued, the fee shall be $100.00 each; if *two* permits are issued, the fee shall be $150.00 each; if but *one* permit is issued, the fee shall be $300.00.

At the present time there are two permittees doing business in the town, and the council proposes, under the ordinance, to charge each operator $150.00.

One permittee claims that he is operating a hotel and that, therefore, the proposed fee of $150.00 may not be charged him since the hotel fee is fixed by the state law. I am informed that the "hotel" has only two or three rooms upstairs over the beer parlor, and that there is no entrance from the beer parlor to the upstairs rooms.

Has the town, under these circumstances, the right to charge this permittee $150.00 for his permit?

The first question to be determined is whether or not the permittee is in fact operating a hotel. We believe that this involves a question of fact and would necessarily be determined by the character of the place of business conducted by the permittee. Section 2808, 1935 Code, which is included in the chapter relating to hotels, restaurants, and food establishments, sets out the following definition of "hotel":

"2808. *Definitions.* For the purpose of this chapter:

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. * * *"

It is our opinion that the issuing authority, using the above definition as a guide, must determine as a matter of fact whether or not the particular place of business is a hotel. If such place of business is determined in fact to be a hotel, then the prescribing of the amount of the permit fee in such case is not within the jurisdiction of the town council since the statute, Section 1921-f117, subsections (a), (b) and (c), specifically provides the amounts to be charged for hotel permits. In the particular case, subsection (c) of said section would apply, it providing as follows:

"1921-f117. *Fees.* * * *

c. Hotels, having one hundred guest rooms or less shall pay an annual permit fee of one hundred dollars. * * *"

In this connection it is also to be noted that the provisions of Section 1921-f126 may be applicable in the above situation, said section providing in part as follows:

"1921-f126. *Power of municipalities.* * * *

In determining the number of permits to be issued under the provisions of this section, class 'B' permits issued to clubs and hotels as contemplated in this chapter, shall be excluded from the limitation as to number, as in this section provided."

In view of the foregoing, it is the opinion of this department that the fee of $150.00 fixed by the town ordinance would not be applicable to a place of business which is in fact a hotel since the permit fee in such case is fixed and determined by the statute. Determination of the question of whether or not the place of business is a hotel must be made by the issuing authority upon the basis of available facts.

We express no opinion upon the validity of the ordinance of the said town with respect to what appears to be a sliding or indefinite scale of fees to be paid by permittees since we do not have this ordinance before us. We may say, however, that it would seem doubtful that an ordinance would be good

which does not fix a definite standard of fees to be charged permittees since it would appear that under such ordinance it is possible that permittees of the same class might be required to pay different amounts in fees. If the operation of the ordinance leads to this result, it is doubtful whether the same would be valid. However, no definite opinion is expressed upon this phase of the question for the reason above stated.

CONSERVATION COMMISSION: ISLANDS: RIVER CHANNELS: SALE: Provisions of Chapter 87, 1935 Code, should be applied in case sale or other disposition of abandoned river channels and islands is contemplated. Sections 1824 and 1825 should be observed.

July 7, 1937. *Mr. M. L. Hutton, Director, State Conservation Commission:* We acknowledge the receipt of your request for an opinion upon the question involved in the following statement of facts:

"There are two provisions of law relative to islands and abandoned river channels. One is under Chapter 448, Code 1935, and it provides the procedure authorizing the sale of islands and abandoned river channels. The other appears in Chapter 87, 1935 Code, Section 1812, giving jurisdiction to the state conservation commission over all meandered streams and lakes of the state and on state lands bordering thereon not now used by some other state body for state purposes.

"At present there appear to be a number of cases arising where the secretary of state's office is being requested to dispose of state lands under the provisions of Chapter 448.

"We now think it advisable to have a legal opinion as to whether or not the provisions of Chapter 87 would apply in such cases."

In answer to the above question reference will first be made to certain provisions contained in Chapter 448, 1935 Code, which relates to islands and abandoned river channels. Section 10221 thereof provides as follows:

"10221. *Sale authorized.* All land between high-water mark and the center of the former channel of any navigable stream, where such channel has been abandoned, so that it is no longer capable of use, and is not likely again to be used for the purposes of navigation, and all land within such abandoned river channels, and all bars or islands in the channels of navigable streams not heretofore surveyed or platted by the United States or the state of Iowa, and all within the jurisdiction of the state of Iowa shall be sold and disposed of in the manner hereinafter provided."

Following the above section are other sections making provision for the procedure to be followed in the survey and appraisement of the land in question. Section 10230 gives to the occupant of such land who has occupied the same as a home for a period of three years or more a preference in the purchase of such lands at the appraised value. Section 10238, Chapter 448, provides as follows:

"10238. *Good faith possession—preference.* If any lands in the present or in any former channel of any navigable river, or island therein, or any lands formed by accretion or avulsion in consequence of the changes of the channel of any such river, have been for ten years or more in the possession of any person, company, or corporation, or of his or its grantors or predecessors in interest under a bona fide claim of ownership, and the person, company, or corporation so in possession, or his or its grantors or predecessors in interest, have paid state or county taxes upon said lands for a period of five years, and have in good faith and under bona fide claim of title made valuable improvements thereon, and also in any other case where, in the judgment of the executive council, the person in possession of any land subject to the provisions of this chapter, has, in equity and good conscience, a substantial interest therein, then the said lands shall be sold to the person, company, or corporation so in possession thereof as hereinafter provided."

Section 10241, Chapter 448, provides as follows:

"10241. *Sale or lease authorized.* The executive council of the state is hereby authorized and empowered to sell, convey, lease, or demise any of the islands belonging to the state which are within the meandered banks of rivers in the state, and to execute and deliver a patent or lease thereof. Nothing in this and Sections 10242 to 10245, inclusive, shall be construed to apply to islands in the Mississippi or Missouri rivers."

The sections above mentioned all relate to the sale or lease of state owned islands, abandoned river channels or such lands formed by accretion or avulsion. All of the above provisions first appear in the 1913 supplement.

Reference will now be made to the provisions contained in Chapter 87, 1935 Code, relating to conservation and public parks. The following sections of said Chapter 87 contain the following provisions:

"1812. *Jurisdiction.* Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission. The commission, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

"1818. *Boundaries—adjustment.* Whenever a controversy shall arise as to the true boundary line between state-owned property and private property, the commission may, with the approval of the executive council, adjust said boundary line or take such other action in the premises, all with the approval of the executive council, as in its judgment may seem right. When such disputed boundary line is fixed it shall be surveyed and marked as herein provided."

"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."

"1823. *Sale of islands.* No islands in any of the meandered streams and lakes of this state or in any of the waters bordering upon this state shall hereafter be sold, except with the majority vote of the executive council upon the majority recommendation of the commission, and in the event any of such islands are sold as herein provided the proceeds thereof shall become a part of the funds to be expended under the terms and provisions of this chapter."

"1824. *Sale of park lands.* The executive council may, upon a majority recommendation of the commission, sell or exchange such parts of public lands under the jurisdiction of the commission 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 commission 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."

The above provisions first appear in the 1924 Code of Iowa and are enactments subsequent to the provisions found in Chapter 448 above referred to. It is immediately apparent that a conflict exists between the provisions of Chapter 448 and the provisions of Chapter 87. Chapter 448 provides procedures whereby state owned lands within meandered streams and lakes and lands bordering thereon may be required to be sold to persons who may make application to purchase same. On the other hand, Chapter 87 restricts the sale of such land, specifically places the same under the jurisdiction of the state con-

servation commission, and forbids the sale of state owned islands except with the assent of a majority of the executive council and the state conservation commission. Furthermore, sale of such state owned land, except islands, is restricted to that which is found to be undesirable for conservation purposes. (See Section 1824 above quoted.)

The provisions of Chapter 87 were enacted subsequent to the provisions of Chapter 448. Repeals by implication are not favored by the law and every effort should be made to harmonize apparently conflicting provisions of the statutes. However, to give effect to the provisions of Chapter 448 insofar as the same affect the disposition of state owned lands of the character heretofore described, would be to leave without effect the provisions of Chapter 87.

Since the provisions of Chapter 87 relative to the management and disposition of such state owned land within and bordering meandering lakes and streams of the state are of more recent enactment than the provisions of Chapter 448, it is our opinion that the provisions of Chapter 87 must control insofar as a conflict exists between the two chapters.

It is therefore our opinion that the procedure outlined in Chapter 87 should be applied in case sale or other disposition of such property is contemplated, and that the directory provisions of Sections 1824 and 1825 should be followed in consummation of such transactions.

STATE SINKING FUND: Proceeds from rents, etc., of county owned real estate acquired by tax deed, if deposited as law requires, are entitled to protection of state sinking fund.

July 8, 1937. *Honorable Leo J. Wegman, Treasurer of State:* This department is in receipt of your request for an opinion in connection with which request the following facts have been furnished:

Polk County has purchased some thirteen thousand properties at tax sale under the provisions of Section 7255-b1, 1935 Code. After tax deed has issued the county commences the management of and collection of rents from the properties until the same are sold. These rents, as collected, are placed on deposit in a depository pursuant to a formal resolution of the board naming such bank as a depository, in an account styled "Polk County, Iowa."

Because of the volume of work, the board has established an office known as the Polk County Real Estate Department. This department deposits the rents in the above account, and when there is a sale of this property on which rent has been collected, the proceeds from such sale, together with the rent which has been collected on the same, is then forwarded to the county treasurer with a receipt of such sale.

Kindly advise if the statutes relative to the State Sinking Fund would be applicable to this bank account in the event of the closing of such bank and the loss of such funds.

This department recently held that boards of supervisors, where the circumstances warrant such action, have authority to delegate or employ an agent or agents to look after the ministerial duties connected with the management of such property, the said opinion containing the following language:

"* * * under the general powers vested in the Board of Supervisors, such Boards are authorized to employ a person to secure tenants, collect rents, care for the repairing and otherwise, look after such properties. The Board of Supervisors should, however, be guided by the necessity of the occasion and only make such employment where the number of properties justify the expenditures.

"It is therefore our opinion that Boards of Supervisors have the power and authority to delegate and employ a person to perform such duties with reference to properties as herein specified."

For your further information I inclose herewith a copy of the opinion referred to above, which opinion issued to Mr. A. J. Braginton, Rockwell City, Iowa, under date of June 26, 1937.

Your inquiry presents for determination the question of whether or not the deposit of funds acquired as rents from such county property would be subject to the provisions of the law pertaining to the state sinking fund for public deposits, as the same appears in Chapters 352-G1 and 352-A1, 1935 Code.

Section 10260-g1, 1935 Code, relative to the apportionment of proceeds under tax deed title held by a county, provides in part as follows:

"10260-g1. *Title under tax deed—sale—apportionment of proceeds.* * * * All money received from said real estate either as rent or as proceeds from the sale thereof shall, after payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums on any buildings located on said real estate and after expenditures made for the actual and necessary repairs and upkeep of said real estate, be apportioned to the tax levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

The fund, therefore, accumulated from the proceeds of rents derived from such county owned land is clearly a fund to be held for the benefit of the interested taxing districts. Such fund is clearly a public fund since the whole interest therein is held by the taxing districts.

Section 7420-d1, 1935 Code, 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, each clerk and bailiff of the municipal court, and clerk of the district court, and each secretary of a school board shall deposit all public funds in their hands in such banks as are first approved by 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."

Section 7420-d8, 1935 Code, provides as follows:

"7420-d8. *Liability of public officers.* No officer referred to in Section 7420-d1 shall be liable for loss of public funds by reason of the insolvency of the depository bank when said funds have been deposited as herein provided."

In effect the last quoted two sections provide that it shall be the duty of the named officers to deposit all public funds in their hands in properly designated banks, and that if such deposit is made in accordance with the statute, no personal liability attaches to such officer in event of insolvency of such bank.

Under the facts available in the present inquiry, we do not have a deposit made by any of the above named officers, but the rents are deposited by the Real Estate Board in an account entitled "Polk County, Iowa."

Section 7420-a2, 1935 Code, sets out the purpose of the state sinking fund in the following language:

"7420-a2. *Purpose of fund.* The purpose of said fund shall be to secure the payment of their deposits to state, county, township, municipal, and school corporations having public funds deposited in any bank in this state, when such deposits have been made by authority of and in conformity with the direction of the local governing council or board which is by law charged with the duty of selecting depository banks for said funds."

Of the fact that the fund under consideration is a public fund there can be no question.

We are of the opinion that the board of supervisors may, where the number of properties warrant such action, delegate an agent to look after the ministerial details relating to the care and management of county property held under

tax deeds. The net proceeds arising out of the rents of such properties belong to the various taxing districts having interests in such funds.

We are, however, of the further opinion that the account referred to should be carried as a special fund in the office of the county treasurer. Section 10260-e1 provides as follows:

"10260-e1. *Management.* When the title to real estate becomes vested in the state, or in a county or municipality under this chapter, or by conveyance under the statutes relating to taxation, the executive council, board of supervisors, or other governing body, as the case may be, shall manage, control, protect by insurance, lease or sell said real estate on such terms, conditions, or security as said governing body may deem best."

It appears that the board of supervisors is designated by the statute as the governing body charged with the management of such fund. However, the county treasurer is the fiscal officer of the county, and Section 5156, 1935 Code, provides as follows:

"5156. *Duties.* The treasurer shall receive all money payable to the county, and disburse the same on warrants drawn and signed by the county auditor and sealed with the county seal, and not otherwise, and shall keep a true account of all receipts and disbursements, and hold the same at all times ready for the inspection of the board of supervisors."

Therefore we believe that the statute contemplates that such funds be carried as an account in the treasurer's office and that receipts and disbursements affecting such fund be accounted for as provided above.

In view of the foregoing, and particularly in view of the broad purpose of the sinking fund law, it is our opinion that the proceeds that arise out of the rents or profits of county owned real estate acquired by tax deed, provided such funds are deposited in such depositories as the law requires, in the manner indicated, constitutes such public deposit as a fund entitled to the protection of the sinking fund law and would be otherwise subject to the provisions of the law pertaining to the deposit of public funds.

COUNTIES: LIME—AGRICULTURAL: RELIEF LABOR: LABOR: Cost of relief labor used in production of agricultural lime shall be charged to price of lime.

July 8, 1937. *Mr. Kenneth C. Mumma, County Attorney, Corydon, Iowa:* We are in receipt of your request for the opinion of this department upon the following question:

Shall the cost of relief labor, referred to in Section 11 of House File 147 of the acts of the Forty-seventh General Assembly, be charged to the price of lime."

Under the provisions of House File 147, when certain conditions have been complied with, a county board of supervisors is given authority to acquire and operate a limestone quarry, and to quarry, pulverize, sell or purchase and resell limestone for agriculture purposes within such county. Your inquiry relates specifically to the question of whether or not the cost of relief labor is to be charged to the price of the lime furnished by the board.

Section 11 of said file authorizes the use of relief labor in the production of lime, providing as follows:

"Section 11. The board is specifically authorized to use relief labor in the production of agricultural lime as provided for in this act, but shall pay the prevailing labor scale for that type of work, customary in that vicinity."

The rule for fixing the cost price of the lime so produced is set out in Section 9 of the act, which provides as follows:

"Section 9. The cost price of this agricultural lime shall be fixed by the board of supervisors, at not less than the actual cost of production at the quarry with ten per cent added to provide for the cost of and depreciation on the equipment used in the production of said agricultural lime, together with any cost in transportation of the lime from the quarry to the farm of applicant."

It is to be observed that "the actual cost of production at the quarry" is an element which must be included in the cost price. This, therefore, includes the costs of labor entailed in such production, and includes the cost of relief labor since the act specifically authorizes the board to pay the cost of such labor.

Section 10 of said act provides as follows:

"Section 10. In calculating the cost price of the agricultural lime to the county as referred to in Section 9 herein, all elements of the cost of the operations, including the amortization of the purchase price of any quarries, lands, or equipment over the period during which any bonds, warrants, or other obligations incurred by the county therefor shall mature, cost of all labor, proportionate and actual administrative overhead of county officials and other county executive employees in administering said act and conducting said business, repairs to plant machinery and equipment, wages of all employees and all other costs of production shall be kept in a separate system of accounts, and all books and records with respect to the cost of said agricultural limestone and the methods of bookkeeping and all records in connection with the production, disposal and sale of said agricultural limestone shall be open to the inspection of the public at all times."

It will be noted that the above section makes reference to the "elements of the cost of the operations" and that included as an element in such cost is "cost of all labor."

In view of the foregoing, it is our opinion that House File 147 requires that the cost of all labor is to be included in and charged to the price of the lime produced and furnished, and that the cost of relief labor is included in the said requirement.

BOARD OF CONTROL: COPYRIGHT: Proposed procedure, if followed, would be an infringement on the copyright of Terman and Merrill. 101 U. S., 103: 13 C. J., 1113 and 1122.

July 8, 1937. *Mr. E. H. Felton, Member, Board of Control:* This department acknowledges receipt of your request for an opinion on a question raised by Doctor Harold M. Skeels, Psychologist, which is hereinafter set out.

It is disclosed that in connection with psychological testing in state institutions under the supervision of the Board of Control a certain record card is proposed for use styled "Record Blank for the Stanford Revision of the Binet Scale," whereon there is recorded the results of tests given from which the I. Q. of the person examined is partly or wholly determined. The card is to be made up in ruled columns, each column to contain words and symbols very nearly similar to the contents of a booklet entitled "Record Booklet for the Revised Stanford-Binet Scale as described in Terman and Merrill's Measuring Intelligence," which booklet is admittedly the pattern proposed to be followed in printing the record blanks hereinbefore alluded to.

The opinion desired concerns the following question:

Would it be construed as a definite infringement on copyright if we were to print a supply of record blanks for use in psychological tests in Board of Control institutions, the use thereof to be limited to the needs of the Department of Psychology, and in no case to be distributed for remuneration?

Article I, Section 8 of the Constitution of the United States provides in part as follows:

"The Congress shall have Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries * * *."

Pursuant to this constitutional provision, the Federal Congress enacted the Copyright Act of 1909 (35 Stat. 1075, 1088) embraced within Title 17, U. S. C. A., which "secures to the owner of a copyright in a literary work an exclusive right to print, reprint, publish, copy and vend the copyrighted work," and to "make any other version thereof."

Section 25, Title 17, U. S. C. A. provides that if any person shall infringe the copyright in any work protected under the Copyright Law of the United States, such person shall be liable (a) to injunction restraining such infringement, (b) to pay damages and profits, (c) to deliver up all articles alleged to infringe a copyright, (d) to deliver up for destruction all infringing copies, et cetera.

Infringement of copyright is defined in Section 263, 13 Corpus Juris, 1106, as follows:

"Infringement of copyright * * * consists in the doing by any person without the consent of the owner of the copyright, of anything the sole right to do which is conferred by the statute on the owner of the copyright * * *."

The question arises whether or not the printing of the blanks referred to constitutes an infringement of the copyright of Terman and Merrill. The record booklet copyrighted by these persons contains on the top front page the following matter:

"Copyright, 1937, By Lewis M. Terman and Maud A. Merrill.

Persons who, without authorization, reproduce the material in this Scale or any parts of it in any form whatever, whether typewritten, multigraphed, mimeographed, or printed, are violating the authors' copyright. No material contained herein, or modifications of it, may be used except by special arrangement with the publishers and the payment either of permission fee or of a royalty on all copies distributed."

It is admitted that the product of Terman and Merrill will be the pattern from which the record blanks will be prepared. It further appears that the tentative draft of the record blanks incorporates in substantial detail words and symbols from the Terman and Merrill booklet.

It appears from the express wording of the statute that the peculiar right secured by copyright is the exclusive right to print, reprint, publish, copy and vend the copyright work. Use of the copyrighted work in any other manner by another would not be an infringement of the copyright. 13 Corpus Juris, 1106: *Bobbs-Merrill Company vs. Straus*, 210 U. S., 339; 52 L. ed., 1086. For example, the copyright in a book does not extend to or protect the art or systems of which the work is an exposition, such as a system of shorthand, bookkeeping, et cetera, protection of which is the province of letters patent. It is stated further at Section 267, 13 Corpus Juris that "theories, speculations, ideas, or opinions, however original they may be, are not covered by the copyright of a book in which they are propounded or expressed, and hence the adoption and use of them by another is not an infringement of copyright. *But the association, arrangement, and combination of ideas and thoughts makes a particular literary composition, and the appropriation and use of them in that arrangement and combination is an infringement.* Protection is afforded only to the material or tangible semblance in which the intellectual conception is expressed." 13 Corpus Juris, 1108, et seq: *Bobbs-Merrill Company vs. Straus*, supra; *Holmes vs. Hurst*, 174 U. S., 82; 43 L. ed. 904; *Baker vs. Selden*, 101

U. S. 99; 25 L. ed. 841. In the last cited case the United States Supreme Court at page 103 of 101 U. S. had the following to say:

"On the other hand, the teaching of science and the rules and methods of useful arts have their final end in application and use; and this application and use are what the public derives from the publication of a book which teaches them. But if embodied and taught in a literary composition or book, their essence consists only in their statement. This alone is what is secured by the copyright. The use by another of the same methods of statement whether in words or illustrations in a book published for teaching the art would doubtless be an infringement of the copyright."

In view of the foregoing and under the stated facts, it is the opinion of this department that the proposed procedure, if followed, would be an infringement of the copyright of Terman and Merrill for it would be in violation of their rights conferred by the copyright and contrary to the express conditions of the proprietors set out in the "notice" appearing on the top front page of their booklet. It is our further opinion that it makes no difference that there is a revision of the Terman and Merrill booklet to meet the particular needs of the Department of Psychology. The substance, if not the exact form, is there, and it is well settled that where the similarity or identity is due to copying from the copyrighted work there is an infringement. *Baker vs. Selden*, supra: 13 Corpus Juris, 1113, et seq.

In other words, a literal reproduction is not necessary. Further, it is immaterial that the record blanks are neither distributed nor sold for profit for the reason that the mere fact of printing the blanks with contents substantially like the record booklet copyrighted by Terman and Merrill constitutes the infringement. 13 Corpus Juris, 1122—Section 290.

In this very connection we may refer to the case of *MacMillan vs. King*, 223 Federal Reporter, 862, wherein an economics professor prepared typewritten outlines or briefs for use by his students. They were a compilation of his own ideas and those of the author of a book entitled "Principles of Economics." In numerous instances complete and deleted quotations were taken from the book. The Federal District Judge said in his opinion:

"I must hold that defendant's sets are not in any event such abridgments from the copyrighted book as he has the right to make, and that they constitute 'versions' of substantial proportions of the book such as the plaintiff alone has the right to make."

The defendant in that case had neither leased nor sold the outlines or briefs. The plaintiff's bill of complaint alleged that the defendant had prepared them in such sense as to make his publication an infringement, and the court held that in order to constitute publication it was not necessary that they should have been offered in the market to whoever chose to buy them, but that a limited publication would entitle the owner of the copyright to an injunction.

Further, the fact that an arm or agency of the state would be responsible for what, in our opinion, would be an infringement is apparently immaterial insofar as liability is concerned. In this regard in the case of *Howell vs. Miller, et al.*, 91 Federal Reporter, 129, wherein pursuant to a state statute certain officers of the state undertook to print a Code or compilation of statutes, and in the process copied from a copyrighted edition of statutes, it was held that the official connection of the defendants could not of itself constitute a reason why they may not be enjoined from infringing the rights, if any, which the plaintiff had under the Copyright Laws of the United States; the court being

of the opinion that a state could not authorize its agents to violate a citizen's right of property and then invoke the Constitution of the United States to protect those agents against suit instituted by the owner for the protection of his rights against injury by such agents.

STATE FUNDS: EMERGENCY RELIEF FUND: Iowa Emergency Relief Fund is entitled to $1,000,000 allocation from the proceeds of the three point tax law, which should have been paid April 1, 1937.

July 8, 1937. *Iowa Emergency Relief Administration:* We are in receipt of your request for an opinion on the following proposition:

Does Senate File 184, Acts of the 47th General Assembly, deprive the Iowa Emergency Relief Fund of its right to a million dollar allocation from the funds received from the three point tax law to be paid April 1, 1937 under Chapter 76 of the Acts of the 46th General Assembly?

Chapter 82, Acts of the 45th General Assembly Extra Session, created the three point tax law, and Section 61 thereof provided for distribution of the funds collected as follows:

1. Three per cent to the general fund of the state.
2. The next three million for the emergency relief fund for 1934.
3. Starting January 1, 1935 and quarterly thereafter, the general fund of the state to be paid one and a half millions.
4. The remainder for the relief of property taxes.

The 46th General Assembly amended the above chapter by striking all of Sections 2 and 3, and inserting in lieu thereof the following:

2. (a) On July 1, 1935 and quarterly thereafter up to and including April 1, 1937, the sum of one million dollars is to be paid into the Iowa Emergency Relief fund.

(b) On July 1, 1935 and semi-annually thereafter up to and including January 1, 1937 the sum of $125,000 to the Iowa Emergency Conservation fund.

3. On July 1, 1935, and on October 1, 1935, the sum of not to exceed $1,500,000 on each date, for general expenses of the state government.

The 46th General Assembly left the expenditures set out in paragraphs 1 and 4 intact, but repealed and substituted paragraphs 2 and 3.

The Code of 1935 did not carry the provisions under paragraphs 2 and 3, as they were not of a permanent nature but would expire on the dates therein set out.

The 47th General Assembly then looked to the Code of 1935 in amending that section pertaining to the distribution of the income from the three point tax act, and struck out paragraph 2 of Section 6943-f63, which is Section 4 as hereinbefore set forth.

In lieu of paragraph 2 of the 1935 Code, the Legislature enacted the following:

2. $5,500,000 to be paid each year to the Old Age Pension Fund.
3. July 1, 1937 and quarterly thereafter up to and including April 1, 1939, the sum of $500,000 to the Iowa Emergency Relief Administration.
4. The balance to the Homestead Credit Fund.

This act became effective by publication, and it was thereby effective as of March 26, 1937. That is to say, it was effective prior to the April 1, 1937 allocation of $1,000,000 to the Iowa Emergency Relief Fund under the acts of the 46th General Assembly.

The question then is what was the effect of the amendment passed by the 47th General Assembly on the allocation of the 46th General Assembly. If Sections 2 and 3 of Chapter 76 of the acts of the 46th General Assembly had been incorporated in the Code, there would be no question but what the Acts of the 47th General Assembly did not disturb them as it referred to and

repealed only one section. The fact that they were not incorporated in the Code, we think, makes no difference as far as this question is concerned. The laws enacted by the legislature and carried only in the session laws and not in the Code have just as much validity and effect as those carried in the Code.

Section 168 (i) reads as follows:

"168. *Style of code.* The code shall be prepared and published substantially in the following form and style: * * *

"i. All of the statutes of Iowa of a general and permanent nature."

Section 175 of the Code reads as follows:

"175. *Official statutes.* The code and session laws published under authority of the state shall constitute the only authoritative publications of the statutes of this state. No other publications of the statutes of the state shall be cited in the courts or in the reports or rules thereof."

That is to say that all of the provisions for the allocation of the fund were not carried in the Code for the reason that some were not of a "general and permanent nature," but they still were in full force and effect. Codification does not alter the meaning or construction to be given the language contained in a regular enactment by the General Assembly. *State vs. Earle*, 210 Iowa 974.

It is also a rule of construction that changes made by a revision of the statutes will not be construed as altering the law unless it is clear that such was the intention, and, if the revised statute is ambiguous or susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining the intent of the legislature. *Dennis vs. School District*, 166 Iowa 744, and cases therein cited. The session laws can therefore be termed the basic law and the law as printed in the Code must yield, if the occasion arises, to the provisions as set out in the session laws.

With these things in mind, the answer to this inquiry is obvious. The provisions of the session laws have the same force and effect as have the provisions of the Code. The amendment by the 47th General Assembly did not repeal the amendment enacted by the 46th General Assembly, and when the new act became effective a part of the provisions as enacted by the 46th General Assembly were still to be carried out. That part of the act was not expressly repealed by the 47th General Assembly, and there is no room for a construction of repeal by implication.

A construction opposite from this opinion would be to deprive the Iowa Emergency Relief Fund of funds for a three months' period by this new act, which enacted nothing in lieu thereof for that period, it being from April 1, 1937 to July 1, 1937. Surely this was not the intention of the legislature, nor the purpose of the legislation.

It is therefore our opinion that the Iowa Emergency Relief Fund is entitled to the $1,000,000 allocation from the proceeds of the three point tax law, which should have been paid April 1, 1937.

BASIC SCIENCE BOARD: Basic Science Board has authority to broaden the scope of its rule in regard to the waiving of examinations.

July 9, 1937. *Dr. Walter L. Bierring, Commissioner, State Department of Health:* We are in receipt of your request for an opinion on the following proposition:

Has the Basic Science Board the authority to broaden the scope of its rule hereinafter set out under authority of Section 2437-g20 of the Code of 1935?

Section 2437-g20 of the Code reads as follows:

"*Waiver of examination.* 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 rule laid down by the basic science board is 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."

The question is whether the board has restricted its discretionary power by the promulgation of this rule.

It is our opinion that the discretion allowed by Section 2437-g20 does not depend on whether or not this state has a reciprocal agreement with any other state. Section 2437-g20 is expressly a discretionary section and that discretion may be exercised in certain cases to waive the examination for those passing similar tests in "any state, territory or other jurisdiction under the United States or any foreign country." Reciprocal agreements can be made only with other states. The right to waive the examination is not dependent then on reciprocal agreements.

Nor is it necessary that the exemption be granted to only those who have passed examinations in other jurisdictions before a Basic Science Board. Not all states, territories, jurisdictions under the United States or foreign countries have Basic Science Boards so compliance by many jurisdictions would be impossible. The statute says the examination may be waived upon "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, etc." The plain wording of the statute extends the authority to waive not only to those who have passed the examination before Basic Science Examination Boards, but to those who have passed the examination by a group who examine in the basic sciences even though the group assumes a different name and also the exemption extends to those passing the examination before a licensing board. Of course, the examination must be "as comprehensive and as exhaustive as that required under the authority of this chapter." That determination is left to the judgment of the board.

Our conclusion then is that the board has authority to widen the scope of its rule above set out if it sees fit. This opinion is not to be construed as even indicating whether that rule should be broadened or not, the question asked being whether it had the authority to broaden it.

SCHOOLS: OFFICERS—SCHOOL BOARD: Acts of board member holding position during contest of his election, though subsequently removed as result of contest, are valid.

July 9, 1937. *Mr. John E. Miller, County Attorney, Albia, Iowa:* We acknowledge receipt of your request for an opinion of this department upon the following statement of facts:

"At the March, 1937 election of school directors in Wayne Independent School District No. 5 of this county, one man was declared elected by the election board and was duly sworn in.

"Subsequent to that time his election was contested, and at the contest it was determined that illegal votes were cast for the man declared elected, and the contest board then ordered that the contesting party be seated and sworn in as a member of the board of directors, which was done.

"It now appears immediately after the election and before the decision of the contest, that the board of directors elected a teacher and conducted certain other business. All of this business was done during the absence of one of the three members of this board of directors, although he was duly served with notice of the meeting. The question now arises as to whether or not the contract entered into with the teacher for the school year 1937-38 is valid, or whether or not the board of directors as now constituted has the power to make a new contract in regard to the election of a teacher. There was no appeal from the finding of the contest board."

From the statement of facts above submitted, it appears that the first person referred to therein was declared elected by the canvassers and duly sworn in. He, therefore, became the incumbent and was as such pending the outcome of the contest at least a de facto officer and a member of the board of directors. Insofar as the acts of de facto officers concern the public or the rights of third persons, it is the general rule that such acts are valid and effectual. To this effect, see the case of *Bremer County vs. Schroeder*, 200 Iowa 1286, in which case the following language appears:

"The acts of officers de facto are as valid and effectual where they concern the public or the rights of third persons as though they were officers de jure, and their authority cannot be questioned in collateral proceedings."

It is stated that two members of the board were present at the meeting at which the election was had, but that the third member was duly notified of the same. Section 4223, 1935 Code, provides as follows:

"4223. *Quorum.* 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."

In view of the above provision it appears that the fact that one of the members of the board was absent upon the occasion of the election is immaterial to the determination of the question under consideration.

It is not stated whether or not the meeting at which election was had was the annual organization meeting provided for by Section 4220, 1935 Code, or a special meeting. It is assumed for the purposes of this opinion that this board of directors had organized prior to the election of the teacher.

Section 4229, 1935 Code, which refers to contracts with teachers, provides among other things that

"no such contract shall be entered into with any teacher for the ensuing year or any part thereof until after the organization of the board."

Section 4220 provides for the organization of the board at the meeting to be held the Monday following the regular election.

In view of the foregoing and upon the basis of the facts submitted, it is our opinion that a valid contract was entered into by the school district and the teacher employed by the board as aforesaid, and that, under the circumstances, to rescind the action taken by the board in electing the teacher might subject the district to liability for breach of contract.

STATE INSTITUTIONS: FORT MADISON STATE PENITENTIARY: ESCAPED CONVICT: REWARD: POLICE OFFICER: Officer Sutton is entitled to the reward offered by the warden of the state penitentiary for the arrest of escaped convict, Goodwin.

July 9, 1937. *Glen C. Haynes, Warden, State Penitentiary, Fort Madison, Iowa,* and *W. Burton Dull, City Solicitor, LeMars, Iowa:* In your letters of May 24 and June 25, respectively, you state in effect the following problem:

Mr. Joe Sutton, a member of the police force of the town of LeMars, captured a convict by the name of George Goodwin who had escaped from the State Penitentiary at Fort Madison. Mr. Glen C. Haynes, Warden of the State Penitentiary, offered a reward of $50.00 for the capture of this escaped convict in accord with the powers granted him by Section 3770 of the Code of Iowa. Officer Sutton is on active duty as a policeman in the town of LeMars from 2:00 P. M. until 2:00 A. M. Officer Sutton made the arrest of the escaped convict sometime between the hours of 1:00 P. M. and 2:00 P. M. Is Officer Sutton entitled to the reward of $50.00?

The matter of a reward for the capture of convicts who escape from the penitentiary or the men's reformatory is dealt with in the Code of Iowa as follows:

"3770. *Escape of prisoner.* If a convict escapes from the penitentiary or the men's reformatory, the warden shall taken all proper measures for his apprehension; and for that purpose he may offer a reward not exceeding fifty dollars, to be paid by the state, for the apprehension and delivery of such convict.

"3770-a1. *Payment of reward—appropriation.* The state comptroller shall issue warrants in payment of such reward upon filing of vouchers. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated, a sum sufficient for the payment of such claims."

The subject of paying rewards to peace officers is discussed at length by Justice Weaver in the case of *Maggi vs. Cassidy,* 190 Iowa 993; 181 N. W. 27. In that case the Iowa Supreme Court held that the sheriff of Madison County was not entitled to a reward for arresting a man in Black Hawk County who had committed a murder in Madison County, but that the Sheriff of Black Hawk County who assisted the Madison County Sheriff in making the arrest in Black Hawk County might share in a reward offered for the arrest of the murderer. Justice Weaver, for the court, states:

"Our statute (Code, 13301) makes it unlawful for any officer to accept or receive any gratuity or thing of value for the performance of any official duty. It is also a general rule of law, irrespective of statute, that a public officer cannot earn a reward for making an arrest which it is his duty to make. See *Somerset Bank vs. Edmund,* 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. (N. S.) 1170, 10 Ann. Cas. 726; *Means vs. Hendershott & Burton,* 24 Iowa 78. Obedience to this rule compels us to hold that Mr. Brock, as sheriff of the county, is disqualified to share this reward."

"Now the reason for the rule by which we have held Sheriff Brock disqualified to receive or share in the reward is that it is manifestly contrary to sound public policy to permit a public officer to demand or receive a gratuity or reward for making an arrest which it is his duty to make. To hold otherwise would be to open the door to fraud and corruption. If, however, the claimant is not charged with any official duty to make such arrest, the reason for the rule does not exist and there is no call for its application."

"The intervener Henderson held no warrant for the arrest of Clifton. He was under no official obligation to join in his pursuit or capture. Neither Black Hawk County nor Madison County was chargeable with fees or compensation for such volunteer service, and if he was influenced to action by the offered reward he wronged no one and neglected no duty he was otherwise bound to perform."

"This question, in various forms, and under various circumstances, has had the consideration of the courts and given rise to some conflict of opinion, but the trend of judicial opinion is quite in accord with the view that a reward for the arrest or arrest and conviction of an alleged criminal may be earned and properly received by an officer who is under no official duty to do the act without such reward."

Applying the principles laid down in the cited case from which the quotation is taken to the facts which form the basis of this opinion, we conclude that Officer Sutton is entitled to the $50.00 reward offered by the warden of the state penitentiary for the arrest of the escaped convict Goodwin. Officer Sutton was under no official duty, whether he was on or off active duty, to arrest the convict Goodwin for a crime that had been committed in Lee County.

The conclusion that Officer Sutton might receive the reward of $50.00 for the capture of the escaped convict Goodwin, is strengthened by the fact that this is not a reward offered by some interested individual but is a reward authorized by statute and that the purpose back of the statute granting the reward was to insure the return of escaped convicts.

Therefore, it is the opinion of this department that Officer Sutton is entitled to the reward of $50.00 which was offered by the warden of the state penitentiary for the arrest of the escaped convict George Goodwin.

LEGAL SETTLEMENT: INSANITY: SUPPORT: Unless it can be shown that the person in question did within five years after entry become a public charge from causes not affirmatively shown to have arisen subsequent to landing, he cannot be deported, and if committed to Mt. Pleasant, he is a charge of Des Moines County and not the State of Iowa.

July 12, 1937. *Mr. E. H. Felton, Board of Control:* This department acknowledges receipt of your request for an opinion on the following matter. You state that you have been advised that there is pending before the Commissioners of Insanity of Des Moines County, Iowa, an information of Insanity against a person who the Commission finds has lived in said county the past fifty-five years but is a citizen of Sweden, he never having been naturalized. Your question is whether the State of Iowa is liable for the support of this man if committed to the State Hospital at Mt. Pleasant.

Section 3552, Code, 1935, provides:

"*Findings and order.* If the commission finds from the evidence that said person is insane and a fit subject for custody and treatment in the state hospital, it shall order his commitment to the hospital in the district in which the county is situated, and in connection with such finding and order shall determine and enter of record the county which is the legal settlement of such person. If such settlement is unknown the record shall show such fact."

Section 3582, Code, 1935, provides:

"*Finding of legal settlement.* The commission of insanity shall, when a person is found to be insane, or as soon thereafter as it obtains the proper information, determine and enter of record whether the legal settlement of said person is:

1. In the county of the residence of said commissioners;
2. In some other county of the state;
3. In some foreign state or country; or
4. Unknown."

Section 5311, Code, 1935, in part provides:

"*Settlement—how acquired.* 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. * * *.

"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.

* * *"

Section 5312, Code, 1935, provides:

"*Settlement continues.* 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."

The last cited sections are to be found in the chapter on "Support of the Poor," and while they are not made specifically applicable to the determination of legal settlement in insane proceedings, yet it has been held by our supreme court that the legal settlement for an insane person is the same as the legal settlement for a poor person under our statutory law relative to the poor. *Scott County vs. Polk County,* 61 Iowa 616; *State ex rel. Gibson vs. Story County,* 207 Iowa 1117. Therefore, it is the opinion of this department that under the stated facts, (the assumption being that the person in question has continuously resided for one year or more in Des Moines County), the legal settlement of the person in question is Des Moines County, and under the provisions of Section 3581, Code, 1935, said county is liable for the necessary or legal costs or expenses attending the arrest, care, investigation, commitment and support of said person unless he be subject to deportation from the United States.

There is no reciprocal treaty agreement between the United States and Sweden that controls this case.

It is provided at Section 155, Title 8, U. S. C. A. as follows:

"At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; shall * * * be taken into custody and deported. * * *"

Section 136 of said Title and Code provides:

"The following classes of aliens shall be excluded from admission into the United States:

"(a) All idiots, * * * insane persons;

* * *

"(i) Persons likely to become a public charge— * * *"

Now the ban of the statute attaches, irrespective of previous residence or domicile in the United States, and "entry" within the statute authorizing the deportation of aliens within five years thereafter, includes admittance on return after visiting native country. *Lewis vs. Frick,* 233 U. S., 291; *58 L. ed.,* 967.

Therefore, unless it can be shown that the person in question did within five years after entry become a public charge from causes not affirmatively shown to have arisen subsequent to landing, he cannot be deported, and if committed to Mt. Pleasant, he is a charge of Des Moines County and not the State of Iowa.

CRIMINAL LAW: GOVERNOR: EXTRADITION: REQUISITION: Executive of demandee state must honor requisition of another state if it is determined that accused is a fugitive and is charged with what constitutes a crime in demanding state. Executive may exercise limited discretion.

July 12, 1937. *Mr. Robert Burlingame, Assistant to Executive Secretary:* This department acknowledges receipt of your request for an opinion on a matter stated by you as follows:

"Governor Kraschel has requested me to secure from you an opinion on the following points, both of which relate to extradition procedure.

"1. The degree of discretion which the Governor may exercise in passing

judgment on the requisition of the Governor of another state for the return to that state of an alleged fugitive who is presumed to be within the confines of Iowa at the time of the hearing.

"2. The degree of discretion which the Governor may exercise in issuing or declining to issue a requisition upon the Governor of another state for the return to Iowa of an alleged fugitive who is presumed to be within the confines of that other state at the time an application for requisition is made."

Interstate rendition, or the right of one state to require the extradition by another state of a person who has offended against the laws of the former and who has fled into the latter state, rests upon the Federal Constitution, Article IV, Section 2, and on Section 5278, revised statutes, U. S. (Section 662, Title 18, U. S. C. A.), which provide as follows:

"Article IV, Section 2. * * *

"A Person charged in any State with Treason, Felony, or other crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.* * *"

"662. *Fugitive from state or territory.* Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person had fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it *shall* be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."

The State of Iowa early enacted legislation on extradition matters, which is to be found in Chapter 624 of the present Code, the pertinent section of which is 13502, providing as follows:

"13502. *Warrant of arrest.* Whenever a demand is made upon the governor by the executive of another state or territory, in any case authorized by the constitution and laws of the United States, for the delivery of a person charged in such state or territory with a crime, if such person is not held in custody or under bail to answer for an offense against the laws of the United States or of this state, he *shall issue* his warrant, under the seal of the state, authorizing the agent who makes such demand, forthwith, or at such time as may be designated in the warrant, to take and transport such person to the line of this state at the expense of such agent, and may also, by such warrant, require all peace officers to afford all needful assistance in the execution thereof."

We italicize the word "shall" in both the federal and state statutes for the reason that in its ordinary connotation, it is a mandatory term and when so used is the antithesis of any construction indicative of an exercise of discretion.

Having set out the derivatives of authority, we may now turn to text and case authority to determine the exact nature of the duty devolving upon the chief executive of the "demandee" state. It is said in Section 5, 25 C. J. 255, that

"(5) C. *Authority or Duty to Demand or Deliver Persons Accused.* 1. In General. The duty of the governor of a state under the constitution of the United States to deliver up a person charged with crime in another state upon proper demand by the executive authority of the state from which he has fled

is imperative in every case in which it arises. His authority to act is derived from the constitution and laws of the United States and is not dependent on the existence of any state statute. The constitutional and statutory provisions will be strictly construed and all of the requirements of the statute must be respected, although a narrow interpretation will not be adopted in order to permit an offender against the laws of one state a permanent asylum in the territory of another state. * * *" See: *Roberts vs. Reilly*, 116 U. S. 80, 29 L. ed. 544.

and in the concise language of Justice Holmes in a leading case, *Drew vs. Thaw*, 235 U. S. 432, 59 L. ed. 302:

"* * * In extradition proceedings, * * * the purpose of the return is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The constitution * * * pre-emptorily requires that upon proper demand, a person charged shall be delivered up to be removed to the state having jurisdiction of the crime. Article 4, Section 2. *Pettibone vs. Nichols*, 203 U. S. 192, 205. *There is no discretion allowed, no inquiry into motives. Kentucky vs. Dennison*, 24 How. 66; *Pettibone vs. Nichols*, 203 U. S. 192, 203. The technical sufficiency of the indictment is not open. *Munsey vs. Clough*, 196 U. S. 364, 373. * * * When * * * the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York alleged to be crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with * * * upon speculations as to what ought to be the result of a trial in the place where the constitution provides for its taking place."

Our own Iowa Court has, in at least two instances, considered the precise point, first, in *Harris vs. Magee*, 150 Iowa 144, wherein at page 147 it is stated:

"It must be borne in mind that the purpose of this habeas corpus proceeding is in the nature of a review of the legality of the action of the Governor in issuing a warrant of extradition. It was not incumbent upon the Governor to try the question of the guilt or innocence of the petitioner, or to hear evidence thereon, except so far as it might be necessary to determine the question whether he was a fugitive from justice. The *identity* of the prisoner could be inquired into. Whether the *venue* of the crime charged was properly laid within the demanding state would also be a proper inquiry. But if the substance of the act charged in the indictment was committed by the petitioner while he was within another state, and if the indictment on its face fairly *charged* a violation thereby of the criminal statutes of such state, it was sufficient to warrant a finding by the Governor that the defendant was a fugitive from justice. It did not devolve upon the Governor to deal with technical defects in the form of the indictment, provided the substance of the offense was charged. Such questions may be properly left to the courts of the states in which the alleged offense has been committed. *In re Greenough*, 31 Vt. 279; *Ex parte Roberts* (D. C.) 24 Fed. 132; *In re Keller* (D. C.) 36 Fed. 681; *In re White* (C. C.) 45 Fed. 237; *Webb vs. York*, 79 Fed. 616 (25 C. C. A. 133); *Ex parte Pearce*, 32 Tex. Cr. R. 301 (23 S. W. 15). We find nothing in this record at this point that would justify us in holding the warrant of extradition to be void."

And again in *Leonard vs. Zweifel*, 171 Iowa 522, from page 526, we quote the following:

"The clear purpose of the Constitution in providing for extradition is to prevent the individual states from becoming houses of refuge for persons charged with offenses against the laws of other states. Broadly speaking, the governor to whom a requisition is directed does not and ought not to attempt to pass upon the question of the guilt or innocence of the accused or the circumstances of the alleged offense, except so far as is necessary to determine that an extraditable offense has been regularly charged and that the accused was, at the date of such alleged offense, within the jurisdiction of the state from which the requisition issues. It is true that the governor to whom the requisition is directed is to some degree his own interpreter of the Constitution, and extraor-

dinary circumstances have sometimes arisen under which he has looked beyond the formality of the papers and proofs laid before him and refused to order an extradition because he believed it was not demanded in the furtherance of justice. Of the propriety or legality of the executive action in such cases, we are not here called to speak."

These authorities are most conclusive of the proposition that little or no discretion resides in the chief executive officer of the state when demand is made upon him to deliver up a person who has offended against the laws of a demanding state and such person is within the confines of the demandee state.

However, this department, in considering the question as to whether or not the sheriff is required or authorized to transport a person to a seat of government when a hearing is ordered by the executive, parenthetically said:

"The duties which devolve upon the executives of the states have been discussed in several United States Supreme Court decisions as well as by various text writers. With reference to this matter, the following comment is made by Hughes in his text, Criminal Law and Procedure, at page 603:

" 'Though the language of the constitutional provision which requires governors to deliver up fugitives from justice is mandatory, it is in fact not obligatory, for there is no means of compelling a governor to issue a warrant of requisition if he refuses. The governor is not presumed to base his decision on the merits of the case, but if he believes that the object in seeking requisition of a fugitive is private gain instead of public interest, or in some cases in which the crime with which the fugitive is charged bears a political aspect, he will refuse to issue a warrant.'

"In the leading case, *Kentucky vs. Dennison*, cited above, it was held that a moral obligation to deliver a prisoner rested upon the demandee state 'without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled.' But this case also held that 'if the Governor of Ohio refuses to discharge this, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.' "

In other words, the United States Supreme Court apparently recognizes a certain latitude inherent in the provisions of the extradition laws.

At this point, however, it is the opinion of this department that if the requisition is in due form, a fact that should, in every instance, be determined by the office of the Attorney General, the chief executive has but two questions to decide, namely:

(1) That the accused is charged with what constitutes a crime against the laws of the demanding state; and

(2) That the accused is in fact a fugitive from justice.

It is the opinion of this department that if in aid of the determination of these two issues, the executive deems it proper and necessary, he may hear additional evidence apart from the formal matter presented to him. There is authority for this, whether it be dictum or otherwise, to be found in the report of the United States Supreme Court decision in *Marbles vs. Creecy*, 215 U. S. 63, 68, where the Court said:

"He was, no doubt, at liberty to hear independent evidence showing that the act with which the accused was charged by indictment was not made criminal by the laws of Mississippi and that he was not a fugitive from justice."

But such an exercise of discretion goes only to the determination of the questions of identity and venue. It is not the executive's prerogative to go into the motives underlying the demand or the guilt or innocence of the accused. 25 C. J. 267; *Harris vs. Magee*, supra; *Leonard vs. Zweifel*, supra; *Edmunds vs. Griffin*, 177 Iowa 389.

Were we to hold that the executive may go beyond the requisition, which

if in due form, will establish that a crime has been committed, except to determine the two questions hereinbefore set out, it would be in effect to hold that the executive may, in his discretion, impeach the certificate of the executive authority of the demanding state.

If there has been an abuse and prostitution of this extraordinary process by the individual or persons responsible for the demand, if they have falsely sworn, they are amenable to the laws of the forum from which demand is made, and it is hardly to be assumed that the executive of the demandee state is endowed with authority to determine the question of the credibility of the complainants. In other words, we think that a limitation is placed upon the executive of the demandee state similar to the restriction placed upon a court in a habeas corpus proceedings. In this regard the Supreme Court of Iowa in considering the claim of the defendant in *Leonard vs. Zweifel*, supra, that the criminal law was being used to coerce the payment of a debt, stated as to the scope of review on habeas corpus as follows:

"* * * where a request is made in due form and is honored by the governor of the state, it is not within the province of the court upon habeas corpus to inquire into the motive which actuates the prosecution. However little credit it may reflect upon human nature, it is doubtless true that in very many, if not in a majority of cases where there has been a conversion of money or property by an employee or agent, the offense is condoned by the employer or principal if the debt is paid or made good, and that many of the cases actually prosecuted would never have been begun if the defaulting servant or agent or their friends had been able to right the financial wrong. Many other cases of a criminal character are instituted by complaining witnesses out of personal spite or in a spirit of revenge or malice. These facts, while pertinent as bearing upon the credibility of testimony, are never considered a sufficient reason for refusing to investigate a case or for discharging the accused if his guilt be fairly established. It is to be presumed that the accused will be given a fair trial in the jurisdiction to which he is returned and that the courts there will not permit themselves to be made the mere instruments of private malice. The appellant may be entirely innocent of crime. The fact, if it be a fact, that he was repeatedly allowed to use for his own purposes the money of his employer may be found sufficient evidence of implied authority to so use the money in the instance complained of to justify a reasonable doubt of his guilt and call for his acquittal; but all these matters are for the consideration of the tribunal having jurisdiction of the case on its merits. It is manifestly impossible, not to say improper, to consider and pass upon such questions in a habeas corpus proceeding in a foreign state, and the trial court did not err in so ruling. * * *"

Yet we cannot but recognize the authority of the executive in extradition matters as plenary, and it is our further opinion that if in the determination of the two issues hereinbefore mentioned, facts are elicited which satisfy the executive that the sole object of the party complaining is to enforce the payment of a private claim for money, there is neither an obligation nor any satisfactory reason in law why the warrant should issue.

This brings us to a consideration of the second question relating to the exercise of discretion when application is made in this state for a requisition on the executive of another state.

There is nothing in either the United States Constitution or federal and state laws that compels the executive to honor an application for requisition on the executive of another state. Section 13497, Code 1935, provides as follows:

"13497. *Agents in extradition cases.* 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."

This is the statutory authority in this state under which the chief executive appoints agents to demand a fugitive from justice who has fled to another state. The state says "may" appoint agents. Since there is no mandatory requirement compelling the executive to honor the application, it is the opinion of this department that he not only may but should examine into each application for requisition made upon him to determine whether the object of the demand is to secure the punishment of public offenders, and no satisfactory reason in law or otherwise is perceived why the chief executive of this state should issue a requisition where he is satisfied that the sole object of the party complaining is to enforce the payment of a private claim for money. As the Court of Common Pleas in Ohio said in *Work vs. Corrington*, 34 Ohio State Reports, 65, 74, "such an abuse of process is equivalent to a fraudulent use of it."

To that language we wholeheartedly subscribe, and we express as our further and final opinion that the executive should minutely and critically scrutinize each application for requisition where the crime charged is based upon other than indictment or county attorney's information, approved by one of the judges of the particular judicial district, and that even in such cases he may examine into the motives underlying the demand.

BEER: PERMITS—LIMITATION OF: CITY ORDINANCES: City may decide either that no limiting ordinance is to be adopted, or incorporate limitations prescribed by statute into ordinance.

July 13, 1937. *Mr. Donald P. Chehock, City Attorney, Osage, Iowa:* We acknowledge your request for an opinion of this department upon a statement of facts which may be summarized as follows:

Under the power given to cities and towns to limit by ordinance the number of class "B" beer permits established by the municipalities, will an ordinance be valid which fixes a limitation at a number greater than the number indicated by the statute?

It is fundamental that a municipal corporation cannot, by ordinance, contravene the law, and this limitation is incorporated in the general statute which grants to cities and towns the power to pass ordinances.

"5714. *Power to pass.* Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

Section 1921-f103 relates to class "B" applications and provides in part as follows:

"1921-f103. *Class 'B' application.* Except as otherwise provided in this chapter a class 'B' permit *shall* be issued by the authority so empowered in this chapter to any person who:

"1. Submits a wrtiten application for a permit, which application shall state under oath:

a. The name and place of residence of the applicant, and the length of time he has lived at such place of residence.

b. That he is a citizen of the state of Iowa.

c. The place of birth of the applicant, and if the applicant is a naturalized citizen the time and place of such naturalization.

d. The location of the place or building where the applicant intends to operate.

e. The name of the owner of the building and if such owner is not the applicant, that such applicant is the actual lessee of the premises.

f. That the place of business for which the permit is sought is and will continue to be equipped with sufficient tables and seats to accommodate twenty-five persons at one time, and is located within a business district or an area now or hereafter zoned as a business district. * * *"

Therefore the issuance of a class "B" permit to an applicant who properly qualifies under the statute is mandatory, except as may be otherwise provided by Chapter 93-F2, which relates to beer and malt liquors.

A method whereby cities and towns may limit the number of class "B" beer permits to be issued by such municipalities is provided by Section 1921-f126, 1935 Code. The pertinent provisions of said section are as follows:

"1921-f126. *Power of municipalities.* * * * Cities and towns, including cities under special charter, are hereby empowered to adopt ordinances for the enforcement of this chapter, and are further empowered to adopt ordinances providing for the limitation of class 'B' permits, as follows:

"Allowing only one class 'B' permit to be issued upon application meeting the requirements of this chapter, for each five hundred population, or fractional part thereof, up to twenty-five hundred, and allowing only one additional permit for each seven hundred fifty population or fractional part thereof, over and above twenty-five hundred, provided, however, that in towns having a population of one thousand or less, two permits shall be allowed if proper application is made therefor in accordance with the requirements of the provisions of said chapter, * * *"

The legislature has provided that a limitation of the number of permits granted in any city or town may be established and that this may be accomplished by the adopting of an ordinance by the municipality. The statute has prescribed a formula which the city or town desiring to limit its number of such permits shall apply in determining the number of permits to be granted under its authority. The statute states that cities or towns may adopt ordinances "allowing *only one* class "B" permit to be issued * * * for each five hundred population * * * and *only one* additional permit for each seven hundred fifty * * *." If the statute provided that "at least" or "not less than one" or contained other words which would permit of some latitude of construction, it could be urged that the authority to fix the number of permits to be issued at variance with the statutory scheme would be conferred upon cities or towns. But the statute provides that the ordinance shall allow *only one* permit for each designated proportion of the population of the city or town.

It is, therefore, our opinion that if a limiting ordinance is adopted by a city or town, the number of class "B" permits to be granted thereunder is necessarily fixed and determined by applying the statutory formula. An ordinance which purported to allow a greater number of permits would be inconsistent with the statute, which says that *only one* permit shall be allowed for each bracket of population.

It is our conclusion that under the statute the governing body must determine either that no limiting ordinance at all is to be adopted, or that the limitations prescribed by the statute shall be incorporated into such ordinances as are adopted. In this connection it should be stated that in calculating the number of permits to be allowed under such ordinance of a city or town, special class "B" permits issued to clubs and hotels, as contemplated by the chapter, are to be excluded from the maximum number fixed in the ordinance.

STATE BOARD OF SOCIAL WELFARE: DIVISION OF CHILD WELFARE: BOARD OF CONTROL: An enumeration of those child welfare services which are now under the jurisdiction and control of the state board of social welfare (S. F. 374).

July 15, 1937. *The Honorable Warren F. Miller, Chairman, State Board of Social Welfare:* You have asked us for an opinion as follows:

"The board would like an opinion as to what specific child welfare services are taken over by the state board of social welfare that were formerly held by the state board of control. In other words, the state board would like an enumeration of those child welfare services which are now under the jurisdiction and control of the state board of social welfare."

An analysis of Chapter 118, Laws of the 47th General Assembly, creating the subdivision of child welfare of the State Board of Social Welfare, discloses the following:

1. The State Board of Social Welfare now has the entire supervision of the maternity hospitals as set forth in Chapter 181-A2, 1935 Code of Iowa.
2. The State Board of Social Welfare now has entire supervision of all children's boarding homes, as set forth in Chapter 181-A3, 1935 Code of Iowa.
3. The State Board of Social Welfare has entire supervision of all the child placing agencies as set forth in Chapter 181-A4, 1935 Code of Iowa.
4. The State Board of Social Welfare has entire supervision of all private institutions for dependent and neglected children, as set forth in Chapter 182, 1935 Code of Iowa.
5. The State Board of Social Welfare now has the right to designate and approve the private institutions to which children may be legally committed, and shall be the supervisors and have the right of visitation and inspection at all times, set forth in Section 3655 of the 1935 Code of Iowa, as amended by Chapter 118, supra, and by the terms of paragraph 4 of Section 5 of said chapter.

The above are the specific child welfare services which have been removed from the jurisdiction of the Board of Control and given to the newly created State Board of Social Welfare.

In addition to the above enumerated specific powers, the State Board of Social Welfare is given many other broad powers of a general nature, all of which are enumerated in the act itself.

The State Board of Control retains its supervision and exclusive jurisdiction over all those institutions which are set forth in Section 3287 of the 1935 Code of Iowa, and enumerated as follows:

1. Soldiers Home
2. Institution for Feeble-minded Children
3. State Sanatorium
4. Hospital for Epileptics and School for Feeble-minded
5. Cherokee State Hospital
6. Clarinda State Hospital
7. Independence State Hospital
8. Mount Pleasant State Hospital
9. Training School for Boys
10. Training School for Girls
11. Juvenile Home
12. Soldiers' Orphans' Home
13. Women's Reformatory
14. Men's Reformatory
15. State Penitentiary

The State Board of Control, through its agents or officers, appears to have complete supervision over discharged or released persons from the public institutions above enumerated insofar as the obtainment of employment, inspection of homes, and return to the institutions are concerned, except as limited by

Section 3317 of the 1935 Code of Iowa. This authority given the State Board of Control is set forth in Section 3319 of the Code of Iowa, and was not repealed by Chapter 118, supra.

The State Board of Social Welfare does have a legal interest in this matter, however, as paragraph 8, Section 4, of the act states:

"The State Department, in addition to all other powers and duties given it by law, shall: * * *

"(8) Cooperate with the juvenile courts of the state, and with the Board of Control of State Institutions in its management and control of state institutions and the inmates thereof."

The State Board of Social Welfare is further entitled to receive yearly reports from all juvenile courts and all institutions receiving neglected, dependent and delinquent children as provided by Section 3656 of the 1935 Code of Iowa, as amended by Chapter 118, supra, and paragraph 6 of Section 5 thereof dealing with child welfare.

STATE BOARD SOCIAL WELFARE: EXPENSES PRIOR TO JULY 4, 1937: APPROPRIATION: All necessary expenses incurred by state board of social welfare prior to July 4, 1937, may be properly paid by state comptroller from appropriations made by Senate File No. 379 which became effective July 4, 1937. (Chapter 31, Laws of the 47th General Assembly.)

July 15, 1937. *Mr. Byron G. Allen, Superintendent, Old Age Assistance Division:* You have requested an opinion from me upon the following proposition:

"Senate File 373 creating the new state department of social welfare and the State Board of Social Welfare, was passed by the 47th General Assembly and became effective by publication on May 28, 1937.

"Senate File 379 was the appropriation bill which accompanied Senate File 373 and granted an appropriation of $40,000 to the state board and state department of social welfare for their necessary administrative expenses. Senate File 379, however, did not carry a publication clause and therefore, no part of the money for the state board and state department will be available until July 4, 1937.

"Inasmuch as the state board has been meeting to complete the organization of the new department and to adopt rules and regulations for the various divisions under its jurisdiction, and inasmuch as certain pamphlets and other material has had to be printed by the state board and various clerical services had to be performed for them, the question arises as to whether or not such expenses as were incurred before July 4, 1937, by the state board and state department may be paid from the $40,000 appropriation after the date of July 4, 1937."

A survey of the meager authority dealing with this precise question indicates that there is no fixed rule of law which determines the exact expenditures covered by an appropriation act.

An appropriation statute is construed and interpreted the same as any other statute, and the same rules of statutory construction apply. *See 59 C. J., page 262, par. 401,* which states:

"An appropriation law is to be construed under and by the same rules as other legislation where the intention of the legislature is plain and obvious. There is no room for judicial construction of an appropriation. They are to be construed without liberality towards those who claim the benefits, but are not to be construed so strictly as to defeat their manifest objects. The whole bill is to be examined to arrive at the true intention of the parties. Where the meaning of an appropriation act is doubtful, the construction placed upon it by the officers charged with the administration thereof is entitled to considerable weight, but is not a controlling factor when it is clearly wrong. They are to be construed in connection with other legislation concerning relative matters and with relevant constitutional provisions. Rules of construction

confirmed or established by statute for the construction of statutes generally are to be applied in the construction of appropriation bills."

Since the cardinal rule of all statutory construction is the determination of the legislative intent, the real question presented is whether or not the legislature in the appropriation act designated as Senate File 379, intended that part of this appropriation could be used by the State Board of Social Welfare to pay certain expenses of administration and organization incurred by such board prior to July 4, 1937.

It is our opinion that the legislature so intended, and that such expenses may properly be paid by the State Comptroller.

To determine the legislative intent, it is necessary to consider the act creating the State Board of Social Welfare, for whose operation the appropriation act in question was intended, as is stated in *State vs. Sorlie*, 219 N. W., 105 (North Dakota case):

"It is also a well settled rule that in the construction of a particular statute or in the interpretation of any of its provisions, the acts relating to the same subject or having the same general purpose should be read in connection with it, and this rule applies with peculiar force to statutes passed at the same session of the legislature."

It was the expressed intention of the legislature to create a state board of social welfare as quickly as possible so that the board could have its plan approved by the federal government on or before July 1, 1937.

Paragraph 2 of Section 6 of the act itself states that the state board shall cooperate with the federal Social Security Board created by Title 7 of the Social Security Act or any other agency of the federal government, in such a reasonable manner as may be necessary to qualify for federal aid.

The federal act designated as Public .... No. 271, Acts of the 74th Congress of the United States, provides in essence that each state having an approved plan of social welfare shall receive certain benefits and direct grants of money paid quarterly in advance commencing June 1, 1935.

The legislature, no doubt, desired to obtain the benefits of the federal act and had Senate File 373, which created the State Board of Social Welfare, become effective on May 28, 1937, by publication.

The obvious intent of the legislature in the enactment of Senate File 373 to take effect by publication was to enable the board to act as quickly as possible in order to enable it to commence operations and co-ordinate its plan with the federal government immediately, thus insuring that benefits would be paid by the federal government for the quarter commencing July 1, 1937. If this were not true, there would be no necessity nor occasion for making this act effective by publication.

Having intended that the state board become existent immediately upon the passage of the act and the appointment of its members, it must be presumed that the legislature intended the board to receive compensation for its necessary services and expenses of organization.

It further appears that the Old Age Assistance Commission by the terms of Senate File 373, became a division of the State Board of Social Welfare the moment the act became effective and the board appointed.

For all of the above reasons, we, therefore, conclude that all necessary expenses incurred by the State Board of Social Welfare prior to July 4, 1937, in the way of per diem, traveling expenses and organization expenses, may be properly

paid by the State Comptroller from the appropriation made by Senate File 379 which became effective July 4, 1937.

STATE BOARD OF SOCIAL WELFARE: COUNTY BOARD EMPLOYEES: (Sections 13-14, S. F. 373.) County board has right to select employees and pass on their qualifications as provided in Section 13, subject only to power of review by State Board. State Board can order discharge of any employee of county board if employee is not carrying out duties for which appointed or is not capable, or is not complying with rules and regulations.

July 15, 1937. *The Honorable Warren F. Miller, Chairman, State Board of Social Welfare:* Under written request of July 8, you ask our opinion on the following matter:

"The State Board of Social Welfare desires an opinion concerning Section 13 of Senate File 373 (Chapter 151, Laws of the 47th General Assembly). Is the county board the sole judge as to the qualifications and number of its employees, or does the state board have the right to pass upon the qualifications and number of employees under the county board?

"Does the state board have the right to dismiss any employee of a county board when it deems such an employee is not properly qualified or does not meet certain rules and regulations as prescribed by the state board?"

The answer to your question depends entirely upon the interpretation to be given Sections 13 and 14 of Senate File 373 creating the State Board of Social Welfare.

Section 13 states:

"The county board shall employ a county director and such other personnel as is necessary for the performance of its duties."

Section 14 states:

"The compensation of county board employees shall be fixed by the county board of social welfare."

It would thus appear that the county board is given the right to select and employ such personnel as it deems necessary, and is given the right to pass upon their qualifications, providing such employees are selected on the basis of fitness for the work to be performed and experience and training as provided by Section 13.

It would thus appear that in the first instance the county board is the sole judge of the qualifications, number, and salary of its employees. This particular power, however, is subject to certain modifications.

The state board is given the right to review the acts of the county board in the following particulars:

1. The number of county employees is subject to the approval of the state board.
2. The compensation of all county board employees is subject to the approval of the state board.
3. All appointments made by the county board other than clerical or stenographical help are subject to review by the state board on certain specified grounds, to-wit: The state board can make a finding that any appointee is not properly carrying out the duties for which he was appointed, and the state board can make a finding that any appointee is not qualified or capable of handling the duties for which he was appointed. If the state board makes such a finding, it is then mandatory upon the county board to discharge such employee and fill the vacancy.

In the light of these provisions, it is the opinion of this department that the county board has the right to select and employ such personnel as it deems necessary and proper and to determine their qualifications and salaries, subject

only to the power of review given the state board as above enumerated and set forth in the statute.

It is the further opinion of this department that the State Board of Social Welfare can order the discharge of any employee of the county board if it finds that such employee is not properly carrying out the duties for which he was appointed, or that such employee is not qualified nor capable of handling the duties for which he was appointed, or if such employee is not complying with the rules and regulations as adopted by the state board.

STATE BOARD OF SOCIAL WELFARE: EXAMINATIONS FOR EMPLOYEES: Employees of county board or personnel employed by county board not regarded as state board employees and need not qualify in examination given by state board. State board sole arbiter as to what examination should be given and sole judge and arbiter as to classification of all persons successfully qualifying. Examinations may be either oral or written.

July 15, 1937. *The Honorable Warren F. Miller, Chairman, State Board of Social Welfare:* Under written request of July 8, you ask our opinion on the following matter:

"The State Board of Social Welfare would like an opinion upon the following matters:

"The State Board of Social Welfare desires an interpretation of Section 8, Senate File 373 (Chapter 151, Laws of the 47th General Assembly). By the terms of the section, who are the employees of the State Board of Social Welfare who must successfully qualify in an examination to be given by the said state board?

"Is the state board the sole arbiter as to what examinations shall be given and as to which applicants successfully qualify in the meaning of this section?

"Must this examination be in writing?"

The real test of an employer and employee relationship is:

1. To be an employer, one must retain control over the mode and manner of doing the work contracted for.

2. The right to direct and control almost invariably includes the right to discharge, and, therefore, to be an employer, one must usually have the right to discharge.

It is stated in *Minneapolis Iron Store Company vs. Branum*, 36 N. Dakota, 355, 162 N. W., 543 at 547, that "A distinguishing feature of the relations between master and servant is that the employer retains the control over the mode and manner of doing the work under the contract of hiring. Whether parties engaged in doing the work for another are his servants depends upon the control and the direction that he can rightfully exercise over them. If they are at his command and bound to obey his orders and directions in regard to the work and can be discharged by him, they are then his servants."

Also, *37 C. J. 34, par. 2,* states: "The relation of master and servant arises out of contract, the assent of both parties is essential; hence, the relation does not arise between employees and one who has agreed with the owner to pay the salaries of employees."

It would thus appear that state board employees are those who are employed and paid by the state board or any division under its control and subject to discharge by the state board.

An employee of the state board is one over whom the board has the right of control as to the mode and manner of work or service. The term "employee" would necessarily include division heads, secretaries, and other administrative officers who are employed by the board and who are under its control and supervision. By the terms of Section 8, Senate File 373, all such employees must successfully qualify in an examination given by the state board.

It is our opinion that the county board employees, as provided for in Section

13 of Senate File 373 are not employed by the state board within the meaning of Section 8 of said act.

The wording of Section 13 indicates that the legislature intended the county board to be the employer so far as a county director and other necessary county personnel were concerned. This section states: "The county board shall employ a county director and such other personnel as is necessary for the performance of its duties." At Section 14, the act states: "The compensation of county board employees shall be fixed by the county board of social welfare." This expressed intention of the legislature must be carried out unless there are other legal rules that prevent such an interpretation. Section 13 and Section 14 clearly indicate that the county board has the direct control and supervision of its employees, including the right to discharge them. It is true that the state board has certain reserved rights of supervision and control, but such reservations do not, in our opinion, destroy the relationship of employer and employee existing between the county board and its workers. By the terms of Section 13, the state board has the right to demand the discharge of certain county employees on certain specified grounds, but the actual discharge is made by the county board, which is another circumstance indicating that the county board is really the employer. The wages of the county board employees are paid by the State Board of Social Welfare, and while such payment is a circumstance relating to the relationship of employer and employee, it is unimportant by itself.

"A" might agree to pay the wages of "B's" employees, but the payment of such wages does not make "A" an employer. It is stated at *37 C. J., page 34*, paragraph 2, that:

"The relation of master and servant arises out of contract, the assent of both parties is essential; hence, the relation does not arise between employees and one who has agreed with the owner to pay the salaries of employees."

In fact, compensation is not necessary to create the relationship of employer and employee, as stated in *Napier vs. Patterson*, 198 Iowa 257, 196 N. W. 73:

"To constitute the relationship of principals and agents or master and servant it is not necessary that there be an express contract between them or that the services be rendered for compensation. The relationship may be either express or implied."

By the terms of Section 13, the State Board of Social Welfare reserves to itself certain powers of review concerning the county board employees, but a careful reading of the entire act shows that the legislature intended that the personnel employed by the county board should be under its direct supervision and control. In other words, such employees are in the service of the county board. *State vs. City of Minneapolis*, 219 N. W. 924 at 925, states:

"The term 'employee' is defined in the dictionary as one employed by another, a clerk or workman in the service of an employer. The term has been defined as one who works for a salary or wages."

The act itself clearly shows that the legislature did not regard the employees of the county board or the personnel employed by the county board as being state board employees. Section 8 of the act states: "All employees of the state board shall have been residents of the state of Iowa for at least two years immediately preceding their employment." Section 13 of the act, which bears the title "County Board Employees" states:

"It shall be a prerequisite to obtaining an appointment that the applicant shall have been a legal resident of Iowa for at least two years prior to the time of making said application."

If the legislature had regarded the county personnel as being state board employees, there would be no occasion for repeating the two-year qualification under Section 13 relating to county board employees.

We therefore conclude that the county director and such other personnel as is employed by the county board, are not employees of the state board within the meaning of Section 8 and need not qualify in an examination given by the state board or under its direction.

We are further of the opinion that the state board is the sole arbiter as to what examination shall be given, and is the sole judge and arbiter as to the classification of all persons successfully qualifying in the examination. Webster's Dictionary defines an examination as "The act of examining; a careful search or inquiry with a view to discover truth or the real state of things; mental inquiry; careful consideration of the circumstances or facts which relate to a subject or question; a view of qualifications and relations and an estimate of their nature and importance." It is apparent that the word "examination" does not necessarily mean a written examination. It is our opinion that the examinations given by the State Board of Social Welfare may be either oral or written, and different forms and manner of examination may be given and prescribed for the different types of work for which application is made. In other words, the board may prescribe a certain examination for superintendents of divisions and an entirely different examination for work of a clerical nature.

The examination, however, should be open to all persons, and classification of successful applicants should be made in accordance with rules and regulations adopted by the State Board of Social Welfare as provided for in Section 8 of the act. The act states that such rules and regulations should be published by the State Board of Social Welfare. Webster's Dictionary defines the word "publish" as follows: "To make known to mankind or to people in general what before was private; to divulge a private transaction; to promulgate or proclaim as a law read; to make known by posting." It is our opinion that the publication required by Section 8 would be met by having printed copies of the rules and regulations made and by posting a copy of such rules and regulations in the general offices of the divisions and the board itself, and by having copies on hand for distribution for those who request the same.

STATE BOARD OF SOCIAL WELFARE: EMPLOYMENT OF COUNTY DIRECTOR OF RELIEF AS COUNTY DIRECTOR OR INVESTIGATOR FOR STATE BOARD: There is nothing in the act that expressly denies the right of county board to employ county director of relief as county director or county investigator under the Social Welfare Act. If county board employed director of relief to act as welfare director or investigator and in opinion of state board, such appointee was not capable, the state board could compel county board to discharge said employee.

July 15, 1937. *The Honorable Warren F. Miller, Chairman, State Board of Social Welfare, Des Moines, Iowa:* Under written request, you ask our opinion on the following:

"Can the county board employ the county director of relief as a county director or county investigator for the state board of social welfare?"

An examination of the social welfare act, known as Senate File 373 (Chapter 151, Laws of the 47th General Assembly), discloses there are no express qualifications for a county director or county investigator other than the statement in Section 13 of said act, reading:

"* * * shall be selected solely on the basis of the fitness for the work to be performed with due regard to experience and training, but graduation from college shall not be made a prerequisite of any such appointment; it shall be a prerequisite to obtaining an appointment that the applicant shall have been a legal resident of Iowa for at least two years prior to the time of making said application."

There is, of course, nothing in the act that expressly denies the right of a county board of social welfare to employ the county director of relief as a county director or county investigator under the social welfare act.

By the terms of Section 13, however, the state board is given the right to order the discharge of an employee of the county board if it finds that such appointee is not qualified or capable of handling the duties for which he is appointed, or is not complying with the rules and regulations as adopted by the state board. If a county board employed its director of relief to act as welfare director or investigator, and if, in the opinion of the state board, such appointee by virtue of his dual employment, was not capable of handling his duties as such welfare director or investigator, then the board could make a finding and thus compel the county board to discharge said employee.

SCHOOLS: TUITION: FOREIGN STATE: School board of rural district may pay tuition for student attending school in another state if last mentioned school is the nearest one to pupil's residence.

July 17, 1937. *Mr. Geo. E. Allen, County Attorney, Onawa, Iowa:* This department acknowledges receipt of your request for an opinion upon the following question:

May the school board of a rural district of Monona County pay high school tuition to a high school in the State of Kansas for the schooling of a pupil of this district who desires to attend the Kansas school?

Powers of school boards are limited to those expressly conferred by law, and to such implied powers as are necessary to carry out the powers expressly conferred. It is our opinion that a board of directors would have no authority to pay tuition of a resident pupil attending a school outside the state unless the statute authorizes such payment.

It appears that two sections of the Code make provisions for the payment of tuition of pupils who attend high school in a district situated outside the state. These two sections are as follows:

"4274-c1. *Attending school outside state.* Any person under twenty-one years of age residing in any school district or portion thereof in this state which district or portion thereof does not maintain a high school and is severed from the balance of the state or the school district by a navigable stream, who has successfully completed the eighth grade, may with the consent of a majority of the school board of his residence district, expressed at a meeting thereof, attend any high school in any adjoining state willing to admit him, which high school is nearer to his place of residence than any duly established high school in Iowa, the distances being measured by the usual traveled routes."

"4275. *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."

It is to be noted that one requirement is common to both of the above quoted

sections. In the first section it is required that such high school in the adjoining state be "nearer to his place of residence than any duly established high school in Iowa." In the second Code section it is provided that the person of school age may attend a high school 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."

In view of the foregoing, it is our conclusion that the authority of an Iowa school board, in a district which does not maintain a high school, to pay tuition of a resident pupil of such district who attends high school in an adjoining state, is limited to those instances where the school so attended is nearer to the pupil's residence than any duly established or approved high school in Iowa.

STATE FUNDS: GOVERNOR'S SECRETARY: EXPENDITURE OF APPROPRIATIONS: The only official act necessary to make the budget of the Governor entirely legal under the statutes of this state is the approval of the Comptroller.

July 19, 1937. *Mr. C. B. Murtagh, Comptroller of State:* This is an answer to your inquiry of June 30th with reference to the proposed budget of the Governor's office, in which you inquire as to his right to pay certain salaries in the office and transfer certain funds.

The first question is whether, in view of Section 17, Chapter 1, Laws of the 47th General Assembly, the Governor has the right to pay his secretary $2,100.00. We refer you to the provisions of Section 17, which make an appropriation of $20,406.00 for the department of the Governor "or so much thereof as may be necessary, to be used in the following manner: * * * for salary of the secretary to the Governor, $3,000.00 * * *." In view of the wording of Section 17, it is our opinion that both the lump sum of $20,406.00 for the conduct of the office and the sum of $3,000.00 for the salary of secretary are maximum amounts, and that, subject to your approval, any part of the respective amounts may be used for particular purposes as long as the office is operated within the total amount appropriated.

Your next questions are whether or not $900.00 of the $3,000.00 may be transferred to other office salaries, and whether or not an executive assistant may be employed at $4,500.00 per year. It is our opinion that both of these questions find answer in the provisions of Chapter 1, supra. Section 53 of that Act provides that the head of any department, with your approval, may partially or wholly use its unexpended appropriations for purposes properly within the scope of such department. Section 54 of that Act provides that the state comptroller, with the approval of the governor, may transfer funds from one department to another when the appropriation of any department is insufficient to properly meet the legitimate expenses of such department. These two provisions of the Act give you very broad powers to make intra-department transfers of funds, and also transfers as between different departments of the State Government. Section 58 of this Act provides that the compensation paid to any employee of the state is subject to the approval of the governor and state comptroller. In other words, all salaries paid any employees of the state are subject to such approval.

It is, therefore, our opinion that under Chapter 1, supra, the Governor of this state and yourself as Comptroller are given complete control over the expenditure of appropriations, the transfer of appropriations, and the salaries paid

employees in the various departments. In view of the fact that the questions before us involve the department of the Governor, it would appear that he has approved the transfer of a part of his appropriation, and that he has approved the salaries set forth in his proposed budget. The only official act necessary to make the budget of the Governor entirely legal under the statutes of this state is your approval. If you approve the proposed budget of the Governor as outlined in your letter, then it is our opinion that warrants may be drawn in payment of the proposed salaries.

We might suggest that these rather broad powers are given the Governor and the State Comptroller under the provisions of the Budget and Financial Control Act, and this Act together with the provisions of Chapter 1, supra, place the responsibility for the use of appropriated funds almost entirely in the hands of these two state officers. Certain duties are placed upon the Committee on Retrenchment and Reform to examine any of the reports and official acts of each officer and department of the state in respect to the conduct and expenditures of each office, and the receipts and disbursements of public funds thereby. We understand that the facts in connection with this particular matter will be placed before this Committee. However, the opinion herein expressed involves only your approval.

STATE PLANNING BOARD: APPROPRIATION: STATE FUNDS: State Planning Board is specifically authorized to accept and use funds from public or private sources, and has access to funds appropriated by Senate File 530.

July 19, 1937. *Mr. R. H. Matson, Director, Iowa State Planning Board:* We acknowledge your request for an opinion of this department upon the construction to be given Section (6) of Senate File 212, Acts of the Forty-seventh General Assembly, relating to expenditures of the State Planning Board.

Section (6) of the act referred to above provides as follows:

"Section 6. *Expenditures.* The board is authorized and empowered to accept and use any and all funds provided by any agency of the United States government or by other public or private source for such purposes. However, neither the said board nor its employees shall have the authority to obligate the state of Iowa for the payment of any sum of money."

You inquire whether or not the board would have authority to accept funds from whatever source available, and particularly whether or not funds from the appropriation made by Senate File 530 may be accepted by the board.

Under the provisions of Senate File 212 a State Planning Board is created. Certain duties and powers are conferred upon the board under the law. Section (4) of the act creating the board provides that the members of the board are to receive no compensation, but that actual, reasonable and necessary expenses contracted by members in discharge of their official duties shall be paid. Duties are placed upon the board by provisions of Section (7) of the act which of necessity entail expenditures. Further evidence that the work of the board requires expenditures of money is apparent from the provisions of Section (5) of the act which provides as follows:

"Section 5. *Staff.* The board shall appoint all assistants necessary to carry on the work of the board, define their duties, fix their compensation and provide for necessary bonds and the amounts thereof. The term of employment of such assistants may be terminated by the board at any time and for cause."

The act thus creates an official board and charges that body with the performance of certain duties. No direct appropriation is made for the purpose of carrying out the provisions of the act.

The language of Section (6) which is quoted above is clear and unambiguous and provides that the State Planning Board is empowered to accept and use any and all funds provided by any agency of the United States government or by any other public or private source. Authority to accept funds to be used for the purposes of the act is specifically conferred upon the board. Acceptance of funds from any of the sources specified would not create any obligation on the part of the State of Iowa.

We now pass to the second part of your inquiry, namely, whether or not the board can lawfully accept and use money allotted to it out of the appropriation set up by the provisions of Senate File 530.

It is clear that such funds arise from a public source and we have already determined that the State Planning Board may accept and use funds from such sources. Therefore the question remaining to be answered is whether or not the provisions of Senate File 530 permit the allotment to the State Planning Board of funds therein appropriated.

By the provisions of Senate File 530 there is appropriated for each semi-annual period of the biennium the sum of $125,000.00. The title of the act is indicative of the general purpose thereof and states that the appropriation is made "to enable the State of Iowa to participate in the program of the Civilian Conservation Corps, the Works Progress Administration and with federal and other agencies within the State of Iowa." Section (1) of said act provides as follows:

"Section 1. There is hereby appropriated for each semi-annual period of the biennium from July 1, 1937 to July 1, 1939, out of any funds in the state treasury not otherwise appropriated, the sum of one hundred twenty-five thousand ($125,000) dollars, which sum is to be used to enable the State of Iowa to participate in the program of the Civilian Conservation Corps, the Works Progress Administration and with federal and other agencies for conservation purposes and for acquiring, developing and administering submarginal lands which have become distressed or tax delinquent, to be used for reforestation, game development, grazing or other soil conservation purposes; to provide for the purchase or rental of supplies, materials, and equipment and the employment of the necessary personnel not provided by the federal government, and to purchase such additions to park and recreational areas now under improvement as may be expedient."

Particular attention is called to the general provisions of Section (1) in which the general purpose of the appropriation is expressed in the following language: "* * * to enable the State of Iowa to participate in the program of the Civilian Conservation Corps, the Works Progress Administration and with federal and other agencies for conservation purposes * * * following this general provision are certain specific provisions for expenditures, all of which seem to indicate that the fund created by the act is to be expended for purposes of conservation.

Section (2) of the act provides that the appropriation is in addition to the regular biennial appropriation made for the State Conservation Commission. Section (2) of the act provides as follows:

"Section 2. The appropriation made in the foregoing section is in addition to the regular biennial appropriations made for the operations of the State Conservation Commission and shall be in full force and effect after June 30, 1937, and be available to June 30, 1939, unless earlier expended."

It appears, therefore, that the money appropriated by Senate File 530 was so appropriated for conservation purposes to be used to enable the State of Iowa to participate in the programs of the federal agencies and other agencies.

The state comptroller, upon order of the governor, is authorized to draw warrants against said fund, payable to the conservation commission or *other co-ordinating agencies.*

From the foregoing discussion of the provisions of Senate File 530, it appears that in order to determine whether or not an allotment of the funds appropriated thereby may be made to the State Planning Board, two questions must be determined. These questions are as follows:

(1) Is the State Planning Board an agency created "for conservation purposes?"

(2) Is the State Planning Board a co-ordinating agency within the meaning of the act?

The broad purposes of the act creating the State Planning Board are set out in the preamble thereof as follows:

"WHEREAS, both the several states and the nation are recognizing the importance of state planning as a technical instrument of democratic government, as witnessed by the creation of statutory planning boards in a majority of the several states and by the growing dependence of federal agencies on state planning boards for unbiased aid in public works and other programs for the common good, and

"WHEREAS, an unofficial state planning board has demonstrated the value of a permanent, non-partisan agency applying the best available technical talent and directing public interest toward a better understanding of the problems of preservation and utilization of the physical, social and economic resources of Iowa, * * *"

In Section (7) of the act the powers and duties of the State Planning Board are enumerated as follows:

"Section 7. *Duties and powers.* The duties and powers of the board shall be as follows:

"1. To make inquiries and surveys concerning the physical, social, and economic resources of all sections of the state, and formulate plans and make recommendations as to the best methods of utilization and preservation of said resources.

"2. To make available to the governor and general assembly such information and research service as they may request to assist in preparing legislation for advancing the welfare of the state.

"3. To advise with the various state departments and agencies with a view toward the coordination of all physical development plans related to state activities.

"4. To assemble, prepare and maintain an up-to-date file of base maps of the state and of the various subdivisions thereof.

"5. To file basic data and records obtained by the board and pertaining to land records in the state land office, which office shall be the custodian of said data and records. The land office shall be furnished a copy of each base map prepared.

"6. To advise with county and municipal agencies for the purpose of assisting county and municipal planning and zoning.

"7. To report the activities and findings of the board to the Governor and the Legislature not later than December 1st of each year, and also to report the expenditure of all money allotted to the said board and the said report shall include a list of all employees employed by the said board and the salaries and expenses of said employees."

From all of the above provisions, we believe the conclusion must be reached that the duty "to formulate plans and make recommendations as to the best methods of utilization and preservation of * * * the physical * * * resources of all sections of the state" is a duty pertaining to the conservation of the natural resources of the state; that the State Planning Board, therefore, is an agency created "for conservation purposes" within the meaning of Senate File 530.

Section (1) of said act provides for the creation of the State Planning Board and the membership thereof:

"Section 1. *Creation of board—membership.* There is hereby created a state planning board. Said board shall be composed of ten (10) regular members as follows: the state geologist, the state commissioner of public health, the state superintendent of public instruction, one (1) member appointed by the president of the state college from the faculty of the division of agriculture, one (1) member appointed by the president of the state university from the faculty of the college of commerce, one (1) member appointed by the state highway commission, and three (3) members appointed by the governor, one of whom shall be the chairman of the Greater Iowa Commission. The state planning board, may, from time to time, after its organization, appoint to membership on said board, for one-year terms, persons deemed by the board to have special qualifications for furthering its work, provided, however, that the membership of said board shall not at any time exceed fifteen (15) members."

Under the law, therefore, the membership of the board is made up of representatives of varied agencies and interests within the state. This board is charged with the duty "to advise with the various state departments and agencies with a view toward the coordination of all physical development plans relating to state activities."

Thus the law contemplates that a body of citizens, specially qualified, shall advise with the various state departments to the end that a harmonious development of the state's physical resources may be attained. It would seem, therefore, that a chief function of the board is to serve as a co-ordinating agency of the state.

In view of the foregoing, it is the opinion of this department that the State Planning Board is specifically authorized to accept and use funds from public or private sources for its proper purposes, and it is further our opinion that there is no legal objection to the drawing of warrants payable to the State Planning Board against the funds appropriated by Senate File 530.

BOARD OF EDUCATION: FUNDS: BLEACHERS: CONSTRUCTION OF: Board of education does not have authority to finance construction of bleachers by issuance of notes to be retired from fund built up from receipts from student fees and ticket sales.

July 19, 1937. *Mr. M. R. Pierson, Secretary, Iowa State Board of Education:* We acknowledge receipt of your request for an opinion upon a question stated as follows:

Does the Iowa State Board of Education have the legal right to issue notes to finance construction of new bleachers, to be retired from a sinking fund built up from receipts other than moneys appropriated by the legislature?

In addition to the information contained in your letter we have been furnished with a copy of proposed proceedings prepared by a company which contemplates financing the enterprise. In substance these proceedings provide that a series of fifty notes in the denominations of one thousand dollars each be issued to become due and payable in amount of five thousand dollars annually, commencing December 1, 1938, and ending December 1, 1947. It is proposed that the notes be executed by the Iowa State Board of Education; that the same not be general obligations, but payable solely from a fund consisting of a portion of a student quarterly fee for attendance at athletic events, and of the net rents, proceeds and income arising from the admissions to and seats in the grandstand.

The Iowa State Board of Education is an administrative agency of the State of Iowa, created by and existing under the laws of the state. The government of four state educational institutions is delegated to the said Iowa State Board of Education, among which is the Iowa State Teachers College, at which institution, we understand, it is proposed to erect the bleachers or grandstand.

The powers of the Iowa State Board of Education are limited to those conferred upon it by the statute, and such implied powers as may be necessary to be exercised in order to carry out the powers expressly conferred. The specific question, therefore, to be determined is whether or not the Iowa State Board of Education has the power to borrow money to be expended for a capital improvement at a state institution under its control and to pledge anticipated revenues other than appropriations as security for such loan.

It is apparent, we believe, that the Iowa State Board of Education has no power or authority under the statute to pledge the credit of the state incident to the raising of funds. In the present case it is contemplated that the proposed obligation shall be "not payable in any manner by taxation and under no circumstances shall the State of Iowa, or the State Board of Education, be in any manner liable by the reason of the failure of said fund to be sufficient for the payment thereof."

It is anticipated that revenues arising from certain student fees, together with admission fees to the proposed grandstand, shall constitute the sole sources of income chargeable with the proposed obligation. The revenues derived from student fees, as well as those derived from admissions to the grandstand at the institution, are funds belonging to the State of Iowa.

Section 3921, 1935 Code, enumerates the powers and duties of the Iowa State Board of Education, and among other provisions thereof are the following:

"3921. *Powers and duties.* The board shall: * * *

"4. Manage and control the property, both real and personal, belonging to said institutions. * * *

"7. Direct the expenditure of all appropriations made to said institutions, and of any other moneys belonging thereto, but in no event shall the perpetual funds of the state college of agriculture and mechanic arts, nor the permanent funds of the university derived under acts of congress, be diminished. * * *"

The above provisions authorize the board to manage and control property belonging to the institutions under its jurisdiction and to direct expenditures of moneys belonging thereto. However, we do not believe that the above powers grant to the Board the power to borrow money, nor is the board thereby empowered to pledge anticipated revenues as security for such borrowings.

The legislature has apparently deemed it necessary to specifically grant authority to the Iowa State Board of Education to erect and finance dormitories. Some of the statute provisions relating thereto are as follows:

"3945-a1. *Dormitories at state educational institutions.* The state board of education is authorized to:

"1. Erect from time to time at any of the institutions under its control such dormitories as may be required for the good of the institutions.

"2. Rent the rooms in such dormitories to the students, officers, guests, and employees of said institutions at such rates as will insure a reasonable return upon the investment.

"3. Exercise full control and complete management over such dormitories."

"3945-a4. *Borrowing money and mortgaging property.* In carrying out the above powers, said board may:

"1. Borrow money.

"2. Mortgage any real estate so acquired and the improvements erected thereon in order to secure necessary loans.

"3. Pledge the rents, profits, and income received from any such property for the discharge of mortgages so executed."

"3945-a5. *Nature of obligation—discharge.* No obligation created hereunder shall ever be or become a charge against the state of Iowa but all such obligations, including principal and interest, shall be payable solely:

"1. From the net rents, profits, and income arising from the property so pledged or mortgaged,

"2. From the net rents, profits, and income which has not been pledged for other purposes arising from any other dormitory or like improvement under the control and management of said board, or

"3. From the income derived from gifts and bequests made to the institutions under the control of said board for dormitory purposes."

It is to be observed that the power thus granted to the board to construct and finance dormitories through the pledging of anticipated revenue derived from the operation of such dormitories is similar to the power, into which we are now inquiring, of the board to construct a grandstand. The power granted to the board under the above sections is limited to the subject of dormitories.

In accordance with the maxim, "Expressio unius est exclusio alterius," where a statute enumerates the things on which it is to operate, it is to be considered as excluding from its effect all those not expressly mentioned. The above provisions provide that obligations created thereunder shall be payable solely out of revenues arising from the operation of dormitories or from income derived from gifts made for dormitory purposes.

In the present case it is proposed that the Board of Education pledge not only the net revenues arising out of the operation of the proposed grandstand, but also a certain portion of the required student fees. If a part of such student fees can be pledged, it would follow that the whole of such fees could be pledged. The credit of the state, it is true, is not directly pledged, but the obligation of the state to maintain the institution would continue. If revenues ordinarily applied to the current expenses of an institution can be segregated and pledged to secure borrowed money, it is possible that the legislature would need to supply the resulting diminution by appropriation. We do not wish to infer that such result would follow in the present case, but we point out that an extension of such policy might lead to this end.

In conclusion, we are of the opinion that the enumerated powers of the State Board of Education do not include the power to borrow money and to pledge anticipated institutional revenues as security therefor, except as such power has been granted with respect to the acquisition of dormitories at such institutions. It is further our opinion that such power to borrow and to pledge revenues cannot be said to be necessarily incident to the carrying into effect of any of the express powers of the board.

BANKS: INTEREST RATE: A bank may not charge interest at the rate of two per cent per month on its loans.

July 20, 1937. *Mr. R. L. Bunce, Department of Banking:* This department acknowledges receipt of your request for an opinion upon the following question:

May a bank charge interest at the rate of two per cent per month on its loans under Section 9408 of the Code 1935?

The title to Section 9408 as originally enacted in Chapter 341, Acts of the Thirty-sixth General Assembly, reads as follows:

"An act to punish loan agents and others for receiving a greater rate than two per cent per month, and to provide a penalty therefor."

As originally enacted it contained no $300.00 limitation and it had the following paragraph as a part of the section:

"* * * But the person or corporation making the loan shall be permitted to charge and include within the loan, a reasonable amount for the inspection or investigation of the security, and also the cost of drawing the papers, not exceeding one dollar ($1.00), and cost of recording the same, which cost of inspection or investigation shall not exceed ten (10) per cent of the amount loaned when the loan is under fifty dollars ($50.00) nor more than five dollars ($5.00) in any event, and no recording fee shall be included unless an instrument is actually recorded."

That section was enacted to prohibit loan agents from exacting a commission in excess of two per cent.

The Thirty-ninth General Assembly enacted the first "small loan act" which was applicable to loans of $300.00 and under, and in an endeavor to coordinate that section and the small loan act they inserted the figures $300.00 and they also struck out the last paragraph above quoted. The section as originally written was aimed at commission agents and brokers engaged in the business of procuring loans for parties and those whose business was to find borrowers for financial interests. Whether the act is more inclusive than that, we need not decide—obviously that was the reason behind its enactment.

The section (being 9408) as it now exists reads as follows:

"9408. *Interest in excess of two per cent per month.* Every person or persons, company, corporation, or firm, and every agent of any person, persons, company, corporation, or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money in the sum or amount of more than three hundred dollars a rate greater than two per cent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

Section 9404 reads 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.

"4. Money received to the use of another and retained beyond a reasonable time, without the owner's consent, express or implied.

"5. Money due on the settlement of accounts from the day the balance is ascertained.

"6. Money due upon open accounts after six months from the date of the last item.

"7. Money due, or to become due, where there is a contract to pay interest, and no rate is stipulated."

Section 9406 provides as follows:

"9406. *Illegal rate prohibited—usury.* No person shall directly or indirectly, receive in money or in any other thing, or in any manner, any greater sum or value for the loan of money, or upon contract founded upon any sale or loan of real or personal property, than is in this chapter prescribed."

Section 9407 prescribes the penalty for usury. There is one exception pro-

vided by law for exacting a greater interest rate than that provided in Section 9404, and that is under Chapter 419-F1, known as the small loan act. But unless a person is licensed under that chapter and complies with its requirements, he cannot charge the rate allowed by its provisions.

As I understand it, this inquiry pertains to no one licensed under the small loan act. That being so, the provisions of Section 9404 are applicable to him. The provisions of 9404 will apply and control in this inquiry unless there is something in Section 9408 that is an extension of authority to charge interest in addition to or different from that set out in Section 9404. Section 9404 is a grant of authority with a limitation therein fixed. A careful reading of Section 9408 will show that there is no grant contained in the section. There is nothing therein in conflict with the provisions of Section 9404. It is only a penal statute. The last sentence of 9408 says, "Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law." That language means that Section 9404 is still controlling and that 9408 contains no grant of authority but only defines an offense and prescribes a penalty for the violation thereof.

Having determined that Section 9404 and Chapter 419-F1 are controlling as to the interest rate that may be charged and that Section 9408 in no way changes or modifies them, it is therefore our opinion that a bank may not charge interest at the rate of two per cent per month on its loans.

STATE BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE: Substitute word "division" or "state board" for word "commission" in statute as commission is no longer in existence.

July 21, 1937. *Mrs. E. R. Merideth, Assistant Superintendent, Old Age Assistance Division:* Under letter of July 15 you asked for the opinion of this department upon the following:

"The last paragraph of Section 24, Senate File 376 (Chapter 137), Acts of the 47th General Assembly, reads as follows:

"'Any recipient of old age assistance may assign any such insurance policy or benefit for the purpose stated in this section, and when such assignment has been received by the company, association, society, or other organization, issuing same, the *commission* shall have a vested interest therein for the purpose and to the extent as is contemplated in this section, and the contract so made between such insured person, and the *commission*, shall be valid, and binding upon such insured person, company, association, society or other organization, any other statute to the contrary notwithstanding. * * *'

"Should the word 'commission' be interpreted to mean 'state board'?"

The paragraph to which you refer is in Section 14-A of Senate File 376 (Chapter 137, Laws of the 47th General Assembly), this being the same as the last paragraph of Section 24 of Chapter 266-F1, 1935 Code of Iowa, as amended by Senate File 2 and Senate File 376, Acts of the 47th General Assembly.

Without question the legislature intended to use the word "state board" instead of the word "commission" in Section 14-A of Senate File 376.

The legislature in Section 1 of Senate File 376 which created a Division of Old Age Assistance under the administrative jurisdiction of the State Department of Social Welfare amended paragraph 1 of Section 5296-f1, 1935 Code of Iowa, by striking out the statement, "When used herein the term 'commission' shall mean the Old Age Assistance Commission," and inserting in lieu thereof the following: "The term 'state department' shall mean the State Department of Social Welfare created by Senate File 373, Acts of the 47th

General Assembly." A reading of Section 38 of Senate File 376 clearly shows the legislature intended to strike from the original Old Age Assistance Act as contained in Chapter 266-F1, 1935 Code of Iowa, the word "commission" wherever it appeared, and substitute the word "division" or "state board" in lieu thereof as the case may be.

This was necessary because the Social Welfare Act, known as Senate File 373, Acts of the 47th General Assembly, made the Old Age Assistance Commission a division of the State Board of Social Welfare, and the Commission as such no longer exists.

The act of the legislature in using the word "commission" instead of "state board" in Section 14-A of Senate File 376 is obviously an oversight, and in the opinion of this department said Section 14-A should be construed and interpreted to read as follows:

"Any recipient of old age assistance may assign any such insurance policy or benefit for the purpose stated in this section, and when such assignment has been received by the company, association, society, or other organization, issuing same, the state board shall have a vested interest therein for the purpose and to the extent as is contemplated in this section, and the contract so made between such insured person and the state board, shall be valid, and binding upon such insured person, company, association, society or other organization, any other statute to the contrary notwithstanding."

BEER: PERMITS: Beer permits may be issued only in *villages* platted *prior* to January 1, 1934.

July 21, 1937. *Mr. Carl A. Burkman, County Attorney, Des Moines, Iowa:* We acknowledge receipt of your request for an opinion of this department upon certain questions set out below. You state that some persons in the county feel that the legislature probably did not intend to limit the issuance of beer permits for many years after January 1, 1934. That section of the statute which is pertinent to your inquiry is Section 1921-f99, and the particular language applicable is as follows:

"* * * power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934 * * *"

In this connection you ask the following questions:

(1) Are we as a county limited so that a permit cannot be issued if the town or village is now platted, though such platting was subsequent to January 1, 1934?

(2) May we as a county issue beer permits outside of a village or town on platted land if such platting occurred since January 1, 1934?

(3) May we as a county issue beer permits outside of villages or towns on land platted prior to January 1, 1934?

In answer to the first question stated above, we are of the opinion that the language of the statute is clear in its requirement that the power to issue permits is limited to permits granted in villages platted prior to January 1, 1934. The Forty-seventh General Assembly considered proposed changes in the beer laws, but it enacted no legislation which alters the above provisions of the statute.

In answer to your second question, it is our opinion that the statute clearly requires the issuance of permits in villages only, and further that such village must have been platted prior to January 1, 1934.

In answer to your third question, it is our opinion that the fact that an area was platted prior to January 1, 1934, would not, in itself, be sufficient to

authorize the board to issue a permit. The settlement wherein the permit is issued, we believe, under the statute must be determined to have the characteristics of a village. A guide for the determination of the character of such settlement, which determination must be made by the board of supervisors, is furnished in an opinion of the Attorney General, found at page 575, 1934 Report of the Attorney General, which opinion you have referred to in your letter.

TAXATION: SOLDIERS' TAX EXEMPTION: TAX EXEMPTION: A man who was drafted into the service and honorably discharged after having served only six days cannot be denied the privilege of tax exemption granted to him by statute. For a soldier or sailor to be entitled to tax exemption his services must pertain to one of the wars or insurrections named in the statute Under the statute, a stepmother of a soldier is not entitled to the benefits thereof in regard to tax exemption.

July 21, 1937. *Mr. Willis A. Glassgow, County Attorney, Clarinda, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

Q. 1. A man was drafted into the Army on the 3rd day of August, 1918 and was discharged from Camp Dodge on August 9, 1918. The reason was, as given in the discharge, flat feet. Was this man in the Army long enough to be entitled to a property exemption?

The Legislature has made provisions for the exemption of property from taxation to the honorably discharged soldiers, sailors, and so forth, of our various wars. Section 6946 of the 1935 Code is as follows:

"*Military service—exemptions.* The following exemptions from taxation shall be allowed:

* * *

3. The property, not to exceed five hundred dollars in actual value, of any honorably discharged soldier, sailor, marine, or nurse of the war with Germany. * * *"

April 6, 1917 is the official date of the entry of the United States into the World War. The Armistice was signed on November 11, 1918. At the time the person claiming the exemption was drafted into the United States Army, to-wit, August 3, 1918 the United States Government was actually participating in the world war. The facts taken from the foregoing question indicate that the applicant has a discharge, and we assume an honorable discharge, from the United States Army dated August 9, 1918. This would indicate that the man was more than drafted, that he was in fact inducted into the service and that in order to be released from the service of the United States Army it was necessary to discharge him. The provision of the 1935 Code heretofore quoted does not make time a prerequisite to the exemption allowed. Although this man's service to his country was of short duration, he cannot be denied the privileges granted to him by statute on that account.

It is therefore the opinion of this department that the man, under the facts stated herein, is entitled to the benefit of the exemption provided in Section 6946 of the statute.

Q. 2. A man enlisted in the Navy October 24, 1908 and was discharged from the Navy November 30, 1909. While in the Navy he saw service on the U. S. S. Philadelphia. Is he entitled to a property exemption to the extent of $1,800.00 under the statute?

Section 6946 of the 1935 Code is as follows:

"*Military service—exemptions.* The following exemptions from taxation shall be allowed:

* * *

2. The property, not to exceed eighteen hundred dollars in actual value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine insurrection."

In order for one to be entitled to the tax exemption provided for in the foregoing section of the statute, it would be necessary that his services in the United States Navy pertain to one of the wars or insurrections therein mentioned. The statement that the applicant saw service on the U. S. S. Philadelphia does not entitle the applicant to such exemption unless it could be so established that during his enlistment the U. S. S. Philadelphia was employed by the Government in connection with one of the wars or insurrections named in the foregoing statute.

Without further showing on the part of the applicant, and based solely upon the facts as stated in the question, we are of the opinion that he is not entitled to a property exemption of $1,800.00 from taxation.

Q. 3. A lady whose stepson was a soldier during the world war is now allowed an exemption under the statute, due to the fact that she is relying upon him for part of her support. Is such lady entitled to an exemption on account of the fact that her stepson was a soldier in the world war?

Section 6946 of the statute hereinbefore quoted with reference to the exemptions allowed soldiers of the world war, further provides in subdivision 4 thereof:

"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."

"5. The property, to the same extent, of the widow remaining unmarried and of the minor child or children of any such deceased soldier, sailor, or marine."

The exemption laws are to be strictly construed and the benefits can only be extended to those persons enumerated in the statute. There is no reference made in the statute to a stepmother. Therefore inasmuch as the Legislature has enumerated the persons to whom the benefits of the exemptions shall be extended and has omitted therefrom stepmothers, it is the opinion of this department that the stepmother mentioned in this case is not entitled to the benefits of the provisions of the statute.

A similar ruling of this department was made on July 19, 1932.

BEER: MANUFACTURE: LIQUOR CONTROL ACT: Beverage proposed to be manufactured would not fall within definition of beer, and a manufacturer's license under liquor control act would need to be obtained before beverage could be marketed in Iowa.

July 22, 1937. *Mr. Leo J. Wegman, Treasurer of State:* We acknowledge receipt of your request for an opinion upon two questions which have been submitted in connection with the following statement of facts. The questions are included in the following excerpt from your letter:

"A manufacturer and bottler of beverages desires to manufacture and place on the market a beer which will be made by combining extracts of malt and

other ingredients found in ordinary beer and adding thereto the proper proportion of alcohol. It would like to know:

'1. Whether or not this product containing the same alcoholic content as ordinary beer can be manufactured and marketed under the same regulations and sold to the consumer at retail through the same channels as ordinary beer.

'2. Whether there would be any objections to marketing this product under the name "Beer."'

"Our attention was called to the fact that the extracts which will be used and the concentrates which will be used in the manufacture of this product will be produced by the very process described in subsection 'i' of Section 1921-f97, Code of Iowa, 1935."

Section 1921-f105 provides for the authority granted under a class "A" permit issued to manufacturers or wholesale sellers of beer:

"1921-f105. *Authority under class 'A' permit.* Any person holding a class 'A' permit issued by the treasurer of state, as in this chapter provided, shall be authorized to manufacture and sell, or sell at wholesale, beer for consumption off the premises, such sale or sales within the state to be made only to persons holding subsisting class 'A,' 'B,' or 'C' permits issued in accordance with the provisions of this chapter."

"Beer" is defined in Section 1921-f97 as follows:

"1921-f97. *Definitions.* * * *

"i. 'Beer' for the purpose of this chapter shall mean any liquid capable of being used for beverage purposes made by the fermentation of an infusion in potable water of barley, malt and hops, with or without unmalted grains or decorticated and degerminated grains containing not more than four per centum of alcohol by weight.

"No beer shall be sold in this state after July 1, 1934, unless made from sixty-six and two-thirds per cent or more of barley malt."

It is our opinion that any beverage manufactured or sold as beer within the state must comply strictly with the terms of the definition set out above. It is to be noted that beer under the definition of the statute is "* * * any liquid * * * made by the fermentation of an infusion in potable water of barley, malt and hops * * *"

From the facts set out in your letter, it would appear that it is proposed to produce a beverage into which the alcoholic content is introduced by the direct addition of alcohol thereto, and it does not appear that this ingredient would become a part of the mixture through a process of fermentation. This being the case, the resulting product would not, we believe, be "beer" under the statute, and for that reason it could not be manufactured and marketed under the provisions of Chapter 93-F2 which relates to beer and malt liquors.

Also, since it appears that the product would not be "beer" within the meaning of the statute, it is our opinion that such beverage could not properly be manufactured or sold as "beer."

Attention is called to the provisions of Section 1921-f3, which is found in Chapter 93-F1, 1935 Code, which chapter relates to intoxicating liquors and to the Iowa Liquor Control Act:

"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 liquor, except beer as defined in Chapter 93-F2, or as the same may be hereafter amended for any purpose whatsoever, except upon the terms, conditions, limitations and restrictions as set forth herein."

It will be noted that this statute restricts the manufacture, possession and sale of alcoholic beverages except beer.

Section 1921-f5, also contained in the last mentioned chapter sets out certain definitions which are applicable to this inquiry:

"1921-f5. *Definitions.* * * *

"2. 'Alcohol' means the product of distillation of any fermented liquor, rectified either once or oftener, whatever may be the origin thereof, and includes synthetic ethyl alcohol.

"3. 'Spirits' means any beverage which contains alcohol obtained by distillation mixed with drinkable water and other substances in solution, and includes, among other things, brandy, rum, whisky, and gin. * * *

"10. 'Manufacture' means to distill, rectify, ferment, brew, make, mix, concoct, or process any substance or substances capable of producing a beverage containing more than one-half of one per centum of alcohol by volume and includes 'blending,' 'bottling,' or the preparation for 'sale.' * * *"

It appears that the beverage proposed to be manufactured would properly be classified as "spirits" under the above section since it is stated that the product is to be a combination of certain extracts mixed with alcohol and presumably drinkable water. It is obvious also that the proposed process of manufacture of this beverage would be within the terms of the definition of "manufacture" set out in the above section.

In view of the foregoing, it is our opinion that before such beverage could be produced in the state of Iowa, it would be necessary for the manufacturer thereof to obtain a manufacturer's license under the provisions of Section 1921-f36, which provides as follows:

"1921-f36. *Manufacturer's license.* Upon application in the prescribed form and accompanied by a fee of two hundred fifty dollars, the commission may in accordance with this chapter, and in accordance with the regulations, made thereunder, grant a license, good for a period of one year after date of issuance to a manufacturer which shall allow the manufacture, storage and wholesale disposition and sale of alcoholic liquors and wines to the commission and to customers outside of the state."

In conclusion, it is our opinion that the character of the beverage under discussion is such that it may not properly be considered beer within the meaning of the Iowa statutes, and that, therefore, it may not be manufactured and marketed under the provisions of the law relating to beer and malt liquors, and further that it may not be sold as beer.

It is further our opinion that if it is proposed to manufacture and distribute such mixture in the state of Iowa, the same must be so manufactured, sold, offered or kept for sale, and possessed and/or transported under the provisions and restrictions of Chapter 93-F1 relating to the Iowa Liquor Control Act.

TAXATION: SOLDIERS' TAX EXEMPTION: VETERANS: EXEMPTION: The status of property for taxation purposes is fixed as of January 1st. The 1936 taxes are fixed and determined on ownership of the property as of January 1, 1936. The veteran not having been the owner of the property on January 1, 1936 at the time the status was fixed for taxation purposes would not be entitled to the benefit of the exemption on the property.

July 23, 1937. *Mr. Raphael Dvorak, County Attorney, Tama, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. A world war veteran owned a homestead property on January 1, 1937 on which he had applied his soldier's tax exemption. He sold this property on March 1, 1937 and purchased another property a few days later. He now asks that his soldier's tax exemption be applied on his new property recently purchased and that he be given the benefit of such exemption on the 1937 taxes, payable in 1938. The original property sold by the veteran was sold with the understanding that the grantee should pay the 1937 taxes, the veteran having purchased the new property under an agreement whereby he would pay the

1937 taxes. Is the veteran entitled to a soldier's exemption on the property purchased by him in 1937?

The ownership of real estate for the purpose of taxation is fixed as of January 1st, that is, the real estate is assessed to the person who owns the same on January 1st. Section 6946 of the 1935 Code is as follows:

"*Military service—exemptions.* The following exemptions from taxation shall be allowed: * * *

"3. The property, not to exceed five hundred dollars in actual value of any honorably discharged soldier, sailor, marine, or nurse of the war with Germany."

Section 6947 of the Code is as follows:

"*Reduction—limitation.* All persons named in Section 6946 shall receive a reduction equal to their exemption, to be made from the homestead, if any; otherwise from other property owned by said persons. Such exemption shall extend only to the period during which such persons remain the owners of such property."

Section 6948 of the Code is as follows:

"*Listing by assessors.* The beneficiary of exemptions allowed by Sections 6946 and 6947 shall file with the assessor a written statement that he is the owner of the property on which the exemption is claimed, and every assessor shall annually make a list of persons entitled to such exemptions and return such list to the county auditor upon forms to be furnished by the auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption."

Section 6949 of the Code is as follows:

"*Exemption by board of supervisors.* If no such statement is filed, no exemption shall be allowed by the assessor, but it may be allowed by the board of supervisors if such statement is filed before September first of the year following the year for which the same is claimed."

Under the provisions of Section 6947 it is required that the soldier's exemption shall be first applied to the homestead, if the soldier has a homestead, otherwise to any other property. The same section likewise provides that the exemption shall only extend to the period during which such person remains the owner of such property. Therefore, the soldier in making his claim for exemption would be required to apply the same upon his homestead. The status of the property for taxation is fixed and determined as of January first, and while it is true Section 6947 provides that the exemption shall only continue so long as the beneficiary remains the owner, our court has held that there are no provisions of law under which the tax may be apportioned. See *First Congregational Church of Cedar Rapids vs. Linn County*, 30 N. W. 650. Therefore, under the rule that the status of the property would be fixed as of January first, the exemption having been claimed when the property was assessed and made applicable to the property as of January first, would continue throughout the tax year.

The exemption allowed by statute, while spoken of as a tax exemption is not in reality a tax exemption, but is a provision permitting the applicant to have property of the value of $500.00 exempted from taxation. That is, the value of his property is merely reduced to the extent of $500.00 for taxation purposes. In the instant case the veteran having claimed his exemption and secured a reduced valuation of his property to the extent of his exemption has established a value upon which the taxes are to be computed. The veteran has been given the full amount of his exemption as allowed by law and has secured a reduced tax by reason thereof. The fact that he has subsequently sold the property has not and does not deprive him of the benefit of the exemption statute.

To permit the transferring of exemptions from one property to another would be to disrupt the offices of those who are charged with making up the tax levies. All levies are based upon the valuations returned for taxation purposes. To permit a transfer of the exemption from one property to another and perhaps from one taxing district to another would be to leave the taxable value of the property in any taxing district unsettled.

We are therefore of the opinion that after a veteran has made claim to his tax exemption upon a property which he has given in for taxation that he cannot subsequently transfer the same to another property.

2. A world war veteran purchased his home in December, 1934. On March 17, 1937, he sold his home to a second party. What military service tax exemption, if any, would he be entitled to for the year 1937?

As stated in answer to question No. 1 there are no provisions of the law under which the tax may be apportioned. Therefore, if the veteran claimed the benefit of his tax exemption when his property was listed for taxation, even though he sold the property in March, 1937, the full statutory exemption would be available.

3. A world war veteran purchased a home on October 1, 1936, and is now occupying the same. What military service tax exemption would he be entitled to on the 1936 taxes. What military service tax exemption would he be entitled to on the 1936 taxes if he had purchased this home on March 15, 1936?

As heretofore stated, the status of property for taxation purposes is fixed as of January first. The 1936 taxes are fixed and determined on the ownership of the property as of January 1, 1936. The veteran not having been the owner of the property on January 1, 1936, at the time the status was fixed for taxation purposes would not be entitled to the benefit of any tax exemption on the property. So far as the taxes are concerned they were levied and assessed against the person who owned the property on January first and the veteran who purchased the property at a later date is simply paying the taxes that should have been paid by the previous owner.

SCHOOL FUND MORTGAGES: BOARD OF SUPERVISORS: The statute provides that the care and management of the school fund are lodged in the Board of Supervisors and the county is liable for all losses upon loans of the school funds.

July 23, 1937. *Mr. Roscoe S. Jones, County Attorney, Atlantic, Iowa:* This department is in receipt of your request for an opinion upon the following question:

The Board of Supervisors of Cass County made a loan from the permanent school fund taking as security therefor a mortgage upon certain lands in Cass County, Iowa. During the life of this loan the interest thereon and the taxes on the mortgaged property became delinquent. Foreclosure of the mortgage was had in the District Court and the mortgaged property sold under special execution to Cass County. At a tax sale held in March, 1936, Cass County bought the mortgaged property under the public bidder law. Redemption from tax sale has not been made. The Board of Supervisors and County Auditor now desire to serve notice of the expiration of the right of redemption from the tax sale.

We assume that the purpose of the foregoing question is to determine the advisability of serving notice of the expiration of the right of redemption under the tax deed and to determine the status of the various interests with reference to the property. Section 6, 2nd Div. Art. IX of the Constitution provides:

"*Agents of school funds.* The financial agents of the school funds shall be

the same, that by law, receive and control the State and county revenue for other civil purposes, under such regulations as may be provided by law."

Section 4483 of the statute is as follows:

"*Management.* The board of supervisors shall hold and manage the securities given to the school fund in its county, and all judgments and lands belonging to said fund. * * *"

Section 4484 of the statute is as follows:

"*Actions.* All actions for and in behalf of said fund may be brought in the name of the county for the use of the school fund, by the county attorney or such other attorney as the board may select."

Section 4485 of the statute is as follows:

"*Liability of county.* Each county shall be liable for all losses upon loans of the school fund, principal or interest, made in such county, unless the loss was not occasioned by reason of any default of its officers or by taking insufficient or imperfect securities, or from a failure to bid at an execution sale the full amount of the judgment and costs."

Section 4501 of the statute is as follows:

"*Bid at execution sale.* Upon a sale of lands under an execution founded upon a school fund claim or right, the auditor shall bid such sum as the interests of the fund require, and, if struck off to the state, it shall be thereafter treated in all respects the same as other lands belonging to said fund."

It will be noted from the foregoing Constitutional and statutory provisions that the care and management of the school fund are lodged in the Board of Supervisors and that the county is liable for all losses upon loans of the school funds; that it is mandatory upon the county to bid the full amount of judgment and costs upon the foreclosure of any school fund mortgage; that the County Auditor shall bid upon such execution sales for the State and if title to the mortgage security is obtained under execution sale that the title thereto shall be taken in the name of the State for the use and benefit of the school fund.

The procedure heretofore outlined and as applied to the facts herein stated require the County Auditor to attend upon the execution sale and to bid for the property the full amount of the debt plus interest and costs, which we assume, from the facts stated, was done, and that the property is now held on sheriff's certificate in the name of the State of Iowa for the use and benefit of the school fund which will in course of time entitle the State to a sheriff's deed if redemption be not made.

Now during the time this property in question has been incumbered by the school fund mortgage, the taxes have become delinquent, culminating in a sale of the property at tax sale held in March, 1936, at which time the county became the purchaser under the provisions of Section 7255-b1 of the statute and commonly known as the public bidder law.

Under the provisions of Section 7255-b1, if the property in question has been previously advertised and offered for sale for two years or more and remained unsold for want of bidders, it was the duty of the county, through its Board of Supervisors, to become the purchaser of said property by bidding the full amount of the general taxes, interest, penalty and costs accruing against the same. Apparently the county has complied with Section 7255-b1 of the statute. We then have, at the present time, the following situation:

Real estate previously incumbered by a mortgage to secure a loan made from the school fund, now sold to the State under special execution and for which the State holds a sheriff's certificate of sale, and second the same property sold

at tax sale under Section 7255-b1 to the county, which now holds a tax sale certificate against the same. Section 7268 of the 1935 Code is as follows:

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

The following portion of the above section of the statute, namely:

"In all cases where the real estate is mortgaged or otherwise incumbered to the school, agricultural college, or university fund, the interest of the person who holds the fee shall alone be sold for taxes, and in no case shall the lien or interest of the state be affected by any sale thereof."

first appeared as statutory law in the Revision of 1860, having become a law on April 2, 1860 and has remained upon the statute books of the State of Iowa until the present time. The Supreme Court of this State has had before it questions similar to the one involved on several occasions, perhaps the earliest of which was *Helphrey vs. Ross*, 19 Iowa 40. In that case a school fund mortgage in favor of Story County was foreclosed against the mortgaged security and sold on special execution to the State of Iowa. Subsequent to the State's acquiring sheriff's deed the land was sold by the State. Prior to the foreclosure action the taxes against the real estate had become delinquent and the Treasurer of the county, after the execution of the sheriff's deed, offered the land for sale at the annual tax sale for the delinquent taxes then due. An action in equity was brought to enjoin the collection of the taxes which had become delinquent prior to the foreclosure. The District Court denied the relief. Upon appeal to the Supreme Court, the Court, after stating the statutory law hereinbefore set out, and as it appeared in the Revision of 1860, said:

"Under this act it is clear that the State, becoming itself the purchaser under the mortgage foreclosure, takes the land free from and unaffected by the delinquent taxes, and in selling again the land, conveys it in like free condition and discharged of all tax liens."

The ruling of the trial court was reversed and an injunction issued restraining the sale of the property for the delinquent taxes.

In the later case of *Crum vs. Cotting*, 22 Iowa 411, the Supreme Court in approving the doctrine stated in the case of *Helphrey vs. Ross*, supra, stated:

"A tax sale of real estate mortgaged to the school or university fund passes only the interest of the person who holds the fee title and does not affect the mortgage or any incumbrance existing thereon in favor of either of such funds."

In the case of *Lovelace vs. Berryhill*, 36 Iowa 379, an action was brought in equity to set aside and cancel a tax deed executed to the defendant for lands, the title to which was in the plaintiff under the foreclosure of mortgages given to secure an indebtedness to the State University. In this case the Supreme Court, after referring to the law as set out in the Code Revision of 1860 stated:

"The effect of this statute is now to be considered. Its evident purpose is

to protect incumbrances to these funds from defeat by tax titles, and to render the liens thereof superior to the liens for taxes. This purpose is expressed in the last clause of the section, in words whose import cannot be mistaken, namely: *'In no case shall the lien or interest of the State be affected' by any sale for taxes.*"

Therefore, in consideration of the pronouncements made by our Court, the tax sale certificate now held by Cass County and issued at the tax sale held in March, 1936, cannot avail as against the sheriff's certificate of sale issued in the foreclosure proceedings. That is, the only possible interest Cass County could secure under its tax sale certificate would be the equity of the mortgagor subject to the prior rights of the State under its school fund mortgage foreclosure proceedings.

As heretofore pointed out, the tax sale certificate now held by Cass County represents the sale of the equity of the titleholder to the real estate involved. Cass County can therefore secure a tax deed to the real estate involved subject to the prior rights of the State of Iowa by reason of its sheriff's certificate of sale issued under the foreclosure of the school fund mortgage. However, Cass County as an entity could not make redemption from the sheriff's sale even after securing a tax deed to the property for the reason that there is no statutory authority for counties to make such redemptions. Cass County would be without authority to use any of its funds for that purpose, but Cass County would, by virtue of its tax deed, have an interest in the real estate which would be the subject of sale, and Cass County could by following the provisions set out in Section 10260-g1 of the statute sell the interest acquired under its tax deed, and the purchaser under deed from Cass County would be a titleholder such as is authorized by statute to make redemption. Therefore, if the period of redemption under the sheriff's certificate of sale does not expire within 90 days or such time as it would be necessary for Cass County to secure a tax deed, Cass County might by acquiring a tax deed to the property, by selling the same, or getting possession of the property and securing rents and profits therefrom be able to recoup any liability occasioned by loss under the school fund mortgage for which the county is liable.

As heretofore pointed out, the school fund mortgage and the resulting sheriff's certificate of sale are the first and superior liens against the real estate. The interest, sold at the tax sale was the interest of the titleholder subject to the school fund mortgage. The tax sale certificate is to the interest of the titleholder subject to the amount due under the school fund mortgage foreclosure. If redemption from the sheriff's sale be not made, and the State secures a title to the property under sheriff's deed, the taxes represented by the tax sale certificate will be unavailing and should be cancelled by the Board of Supervisors.

CRIMINAL LAW: GAMBLING: SLOT MACHINES: RIVER CHANNELS: It is our opinion that the State of Iowa has jurisdiction to arrest parties operating a boat on the Mississippi River on the Iowa side of the river for the crime of having a slot machine in their possession or allowing the same to be used.

July 23, 1937. *Mr. W. W. Akers, Chief, Bureau of Investigation.* We are in receipt of your request for an opinion on the following:

May a state agent make an arrest of parties on a boat on the Mississippi River on the Iowa side of said river for the crime of possessing, or allowing to be used, slot machines?

Without going into a lengthy discussion of this problem I will say that the rule is well settled in Iowa by the cases hereinafter cited, the last of which is found in 271 N. W., page 514, being *State vs. Rorris*, decided by our supreme court on February 16, 1937, wherein the court says:

"And so Iowa has laid down the rule, accepted by the great weight of authority, that the jurisdiction of this State extends not alone to the boundary line of the State, but that it 'has concurrent jurisdiction on the water of any river or lake which forms a common boundary between this and any other state.'"

That is to say that the jurisdiction of this state extends not only to the middle of the main channel of the Mississippi River, but also to the east boundary of the main channel of the Mississippi River.

The opinion above quoted from is also in accordance with the following Iowa cases on the subject.

Iowa vs. Moyers, 155 Iowa 678, 136 N. W. 896;
State of Iowa vs. Mullen, 35 Iowa 199.

It is therefore our opinion, in answer to your specific question, that the State of Iowa has jurisdiction to arrest parties operating a boat on the Mississippi River on the Iowa side of the river for the crime of having a slot machine in their possession or allowing the same to be used.

STATE BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE DIVISION: Division of old age assistance not required to pay current taxes on land to which it has taken the reversionary interest, and the current taxes assessed and levied against the life estate in said land must be suspended under Section 6950-g1, Code, 1935, as amended.

July 23, 1937. *Mr. H. H. Bittinger, Chief, Trust Division of the Old Age Assistance:* This department acknowledges receipt of your requests for opinions on matters stated by you as follows:

"About a year ago the commission took title to some property in Monona County, Iowa. The deed reserved a life lease to the grantor, an elderly lady who was receiving old age assistance. The commission recently received a statement from the treasurer of Monona County, showing delinquent taxes on this property in the sum of $65.40.

"I understand that a life tenant is usually considered as being liable for the payment of taxes, but in this case, it would seem awkward to require a recipient of old age assistance to pay taxes when the law does not require it. It seems that there can be but one result—that the old age assistance commission will have to advance tax money to pay taxes."

You state further:

"The old age assistance commission in a few instances took warranty deeds from recipients of assistance wherein the grantor reserved life estates.

"The question has been brought to the attention of the writer as to whether or not the division of old age assistance will be required to bear the burden of subsequent taxes against the property should the life tenants elect to suspend the taxes."

Section 5296-f16 of the 1935 Code of Iowa, as amended (that italicized) by Section 13 of Senate File 376 (Chapter 137), acts of the 47th General Assembly provides in part as follows:

"If the commission (now State Board) 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; *upon the taking of such deed the division shall pay any delinquent taxes against said property and said deed shall reserve to the grantor and his spouse a life estate in said property and an option to the grantor and his heirs to purchase said property by repayment of the total amount paid for the*

benefit of the recipient. Said opinion in so far as the heirs are concerned shall be for two years from the date of the death of the grantor or the grantor's surviving spouse, if any, and shall include an interest charge of three and one-half per cent during the period of the option to the heirs."

It appears from the stated facts that the practice of taking conveyances to real property, the grantor-recipient reserving unto himself a life estate, apparently prevailed, though without expression in the statute, under the old law. Your inquiry raises the following questions:

1. Whether or not the old age assistance commission or its successor, the division of old age assistance, is required to pay delinquent taxes on property so conveyed to them, and
2. Whether or not such property is henceforth subject to taxation.

The answer to the first question is clearly in the affirmative since the enactment of Senate File No. 376, which requires that "upon the taking of such deed, the division shall pay any delinquent taxes against the property," but as to conveyances predating the amendment, it is the opinion of this department that there is no liability on the part of the old age assistance commission or its successor, to pay such delinquent taxes, and the property upon which they have attached as a lien cannot be sequestered by governmental authority for their satisfaction. In this connection, attention is called to Section 7268 of the Code of Iowa, 1935, which provides:

"When any school, agricultural college, or university land sold on credit is sold for taxes, the purchaser shall acquire only the interest of the original purchaser therein, and no sale of any such lands for taxes shall prejudice the rights of the state, agricultural college, or university fund, the interest of the person who holds the fee shall alone be sold for taxes, and in no case shall the lien or interest of the state be affected by any sale thereof. *The foregoing provision shall include all lands exempt from taxation by law, and any legal or equitable estate therein held, possessed, or claimed for any public purpose,* and no assessment or taxation of such lands, nor the payment of any such tax by any person, or the sale and conveyance for taxes of any such lands, shall in any manner affect the right or title of the public therein, or confer upon the purchaser or person who pays such taxes any right or interest in such land."

The forerunner to this section, namely, Chapter 101, acts of the 17th General Assembly, was applied by the Iowa supreme court in the case of *Independent School District of Oakland vs. Hewitt*, 105 Iowa 663, wherein plaintiff's title to certain lots was predicated upon condemnation proceedings completed on February 27, 1890, and where defendant's tax certificate for taxes levied in 1889 and sold in 1890, ripened into deed on December 21, 1893, and under which he claimed a title paramount to the plaintiff school district. The court in its opinion said:

"The defendant insists his tax deed is valid because the lots were assessed, and the taxes for which they were sold levied, before the property had been condemned to the public use. With this proposition we cannot agree. Under Section 797, the lots were not exempt from taxation. The assessment and levy were valid. But Chapter 101, Acts 17 General Assembly, provides that 'all lands exempted from taxation by the provisions of this title, including lands * * * of any * * * school district,' shall not be affected by any sale made for taxes, and 'no assessment or taxation of such lands, nor the payment of any such taxes by any person, or the sale or conveyance for taxes of any such land, shall in any such manner affect the right of title of the public therein, or prejudice the public thereto, nor shall any such payment or sale, confer upon the purchaser or person who pays such taxes any right or interest in such lands, adverse or prejudicial to the public right, title or ownership thereto.' The meaning of this is clear and unequivocal. Prior to the enactment

of this statute, land devoted to the public use might be sold for taxes levied before its acquirement for that purpose, and to obviate such a sale this law was enacted. * * * While different classes of property are enumerated in Section 2 of the chapter referred to, all are expressly included in the clause, 'all lands exempted from taxation by the provisions of this title.' This was the thought of the legislature in omitting much of this act as surplusage in preparing the Code. See Code, Section 1435. *First Congregational Church vs. Linn Co.*, 70 Iowa 396, 30 N. W. 650, is relied on. It is there held the property, prior to its use for religious purposes, was subject to taxation. The same is true of these lots. How these taxes may be collected cannot be determined in this action. It is sufficient that the statute prohibits collection by sale. Besides, the district court required the amount bid at the sale, with penalties and interest, and subsequent payments, with interest, to be paid by the district, and this has been done. The defendant acquired no interest whatever in the lots under his deed. The decree is affirmed."

The language of Chapter 101 and Section 7268 is not sufficiently dissimilar, in our opinion, to dissuade us in applying the decision in that case to the question before us. And furthermore there is ample authority for the proposition that where property, subject to the lien of a tax, is acquired by the state or any of its agencies for a public purpose, it thereby becomes freed from such lien, and further steps to enforce it are without effect. See note to reported case of *Re Auditor General* (Michigan), 170 N. W. 549, 2 A. L. R. 1526, 1535, and *State vs. Locke* (New Mexico), 219 Pac. 790, 30 A. L. R. 407, 413, both of which notes digest the Hewitt case, supra. We take it that there is no question but what the old age assistance commission and its successor, the subdivision of old age assistance, are state agencies, and that any conveyance taken by it pursuant to the terms of Section 5296-f16 is for a public purpose, for the statute expressly states: "If the commission deems it necessary to protect the interests of the state."

Now the fact that the fee is divided, the remainder being in the state, and the life estate being vested in the grantor-recipient, does not, in our opinion, alter the situation so as to render inoperative the rule hereinbefore set out. But the question may be asked whether or not the estate of the life tenant is subject to sequestration for the payment of delinquent taxes, which confessedly constituted a lien against the property at the time of the conveyance. We defer our opinion on this proposition until later in the opinion when consideration is given to the second question set out in your letter.

At this point we deem it apropos to discuss the following related question. Assume the following facts:

Under the law, the old age assistance commission or its successor took a conveyance subsequent to date of assessment, which is established in our law as January 1st of each year, but before levy, which is likewise established in our law of date, September 1st of each year. The board of supervisors proceeds to levy against the property in September. Does the lien of the tax attach as of December 31st of that year?

There is not here involved the question of delinquent taxes, but rather of current taxes, and as against the state, at least, the tax does not attach as a lien. If the levy were made by the board of supervisors on the interests of the state in said property, such levy would be void under the holding of the supreme court in the case of *Iowa Wesleyan College vs. Knight*, 207 Iowa 1238, which decision apparently overrules the early Iowa case of *First Congregational Church vs. Linn County*, 30 N. W. 650. But here again we have the fact of the intervening life estate, the question being whether or not said tax may

be levied as against this interest in the property, which question we will subsequently undertake to answer.

In answer to your second question, it is the opinion of this department that for the years subsequent to the conveyance of the reversionary interest or remainder in fee to the state, and while the title remains in the interests designated by the deed of conveyance, the interest of the state is not subject to taxation. Section 7268, supra; *Independent School District of Oakland vs. Hewitt*, supra; notes to reported cases, 2 A. L. R. 1535 and 30 A. L. R. 407, supra; and Section 6944, Code, 1935, provides in part as follows:

"*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."

It is our further opinion, however, that the life estate of the grantor-recipient is subject to taxation during such period. Section 6953, Code, 1935, provides that "all * * * property, real or personal, is subject to taxation * * *" Section 6956, Code, 1935, provides that "every inhabitant of this state * * * shall list for the assessor all property subject to taxation in this state, of which he is the owner, *or has the control or management* * * *" A life estate is a freehold interest in real property; it may be alienated; it is subject to sale on execution; its owner has the right to exclusive possession and control, and it is, in our opinion, a taxable interest under the cited sections of the Iowa code. In further support of this conclusion we cite the early Iowa case of *Stockdale vs. Treasurer of Webster County*, 12 Iowa 536, wherein it was held that the legal title is not essential to constitute a taxable interest in real estate, and that lands held by the United States in trust for grantees were subject to taxation as the property of such grantees. See also *Chicago, Milwaukee & St. Paul Railway Company vs. Hemenway*, 117 Iowa 599, and *White vs. City of Marion*, 139 Iowa 479, where the court in its opinion said:

"A life estate in land is not subject to taxation as such. The land itself is taxed, and the only question which may arise with reference to the taxation thereof, is who should pay the taxes, the life tenant, or the owner of the fee? *We have no doubt that life estates are property.* * * *"

And 21 C. J. 955, paragraph 93, where it is said:

"A life tenant, in possession, enjoying the rents and profits, * * * must pay all ordinary taxes on the property during the continuance of his estate, * * *"

However, though the life estate is subject to taxation, yet, there are mitigating provisions in the law, which diminish the fact of the taxability of the life estate, in cases under consideration, to a bare legal proposition, for it is required by Section 6950-g1, Code, 1935, as amended by Chapters 137 and 186, Laws of the 47th General Assembly, that:

"*Suspension of taxes.* Whenever a person has been issued a certificate of old age assistance and is receiving monthly or quarterly payments of assistance from the old age assistance fund, such person shall be deemed to be unable to contribute to the public revenue. The old age assistance commission shall thereupon notify the board of supervisors, of the county in which such assisted person owns property, of the aforesaid fact, giving a statement of property, real and personal, owned, possessed, or upon which said person is paying taxes as a purchaser under contract. It shall then be the duty of the board of supervisors so notified, without the filing of a petition and statement as specified in section sixty-nine hundred fifty (6950), Code, 1935, to order the county treasurer to suspend the collection of all the taxes assessed against said property and remaining unpaid by such person or contractually payable by him, for such

time as such person shall remain the owner or contractually prospective owner of such property, and during the period such person receives monthly or quarterly payments of assistance from the old age assistance fund."

In other words, it is made the statutory duty of the old age assistance commission and its successor, to notify the board of supervisors of the county in which an old age recipient owns property, so that the board in turn may direct the treasurer to suspend the current taxes thereon, and "for such time as such person shall remain the owner or contractually prospective owner of such property and during the period" that assistance is received.

In effect then, the property, after conveyance of the reversion to the state, and during the period of time the remainder in fee resides in the state, the life estate in the grantor-recipient and his surviving spouse, if one, and until the option is exercised by the grantor or his heirs, insofar as future taxes are concerned, is exempt—exempt as to the remainder by virtue of the state's ownership, and exempt as to the life estate or estates, not expressly, but in effect so, by reason of the statute suspending the taxes. And during the period of time between the death of the life tenant or tenants and the exercise of the option by the heirs, the property would be totally exempt by reason of the full fee title being in the state.

However, while there may in effect be a total exemption, yet the fact remains that in law the taxes are all the while assessed and levied against the life interest and remain a charge, the suspension of such taxes resulting in nothing more nor less than a postponement of their collection, and should the grantor-recipient or his heirs subsequently exercise the option to repurchase, it is the opinion of this department that their respective titles would be impressed with the lien of these taxes, and that title having revested in them, the property could be sold for the payment of these accumulated taxes, notwithstanding the fact that in the one case the reversion, and in the other, the entire fee, is derived from the state, which, in the hands of the state, are freed from the lien of the taxes. (See authorities, *supra.*) The authority for this conclusion is to be found in the act itself, namely, in that part of the quoted amendment where the legislature provided:

"and said deed shall reserve * * * an option to the grantor and his heirs to purchase said property *by repayment of the total amount paid for the benefit of the recipient.*"

In our opinion it was the intention of the legislature to include within that language not only actual outlay in assistance, but also any other form of benefit —delinquent taxes paid by the division and as well, suspended taxes, payment of which was postponed by "grace" of the board of supervisors and the various taxing bodies among which the general revenue is allocated. This is consonant with the spirit of the old age assistance law, namely, to provide assistance in senescence and not to either preserve or insure an inheritance to the heirs, and it further enables a recoupment that will make not only the revolving fund of the old age assistance whole, but likewise the treasuries of the various taxing districts.

This construction would not, of course, prevail in the case of a conveyance by the state to a third and disinterested party after the complete title vests in the state, for there the grantee would procure the title from the state, freed of the lien of such taxes (*Helphrey vs. Ross*, 19 Iowa 40), and there is no statutory provision present that may be called into operation that would cause the rule to be otherwise.

As to the related questions raised in this opinion, namely:

1. Whether or not the life estate is subject to sequestration for the payment of taxes delinquent at the time conveyance of the reversion is made to the state, and

2. Whether or not current taxes assessed but not levied at the time conveyance of the reversion is made to the state, may be levied as of September 1st and will attach as a lien on the life estate as of December 31st,

it is the opinion of this department that both questions must be answered in the affirmative. However, the first question pertains only to conveyances taken prior to the amendment of Senate File 376, for under the new law the division must pay all delinquent taxes, and we think that in the case of those conveyances taken prior to the effective date of the new law, as exemplified by the Monona County case, the division should undertake some practicable expedient to remove the lien of delinquent taxes from the life tenant's interest, by payment or otherwise, to assure the life tenant the enjoyment of the premises during the tenure of such estate and where assistance is being received. Authority for such procedure may be found in the following provision of Section 5296-f16, to-wit:

"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."

And the second question, is in our opinion, rendered virtually moot by reason of the requirements of Section 6950-g1, *supra*, but where this section was not availed of and the taxes were levied, attached as a lien, and are now delinquent, you are confronted with a situation similar to that wherein the taxes were already delinquent at the time of conveyance and you should take steps similar to those suggested immediately above.

TAXATION: Failure to claim offset against an excessive valuation is the fault of the taxpayer. So far as county officials are concerned the tax was a valid one and the taxpayer would not be entitled to a refund of the tax paid.

July 24, 1937. *Mr. Roger F. Warin, County Attorney, Bedford, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. One D. L. Walters was assessed with $4,000 in moneys and credits for the year 1935 and should have had an offset of $3,500 had he claimed it, but he was not familiar with the law. He paid the taxes and asks for a refund at this time.

Section 6988 of the statute is as follows:

"*Deduction of debts.* In making up the amount of money or credits which any person is required to list, or to have listed or assessed, including actual value of any building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him."

This deduction is a privilege given to the taxpayer which he may exercise at the time he is assessed. If he fails to claim the deduction and pays the tax on the valuation as given by him to the assessor, he is not entitled to a refund.

Section 7235 of the statute is as follows:

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

Our Supreme Court in the recent case of *Cedar Rapids Hotel Co. vs. Stirm, et al.*, 268 N. W. 562 said:

"This court has repeatedly held that the tax based on an excessive valuation, is not 'erroneously or illegally exacted or paid' where the taxpayer has failed to make use of the administrative body in having the correction made at the proper time. His failure to take advantage of the means provided by the statute for correcting an erroneous assessment of this character amounts to a waiver. So long as the taxes remain unpaid and within the five-year period of limitation on proper application, the assessment may be corrected by the state board of assessment and review, but this remedy must be resorted to (in the case of an otherwise valid but over or excessive assessment) before voluntary payment of the tax."

Under the facts stated in the foregoing question the tax was a valid tax based upon an excessive valuation. The excessive valuation or in fact the failure to claim offset against the valuation was the fault of the taxpayer. So far as the county officials were concerned, the tax was a valid one.

It is our opinion that the taxpayer is not entitled to a refund at this time.

2. A piece of real estate was assessed at a valuation of $1,380 for the years 1933, 1934, 1935, and 1936. On the 14th day of April, 1933, the dwelling house was completely destroyed by fire, and the owner received $1,200 insurance for the destruction of the house. The taxes for the years 1933, 1934 and 1935 are paid. The taxes for the year 1936 have not been paid. The petitioner asks for a refund of the taxes for the years 1933 to 1935 inclusive.

What has been said in answer to the first question applies with like force to this question. It does not appear from the facts in the question that the assessed valuation of $1,380 was an excessive one or in any way illegal. It does not appear from the question that the taxpayer made any effort to secure a correction of the valuation or to have the valuation reduced to what would be a fair and reasonable valuation. The taxes were apparently paid without protest.

It is therefore the opinion of this department that the taxpayer is not entitled to a refund under the facts disclosed.

LOAN CORPORATION—BRANCH OFFICE: FEES: Investigation and license fee for branch office of small loan concern must be based on liquid assets of concern itself which include the assets of each and every branch.

July 29, 1937. *Mr. D. W. Bates, Superintendent of Banking:* We are in receipt of your request for an opinion on the following proposition:

Should the superintendent of banking base the fee for the investigation and licensing of branch offices of small loan concerns on the liquid assets of the branch or on the liquid assets of the concern itself including the liquid assets of each and every branch?

Section 9438-f2 reads as follows:

"9438-f2. *Application—fees.* Application for such license shall be in writing, under oath, and in the form prescribed by the superintendent, and shall contain the name and the address (both of the residence and place of business) of the applicant, and if the applicant is a copartnership or association, of every member thereof, and if a corporation, of each officer and director thereof; also the county and municipality with street and number, if any, of the place where the business of making loans under the provisions of this chapter is to be conducted and such further relevant information as the superintendent may require. Such applicant at the time of making such application shall pay to the superintendent the sum of fifty dollars if the liquid assets of the applicant are not in excess of twenty thousand dollars, and the sum of one hundred dollars if the liquid assets of the applicant are in excess of twenty thousand dollars, as a fee for investigating the application and the additional sum of seventy-five dollars if the liquid assets of the applicant are not in excess of twenty thousand dollars, and one hundred fifty dollars if the liquid assets of the applicant are in excess of twenty thousand dollars, as an annual license fee and in full payment of all expenses for examinations under and for ad-

ministration of this chapter for a period terminating on the last day of the current calendar year; provided, that if the application is filed after June thirtieth in any year such payment shall be seventy-five dollars as such license fee in addition to the said fee for investigation.

"Every applicant shall also prove, in form satisfactory to the superintendent, that he or it has available for the operation of such business at the place of business specified in the application, liquid assets of at least five thousand dollars, or that he or it has at least the said amount actually in use in the conduct of such business at such place of business."

Section 9438-f7 reads in part as follows:

"9438-f7. *Separate license—change of place of business.* Not more than one place of business where such loans are made shall be maintained under the same license, but the superintendent may issue more than one license to the same licensee upon compliance, for each such additional license, with all the provisions of this chapter governing an original issuance of a license. * * *"

As is set out in Section 9438-f2, the investigation fee and the license fee are based on the "liquid assets of the applicant." The question to determine is whether or not the liquid assets of the person, partnership, corporation or whatnot set over to the branch office to carry on the business of that branch should be treated as part of the assets of the whole concern or whether these assets may be treated separately insofar as this chapter is concerned in determining the liquid assets of the applicant.

Under our facts, the branch office is a part of the corporation, partnership or whatever the concern may be. That is, our question is not one where the branch office is separately incorporated or comprises a separate or different and distinct partnership. It is one concern spread out over the state by way of branch offices. The applicant for the license is the person, partnership or corporation itself. The branch office is not the real applicant. The license issues to the person, partnership or corporation itself. The word applicant can mean nothing else.

Section 9438-f7 makes provisions for obtaining a license at more than one place. It is done by the applicant complying "with all of the provisions of this chapter governing an original issuance of a license." One requirement for the original issuance of a license is the paying of a fee based on the total "liquid assets." Section 9438-f7 shows that the legislature was legislating for just such a situation as the one at hand. Still they wrote and allow to remain intact Section 9438-f2 which is very explicit in its terms. We cannot say that it is ambiguous or even open to judicial interpretation. The rule is well settled in Iowa that where a statute is plain and unambiguous, it is not open to judicial construction. This position is fortified when we see that the legislature had in mind and dealt with this very problem.

In summary we would say, the person, partnership or corporation is the applicant even though the license is for a branch office. Its liquid assets are all of its liquid assets whether used by the main office or by any branch thereof. The legislature has made the total liquid assets the basis for the investigation and annual license fee. The legislature was plain and definite in the terms of the statute.

It is therefore our opinion that the investigation and license fee for a branch office of a small loan concern cannot be based on the liquid assets of that branch of the concern, but must be based on the liquid assets of the concern itself which include the assets of each and every branch.

STATE BOARD OF SOCIAL WELFARE: BLIND PENSION: ASSISTANCE: PRIVATE INCOME: A recipient with a private income of $20 per month can receive the maximum assistance of $30 per month if, in the opinion and judgment of state board, this amount is necessary and in accord with rules and regulations.

July 29, 1937. *Mr. Warren F. Miller, Chairman, State Board of Social Welfare:* Under letter of July 17th you have requested our opinion upon the following proposition:

"Senate File 375 (Chapter 144, Laws of the 47th General Assembly), Section 4, 'Amount of Assistance.' Under Section 4, should the recipient be limited to a total income of $30.00 per month, inclusive of the Blind pension and other resources? Would it be possible in the case of a recipient who had a private income of $20.00 per month to receive a full maximum of $30.00 per month from the Blind Pension if, in the opinion of the Board, the payment of the maximum amount of $30.00, over the private income, would enable the recipient to become a self-supporting person within the course of a year or two?"

The answer to your question depends upon the interpretation to be given Section 4 of Senate File 375, known as the Needy Blind Act of 1937. This section is as follows:

"The amount of assistance which any person shall receive shall be determined with due regard to the resources and necessary expenditures of the individual and the conditions existing in such case, and in accordance with the rules and regulations made by the state board, and shall be sufficient, when added to all other income and support of the recipient, to provide such person with a reasonable subsistence consistent with decency and health, but in no event shall the amount of said assistance exceed thirty (30) dollars per month."

The word "assistance" as used in the above section means a money payment paid by the state to blind persons in need. The word "assistance" is so defined in Section 2 of Senate File 375.

As may be seen from the above, Section 4 sets forth the manner in which the amount of assistance shall be determined and then states "but in no event shall the amount of said assistance exceed thirty (30) dollars per month." It seems clear that this limit of $30.00 refers only to the assistance paid by the State Board and does not include other resources and income of the applicant.

It is therefore the opinion of this department that a recipient with a private income of $20.00 per month can receive the maximum of assistance of $30.00 per month if, in the opinion and judgment of the State Board of Social Welfare, this maximum allowance is necessary, when added to private income, to afford the recipient a reasonable subsistence and is in accord with the Board's rules and regulations.

COUNCILS: BOARD OF SUPERVISORS: WEED LAW: New Weed Law only applies to noxious weeds—Substituted Sections 4826, 4829-a5. Within province of cities and towns to regulate by ordinance. Board of supervisors have supervision over destruction of all noxious weeds and other weeds on streets and highways. Substituted Section 4820.

July 30, 1937. *Honorable Homer Hush, Assistant Secretary of Agriculture:* This department acknowledges receipt of your request for an opinion upon the following questions:

1. Do city and town councils have power under Senate File 148 (Chapter 131), Acts of the Forty-seventh General Assembly, to order weeds cut and to assess the cost thereof to the property?

2. In the absence of such power in town and city councils, does it reside in the county boards of supervisors?

We are also in receipt of the request for an interpretation of the new Weed Law from the County Auditor of Mills County who states:

"I am writing you for an interpretation on the new weed law.

"The town council and the weed commissioner of the city of Glenwood, Iowa, would like to clean up the weeds in the alleys and vacant lots within the city limits. These are not noxious weeds but are just ordinary tall weeds. This has formerly been taken care of by city ordinance, and after weeds had been mowed on the property, the lăbor was paid for out of the city funds and later assessments were made against the property and certified by the city clerk to the County Auditor for collection on the tax lists."

His questions are specifically:

1. Does the city council still have authority to proceed in this manner or is it up to the county board of supervisors to do this and pay for the labor out of the county funds?

2. Does the board of supervisors have the authority to go upon vacant lots and mow weeds other than noxious weeds, and do they have authority to mow ordinary weeds in the streets and alleys within a town or city?

Our opinion on these questions is prefaced with the remark that Senate File 148, Acts of the Forty-seventh General Assembly, repealed in toto the provisions of Chapter 246, Code, 1935, relating to the enforced eradication of noxious weeds and provided in lieu thereof statutory provisions substantially the same in substance but somewhat changed as to methods of procedure in weed eradication and control. The substituted law, as did the old law, applies for the most part to noxious weeds, which are defined in substituted Section 4817 (Section 1, Senate File 148). We say "for the most part," for there are two provisions in the new law pertaining generally to weeds other than those defined as noxious, which provisions are to be found in substituted Sections 4826 and 4829-a5, providing as follows:

"4826. Each owner and each person in the possession or control of any lands shall cut, burn or otherwise destroy, in whatever manner may be prescribed by the board of supervisors, all noxious weeds thereon, as defined in this chapter, at such times in each year and in such manner as shall prevent said weeds from blooming or coming to maturity, *and shall keep said lands free from such growth of any other weeds, as shall render the streets or highways adjoining said lands unsafe for public travel.*"

"4829-a5. *The board of supervisors shall order all weeds other than primary noxious weeds*, on all county trunk and local county roads and between the fence lines thereof *to be mowed to prevent seed production thereof*, either upon its own motion or upon receipt of written notice requesting such action from any residents of the township in which such roads are located, or any person regularly using said roads. Said order shall define the roads along which said weeds are required to be cut and shall require said weeds to be cut within thirty days after the publication of said order in the official newspapers of said county. If the adjoining owner fails to cut said weeds as required in said order the county or township commissioner shall have same cut and the cost thereof shall be paid from the general county fund, and recovered later by an assessment against the adjoining property owners as provided in Section four thousand eight hundred twenty-nine-a six (4829-a6) hereof."

It is the opinion of this department in answer to your first question and the first inquiry of the Auditor of Mills County, that the new weed law has no application, other than as noted in substituted Sections 4826 and 4829-a5, supra, and hereafter in substituted Section 4820, to the extermination of ordinary or other than noxious weeds within the incorporated limits of cities and towns; that this problem, now as in the past, is peculiarly that of cities and towns, which it is within their province to meet by appropriate action in the nature of legal and adequate regulation by way of ordinance. Their authority to so

regulate is contained in Sections 5738 and 5739, Code, 1935, in the chapter which defines the general powers of cities and towns.

As to the second question raised by the Auditor of Mills County, it is clear, in our opinion, that Senate File 148 vests no authority in boards of supervisors to go upon vacant lots within cities and towns to mow weeds other than noxious weeds. However, substituted Section 4820, in part provides:

"* * * Each commissioner shall, subject to direction and control by the county board of supervisors, have supervision over the control and the destruction of all noxious weeds in his jurisdiction, *and of any other weeds growing along streets and highways* * * *"

and it is accordingly the opinion of this department that boards of supervisors have authority under Senate File 148 to go upon streets and alleys (alleys are dedicated to the public use much in the same manner as streets) within cities and towns to mow weeds other than noxious weeds growing along such streets, alleys or highways.

It is our further opinion that the duty, power, and authority to eliminate and control noxious weeds, and in the instances noted, weeds other than noxious weeds, and including such as may hereafter be labeled noxious by the Secretary of Agriculture, growing and existing within or without the incorporated limits of cities and towns is primarily that of the county boards of supervisors, for it is provided at substituted Section 4825, as follows:

"The responsibility for the enforcement of the provisions of this chapter *shall be vested* in the board of supervisors as to all farm lands, railroad lands, state lands and state parks, primary and secondary roads; *roads, streets and other lands within cities and towns unless otherwise provided.*"

at substituted Section 4820 that:

"Whenever, in this chapter, powers and duties are imposed upon a 'commissioner' or 'commissioners,' such powers and duties shall apply, insofar as applicable, to the county, township, town, and city weed commissioners within their respective jurisdiction. Each commissioner shall, *subject to direction and control by the county board of supervisors,* have supervision over the control and the destruction of all noxious weeds in his jurisdiction, and of any other weeds growing along streets and highways unless otherwise provided, and shall hire the labor and equipment necessary for the performance of his duties *subject to the approval of the board of supervisors,* which shall be paid for in the same manner as the weed commissioner's compensation."

and at substituted Section 4819, as follows:

"The board of supervisors of each county shall appoint either a county weed commissioner or one township weed commissioner for each township, whose term or terms of office shall not exceed one year. In incorporated towns and cities each council may appoint a municipal weed commissioner whose term of office shall not exceed one year. The name of the person or persons so appointed and the date of appointment shall be certified to the county auditor. The board of supervisors shall fix the compensation for said county commissioner or township commissioners. Subject to the approval of the board of supervisors of the county, the town or city council shall fix the compensation for the town or city commissioners. Said compensation shall be paid from the county general fund, but a reasonable portion thereof may be assessed as part of the cost of destruction pursuant to section four thousand eight hundred twenty-nine-a six (4829-a6)."

We are not called upon to determine whether or not the foregoing provisions exclude a concurrent exercise of jurisdiction by cities and towns, within their incorporated limits, to eradicate and control noxious weeds, but suffice it to say that the legislature having provided adequate machinery as provided by substituted Sections 4819 and 4820, supra, enforcement by means thereof should

be left to rest in the hands of those designated by the legislature, namely, county boards of supervisors.

Your further inquiry as to whether or not boards of supervisors have authority to assess the cost of weed eradication and control to the property owner in those cases where his failure to perform compels the board to act, finds answer in the provisions of substituted Section 4829-a6, but first of all reference must be made to other sections of the new law upon which it is based.

Substituted Section 4829 makes it the duty of the board to "prescribe and order a program of weed destruction * * * and * * * designate the cutting dates to prevent seed production * * *" Substantial failure on the part of property owners (or tenants) to comply with such order after receiving notice, as provided in substituted Section 4829-a1, makes it the duty of the weed commissioners to destroy such weeds and "the expense of such destruction * * * shall be paid from the county general fund and recovered later by an assessment against the property owner, as provided in Section 4829-a6 hereof." Substituted Section 4829-a6 then provides as follows:

"When the commissioner, or commissioners, destroy any weeds under the authority of sections four thousand eight hundred twenty-nine-a three (4829-a3), or four thousand eight hundred twenty-nine-a four (4829-a4), after failure of the landowner responsible therefore to destroy such weeds pursuant to the order of the board of supervisors, the cost of such destruction shall be assessed against and collected from the landowner responsible in the following manner:

1. On or before December 31st of the year, the board of supervisors shall assess all of said costs for the calendar year, including a reasonable part of the compensation of the commissioner in charge, against the said land and the owner thereof by a special tax, which shall be certified to the county auditor and county treasurer by the clerk of the board of supervisors, and shall be placed upon the tax books, and collected, together with interest and penalty after due, in the same manner as other unpaid taxes. Such tax shall be due on March 1st after such assessment, and shall be delinquent after March 31st. When collected, said funds shall be paid into the fund from which said costs were originally paid.

2. Before making any such assessment, the board of supervisors shall prepare a plat or schedule showing the several lots, tracts of land or parcels of ground to be assessed and the amount proposed to be assessed against each of the same for destroying or controlling weeds during the calendar year.

3. Such board shall thereupon fix a time for the hearing on such proposed assessments, and at least twenty days prior to the time thus fixed for such hearing shall give notice thereof to all concerned that such plat or schedule is on file, and that the amounts as shown therein will be assessed against the several lots, tracts of land or parcels of ground described in said plat or schedule at the time fixed for such hearing, unless objection is made thereto. Notice of such hearing shall be given by one publication in official county newspapers in the county in which the property to be assessed is situated; or by posting a copy of such notice on the premises affected and by mailing a copy by registered mail to the last known address of the person owning or controlling said premises. At such time and place the owner of said premises or any one liable to pay such assessment, may appear with the same rights given by law before boards of review, in reference to assessments for general taxation."

TRUST FUNDS: PAYMENT OF TRUST FUNDS: No liability could attach to either the county auditor or the county treasurer for performing the duty enjoined upon them by law. If the county cannot recover from a person who received a payment to which he was not entitled, it would appear that the matter is one of those which must be charged to profit and loss.

July 30, 1937. *Hon. C. W. Storms, Auditor of State:* We are in receipt of your request for an opinion upon the following facts:

Sometime prior to the 24th day of March, 1936, there was paid in to the office of the Clerk of the District Court of Bremer County the sum of $215.89. This money was evidently money due to one Carl R. Winner from an estate in which he had an interest, and by the Clerk of the District Court paid to the county treasurer. Subsequent to the time that this money was paid to the county treasurer an application was presented to the District Court of Iowa in and for Bremer County, T. A. Beardmore presiding, upon which application the said Judge Beardmore entered an order directing the county auditor of Bremer County to draw a warrant on the county treasurer in the sum of $215.89 payable to Carl R. Winner, which was done, and the warrant drawn by the county auditor presented to the county treasurer and cashed by him from the trust fund account in his office. Subsequent thereto and on the 6th day of April, 1936, an application was presented to the District Court of Iowa in and for Bremer County, Judge M. H. Kepler presiding, and an order made directing the county auditor of Bremer County to draw a warrant in the sum of $215.89 against the county treasurer in favor of W. W. Saylor as Administrator of the Estate of Carl R. Winner, which was done. Upon presentation of the warrant together with certified copy of the order of Judge Kepler to the county treasurer, said treasurer cashed the warrant in the sum of $215.89. The claim having been paid twice by the county treasurer, your request goes to the liability, if any, for the loss occasioned by this double payment.

The statute, Section 12778 provides that whenever any administrator, guardian, trustee, or referee desires to make his final report, and shall then have in his possession funds, moneys, or securities due or to become due to any heir, legatee, devisee, or other person whose whereabouts is unknown, such administrator, guardian, trustee, or referee may, upon order of the court and after due notice, deposit such fund with the Clerk of the District Court of the County wherein the matter is pending.

Section 12784 of the statute provides that if after the deposit of such funds, moneys, or securities with the Clerk of the District Court the same remains unclaimed for six months the Clerk shall then, unless otherwise ordered by the court, deposit such funds, moneys, or securities with the county treasurer taking a receipt from him therefor, the same to be countersigned by the county auditor. After the funds, moneys, or securities have reached the hands of the county treasurer the statute provides for their custody and disposition in the following sections of the statute, to-wit, Section 12785:

"*Duty of treasurer.* Whenever any funds, moneys, or securities shall be deposited with the county treasurer, as provided in this chapter, he shall enter in a book provided and kept for that purpose, the date of such deposit, the amount thereof, from whom received, the source from which derived, and the name of the person to whom the same is due or to become due, if known."

Section 12786:

"*Disbursement.* Whenever the claimant therefor, upon proper application made to the district court, shall satisfactorily show to such court that he is the rightful owner of said funds, moneys or securities and entitled thereto, the court, by order entered of record, shall direct the county auditor to issue a warrant on the county treasurer for said money, funds, or securities, and, upon such order, the said treasurer shall pay to the person named in such order the funds, moneys, or securities to which the claimant shall have shown himself entitled."

Presuming from the facts heretofore stated that the funds were rightfully and properly deposited with the county treasurer, we proceed from that point to determine whether or not there is any liability arising out of the transactions hereinbefore set out. It will be noted from the foregoing statute, Section 12786,

that the county treasurer's authority for paying out funds of the character involved is a warrant drawn by the county auditor based upon an order of court entered of record. It appears from the facts that in each instance there was a court order entered of record upon which the county auditor drew his warrant and that upon such warrant the county treasurer made the payment.

It appears from the facts submitted to us, but not herein previously mentioned, that the order of Judge Beardmore was secured by use of a forged affidavit. That fact does not, however, in our opinion, change or create a liability. The statute does not provide or require any notice to be given upon the hearing of the application for an order upon the county auditor to issue a warrant for the payment of trust funds. Therein lies the weakness of the law. Neither the county auditor nor the county treasurer were parties to the hearing upon either application. Neither party had notice or knowledge of the matter until the court orders were presented to them. They acted in obedience to such orders. Having done so, no liability could attach to either the county auditor or the county treasurer for performing the duty enjoined upon them by law. There is no liability imposed upon a court for an error or a mistake made in the exercise of matters within its jurisdiction.

If the county cannot recover from the person who received the payment to which he was not entitled, it would appear that the matter is one of those which must be charged to profit and loss. In other words, it is a loss for which there is no recovery.

TAXATION: BOARD OF SUPERVISORS: PUBLICATION OF PROCEEDINGS: HOMESTEAD TAX EXEMPTIONS: The proceedings of the Board of Supervisors with reference to homestead tax exemptions should be published in the official newspapers.

July 30, 1937. *Mr. Clyde J. Dimick, County Auditor, Audubon, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Is it necessary that the list of homestead exemptions approved and disapproved by the Board of Supervisors be published in the Board proceedings?

Under the provisions of Senate File 184, being the Homestead Tax Exemption Act, it is required that any person who desires to avail himself of the provisions of the Act shall either deliver to the assessor a verified statement and designation of homestead as claimed by him or file with the county auditor such verified statement and designation. Under the provisions of the Act the assessor is required to file such statement with the county auditor. After such statements are filed with the county auditor, it then becomes the duty of the Board of Supervisors to pass upon each application for homestead exemption. Section 6 of the Act is as follows:

"The county board of supervisors in each county shall forthwith examine all such claims, whether delivered to the assessors or filed with the county auditor as herein provided, and shall either allow or disallow said claims, and in the event of disallowance shall notify the claimant of such action by mailing a written notice thereof addressed to claimant at his last known address."

Section 7 of the Act is as follows:

"All claims which have been allowed by the board of supervisors shall be certified on or before July 1, in each year, by the county auditor to the county treasurer, which certificates shall list the name of each owner, legal description of the claimed homestead, and the assessed valuation of said homestead in an amount not to exceed twenty-five hundred ($2,500.00) dollars for each home-

stead. The county treasurer shall forthwith certify to the State Board of Assessment and Review the total assessed valuation of all homesteads so certified in an amount not to exceed twenty-five hundred ($2,500.00) dollars for each homestead."

Under the provisions of the Homestead Tax Exemption Act the Board of Supervisors is constituted a tribunal to first pass upon the validity of the application. A record of the approvals and disapprovals must be made. The statute with reference to the publication of the proceedings of the Board of Supervisors is as follows:

"5411. *What published.* There shall be published in each of said official newspapers at the expense of the county during the ensuing year:

"1. The proceedings of the board of supervisors, excluding from publication of said proceedings, its canvass of the various elections, * * *"

There are excluded from the proceedings of the Board required to be published certain matters none of which pertain to the Homestead Tax Exemption Act. Subject to the excluded items the statute is mandatory and requires that "the proceedings of the Board of Supervisors shall be published." The actions taken by the Board of Supervisors in passing upon the homestead tax exemption applications are proceedings of the Board of Supervisors. They must be made of record and become a part of the records of the Board of Supervisors.

The purpose of requiring the proceedings of the Board of Supervisors to be published is to give to the taxpayers information as to what is being done by their representatives.

It is therefore the opinion of this department that the proceedings of the Board of Supervisors with reference to homestead tax exemptions should be published in the official newspapers.

TAXATION: BOARD OF SUPERVISORS: SCHOOL FUND MORTGAGES: When the State of Iowa became the owner of property by sheriff's deed under the foreclosure of the school fund mortgage, the real estate was thereby released from the lien of all taxes previously levied and assessed against the property and there were no delinquent taxes against the property for which it could be sold.

July 31, 1937. *Hon. C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following facts:

The Board of Supervisors of Hancock County made a school fund mortgage to L. H. Christensen upon real estate situated in Hancock County. Default occurred upon this loan and a foreclosure action was had by Hancock County against the mortgagor in which a decree of foreclosure was entered and special execution authorized. At sale under the special execution held on December 31, 1934, the county became the purchaser for the full amount of the judgment, interest and costs and the delinquent taxes for the years 1931, 1932 and 1933. On January 6, 1936, the county treasurer sold the mortgaged real estate at the annual tax sale for the delinquent taxes of 1931, 1932 and 1933. A. T. Fillenwarth purchased the same and a tax sale certificate was duly issued to him. Later on, and about March 9, 1937, Hancock County made redemption of the property by payment to the said Fillenwarth the sum of $250.12 and took up and cancelled the tax sale certificate. Your question is whether or not the county was within its legal rights in making redemption from this tax sale.

The facts above fully disclose that the taxes for which the real estate was sold on January 6, 1936, were taxes levied, assessed and delinquent prior to the date of the sheriff's deed to the State of Iowa for the use of the school fund.

Under the foreclosure of a school fund mortgage, the law of the State of Iowa is well and definitely settled that a school fund mortgage is a superior

lien upon real estate covered by it to taxes subsequently levied and assessed against it; that the foreclosure of a school fund mortgage and the acquisition of a title under the foreclosure divests the lien of taxes levied and assessed subsequent to the filing of the school fund mortgage. Therefore, when the State of Iowa became the owner of the property in question on December 31, 1935, by sheriff's deed under the foreclosure of the school fund mortgage the real estate was thereby released from the lien of any and all taxes previously levied and assessed against the property and there were no delinquent taxes against the property for which it could be sold on January 6, 1936. The statute, Section 7235 provides as follows:

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

That the word "taxpayer" as used in the foregoing section of the statute includes a tax sale purchaser is established by decree of our court in the case of *Parker vs. Cochran*, 64 Iowa 757, and reaffirmed in the case of *Schoenwetter vs. Oxley*, 213 Iowa 528.

In the instant case the tax for which the property was sold was erroneous or illegal. Therefore, under the provisions of the foregoing statute the Board of Supervisors was within the law in ordering a redemption from the certificate issued on the sale of January 6, 1936. The county merely refunded the money which it secured by reason of the unlawful sale.

COUNTY OFFICERS: VACANCIES: When a vacancy occurred in the office of the county treasurer it was the duty of the county auditor to take charge of the same as a custodian of the records and property pertaining to that office. The county auditor would not be entitled to any extra compensation for his services as conservator of the county treasurer's office during said vacancy.

July 31, 1937. *Mr. Carl A. Burkman, County Attorney, Des Moines, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Allen Munn, treasurer of Polk County, resigned on July 22, 1937 and Ernest S. Olmsted, county auditor of Polk County, took possession of the county treasurer's office. The salary of the county treasurer of Polk County is $3,900.00 per year and the salary of the county auditor is $3,400.00 per year. The question now arises as to the compensation of Ernest S. Olmsted, whether it should be figured on the basis of the salary fixed by statute for the county treasurer, or that fixed by statute for the county auditor.

This question arising at this time and without any information to the contrary, we are assuming that Ernest S. Olmsted is still in charge of the county treasurer's office and that the purpose of the question at this time is to determine the salary to be paid to Mr. Olmsted August 1st.

The salary of the county treasurer of Polk County is fixed by statute at $3,900.00 per year, and the salary of the county auditor of Polk County is fixed by statute at $3,400.00 per year. These salaries being statutory salaries and fixed on an annual basis are in full compensation to the county treasurer or the county auditor for the performance of all services pertaining to the offices.

Upon the resignation of Allen Munn as county treasurer of Polk County the office became vacant. Section 1146 of the Code provides as follows:

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

* * *

4. The resignation or death of the incumbent, or of the officer elect before qualifying. * * *"

Upon the occurrence of a vacancy in the office of county treasurer the statute prescribes what shall be done, Section 1147 being as follows:

"*Possession of office.* When a vacancy occurs in a public office, possession shall be taken of the office room, the books, papers, and all things pertaining thereto, to be held until the qualification of a successor, as follows: Of the office of the county auditor, by the clerk of the district court; of the clerk or treasurer, by the county auditor;"

It will be observed from an examination of the foregoing section of the statute that upon the resignation of Allen Munn, county treasurer of Polk County, it became the duty of Ernest S. Olmsted to take possession of the office room, books, papers and all things pertaining thereto to be held by him until the qualification of a successor. Under the above quoted section of the statute the county auditor of Polk County became the custodian of the county treasurer's office room, books, papers and all things pertaining thereto upon the resignation of the treasurer, to be by him preserved and kept until a successor to Mr. Munn was appointed and qualified. The statute with reference to resignations of county officers is as follows:

"1148. *Resignations.* Resignations in writing by civil officers may be made as follows, except as otherwise provided.

* * *

"4. By all county and township officers, to the county auditor, except that of the auditor, which shall be to the board of supervisors. * * *"

Upon the filing of a resignation the statute enjoins a duty upon the person receiving such resignation. Section 1151 is as follows:

"*Duty of officer receiving resignation.* An officer receiving any resignation, or notice of any vacancy, shall forthwith notify the board, tribunal, or officer, if any, empowered to fill the same by appointment."

Therefore, upon the filing of the resignation as county treasurer by Allen Munn, which resignation was required by law to be filed with the county auditor, it then became the duty of the county auditor to forthwith notify the Board (in this instance the Board of Supervisors) of such resignation. Section 1152 of the statute is as follows:

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

* * *

"4. *County offices.* In county offices, including justices of the peace and constables, by the board of supervisors. * * *"

Therefore, when the Board of Supervisors of Polk County received notice from the county auditor of the resignation of Allen Munn, county treasurer, it became the duty of the Board of Supervisors to fill by appointment the vacancy thereby created.

So far as the county treasurer's office is concerned, we have pointed out herein all of the provisions of the statute with reference to resignations, vacancies, or appointments to fill vacancies. As heretofore stated, the only right or authority the county auditor had with reference to the county treasurer's office when that office became vacant, was to take charge of the same as a custodian for the preservation of the records and property pertaining to the office until a successor should be appointed, who, upon qualification, would be entitled to

receive from the county auditor the possession of the office, the records, and all property pertaining thereto. This duty of the county auditor, as herein pointed out, and as provided by statute, is one enjoined upon him by law and is one of the duties pertaining to his office and is compensated for by his annual salary.

It is therefore the opinion of this department that the said Ernest S. Olmsted, as county auditor, is not entitled to any extra compensation for his services as conservator or custodian of the county treasurer's office, and records and property belonging thereto during the vacancy in that office.

TAXATION: SCAVENGER TAX SALES: Senate File 167 provides for the exclusion of all interest and penalties on the delinquent taxes for which the property was sold and also on such subsequent delinquent taxes as the county treasurer has shown paid and carried against such tax sale certificate. If the county has permitted the subsequent taxes to remain delinquent, they are not composed into the item which constitutes the amount to be paid in installments, but must be paid in full at the time the taxpayer enters into the agreement to make the installment payments.

July 31, 1937. *Mr. Geo. E. Allen, County Attorney, Onawa, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. Are the penalties and interest that are included in the tax sale price for which the county purchased the property at the scavenger tax sale included in the total sum to be paid in installments under Senate File 167 or are all penalties and interest excluded from this sum whether a part of the original tax sale price or the penalties and interest of the subsequent taxes?

In paragraph 1 of Section 1 the act provides:

"Delinquent taxes * * * may be composed into one item or amount for the entire amount of all such taxes and costs, excluding penalties and interest, as hereinafter provided."

And in paragraph 2 of Section 1 the act provides:

"* * * including all subsequent taxes added affecting the particular property sold appearing on the tax sale record in the office of the County Auditor, but excluding penalties and interest, as certified by the County Auditor * * *"

The items which are to be "composed into one item or amount" are the delinquent taxes upon any parcel of real estate for which it has been bid in by the county and the subsequent taxes added to the tax sale. The amount for which the county is required to bid in the property is all of the delinquent taxes due at the time of the sale. The subsequent taxes referred to in the Act are taxes accruing subsequent to the sale which the county treasurer has shown paid and carried against the tax sale. The Act provides that on these items the interest and penalties shall be excluded.

Therefore, in answer to the foregoing question, it is the opinion of this department that Senate File 167 provides for the exclusion of all interest and penalties on the delinquent taxes for which the property was sold and also on such subsequent delinquent taxes as the county treasurer has shown paid and carried against the tax sale certificate.

2. May the subsequent taxes be included in the sum to be paid in the ten installments and entered in the tax sale record of the County Auditor where the county does not pay these taxes into the County Treasurer's office?

The properties entitled to the benefits of the Act, Senate File 167, are those sold under Section 7255-b1 of the public bidder's statute. Under that section of the statute, the county as the purchaser is not required to pay any money

for such certificate, but each of the tax levying bodies having an interest in the general taxes for which the real estate is sold, should be charged for the full amount of general taxes due to said tax levying body. The property sold to the county under the public bidder's statute cannot be advertised and again sold for delinquent taxes subsequent to the sale at which the county became the purchaser. The county may require subsequent taxes to be carried against the tax sale or permit subsequent taxes to become delinquent. If the county requires the taxes to be carried against the tax sale, then, under the provisions of Senate File 167, if the taxpayer wants to take advantage thereof, the amount of the general tax for which the property was purchased, less the penalty and interest, plus the general tax which the county has carried against the tax sale, less the penalty and interest are the amounts which are composed into one item and of which the taxpayer is given the privilege of making the payments in installments.

If the county has permitted the subsequent taxes to remain delinquent they are not composed into the item which constitutes the amount to be paid in installments, but must be paid in full at the time the taxpayer enters into the agreement to make the installment payments.

SCHOOL FUND: MORTGAGE LOAN: INTEREST RATE: Board of supervisors has authority to make new loan out of permanent school fund to replace an existing loan and to provide that new loan bear rate of interest provided by statute as amended.

TAXATION: HOMESTEAD TAX EXEMPTION: VETERANS: Wife of a person entitled to veteran's exemption is not required to apply such exemption to homestead property owned by her. Such husband may apply such exemption to property owned by him.

July 31, 1937. *Mrs. Virginia Bedell, County Attorney, Spirit Lake, Iowa:* We acknowledge receipt of your request for an opinion of this department upon two questions which are set out below:

"1. Where there is outstanding a school fund mortgage loan which is not due and is in good standing, does the Board of Supervisors have the right and authority to make a new loan to replace the existing loan at a lower rate of interest as authorized by the recent enactment of the Iowa Legislature?

"2. Where a homestead is owned by the wife of a veteran, can the veteran take his tax exemption from other property owned by him, and is the wife entitled to the full amount of homestead exemption without considering the veteran's exemption?"

Prior to March 26, 1937, the statute fixing the minimum rate of interest on loans made from the permanent school fund provided as follows:

"4488. *Terms—appraisement—fee.* Each loan shall be made for at least one and not more than five years, evidenced by promissory notes bearing not less than five per cent per annum, payable annually, and delinquent interest to draw the same rate, to be secured by a mortgage on unincumbered real estate situated in the county in which the loan is made, and appraised, as hereinafter provided, for at least double the sum borrowed; the appraisement to be made by three persons under oath, selected by the county auditor, who shall not in making the valuation take into consideration the buildings upon the lands; for such service each shall be allowed fifty cents, to be paid by the borrower, who shall also pay for recording the mortgage."

Senate File 40, enacted by the Forty-seventh General Assembly, which became effective by publication on the last mentioned date, amended the section above quoted by striking the provision for five per cent interest and substituting in lieu thereof a provision for four per cent interest. Otherwise this section is

unchanged. The legislation is not retroactive in character, and the changed provision of the statute does not affect the rights of the parties arising out of contracts entered into prior to the enactment.

It would appear, therefore, that the purpose of the amendment was not primarily to extend relief to debtors but rather to enable the counties to put the school funds in their custody to active use. Therefore, we believe that a mortgagor who has executed a mortgage providing for interest at the rate of five per cent could not require that the existing rate of interest on his school fund loan be reduced by reason of the change in the statute.

The question, however, goes to the right and authority of a board to accept payment of a loan in good standing and to grant a new loan to the same person and upon the same security at the lowered rate of interest now provided by statute.

The law now provides that boards of supervisors shall "hold and manage school funds under their control." Until the enactment of Senate File 40 referred to above, counties were charged four and one-half per cent per annum interest, payable to the State Comptroller, on school funds placed in their control. By the provisions of Senate File 40 the interest rate so chargeable to counties was reduced to three and one-half per cent per annum. It is provided by Section 4507, 1935 Code, that all interest collected above the three and one-half per cent charged by the state shall be transferred to the county general fund.

If a board of supervisors determines that a five per cent loan in good standing should be replaced by a four per cent loan, the loss in interest would fall upon the county general fund. Yet since the amount chargeable to the county by the state has been reduced to the same extent as has been the county's charge to the borrower, they would be, relatively, no loss to the county.

The permanent school fund is owned by the state and obligations running to said fund are held in the name of the State of Iowa for the use and benefit of said fund. The management and control of the fund, as the same is administered in particular counties, is placed upon the respective boards of supervisors. The law has recognized that some degree of discretion in such county administration of the fund is vested in boards of supervisors. The case of *Poweshiek County vs. Buttles*, 70 Iowa 246, discussed this discretionary power of the board in connection with a compromise which the board had entered into with a mortgagor, saying,

"* * * any acts which, in the exercise of wisdom and care, men of affairs ordinarily bestow for the security and collection of debts, are within the authority conferred by the provision. If a prudent man, acting for himself, or in the capacity of a public officer, would, for the purpose of securing or collecting a debt, compromise with the debtor, and discharge him upon payment of half of the debt, the county supervisors were authorized, under this statute, to do the same thing. The wisdom and prudence of the act must be determined upon the facts as they appeared at the time to the supervisors."

It should be stated that the statute under which the above case was decided by its terms granted a somewhat broader power to the board.

However, the rate of interest which the county may be charged by the state has now been reduced. The statute authorizes the funds to be loaned at the rate of four per cent after March 26, 1937. No real loss would be suffered by a county in allowing a lower rate on outstanding loans. In the interest of cooperation with school fund borrowers it might be determined by the board

that the advantage of a lower rate of interest be extended to mortgagors upon loans entered into prior to the passage of the amendment.

In view of the foregoing, we are of the opinion that a board of supervisors has the right and authority to make a new loan out of the permanent school fund under its control to replace an existing loan and to provide that the new loan bear the rate of interest provided by the statute as amended.

"2. Where a homestead is owned by the wife of a veteran, can the veteran take his tax exemption from other property owned by him, and is the wife entitled to the full amount of homestead exemption without considering the veteran's exemption?"

Under the provisions of subsection 2 of Section 19 of Senate File 184, Acts of the Forty-seventh General Assembly, known as the "Homestead Tax Exemption Act," the term "owner" is defined as follows:

"2. The word 'owner,' shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth (1/10) of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the dividend interest is shared only by blood relatives, or by legally adopted children, or where the person is occupying the homestead under a deed which conveys a divided interest where the other interests are owned by blood relatives or by legally adopted children."

Assuming that the wife, in this case, owns the fee simple title to the homestead and otherwise qualifies as to actual occupancy thereof, it is our opinion that the wife may claim the amount of the tax credit based upon the full assessed valuation of the property. This is a right which is specifically given to her as the owner and occupant of property of a homestead character.

The remaining question is whether or not the husband is to be permitted to take his soldier's exemption or credit on property other than the homestead of the wife. This department has ruled heretofore that the *owner* of a homestead who is entitled to a soldier's exemption shall apply such exemption first to the homestead and that the millage provided by the so-called homestead exemption law is to be based upon the resulting valuation. The basis of this ruling is Section 6947, 1935 Code, which provides as follows:

"6947. *Reduction—limitation.* All persons named in Section 6946 shall receive a reduction equal to their exemption, to be made from the homestead, if any; otherwise from other property owned by said persons. Such exemption shall extend only to the period during which such persons remain the owners of such property."

Under the so-called homestead exemption act, a husband, whose wife holds title to the homestead property, is not an "owner" within the provisions of the act and therefore is not a proper claimant to the benefits thereof. It is true that the wife of the soldier could, if she desired, and if her husband had not otherwise received the benefits of the soldier's exemption, claim the benefits of the latter exemption. If the wife elects not to claim the benefits of the soldier's exemption statute as to property owned by her, we can see no reason why the husband's right to claim the said exemption should be extinguished.

It is our conclusion, therefore, that the wife of a person entitled to the exemptions provided by Section 6946, 1935 Code, is not required to apply such exemption to homestead property owned by her. It is further our opinion that such husband may apply such exemption to property owned by him.

BOARD OF CONTROL: ADOPTION: CHILD WELFARE: Board of Control must give consent to adoption by petitioning party before adoption shall be effective.

August 2, 1937. *Senator Frank M. Stevens, Board of Control:* This department acknowledges receipt of your request for an opinion on the following proposition. You state:

"Since the Bureau of Child Welfare no longer exists, the State Board of Social Welfare having absorbed the work of the Bureau of Child Welfare as of July 1, 1937, and since the Board of Control of state institutions is charged with the care of wards of the state committed to the Iowa Soldiers' Orphans' Home and the Iowa Juvenile Home, we desire an opinion as to the correct procedure in the matter of adoption of such wards.

"Before the Bureau of Child Welfare was established in 1925 the Board of Control proceeded under Sections 3714 and 3715, Code 1924, which sections were repealed by the 46th General Assembly. Subsequent to the establishment of the Bureau of Child Welfare the Board has proceeded under the provisions of Chapter 473, Code 1935, the Board of Control first giving written consent to the adoption.

"Since a number of foster parents are eager to complete the adoption of wards who have been placed in their homes for a period of one year, we desire to know whether or not the written consent of the Board of Control given to the foster family is sufficient for them to petition a court of record for adoption, or is it necessary that the superintendent of the institution give his consent, with the approval of the Board of Control, as was the procedure under repealed Sections 3714 and 3715, supra."

Section 10501-b1 provides as follows:

"10501-b1. *Who may adopt—petition.* Any person of lawful age may petition any court of record of the county in which he or the child resides for permission to adopt any child not his own, but no person other than the parent of a child may assume the permanent care and custody of a child under fourteen years of age except in accordance with the provisions of this chapter or Chapter 181-A4. If the petitioner be married, the spouse shall join in the petition. A person of full age may be adopted."

Section 10501-b3 provides in part:

"10501-b3. *Consent, when necessary.* * * * Where the child is a ward of the state in a state institution, the consent of the Board of Control of state institutions shall be first obtained before said adoption shall be effective. * * *"

In view of the last cited section, it is the opinion of this department that the Board of Control, by its chairman and secretary, must give consent to the adoption by the petitioning party or parties as a prerequisite to the entry of a decree by the court before whom the petition is pending ordering that the child shall be the child of the petitioner.

While there is no requirement in the law that such consent must be obtained by the petitioning party or parties prior to the institution of their petition, yet it is clear under Section 10501-b3, supra, that such consent must be obtained before the adoption shall be effective.

BOARD OF CONTROL: COMMITMENT—CHILDREN: JUVENILE HOMES: Board of Control does not have jurisdiction over child committed to institution under its control until child is delivered into custody of home to which it is committed. This also applies to children admitted on voluntary application. Such children must be actually admitted to such home before being placed with third persons under contract.

August 2, 1937. *Senator Frank M. Stevens, Board of Control:* This department acknowledges receipt of your request for an opinion upon questions hereafter set out. You state:

"In times past children have been committed to the care of the state under the provisions of the law of Iowa now embodied in Chapter 180, 1935 Code, and have been placed in foster homes without having first been received in the state institutions to which the juvenile court directed their commitment. Likewise in the case of voluntary applications, placements of babies have been direct from licensed maternity homes without their having first been received at the state institutions. The following questions arise:

"1. If a child is committed to a state institution and accepted by the Board of Control, is it possible for the committing judge to place said child in a foster home without first notifying the Board of Control that the commitment has been annulled?

"2. If a child is committed or admitted to the care of the state, is the Board of Control responsible for such child prior to receiving such child in person at the institution?"

Section 3637, Code 1935, provides in part as follows:

"3637. *Alternative commitments.* The juvenile court, in the case of any neglected, dependent, or delinquent child, may:

* * *

"2. Commit said child to some suitable family home or allow it to remain in its own home.

"3. Commit said child to any institution in the state, incorporated and maintained for the purpose of caring for such children. * * *"

Section 3646, Code 1935, provides as follows:

"3646. *Mandatory commitments.* If commitment of any child is not made under the foregoing provisions of this chapter, or if made thereunder and the results, in the opinion of the court, are not conducive to the welfare of the child, the court shall proceed as follows:

"1. If the child is neglected, or dependent and not delinquent, it shall be committed either to the soldiers' orphans' home or to the state juvenile home.

"2. If the child is delinquent and under the age of ten years, it shall be committed to the state juvenile home.

"3. If the child is over the age of ten years and, in the opinion of the court or judge is seriously delinquent or so disposed, it shall be committed to the state training school for boys or for girls, as the case may be; but married women, prostitutes, and girls who are pregnant shall not be committed to the training school.

"4. If the child is over the age of ten years and, in the opinion of the court or judge, is not seriously delinquent nor so disposed, it shall be committed to the state juvenile home."

Section 3638, Code 1935, provides:

"3638. *Guardianship and adoption.* In case the court commits said child to the custody of some proper person or institution, such person or institution shall, by virtue of such custody, be the legal guardian of the person of such child and may be made a party to any proceeding for the legal adoption of such child, but any such adoption shall be approved by the court."

Section 3639, Code 1935, provides:

"3639. *Conditions attending commitment.* In any case contemplated by Section 3637, the court may, from time to time, incorporate in its order such conditions and restrictions as it may deem advisable for the welfare of the child, and the jurisdiction of the court over said proceedings and said child shall continue until the child is legally adopted, or until the child is committed to a state institution."

Section 3649, Code 1935, provides in part:

"3649. *Term of commitment—warrant.* * * *

"A warrant of commitment shall consist of a copy of the order of commitment, certified to by the clerk, and shall be in duplicate, one of which shall be delivered to the executive head of the receiving institution and shall constitute sufficient authority to hold in custody the party committed."

These are the pertinent provisions of Chapter 180, supra, relative to the com-

mission of neglected, dependent and delinquent children to the state institutions enumerated in Section 3646, supra. In addition, there is provision made in law for admission on voluntary application to the Iowa Juvenile Home and the Iowa Soldiers' Orphans' Home. (Sections 3600, 3708, and 3709, Code 1935.) Children committed or admitted to either of said state institutions become wards of the state. (Sections 3698 and 3712, Code 1935; *Stephens vs. Treat*, 202 Iowa 1077, 1082.)

We are informed by your office that the following practice has developed: when judicial proceedings to adjudge a child dependent, neglected or delinquent have been commenced in a county and an order of commitment has been entered by the presiding magistrate, a copy of the commitment together with all pertinent facts is transmitted to the Board of Control for its review, and upon the Board's approval of the commitment, the county attorney is notified as is the superintendent of the institution to which commitment has been made. Further, the child in the interim is placed by the court either in a local boarding home or retained in custody by the sheriff, probation officer, or some other suitable person as the court may direct. The actual transportation of the child to the state institution is by a county officer, presumably, in most cases, the sheriff.

Therefore, in answer to your first question, it is the opinion of this department that where an adjudication has been had that a child is in fact neglected, dependent or delinquent, and a commitment to that effect has been entered by the court, but the child has not been delivered into the custody of the superintendent of the institution, the court retains jurisdiction until such time as its order is carried out and it could rescind or annul its order until and up to and including such time as the child is delivered into the custody of the superintendent of the institution to which the child is committed. (1925-26, Report of Attorney General, page 487.) This would appear true notwithstanding the fact that the Board of Control has approved the commitment.

Your second question is in part answered by the foregoing in that if the court retains jurisdiction until its order is carried out, the Board of Control of state institutions, in the case of a child *committed* to one of the state institutions listed in 3696, supra, pursuant to the provisions of Chapter 180, supra, would have no jurisdiction over the child as a ward of the state until such time as the child had been delivered into the custody of the superintendent of the institution. It is stated in *Stephens v. Treat*, supra, that when an adjudication has been had that a child is in fact dependent, neglected or delinquent, the child forthwith becomes a ward of the state, and that the state thence assumes responsibility for the child as its ward. As between state and parent in relation to the child's status this rule no doubt obtains, but how may it be said that the physical control and custody of the child vest in the Board of Control at the very moment the order of commitment is entered when as a matter of fact the Board has no knowledge of the judicial proceedings. According to the accepted practice, the Board is first enlightened at the time a copy of the commitment is transmitted to it; by law it may not be enlightened until the mittimus and child are delivered at the door of the institution. It is accordingly the opinion of this department that the Board of Control has neither jurisdiction over nor responsibility for such child until the child is delivered into the custody of the superintendent of the home to which it is committed.

In the case of a child *admitted* by voluntary application to the juvenile or orphans' home, it is the opinion of this department that the state's wardship or, stated otherwise, its jurisdiction and responsibility, likewise commences at the time the child is delivered into the custody of the superintendent of the home, for it may be said that only at such time is the admittance of the child pursuant to the application of his or her "legal custodian" fully and finally consummated. It is well to bear in mind that here, too, the actual transportation of the child to the institution is in the hands of the county officers.

You inquire further whether or not a child committed or admitted to the named institutions must actually be there received into custody before being placed with third persons under contract.

It is our opinion that they must. This conclusion finds support in the provisions of Sections 3702 and 3716, Code 1935. In reverse order they provide:

"3716. *Placing child under contract.* Any child received in said home, unless adopted, may, under written contract approved by the board, be placed by the superintendent in the custody and care of any proper person or family. Such contract shall provide for the custody, care, education, maintenance, and earnings of the child for a fixed time which shall not extend beyond the age of majority. Such contract shall be signed by the superintendent and by the person taking the child."

"3702. *Adoption or placing under contract.* Children in the juvenile home may be adopted under Chapter 473, or placed with other persons under contract, and repossessed by the board for other disposition, in the same manner and with the same effect as provided in the chapter relating to the soldiers' orphans' home. The provisions of said chapter which prohibits interference with said children while under contract shall also apply to children committed to or received in the juvenile home."

The one provides "any child received in said home," the other, "children in the juvenile home," and the actual duty of placement in each case is enjoined upon the superintendent of the home. Another compelling reason that children should first be received in the home is the practical one that a proper record and case history should there be made and preserved. Such record constitutes a source of evidentiary material in future years,—for the reason that valuable property rights and the determination of issues arising in respect thereto may depend upon the recorded facts surrounding a child's admittance to the home and the subsequent disposition of that child's case. The importance of maintaining complete records cannot be minimized.

STATE BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE: FUNERAL EXPENSES: Funeral services for a person whose old age assistance certificate has been cancelled, even though the notice of cancellation is not received until five days prior to his death, shall not be paid by commission. (Chapter 137, Laws of the 47th General Assembly, amendatory.)

August 4, 1937. *Mrs. E. R. Meredith, Assistant Superintendent, Division of Old Age Assistance:* This department acknowledges receipt of your request for an opinion on the question presented by the following case:

A person was approved for assistance by the Old Age Assistance Commission on May 31, 1935, and payment of assistance to him commenced the following June 1st. In April, 1937 the commission learned of the recipient's admittance to the county home of the county of his residence and accordingly cancelled his assistance certificate on April 22, 1937. Notice of cancellation was not transmitted to him until May 6, 1937, five days subsequent to his death, which occurred on May 1, 1937.

Can funeral expenses as provided by Section 5296-f25, Code 1935, be paid by the division to the person who has furnished funeral services for such decedent?

Section 5296-f25, Code 1935, provides in part 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; * * *."

It should be stated at the outset that by reason of the provisions of Section 5296-f22, Code 1935, assistance payments are in advance. That is, under the stated facts the first payment received by the recipient was presumably June 1, 1935 and for the month of June, 1935. This being the law, we assume that the recipient's assistance certificate, having been cancelled on April 22, 1937, his name was removed from the rolls of those to whom warrants would issue the following May 1, 1937.

Upon the foregoing assumption, and in view of the statutory provision quoted, it is the opinion of this department that the division cannot legally pay funeral expenses to the person who rendered funeral services to the decedent referred to for the reason that the assistance certificate having been cancelled the decedent on the date of his death, namely, May 1, 1937, was neither in fact receiving assistance nor was he entitled to receive assistance by virtue of an outstanding assistance certificate. Since there was nothing in the law at the time the question presented arose which compelled the commission to give notice of cancellation, we are of the opinion that the fact that notice of cancellation was not sent until after death intervened is immaterial.

It may be stated further that the question presented is the converse of one considered by this department under date of April 29, 1937 wherein in an opinion to John F. Porterfield, Commissioner, we held that for the purpose of cited Section 5296-f25 "a person may be said to be receiving assistance from the date the application allowing assistance is approved by the commission," notwithstanding that under the law as it then existed the actual enjoyment of assistance was postponed to the first day of the calendar month following the approval of the application. Here, as in that case, we are of the opinion that the official action taken by the commission, in the one instance the cancellation of the assistance certificate and in the other the approval of the application for assistance, is the determining factor.

Attention is called to the amendatory provision of Senate File 376 (Chapter 137), Acts of the 47th General Assembly, namely, Section 21, wherein it is provided as follows:

"Amend section fifty-two hundred ninety-six-f twenty-five (5296-f25), Code, 1935, by striking from line two (2) the words 'receiving old age assistance,' and inserting in lieu thereof the words 'whose claim has been approved and whose certificate has not been canceled.' * * *"

It is clear under the amended old age assistance law that a like result would be reached as is expressed in this opinion with respect to a similar question arising subsequent to the effective date of Senate File 376 (Chapter 137), to-wit, July 1, 1937.

CURATOR—HISTORICAL DEPARTMENT OF IOWA: RECORDS: VITAL STATISTICS: Curator must charge fees in accordance with schedule set out in Sections 2426, 2427, 2428. Curator shall furnish copies of birth, marriage, etc., certificates free to parents for children to attend school, or for purposes of employment.

August 4, 1937. *Mr. O. E. Klingaman, Curator, Historical, Memorial and Art Department of Iowa:* In your letter of June 24, addressed to this department, you ask for an interpretation of the law relative to the vital statistics which are

deposited in your department by the various other departments of the state. In this connection you ask the following specific questions:

1. "Is my office permitted to charge for searching the records or the registrations of births, deaths, marriages and divorces as is the state registrar under Section 2427?"

2. "I request a ruling as to whether Sections 2427 or 2428 apply to me under Section 4531, or if either one of them applies, indicate in your opinion which one applies."

3. "Further, I request an opinion as to what is meant by securing employment under Section 2428.

"The question arises over two things in my office: Are we required to furnish free certified copies of birth certificates for persons desiring to enlist in the army or in the navy? In other words, is such an enlistment securing employment within the meaning of the law?

"Also, the Junior Legion Baseball League is asking us to furnish certified copies of birth certificates for a large number of boys that they have recruited to play baseball. Am I permitted under the statute to furnish these copies free or shall I make the charge of 50 cents for each one?"

Chapter 114 of the Code of Iowa provides for the filing of certain records with the registrar of vital statistics (The Commissioner of Public Health) and further outlines how these statistics shall be kept and to what uses they may be put. The information that is compiled by the registrar of vital statistics is for public use, however anyone wishing to get information from the registrar of vital statistics must comply with the following provisions of the law:

"2426. *Certified copies.* The state registrar shall, upon request, supply to any applicant for any proper purpose, a certified copy of the record of any birth, death, or marriage registered under the provisions of this chapter, for the making and certifying of which he shall charge a fee of fifty cents."

"2427. *Search of records—fee.* In cases in which search of the files and records is made, but no certified copy is requested, or the requested record is not found, the state registrar shall charge a fee of fifty cents for each hour or fractional part of an hour spent in search."

"2428. *Free certified copies.* Upon request of any parent or guardian, the state registrar shall supply, without charge, a certificate limited to statement as to the date of birth of any child, when the same shall be necessary for admission to school or for the purpose of securing employment."

At the end of the year, such information as has been gathered by the registrar of vital statistics is sent to the State Historical Building. Authority for such transfer is found in sub-section 6 of Section 2393 of the Code, which provides as follows:

"2393. *Duties of state registrar.* The state registrar shall: * * *

"6. Systematically arrange, bind, and deposit in the state historical building at the seat of government, the original certificates of births, deaths, and marriages for the preceding calendar year."

The duties of the curator in respect to these vital statistics that have been deposited with him in the State Historical Building, is outlined in Section 4531 of the Code and this section provides as follows:

"*Certified copies—fees.* Upon request of any person, the curator shall make a certified copy of any document contained in said archives, and when such copy is properly authenticated by him it shall have the same legal effect as though certified by the officer from whose office it was obtained or by the secretary of state. Said curator shall charge and collect for such copies the fees allowed by law to the official in whose office the document originates for such certified copies, and all such fees shall be turned into the state treasury."

From all the foregoing, it is the conclusion of this department that you are not only permitted to charge for searching the records but that it is your duty to so charge and you must charge strictly in accord with the schedule of fees

laid down in Sections 2426, 2427, 2428, as set out above. And these charges are fifty cents for furnishing a certified copy of the information requested (Section 2426). Fifty cents an hour or a fractional part of an hour must be charged for searching the records where no certified copy is requested or where it is impossible to find the information requested (Section 2427). No charge shall be made for furnishing information to a parent or guardian where the information is necessary in order to gain admission to a school or to secure employment (Section 2428).

Your second question is answered in the foregoing since both Sections 2427 and 2428 apply to you.

It evidently was the purpose of the legislature in providing for free information to parents or guardians where such information was necessary to gain admission to a school or to help in securing employment, to do everything in its power to assist parents and guardians in getting children into schools or in securing employment for such children. It must have appeared desirable in the minds of the legislature that enacted Section 2428 of the Code to have children enter schools and to have people secure employment, for in those two instances, they provided that information relative to the birth date of such child should be given free, whereas in all other instances, a definite amount must be charged for such information. In interpreting what constitutes "securing employment" that purpose of the legislature should be borne in mind.

It is practically impossible to lay down a hard and fast definition of what constitutes "securing employment." It would practically be impossible to draw any rule which would be so broad as to fit all cases. It will be necessary for you as curator, in deciding when information shall be granted free, to determine what constitutes securing employment in each individual case, and you will have to use your good judgment in deciding from the facts in each individual case.

It is the opinion of this department that enlistment in the army or navy would come within the broad purpose of the legislature in requiring information to be free in certain instances, since service in the army or navy is certainly employment in the sense that work is performed for hire.

It has come to the notice of this department that the purpose back of the Junior Legion Baseball League, is two-fold:

1. To stimulate interest in the youth of America in the game of baseball.
2. To improve the physical well being of a large number of boys.

It is the conclusion of this department, in view of the purpose for which the Junior Legion Baseball League has been organized and for which it continues to exist, that any information which is required relative to the birth date of any child who wishes to participate in such league, should be granted free of charge.

CITIES AND TOWNS: FIRE MARSHAL: MAINTENANCE FUND: The statute will not permit the funds available under the levies made by virtue of Section 6211 to be used in a campaign for fire prevention work. The use of such funds for that purpose would subject the fire chief and city officers to punishment under the provisions of Section 6230 of the statute.

August 4, 1937. *Mr. J. Vincent Pyle, State Fire Marshal:* This department is in receipt of your request for an opinion upon the following question:

Can a fire chief use the fire maintenance fund in conducting a campaign in fire prevention work?

Under Section 6211 of the statute, cities and towns are given authority to levy special taxes as therein provided, the section being as follows:

"*Taxes for particular purposes.* Any city or town shall have power to levy annually the following special taxes:

* * *

8. *Fire fund.* Not exceeding three-eighths mill, which shall be used only to acquire property for the use of the fire department and to equip the same. No part of the general fund shall be used for equipping the fire department.

9. *Fire department maintenance fund.* Regardless of the form of Government thereof, any city with a population of more than eight thousand, not exceeding three and one-half mills; any city with a population of less than eight thousand, not exceeding one and three-fourths mills; and any town not exceeding three-fourths of one mill. The foregoing levies shall be used only to maintain a fire department, except that any such city with a population under three thousand, and any such town may also use such funds for the purchase of fire equipment."

Section 6230 of the statute provides as follows:

"*Diversion of funds.* Any councilman or officer of a city or town who shall participate in, advise, consent, or allow any tax or assessment levied by such city or town or by other lawful authority for city or town purposes to be diverted to any other purpose than the one for which it was levied and assessed, or who shall in any way become a party to such diversion, shall be guilty of embezzlement."

It will thus be seen by the provisions of Section 6230 of the statute that drastic measures have been taken by the General Assembly to prohibit and prevent the diversion of funds.

The provisions of the statute authorizing the fire fund and the fire department maintenance fund specifically state the purposes for which such fund may be used, subdivision 8 heretofore quoted providing for the fire fund states that such fund "shall be used only to acquire property for the use of the fire department and to equip the same; and subdivision 9 heretofore quoted providing for a fire department maintenance fund states that "the foregoing levies shall be used only to maintain a fire department, except that any such city with a population under three thousand, and any such town may also use such funds for the purchase of fire equipment." It is impossible to read into either subdivision 8 or subdivision 9 of Section 6211, heretofore quoted, any authority on the part of a fire chief to use any of such funds for the purpose of carrying on a campaign in fire prevention work.

It is therefore the opinion of this department that the statute will not permit the funds available under the levies made by virtue of subdivisions 8 and 9 of Section 6211 to be used in a campaign for fire prevention work; that in fact the use of such funds for that purpose would subject the fire chief and city officers to punishment under the provisions of Section 6230 of the statute herein referred to.

TAXATION: HOMESTEAD TAX EXEMPTION: A claimant for homestead tax exemption being the owner of a vacant lot on January 1, 1937 and having subsequent to that date built a house on the lot and occupying it prior to June 1, 1937 would be entitled to the benefits of the homestead tax exemption act to the extent only of the taxable value of the real estate, exclusive of improvements thereon, on his 1937 taxes, as the property was assessed on January 1st as a vacant lot.

August 6, 1937. *State Board of Assessment and Review:* This department is in receipt of your request for an opinion upon the following facts:

A claimant for homestead tax exemption was the owner of a vacant lot on January 1, 1937. Subsequent to the first day of January the applicant built a house upon the lot and was occupying the same as his home before June 1, 1937. Is this applicant entitled to a homestead tax exemption credit on his 1937 taxes?

Under the above facts the applicant is and was the fee simple owner of the lot on January 1, 1937. The property was, however, a vacant lot and in that condition could not be qualified as a homestead. If the owner of said lot is entitled to the benefits of the homestead tax exemption act, it is by reason of the fact that prior to June 1, 1937 he had constructed upon such lot a dwelling house into which he had moved and was occupying as a home. There is no specific provision in the act covering a situation such as we have here to consider. The nearest approach to it is the provision of paragraph (a) subsection 1 of Section 19 of the act which provides as follows:

"except that in the first year of ownership it shall be sufficient if the owner is living in the dwelling house at the time the claim for homestead credit is made, and makes an affidavit of his intention to occupy said dwelling house, in good faith, as a home."

The exception noted in the act does not deal with the manner in which the applicant has secured the property, whether by purchase, contract, gift, or otherwise, but grants to him the benefits of the act during the first year of ownership if he makes the required affidavit.

The purpose of the homestead tax exemption act is to encourage home ownership and to relieve home owners of the burden of taxation. In the instant case the applicant was the owner of the real estate on January 1, 1937. He was really occupying it as a home on June 1, 1937. It would therefore appear that his claim for exemption is entitled to as much merit as one who purchased a house and lot subsequent to the first of January and prior to the first of June and made claim for the exemption under the provisions of the act hereinbefore referred to. It is apparent, however, in the matter under consideration that the real estate was assessed to the owner on January 1st as a vacant lot. The value of the added improvement will not be added to the assessed valuation of the property until after January, 1938. That is, the value of the improvements will not be reflected in the taxable value of the property during the year 1937.

We are of the opinion that the applicant being the owner of the real estate and having constructed his house upon said real estate and occupying the same prior to June 1, 1937 is entitled to the benefits of the homestead tax exemption act to the extent only of the taxable value of the real estate, exclusive of the improvement thereon.

TAXATION: BAND TAX: The City Council of Webster City is authorized to levy a band tax in an amount not to exceed one-half mill, such amount being within that provided by statute and within the amount previously voted by the electors of Webster City.

August 6, 1937. *Mr. George B. Aden, County Attorney, Webster City, Iowa:* This department is in receipt of your request for an opinion upon the following question:

During the year 1933 Webster City submitted at an election the question of whether the city should levy a one mill tax for municipal band purposes. The vote upon the question was favorable and a one mill band tax was levied. The election was had under the statute authorizing a city by vote to levy not to exceed two mills for band purposes. Later the Legislature amended the statute reducing the millage levy which could be made to one-half mill. When the

law was changed, Webster City automatically reduced its levy to one-fourth of a mill, and the one-fourth mill levy has been made for several years. The city now desires to raise the millage levy for band purposes to the maximum of one-half mill. Can such raise be made by the council without again submitting the question at an election?

The provisions for levying a band tax first appeared in the Code of 1924. The law was enacted by the 39th General Assembly. The original enactment was as follows:

"5835. *Levy.* Cities having a population of not over forty thousand and towns may, when authorized as hereinafter provided, levy each year a tax of not to exceed two mills for the purpose of providing a fund for the maintenance or employment of a band for musical purposes."

A subsequent section of the statute provided:

"5836. *Petition.* Said authority shall be initiated by a petition signed by ten per cent of the legal voters of the city or town, as shown by the last regular municipal election. Said petition shall be filed with the council or commission and shall request that the following question be submitted to the voters, to-wit: 'Shall a tax of not exceeding (here insert number) mills be levied each year for the purpose of furnishing a band fund?' "

If the provisions of the statute were complied with in submitting the question to the voters of Webster City in 1933, it may be rightfully assumed that the question in fact submitted to the electors was as follows:

"Shall a tax of not exceeding one mill be levied each year for the purpose of furnishing a band fund?"

That question having carried, the city council was thereby authorized to levy a tax in any amount it deemed necessary for band purposes to the extent of one mill until the statute was changed. The change in the statute was made by Chapter 121 Acts of the 45th General Assembly which became effective by publication on the 30th day of March, 1933. By the change in the statute the millage levy permitted for band purposes was reduced from two mills to one-half mill.

In the facts it is stated that when the General Assembly amended Section 5835 by reducing the permissible millage levy from two mills to one-half mill that the City Council reduced the millage levy of Webster City to one-fourth of a mill. The vote of the electors of Webster City was in favor of levying not to exceed a one mill tax for band purposes. The tax as thus authorized by the vote of the electors was within the law as it appeared at that time. The tax heretofore levied by the City Council of Webster City has at all times been within the limitation placed upon the Council by the General Assembly. As the law now stands the statute permits cities and towns to levy a tax not to exceed one-half mill for band purposes. The vote of the electors authorized the Council to levy not to exceed a one mill tax. The amount of the tax which the Council now desires to levy for band purposes being one-half mill is within that permitted by statute and is within that permitted by a vote of the people of Webster City.

The acts of the General Assembly in Chapter 296 of the 1924 Code providing for the band tax contained a provision for the submission of the question of revoking the authority of the City Council to levy a band tax to the voters. The provision for such revocation has been carried into the 1935 Code without change, the statute thereby giving to the electors the privilege of petitioning for an election to revoke the authority of the Council to levy a band tax under the provisions of the statute. No election seeking a revocation of the Council's

authority to levy a band tax having been had, the authority given in the previous election authorizing the council to make such levy still stands.

It is therefore the opinion of this department that under the facts and circumstances above set out, the Council of Webster City is now authorized to levy a band tax in an amount not to exceed one-half mill, such amount being within that provided by statute and within the amount heretofore voted by the electors of Webster City, Iowa.

TAXATION: TAX SALE DEED: COUNTY TREASURER: SIGNATURE: The county treasurer's seal is not a necessary part of the county treasurer's signature to a tax sale deed.

August 6, 1937. *Mr. B. J. Madigan, County Recorder, Carroll, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Is it necessary for the county treasurer to affix his seal when executing a tax sale deed?

The county treasurer is the grantor in a tax sale deed. The question, therefore, is whether or not the seal of his office is a part of his signature and necessary to the validity of the deed. We do not consider the affixing of the county treasurer's seal to a tax deed as any part of his signature, nor that the same is necessary to give validity to the deed. The only instruments to which the county treasurer is required to affix his seal, so far as we have been able to find, is motor vehicle registration certificates. This provision is contained in Section 5157 of the Code of 1935, and in fact that section of the statute is the only one, so far as we know, which refers to the county treasurer's seal. That section of the statute first appeared in the Code of 1924 and was enacted in connection with the law requiring the registration of motor vehicles in the county treasurer's office.

It is therefore the opinion of this department that the county treasurer's seal is not a necessary part of the county treasurer's signature to a tax sale deed.

BUREAU OF LABOR: RECORDS: MINORS: EMPLOYMENT: Records of Bureau of Labor contemplated by Section 1493 are not of necessity open to public inspection. Employment of child under 14 years of age prohibited in any and all places designated by Section 1526, except in stores or mercantile establishments where fewer than 9 persons are employed.

August 6, 1937. *Honorable Milton Peaco, Labor Commissioner:* We acknowledge the receipt of your request for an opinion of this department upon two questions which are set out below:

1. Is the Bureau of Labor permitted to divulge information received in this department from firms or persons of a nature which is more or less confidential? Reference is made particularly to the reports required to be made under the provisions of Chapter 73 and Chapter 75, 1935 Code.

So far as we can determine, no general statute provides for or restricts the right of inspection of public records. We also are unable to find any definite expression in the decided cases which might be the basis for a general rule upon this subject. Where no statutory enactment is provided, ordinarily the rule of the common law is controlling. At common law a person may inspect public records in which he has an interest, or make copies or memoranda thereof. The nature of this interest is said to be such "as will enable him to maintain or defend an action for which the record will furnish competent evidence or necessary information." See 53 Corpus Juris 43, page 628.

While the above rule is generally accepted in this country as the common law rule, some courts in the United States have declared that under the common law in this country every person is entitled to free access and inspection of public records, strictly speaking, subject to reasonable regulation, irrespective of the motive or interest of the person seeking access to such records.

It further appears that the legislature may properly declare that certain official records or reports be treated as confidential and access thereto denied to the public. Instances of such restriction are to be found in the Iowa statutes, a particular example being the privilege afforded to income tax reports.

In your letter you have referred particularly to Chapter 73 of the 1935 Code, in which the following provisions with reference to reports of accidents to be made to the Labor Commissioner appear. The particular section pertinent to your inquiry is as follows:

"1493. *Report of accidents—evidence.* Within forty-eight hours after the occurrence of an accident, the record of which is required to be kept, a written report thereof shall be forwarded to the commissioner of labor and said commissioner may require further and additional report to be furnished him should the first report be by him deemed insufficient. No statement contained in any such report shall be admissible in any action arising out of the accident therein reported."

The statute in this case provides that no statement contained in any such report made to the Commissioner shall be admissible in any action arising out of the accident therein reported. Such report or record having been by statute made inadmissible as evidence would, under the common law rule first referred to above, not be accessible to the public. We are of the opinion that since this limitation is set out in the statute above quoted, that the Commissioner is warranted in considering such reports as confidential records not subject to the general inspection of the public.

You have referred to reports required under the provisions of Chapter 75, 1935 Code, and you inquire whether or not the reports required by the provisions of that chapter are to be made available and open to inspection to the public. Section 1521, 1935 Code, provides as follows:

"1521. *Reports to bureau.* It shall be the duty of every owner, operator, or manager of every factory, mill, workshop, mine, store, business house, public or private work, or any other establishment where labor is employed, as herein provided, to make to the bureau, upon blanks furnished by the commissioner, such reports and returns as he may require for the purpose of compiling such labor statistics as are contemplated in this chapter; and the owner, operator, or business manager shall make such reports or returns within sixty days from the receipt of blanks furnished by the commissioner, and shall certify under oath to the correctness of the same."

Section 1522 provides as follows:

"1522. *Persons furnishing information.* Any use of the names of individuals, firms, or corporations furnishing the commissioner information required by this chapter for his biennial report, in such manner as to disclose any of their private or personal affairs, is hereby prohibited."

Paragraph (3) of Section 1525 provides as follows:

"1525. *Violations—penalties.* Persons violating any of the provisions of this chapter shall be punished as in this section provided, respectively:

* * *

"3. Any officer or employee of the bureau of labor, or any person making unlawful use of names or information obtained by virtue of his office, shall be fined not exceeding five hundred dollars or imprisoned in the county jail not exceeding one year. * * *"

The language of the above statutes makes it clear, we believe, that the information required to be furnished by the provisions of Section 1521 is of a confidential character, and that the Commissioner not only may, but is required to withhold such information from public inspection.

It is therefore our opinion, in answer to your first question, that the reports contemplated by Section 1493 and by Section 1521 are privileged and that the Commissioner is not required to divulge or make accessible to the public information contained in such records.

Your second question is stated as follows:

Are children under fourteen years of age permitted to work in the establishments mentioned in Section 1526, 1935 Code, where eight persons or fewer are employed?

Section 1526, 1935 Code, provides as follows:

"1526. *Child labor—age limit—exception.* No person under fourteen years of age shall be employed with or without compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in any livery stable, garage, place of amusement, or in the distribution or transmission of merchandise or messages; but nothing in this section shall be construed as prohibiting any child from working in any of the above establishments or occupations when operated by his parents."

It appears that the above section restricts the age limit as of "under fourteen years" and then particularizes the specific places wherein employment of a child within such age limitation is prohibited. The clause "where more than eight persons are employed" modifies the words "store" and "mercantile establishment," the compound subject of the entire clause in which these words appear. It appears that the statute, subject to the exception set out in the section, prohibits the employment of a child under fourteen in any of the designated places of employment without regard to the number of persons employed at such establishments except in the case of stores or mercantile establishments. If the place of employment is a store or mercantile establishment, the inhibitions of the statute do not operate unless more than eight persons are employed at such place of business.

It is therefore our opinion that the employment of a child under fourteen years of age is prohibited in any and all of the places designated by said Section 1526, except that such prohibition does not extend to such employment in stores or mercantile establishments where fewer than nine persons are employed.

TAXATION: POLE LINES: TELEPHONE—TELEGRAPH LINES: BOARD OF ASSESSMENT AND REVIEW: Value per mile of telephone and telegraph line shall be ascertained by dividing the actual cash value as determined by Section 7034 by total miles of line in the state. Total miles of line is determined by adding number of pole miles to number of miles of underground conduits.

August 6, 1937. *Hon. La Mar Foster, Speaker, House of Representatives, West Branch, Iowa:* In your letter of July 2, 1937, you ask for an opinion of this department upon the following question:

"Does Section 7035 mean that in arriving at actual value per mile, the State Board of Assessment and Review shall divide the actual cash value as determined by using Section 7034 by the total miles of underground construction plus total miles of pole line?"

Section 7035 of the Code of Iowa provides as follows:

"7035. *Actual value per mile.* The state board of assessment and review shall ascertain the value per mile of the property of each of said companies within this state by dividing the total value, as above ascertained, by the number of miles of line of such company within the state, and the result shall be deemed and held to be the actual value per mile of line of the property of such company within this state."

It is the conclusion of this department that the value per mile of telephone and telegraph line shall be ascertained by dividing the actual cash value as determined by Section 7034 of the Code by the total miles of line in the state and that the total of miles of line is determined by adding the number of "pole miles" to the number of miles of underground conduits. Underground conduits are substitutes for poles carrying lines and therefore, for the purpose of arriving at value per mile, are to be added to the number of "pole miles."

This conclusion is in accord with an opinion written by this department on March 6, 1929, a copy of which is enclosed.

See also *So. Bell Tel. & Tel. Co. vs. D'Alemherte*, 21 So. 570, 39 Fla. 25; *N. E. Tel. & Tel. Co. vs. Hepburn*, 65 Atl. 747, 72 N. J. Eq. 7, and *Central States Electric Co. vs. Pocahontas County*, 223 N. W. 236. These cases hold that telephone line means "pole line" regardless of the number of wires strung on such poles.

STATE BOARD OF SOCIAL WELFARE: EMERGENCY RELIEF: CHILD WELFARE: SENATE FILE 373: It is the opinion of this department that the State Board of Social Welfare has no power or authority over the administration of emergency relief or aid to dependent children.

August 6, 1937. *State Board of Social Welfare:* This department acknowledges receipt of your request for an opinion on the following questions:

1. Do the provisions of Section 9 of Senate File 373, acts of the Forty-seventh General Assembly, as read alone, serve to empower the state board of social welfare to set up a division of:

a. Emergency relief, and

b. A subdivision of the division of child welfare for aid to dependent children?

2. If such division and subdivision may be set up, should the state board of social welfare take over the work of the corporation now administering social relief, and the appropriation made by Senate File 184 to said corporation, and through the subdivision for aid to dependent children administer the so-called widow pension laws of this state?

While Section 6 of Senate File 373, acts of the Forty-seventh General Assembly, provides that "the state board (of social welfare) shall be vested with the authority to administer * * * emergency relief," Section 9 thereof that "the state board shall create * * * (2) a division of emergency relief," to which end "it shall perform such duties, formulate and make such rules as may be necessary, shall outline such policies, dictate such procedure and delegate such powers as may be necessary to carry out the provisions and purposes of * * * Senate File four hundred fifty-one (451), acts of the Forty-seventh General Assembly," and Section 12 that "the county board (as created by Section 10 of said Senate File) shall be vested with the authority to direct in the county * * * emergency relief * * *," yet proposed coordinating legislation to establish a division of emergency relief in the state board of social welfare and to provide for the administration of public relief in the state of Iowa, as embodied in Senate File 451, never took effect as law.

To the end necessary "to carry out the provisions and purposes of * * *

Senate File 451, acts of the Forty-seventh General Assembly," as provided in Section 6 of Senate File 373, the legislature prescribed that the state board of social welfare should create a division of emergency relief, but since Senate File 451 failed to be enacted into law, it was never one of the powers and duties of the state board to carry out the provisions and purposes of Senate File 451, which prescribed the method of administration of public relief in this state.

The same reasoning applies with like effect to the state board's power and duty to administer aid to dependent children for in that instance Senate File 377, providing for aid to dependent children, was never enacted into law. In a somewhat analogous situation to the foregoing, the supreme court of Wisconsin, in *Garland, et al. vs. Hickey, et al.*, 43 N. W. 832, held that where an act refers to "several acts amendatory" of the act referred to or incorporated, and it appears there are no such amendatory acts, there is nothing to which those acts refer; the court going on to hold that such fact does not impair or render doubtful the application of any of the provisions of the law referred to, which can be made applicable. And so with the instant case, Senate Files 377 and 451 never having been enacted, there is nothing to which the words "to carry out the provisions and purposes of Senate File 377 and Senate File 451, acts of the Forty-seventh General Assembly" can refer.

Further, it must be presumed that the legislature had knowledge of the fact that at a prior date, it had enacted legislation with respect to the administration of emergency relief in the state of Iowa, for it provided in Senate File 184 as follows:

"Section 2. Amend said Section 6943-f63, Code of 1935, by adding the following as paragraph 3:

"'3. On July 1, 1937, and quarterly thereafter, up to and including April 1, 1939, the board shall, from the revenue collected under this chapter, 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 five hundred thousand ($500,000) 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.'"

In other words, there was a clear unequivocal legislative mandate as to the administration of emergency relief, and the legislature having spoken effectively in the one case, and ineffectively in the other, full force and effect must be given its manifest intention.

What the intention of the legislature may have been is further borne out when reference is made to the appropriation act known as Senate File 379, acts of the Forty-seventh General Assembly, wherein it was provided:

"Section 1. There is hereby appropriated out of any funds of the state treasury, not otherwise appropriated * * * the sum of $155,000, or so much thereof as may be necessary to be used in the following manner:

STATE DEPARTMENT OF SOCIAL WELFARE
For salaries, support, maintenance, and miscellaneous purposes....$ 40,000

AID FOR THE NEEDY BLIND
For salaries, support, maintenance, and miscellaneous purposes....$110,000

DIVISION OF CHILD WELFARE

For salaries, support, maintenance, and miscellaneous purposes, the comptroller and the governor are hereby authorized to transfer $5,000 from the funds of the board of control to the child welfare division, a subdivision of the board of social welfare, as provided in Senate File 373, acts of the Forty-seventh General Assembly."

Specific appropriation for the division of old age assistance of the state board of social welfare is found in the provisions of Senate File 184, supra, as follows:

"Section 1. * * *

" 'The board shall set aside and cause to be paid into the Old Age Pension Fund, from time to time as available, the next five million, five hundred thousand dollars ($5,500,000.00) collected each year under the provisions of this chapter.' "

This provision must necessarily be read together with Senate File 374, acts of the Forty-seventh General Assembly, and Chapter 266-F1, Code, 1935, as amended by Senate File 376, acts of the Forty-seventh General Assembly, under well established canons of construction. Chapter 266-F1, supra, at amended Section 5296-f34 provides:

"There is hereby created a fund to be known as the old age pension fund to be administered by the state board and division, * * *."

In view of the foregoing, there can be no question but what the state board of social welfare has the power and duty to administer the appropriations made in Senate File 184 as respects the division of old age assistance, and Senate File 379, as respects the division of child welfare, which has as its subdivisions, aid for the needy blind, and child welfare.

But nowhere do we find any statutory provision prescribing that the Iowa emergency relief administration fund shall be administered by the state board and the Iowa emergency relief administration, and nowhere do we find the functions of the Iowa emergency relief administration incorporated in or coordinated with those of the state board of social welfare.

It is accordingly the opinion of this department that the state board of social welfare has no power or authority to assume jurisdiction over the administration of emergency relief or aid to dependent children, or to administer the appropriation of $500,000.00 quarterly, directed by the legislature to be paid into the Iowa emergency relief administration fund; and that Sections 3641 to 3643, inclusive, Code 1935, relating to "aid to widow in care of child," and for which Senate File 377 was a proposed substitute, remained the statutory law in Iowa to be administered as in those sections provided.

It is further the opinion of this department that the county boards of social welfare have no power or duty with respect to the administration of emergency relief, for it is provided by Section 12 of Senate File 373, acts of the Forty-seventh General Assembly, as follows:

"Duties of the County Board. The county board shall be vested with the authority to direct in the county old age assistance aid to the blind, aid to dependent children and emergency relief, *with only such powers and duties as are prescribed in the laws relating thereto.*"

Since Senate File 451 failed of enactment, it follows that there are no powers and duties prescribed by law relating to emergency relief for such board to perform. Since Senate File 451 failed of enactment, it follows that there are no powers and duties prescribed by law relating to emergency relief for such board to perform.

In view of our opinion as to your first inquiry, it becomes unnecessary for this department to give consideration to the second question presented.

TAXATION: BOARD OF SUPERVISORS: SUSPENSION OF TAXES: WARRANTS (PUBLIC): The Board before suspending taxes must first have the approval of the council of the city or town in which the property is located.
PUBLIC WARRANTS: The treasurer whose duty it is to register said warrants is authorized by statute to sell them at private sale at par if he can secure a lower rate of interest than that provided by statute.

August 6, 1937. *Mr. Harold L. Martin, County Attorney, Sidney, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

Where taxes have been suspended to a person by reason of age or infirmity can any person other than the titleholder to whom the suspension was granted petition for cancellation of the tax previously suspended if the original petitioner is deceased?

The authority for suspending taxes is lodged in the Board of Supervisors by Section 6950 of the statute. This section of the statute authorizes the Board of Supervisors to suspend taxes to persons who by reason of age or infirmity are unable to contribute to the public revenue, the suspension being made in response to a sworn petition therefor and for the current year. The same section of the statute authorizes the Board of Supervisors to cancel and remit such taxes. The Board, before suspending or cancelling taxes must first have the approval of the council of the city or town in which the property is located, or the township trustees of the township in which the property is located.

Section 6951 of the statute authorizes Boards of Supervisors in the exercise of their judgment and discretion to cancel and remit the taxes assessed against the petitioner referred to in Section 6950. However, in the event the taxes have only been suspended during the lifetime of the taxpayer, Section 6952 of the statute provides as follows:

"*Grantee or devisee to pay tax.* In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance to any person other than the surviving spouse or minor child of such infirm person, the taxes, without any accrued penalty, that have been thus suspended shall all become due and payable, with six per cent interest per annum from the date of such suspension, except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old age assistance, and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child."

It will thus be seen that in the event of a sale or devise of the property, if the same passes to other than the spouse or minor child the suspended taxes then become due and payable with six per cent interest, except in the event of a person who has received monthly or quarterly payments of old age assistance. The surviving spouse would be a competent person to ask that suspended taxes against property thus passing to her by deed or inheritance be cancelled.

2. When public warrants are presented to the treasurer for payment and not paid for want of funds such warrants shall be endorsed with the fact that they have been presented and not paid for want of funds with the date of presentation, which endorsement shall be signed by the treasurer after which the warrant shall draw interest as provided by statute unless the treasurer arranges for a sale of the warrants at par at a lower rate of interest than the warrant as originally written would draw under the statute, what procedure is necessary for the treasurer to go through in the sale of said warrant?

State and county warrants draw 5 per cent interest per annum, city, drainage and school warrants draw 6 per cent interest per annum. Under Section 1171-f2 of the statute the treasurer must stamp such warrants "unpaid for the want

of funds," if he is out of funds to pay them and endorse thereon the date of presentation and the rate of interest which the warrant will draw, unless the treasurer arranges for the sale of said warrant at par at a lower rate of interest. The statute is silent as to any particular formula to be pursued by the county treasurer. Inasmuch as the holder of the warrant should have the privilege of taking the interest bearing warrant if he chooses he should be given the first opportunity to take the warrant at an interest rate no greater than the offer of anybody else. There is no provision in the statute for advertising these warrants or for offering them to bidders.

It is therefore the opinion of this department that the treasurer whose duty it is to register said warrants is authorized by statute to sell them at private sale at par if he can secure a lower rate of interest than that provided by statute.

MOTOR VEHICLE FUEL TAX: REFUND OF GASOLINE TAX: GASOLINE TAX: The statute is concise and specific in stating that no tax refund shall be paid to any person on any motor vehicle fuel used in construction or maintenance work which is paid for from public funds.

August 7, 1937. *Mr. Leo J. Wegman, Treasurer of State:* This department is in receipt of your request for an opinion upon the following question:

The United States Government is building a dam in the Mississippi River near Bellevue, Iowa to be constructed by an independent contractor and the cost of the project is to be paid exclusively with Federal funds. Your question is whether or not the State of Iowa should collect motor vehicle tax on motor vehicle fuel to be sold to the contractor by an Iowa dealer to be delivered at Bellevue, and if collected, should a refund be allowed?

This question has heretofore been before this department and an opinion furnished by our predecessor. The opinion of the former attorney general is to the effect that the contractor is entitled to a refund of the motor vehicle fuel tax upon proper application being made therefor to your department. With that conclusion, we are unable to agree. Section 5093-f3 of the statute is as follows:

"*Tax imposed.* A license fee of three cents per gallon or a fraction of a gallon is hereby imposed on the sale or use of all motor vehicle fuel sold or used in this state for any purpose whatsoever, except that no license fee shall be imposed on motor vehicle fuel sold to the United States or any of its instrumentalities or agencies, unless now or hereafter permitted by the constitution and laws of the United States; * * *."

The foregoing statute imposes a license fee or tax of three cents per gallon upon all motor vehicle fuel sold or used in the State. The above statement of the law is the basis for the imposition of the fee or the tax. The exceptions mentioned in the foregoing statute are such as relieve motor vehicle fuel sold or used in the State of Iowa from the tax, and in order to entitle one claiming an exemption from the tax on one of the conditions mentioned in the above exception the conditions must be established to the satisfaction of the State Treasurer whose duty it is to collect the tax.

Under the facts submitted in the question, it will be observed that the work to be performed is to be done by an independent contractor, not by the United States Government, or any of its instrumentalities, but by one who has entered into a contract to construct a dam for a stipulated sum. The price to be paid is fixed by contract, and beyond determining that the work progresses in accordance with the terms of the contract and the payment of the contract price, the Government is not concerned. The further provisions of the statute, Section 5093-f4 is as follows:

"*Passing on the tax.* Said tax shall be paid to the state by the distributor, or other person who first receives said motor vehicle fuel in this state, * * * and such distributor or other person having paid said tax or being liable for the payment thereof, shall collect the amount thereof from any person to whom said motor vehicle fuel is sold in this state as a part of the selling price thereof. * * *"

Section 5093-f29 of the statute provides for a refund of the motor vehicle fuel tax paid by any user or consumer thereof upon certain terms and conditions set out in the section. In the instant case the contractor has purchased the motor vehicle fuel from an Iowa dealer, and the same has been delivered to him at Bellevue in the State of Iowa. Upon the purchase of this motor vehicle fuel the contractor has paid to the distributor the motor vehicle fuel tax imposed by the statutes of Iowa. Having so paid the motor vehicle fuel tax, he now asks that a refund thereof be made by the State Treasurer. Therefore in order to secure such refund said contractor must bring himself within the provisions of the section of the statute entitling him to such refund, this for the reason that we are not satisfied that an independent contractor, although operating under a contract with the Government, is relieved from the payment of the tax in the first instance. Section 5093-f29 of the statute with reference to the refund sets out and specifies certain conditions under which motor vehicle fuel tax may be refunded. That is, it specifies and enumerates certain uses of the motor vehicle fuel tax which entitles the purchaser to refunds of the tax, but after so specifying those uses, the statute makes the further specific, definite statement:

"No tax refund shall be paid to any person, firm, or corporation on any motor vehicle fuel used in any construction or maintenance work which is paid for from public funds."

In the recent case of *Trinityfarm Construction Company vs. Alice Lee Grosjean*, 291 U. S. 466, a question similar to the one under consideration was before the United States Supreme Court. In that case the Trinityfarm Construction Company had contracted with the United States for the construcion of levees in Louisiana to control the waters of the Mississippi River. It consumed much gasoline in the operation of the machinery employed to do the work. The defendant Grosjean sought to collect a tax or excise of five cents per gallon imposed by the statutes of Louisiana upon the gasoline used by the construction company. The construction company sought to enjoin the collection of the tax on the grounds that the contracts between the company and the Government were Federal means or instrumentalities and that the State was without authority to impose a burden upon them in the form of a tax or excise and on that basis sought to invoke the rule that, consistently with the Federal Consitution, a State may not tax the operations of an instrument employed by the government of the Union to carry its powers into operation. The United States Supreme Court in an opinion by Mr. Justice Butler stated:

"The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi River and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor. * * * The appellant is an inde-

pendent contractor. * * * Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct."

The main distinction between the Louisiana statute imposing the motor vehicle fuel tax and the Iowa statute imposing the motor vehicle fuel tax is in the method of collection. The opinion of our predecessor was based upon a distinction between the Louisiana statute and the Iowa statute, which we do not recognize, and upon the further grounds that the Iowa statute "prohibits tax refunds where the motor vehicle fuel was used in any construction or maintenance work paid for from the public funds of the State of Iowa." The construction placed upon the statute in the former opinion requires one to read into the statute something that does not exist. There must be added to the statute something which the Legislature did not put there. In the former opinion, and in that portion hereinbefore quoted, there has been added to the statute the following: "of the State of Iowa." The statute is concise and specific in stating that no tax refund shall be paid to any person on any motor vehicle fuel used in construction or maintenance work which is paid for from public funds.

Therefore, unless we are to interpret the words "public funds" as used in the statute to exclude Federal funds the inhibition upon the refund is conclusive. No hard or fast definition of the words "public funds" is to be found either in text books or decided cases. A definition of public fund with which we are satisfied and which we think is justified is "one raised by general taxes, customs, duties, or excise imposed upon all property and all people in general." All government funds are realized from general contribution by the people at large or by the property in general, and must, in our opinion, be classed and included in the term "public fund."

It is therefore the opinion of this department that the construction company is not entitled to a refund.

STATE BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE: DELEGATION OF AUTHORITY TO EXECUTE RELEASES: SELL, LEASE OR TRANSFER PROPERTY: ACTS OF A MINISTERIAL NATURE: State Board cannot delegate to the Superintendent of OAA or some other person in the Division the authority to execute releases or to sell, lease or transfer property—these should be executed by Chairman of Board, and Secretary. Acts of a ministerial nature as enumerated may be delegated to Superintendent of OAA or some other person in said division.

August 7, 1937. *Mr. Warren F. Miller, Chairman, State Board of Social Welfare:* Under letter of July 17th you have requested an opinion upon the following proposition:

"Can the State Board of Social Welfare delegate to the Superintendent of the Old Age Assistance Division or some other person in such Division authority to release liens upon the property of a recipient of Old Age Assistance and to sell or lease or transfer property of an applicant or recipient which has been deeded to the State as provided in Section 22 of Chapter 266-F1 of the 1935 Code of Iowa as amended by Senate File 376 and Senate File 2, Acts of the 47th General Assembly?

"Can the Board of Social Welfare delegate to the Superintendent of the Old Age Assistance Division or some other person in such Division the authority to do the following acts: to execute and file claims against the estate of a recipient; to petition for letters of administration on the estate of a recipient; to reassign the property of a pensioner upon his payment of benefits received; to accept property deeded by an applicant to the State to be held in trust; to execute a priority waiver of Old Age Assistance liens?"

In enacting Senate File 373 the Legislature invested the State Board of Social Welfare with certain powers and delegated to them certain duties.

Among the powers and duties delegated to the State Board are the following as contained in Section 22 of Chapter 266-F1 of the 1935 Code of Iowa, as amended by Senate File 376 and Senate File 2, Acts of the 47th General Assembly:

"The State Board shall release liens, * * * The State Board shall have power to sell, lease, or transfer such property * * *."

It is a general rule of law that an agency or board or commission which has been given or delegated certain duties cannot delegate or entrust the performance of such duties to another, if they involve the exercise of judgment or discretion. Only acts of a purely administrative or ministerial nature may be so delegated. This general rule is stated in 59 Corpus Juris, paragraph 125, page 113:

"The official acts of state officers must be performed personally except when otherwise allowed by law, and they may not delegate their discretion, although it is permissible to employ technical experts, and purely ministerial acts may be delegated."

The release of liens and the sale, lease, or transfer of property as contemplated and provided in Section 22 of Chapter 266-F1 of the 1935 Code of Iowa, as amended by Senate File 376 and Senate File 2, Acts of the 47th General Assembly, would seem to demand and require an exercise of discretion and judgment. In other words, such acts are not of a purely ministerial or administrative nature.

It is, therefore, the opinion of this department that the State Board of Social Welfare cannot delegate to the Superintendent of the Old Age Assistance Division or some other person in such division the authority to execute releases or to sell, lease, or transfer property. These instruments should be signed and executed by the Chairman of the State Board of Social Welfare and its Secretary.

It is the further opinion of this department that the execution and filing of claims, the execution and filing of a petition for Letters of Administration, the re-assignment of the property of a pensioner upon his payment of benefits received, the acceptance of property deeded by an applicant to the State to be held in trust; the execution of priority waivers of Old Age Assistance liens, and acts of a similar nature, are acts of a ministerial nature, and that the State Board of Social Welfare may delegate these acts and functions to the Superintendent of the Old Age Assistance Division or some other person in said division.

HOMESTEAD TAX EXEMPTION: One of the requirements of the homestead tax exemption act is that the person making application must be the owner in fee simple, or a surviving spouse. In the instant case the property is owned by a corporation and therefore would not be entitled to the benefits of the act. A homestead destroyed by fire, necessitating the owner to find another dwelling place until he could rebuild, the owner thereof would not be deprived of the benefits of the homestead tax exemption.

August 7, 1937. *Mr. Robert K. Brannon, County Attorney, Denison, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

A Mr. Meehan died intestate owning several tracts of land. The surviving spouse and children organized a corporation and conveyed the land to the corporation, dividing the stock in the corporation among themselves according to their interest in the estate. All of them live on land now owned by the corporation. Are any of them entitled to the benefit of the homestead tax exemption act?

One of the requirements of the homestead tax exemption act is that the person who makes the application must be the owner in fee simple, or the surviving spouse of the previous owner, or occupying under a contract of purchase, or occupying under devise, or by operation of the inheritance laws, or under a deed which conveys a divided interest where the other interests are owned by blood relatives. Under the facts stated, neither the surviving spouse nor children of the decedent come within the definition of the word "owner." A corporation is a separate entity and is separate and distinct from its stockholders. In the facts submitted, it appears that this land is now owned by a corporation. The benefits of the homestead tax exemption act are only granted to those persons who bring themselves within the provisions of the act. Under subsection 1 of Section 19 it is provided:

"The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under the act actually lives six (6) months or more in the year, * * *."

While a corporation has a principal place of business it cannot be said that the corporation lives there, and as a matter of fact and of law, a corporation does not live but simply exists.

Under the facts submitted in the foregoing question, those now claiming the benefit of the homestead tax exemption are not the owners of the property upon which they claim such exemption. They are not therefore entitled to the benefits of the act.

2. A family lived upon a farm and occupied the dwelling house thereon as their home. During the latter part of 1936 the dwelling house burned. The husband put a bed and stove in one of the outbuildings and has slept there quite frequently during the winter. The family moved to a temporary home off of the land. Under the circumstances, is the party entitled to the benefit of the homestead tax exemption act?

We are assuming that this applicant is the owner of the land upon which he has resided, as the word is defined in the homestead tax exemption act; that he and his family had occupied a dwelling upon the land until the dwelling house was destroyed by fire. Subsection (f) of Section 19 of the act is as follows:

"The words, 'dwelling house' shall embrace any building occupied wholly or in part by the claimant as a home."

The foregoing provision of the act would entitle the claimant to qualify under the facts stated, that is, that he had put up a bed and a stove in an outbuilding and had occupied the same during the winter if it were not for the fact that the claimant's family has moved to another home. A question might arise therefore, which one of the habitations was really in truth and in fact the home of the applicant. However, it would appear from the facts that the property in question was, previous to the fire, qualified as a homestead owned and occupied by the applicant. The house having burned has made it necessary

that the owner secure temporary shelter for his family at another place. This fact does not deprive him of the benefits of the homestead tax exemption act.

It is therefore the opinion of this department that the applicant is entitled to the benefits of the act.

PODIATRIST: CAST: The making of a plaster of paris cast is not an act of examination, diagnosis or treatment medically or surgically of the human foot, and individual so doing would not be required to have a podiatrist's license.

August 9, 1937. *Cecil L. Moon, D. S. C., Secretary, Board of Podiatry Examiners, Marshalltown, Iowa:* We acknowledge receipt of your request for the opinion of this department upon a statement of facts summarized as follows:

An individual without a podiatrist's license takes a cast of a foot for the purpose of fitting a shoe, arch support or bunion appliance. In all cases the diagnosis is made by the customer, and the shoe, arch support or appliance is fitted by the customer. The cast would be made by taking an impression of the foot or toe with the usual plaster of paris technique by said individual.
Would this be an infringement of the podiatry law?

House File No. 388, relating to the practice of podiatry, which became effective July 4, 1937, repealed Chapter 117, and was enacted in lieu thereof. Pertinent sections of House File No. 388, applicable to your inquiry, are as follows:

"Section 2. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of podiatry:
"(a) Persons who publicly profess to be podiatrists or who publicly profess to assume the duties incident to the practice of podiatry.
"(b) A podiatrist is one who examines or diagnoses or treats ailments of the human foot medically or surgically.
"Section 3. This act shall not apply to the following: * * *
"(c) Nothing herein shall affect or alter the existing right now held by retailers, manufacturers or others to sell corrective shoes, arch supports, drugs or medicines for use on feet."

It appears that the above provisions except from the operation of the podiatry laws the right of individuals to sell corrective shoes and arch supports. Under the statement of facts submitted by you, it appears that the individual does not undertake to examine, diagnose or treat ailments of the human foot unless it may be said that the taking of the cast of the foot might constitute such examination, diagnosis or treatment. In our opinion, the making of such a plaster of paris cast could not in itself be considered an act of examination, diagnosis or treatment medically or surgically of the human foot.

It would appear to be a mechanical practice which is incident to the right of a person to sell corrective shoes or arch supports.

LIBRARY: BEQUEST: Board of Library Directors may direct city treasurer to invest funds of a bequest and use interest accumulated to purchase books.

August 9, 1937. *Miss Julia Robinson, Executive Secretary, State Library Commission:* We acknowledge receipt of your request for the opinion of this department upon the following statement of facts:

A library has received a bequest "for the purchase of books" and the trustees wish to invest and use only the interest each year for the purchase of books. The library would be much more efficient if it could have $20.00 in new books once or twice a year rather than $200.00 in books purchased at one time.
May we have a ruling as to the authority of the board to make the purchases over a period of time and to invest the proceeds of the bequest?

It is assumed that the library in question is a public library such as it contemplated by the provisions of Chapter 299, 1935 Code. Section 5850, contained

in the above chapter, authorizes cities and towns to accept bequests for library purposes and provides as follows:

"*Donations.* They may receive, hold, and dispose of all gifts, donations, devises, and bequests that may be made to them for the purpose of establishing, increasing, or improving any library; and when the conditions thereof have been accepted by the city, their performance may be enforced by the library board by an action of mandamus against the council or by other proper action. The council may apply the profits accruing therefrom to best promote the prosperity and utility of the library."

It is provided by the said chapter that there shall be a board of library trustees in any city or town in which a free public library has been established. Broad powers of control and management are conferred upon the board of library trustees by the provisions of Section 5858, 1935 Code, among which are the following:

"5. to select and make purchases of books, pamphlets, magazines, periodicals, papers, maps, journals, furniture, fixtures, stationery, and supplies for such library.

"8. To have exclusive control of the expenditures of all taxes levied for library purposes as provided by law, and of the expenditure of all moneys available by gift or otherwise for the erection of library buildings, and of all other moneys belonging to the library fund."

The statute thus confers upon such boards of trustees exclusive control of all moneys belonging to the library fund. The first paragraph of Section 5865, 1935 Code, provides for the manner of deposit and disbursement of library funds:

"*Fund—treasurer.* All moneys received and set apart for the maintenance of such library shall be deposited in the treasury of such city or town to the credit of the library fund, and shall be kept by the treasurer separate and apart from all other moneys, and paid out upon the orders of the board of trustees, signed by its president and secretary. * * *"

It is our conclusion, in view of the foregoing, that a board of library trustees is not required to spend immediately and wholly the proceeds of a bequest made to a library "for the purchase of books." It is our opinion that such a fund may be expended for books over a period of time in a manner which the board deems advantageous for the purposes of the library.

It is suggested in your letter that the trustees desire to invest the principal of said bequest and use the accruing interest for the purchase of books. The broad powers conferred upon boards of library trustees by virtue of Section (8) of 5858, above quoted, include the exclusive control of "other moneys belonging to the library fund." Section 12775-b1, 1935 Code, provides as follows:

"12775-b1. *Nonactive funds.* The governing council or board who by law are authorized to direct the depositing of funds shall be authorized to direct the treasurer to invest any fund not an active fund needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest of which is used for the same purpose, in the certificates provided by Section 7420-b3, or in United States government bonds, or in local certificates or warrants issued by any municipality or school district within the county, or in municipal bonds which constitute a general liability, and the treasurer when so directed shall so invest such fund."

Under the facts set out in your letter, it would appear that the bequest may properly be considered a non-active fund in the nature of a sinking fund, the purpose of which is to provide for the replacement of books. Under these circumstances it would appear that the board might properly direct the city treasurer to invest such fund in the securities designated in the above mentioned section. As the interest accumulates from such investment, the board could,

from time to time, expend the proceeds of such interest accumulation by drawing the order upon the treasurer provided for by Section 5865.

HIGHWAYS: COUNTY ROAD: CONSTRUCTION: BOARD OF SUPERVISORS: No legal duty on county to build bridge on local county road unless it is a bridge over a drainage ditch. Discretionary with board of supervisors. Section 4644-c1; Senate File 464, Acts 47th General Assembly.

August 9, 1937. *Mr. Carl Nystrom, County Attorney, Decorah, Iowa:* In response to your letter requesting the opinion of this department as to whether or not the expense of replacing an unsafe bridge on a local county road can be paid for out of the 65 per cent of the secondary road construction fund pledged under Section 4644-c10 of the Code, will say:

In Section 4644-c1 the duty to construct, repair and maintain the secondary road and bridge systems is imposed on the board of supervisors; Section 4644-c2 defines the secondary road system, and Section 4644-c3 defines the secondary bridge system. But when the legislature came to providing the road fund it seems to have combined all of the secondary road funds, both bridge and general construction funds, in one fund. Then the legislature provided in Section 4644-c9 that 35 per cent be pledged to the improvement of local county roads, and in Section 4644-c10 the balance, or 65 per cent, is pledged for seven specific purposes as follows:

"The balance of said secondary road construction fund shall be used for any or all of the following purposes at the option of the board of supervisors to:

"1. The payment of the cost of constructing the roads embraced in the existing county trunk road system.

"2. The payment of the outstanding county road bonds of the county authorized and issued under Chapter 242, to the extent heretofore pledged.

"3. The payment of legally outstanding bridge or road bonds of the county (not including primary road bonds), when construction work on the county trunk system of the county is complete.

"4. The discharge of any legal obligation or contract which, under the provisions of this chapter, is required to be taken over and assumed by the county.

"5. The payment of all or any part of special drainage assessments which may have been, or may hereafter be, levied on account of benefits to secondary roads.

"6. The payment of the cost of constructing local county roads and expenditures pertaining thereto, but only when the construction work on the county trunk roads has been fully completed, and when the board deems it inadvisable to make additions to said trunk roads.

"7. The payment of county road bonds authorized under Chapter 242, Code of 1927, or 1924, prior to July 4, 1929."

The fourth subdivision is the only one that might apply to your situation. The sixth subdivision might apply if it were not for the fact, as stated by you, that the trunk system has not been completed. Under the fourth subdivision the question is whether or not there is a legal obligation on the part of the county to build a bridge. If the bridge happens to be over a levee, ditch, drain or change of natural water course, then the bridge can be paid for out of either the 65 per cent fund or the 35 per cent fund. It is so provided by Section 7539 of the Code which reads as follows:

"When such levee, ditch, drain, or change of any natural watercourse crosses a public highway, necessitating moving or building or rebuilding any secondary road bridge, the board of supervisors shall move, build, or rebuild the same, paying the costs and expenses thereof from either or both of the secondary road funds.

"If the bridge be a primary road bridge, the work aforesaid shall be done by

the state highway commission, and paid for out of the primary road fund." (But see Amendment hereafter referred to.)

That section appears to be mandatory and it was so construed by the Supreme Court in the case of *Robinson vs. the Board of Supervisors of Davis County*, 269 N. W. 921. In that case the Supreme Court held that a writ of mandamus should be issued requiring the board of supervisors to build a bridge over a drainage ditch. It was contended that, under Code Sections 4644-c24 to 4644-c34, the board of approval controlled the funds pertaining to the local county road, but the court called attention to the fact that Section 7639 provides that a bridge over a drainage ditch shall be paid for by the board of supervisors from either or both of these secondary road funds and the court goes on to say:

"The evident purpose of the Sections 4644-c24 to 4644-c34 is that in the expenditure of the secondary road construction fund the discretion as to the manner thereof shall be exercised not alone by the board, but in part by the board in conjunction with the representatives of the townships. But these sections have reference to expenditures, the making of which is discretionary and are without application to an expenditure from those funds that the legislature has made mandatory and has placed beyond the discretion of either the board of supervisors or the board of approval as to whether the expenditure be made."

But the 47th General Assembly passed an act, being Senate File 464 which amended Section 7539 making it discretionary with the board of supervisors whether or not it will build a bridge over a drainage ditch. In other words, the Legislature removed the mandatory provisions of said action and made it a discretionary matter. So we have this situation: if the bridge is over a drainage ditch, the board can pay for it out of the 65 per cent fund or the 35 per cent fund or from both. Prior to the amendment passed by the 47th General Assembly, in view of this Section 7539 and in view of the language of Section 4644-c1, much could be said in support of the argument that under the law as it stood the board of supervisors could be compelled to rebuild any bridge that had been destroyed. But aside from the case of *Robinson vs. the Board of Supervisors*, it seems to have been the uniform holding of our Supreme Court that the matter of building a bridge is discretionary with the board of supervisors. There is an extended discussion of the authorities in *McCarl vs. Clarke County*, 148 N. W. 1015, 167 Iowa, p. 14. In the course of the opinion in that case the court referred to Section 422 of the then Code of 1897 and said, "The power to build or repair is conferred, but the statute goes no further. The duty to build, or rebuild, or repair is, or was not then, enjoined upon the board. Whether the law, as changed since the trial of this case, does so, we do not determine." So far as we can find the court has never passed upon the question whether the law as changed has made the building or rebuilding of bridges mandatory. Section 422 of the Code of 1897 so far as concerns bridges has been eliminated. It is not a part of the present law defining the duties of the board of supervisors. The power to build the bridge and the duty to build a bridge, if there is a duty, is conferred by Section 4644-c1. But the latest expression of legislative intent is the action of the 47th General Assembly in passing the amendment to Section 7539 above referred to. We think that this clearly evidences the thought of the Legislature that the law does not require the board of supervisors to build any particular bridge but leaves it discretionary with it, just as it was before the enactment of the present road law. Such being the case and there being no legal duty resting upon the county to build the bridge, it cannot be paid for out of the 65 per cent reserved for construction of the

county trunk roads unless it happens to be a bridge over a drainage ditch, in which case it can be built out of the 65 per cent or the 35 per cent or both, pursuant to statute. It may be said that there is not much reason in support of the proposition that a bridge over a drainage ditch on a local road can be paid for out of either or both of these funds and that a bridge over a natural water course must be paid for out of the 35 per cent. But however that may be, the answer to your proposition is determined, we think, by the answer to the question whether or not there is a legal duty on the part of the county to build the bridge, and as stated, we are of the opinion that no such legal duty exists. Therefore, it is the opinion of this department that unless the bridge in question is over a drainage ditch, the cost of rebuilding must be paid out of the 35 per cent fund.

BEER: FIXTURES: WHOLESALERS: Wholesalers forbidden to furnish fixtures, furniture, or equipment to class "B" permittees, Section 1921-f115. Those enaged in such practice are amenable to the law.

August 9, 1937. *Mr. Carl A. Burkman, County Attorney, Des Moines, Iowa:* We acknowledge receipt of your request for the opinion of this department as to the interpretation to be given Section 1921-f101, 1935 Code, relating to prohibited interest with respect to holders of beer permits. In this connection you set out an excerpt from a letter received by you which furnishes a background for your request. It follows:

"It is stated that certain wholesalers are furnishing fixtures, furniture and equipment to Class 'B' operators; that they are loaning money to said operators; that they are placing refrigeration equipment in taverns and then charging the tavern owner an additional fee over and above that required for the purchase of beer for the use of equipment so furnished. It is further stated that many devices are being invoked by the distributor to place the Class 'B' operator where he is under direct obligation to the distributor. It is alleged that said position places the tavern keeper where he is not an independent merchant, but virtually becomes the employee and servant of the wholesaler and must abide by said wholesaler's wishes and desires."

Section 1921-f101, 1935 Code, provides as follows:

"*Prohibited interest.* It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of permit."

In our opinion it is questionable whether the above section is applicable to all of the practices set out in the above quoted statement, for the reason that the prohibition contained in said section goes to the interest in the permit as such, rather than to the place of business and the method of the conduct thereof. We are of the opinion, however, that the law, as set out in Section 1921-f115, expressly forbids such practices as are outlined above. Section 1921-f115, 1935 Code, provides as follows:

"*Brewers, etc.—prohibited interest.* No person engaged in the business of manufacturing, bottling or wholesaling beer nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving or dispensing of beer or food within the place of business of another permittee authorized under the provisions of this chapter to sell beer at retail; nor shall he directly or indirectly pay for any such permit, nor directly or indirectly be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter."

It is our opinion that both the wholesaler and retailer who may be parties to such transactions thereby violate the provisions of Chapter 93-F2. Such violation would subject a permittee to the provisions of Section 1921-f123 which provides for revocation of permits. Also, such violator, upon conviction, would be subject to the penalties of violation of said chapter, provided by Section 1921-f127 thereof.

BOARD OF SUPERVISORS: OFFICIAL NEWSPAPERS: It is the opinion of this department that the Cedar Falls News remains and is one of the three official newspapers of Black Hawk County, and that the Board of Supervisors should cause the record in the auditor's office to show same.

August 9, 1937. *Mr. Paul L. Kildee, Assistant County Attorney, Waterloo, Iowa:* This department acknowledges receipt of your request for an opinion on the question contained in your statement of facts which is substantially as follows:

Our board of supervisors had four applications for county printing during the January, 1937, session. A complete check of the subscription list of each of the four applicants was made by a committee composed of four members of the board and myself. We found that the Waterloo Daily Courier, the Cedar Falls Daily News and the La Porte City Progress Review were qualified under the law, and these papers were declared by the board to be the official newspapers.

Within the last week, the Cedar Falls Daily News has reduced its publication from daily to weekly. The name has been changed from the Cedar Falls Daily News to the Cedar Falls News. Under the law the paper must have been in existence a year. A question now arises as to whether or not this paper is a new paper in the sense that it must have been in existence for the specified time and in view of the fact that the record in the auditor's office now shows the Cedar Falls Daily News to be one of the official newspapers, the board of supervisors is desirous of determining what action it should take.

Since you state that "under the law the paper must have been in existence a year," we see fit to first point out the distinction between the requirements of the law relating to "official newspapers," and those pertaining to the "publication of notices." Chapter 274, Code, 1935, governs the former; Chapter 490, Code, 1935, the latter. It is provided as follows in the first of said chapters:

"5397. *Time of selection.* The board of supervisors shall, at the January session each year, select the newspapers in which the official proceedings shall be published for the ensuing year.

"5398. *Source of selection.* Such selection shall be from newspapers published, and having the largest number of bona fide yearly subscribers, within the county. When counties having a population of more than fifty thousand are divided into two divisions for district court purposes, each division shall be regarded as a county."

and in the latter:

"11099-e1. *'Newspaper' defined.* For the purpose of publishing and giving assured circulation of legal notices within this state, where newspapers are required to be used, newspapers of general circulation that have been established and published regularly for a period of more than one year, and which have a bona fide paid circulation recognized by the postal laws of the United States, shall be designated for publication of legal notices as required by law."

"11102. *Selection by county officers.* The clerk of the district court, sheriff, auditor, treasurer, and recorder shall designate the newspapers in which the notices pertaining to their respective offices shall be published and the board of supervisors shall designate the newspapers in which all other county notices and proceedings, not required to be published in the official county newspapers, shall be published."

Section 5411, Code, 1935, prescribes what shall be published in official news-

papers at the expense of the county, which, as enumerated therein, includes the publishing of board proceedings, the schedule of bills allowed by the board, and the reports of the county treasurer. Nowhere is there mentioned the publication of "legal notices." Section 11102, supra, on the other hand, provides that "the board of supervisors shall designate the newspapers in which all other county notices and proceedings, *not required to be published in the official county newspapers*, shall be published." It is discretionary then with the county board of supervisors to designate any newspaper meeting the qualifications set up in Section 11099-e1, supra, wherein matters not required to be published in an official newspaper may be published. Its designation may or may not be an "official newspaper." Or, in other words, it is the opinion of this department that the "one year" requirement contained in Section 11099-e1, supra, is not a prerequisite to qualifying as an official newspaper for the purposes of Chapter 274, supra. That requirement pertains only to the publication of notices as contemplated by Chapter 490, supra. See 1934 *Report of the Attorney General* 437, et seq.

This brings us to a consideration of your specific inquiry as to whether or not the July, 1937, transformation of the Cedar Falls Daily News to the Cedar Falls News,—from a daily to a weekly—renders inoperative the January, 1937, action of the Black Hawk County board of supervisors, designating the Cedar Falls Daily News an "official newspaper" in and for Black Hawk County, so that the publication therein of the matters enumerated in Section 5411, supra, since July, 1937, would not be effective on the ground that the Cedar Falls News is not an "official newspaper." If it does, then Black Hawk County since that date has had but two official newspapers, whereas the law requires three in that county (Section 5399, Code, 1935) and publication must be had in *each* official newspaper of the county. Section 5411, supra. It is stated in *46 Corpus Juris 30*, paragraph 34, as follows:

"4. *Effect of change of name.* The mere change of name does not destroy the identity of a newspaper. And so long as the identity of the newspaper remains unchanged, a change of name between the time of designation and the time of publication does not render the publication invalid."

The decisions collated by the editor are not numerous and furthermore while none are directly in point, yet reference to them does shed some light upon the attitude of the courts that have considered the question of what is necessary to constitute a change in the identity of a newspaper designated as an official publication.

The case of *Sage vs. Central Railroad Company* (1878—Iowa), 99 U. S. 334, 25 L. ed. 394, was one wherein objection was made that the decree and order required notice of sale to be advertised in a New York newspaper called the "Financier"; that the master did not advertise the sale in that newspaper, nor report his inability to find any such newspaper, and therefore the order of court was not complied with. It was represented and made to appear to the circuit judge, however, that the "Financier" had been merged with the "Public" or that its name had been changed to the "Public" and the court did in fact order notice of sale to be inserted in the "Public." The sale was thus accordingly advertised. The court in its opinion, at page 347 of 99 U. S., said:

"Now, whether the judge had authority to make such an order in a recess of the court, it is not worth the while to inquire, for if he had not, advertisement in the 'Public' was a substantial compliance with the original order. If the name of 'Financier' was merely changed, the identity of the newspaper

remained, and the order was to advertise in that newspaper. And so if the 'Financier' was merged into the 'Public,' its subscribers and readers, to whom the advertisement was addressed and required to be addressed, were reached by it, as they would have been had there been no merger or change of name. The purpose of the order to advertise in that newspaper was publicity, and to reach those persons who saw the paper. That purpose was not defeated by a change of name or a union with another newspaper. This objection, therefore, is formal rather than substantial."

In *Knight, et al. vs. Alexander* (1888—Minnesota), 37 N. W. 796, a tax judgment through which the defendants' asserted title was derived, was based upon a publication of a delinquent list in a newspaper in McLeod County, Minnesota, which, at the time of publication appeared under the name of "Glencoe Enterprise." As to the objection that it had not been properly designated by the county commissioners as an official publication, the supreme court of Minnesota said, quoting from its opinion at page 796 of 37 N. W.:

"This newspaper had previously been called the 'McLeod County Enterprise,' but the name had been changed as above indicated. In common speech it was spoken of as the 'Enterprise.' It was the only paper published in the county bearing that name. Only one other newspaper was published in the county. That was published under the name 'Glencoe Register.' It is claimed that the county commissioners had not sufficiently designated this newspaper for the publication of the delinquent list, because in their resolution they merely named the 'Enterprise.' We think that this designation was sufficient, in view of the facts that the publication was required to be made in a newspaper published in that county, (if any paper was published there, such as the statute specifies,) and that there was no other paper in the county bearing that name."

The same court, in 1891, in *Reimer, et al. vs. Newall*, 49 N. W. 865, at page 866, said:

"After the 'Daily Minnesota Tribune' was designated, but before the delinquent list was published, that paper changed its name to the 'Minneapolis Daily Tribune' and at the same time got what in the parlance of printers is called 'a new dress,'—that is, a new outfit of type,—but, as the court finds, no other change was made in the paper, and the 'Minneapolis Daily Tribune' was the same paper as the 'Daily Minnesota Tribune' mentioned in the resolution referred to, and as the undisputed evidence shows, it was published at the same place and sent out to the same subscribers to fill their subscriptions. Notwithstanding the change of name, the evidence abundantly justified the finding of the court that the newspaper in which the delinquent list was published was the identical one designated in the resolution of the county board. Any other conclusion would be unreasonable, and attended with many serious practical difficulties."

And more to the point is the case of *Norton vs. City of Duluth, et al.* (1893—Minnesota), 56 N. W. 80. Under its charter the city of Duluth, through its council, was required to advertise for sealed proposals for publication for the ensuing year, the ordinances, official proceedings of the council and other matters *required to be officially published in some daily newspaper which had been printed, published and in general circulation in said city for at least six months prior to the advertising for bids.* The lowest bidder was the defendant Schmied, publisher and proprietor of a daily newspaper called "The Commonwealth." Whereupon the city council awarded the city printing to him and designated his paper as the official newspaper of the city for the ensuing year. The plaintiff as a taxpayer of the municipality brought the action to restrain the city and its officers from entering into the required contract for such printing. On the day the city council received and opened proposals for the public printing, a new law went into effect requiring the council to select a daily

newspaper that for at least one year instead of six months prior to the time proposals were advertised for, had been printed in whole or in part in the city of Duluth. The sole question that arose was whether or not "The Commonwealth" could so qualify, although there was no question but that it could for the formerly required period of six months.

It appeared that "The Commonwealth" was preceded by a paper called the "Daily Short Line," an advertising sheet intended for gratuitous distribution upon cars and boats, running into Duluth and the neighboring vicinity. In addition to advertising, it contained several columns of short paragraphs of a general news character. It had no subscribers who paid directly. Schmied, the defendant, acquired it a good year before he was awarded the 1893 printing contract. The court, in its opinion, at page 81, et seq., of 56 N. W. said:

"The publisher continually improved its character and contents, so that by June 1st it contained several more columns of ordinary reading matter, including telegraphic items; but, desiring to change its style of publication and circulation, the name was changed to 'The Commonwealth' on September 29, 1892. There was no change in the general appearance of the paper, and we are clearly of the opinion that its legal identity was preserved. It was the same newspaper, under a different name, but this change of name had no more effect upon its identity as the same publication than would have had a change of proprietors. Within a very few weeks after this change, and by degrees, the old method of gratuitous distribution was abandoned, and the paper delivered to subscribers only. That it had developed into a very respectable daily newspaper some time before April 1, 1893, and that it then had the required number of paying subscribers, is not disputed. We conclude, then, upon the facts, that the resolution of the city council, whereby it accepted the proposal of defendant Schmied, and awarded to him the official printing for the then ensuing year, the same to be done in The Commonwealth, was authorized and valid."

The district court of appeals, second district of California, in *In Re LeFavor* (1917), 169 Pacific 412-413, was of the opinion that:

"The mere dropping of a part of the wording in the name did not change the character of the newspaper, nor destroy its identity. We think that, on the findings of fact as made by the trial judge, the prayer of the petition should have been granted."

And on the question of change of name as rendering a newspaper different from its predecessor, the supreme court of Washington, in *City of Bellingham vs. Bellingham Pub. Co.* (1921), 198 Pacific 369-370, said:

"Does the change of the name of respondent's newspaper render it a different newspaper from its predecessor in name, during the six months next following such change of name? We are quite convinced that the mere change of the name from 'American Reveille' to the 'Bellingham Reveille,' in view of the other conceded facts shown by this record, is not a change in the identity of the paper, and, that being our conclusion it follows that such change of name has not affected, and will not affect, the legality of the publication of the city's legal notices therein during any portion of the year 1921; assuming, of course, that the paper will be continued to be printed and published as printed and published at the time of the commencement of this action."

In the instant case, the "Shaw Publishing Company" duly incorporated in 1936 with its principal place of business in Cedar Falls, Iowa, was printing in January, 1937, a daily newspaper called the Cedar Falls Daily News. In that month the paper was designated as one of the official newspapers of Black Hawk County, pursuant to the provisions of Chapter 274, supra. It continued to publish said daily until sometime in July, 1937, when for reasons not pertinent to this inquiry, it discontinued daily publications in lieu of which the publication appeared and now appears as a weekly newspaper. The word "daily"

was dropped from the name, and the paper is now called the Cedar Falls News. While we are not so informed, we assume that the "weekly" is being published by the same "Shaw Publishing Company"; that the publisher and proprietor are the same person or persons who published, edited or managed the "daily"; that the situs of the publication has not changed, and that the bona fide subscription list is substantially unchanged. These assumed facts are, however, in our opinion, immaterial, but fortify the conclusion that there has not been a change in identity such as would render the paper no longer an official publication.

Therefore, in view of the case authorities cited and quoted from supra, the statute which sets up no requirement that the paper be a daily as opposed to a weekly publication (Section 5412-a1, Code 1935, only requires that the County Auditor furnish a copy of the proceedings to be published within one week following the board's adjournment), and the fact that the Shaw publication was designated one of the official newspapers upon the basis of its bona fide yearly subscription list, it is the opinion of this department that there has not been such a change in identity since the time of designation as would render invalid the publication therein of the matters enumerated in Section 5411, supra, and that the Cedar Falls News remains and is one of the three official newspapers of Black Hawk County and no further action is necessary on the part of the Board, excepting that it should by a proper resolution acknowledge the change in name and cause the record in the auditor's office to show that the Cedar Falls News, formerly the Cedar Falls Daily News, is one of the three official publications of the county, thereby complying with the statute which requires that official proceedings be published in each of the official newspapers of the county, which, in the case of Black Hawk County, by statute is three in number.

Further, we find no reason in law or logic why the foregoing should not apply alike to the insertion of "legal notices" in said paper. The statute defines a newspaper for the purposes contemplated in Chapter 490, supra, as one of "general circulation * * * established and published regularly for a period of more than one year * * *." We take it to be a fact that the Cedar Falls News is a newspaper of "general circulation" with "a bona fide paid circulation recognized by the postal laws of the United States," and it is accordingly our further opinion that because of the change in name and from a daily to a weekly, it cannot successfully be assailed as not within the meaning of Section 11099-e1, supra, on the theory that it has not been established and published regularly for a period of more than one year. *Norton vs. City of Duluth, et al.*, supra. Parenthetically we state that insofar as the publication of legal notices by plaintiffs, executors, or their attorneys, in civil, probate and like proceedings, is concerned, and likewise, as stated hereinbefore by the county officers named in Section 11102, supra, it is entirely a matter within their discretion as to the paper they may designate.

BEER: PERMIT: VILLAGE—PLATTED: Beer permit issued to village not platted prior to January 1, 1934, should be rescinded and refund made of permit fee. If board of supervisors refuse to take action to rescind, county attorney may proceed by certiorari and ask court to rule permit null and void.

August 11, 1937. *Mr. J. W. Thompson, County Attorney, Iowa Falls, Iowa:* We acknowledge receipt of your request for the opinion of this department in

connection with which you set out facts which may be summarized as follows:

"Sometime ago I advised an individual that a permit to sell beer could not be issued to him for the reason that his place of business was not within a platted village. A similar opinion was also given to the board of supervisors. It now appears that the board has issued a permit in the above case.

If the board had no authority to grant such permit, how should I proceed to stop the sale of beer at this location?"

The opinion which you state was given to the individual, and to the board of supervisors, was based, we presume, on the following provision of Section 1921-f99, 1935 Code:

"1921-f99. *Power to issue permits.* Power is hereby granted to the treasurer of state to issue the class 'A' permit, provided for in this chapter, and to revoke the same for causes herein stated. Power is hereby granted to cities and towns, including cities under special charter to issue the class 'B' permits and class 'C' permits within their respective limits and to revoke same for the causes herein stated, or in the event the place of business of the permit holder is conducted in a disorderly manner. Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934, and to clubs as defined in Section 1921-f110 and to revoke same for causes herein provided, or in the event the place of business of the permit holder is conducted in a disorderly manner."

It appears that the board was without jurisdiction in issuing the permit in this case. Acts of a board performed without its jurisdiction are void. The result is that the individual, under the facts stated, does not hold a valid permit.

It is our opinion that a petition should be addressed to the board by you setting out wherein the act of issuing the permit was without jurisdiction and illegal, and asking that such action be rescinded by the board. Under the circumstances it appears that the board should rescind the action taken in granting the permit, and since no valid permit ever issued, we believe it would be proper to order a refund of the amount of permit fee erroneously paid.

If the board refuses to take action and rescind in the manner indicated, it is our opinion that you might proceed by certiorari and ask that the court determine that the act of the board in issuing the permit was illegal and that the permit be declared to be null and void.

MOTOR VEHICLE FUEL TAX: PRICE POSTING REQUIREMENTS: The Price Posting Act is one designed and passed for the purpose of governing and controlling the posting of prices of motor vehicle fuel and fuel oil and prohibiting the sale of motor vehicle fuel and fuel oil at prices other or different from those posted on the required placard.

August 11, 1937. *Mr. Leo J. Wegman, Treasurer of State:* This department is in receipt of your request for an opinion interpreting Senate File 321 commonly referred to as the Price Posting Act. This Act now appears as Chapter 136 of the Acts of the 47th General Assembly. Senate File 321 is a new departure in the Legislative field and any attempt to interpret the same must be done without the aid of Judicial construction or precedent to guide us.

A reference to the title to the Act as it appears in the Acts of the 47th General Assembly discloses that the evident purpose of the General Assembly was to provide for the posting of prices of motor vehicle fuel and fuel oils by every distributor and person selling motor vehicle fuel and fuel oils, making it unlawful for distributors or persons engaged in the sale of motor vehicle fuel or fuel oil to deviate from such posted prices by means of rebate, discount, commission or other concession; to provide that price placards may not be changed

until twenty-four hours after the posting thereof, and that any deviation from the posted prices shall constitute a misdemeanor for which penalty is provided. Therefore, with the thought in mind as expressed in the title to the Act, we must determine from the provisions of the Act the things which are required and things which are prohibited.

From our analysis of the Act we have reached the conclusion that the following things are either required or prohibited by the Act:

1. The posting of a placard showing in words and/or figures the same height and size but not less than one inch in height or size, the price per gallon of each grade of motor vehicle fuel and fuel oil offered for sale, the amount of state license fee per gallon thereon, the federal excise tax per gallon thereon, and the total thereof.
2. If any rebate discount, commission or other concession is granted by distributors or persons engaged in the sale of motor vehicle fuel or fuel oil of such nature as will reduce the cost or price to any purchaser or consumer of such products, the conditions, quantity and amount of such rebate, discount, commission or other concession shall be posted as a part of the posted price.
3. At all places making wholesale sale only and upon motor vehicle transports, the words and figures shall be of such size as to be plainly legible to the public and as provided by the treasurer.
4. All price placards shall be subject to the approval of the treasurer.
5. Any distributor or person failing to post or keep posted the placard required by this Act or who posts placards not approved by the treasurer as provided in this Act, or who sells any motor vehicle fuel or fuel oil at a price which directly or indirectly, by any means or device, deviates from the posted price set forth on the price placard approved by the treasurer shall be guilty of a misdemeanor, etc.
6. Nothing contained in the Act shall prohibit or restrict the distribution of earnings to the members of any distributor or person, nor to the distribution to consumers of road maps, publicity and other advertising media carrying the name of the distributor, person or produce.

The first specification herein set out, interpreted in connection with the title of the Act, means that a distributor of motor vehicle fuel and/or fuel oil must post the price, at the place of distribution, of each grade of motor vehicle fuel and fuel oil offered for sale, the selling price per gallon of each grade of such motor vehicle fuel or fuel oil, together with the amount of State license fee per gallon thereof and the Federal excise tax per gallon thereof, and the total of the three items; that the placard showing such information shall be printed or composed in words and figures the same height and size, but not less than one inch in height or size. That is, if a distributor is handling or offering for sale more than one grade of motor vehicle fuel or fuel oil, he must, at the place of distribution, post a placard containing the above information and printed or composed in words and figures of the height and size above designated for each grade of motor vehicle fuel or fuel oil offered for sale by him, the placard required being so placed and so constructed that the prospective buyer may be readily informed as to the selling price, State license fee per gallon, the Federal excise tax per gallon and the total of the three which the buying public is paying for that particular grade of motor vehicle fuel and/or fuel oil.

Under the second specification herein set out, when considered in connection with the title to the Act, and in connection with the matters set out in specification number one, the Act requires that in addition to the posting of the placard required that if such distributor is granting or offering any rebates, discounts, commissions, or other concessions in connection with the sale and distribution of the motor vehicle fuels or fuel oils of such nature as will reduce the cost

or price of such motor vehicle fuel or fuel oil to any purchaser or consumer that the placard required under specification number one hereof must, in addition to the matters and things required, also contain the conditions, quantity and amount of such rebate, discount, commission, or other concession made by said distributor to the purchaser, and shall be so shown upon the price placard as to reflect the effect of such rebate, discount, commission or other concession on the cost price of such motor vehicle fuel or fuel oil to the purchaser or consumer.

Under the third specification as herein set out, when considered in connection with the title to the Act, distributors of motor vehicle fuel or fuel oil making wholesale sales only, shall post the sale price of such motor vehicle fuel or fuel oil on placards at all places where such wholesale sales are made, and upon all motor vehicle transports, containing the same information as is required under specifications one and two hereof, printed and composed of words and figures of such size as to be plainly legible to the public and as provided by the State Treasurer, the Treasurer being given a discretion as to the size of the printing on the placards to be used.

Under the fourth specification, as hereinbefore set out, all price placards shall be subject to the approval of the Treasurer. This gives the Treasurer a discretion in approving or disapproving placards. That is, the Treasurer may determine whether the placards comply with reference to substance, size and form as to the matters required to be shown, as hereinbefore set out.

Under the fifth specification, as herein set out, the failure to post or keep posted the placard required, or the posting of placards not approved by the Treasurer, or the selling of any motor vehicle fuel or fuel oil at a price different from the price required to be posted is made a misdemeanor. That is, any distributor or person selling motor vehicle fuel or fuel oil who fails to post or keep posted a placard of the size and nature required by specification number one hereof, showing the sale price, the State license fee per gallon thereon, the Federal excise tax per gallon thereon and the total thereof, is guilty of a misdemeanor, or any distributor or person selling motor vehicle fuel or fuel oil who fails to post or keep posted a placard showing the sale price of each kind of motor vehicle fuel or fuel oil offered for sale, the State license fee per gallon thereon, the Federal excise tax per gallon thereon and the rebate, discount, commission, or other concessions granted to any purchaser or consumer and reflecting upon such placard the effect of such rebate, discount, commission or other concession granted in the sale price of such motor vehicle fuel or fuel oil, is guilty of a misdemeanor; or any distributor or person who sells motor vehicle fuel or fuel oil at a price which, either directly or indirectly, deviates from the posted price shown upon the price placard by reason of any rebate, discount, commission or other concession, or by any gift or bonus which is not reflected upon such price placard is guilty of a misdemeanor.

Under the sixth specification, as herein set out, there is no restriction placed upon the distributor or dealer restricting the distribution of earnings to the members of any distributor or person, nor to the distribution to consumers of road maps or other advertising media carrying the name of the distributor, person or produce.

In its final analysis the Act requires that the distributor of motor vehicle fuel or fuel oil must at all times keep posted at his place of business a placard

truly reflecting the exact price, together with State license fee and Federal excise tax at which the motor vehicle fuel or fuel oil is sold to the general public; that if any concession is made in the way of rebates, discounts, commissions, or other concessions, or free oil, candy, food, lodging, or other things of value, except maps, publicity and other advertising media, are given as a bonus to the purchasers of a quantity of motor vehicle fuel or fuel oil, the same must be so stated on the price posting placard and truly reflect in the total price of such motor vehicle fuel or fuel oil on the price placard; that no distributor of motor vehicle fuel or fuel oil shall at any time or under any circumstances either directly or indirectly, by any means or device, deviate from the posted price set forth on the price placard; that only such placards may be used as are approved, as to form, size and substance, by the Treasurer.

The further question arises as to whether or not the use by the distributor of motor vehicle fuel and fuel oil of such slogans as "Always Less," "Cut Rate," and "Lowest Prices" is prohibited under the Act. As heretofore pointed out, we are of the opinion that the Act must be interpreted with the title thereof in mind. We have, and do consider the Act as one designed and passed for the purpose of governing and controlling the posting of prices of motor vehicle fuel and fuel oil and prohibiting the sale of motor vehicle fuel and fuel oil at prices other or different from those posted on the required placard. The slogans, "Always Less," "Cut Rate" and "Lowest Prices" and others of like character do not reflect the price as set forth in the placards required by the law. In our opinion, the use of the above phrases or slogans is within the realm of legitimate advertising; that they are the lures which entice the customer into the station where, if the distributor has otherwise complied with the Act, the customer will, by reference to the posted placard be fully advised as to the price which he will be required to pay for motor vehicle fuel and fuel oil before making his purchase, and will have full opportunity to verify the truth of the slogan used by the distributor or dealer.

DIVISION OF OLD AGE ASSISTANCE: APPROPRIATION: FUND: Money begins to accrue to old age pension fund as of date of July 1, 1937.

August 13, 1937. *Mr. Byron G. Allen, Superintendent, Old Age Assistance Commission:* This is a reply to your letter of July 30, in which you request an opinion on the following set of facts:

Senate File 184 amended Section 6943-f63 of the Code of 1935 by inserting as paragraph (2) of said section the following:

"The Board shall set aside and cause to be paid into the old age pension fund, from time to time as available, the next five million five hundred thousand dollars ($5,500,000.00) collected each year under the provisions of this chapter."

It is essential that we know definitely whether or not the language of this section means that the money begins to accrue to our division at the division of the calendar year, January 1, 1937, or as of March 26, 1937, when Senate File 184 became effective by publication, or on July 1, 1937, the beginning of the new fiscal year.

After the receipt of your letter you will recall that we arranged a conference with yourself, your comptroller, Mr. Valker, and the State Comptroller's Office, which was represented at the conference by Mr. Fred Porter.

This office listened to your suggestion and those of Mr. Valker and your actuary, and those of Mr. Fred Porter. As a result of this conference, and after reviewing the statutes, we are of the opinion that the money begins to accrue

to the Division of Old Age Assistance as of July 1, 1937, the beginning of the new fiscal year.

COUNTIES: COAL: TRANSPORTATION CHARGES ON: Transportation charges on coal are a part of its costs.

August 14, 1937. *Senator Hugh W. Lundy, Albia, Iowa:* We are in receipt of your request for an opinion on the following proposition:

Under Chapter 93, Acts of the 47th General Assembly, and particularly Section 2 thereof, does the $300 minimum include the delivered cost of coal to a governing body, or is that minimum the cost of the coal at the mine?

Chapter 93 is an addition to Chapter 62-B1 of the Code, 1935, which provides generally for preference to be given by governing bodies of the government to Iowa products. The section which is determinative of the question involved is Section 2 of Chapter 93, as follows:

"Section 2. Before any users of coal designated in the preceding section, purchase or propose to purchase coal, whose annual needs for coal exceed three hundred ($300.00) dollars, said governing bodies and officers shall make requests for bids for coal by advertisement in an official newspaper published in the county in which the purchaser has its principal office, and such advertisement shall, among other things, state the date, time and place such bids shall be received, which date and time shall not be less than fifteen (15) days after such publication and the advertisement shall contain the approximate quantity and description of coal to be purchased as otherwise provided by law, and the contract shall be let to the lowest responsible bidder, but any and all bids may be rejected, provided that if all bids are so rejected, then an advertisement for bids shall again be made as hereinbefore provided. After any bid is accepted, a written contract shall be entered into and the successful bidder shall furnish a good and sufficient bond with qualified sureties for the faithful performance of the contract. Any contract for purchase of coal provided for in this Act may contain the provision that the purchaser may, in the event of an emergency, purchase coal elsewhere without advertising for bids in any year, for not more than ten per cent (10%) of said purchaser's annual requirements for coal."

Our question then turns on the proposition of whether or not the delivery price is part of the cost of coal. First it may be said that coal at the mine is of no value to any institution, but its only concern is the cost at the place it is to be used. That is, what is the price laid down.

Transportation is a part of the cost of coal. Each transaction in the preparation of coal for use adds to its final cost. For example, coal unmined may be worth a dollar a ton. When it has been mined and put in a storage pile its value may be increased to a dollar and a half a ton, and when loaded on a freight car the cost is still further increased. Delivery to the point of consumption adds further cost, yet the total of these transactions determines the cost of coal to the purchaser.

If this section were dealing with automobiles, a person would hardly contend that the cost of a car to an institution would be the cost of the car F. O. B. Detroit instead of F. O. B. the place of delivery. Transportation becomes part of the cost of the product the same as labor becomes part of the cost of a finished product.

It is therefore our conclusion that the transportation charges on coal are a part of its costs within the meaning of Section 2 of Chapter 93 of the Acts of the 47th General Assembly, and when the annual need for coal exceeds $300 per annum laid down, it is necessary that the bodies set out in Section 1, Chapter 93, Acts of the 47th General Assembly comply with Section 2 thereof,

COUNTIES: STATE WARDS: ORPHANS: CLOTHING OF: Child under contract may be furnished clothing, and net cost thereof should be pro-rated, the county assuming the same share of expense as obligated by statute to pay in Section 3720.

August 14, 1937. *Mr. Syl McCauley, Superintendent, Iowa Soldiers' Orphans' Home, Davenport, Iowa:* This department acknowledges receipt of your request for an opinion on the following proposition. You state:

The practice of providing clothing and medical services to children who have been placed out in the field and have been taken off our population records, has prevailed for some time. The expenditures for this purpose have amounted to as much as $2,000 in a fiscal year. In most cases the state has been faced with the alternative of either helping these children out with clothing and medical attention or returning them to the institution.

I am very desirous of keeping these children placed, but the question in my mind is who should assume the financial responsibility for money spent on these children. As soon as they are placed they go off our population records and we immediately cease billing the counties for their maintenance of $12.50 per child per month. In no case does the actual expenditure for these children exceed $7 or $8 per month on the year round average. If these children were to be returned to the institution by reason of our refusal to provide additional help for them in their foster homes, then the counties would immediately become responsible again for their pro rata share.

It occurs to me that the money is well spent and that between the two alternatives of returning the child to the institution or assisting him financially in the home, which is otherwise a good home, the child should be assisted rather than returned. Further, I feel that counties should meet the expenditure provided it is regulated by the authority of the Board of Control.

Section 3716, Code 1935, provides:

"3716. *Placing child under contract.* Any child received in said home, unless adopted, may, under written contract approved by the board, be placed by the superintendent in the custody and care of any proper person or family. Such contract shall provide for the custody, care, education, maintenance, and earnings of the child for a fixed time which shall not extend beyond the age of majority. Such contract shall be signed by the superintendent and by the person taking the child."

Section 3720, Code 1935, provides:

"3720. *Counties liable.* Each county shall be liable for sums paid by the home in support of all its children, other than the children of soldiers, to the extent of a sum equal to one-half of the net cost of the support and maintenance of its children. The sums for which each county is so liable shall be charged to the county and collected as a part of the taxes due the state, and paid by the county at the same time state taxes are paid."

While Section 3716, supra, requires in general terms that the contract of placement provide for, among other items, the "care and maintenance" of a child, yet it does not require that the entire cost of such care and maintenance shall be borne by the other contracting party. That such contracts should so provide is to be recommended and conceived if possible. On the other hand placement contracts are desirable for many reasons, two of which may be called to mind and stated as follows: (1) by placing children under contract the home is relieved of a serious population problem, and (2) such children might well be said to be on the road to adoption, a desired end where orphan or neglected and dependent children are involved. Therefore, if in order to place a child under contract it is essential that a part of the burden be assumed by the state, and it is deemed expedient by the Board of Control and the superintendent to contractually agree that the child, while under contract, shall be furnished clothing and medical attendance, we see no reason in law why it

cannot be done, and in event that it is, it is our opinion that the net cost thereof should be pro-rated as in Section 3720 provided, the county assuming the same share of expense as it is obligated by statute to pay under the provisions of said section.

COUNTIES: INDIGENTS: TRANSPORTATION: State may advance expense of transporting indigents to state sanatorium, as well as treatment and support while there, and may bill the same back to the county involved.

August 16, 1937. *Mr. G. S. Wooten, Secretary, Board of Control of State Institutions:* We are in receipt of your communication of recent date requesting an opinion on the correct interpretation of Sections 3395, 3396 and 3399, Code of Iowa 1935.

Your request for this opinion is presumably based upon facts called to your attention by Dr. John H. Peck, Superintendent of the State Sanatorium at Oakdale, Iowa, and, while his letter to the Board of Control fails to disclose the controversy, yet the contents reveal that there is some misunderstanding as to what expense counties must bear with respect to indigent patients whose applications for admission to the sanatorium have been approved.

We state the question as follows:

Is a county liable for the cost of transporting indigent, accepted applicants for admission to the state sanatorium to and from said institution, as well as for the expense of treatment and support while in the sanatorium—all as concerns patients from that county,—and must it accordingly reimburse the state for advanced transportation expense and for the cost of such treatment and support?

Section 3399, Code 1935, provides:

"3399. *Liability of county.* Each county shall be liable to the state for the support of all patients from that county in the state sanatorium. The amounts due shall be certified by the superintendent to the state comptroller, who shall collect the same from the counties liable, at the times and in the manner required for the certification and collection of money from counties for the support of insane patients."

The method of collection on the part of the state is prescribed in Section 3600, Code 1935, as follows:

"3600. *Expenses certified to counties.* Each superintendent of a state hospital where insane patients are cared for shall certify to the state comptroller on the first days of January, April, July, and October, the amount not previously certified by him due the state from the several counties having patients chargeable thereto, and the comptroller shall thereupon charge the same to the county so owing. A duplicate certificate shall also be mailed to the auditor of each county having patients chargeable thereto. This section shall apply to all superintendents of all institutions having patients chargeable to counties."

The other provisions of Chapter 169, entitled "State Sanatorium" that are here involved are the following:

"3395. *Indigent patients.* The state shall, on certificate of the superintendent approved by the board of control, pay, out of any money in the state treasury not otherwise appropriated, the actual and necessary expense attending the transportation of an accepted applicant for admission, to and from the sanatorium, and the expense of treating said applicant at said institution, if said applicant is unable to pay the same and such fact is certified to by the board of health of the city, town or township, as the case may be, depending on the residence of said applicant."

"3396. *Advancing transportation expense.* In cases contemplated by Section 3395, the superintendent shall certify an itemized estimate of the expense attending such transportation, which certificate when approved by the board of control shall be filed with the state comptroller who shall thereupon issue

his warrant to the superintendent for said amount. Within thirty days thereafter the superintendent shall file with said comptroller, an itemized and verified statement, approved by the board, of the actual and necessary expense attending said transportation, together with the receipt of the treasurer of state for any part of said warrant not expended. If said warrant prove insufficient, said certificate shall show the amount of such deficiency, and the comptroller shall at once issue his warrant therefor."

Section 3395, supra, in substantially different form, first appeared in the 1913 Supplement to the Code as Section 2727-a84, having been enacted into law by the 31st General Assembly in 1906, and from April 23, 1906 (the effective date of said section) until April 25, 1913, when Section 2 of Chapter 238, Acts of the 35th General Assembly (present Section 3399 of the Code) took effect, patients in the sanatorium other than "pay patients" were presumably state charges. Said Section 2727-a84 was enacted into law in terms as follows:

"*Transportation and other expenses—how paid.* In case an applicant who has been authorized to be received as a patient in the sanitorium, is without means to pay for transportation and other necessary expenses to and from including treatment at the institution, and such fact is duly certified to by the board of health of the city, or incorporated town where the applicant resides, or by the majority of the township trustees in case the applicant resides outside of a city or incorporated town, and the superintendent is satisfied that such is the fact, then such expense shall be paid by the state out of any funds in the state treasury not otherwise appropriated after the same is certified by said superintendent and approved by the board of control."

The foregoing terminology was changed by the 40th General Assembly in extraordinary session. See House File 84, Section 121.

That patients admitted under said section were state patients is further borne out by the fact that the forerunner to Section 3399, supra, namely, Section 2727-a86 of the 1907 Supplement to the Code, enacted at the same time as Section 2727-a84 (31st General Assembly, C. 120, 12), provided as follows:

"*Charges for care, treatment and maintenance.* Said sanitorium shall be open for all patients, but all patients who are able to pay, shall be charged such rate monthly as the board of control may fix, not exceeding the average actual per capita cost of care, treatment and maintenance. All sums so collected shall by the board of control be covered into the state treasury."

The repeal of Section 2727-a86 followed in April, 1913 (35th General Assembly, C. 238, 2) and present Section 3399, placing the liability for the support of patients in the sanatorium upon the counties, became law.

Section 3396, supra, is a corollary of Section 3395, and was written into law by the 40th General Assembly in extraordinary session. House File 84, Section 122. This section does nothing more or less than point out the method to be followed in advancing *transportation expense* to and from the sanatorium for indigent patients. It is clear that said section has nothing whatsoever to do with the expense of treatment and/or support in the sanatorium.

This history of the evolution of Sections 3395 and 3399, supra, clearly shows that at the time the state sanatorium was established the expense incident to the transportation, treatment and support of the patients therein was to be borne by the state, but that the legislature transferred this burden to the counties at the time of the enactment of what appears in the 1935 Code as Section 3399, of date, to-wit, April 19, 1913.

It is accordingly the opinion of this department that the legislature, in enacting Section 3399, intended that the entire expense attending the transportation to and from the sanatorium, and the treatment and support of the patient while

in the sanatorium should be the liability of the county from which the patient is admitted, and that Section 3395, in its final and present form, together with Section 3396, was designed to afford a means whereby, as the title to the sections imply, indigent patients could be advanced transportation expense to and from the sanatorium. As a matter of fact, there would be no way that the county could legitimately advance such costs unless possibly under the statutory provisions relating to the support of the poor, and there the inadequacy of the law for any such purpose would tend to work a practical prevention of the employment of any such means by counties to defray this expense. So the legislature saw fit to remove every impediment in the way of these indigents, and provided a means whereby the state could first advance transportation expense, which expense is billed back to the counties involved, in the same manner as is the expense of treatments and support. As stated hereinbefore, the mechanics are described in Section 3600, supra.

It should be stated in further support of our opinion as expressed herein, that it has long been the administrative practice to bill back to the county advanced transportation expense, and it is well established in our law that administrative construction will be given much weight and will not be disturbed except for a very compelling reason. *New York Life Ins. Co. vs. Burbank*, 209 Iowa 199, and cases cited therein.

TOWNSHIP ASSESSORS: SALARIES OF: Board of supervisors has no authority to authorize additional compensation to township assessors for the current year, but the salary fixed at the January meeting is the maximum and is controlling.

August 16, 1937. *Mr. Roy A. Potter, County Attorney, Tipton, Iowa:* We are in receipt of your request for an opinion on the following proposition:

Pursuant to Section 5573 of the Code, 1935, the board of supervisors fixed the salaries of township assessors on a per diem basis and calculated in advance the number of days that would be required to finish the task and based the salary on the basis of $4.00 per day for a specified number of days. In some instances it took the assessors more than the anticipated number of days to finish the work. Your questions are:

1. Should your office (the attorney general's) determine that the board of supervisors should compromise the claims for additional time actually put in by the assessors?

2. Would the board of supervisors be justified in allowing all of the claims as made, or can they pay only the amounts originally designated by them?

The pertinent section which deals with the salary of township assessors is Section 5573, which reads as follows:

"*Compensation of assessor.* Each township assessor shall receive in full for all services required of him by law, a sum to be paid out of the county treasury, and fixed annually by the board of supervisors at its January session, for the current year, on the basis of four dollars for each day of eight hours which said board determines may necessarily be required in the discharge of all official duties of such assessor. * * *"

In answer to your first inquiry, it is obvious that the attorney general's office has no authority to fix the salary or to direct a compromise.

Going to the second question, it is our opinion that the above section means that in January the board of supervisors shall fix the salary for the township assessors for the work to be done by the assessors subsequent thereto. The phrase, "on the basis of $4.00 for each day for eight hours," does not mean that an assessor is entitled to that pay for each day's work, irrespective of the

salary fixed by the board in January. If such was the case, the fact that the board set the salary would be of no consequence, as the money earned would be based on the days worked. The statute contemplates the board estimating or determining in advance how long it will take and multiplying those estimated days by $4.00 to arrive at the annual salary. The specificness of the statute is not for the purpose of setting the salary for each day actually worked, but is for the purpose of furnishing a yardstick and a limitation for the board to go by. Judge Morling, in the case of *Alderice vs. Wapello County, et al.*, 210 N. W. 242 (Iowa 1926), under a statute as it then existed somewhat similar to the one before us, said:

"The statute was enacted for the purpose of determining not the minimum compensation of the assessor, which would be for his benefit, but for the purpose of fixing the maximum compensation. Thereby the board of supervisors would know in advance the utmost that would have to be provided therefor by the tax levy. It is in the interest of publicity and public economy to fix a maximum."

Further on in the opinion, he said:

"The gross compensation, therefore, both for regular and extra or special services, was required to be fixed in advance in all cases unless it was in the case of a per diem allowance in cities of the first class. No reason for excepting them, when a per diem was allowed, is apparent. * * *

"We think that the intention of the Legislature was to require the board in allowing a per diem, to limit the time for which the per diem would be allowed as well as to limit the per diem rate."

It is therefore our opinion that the per diem salary fixed by the board in January is the maximum salary that is to be paid to township assessors, and as the authority granted to the board is specific and says that they shall determine and fix the salary at their January meeting for the ensuing year, we are of the opinion that they have no implied or inherent power to grant additional compensation when the work is completed. We will say parenthetically that we question the constitutionality of additional pay, if it were otherwise possible, under Section 31 of Article III of the Constitution of Iowa, which reads in part 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, * * * unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

See *Love vs. City*, 210 Iowa 901, 230 N. W. 373.

Certainly a township assessor is an officer or a public agent. The service "had been rendered," and the asking is for extra compensation when the fixed salary had been paid in full. It would appear that this set of facts comes within the prohibition of the constitution.

As another ground for the lack of authority of the board to authorize additional compensation, we will say that generally speaking, it is vital to the legality of any payment or promise of public funds that there must be a consideration in the nature of a public benefit. In our specific case the salary had been set in the regular manner by the board. The assessors were entitled to that sum. They could not be compelled to take less than that amount which the board had set. The board was bound to pay in full, but was not bound to pay more. In fact, they are bound not to pay more. There is no public benefit as a consideration for the proposed additional compensation. The board has paid the salary they set for the work to be done, and for that work the assessors

have been paid in full. Both parties have performed their duties, and the obligations have been fulfilled. There is then no consideration or public benefit which would be derived from an additional appropriation, so the board is without authority to now add to the fixed compensation.

It is therefore our opinion that the board of supervisors has no authority to authorize additional compensation to township assessors for the current year, but the salary fixed at the January meeting is the maximum and is controlling.

BEER: PERMIT: Matter of issuance of beer permit by a county board of supervisors is entirely discretionary with the board.

August 16, 1937. *Mr. Ned B. Turner, County Attorney, Corning, Iowa:* We acknowledge receipt of your request for the opinion of this department upon the following questions:

1. In Code Section 1921-f99 appears the following:

"Power is hereby granted to boards of supervisors to issue * * *"

In Code Sections 1921-f102-f103-f104 of the same chapter the following language appears:

"A permit *shall be issued* * * *"

As these two code sections seem to be contradictory, I would like to know whether or not the board of supervisors has absolute discretion in issuing beer licenses or whether under the last quoted provisions above referred to the board is compelled, upon proper application, to issue the license.

Under the provisions of Section 1921-f99 referred to above, it is clear the boards of supervisors are authorized to issue only class "B" and "C" permits. Section 1921-f103 pertaining to class "B" applications provides in part as follows:

"1921-f103. *Class 'B' application.* Except as otherwise provided in this chapter a class 'B' permit shall be issued by the authority so empowered in this chapter to any person who: * * *"

Section 1921-f104 relating to class "C" applications provides in part as follows:

"1921-f104. *Class 'C' application.* Except as otherwise provided in this chapter a class 'C' permit shall be issued by the authority so empowered in this chapter to any person who: * * *"

It is to be observed that both Sections 1921-f103 and 1921-f104, supra, provide that the class "B" and "C" permits shall be issued by the authorities so empowered "*except as otherwise provided in this chapter.*" Section 1921-f99, supra, relating to the power of the board to issue permits, provides:

"Power is hereby granted to boards of supervisors to issue *at their discretion* class 'B' and 'C' permits in their respective counties. * * *"

The mandatory language of Sections 1921-f103 and 1921-f104 is qualified by the phrase "except as otherwise provided in this chapter." The chapter provides that such power of the boards may be exercised "at their discretion."

It is the opinion of this department, therefore, that the matter of the issuance of a beer permit by a county board of supervisors is entirely discretionary with the board. This holding is in conformity with opinions of this department heretofore rendered.

2. You inquire whether or not change has been made in the law which restricts the issuance of permits by boards to "villages platted prior to January 1, 1934."

Please be advised that no change with respect to the requirement above mentioned was made by the Forty-seventh General Assembly.

COUNTIES: JUVENILE COURTS: JURISDICTION: In counties where there is a superior or municipal court, the judges thereof shall constitute the juvenile court when designated as such by the judges of the district court.

August 16, 1937. *Mr. Hillis W. Noon, County Attorney, West Union, Iowa:* This department acknowledges receipt of your request for an opinion on the construction that is to be placed on Sections 3606 and 3607, Code 1935.

It appears from your letter that there is a superior court in Fayette County, located at Oelwein, and that the judge of this court, without having been designated judge of the juvenile court, has nevertheless been exercising jurisdiction in juvenile matters, and you express as your opinion that this judge is acting without authority, and that all orders made by him in connection with widow's pensions and other juvenile matters are illegal.

Prior to the code revision of 1924, it appears there was no statutory provision in the Iowa law for a juvenile court as an independent tribunal. At least the Supreme Court of Iowa so thought and expressed itself in its opinion in *DeKay vs. Oliver*, 161 Iowa 550, 553, where it said:

"An examination of the several statutes relating to proceedings under the juvenile court act shows that no new tribunal was created by the Legislature. Originally the full and exclusive jurisdiction was given to the district court, which later by amendment was extended to the superior court. Nowhere does the statute provide for a juvenile court as an independent tribunal; the only provision being that record of proceedings in the district court or the superior court, under what is termed the juvenile court act, shall be kept in a book or books to be known as the Juvenile Court Record. * * *."

That decision was handed down in October, 1913, at which time the law of Iowa provided "The District Court and superior courts are hereby clothed with original and full jurisdiction to hear and determine all cases coming within the purview of this act, * * * (juvenile courts, etc.), Section 254-a13, 1913 Supplement to the Code, and at Section 260-a of said Supplement that "The superior court of any city shall have concurrent jurisdiction with the District Court of the county in which said superior court is located, of all cases brought under the provisions of Section 254-a13, * * *" to Section 254-a30, inclusive, of the 1907 Supplement to the Code (all relating to juvenile courts, detention homes and schools).

In 1917 the 37th General Assembly (Chapter 405, Section 1) added the following, among other provisions, to the existing law:

"*Juvenile court—judge—selection.* In all counties of the state having a population of one hundred thousand or over, it shall be the duty of the judges of the district court, after each election, to select one of their number to act as judge of the juvenile court for the ensuing four years. Such judge so chosen shall have charge of all matters pertaining to dependent and neglected children, widows' pensions, and any and all matters which are, by the laws of this state, now heard in the juvenile court, and shall be vested with all the power and authority now vested in the district court in relation to such matters."

So that down to July 4, 1924, the effective date of House File 84, Acts of the 40th General Assembly, extraordinary session, the District Court and superior courts had jurisdiction of "juvenile matters" as specified in Chapter 5-B of Title III, 1913 Supplement to the Code as amended. The jurisdiction of the District Court in such matters was additional to the jurisdiction provided in Section 225, Code 1897, now Section 10761, Code 1935, which provides:

"10761. *General jurisdiction.* The district court shall have general, original, and exclusive jurisdiction of all actions, proceedings, and remedies, both civil and criminal, except in cases where exclusive or concurrent jurisdiction is

or may hereafter be conferred upon some other court or tribunal by the constitution and laws of the state, and shall have and exercise all the powers usually possessed and exercised by courts of record."

and which jurisdiction, by reason of Section 10704, Code 1935, is extended to superior courts in all matters except probate, divorce, alimony and separate maintenance.

However, the law relating to "juvenile courts" as found in the 1935 Code, specifically Sections 3605 to 3608, inclusive, represents the handiwork of the 40th General Assembly, extraordinary session, to-wit, House File 84, Chapter 14, Sections 338 to 341, inclusive, and is a radical departure from the previously existing law. We find provided:

"3605. *Jurisdiction.* There is hereby established in each county a juvenile court, which, and the judges thereof, shall have and exercise the jurisdiction and powers provided by law."

"3606. *How constituted.* The juvenile court of each county shall be constituted as follows:

1. Of the judges of the district court.
2. In counties wherein there is a superior or municipal court, of the judges thereof, respectively, when designated as judges of the juvenile court by the judges of the district court."

"3607. *Designation of judge.* The judges of the district court may designate one of their number to act as judge of the juvenile court in any county or counties, and may designate a superior or municipal court judge to act as judge of the juvenile court in cases arising in any city in which any such court is organized and in cases arising in any part of any county convenient thereto. In counties having a population of one hundred thousand or over, unless said district judges designate a superior or municipal court judge to act as juvenile judge, they shall after each election, designate one of their number to act as juvenile judge for the ensuing four years."

"3608. *Effect.* The designation of any judge to hold the juvenile court shall not deprive him of other judicial functions, nor the other judges of the power to act as judges of the juvenile court during the absence, inability to act, or upon request, of the regularly designated juvenile judge."

Or in other words, the legislature created a tribunal, to be known as the juvenile court, separate and distinct from the district or superior court. The jurisdiction and powers enjoined by law upon the juvenile court, and finding expression in Chapters 180, as amended, 181, 182, as amended, 183, 184, 185, dealing with neglected, dependent and delinquent children, and Chapter 473, as amended, dealing with the matter of adoption, does not obtain in the district and superior courts except that each may have concurrent jurisdiction in adoption matters. And not only did the legislature create a new tribunal, but specifically directed in what manner it shall be constituted. The district judges are named judges of the juvenile court, and in their particular judicial district are such by reason of their election and qualifying as district judges. They may designate one of their number to act as judge of the juvenile court, but in the absence of such designation, or in the absence, inability or upon request of the one designated, each and all of them is empowered to act as judges of the juvenile court.

The legislature then went on to provide that in counties where there is a superior or municipal court the judges thereof shall constitute the juvenile court *when designated as such by the judges of the district court.* Section 3606, supra.

While the statute provides in the second instance that the juvenile court in each county shall be constituted of the judges of the superior or municipal

court (in counties where such courts exist), yet as a condition precedent they must be so designated by the judges of the district court. There was no such designation in the case of the Honorable Jay Cook, judge of the superior court of the city of Oelwein.

The question, then, is whether or not the orders, decrees and judgments entered by him in juvenile matters, while ostensibly presiding as judge of the juvenile court, are valid, binding and of full force and effect.

Applying the doctrine that the acts of "*de facto*" officers, as distinguished from the acts of mere usurpers, are valid, it is the opinion of this department that insofar as this ground for objection alone is concerned, orders, decrees and judgments entered by him while presiding as judge of the juvenile court, are valid, binding and of full force and effect as against collateral attack.

In this connection it is stated in 15 C. J., paragraph 212, at page 874, as follows:

> "* * * and where the organization of a court is authorized by law, a court organized thereunder is at least a de facto court, although it is defectively organized."

And while not directly in point, but dealing specifically with the proposition that the right to hold office is not subject to collateral attack, yet reference may be made to the following cases as bearing upon the question presently considered. In *Herkimer vs. Keeler*, 109 Iowa 681, the defendant in attacking the jurisdiction of the presiding magistrate (located in an adjoining township) contended that there was a de facto if not a de jure justice of peace in the township wherein the land in controversy was situated. The facts disclosed that one Long had received a majority of the votes cast in the election, but had done nothing toward qualifying or possessing himself of office. Moreover the statute provided that an office becomes vacant on failure of the incumbent to qualify. The Supreme Court in holding that Long was not an officer de facto, stated at page 682 et seq. of 109 Iowa:

> "* * * There is no showing whatever that Long assumed to act as justice, or to perform any of the functions of that office, until after the filing of his bond, which, * * * was after the commencement of this action. Appellant contends, however, that he was a de facto officer; * * * Surely, Long was not such an officer merely because he was elected to the office. For failure to comply with the statute within the time fixed, the office became vacant, and he was not a de jure officer. Whether or not he was a de facto officer depends upon the facts. *If he assumed to act as justice after his election, without taking the oath and filing bond, he might then be considered such an officer. A de facto officer is one who, colore officii, claims and assumes to exercise official authority, is reputed to have it, and in whose acts the community acquiesces. Hussey vs. Smith,* 90 U. S. 20-25 (25 L. Ed. 314). * * * As said in *Ex Parte Strahl*, 16 Iowa 369: 'An officer *de facto* is one who comes in by the forms of an election or appointment, and who thus acts under claim and color of right, but who, in consequence of some informality, omission, or want of qualification, could not hold his office if his right was tried in a direct proceeding by information in the nature of *quo warranto*.'"

See also: *Town of Decorah vs. Bullis*, 25 Iowa 12; *State ex rel. Bales vs. Bailey, Sheriff*, 106 Minn. 138, 118 N. W. 676 (holding that even though defectively organized, the organization being authorized by law, the municipal court of Bemidji is at least a de facto court); and *Gildemeister vs. Lindsay, et al.*, (Michigan) 180 N. W. 633 (involving an unconstitutional statute).

On principles of public policy and for the security of rights—there may be valuable property rights here involved incident to adoptions, other questions

of inheritance rights, legality of expenditures from the county treasury, bond liability, etc.,—it is the further opinion of this department that the judges of the 13th judicial district of Iowa should at this time, either enter an order *nunc pro tunc* designating the Honorable Jay Cook, judge of the superior court of Oelwein, to act as judge of the juvenile court in cases arising in the city of Oelwein and arising in any part of any county convenient thereto and within the judicial district, and ratifying his acts performed while presiding as judge of the juvenile court while without official designation, or simply the latter, in which event each of the judges of the district court will henceforth have sole jurisdiction in juvenile matters in the absence of the designation of one of their own number to so act.

CONSERVATION COMMISSION: RIVERS: BOATS: Conservation Commission has exclusive jurisdiction over Des Moines River since said waters are not subject to paramount authority of Congress. On navigable waters of United States, the federal government has exclusive control.

August 20, 1937. *Mr. M. L. Hutton, Director, State Conservation Commission:* We acknowledge receipt of your request for the opinion of this department upon a question presented by a statement of facts which may be summarized as follows:

Section 1703-e7, 1935 Code, provides in part as follows:

"1703-e7. *Block numbers and registration.* * * *

"All machinery propelled boats, not operated for hire and capable of a speed of eight miles or more per hour, shall be registered with the commission. No fee shall be required for such registration. The registry number shall be plainly marked, upon both sides of the bow, in block figures not less than four inches in height. Such number shall be in color contrasting with the color of the boat."

Section 17, Chapter 99, laws of the 47th General Assembly, provides as follows:

"Section 17. The provisions of this chapter shall not apply to craft licensed by authority of the United States when such craft are operated in accordance with the federal laws and regulations therefor."

Several cases have come to our attention where boat owners operate such craft on the Des Moines River above the Center Street dam in Des Moines and refuse to register such craft with the Commission, claiming that Section 17, Chapter 99 quoted above exempts them from such requirement, their craft being registered with the U. S. Department of Commerce.

Is a motor boat registered with the U. S. Department of Commerce, being operated upon inland waters or waters not under the jurisdiction of the United States to be excepted from state registration by reason of the provisions of Section 17, Chapter 99, laws of the 47th General Assembly, above referred to?

By an act of Congress of August 8, 1846, Sess. I, Chapter 103, 1846, 9 U. S. Stat. at L. 77, the Des Moines River was recognized as a navigable stream. This act provided for the granting of a portion of the public lands lying along said river to the then Territory of Iowa, for the improvement of navigation. It was therein further enacted:

"* * * that the River Des Moines shall be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever, for any property of the United States or persons in their service passing through or along same."

On January 20, 1870, the Congress by Chapter 7, Sess. II, 1869-70, 16 U. S. Stat. at L. 61, enacted the following:

"that so much of the Act of August 8, 1846, entitled 'An Act granting certain lands to the territory of Iowa to aid in the improvement of the navigation of the Des Moines River in said territory' *as makes said river a public highway be, and the same is hereby repealed.*" (Italics ours.)

Several cases have arisen in Iowa which involved the question of the navigability of the Des Moines River. Cases of this description which deal with the navigability of the river above the Raccoon forks and within the City of Des Moines are: *Serrin vs. Grefe*, 67 Iowa 196; *Boehler vs. City of Des Moines*, 111 Iowa 417; *Board of Park Commissioners vs. Diamond Ice Company*, 130 Iowa 603; *Board of Park Commissioners vs. Taylor*, 133 Iowa 453; *Hubbell vs. City of Des Moines*, 166 Iowa 581. It appears that in each of the cases referred to above proprietary rights were involved. Claims were made that the second Act of Congress, i. e., the Act of 1870, referred to above, amounted to a declaration that the Des Moines River was non-navigable, and that therefore titles of riparian owners were extended from the high-water mark to the bed of the stream. The cases cited seem to hold uniformly that for purposes of fixing the ownership of the bed of the stream, the said river is to be considered navigable, and that the meandering of the stream by the government survey reserved the title to the bed thereof in the State of Iowa. This view is summarized by the Iowa Court in the case of *Shortell vs. Des Moines Electric Company*, 186 Iowa 482, in the following language:

"We are not disposed to disturb or overrule the holding of the prior decisions of this court, as indicated by the cited cases upon this question, nor disregard the numerous acts of the legislature referred to, and to now hold that the Des Moines River, at the point in question, is a non-navigable stream. It may be that it will never be used as a waterway for commercial purposes, and that it should not be classified as a part of the navigable waters of the United States, under the numerous acts of Congress relating to such waters; but, for the purpose of fixing the ownership of the bed thereof and the rights of riparian owners, the question must be considered as settled in this state, and the holding of the court below that the river is non-navigable is disapproved and overruled."

Now, the inquiry here presented raises no question of proprietary rights, and so far as we can determine, the question of the navigability or non-navigability of the Des Moines River has not been raised in connection with the question of jurisdiction for purposes of regulating navigation upon said river.

The Iowa statute first set out above required boats of a certain description to be registered with the State Conservation Commission, and prescribes the manner of marking the registry number upon such boats. The law is applicable to craft operated upon waters under the jurisdiction of the State Conservation Commission.

As set out above in the statement of facts, the 47th General Assembly amended the chapter pertaining to the licensing of boats and pilots, and inspection, by providing in Section 17 of Chapter 99, laws of the 47th General Assembly, that:

"The provisions of this chapter shall not apply to craft licensed by authority of the United States when such craft are operated in accordance with the federal laws and regulations therefor."

The federal government has enacted detailed legislation with respect to the operation of motor boats. The pertinent provisions thereof relating to the documenting of motor boats and the numbering thereof are as follows:

"That every undocumented vessel, operated in whole or in part by machinery, owned in the United States and found on the navigable waters thereof, except public vessels, and vessels not exceeding sixteen feet in length measured from end to end over the deck excluding sheer, temporarily equipped with detachable motors, shall be numbered. Such numbers shall be not less in size than three inches and painted or attached to each bow of the vessel in such manner

and color as to be distinctly visible and legible. When a number is awarded to a vessel under the provisions of this act, a certificate of such award shall be issued by the collector, said certificate to be at all times kept on board of such vessel and to constitute a document in lieu of enrollment or license.

"Section 2. That the said numbers, on application of the owner or master, shall be awarded by the collector of customs of the district in which the vessel is owned and a record thereof kept in the custom house of the district in which the owner or managing owner resides. No numbers not so awarded shall be carried on the bows of such vessel.

"Section 3. That notice of destruction or abandonment of such vessels or change in their ownership shall be furnished within ten days by the owners to the collectors of customs of the districts where such numbers were awarded. Such vessel sold into another customs district may be numbered anew in the latter district.

"Section 4. That the penalty for violation of any provisions of this act shall be $10, for which the vessel shall be liable and may be seized and proceeded against in the district court of the United States in any district in which such vessel may be found. Such penalty on application may be mitigated or remitted by the Secretary of Commerce.

"Section 5. That the Secretary of Commerce shall make such regulations as may be necessary to secure proper execution of this act by collectors of customs and other officers of the Government."

The Iowa legislature in enacting Section 17 of Chapter 99, laws of the 47th General Assembly, referred to above, must have known of the existence of these federal regulations, and apparently determined that the craft licensed by the authority of the United States and "operated in accordance with the federal laws and regulations therefor" were to be excepted from the provisions of the state navigation laws. This was but an expression of the well recognized rule that the authority of Congress *over the navigable waters of the United States* is paramount to the power of the state to legislate with respect thereto. Illustrative of this proposition is the case of *State vs. Kelly*, 59 Pac. 373 (1936), which considers the validity of Washington laws providing for the inspection of every vessel operated by machinery which was not subject to inspection under the laws of the United States. It appears that there is no federal law dealing with inspection of motor driven tugs. The Washington court, by a five to four decision, decided that the Washington statute was invalid as to boats plying the navigable waters of the United States, for the reason that where Congress has occupied a field of its jurisdiction in whatever degree, the state cannot do what Congress has deemed unnecessary or unwise to do in the way of legislation. It should be emphasized, however, that this decision recognized the fact that the state statutes would be operative as upon waters to which the jurisdiction of the United States did not extend.

The particular act of Congress referred to above, under which boats plying the Des Moines River have been registered, limits the operation of the act to boats "found on the navigable waters" of the United States. In fact, the power of Congress to regulate navigation is limited to the navigable waters of the United States. The meaning of the phrase "navigable waters of the United States" is discussed in the case of *The Daniel Ball vs. U. S.*, 10 Wall. (U. S.) 557, at page 563:

"They constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

As stated above, the designation of the Des Moines River as "navigable waters of the United States" was withdrawn by act of Congress in 1870. It is our understanding that since this time the federal government has not asserted regulatory jurisdiction of the said waters.

It is our conclusion, therefore, that for the purposes of navigation, the State of Iowa has exclusive jurisdiction over craft plying the Des Moines River since the said waters are not subject to the paramount authority of Congress. We are of the further opinion that upon waters which are "navigable waters of the United States," the federal government has exclusive control of the regulation of navigation where boats found upon such waters are licensed by the authority of the federal government and operated in accordance with the federal laws. It follows that the exceptions set out in Section 17, Chapter 99, Acts of the 47th General Assembly, include only such craft as may be found on the navigable waters of the United States, since it is only on such waters that such boats could be operated "in accordance with the federal laws and regulations therefor."

SEAL: INSIGNIA: IOWA—SEAL OF: State seal may not be used except by state officers; may be used only by departments connected either by election or by appointment to state government.

August 20, 1937. *Tom J. White, Superintendent, Printing:* We have your letter of August 11, 1937, in which you ask the opinion of this department relative to the use of the seal of the State of Iowa.

It is the opinion of this department that the seal of the State of Iowa should only be used by the officers and departments which compose the state government. That is, it should be used exclusively by state offices and their immediate sub-divisions; it should not be used except by departments of state which are immediately tied up either by election or by appointment to the state government.

The seal of the State of Iowa is an insignia which represents the greatness of our state. To the people of Iowa the seal of the state should symbolize that the state government is ever standing ready to protect their rights and liberties. As such the seal should not be used in such a way as to detract, in even the remotest instance, from the dignity which it deserves. Therefore, you should confine its use to such offices as represent the state, and you should even confine its use by such offices to such purposes as are compatible with the honor and dignity of the State of Iowa.

Although there is no section of the Constitution or the Code which in so many words states how the seal of Iowa should be used, nevertheless Chapter 30 of the Code contains certain provisions on the use of the seal from which we can infer the thought which our legislators had in mind in dealing with this subject.

COUNTIES: DRAINAGE DISTRICT: LIABILITY OF COUNTY: The county is not a party to nor a part of any drainage district. Therefore there is no liability on the part of the county, the county being in no manner interested in the drainage project. If the dirt were wasted beyond the limits of the right of way, it was an act of negligence on the part of the contractor who alone would be liable therefor.

August 20, 1937. *Mr. A. C. Carmichael, County Attorney, Pocahontas, Iowa:*

This department is in receipt of your request for an opinion upon the following questions:

When a drainage district has been established and the owner of land has been paid damages for right of way for an open drainage ditch, when it becomes necessary to clean out the ditch and the dirt is deposited along the spoil bank, whether or not, if this new dirt extends beyond the original spoil bank, there is any liability on the part of the county for damages to the owner of the land.

Where a drainage ditch was planned, and, as a matter of convenience and economy, the ditch was dug three times the planned width of the ditch and in the cleaning out of the ditch an extraordinary amount of dirt was deposited on the spoil bank, it also being necessary to deposit all of the dirt on one side of the ditch and the excess of the dirt ran over beyond the original spoil bank, would the county be liable for damages to the owner for the excess land used for the deposit of the dirt?

The same answer will apply to each of the foregoing questions. In each of the questions you have stated that the wasted dirt from the cleaning out of the drainage ditches has extended beyond the original spoil bank. We are not informed as to whether or not the wasted dirt extended beyond the right of way acquired by the drainage districts for the construction of the drainage ditches. However, with that particular fact we are not concerned. Your question deals with the liability of the county. In matters of drainage the county is not a party. The statute providing for establishment of levee and drainage districts confers the jurisdiction upon the Board of Supervisors which acts as a drainage commission and represents the drainage district if and when established. The county as a corporation is neither directly nor indirectly a party to or part of any drainage improvement. This has been the settled law of the State of Iowa from an early date. See *Yockey vs. Woodbury County*, 106 N. W. 950; *Canal Construction Co. vs. Woodbury County*, 121 N. W. 556, and numerous later decisions of our Supreme Court. A drainage district is not a corporation. In fact it is not an entity and cannot be sued. See *Board of Supervisors of Worth County vs. District Court of Scott County, et al.*, 229 N. W. 711; *Mitchell County vs. Odden, et al.*, 259 N. W. 774. In the recent case of *Payne vs. Missouri Valley Drainage Dist. No. 1*, 272 N. W. 618, the court, speaking through Mr. Justice Donegan, used this language with reference to a situation similar to that involved herein:

"The evidence shows that the engineer employed by the board set stakes showing the lines of this right of way, and that the contractor was instructed to keep within the limits of the right of way in distributing the dirt taken out of the ditch. If in doing the work of cleaning out the ditch the contractor deposited dirt outside of the right of way, such conduct was not authorized by the board, could have been restrained by proper action, and did not constitute a taking of the land by the board. If any portion of plaintiff's land outside of the right of way of said ditch has been covered or damaged by the manner in which the work of cleaning out said ditch was done, a proper remedy undoubtedly exists to redress such injury."

The writer of this opinion having been one of the attorneys for the drainage district in the Payne case, feels free to make this observation. The court inclined to the view that if the contractor in performing the work deposited or wasted the dirt beyond the limits of the right of way that any damages accruing to the land owner were occasioned by the carelessness of the contractor in performing his work and that if there was any cause of action growing out of such damages it was against the contractor and the contractor alone.

Therefore, under the facts submitted in the foregoing matter, there is no liability on the part of the county, the county being in no manner interested

in the drainage project. The drainage district is a nonentity and cannot be sued. If the dirt were wasted beyond the limits of the right of way, it was an act of negligence on the part of the contractor who alone would be liable therefor.

COUNTIES: BOARD OF SUPERVISORS: BILLS FOR ROAD CONSTRUCTION WORK: The allowance of bills for road construction work shall be published in the proceedings of the Board, and show the name of the individual, the amount allowed and the purpose for which allowed.

August 20, 1937. *Mr. Roscoe S. Jones, County Attorney, Atlantic, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Can the Board of Supervisors allow bills for road construction for maintenance in lump sums covering maintenance divisions and publish only the lump allowance without including in the publication each individual item to be allowed?

The facts stated in the foregoing question do not disclose whether the work of road construction or maintenance is being handled under contract or by day labor. If the work is being done under contract it would be sufficient to publish in the Board's proceedings the allowance and payment of claims filed on the part of the contractor without specific itemization of such claims. However, if this work is being done by the county with day labor, then there is a different situation to contend with. Section 5411 of the statute requires that the proceedings of the Board of Supervisors shall be published, subdivision 2 of the section being as follows:

"The schedule of bills allowed by said board."

Further reference is made in Section 5412-a1 to the publishing of bills allowed, the pertinent part of which is as follows:

"and the publication of the schedule of bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon."

Therefore, it is necessary that the Board of Supervisors in its board proceedings publish the name of the individual, the amount allowed, and the purpose for which allowed.

BUILDING AND LOAN ASSOCIATIONS: ARTICLES OF INCORPORATION: The Articles of Incorporation of Building and Loan Associations must conform to the statute and cannot be in derogation of the statute. The Articles of Incorporation could not therefore confer upon a shareholder, who was also a borrower, the right to vote both the stock owned by him and one vote as a borrower.

August 20, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following question:

If a borrower from a Building and Loan Association owns unpledged shares of stock in the Association and also owes a loan to the Association is such shareholder and borrower entitled to vote at a shareholder's meeting, one vote for each share of stock owned by him plus one vote as a borrower?

Building and Loan Associations are creatures of the statute. Chapter 417 of the statute provides for their organization, and the method and manner in which the business of the organization shall be carried on. The question of voting and the right to vote at shareholders' meetings are provided for by Section 9342 of the statute which is as follows:

"*Voting shares of stock.* Each member shall have one vote for each one

hundred dollars 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. 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."

Under the provisions of the foregoing section of the statute, a shareholder is entitled to one vote for each share of stock par value of one hundred dollars owned by him at the time of such election. Such shareholder has the right to vote his stock regardless of whether or not the same is pledged as security. That is, so long as the share of stock stands in the name of the shareholder, the statute grants him the right to one vote for each share of stock.

In addition to the provisions of Section 9342 the recent General Assembly amended Chapter 417 of the statute by adding thereto subsection (k) of Section 3, Chapter 220 of the Acts of the 47th General Assembly which is as follows:

"Any borrower not holding or subscribing for stock shall nevertheless be a member of such association and shall be entitled to one vote at any shareholders' meeting."

It will be observed that under subsection (k) above quoted, a borrower from the association is entitled to one vote at a shareholders' meeting, as a borrower, only upon the condition that he is not a holder of or subscriber for stock in the association. The above amendment grants to the borrower the right to vote as a borrower at a shareholders' meeting only upon the contingency that such borrower does not own stock nor has subscribed for stock.

Therefore, under the facts stated in your question, namely, that the shareholder is also a borrower, such shareholder would be entitled to vote only the number of votes represented by the number of shares of stock of the par value of one hundred dollars owned by him in such association. The fact that he is a shareholder excludes him from voting as a borrower.

The Articles of Incorporation of Building and Loan Associations must conform to the statute and cannot be in derogation of the statute. Therefore, the Articles of Incorporation could not confer upon a shareholder, who was also a borrower, the right to vote both the stock owned by him and one vote as a borrower.

TOWNSHIP TRUSTEES: FENCE VIEWERS: FEES: When township trustees are serving in the capacity of fence viewers their compensation shall be figured on the basis of $4.00 per day. The same shall be paid by the person or persons requiring their services.

August 21, 1937. *Mr. Clarence A. Kading, County Attorney, Knoxville, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

Does division 3 of Section 5571 contemplate that the township trustees must demand an advancement of their fees from parties requiring their services as fence viewers? If so, what remedy do they have in case they have proceeded and completed their work without the advancement of such fees? If fees have not been advanced, what procedure must they follow in getting their compensation for their services in case they have omitted any reference thereto in their order?

Division 3 of Section 5571 does not require that the township trustees, when acting as fence viewers, demand an advancement of their fees from the party making application to them for their services. Division 3 of Section 5571 provides that the fees of the fence viewers shall be paid in the first instance by

the party requiring their services. That is, the party who files the application is primarily liable to the fence viewers for their fees.

Under the facts stated in the foregoing question it appears that the fence viewers have now completed their work. Under such circumstances, each of the trustees who served as a fence viewer has a claim against the applicant for the amount of the fee due him. There is no provision in the statute for collecting such fees by having them assessed against the real estate. Therefore, the trustees will have to resort to an action at law for collection of their fees.

In the foregoing question you state that the trustees omitted any reference to their fees in their findings and order. The trustees would have authority to amend their report and in such amended report set forth their findings as to the fees and expenses incurred by reason of the viewing of the fence. Liability to the trustees clearly incident to the viewing of the fence being chargeable to the person who makes the application, the Board should determine by their amended order in what proportion the fees and expenses should be borne by the interested parties. The applicant would then be entitled to recover from his adversary or the opposite party the amount of fees found and charged by the trustees.

2. What is the amount of fees to which a fence viewer is entitled? Is he to be paid under division 1 of Section 5571 on the basis of $4.00 per day, or under division 2 on the basis of $1.00 per day?

The township trustees are a special tribunal provided for by statute to view and make determination and report on matters in connection with fences. The remedy with reference to division and construction of partition fences is a matter exclusively in the hands of the fence viewers. When the township trustees are employed as fence viewers they are serving in an official capacity. That is, they are engaged in official business. Division 1 of Section 5571 provides for the payment of township trustees on a basis of $4.00 for each eight hours engaged in official business, the compensation to be paid from the county treasury. Division 2 of the section provides a fee of $1.00 each to the trustees for each day engaged in assessing damages done by trespassing animals. Division 3 of the section provides:

"When acting as fence viewers, or viewing or locating any ditch or drain, or in any other case where provision is made for their payment otherwise, they shall not be paid out of such treasury, * * *."

The statute in division 2 of Section 5571 makes special provision for paying the trustees when appraising damage caused by trespassing animals. That is the only exception made to the compensation fixed by division 1 of the section. Division 3 of the section, however, provides that when the trustees are acting as fence viewers they shall not be paid from the county treasury, but makes no provision for any other or different compensation of the trustees than that in division 1 of Section 5571. We are therefore of the opinion that when such trustees are serving in the capacity of fence viewers that their compensation shall be figured on the basis of $4.00 per day, but that the same shall be paid by the person or persons requiring their services.

3. Can the township trustees certify their compensation for serving as fence viewers to the county auditor and have the same levied as a tax against the real estate of the interested parties?

Section 1834 of the statute provides in substance that in default of the landowner in carrying out the orders of the fence viewers in erecting, rebuilding, trimming or cutting back or repairing such fence for a period of thirty days

after the time fixed in the order, the adjoining landowner may do such work and have it appraised by the fence viewers and the cost thereof, together with all fees in connection therewith be certified to the county auditor and collected as ordinary taxes. However, it is only in the event that the landowner defaults and neglects or refuses to carry out the order of the fence viewers that the adjoining owner is permitted to carry out said order and have costs appraised and they, together with the fees, certified to the county auditor for collection as regular taxes. When there is no default in carrying out the orders of the fence viewers, the cost and expenses of the fence viewers cannot be certified and collected as taxes.

STATE BOARD OF SOCIAL WELFARE: BONDS OF BOARD MEMBERS: Each member of the board is a public officer and is required to give bond as are also the superintendents. Board may in its discretion require bond from such other employees as deemed necessary. Amount of bonds for board members set by Governor, for superintendents by Governor, and other bonds fixed by Board itself. Bonds shall be paid for by the members and superintendents.

August 20, 1937. *Mr. W. F. Miller, Chairman, State Board of Social Welfare:* Under letter of August 10th you have requested an opinion from this department upon the following proposition:

"Will you kindly inform us as to whether or not the members of the Board should be bonded. If so, the amount, and also advise what other positions of trust in the organization should carry bonds. Will the premiums on these bonds be payable by the state?"

Section 1059 of the 1935 Code of Iowa provides in part as follows:

"All other public officers except as otherwise specially provided shall give bond with the conditions in substance as follows * * *."

From the above, it is clear that every public officer in Iowa must give a bond.

The case of *State vs. Spaulding*, 102 Iowa 639, 72 N. W. 288, sets forth the Iowa rule as to what constitutes a public officer. The court said in that opinion:

"From all the authorities we think the following rules may properly be laid down to determine whether one is a public officer. * * *: (1) The office itself must be created by the constitution of the state, or authorized by statute. (2) If authorized by statute, its creation may be by direct legislation; or the law making power, when not inhibited by the constitution or public policy from so doing, may confer the power of creating an office upon official boards or commissions which are themselves created by the legislature, when such office is necessary to the due and proper exercise of the powers conferred upon them, and the rightful discharge of duties enjoined. (3) A position so created by the constitution, or by direct act of the legislature, or by a board of commissions duly authorized so to do, in a proper case, by the legislature, is a public office. (4) To constitute one a public officer, at least within the purview of the criminal law, so that he may be liable for the misappropriation of the public funds, his appointment must not only have been made or authorized as above stated, but his duties must either be prescribed by the constitution or the statutes of the state, or necessarily inhere in and pertain to the administration of the office itself. (5) In any event the duties of the position must embrace the exercise of public powers or trusts; that is, there must be a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public. (6) The following among other requirements are usually though not necessarily attached to a public office: (a) an oath of office; (b) salary or fees; (c) a fixed term of duration or continuance."

The case then holds that a treasurer, elected by the Commissioners of Pharmacy who were appointed under an Act of the legislature, was not a "public officer"

for the reason that the office of treasurer was not created by either the constitution or by an act of the legislature, nor was any authority conferred upon said commission to create or establish such an office.

The State Board of Social Welfare is a Board created by an act of the legislature, and the legislature has delegated to this Board certain sovereign powers of government to be exercised by said Board for the benefit of the public.

It is, therefore, the opinion of this department that each member of the State Board of Social Welfare is a public officer within the meaning of Section 1059 of the 1935 Code of Iowa, and is required to give a bond in the form and manner provided in said section.

Section 9 of the Act creating the State Board of Social Welfare, known as Senate File 373, Acts of the 47th General Assembly of Iowa, is as follows:

"The state board shall create (1) a division of old age assistance, (2) a division of emergency relief, and (3) a division incorporating aid to the blind, aid to dependent children, and child welfare. It shall appoint a superintendent for each division, who shall serve at the pleasure of the state board, and shall have such powers and perform such duties as are prescribed by law or as are delegated by the state board. Each superintendent shall receive such salary as is fixed by the state board, but not in excess of thirty-six hundred dollars per year."

Thus, it is seen that the legislature has created the office of Superintendent of the Division of Old Age Assistance, and Superintendent of the Division incorporating Aid to the Blind and Child Welfare.

It is the opinion of this department that these Superintendents are public officers within the meaning of Section 1059 of the 1935 Code of Iowa, and should give a bond in the form and manner provided in said section.

It is the further opinion of this department that the Board may in its discretion require a bond from such other employees as it deems necessary, even though such employee is not a public officer.

Senate File 373 of the Acts of the 47th General Assembly of Iowa, which creates the State Board of Social Welfare, does not state the amount of bond that is to be given by the members of the State Board, nor the Division Superintendents.

Section 1064 of the 1935 Code of Iowa provides that where no amount is fixed by law for the bond of a public officer, the approving officer fixes the amount of said bond.

Section 1073 of the 1935 Code of Iowa states in part as follows:

"Bonds shall be approved: (1) by the Governor in case of state and district officers, elective, or appointive."

It is, therefore, the opinion of this department that the amount of the bond to be furnished by each board member and division superintendent should be fixed by the Governor. The amount of any bond required of employees of the State Board other than public officers should be fixed and approved by the Board itself.

Chapter 54 of the 1935 Code of Iowa relating to bonds of a public officer, provides that a bond given by a county treasurer shall be paid by the county where the bond is filed, and provides that the bond given by a township clerk shall be furnished and paid for by the township.

It would thus appear that the legislature intended every public officer other than those specifically exempted as above to pay his own bond.

It is, therefore, the opinion of this department that each member of the State

Board of Social Welfare and the Superintendents of the divisions hereinabove referred to must pay the bond premium.

STATE BOARD OF SOCIAL WELFARE: CHILD WELFARE: It is the opinion of this department that the subdivision of child welfare, under the supervision of the state board of social welfare, has authority to audit the accounts of these institutions, if and when deemed necessary.

August 21, 1937. *Mr. W. F. Miller, Chairman, State Board of Social Welfare:* You request our opinion on the following proposition:

Does the subdivisions of child welfare have authority to audit the accounts and investigate the financial status of child-caring agencies, child-placing agencies and maternity hospitals?

Section 5, Chapter 118, laws of the 47th General Assembly, provides in part as follows:

"*Powers and duties of sub-division of child welfare.* The sub-division of child welfare, under the supervision and control of the state board, shall:

* * *

(3) Make such rules and regulations as may be necessary or advisable for the supervision of the private child-caring agencies or officers thereof which the division is empowered to license, inspect and supervise, * * *.

* * *

(8) License and inspect maternity hospitals, private boarding homes for children, and private child-placing agencies; * * *."

Section 3661-a36, Code, 1935, of the chapter dealing with "maternity hospitals," as amended, provides:

"*Inspections.* Officers and authorized agents of the sub-division of child welfare may inspect the premises and conditions of such agencies at any time and examine every part thereof, and interview the inmates, and may inquire into all matters concerning such hospitals and the women and children in the care thereof."

Section 3661-a55, Code, 1935, contained in the chapter entitled "Children's Boarding Homes," as amended, provides:

"*Records and inspection.* The sub-division of child welfare shall have the same rights and duties relative to records, reports, and inspections of children's boarding homes as are provided for in connection with maternity hospitals."

Section 3661-a76, Code, 1935, of the chapter relating to child-placing agencies, as amended, provides:

"*Inspection generally.* Officers and authorized agents of the sub-division of child welfare may inspect the premises and conditions of such agency at any time and examine every part thereof; and may inquire into all matters concerning such agencies and the children in the care thereof."

Child-caring agencies, by such title, had no counterpart in the law prior to the enactment of Chapter 118 unless we are to assume the term to be synonymous with child-placing agencies.

In addition Section 3661-a80, Code, 1935, embodied within the chapter on child-placing agencies, provides in part:

"*Annual report.* Every such agency shall file with the sub-division of child welfare, during the month of January of each year, an annual written or printed report, which shall show:

* * *

8. A statement showing the receipts and disbursements of such agency.
9. The amount expended for salaries and other expenses, specifying the same.
10. The amount expended for lands, buildings, and other investments.
11. Such other information as the board may require."

Further, in each instance, the subdivision is empowered to license any mater-

nity hospital, children's boarding home, and child-placing agency "that is conducted by a reputable and responsible person." Sections 3661-a12, 3661-a44 and 3661-a60, Code, 1935, as amended. We take this to mean a person morally and financially reputable and responsible.

In each instance, the duty is imposed upon the subdivision to provide such general rules and regulations for the conduct of each of the named institutions as shall be necessary to effect the purposes of the laws relating to children, wherein same are applicable. Sections 3661-a22, 3661-a52 and 3661-a73, Code, 1935, as amended.

In view of the foregoing statutory provisions, it is the opinion of this department that the subdivision of child welfare, under the supervision of the state board of social welfare, has the authority to audit the accounts of these institutions, if and when deemed necessary, as an incident to the licensing and inspection thereof, and that it is the duty of the subdivision to investigate the financial status of such institutions as an incident to determining whether or not the person or persons conducting such institutions are reputable and responsible.

COUNTIES: SEWERS AND SEWAGE DIVERSION SYSTEM—DICKINSON COUNTY: Language of Senate File 278 may be interpreted to include sewage diversion system.

August 23, 1937. *Mr. M. L. Hutton, Director, State Conservation Commission:* We acknowledge receipt of your request for the opinion of this department relative to the construction to be given certain provisions of Senate File 278, acts of the 47th General Assembly.

Senate File 278, aforesaid, according to the language thereof, was passed "to provide for an appropriation to the state conservation commission for the construction of sewers and sewerage diversion works in Dickinson County, Iowa, which will provide for the protection of the state waters, commonly known as the Iowa great lakes system in said county, and providing for the construction, maintenance, and operation of said works in cooperation with federal or other agencies." The above language is set out in the preamble of the act referred to. The purpose of the said act is also expressed in Section (1) of Senate File 278, as follows:

"Section 1. *Purpose.* The purpose of this act is to provide for the improvement of state owned water of Dickinson county, Iowa, known as Spirit Lake, East Okoboji, West Okoboji, Upper Gar Lake, Lake Minnewashta and Lower Gar Lake, by providing for the construction of a sewage diversion system whereby sewage from the area surrounding said lakes may be cared for by a common system that will not empty into said lakes, and to further provide a method financing, construction, maintenance and operation of said system or works."

The specific question asked by you is as follows:

Is the terminology "sewage diversion system" as employed in the foregoing section broad enough to include a sewage disposal works?

We understand that the preliminary survey of this project indicates that in order to make feasible the sewage system contemplated, that a sewage disposal plant will need to be constructed at the lower end of the proposed diversion system.

In reviewing the history of this bill in the legislature, we have observed that in the original draft of the bill the following language was employed in the section which set out the purpose of the act:

"by providing for the construction of a sewerage system and/or sewage treatment works whereby sewage from the area surrounding said lakes may be cared for by a common system. * * *"

An amendment to this bill struck from the above provision the words "and/or sewage treatment works" so that in the bill as passed, no specific reference is made to a treatment works. It is possible that the fact that the above amendment was adopted is indicative of the legislative intent. However, in view of the fact that the bill as passed contemplates the construction of a "sewerage system whereby sewage from the area surrounding said lakes may be cared for by a common system that will not empty into said lakes," we are of the opinion that the language of the bill controls, and that it is broad enough to include the construction of a sewage disposal plant or treatment works in connection with the system.

In view of the broad language employed above, and in view of the fact that the construction of a sewage treatment works in connection with the proposed system appears to be necessary to insure the feasibility thereof, we are of the opinion that the act under consideration authorizes the construction of a sewage diversion system in which might properly be included a sewage disposal works.

BEER: PERMITS: VILLAGES—PLATTED: If board of supervisors determine that a certain area is a village, and was in fact platted prior to January 1, 1934, beer permit may issue. Such plat need not to have been recorded.

August 23, 1937. *Mr. Carl A. Burkman, County Attorney, Des Moines, Iowa:* We are in receipt of your letter requesting the opinion of this department upon a question raised by the following statement of facts:

"I have before me a blue print covering a tract of ground near Johnston Station, north of the City of Des Moines, which is an unincorporated village. One-half of the blue print made in 1932, or prior thereto, was actually recorded, the other half, for some reason, was not used and never recorded. The Rainbow Gardens which was formerly a large brick garage has been reconstructed into a place where beer and food could easily and perhaps profitably be sold. This is entirely outside of the recorded plat area, but within the portion of the plat that was never recorded.

"Must the entire tract referred to have been recorded before the beer permit can issue, or is the fact of the existence of such plat sufficient to warrant the issuing of a permit?"

The section of the statute applicable to the above inquiry is Section 1921-f99, dealing with the powers of boards of supervisors to issue beer permits outside cities and towns, and which in part provides as follows:

"1921-f99. *Power to issue permits.* * * * Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934. * * *"

It is stated that the area under consideration is, in fact, a village. The statute authorizes the issuance of permits by boards of supervisors in villages platted prior to January 1, 1934. One of the two requirements of the statute is, therefore, complied with, i. e., it appears that the area is, in fact, a village. The section does not elaborate on the details pertaining to the question of platting. We are of the opinion that, under the statute, the board must determine the question as to whether or not a bona fide plat of the area comprising the village in which a permit is to be issued was in existence prior to January 1, 1934. The fact that such plat was recorded prior to January 1, 1934, is evidence, and probably the best evidence, of such fact.

The statute does not require that such plat must have been recorded prior

to said date, and it is our opinion that the question of the existence of the plat as of the time set out in the statute is a matter of fact to be determined by the board of supervisors. If the board determines that such area is, in fact, a village, and that a bona fide plat thereof was in existence prior to January 1, 1934, it is our opinion the board has jurisdiction to issue a permit within such area.

BEER: PERMITS—CLASS "C": Hours during which beer may be sold by Class "C" permittee is limited only by Sections 1921-f107 and 1921-f114.

August 23, 1937. *Mr. O. J. Wardwell, County Attorney, Northwood, Iowa:* We acknowledge receipt of your request for an opinion of this department upon facts stated by you as follows:

"In one of the towns in this county, one Class B and one Class C beer permits have been issued. An ordinance has been adopted by the City Council limiting the hours between which beer can be sold.

"The question arises as to whether or not the holder of the Class C permit is bound by this ordinance as to the time of closing or whether he can sell within the hours prescribed in Section 1921-f107, in which it is provided that no sales or deliveries shall be made between the hours of 1:00 A. M. and 6:00 A. M., and no sale or delivery on Sunday."

Pertinent to the inquiry here presented is Section 1921-f107, 1935 Code, which provides as follows:

"1921-f107. *Authority under class 'C' permit.* Any person holding a class 'C' permit issued as herein provided, shall be allowed to sell beer for consumption off the premises, provided, however, that such sales when made shall be in original containers only and that no sale or delivery shall be made between the hours of one a. m. and six a. m., and no sale or delivery on Sunday."

It is thus specifically provided that no sale or delivery of beer can be made by class "C" permittees between the hours of one a. m. and six a. m. Section 1921-f114, 1935 Code, further restricts the sale of any beer by such permittee on Sunday:

"1921-f114. *Prohibited sales and advertisements.* * * *

"Nor shall any such beer be sold or delivered to any person between the hours of twelve o'clock midnight on Saturday and seven o'clock of the following Monday morning."

Section 1921-f126, 1935 Code, extends to municipalities certain ordinance making powers with reference to matters pertaining to the sale and distribution of beer. That part of said section applicable to this inquiry is as follows:

"* * * and said city and town councils are further empowered to adopt ordinances, subject to the express provisions of Section 1921-f114, for the fixing of the hours during which beer may be sold and consumed in the places of business of class 'B' permittees, and further providing that subject to the express provisions of said Section 1921-f114 no sale or consumption of beer shall be allowed on the premises of a class 'B' permittee, as above provided, between the hours of one a. m. and six a. m.; * * *"

It is to be noted that the statute which grants to municipalities power to adopt ordinances for the fixing of hours during which beer may be sold and consumed, limits this power by the language "in the place of business of class 'B' permittees." Since the legislature saw fit to specifically provide that such ordinances are to affect places of business of "B" permittees, the conclusion must be reached that the power was not extended to cities and towns to adopt ordinances fixing hours of operation for class "C" permittees. Such result follows the application of the familiar rule of statutory construction that where a statute directs the performance of certain things in a particular manner, it

implies that it shall not be done otherwise. Since beer sold by a class "C" permittee must be "for consumption off the premises," it appears that the legislature deemed it unnecessary to vest in cities and towns the same regulatory powers with respect to "C" permits as was granted with respect to "B" permits. That such construction is consistent with the legislative intent is supported by the fact that all the specific limitations which cities and towns are, by the statute, authorized to adopt, are restricted to class "B" permits.

It is therefore the opinion of this department that the hours during which beer may be sold by class "C" permittees is to be limited only by Section 1921-f107 and Section 1921-f114, 1935 Code, referred to above.

BOARD OF SUPERVISORS: EXPENSES: JUSTICE OF THE PEACE: In no event can the actual office expenses of the office of the Justice of the Peace, as approved by the Board of Supervisors, exceed the sum of $600.00.

August 23, 1937. *Mr. Leon A. Grapes, County Attorney, Davenport, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Merle F. Wells was Justice of the Peace from January 1, 1934 until he resigned on April 15, 1934, having served three and one-half months. Another party was appointed to fill the vacancy and served from April 15th until the end of the year. The Board of Supervisors of Scott County passed and adopted the following resolution:

"*Be It Resolved,* That for the year 1934 each Justice of the Peace in and for the City of Davenport Township, Scott County, Iowa, be allowed to retain from the fees collected by him in civil cases his actual office expense incurred for said year not in excess of $600."

During the three and one-half months which Mr. Wells served as Justice of the Peace he collected in civil fees more than $366.64. During the same period Mr. Wells claims actual office expense in the sum of $366.64. The state checkers have recommended an allowance to Mr. Wells for his expenses a sum of $175.00, the same being on the basis of $50.00 per month.

The question involves a determination of the expenses to be allowed Mr. Wells as Justice of the Peace during the three and one-half months which he served during 1934. The Board of Supervisors by its resolution authorized the retention of fees collected in civil cases to cover actual office expenses incurred during the year in amount not to exceed $600.00. As to just what constitutes the expense account of Mr. Wells in the amount of $366.64 is not stated. As to what are legitimate office expenses to which the Justice of the Peace is entitled to be compensated for by the retention of civil fees is another question. This department in an opinion rendered on April 1, 1931 and reported at page 27 of the 1932 Attorney General's Report held that the determination of the proper expenses of the office of the Justice of the Peace was a question of fact to be determined by the Board of Supervisors. With that opinion we concur. So, in our judgment there is a fact question to be determined by the Board of Supervisors as to what expenses shall be approved as office expenses of Mr. Wells during the early part of 1934. After it has determined the expenses to be allowed him as office expenses actually incurred, the amount so determined by the Board is the amount which Mr. Wells, as Justice of the Peace, would be authorized to retain from the civil fees collected by him during the time, but not in excess of $600.00, the amount fixed by the resolution of the Board. The limitation of $600.00 fixed by the Board is fixed on an annual basis, or as an annual maximum, but the Justice of the Peace is only permitted to retain civil fees to the extent of the actual expenses incurred. Therefore, if

the actual expenses incurred by the Justice of the Peace from January 1, 1934 until April 15, 1934 were in the sum of $600.00, and his collection from civil fees amounted to $600.00 or exceeded that amount, he would be entitled to retain the full amount of his actual expenses during the period of time that he served, but under such circumstances, it would then be necessary that the Justice of the Peace bear his own expenses from that time on until the end of the year. In the instant case, the collections from civil fees from January 1, 1934 until April 15, 1934 exceeded the sum of $366.64. The Justice, Mr. Wells, claims actual office expenses incurred during that period of time in the sum of $366.64. If the Board of Supervisors approves the expenses incurred by Mr. Wells during that period of time in the amount claimed by him, it is our opinion that Mr. Wells is entitled to retain the $366.64, the amount of civil fees collected. The contention made by Mr. Wells, as we understand it, is that the allowance of $600.00 per year is made to the Justice of the Peace. We think this is error. The allowance of $600.00 is made to the office, not to the person. Therefore, if the Board of Supervisors should allow actual office expenses to Mr. Wells in the sum of $366.64 during the time from January 1, 1934 to April 15, 1934, that being the date of his resignation and the appointment of a new Justice, the Justice who succeeded him would be limited in the amount of office expenses, which he could retain from civil fees, to the difference between $366.64 and $600.00 or $233.36. In no event can the actual office expenses of the office of the Justice of the Peace, as approved by the Board of Supervisors, exceed the sum of $600.00 per year.

It is therefore the opinion of this department that Mr. Wells who served from January 1, 1934 to April 15, 1934 would be entitled to retain from civil fees collected by him during that period of time the amount of actual office expenses incurred by him and as approved by the Board of Supervisors and in an amount not to exceed the sum of $600.00, and not in excess of the civil fees collected by him.

BOARD OF SUPERVISORS: DRAINAGE WARRANTS: The drainage warrants of Pigeon Creek Drainage District No. 2 are not barred by the statute of limitations. The resolution of the Board on December 15, 1930 was a sufficient recognition to remove such bar and to re-establish the indebtedness represented by said warrants.

August 27, 1937. *Mr. Robert B. Organ, County Attorney, Council Bluffs, Iowa:* You have asked for an opinion from this department as to the applicability of the statute of limitations to certain warrants issued by the Board of Supervisors of Pottawattamie County in Pigeon Creek Drainage District No. 2 dated in 1924 and 1925.

This department has heretofore had the question of whether the statute of limitations was a bar to the payment of drainage warrants before it. In the 1932 Report at page 232 is an opinion, the pertinent part of which is as follows:

"We are of the opinion that the Board would not have authority to forego the statute of limitations and could not pay an obligation which has been barred by the statute."

The present administration has upon at least two occasions rendered opinions in accord with the above ruling. However, the fact question involved here is materially different from the fact questions heretofore considered by this department, and we consider it necessary to take into consideration the facts

involved in the present case and with those facts in mind determine the answer to be given to your question.

Pigeon Creek Drainage District No. 2 was established by the Board of Supervisors of Pottawattamie County under the drainage statutes in 1903 and the improvement completed in 1907. The cost of the original improvement was assessed against the property within the drainage district.

Subsequent to the completion of the improvement in Pigeon Creek Drainage District No. 2, the outlet of the drainage ditch into the Missouri River became silted and out of repair to such an extent as to render the ditch insufficient for the purpose for which it was constructed. That condition having been called to the attention of the Board of Supervisors, the Board took the necessary action to authorize the repair of the drainage ditch. In connection with this procedure, that is, in setting up the mechanics necessary to give the Board of Supervisors jurisdiction, and in connection with the repairs, the Board incurred an indebtedness of approximately $65,000.00. This indebtedness was evidenced by drainage warrants authorized by the Board of Supervisors and drawn by the county auditor against the drainage fund of Pigeon Creek Drainage District No. 2. Upon presentation of these warrants to the county treasurer of Pottawattamie County they were stamped "not paid for want of funds."

After the repairs hereinbefore mentioned were ordered by the Board of Supervisors, the Board caused the lands and properties within the drainage district to be classified by a Classification Commission and later approved the Classification Commission's report and ordered an assessment in accordance with such report to be levied against the property within the district for the purpose of paying the cost and expenses incurred in making the repairs. Objections were filed to the report of the Classification Commission which were denied by the Board of Supervisors. An appeal was taken by the objectors to the District Court of Pottawattamie County. The District Court confirmed the action of the Board of Supervisors. The objectors appealed from the decree of the District Court of Pottawattamie County to the Supreme Court of the State of Iowa, where the decree of the District Court was reversed and the case remanded. See *Mayne vs. Board of Supervisors*, 208 Iowa 988.

Following the ruling made by the Supreme Court in the case of *Mayne vs. Board of Supervisors*, supra, the Board of Supervisors of Pottawattamie County appointed a new Classification Commission for the purpose of re-classifying the land within the drainage district in accordance with the holding of the Supreme Court. The report of the second Classification Commission met with objections before the Board of Supervisors and that classification eventually reached the Supreme Court of the State of Iowa. See *Mayne vs. Board of Supervisors*, 241 N. W. 29 in which opinion, filed on the 9th day of February, 1932, the Supreme Court sustained the lower court and the Board of Supervisors in approving the report of the Classification Commission.

The classification of the lands in Pigeon Creek Drainage District No. 2 has resulted in a great deal of litigation and in addition to the two cases hereinbefore referred to, the matter was before the Supreme Court in the case of *Board of Supervisors of Pottawattamie County vs. Board of Supervisors of Harrison County*, 241 N. W. 14, in which an opinion was rendered on February 9, 1932, and in the case of *Ward vs. Board of Supervisors*, 241 N. W. 26, in which an opinion was rendered on the 9th day of February, 1932.

Following the report of the Classification Commission and on or about December 15, 1930, a resolution was passed by the Board of Supervisors ordering an assessment upon the lands within Pigeon Creek Drainage District No. 2 in accordance with the report by the Classification Commission for the purpose of paying the indebtedness incurred by reason of the repairs hereinbefore referred to. On account of the matter being then pending in court, and for various other reasons, as disclosed by ditch records of the county, the assessment was not in truth and in fact levied against the property in the district until June 24, 1935. The tax having been levied in June, 1935, became payable with the regular taxes in 1936 and during 1936 and 1937 property owners within the district have paid into the county treasurer's office, as a result of said levy, some seven or eight thousand dollars. Some of the property owners paid under the prior resolution adopted in 1925 and before the resolution was nullified by the court. As the situation now stands, there is in the drainage fund of Pigeon Creek Drainage District No. 2 the sum of approximately $8,000.00. There are outstanding warrants against this fund in an approximate amount of $6,500.00, all of the warrants being dated in 1924 and 1925 and all being now more than ten years old.

We have not attempted to state all of the facts in connection with the above matter, nor do we claim that the chronological order is correct, but believe that we have set out sufficient of the facts to justify the conclusion hereinafter stated. A reference to the foregoing reported cases will more accurately give the facts.

At the outset we are confronted with the holding of our Supreme Court in the case of *Mills County Nat. Bank vs. Mills County*, 25 N. W. 884, wherein the Supreme Court stated a rule of law which has been cited with approval and followed by our Supreme Court to the present time. The rule as announced by the court in the above case is to the effect that in drainage matters, it is the duty of the county to make the levy for the purpose of paying outstanding warrants without a demand being made therefor, and that the holder of the warrants may bring suit to compel the levy of a tax to replenish the fund out of which the warrants are payable without first requesting the levy of such tax. In the case of *Bodman vs. Johnson County*, 86 N. W. 331, the case of *Mills County Nat. Bank vs. Mills County*, supra, was cited with approval and of that case Mr. Justice McClain stated:

"It was decided in the case of *Mills County Nat. Bank vs. Mills County*, 25 N. W. 884, that action on such warrants may be maintained without regard to the existence of assets in the fund from which they are payable, and that the holder of the warrants is not justified in waiting for the county to take proceedings to collect the money due to the fund, but may have his judgment, and afterwards take steps for its enforcement."

In the case of *Lenehan vs. Drainage District*, 258 N. W. 91, an action in mandamus was brought by the warrant holders to compel the Board of Supervisors of Sac County to levy an assessment to raise funds with which to pay said warrants. The statute of limitations was interposed as a defense. The court said:

"Manifestly, therefore, the statute of limitations in the case at bar would commence to run under proper circumstances even though the drainage district, through the board of supervisors, had not levied, or otherwise provided for, the additional assessment to complete the fund from which the appellants' warrants are to be paid."

Without going to the length of citing numerous decisions in line with the above

pronouncement of our court, it can be stated that the rule set out in *Mills County Nat. Bank vs. Mills County*, supra, as approved by the later holdings of our court, is that the statute of limitations does under ordinary circumstances apply to drainage warrants. Therefore, unless there is something in the facts involved or in the nature of the proceedings to take the same out of the usual and ordinary case of drainage warrants, the same would now be barred by the statute of limitations.

It will be noted that following the pronouncement of the Mills County Nat. Bank case, supra, the court made the pronouncement that it is not necessary for the warrant holder to wait for the Board of Supervisors to make the levy or to create a fund out of which the warrant is to be paid, but that such warrant holder may proceed by appropriate methods to compel the Board of Supervisors to make the requisite levy for the purpose of raising funds with which to pay the warrant.

We are of the opinion that the warrants in question are not now barred by the statute of limitations for two reasons:

1. That the statute of limitations would not begin to run until the litigation involving the classification of the land in the district for tax purposes ended;
2. That if such warrants were barred by the statute of limitations, that there has been a sufficient recognition of the indebtedness to remove the bar of the statute.

Under the first reason assigned above, we may start with the case of *Wetmore vs. County of Monona*, 34 N. W. 751, which was an action brought to recover on a warrant payable "out of any swamp-land money not otherwise appropriated." The warrant was originally issued in 1866. The action was brought in 1878, a demurrer having been interposed to the petition raising the bar of statute of limitations. The Supreme Court in ruling upon the matter found that the cause of action accrued on January 1, 1878, and held that the petition was not vulnerable to a demurrer and stated:

"The warrant was made payable out of a special fund, and the defendant was not liable to an action on the warrant until the fund out of which it was made payable came into existence."

Under our drainage laws, which are all statutory, Boards of Supervisors are the custodians of and charged with the duty of keeping all improvements in repair. So far as is pertinent, Section 7556 of the 1935 Code is as follows:

"*Repair.* When any levee or drainage district shall have been established and the improvement constructed the same shall be at all times under the supervision of the board of supervisors except as otherwise provided for control and management by a board of trustees, and it shall be the duty of the board to keep the same in repair and for that purpose it may cause the ditches, drains, and watercourses thereof to be enlarged, reopened, deepened, widened, straightened or lengthened, or the location changed for better service, * * *."

This work, that is repairing and so forth, may be done at the instance of the Board of Supervisors and the costs in connection therewith assessed against the property within the drainage district, if the cost of such repairs does not exceed ten per cent of the original cost of the improvement, and a new assessment made against the property on the basis of the old apportionment without notice. However, if the cost of such repairs does exceed ten per cent of the original cost of the improvement, the Board of Supervisors must then comply with Section 7559 of the 1935 Code which is as follows:

"*Assessment with notice.* If the cost thereof does exceed ten per cent of the original cost of the improvements in the district, * * * then the board

shall order a new apportionment of, and assessment upon, the lands in the district to be made; and the same proceedings shall be had and the same rules shall be applied as are provided in this chapter for an original establishment and assessment; and the same right to appeal shall be given to any interested party."

Presumably, from the facts heretofore stated, the cost of the repairs undertaken by the Board of Supervisors in Pigeon Creek District No. 2 did exceed ten per cent of the original cost of the improvement and the Board of Supervisors therefore followed the procedure outlined in Section 7559 of the statute above quoted, and it was the report of the Classification Commission making the new apportionment that caused the litigation hereinbefore referred to. Section 7568 of the statute with reference to the levy of the tax is as follows:

"*Levy under reclassification.* If the amount finally charged against a district exceeds ten per cent of the original cost of the improvement, the board shall order a reclassification as provided for the original classification of a district and upon the final adoption of the new classification and apportionment shall proceed to levy said amount upon all lands, highways, and railway rights of way and property within the district, in accordance with said new classification and apportionment."

Under the facts as disclosed herein, the Board of Supervisors was unable to secure a reclassification and apportionment upon which to make its levy on account of litigation until December, 1930. The Board of Supervisors had prior to that time done all within its power to secure the classification of the lands for the purpose of the levy. Interested taxpayers had objected to the classification before the Board of Supervisors and appealed from the determination of the Board of Supervisors and finally from the decree of the District Court to the Supreme Court of the State of Iowa. True, during the interim, the warrant holders had a right by mandamus to compel the Board of Supervisors to levy a tax for the purpose of raising funds with which to pay their warrants, but such an action of mandamus would have availed them nothing. No court exercising equitable power would have granted a decree to compel the Board of Supervisors to do that which it had already done and which was being contested in the courts. It is a rule of law, well settled and well recognized, that the statute of limitations does not run during the time proceedings are enjoined or tied up by injunction. The appeal from the action of the Board of Supervisors had the same force and effect as an injunction. That is, an appeal from the action of the Board of Supervisors removed the matter from its hands and placed it in the hands of the District Court. During all of the time intervening between the issuance of the warrants in question and the adoption of the resolution in December, 1930, the Board of Supervisors was without power to do more than it did, and during the time the matter was pending upon appeal in the courts the Board of Supervisors was entirely without authority or jurisdiction in the matter. Therefore, during the time the reclassification and reapportionment were being made there was no fund out of which the warrants in question could have been paid.

In the case of *Lincoln County vs. Luning*, 133 U. S. 529, an action was brought on bonds and coupons issued under a funding act of the State of Nevada. The county was delinquent in its interest. The Legislature passed an amendatory act providing for the registering of overdue coupons and imposed upon the treasurer the duty of thereafter paying the coupons as money came into his possession applicable thereto in the order of their registration. The coupons, which by the general limitation law would have been barred, were presented

as they fell due, to the treasurer for payment and payment demanded and refused because the interest fund was exhausted. Thereupon the coupons were registered and from the time of their registration to the commencement of the suit there was no money in the treasury applicable to their payment. In denying the plea of the statute of limitations, the court said:

"This act, providing for registration and for payment in a particular order, was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

The foregoing quotation taken from the case of *Lincoln County vs. Luning*, supra, was cited with approval in the case of *Rialto Irrigation District vs. Stowell*, 246 Fed. 294, and in the case of *Smythe vs. Inhabitants of New Providence Township*, 253 Fed. 824, and by our own Supreme Court in the case of *Stockholders' Investment Co. vs. Town*, 216 Iowa 694, wherein our court, speaking through Mr. Justice Anderson quoted from the *Lincoln County vs. Luning case*, supra, the following:

"And, when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

and then made the following observation:

"To the same effect was the holding in (cases cited) and a long line of cases which we will not extend this opinion to include. But we deem it sufficient to say that such is the general rule and practically the unanimous holding."

We are not unmindful of the fact that our Supreme Court has in the past applied the statute of limitations to drainage warrants, but we have been unable to find any reported cases analogous to the facts now being considered.

The provisions for raising the fund from which the warrants under consideration were to be paid were never in fact completed until the resolution of December, 1930 after a long siege of litigation during which time the creative power was without authority to act. Therefore, until the litigation involving the report of the Classification Commission was ended and the report finally approved and adopted by the Board of Supervisors, the Board was without right, authority, or jurisdiction to levy any tax against the property within the drainage district for the payment of the warrants in question, and it would only be after the Board of Supervisors was in a position and had authority to levy the tax from which the warrants were to be paid that the statute of limitations would begin.

2. That if such warrants were barred by the statute of limitations, there has been a sufficient recognition of the indebtedness to remove the bar of the statute.

We deem it sufficient under this second assigned reason to refer to but two of the many cases of our court upon the proposition of law involved. In the case of *Koht vs. Dean, et al.*, 261 N. W. 491, our court, speaking through Mr. Justice Donegan, stated:

"It seems clear from the holding of this court in the cases above cited that it is not essential that the writing upon which an admission is based expressly admit that the debt is unpaid, that it state the amount thereof, and that it

specifically refer to the indebtedness which is involved. It is sufficient that an admission that an indebtedness is unpaid is the natural and necessary inference from the writing. The amount and items of the indebtedness and the fact that the writing relates to the indebtedness sued on may be established by extrinsic evidence."

And in the case of *McClure vs. Smeltzer, et al.*, 269 N. W. 888, our Supreme Court, speaking through Mr. Justice Kintzinger stated:

"It is enough that such an admission is the natural and necessary inference from the writing. So also of the letter offered in evidence. Its language contains a clear implication of the existence of the debt and the obligation of the writer to pay it. To have the effect of an admission within our statute, it is not required that the writing specifically describe the debt or mention its exact amount, but the identification of the debt and of the amount due may be shown by extrinsic evidence. These rules are too well established to call for a review of the authorities."

Reference to the resolution of the Board of Supervisors passed and adopted under date of December 15, 1930, after the litigation had ended, discloses that the Board of Supervisors of Pottawattamie County, acting as a drainage commission, recognized the indebtedness incurred for the improvement and repairs made in Pigeon Creek Drainage District No. 2 and represented by the warrants in question. The resolution is too long to be set out herein in toto. However, the following quotations from the resolution will be of benefit, Paragraph 3 thereof being as follows:

"*Whereas*, the litigation that followed involving the legality of such apportionment did not terminate in the district court till about December 2, 1930, when that court sustained the apportionment made to Pigeon Creek Extension Drainage District No. 8 but dismissed the action brought to enforce the apportionment made to Pigeon Creek Drainage District in Harrison County, the pendency of which litigation made it impossible to sooner take action to clear up and discharge the indebtedness against Pigeon Creek Drainage District No. 2, and it is now imperative to take action looking to the assessment of all property and railroad corporations subject to assessment in said drainage district in order to provide funds with which said indebtedness can be paid."

and the following portion of Paragraph 5:

"The amount of the indebtedness against this drainage district, which has accrued from the cost and expenses of repairing and reconstructing the ditches and levees of the district and expense of administering its affairs, and which the commissioners herein appointed shall apportion to said lands, public roads, and railroad companies, and for the payment of which a levy of assessments is contemplated, being $58,915.64 as found by this board."

In said resolution is found an admission that an indebtedness exists against said drainage district and is unpaid; the amount of the indebtedness; and that the same is to be paid by the levy of an assessment upon the lands and properties within the district.

No one could be misled as to the intention of the Board of Supervisors in providing for an assessment against the property within the drainage district. The above quoted portions of the resolution fully advise anyone interested of the purpose for which the contemplated levy was to be made. The resolution refers to the unpaid indebtedness; the amount thereof; and the purpose for which the indebtedness was incurred. Furthermore, under the provisions of Section 7559, hereinbefore quoted, the Board of Supervisors was required to give notice of the assessment and levy to be made upon the apportionment and classification made by the commission, thereby fully advising the property owners of the contemplated tax and giving to such property owner an opportunity to be heard thereon. No one interested as a property owner in Pigeon

Creek Drainage District No. 2 could in any manner be misled as to the purpose for which the contemplated levy was being made.

After a study of the reported cases, the copy of the resolution levying the tax in question, and the foregoing facts, which we do not claim to be accurate in every detail, we arrive at the conclusion that the warrants in question are now valid and subsisting debts of Pigeon Creek Drainage District No. 2, and are not barred by the statute of limitations; that if it should be thought that said warrants were at any time subject to the statute of limitations, the resolution of the Board of Supervisors of December 15, 1930, was a sufficient recognition to remove such bar and to re-establish the indebtedness represented by the warrants; and that the county treasurer of Pottawattamie County, as custodian of the drainage funds of Pigeon Creek Drainage District No. 2, should pay such warrants, upon presentation, from the drainage funds of the district.

TAXATION: PUBLIC BIDDER STATUTE: TAX SALES: DELINQUENT TAXES: The provisions of Senate File 167 are confined to those sales made under Section 7255-b1 of the statute.

August 28, 1937. *Mr. Harvey D. Carr, County Auditor, Sioux City, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Does Senate File 167 passed by the 47th General Assembly apply to all tax sales wherein the county was the purchaser, or is it limited to purchases made by the county under Section 7255-b1 of the statute?

There are several provisions of the statute authorizing the county to purchase property at tax sale, but in each instance except Section 7255-b1 the authority is limited to the condition contained in the specific section giving the authority, and in each instance, except Section 7255-b1 of the statute, the county is required to purchase on the same basis as an individual. The provisions of Senate File 167 are in our opinion limited to purchases made under the provisions of Section 7255-b1 of the statute. The title to the act provides that the amendment is to provide for the payment of certain taxes "where property has been sold to the county under Section 7255-b1." True, the first section of the Act states:

"Delinquent taxes upon any parcel of real estate which, prior to the adoption of this act, have been bid in for and held by the county and not assigned by it."

But the subsequent provision of the Act and in the second paragraph of Section 1 thereof states:

"The owner of any such property sold to the county under Section 7255-b1 and not assigned by it, * * *"

It would seem from the title of the Act and the subsequent wording of the provisions thereof that it was the intent of the Legislature to confine the provisions of Senate File 167 to those sales made under Section 7255-b1 of the statute.

BOARD OF SUPERVISORS: REDEMPTION: OLD AGE ASSISTANCE, RECIPIENTS: The recipient of old age assistance making application under Senate File 167 to redeem property must pay the current year's tax, that is, the 1936 tax now payable. Subsequent to that time it becomes the duty of the Board of Supervisors to suspend subsequent taxes upon advice from the Old Age Assistance Commission that such person is a recipient of old age assistance.

August 28, 1937. *Mr. Carl A. Burkman, County Attorney, Des Moines, Iowa:* This department is in receipt of your request for an opinion upon the following facts:

A recipient of old age assistance has since 1930 occupied and owned certain real estate in the City of Des Moines. The property was sold at scavenger tax sale in December, 1935 and Polk County became the purchaser under the public bidder statute, and has now taken a tax deed to the property and at the present time retains the title thereto. The questions now arise:

1. In order that the recipient of old age assistance may redeem under Senate File 167, must such recipient pay the current taxes due in the year that the application is made, or may the Board of Supervisors suspend the first year's tax, or 1936 tax, and relieve the recipient from the actual payment of the same?

Under the provisions of Senate File 167, which is now Chapter 191 of the Acts of the 47th General Assembly property owners may redeem from the tax sales made under the public bidder's statute in installments, and each titleholder is allowed to redeem for a period of six months even though the property had gone to tax deed. As a condition to such redemption the titleholder is required to enter into an agreement with the county in which the property owner agrees to pay one-tenth of the amount for which the property was sold, plus any tax carried under such tax sale certificate subsequent to the sale, excepting therefrom interest and penalties, and the current taxes then due against the property, and the current taxes each year thereafter before the same become delinquent. It will be noted that a condition precedent to the applicant's right to redeem is an agreement that such applicant will pay one-tenth of the amount less penalty and interest represented by the certificate of sale, and the taxes for the current year. Therefore, under the question you ask, it would appear that even though the applicant was the recipient of old age assistance, it would be necessary for such applicant to include in his payment the current year's taxes against the property before repossessing and reowning the same.

2. Must the recipient pay the current tax each year following the year that the application is made, or may the Board of Supervisors suspend the payment of such taxes?

The statute as it now stands requires that the Board of Supervisors suspend the taxes on the property of any recipient of old age assistance. Therefore, after the applicant who is a recipient of old age assistance has repossessed the property it becomes the duty of the Board of Supervisors to suspend the taxes thereon each year.

3. In view of the fact that a tax deed had already issued, would that remove from the Board of Supervisors the authority to suspend the current tax for not only the year in which the application is made, but also the current tax each year following the year that the application is made?

We are of the opinion that answers to questions 1 and 2 sufficiently answer the above question.

4. Is it necessary in event that your opinion relieves recipient from the payment of the current taxes, that the Old Age Assistance Commission report to the Board of Supervisors the suspension of such tax and that the Board take action on such suspension prior to the time the first half of the current tax becomes delinquent, or may such suspension be made at any time during the year in which such tax is payable?

As heretofore stated, it is our opinion that the recipient of old age assistance making application under Senate File 167 to redeem property must pay the current year's tax, that is, the 1936 tax now payable. Subsequent to that time it becomes the duty of the Board of Supervisors to suspend subsequent taxes upon advice from the Division of Old Age Assistance that such person is a recipient of old age assistance.

BOARD OF SUPERVISORS: SHERIFF: COUNTY OFFICERS: Payments made to the sheriff for lodging and caring for prisoners, in excess of the amount allowed by law, can be recovered by the board of supervisors. The Board would be entitled to recover all overpayments made within the period of the statute of limitations.

August 31, 1937. *Mr. Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* This department is in receipt of your request for an opinion based upon the following facts:

Lee County maintains two sheriffs' offices, one at Fort Madison and the other at Keokuk. Separate records are kept at each place. Mr. Harry V. D. Maas is sheriff and is in charge of the Keokuk office. Mr. F. L. Klopfenstein is deputy sheriff and is in charge of the Fort Madison office. An audit of the office for the year 1935 has disclosed discrepancies which prompt the following questions:

1. Should the amount allowed the sheriff for caring for prisoners from October 1, 1934 to January 1, 1935, claim for which was audited by the Board of Supervisors in January, 1935, be charged to the sheriff's compensation for the year 1934 or 1935?

Under Section 5191, subdivision 11 of the 1935 Code, sheriffs, as a part of their compensation, are entitled to receive, from the county, recompense for boarding and lodging prisoners. The pertinent part of subdivision 11, Section 5191 with reference to the question under consideration is as follows:

"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."

The facts embodied in the above question disclose that the services rendered, or rather the lodging furnished was during the period of time from October 1, 1934 to January 1, 1935, and all within the calendar year of 1934. The fact that the Board of Supervisors did not consider or pass upon the sheriff's claim until the year 1935 did not constitute the account a part of his compensation during 1935. The sheriff was entitled to include all of the items incurred during the quarter in his account for lodging which would include December 31st. The Board of Supervisors considered these claims and accounts at its regular monthly meeting. The first meeting of the Board of Supervisors following December 31, 1934 would necessarily occur during the year 1935. The Board cannot allow the bills or accounts in advance. Therefore its action must be for services already rendered or lodging already furnished. The allowance of the bill or account in January, 1935 was for lodging furnished during the year 1934 and would be payable out of appropriations made for the year 1934.

Therefore, it is the opinion of this department that in answer to the foregoing question the allowance made in January, 1935 for lodging furnished from October 1, 1934 to December 31, 1934 should be charged to the sheriff's account for the year 1934 and considered in making up his maximum amount of $250.00 for that year and should not be used in computing the $250.00 allowable for the year 1935.

2. Is the sheriff entitled to compensation for lodging tramps in the county jail?

Section 13395 of the statute is as follows:

"*Compensation for keeping.* No sheriff or jailer shall receive, and no board of supervisors allow, any compensation for keeping or boarding any tramp in the jail or other place in the county, unless such tramp has been duly arrested or committed under the provisions of this chapter, except the board of supervisors of each county may furnish one night's lodging for apparently deserving persons, and those who are sick or disabled may be cared for as the necessities of the case demand."

An analysis of the foregoing section of the statute discloses that in the first instance the Legislature has put an inhibition upon sheriffs and boards of supervisors with reference to the lodging of tramps in the jail. In the first instance the section specifically provides that no sheriff or jailer *shall receive* and no board of supervisors *allow* any compensation for keeping or boarding any tramp in the jail unless such tramp has been duly arrested or committed under the provisions of the statute. Therefore, under the statute as above set out, there is no question but what the furnishing of lodging to tramps who have not been arrested or committed to the jail must be gratis, for under such circumstances the statute specifically prohibits the sheriff or jailer from receiving compensation or the board of supervisors from allowing it. However, a consideration of the balance of the statute places the matter in a different light and in the opinion of this department clothes the board of supervisors with a discretion in the matter of furnishing lodging, the portion of the section referred to being as follows:

"except the board of supervisors of each county may furnish one night's lodging for apparently deserving persons, and those who are sick or disabled may be cared for as the necessities of the case demand."

Therefore, if the board of supervisors should determine that a tramp was a deserving person, under the discretion given to it in the above section, it is our opinion that the board of supervisors in the exercise of such discretion could provide one night's lodging for such person, and if the board of supervisors should determine that a tramp was sick or disabled, in the exercise of the discretion lodged in it, may provide for his care at the county jail. However, this discretion lodged in the board of supervisors does not, in our opinion, remove the inhibition against the sheriff or jailer, the statute being specific in denying to the sheriff and jailer compensation for the keeping or boarding of any tramp. In the facts submitted pertinent to the foregoing question it is disclosed that the same person has been furnished lodging at the county jail as much as fifteeen times. We presume that means fifteen nights during the quarter. There is nothing in the facts submitted that indicates that such person came within the exception provided by statute or that the lodging was furnished after a consideration of the case by the board of supervisors. In view of the strict language of the statute placing a direct inhibition against the sheriff or jailer *receiving* compensation for lodging tramps, it is the opinion of this department that the board of supervisors under such circumstances was without authority to allow to the sheriff or deputy any compensation based upon a claim for lodging tramps in the county jail.

3. Is the sheriff entitled to compensation for lodging Federal prisoners in the county jail?

Section 5511 of the statute is as follows:

"*Expenses.* 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, in which cases the United States must pay such expenses to the county."

Here we have a section of the statute providing for the charges and expenses for the safekeeping and maintenance of prisoners. These expenses are allowed by the board of supervisors, but the statute specifically excepts Federal prisoners and provides that the United States must pay such expenses to the county. This provision of the statute no doubt deprives the sheriff or jailer of any authority to make charge against the Federal Government for caring for or

maintaining Federal prisoners. The exception in the statute is, in our judgment, controlling and the sheriff would not be entitled to make charge against the Federal Government for lodging Federal prisoners.

In the event of an overpayment to the sheriff for lodging tramps and Federal prisoners in the county jail during the calendar year, may the county recover such overpayment from the sheriff or offset the same against future claims filed by the sheriff?

From the facts submitted from which we have taken the foregoing question it appears that at both Keokuk and Fort Madison the sheriff and deputy sheriff have in the past filed claims for lodging furnished to tramps who have not been arrested or committed to the jail. In at least one instance the quarterly claim was approved by the county worker or overseer of the poor and the superintendent of the poor, and in each instance the board of supervisors audited the accounts of the sheriff and his deputy, allowed the same and directed the county auditor to issue warrants therefor. In the claims filed for compensation for lodging prisoners have been included prisoners committed by the Federal Courts. It is apparent that there has been no deception practiced, and that the board of supervisors recognized that the claims filed by the sheriff and his deputy included lodging for tramps which had not been arrested or committed and for care and maintenance of Federal prisoners. Section 5191 of the statute is as follows:

"*Fees.* The sheriff shall charge and be entitled to collect the following fees: * * *

"11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and fifteen cents for each night's lodging. But the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for any calendar year. In counties where district court is held in two places and jails are maintained in two places the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for each of said jails for any calendar year."

That is, under the foregoing subdivision of the section, counties in which there are two jails maintained the maximum allowance for boarding and caring for prisoners is $250.00 to each jail, and the same cannot be computed on a combined allowance to the sheriff of a maximum of $500.00.

In the preceding questions we have herein expressed our opinion on the legality of the claims for lodging tramps and Federal prisoners. From the facts submitted to us, it is apparent that when the charges for lodging tramps and Federal prisoners are included that the sheriff and his deputy have each received more than the maximum amount allowed for his respective jail; that in each event the sheriff and his deputy have included charges for lodging tramps and caring for and maintaining Federal prisoners, which as pointed out in the answers to the foregoing questions, were, in our opinion, not proper amounts to be so included.

Therefore, under the facts submitted, it is apparent that the sheriff and his deputy have been overpaid by reason of the matters and things herein set out, and the pertinent question now is, can the board of supervisors recover such overpayment or may the same be used as offset on subsequent bills filed by the sheriff or his deputy?

You have stated in your submission of this matter to this department that you have given to the board of supervisors an opinion based upon the case of *Painter vs. Polk County*, 81 Iowa 242, that the county cannot recover the over-

payments thus made. You base your opinion on the pronouncement of the court in the Polk County case that a mutual mistake of law was made which would prevent a recovery. The case of *Painter vs. Polk County*, supra, is one based upon facts practically on all fours with the facts with which we are dealing. The court, speaking through Mr. Justice Given, stated:

"Appellant admits 'the general proposition that payments made under misapprehension or mistake of law cannot ordinarily be recovered back,' but insists that it does not apply to the payments of fees or salary made by public officers to public officers. To permit persons who have made a payment to plead ignorance of the law as a ground for recovering it back would be counter to that indispensable principle to civil government that all persons of sufficient age and sound mind are presumed to know the law, and would go far towards unsettling business transactions, and encouraging litigation. We discern no reason why the rule should be different in this case from what it would be between private individuals. The necessities for the rule are the same."

Your opinion given to the board of supervisors was in line with the pronouncement of the court in the Painter case, but subsequent pronouncements by our court have changed the rule announced in the Painter case. In the case of *Heath vs. Albrook*, 123 Iowa 559, an action brought by certain taxpayers of Hardin County to restrain the payment of money for an accounting and judgment against the defendant Albrook and certain others of the defendants on account of moneys alleged to have been wrongfully received by them from out of the county treasury, the court, speaking through Mr. Justice Bishop made this statement:

"It is contended on behalf of appellants (defendants) that the decree, in so far as repayment is thereby ordered, cannot be sustained, for that it appears from the record that the payments made to Albrook were made under mistake of law, and that not even a court of equity may give relief from the consequences of such mistake. We are agreed that this contention cannot be sustained. We may concede the general rule that payments made under mistake of law cannot be recovered back; and that municipal corporations, as well as natural persons, come within the operation of the rule, was our holding in *Painter vs. Polk County*, 81 Iowa 242. The reason for the rule is not difficult of discernment. Generally speaking, payments as contemplated by the rule are made either in settlement of some supposed legal liability, or, by way of compromise of some asserted liability, the existence of which is the subject of dispute. The payment of liabilities without suit and the compromise of controverted rights, are matters highly favored in law; and so it is that courts have persistently refused to overturn or set aside settlements and compromises once made, simply because it appears that the parties have acted in accordance with an erroneous understanding of the law governing their rights. But the reason of the rule, and hence the rule itself, can have no application where, as in the case before us, money of a municipal corporation has been paid out by an officer thereof in violation of the provisions of law, and this with full knowledge on the part of the payee."

In the case of the *State of Iowa vs. Young*, 134 Iowa 505, an action to recover from the defendant alleged overpayments for public binding, the court, speaking through Mr. Justice Ladd, stated:

"It is not questioned but that the mistake of the Secretary was one of law, and not of fact, though it seems scarcely possible that a mistake of law could have been made."

And further on in the opinion the following was said:

"In so far as he is called upon to audit the accounts of the State binder as presented, he acts in a ministerial capacity, and makes the computation and executes the certificate merely to enable the binder to draw his compensation. His duties therein are somewhat like those of the board of supervisors in allowing claims against the county, or those of the city or town council in

auditing claims against a municipality. These bodies represent the corporations for which they act. * * * The finding of such bodies is in no sense an adjudication, to be regarded as res adjudicata. The allowance of a claim presented is in the nature of settlement between individuals, and is accorded no greater effect. *Poweshiek County vs. Stanley*, 9 Iowa 511. And in the absence of fraud or mistake, the allowance of a claim by such body can no more be set aside than an adjustment of different items between individuals. * * * Even to be accorded such effect as will hereafter appear, the items allowed must be such as might have been considered by the board or council, and, if prohibited by law, the municipality will not be bound by the action of its agents. * * * It is conceded that the Secretary held the work to have been properly done, and of this no complaint is made. The contention of the State is that, though properly done, the Secretary certified that the State Binder was entitled to an amount of compensation therefor in excess of the fees fixed by law, and this is conclusively shown by the record before us. Under these circumstances, can the payment of the excess to the State Binder be regarded as voluntary? Where the amount to be paid is definitely fixed by law, as a salary, the State is universally held not to be bound by a mistake in amount paid by the officer issuing the warrant. Such officer is regarded as the trustee or agent of the State, and in making any payment other or in excess of that to which the law allows is plainly acting beyond and outside the scope of his duty; and this is not only within his knowledge, but that of him with whom he deals, for everyone is presumed to know the law. There is a broad distinction between the acts of a public officer in this respect and the agent of an individual or private corporation. In the case of the latter, it is enough that the agent be clothed with apparent authority and that third persons deal with him innocently. Then, even though he violated his private instructions, the principal is bound. Good faith requires this much, for the principal has held him out as competent to act.

But it is not so with public officers acting in a ministerial capacity. Their authority is written in the statutes. All men are charged with knowledge of the extent of such authority. Necessarily they must know when their powers are exceeded, and act at their peril. * * * There are decisions holding that payments of claims in mistake of law by public officers may not be recovered; but these are planted either on the theory that the allowance of a claim is an adjudication, as *Heald vs. Polk Co.*, 46 Neb. 28 (64 N. W. 376), and *County of Richland vs. Miller*, 16 S. C. 236, a doctrine which, as seen, does not obtain in this State, or that the payment is voluntary. *State vs. Ewing*, 116 Mo. 129 (22 S. W. 476); *Painter vs. Polk Co.*, 81 Iowa 242. These last cases rest on the proposition that voluntary payments by a public officer may not be distinguished from such payments by an individual. * * * This is not so, as was clearly pointed out in *Heath vs. Albrook*, supra, in overruling *Painter vs. Polk Co.*, 81 Iowa 242, for the individual acts for himself, and no question of exceeding his authority is involved when he makes payment to an officer or other person. Money cannot be taken from the public treasury lawfully, save for the purposes and in amounts as directed by statute, and the officer, in doing so, acts, not for himself but in behalf of the public; and, if he does so in violation of law, he necessarily exceeds his authority, and the public is no more bound by his act than is any principal by the unauthorized act of his agent."

It does not seem that the court in the case of *State vs. Young*, supra, speaking through Justice Ladd, could have used stronger language than was used in denouncing the rule laid down in the case of *Painter vs. Polk County*, supra.

In the question before us and the facts upon which it is based, it is apparent that the board of supervisors of Lee County has paid to the sheriff and his deputy, money for services performed, in excess of the fees provided therefor by statute. If it be conceded that such payments were made under a mistaken application of the law, under the ruling in the Young case, supra, such payments cannot be upheld. The board of supervisors was bound to know the law. The sheriff cannot plead ignorance of the law. Therefore, the payments made

were made and received with knowledge of the fact that such payments were in excess of the payments authorized by law, and under such circumstances the county, through its board of supervisors, would in our opinion be entitled to recover all overpayments made within the period of the statute of limitations.

RETRENCHMENT AND REFORM COMMITTEE: FUNDS OF: PLANNING BOARD: Determination of allocating money to Iowa State Planning Board rests wholly within the discretion of committee on retrenchment and reform.

August 31, 1937. *Honorable Roy E. Stevens, Chairman, Committee on Retrenchment and Reform:* Reference is made to your request for an opinion of this department upon a question which may be stated as follows:

Can the committee on retrenchment and reform legally allocate money from its contingent fund to the Iowa State Planning Board to finance the work of said board?

The Iowa State Planning Board was created by Senate File 212, Acts of the 47th General Assembly, and is recognized thereby as an official agency of the state. The said act provides, among other things, that the Executive Council furnish the board with articles and supplies necessary to enable it to perform the duties imposed upon it by law. The State Planning Board, therefore, is an official agency of the state of Iowa.

The act places certain duties upon the board, among which is the duty of employing necessary assistance to carry on the work of the board. The State Planning Board, by virtue of Section 6 of the act, is given broad powers to accept and use funds from public and private sources, the said section providing as follows:

"Section 6. *Expenditures.* The board is authorized and empowered to accept and use any and all funds provided by any agency of the United States government or by any other public or private source for such purposes. However, neither the said board nor its employees shall have the authority to obligate the state of Iowa for the payment of any sum of money."

The specific question presented is whether or not the committee on retrenchment and reform has authority to make available to the State Planning Board any part of the contingent fund placed in its control by Section 49 of House File 477, Acts of the 47th General Assembly. The last mentioned section makes available to your committee a general contingent fund for the purpose of taking care of contingencies arising during the biennium, which are legally payable from the general fund of the state.

This department is informed that at the time the bill creating a State Planning Board was finally passed, that funds for payment of the administrative costs of the board were being advanced by a federal agency. We understand further that after the bill became a law this federal assistance was withdrawn.

Whether or not an emergency or contingency, by reason of the above facts or other facts, has now arisen, is, in our opinion, a question of fact. Such a question of fact must be determined by the committee on retrenchment and reform. Since Section 49, above referred to, clearly contemplates that such discretion be vested in the committee, such a fact question must be determined officially by your committee, and such finding reached after such inquiry as the committee may deem warranted by the circumstances.

The members of the committee on retrenchment and reform all served as members of the General Assembly, which enacted the law creating the Iowa State Planning Board. The committee, therefore, is peculiarly well qualified

to make a determination as to the general intent of the legislature in creating the State Planning Board, and the committee likewise is particularly competent to weigh the present urgency of the board's request for funds.

We see no legal objection to action on the part of the committee on retrenchment and reform which would make available funds to the State Planning Board provided the committee first officially determine as a matter of fact that a contingency has arisen with respect to the Planning Board's activities, which makes committee action expedient. This determination must be made by, and rests wholly with the discretion of, the committee on retrenchment and reform.

NOXIOUS WEEDS: PRIMARY WEEDS: The expense of destroying all primary noxious weeds should be paid for either from the county general fund or the State Highway Commission general fund.

August 31, 1937. *Mr. Hermann Onken, County Auditor, Tipton, Iowa:* This department is in receipt of your request for an opinion on the following question:

To what fund should the expense of destroying primary weeds be charged?

The 47th General Assembly by Chapter 131 of the Acts thereof repealed Chapter 246 of the 1935 Code. In the enactment of Chapter 131 of the Acts of the 47th General Assembly the new enactment carries the same code section numbers as did Chapter 246 of the 1935 Code.

The Act of the 47th General Assembly classified weeds into primary noxious weeds and secondary noxious weeds. The Act also provided for the appointment of weed commissioners and the compensation thereof. Section 4819 of the Act in providing for the compensation of the weed commissioners states:

"Said compensation shall be paid from the county general fund."

By the provisions of Section 4820 of the Act the commissioners have "subject to direction and control by the county board of supervisors" supervision over the control and destruction of all noxious weeds in their jurisdiction and authority to hire labor and equipment, subject to the approval of the board, necessary to destroy such weeds which expenditure and expenses "shall be paid for in the same manner as the said commissioner's compensation," that is, out of the general fund. Section 4827 of the Act is as follows:

"The board of supervisors shall destroy primary noxious weeds growing in county, trunk, and local county roads, and the highway commission shall destroy primary noxious weeds growing on primary roads."

There is no specific provision in the Act for the payment of the expenses incurred in the destruction of primary noxious weeds. However, the duty of so destroying primary noxious weeds is imposed upon the board of supervisors and on the highway commission.

Reverting to Section 4820 of the Act we find that the commissioners are, in the performance of their duties, subject to the direction and control of the board of supervisors. Therefore, if the board of supervisors in carrying out the duty imposed upon it by Section 4827, namely the destruction of primary noxious weeds growing on the county, trunk and local county roads, directs the said commissioner to destroy such weeds, then there is no doubt that such expense would be chargeable to the county fund, because under Section 4820 the expense incurred by the commissioner in carrying out his duties is specifically chargeable to the county general fund. If the board of supervisors, in the exercise of its authority and the duty enjoined upon it to destroy the primary noxious weeds growing along county, trunk and local county roads should designate

someone other than the weed commissioner to perform such work, we are of the opinion that that expense so incurred should be chargeable to the general fund. We are likewise of the opinion that the expense of destroying primary noxious weeds growing upon primary roads which is a duty enjoined upon the highway commission should be charged by the highway commission against its general fund and not against a road maintenance fund. The destruction of primary noxious weeds is a state-wide movement, and one in which the entire state is interested. The Legislature, in each instance where it has designated the fund from which the work should be paid, designated such payment from the general fund.

We are of the opinion that the Legislature intended that the expense of destroying all primary noxious weeds should be paid for either from the county general fund or the State Highway Commission general fund.

TOWNSHIPS: CITIES AND TOWNS: RESIDENT FREE HOLDERS: Freeholders residing in the portion of the township included within the corporate limits of any city or town are not to be considered in determining the sufficiency of any petition affecting the township. Those persons residing within the town are not included in the resident freeholders of the township.

August 31, 1937. *Mr. J. F. Wilson, County Attorney, Sac City, Iowa:* This department is in receipt of your request for an opinion upon the following question:

The American Legion owned a hall located in Jackson Township, Sac County. Sac City is located in Jackson Township. The Legion has voted to donate this hall to Jackson Township and Sac City if the Township and city will maintain and keep the same up to be used for township, town and community center purposes. In connection with the proposition the following questions arise:

1. Under the township hall statute should the resident freeholders of the city of Sac City, which is located within the township, be required to sign the petition asking the township trustees to submit the proposition to the electors?

Section 5574 of the statute, a part of the Chapter relating to Township Halls, is as follows:

"*Election.* The trustees, on a petition of a majority of the resident freeholders of any civil township, shall submit to the electors thereof, by posting notices of such election in four conspicuous places in the township, thirty days before election, and the form of the proposition shall be: 'Shall the proposition to levy a tax of.........mills on the dollar for the erection of a public hall be adopted?' "

It is our opinion that under the foregoing statute those freeholders residing in the portion of the township included within the corporate limits of any city or town are not to be considered in determining the sufficiency of the petition. That is, it is our opinion that those persons residing within the town are not included in the resident freeholders of the township; that the sufficiency of the petition should be determined by the number of resident freeholders living within the township and outside of the incorporated town. The statute is quite vague on the subject and so far as we have been able to find, there have been no interpretations by our court. In Section 523-b1 of the statute with reference to township trustees, it is provided:

"In townships which embrace a city or town, said officers shall be elected by the voters of the township who reside outside the corporate limits of such city or town."

It is our opinion that the sufficiency of the petition must be determined as

above indicated, and that the election held for the purpose of voting a tax in response to the petition is to be voted upon by those persons only who live within the township and outside of the corporate limits of cities and towns, and that the people residing within the corporate limits of the city or town would not be qualified voters at such an election. This for the reason that the tax to be levied by the township would be levied upon the property outside of the corporate limits of the city or town. To hold otherwise would be granting to the residents within the city or town the right to vote upon the levying of a tax in which some of them at least would not be interested and might result in defeating the will of the majority of the voters residing within the township and outside the corporate limits of the city or town.

2. Would it be legal for the Township Trustees to proceed under the township hall statute and the city to proceed under the town hall statute and levy taxes in accordance with the respective statutes for the remodeling, repairing and maintenance of this building?

What has heretofore been said applies with the same force and effect to this question. Cities and towns are given authority under Section 5773 to join with township authorities in building and equipping city halls under and upon such terms and conditions as may be mutually agreed upon. Section 5773 requires that the city or town may submit the question to a vote of the electors of the city or town. The city or town, however, would be limited in their indebtedness by Chapter 319 of the Code.

In view of the fact that the matter is a joint enterprise between the township and the city or town, and that in each instance, precedent to the levying of the tax, an election is necessary, the residents of the township would not be permitted to vote at the city or town election, but the matter would be determined solely by the electorate within the city or town. This fact seems to control and add strength to the position that residents of the town or city should not be permitted to vote in the township elections.

In other words, it is the opinion of this department that so far as the joint enterprise is concerned, the city or town and the township should each be considered and treated as a separate entity.

IOWA PRODUCTS AND LABOR—PREFERENCE: SENATE FILE 151: CONTRACTS: The purchase of other than Iowa coal would be a violation of the amendment of the law, unless purchaser shows that it falls within the exceptions in Section 1.

September 3, 1937. *Honorable Hugh W. Lundy, Albia, Iowa:* This department is in receipt of your inquiry of September 1st requesting an opinion upon the following set of facts taken from your letter:

I have had some inquiry relative to the interpretation of Senate File 151, passed by the 47th General Assembly, amending Chapter 62-B1, Code of Iowa, 1935, entitled, "Preference for Domestic Products and Labor." The question arising under the above mentioned bill is the interpretation of Section 2 of the same, line 11, "and the contract shall be let to the lowest responsible bidder."

The question that has been raised on the part of some public officials is whether Senate File 151 and particularly line 11, Section 2, as herein set out, refers solely to the purchase of coal produced within the State of Iowa.

In answering your question, we shall first refer to Section 1171-b1 of the 1935 Code, the pertinent parts of which are as follows:

"1171-b1. *Preference authorized—conditions.* Every commission, board, committee, officer or other governing body of the state, or of any county, township,

school district, city or town, and every person acting as contracting or purchasing agent for any such commission, board, committee, officer or other governing body shall use only those products and provisions grown and coal produced within the state of Iowa, when they are found in marketable quantities in the state and are of a quality reasonably suited to the purpose intended, and can be secured without additional cost over foreign products or products of other states."

It is our opinion that this was a mandatory section of the Code requiring the use of Iowa coal when the quantity was sufficient and when the quality was reasonably suited to the purpose intended, and when it could be secured without additional cost over foreign products or products of other states. As a matter of fact, this section required the use of Iowa coal when it could be secured without additional cost over foreign coal and when the quality was reasonably suited to the purpose intended because it is our understanding that there has always been marketable quantities of Iowa coal available.

The 47th General Assembly amended Chapter 62-B1 (in which Section 1171-b1 appears) by passing Senate File 151, which now appears as Chapter 93 of the Acts of the 47th General Assembly, and this Act provides:

"Chapter sixty-two-B one (62-B1), Code, 1935, is amended by adding thereto the following:

"Section 1. It shall be unlawful for any commission, board, county, officer or other governing body of the State, or any county, township, school district, city or town, to purchase or use any coal, except that mined or produced within the state of Iowa by producers who are at the time such coal is purchased and produced, complying with all the workmen's compensation and mining laws of the state. The provisions of this section shall not be applicable if coal produced within the state of Iowa cannot be procured of a quantity or quality reasonably suited to the needs of such purchaser, nor if the equipment now installed is not reasonably adapted to the use of coal produced within the state of Iowa, nor if the use of coal produced within the state of Iowa would materially lessen the efficiency or increase the cost of operating such purchaser's heating or power plant, nor to mines employing miners not now under the provisions of the Workmen's Compensation Act or who permit the miners to work in individual units in their own rooms."

This amendment was an addition to Section 1171-b1, and it is our opinion that it makes it unlawful for any board or commission, et cetera, to purchase or use any coal except coal mined or produced within the State of Iowa unless (1) the coal produced within the State of Iowa cannot be procured of a quantity or quality reasonably suited to the needs of the purchaser; (2) the equipment now installed is not reasonably adapted to the use of Iowa coal; (3) the use of Iowa coal would lessen the efficiency or increase the cost of operating the heating or power plant; (4) the mine employs miners who are not under the provisions of the Workmen's Compensation Act, or who permit the miners to work in individual units in their own rooms. Therefore, unless a showing is made by the purchaser that it falls within one of the exceptions, it is unlawful for them to purchase anything but Iowa coal, and Section 1 is very definite in this respect.

We now refer to Section 2 of the amendment, which is the part you particularly refer to in your letter. It must be borne in mind that Section 2 relates back to Section 1, and reads as follows:

"Section 2. Before any users of coal designated in the preceding section, purchase or propose to purchase coal, whose annual needs for coal exceed three hundred ($300.00) dollars, said governing bodies and officers shall make requests for bids for coal by advertisement in an official newspaper published in the county in which the purchaser has its principal office, and such advertisement

shall, among other things, state the date, time and place such bids shall be received, which date and time shall not be less than fifteen (15) days after such publication and the advertisement shall contain the approximate quantity and description of coal to be purchased as otherwise provided by law, and the contract shall be let to the lowest responsible bidder, but any and all bids may be rejected, provided that if all bids are so rejected, then an advertisement for bids shall again be made as hereinbefore provided. After any bid is accepted, a written contract shall be entered into and the successful bidder shall furnish a good and sufficient bond with qualified sureties for the faithful performance of the contract. Any contract for purchase of coal provided for in this Act may contain the provision that the purchaser may, in the event of an emergency, purchase coal elsewhere without advertising for bids in any year, for not more than ten per cent (10%) of said purchaser's annual requirements for coal."

It will be seen that Section 2 refers to the users of coal designated in Section 1, which includes all the boards and commissions of the state government and all political subdivisions of the state government. Consequently, the section must refer to the mandatory use of Iowa coal and the use of any other coal is unlawful, as heretofore pointed out. The particular part of the section you refer to is that appearing in line 11 of Section 2, which reads, "and the contract shall be let to the lowest responsible bidder." It is our opinion that these words refer to the lowest responsible bidder as far as Iowa coal is concerned because the whole amendment refers specifically to the use of Iowa coal, and certainly could not be construed as meaning the lowest responsible bidder on anything but Iowa coal.

We believe our position is supported by the wording of Section 3 of the amendment, which reads as follows:

"Section 3. No bid for coal produced in Iowa, which comes under the provisions of the preceding section, shall be considered unless it states the name of the producer and gives the location of the mine from which the coal is to be produced, and unless there is attached thereto a certificate of the Secretary of the State Mine Inspectors that the producer designated in such bid is now complying with all the workmen's compensation and mining laws of the State."

It will be noted that this section refers to coal produced in Iowa, and is a further indication of the fact that the whole amendment applies to Iowa coal and supports the conclusion we have just reached with reference to the lowest responsible bidder. We also call your attention to the further language of Section 3 which requires a certificate from the secretary of the state mine inspectors to the effect that the producer making the bid is complying with the workmen's compensation and mining laws of the state. We feel this language refers to the mine inspectors of this state and to the workmen's compensation and mining laws of this state, and further supports our position.

We feel that some reference should also be made to Section 4 of the amendment, which provides:

"Section 4. Any contract entered into or carried out in whole or in part, in violation of the provisions of this act, shall be void and such contract or any claim growing out of the sale, delivery or use of the coal specified therein, shall be unenforceable in any court. In addition to any other proper party or parties, any unsuccessful bidder at a letting provided for in this act shall have the right to maintain an action in equity to prevent the violation of the terms of this act."

This is rather a drastic provision providing that any contract entered into in violation of the provisions of the amendment shall be void and the contract unenforceable in court. It further gives an unsuccessful bidder the right to an action in equity to prevent the violation of the terms of this act. We refer

to this for the purpose of pointing out the difficulty that might arise if the provisions of the act were not carried out.

The question has been raised as to whether or not a contract should be let for other than Iowa coal when and if a lower bid is made on out of the state coal. It is the opinion of this department that the awarding of a contract for other than Iowa coal would be a violation of the amendment unless the purchaser makes a showing that it falls within the exceptions set out in Section 1.

MOTOR VEHICLE FUEL TAX: Term "invoiced gallonage" on which tax is paid means gallonage as shown by the invoice at the time the car was loaded at refinery.

September 4, 1937. *Mr. Leo J. Wegman, Treasurer of State:* This department is in receipt of your request for an opinion construing or interpreting Section 5093-f9 of the 1935 Code with reference to the manner in which the quantity of motor vehicle fuel brought into the state of Iowa is to be determined for the purpose of imposing the motor vehicle fuel tax thereon. You state in your letter that some of the companies are now taking the position that under the law, as it appears in the 1935 Code, they should be permitted to report the actual contents of the tank cars and deduct therefrom three per cent. You further state that this is contrary to the interpretation your department has placed upon the law.

The 41st General Assembly provided for the imposition of the first motor vehicle fuel tax in the State of Iowa. Under the law as originally written, distributors of gasoline were required to pay the tax on the number of gallons of gasoline actually sold or disposed of by the distributor during the preceding month. The method employed under the original act for the collection of the tax left the question of the payment of the tax to the honesty of the distributor. Whether the distributors were taking advantage of the laxity of the law, or whether to remove temptation, or for other reasons, the legislature considered it necessary to change the method of computing the tax upon gasoline. Consequently the 42nd General Assembly amended the original act. The amendment adopted recognized the fact that gasoline or motor vehicle fuel was not a natural product of the state of Iowa and was largely shipped into the state.

The amendment adopted by the 42nd General Assembly provided a new and different manner of determining the quantity of gasoline or motor vehicle fuel subject to the tax. The new act was written into the Code of 1931 as Section 5093-a5, and was as follows:

"*Reports—remittances—rebates—penalties.* On or before the twentieth day of each calendar month each distributor of motor vehicle fuel shall file in the office of the treasurer of state, at Des Moines, Iowa, a duly acknowledged report on forms prescribed and furnished by said treasurer, showing the total number of gallons of motor vehicle fuel and/or of any substance or material imported into the state for the purpose of manufacturing, mixing, blending, or compounding motor vehicle fuels as defined in this chapter imported by him during the preceding calendar month, the date of receipt, unloading point, tank car identification and invoiced gallonage of each and every tank car or other receptacle in which motor vehicle fuel is imported into the state of Iowa. If no importations are made for the preceding calendar month, a report shall be made to that effect on the forms prescribed herein, and in the same manner. At the same time he shall remit to the treasurer the amount of the license fee for such preceding month; provided, however, that in computing said amount a deduction of three per cent of the invoiced gallonage imported may be made for evaporation and loss. * * *"

Under the statute as it appeared in the Code of 1931, the treasurer of state adopted the following method for determining the quantity of motor vehicle fuel subject to the tax:

1. Invoiced gallonage of motor vehicle fuel imported into Iowa;
2. Deducted gallonage sold and delivered outside of the State of Iowa;
3. Gallonage sold and delivered in the State of Iowa;
4. Evaporation and loss (not to exceed three per cent of gallonage imported into Iowa).

The method adopted by the treasurer of state did not meet with universal satisfaction and later became the subject of litigation. In the case of *State vs. Standard Oil Company*, 271 N. W. 185, issue was joined upon the question of determining the gallonage of motor vehicle fuel subject to tax. In that case the court, speaking through Mr. Justice Mitchell, reviewed the history of the motor vehicle fuel tax law and gave its endorsement to the method of computing the quantity of motor vehicle fuel subject to the tax adopted by the treasurer of state. The exact proposition which prompted the foregoing case was refunds or rebates which had been granted to the Standard Oil Company on a claim of overpayment of the tax by it, the contention of the company being that there was an overpayment of the tax on "car outages" (which is the difference between the amount invoiced or loaded at the refinery and the amount actually received.) Thus the matter eventually came before our Supreme Court for an interpretation of the statute, Section 5093-a5. The court, in the opinion written by Mr. Justice Mitchell, determined the matter in the following language:

"The Legislature knew that there was a shrinkage in gasoline, depending upon the temperature at the time the gasoline was loaded and unloaded, and the act now before us provided for the deduction of 3 per cent from the 'invoiced gallonage imported' for the purpose of covering evaporation and loss. This is not a case where there was a tax imposed upon gasoline which was not imported into the State, for this record shows without any dispute that the loss due to shrinkage or evaporation, or whatever you may call it, from the loading point at the refinery to the unloading point in Iowa, was .59 of one per cent, whereas the amount the statute permitted the distributor to deduct is 3 per cent. If you adopt the construction advanced by the appellant, it necessarily follows that you must strike from the statute the words 'invoiced gallonage.' The Legislature certainly had a purpose in mind in using the word 'invoiced.' The only construction that can be placed upon the statute, to give any meaning to the term 'invoiced,' is to say that the 'invoiced gallonage imported' means the gallonage shown by the invoice at the time the car was loaded at the refinery. The 'invoiced gallonage' is the amount placed in the tank car by the refinery at point of loading. The gasoline was not invoiced when it crossed the State line, nor was it invoiced at the time it reached its destination and was unloaded. The invoice was made at the time the car was originally loaded.

The purpose of knowing the 'invoiced gallonage' can be readily understood. It was no doubt inserted for the purpose of helping the State officials in properly checking the amount of gasoline which came into Iowa. If the State officials had to check every car, the task would be an impossible one. Thousands of cars of gasoline are shipped into Iowa. There is no way that the officials of this State, charged with the collection of this tax, could measure every one of these cars. Upon the honesty of the individual or corporation that receives the shipment depended the accuracy of the amount reported. To provide a method which would be simpler and more efficient, the Legislature provided for the reporting of the 'invoiced gallonage,' not the unloaded gallonage, but the gallonage when the car was originally loaded, known to the trade as the 'invoiced gallonage.' * * * The treasurer of state at all times required the appellant and other distributors to report upon a form provided by him.

We find that form, a copy of which is in the record before us, provided that the distributor report:

1. Invoiced gallonage of motor vehicle fuel imported into Iowa

Deductions

2. Gallonage sold and delivered outside the State of Iowa
3. Gallonage sold and delivered in the State of Iowa (deduct 2 from 1)
4. Evaporation and loss (not to exceed 3 per cent of gallonage reported as Item 3)

Thus it appears that from the very beginning, covering all of these years, the treasurer of state has required not only this appellant, but more than seven hundred distributors doing business in Iowa, to file a form in which he permitted the deduction of 3 per cent of the 'invoiced gallonage.' It will be noted that the first requirement in the report is the number of the invoiced gallons of motor vehicle fuel imported into Iowa. *That was the gallonage as shown by the invoice at the time the car was loaded at the refinery.* The distributor is then permitted under the report to deduct the gallonage delivered outside the State of Iowa. Then (3) of the report directs that he state the gallonage sold and delivered in the State of Iowa, and in parenthesis says to 'deduct 2 from 1,' 2 being the gallonage sold and delivered outside of the State of Iowa, and 1 being the invoiced gallonage. *When that figure has been ascertained the distributor is then permitted, under (4), to deduct the 3 per cent for evaporation and loss.*" (Italics are ours.)

Under the 1931 Code the report required by the treasurer of state to be filed on or before the 20th of each month by the distributor must show the following things:

1. The invoiced gallonage imported by him during the preceding calendar month;
2. The date of receipt;
3. The unloading point;
4. The tank car identification and invoiced gallonage of each and every tank car or other receptacle;
5. Remittance for the license fee for the amount of motor vehicle fuel shown in said report, subject however to deduction of three per cent of the invoiced gallonage imported.

It will be noted from a study of the 1931 statute and of the case of *State vs. Standard Oil Company*, supra, that while the treasurer of state required that the invoiced gallonage of tank cars and/or trucks or other receptacle in which motor vehicle fuel is imported into the State must be shown, that the same is required for information purposes and that the invoiced gallonage of such tank cars, trucks or other receptacle in which such motor vehicle fuel is transported does not in fact enter into the computation of the amount of motor vehicle fuel subject to the tax. As a matter of fact the invoiced gallonage of tank cars, trucks, or other receptacle in which motor vehicle fuel is transported required by the report is the "invoice capacity" of such cars, trucks, or other receptacle and is furnished for the purpose of aiding and assisting the treasurer of state in checking the accuracy of the reports furnished him by the distributor.

The Supreme Court of this State has, in the case of *State vs. Standard Oil Company*, supra, approved the method adopted by the treasurer of state for computing the amount of motor vehicle fuel subject to the tax under the provisions of Section 5093-a5 of the 1931 Code. Therefore, the method and procedure adopted by the treasurer of state and as approved in the case of *State vs. Standard Oil Company*, supra, is the correct and approved method for determining such tax liability under the 1931 Code, and unless the subsequent amendments to the statute now appearing in Section 5093-f9 of the 1935 Code have

made a material change in the statute, the method for determining the amount of motor vehicle fuel subject to the tax must be determined by the method adopted by the treasurer of state and approved by our court. It therefore becomes necessary to compare the two statutes, Section 5093-a5 of the 1931 Code and Section 5093-f9 of the 1935 Code to determine whether the procedure heretofore followed by the treasurer of state is now applicable under the statute as it appears in the 1935 Code.

Under the provisions of Section 5093-a5 of the 1931 Code the distributor's report must show the following matters:

1. The total number of gallons of motor vehicle fuel imported into the State;
2. The date of receipt;
3. The unloading point;
4. The tank car identification and the invoiced gallonage thereof;
5. A deduction of three per cent of the invoiced gallonage imported (may be made for evaporation and loss).

Under the provisions of Section 5093-f9 of the 1935 Code the distributor's report must show the following matters:

1. The total number of gallons of motor vehicle fuel received by him from outside the state;
2. The person from whom received;
3. The date received;
4. The unloading point;
5. The tank car identification and invoiced gallonage thereof;
6. Deduction of three per cent of the invoiced gallonage received from outside the State and which remained within the State (may be made for evaporation and loss).

The main distinctions or differences between the report required to be filed by the distributor under the provisions of the 1931 Code and the report required to be filed by the distributor under the 1935 Code are to be found in the first items of the reports, and in item 5 of the 1931 report and item 6 of the 1935 report. Item 1 of the 1931 report as interpreted by the court in the case of *State vs. Standard Oil Company*, supra, means "the gallonage shown by the invoice at the time the car was loaded at the refinery. The invoiced gallonage is the amount placed in the tank car by the refinery at the point of loading." That is the manner and way the Supreme Court interpreted "invoiced gallonage imported." The same interpretation likewise applies to item 5 of the 1931 report. That is, "the invoiced gallonage imported" for the purpose of the three per cent deduction is, in accordance with the pronouncement of the Supreme Court, "the amount placed in the tank car by the refinery at point of loading."

With the construction of items 1 and 5 of the 1931 report established by the opinion of our court, let us now turn to the 1935 report and ascertain whether or not the Legislature has so changed the matters required to be shown in items 1 and 6 of the 1935 report as to justify any other interpretation thereof than as heretofore placed on items 1 and 5 of the 1931 report by our Supreme Court. It must be acknowledged that there is a difference in the wording and phraseology of the requirement of the matters and things necessary in the 1935 report from that required in the 1931 report. An inspection of the title to the act of the General Assembly amending and changing Section 5093-a5 of the 1931 Code does not give us any insight into the legislative intent. The change in the statute occurred prior to the opinion of the court in the case of *State vs. Standard Oil Company*, supra. The change in the statute was therefore not made as a result of the interpretation put upon the provisions of the 1931 Code, by the Supreme Court, or to conform the statute to the court's ruling.

Let us look at the wording of the statute. We find that Section 5093-f9 of the 1935 Code reads as follows:

"* * * provided, however, that in computing said amount (motor vehicle fuel tax) a deduction of three per cent of the invoiced gallonage received from outside the state * * * and which remained within the state may be made for evaporation and loss. * * *"

The question, therefore, becomes one of interpreting the words "invoiced gallonage received," and we are therefore called upon to decide whether or not there is such a difference between the words "invoiced gallonage imported" and "invoiced gallonage received" as to cause a different ruling in view of the Supreme Court's decision in the case of *State vs. Standard Oil Company*, where the words "invoiced gallonage imported" were construed.

We have considered this matter at some length, and have conferred with a number of the interested parties. We have also sought, as best we could, evidence of the legislative intent at the time of the passage of the 1935 act. Our investigation of the whole matter leads us to the conclusion that there is not such a change in the law as would warrant a change in the administrative practice of your office.

It is therefore our opinion that the language "invoiced gallonage received" is governed by the decision of the Supreme Court in the case of *State vs. Standard Oil Company*, and it is our ruling, therefore, that you continue the administrative practice you are now using.

SCHOOLS: COAL: ADVERTISING FOR BIDS: Advertising for bids for coal is not required on the part of school districts which come within the exceptions set out in Section (1) of Senate File 151, Acts of the 47th General Assembly.

September 7, 1937. *Mr. Harlan J. Williamson, County Attorney, Manchester, Iowa:* We acknowledge the receipt of your request for the opinion of this department upon a question which may be stated as follows:

Does the requirement of Section (2), Senate File 151, Acts of the 47th General Assembly, relating to the advertisement for bids for coal, apply to schools where the equipment now installed is not reasonably adapted to the use of Iowa coal?

Senate File 151 was enacted as an amendment to Chapter 62-B1, 1935 Code, relating to preference for domestic products and labor. Section (1) of the act declares unlawful the purchase of or use by a school district of any coal except Iowa coal produced under compliance with the Workmen's Compensation Act and mining laws of the state. School townships and rural independent districts are specifically excepted from the provisions of the act by Section (5) thereof. Certain other exemptions or exceptions are set out in Section (1) of said act, among which is the following:

"The provisions of this section shall not be applicable if * * * the equipment now installed is not reasonably adapted to the use of coal produced within the state of Iowa * * *"

Therefore, if, in fact, the equipment now installed in this particular school is not reasonably adapted to the use of Iowa coal, it follows that the board may lawfully purchase other than Iowa coal.

It should be emphasized at this point, however, that the finding of the board that its equipment is not so reasonably adapted to the use of Iowa coal must be predicated upon a factual basis. The purpose of the act is to require the

use of the Iowa product, and this requirement may not be nullified by a finding which is not amply supported by actual facts and circumstances.

An appeal from a finding by a board of directors that the equipment of the school is such that the exception is operative could be entertained by the county superintendent of schools and by the state superintendent of schools as is provided in Chapter 219, 1935 Code.

Your inquiry goes to the question of whether or not such school board is required to advertise for bids notwithstanding the fact that Iowa coal will not be used.

That part of Section (2) of the act which prescribes the duty of advertising for bids is as follows:

"Before any users of coal designated in the preceding section, purchase or propose to purchase coal, whose annual needs for coal exceed three hundred ($300.00) dollars, said governing bodies and officers shall make requests for bids for coal by advertisement in an official newspaper published in the county in which the purchaser has its principal office, * * *"

Under the statute, the duty of thus advertising for bids is placed upon "*users of coal designated in the preceding section * * * whose annual needs for coal exceed three hundred ($300.00) dollars.*" We assume that this district's annual need for coal exceeds a quantity in value greater than $300.00. The question in issue, therefore, is as follows: Is this user of coal such a one as is "designated in the preceding section"?

The preceding section must be read in its entirety in order to determine the true legislative intent and purpose. It will be noted that certain agencies of government are specifically named as those users of coal which are affected by the legislation. School districts are included in this particularization, but it is provided that "the provisions of this section shall not be applicable" in certain enumerated, specified cases. Therefore, the conclusion must follow that in any case where the exception is operative, such user of coal is taken from without the operation of the section. Such user of coal is not such user as is designated "in the preceding section" since the exception clause heretofore noted has removed such user from the designated class.

This conclusion is consistent with the expressed purpose of the act. That the act does not propose to direct or relate to the advertising for bids is confirmed by an examination of the title. The law has not heretofore required school districts to advertise for bids for coal. Advertising is, by this act, made mandatory when the public users of the specified quantity of coal are required by the act to give the statutory preference to Iowa coal. This advertising is required by the act for the purpose of insuring the preference to Iowa produced coal and protection to Iowa miners. This end is achieved by Section (3) of the act, which provides as follows:

"Section 3. No bid for coal produced in Iowa, which comes under the provisions of the preceding section, shall be considered unless it states the name of the producer and gives the location of the mine from which the coal is to be produced, and unless there is attached thereto a certificate of the Secretary of the State Mine Inspectors that the producer designated in such bid is now complying with all the workmen's compensation and mining laws of the State."

In those cases which are excepted from the operation of the act insofar as the use of Iowa coal is concerned, the reason which prompts such advertising is lacking.

In view of the foregoing, it is our opinion that advertising for bids for coal

is not required on the part of school districts which come within the exceptions set out in Section (1) of Senate File 151, Acts of the 47th General Assembly.

SCHOOLS: TRANSPORTATION: CHAUFFEUR'S LICENSE: Occasional use of private car in transportation of contestants to and from school contests, if no compensation is paid for such service or if no more than the expense of gasoline and oil used on the trip is paid, would not necessitate the securing of a chauffeur's license by owner or operator of such vehicle.

September 8, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for the opinion of this department upon the question presented by the following statement of facts:

"It is a common practice among schools that carry on interscholastic athletics —such as football, basketball, baseball, track, etc.— to charge the general public admission to such activities. The funds derived from such gate and door receipts are used exclusively for the purpose of carrying on said activities. In a great many cases such funds are meager and schools find it difficult to carry on within the funds available.

"Therefore, when transporting a team to another town to engage in a contest, many schools solicit patrons of the school to use their private cars to transport such contestants to and from such contests. In many cases such patrons make no charge whatever. In other cases, they merely accept what would substantially cover the cost of the gas and oil consumed on the trip.

"The question is, does this occasional use of a private car by a private individual, either with or without such nominal payments to cover expenses, constitute such party a bus driver and require that he hold a chauffeur's license?"

Section 205 of Senate File 181 provides in part as follows:

"* * * No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license."

Paragraph (40) of Section 1 of said act defines chauffeur as follows:

"40. *Chauffeur* means any person who operates a motor vehicle in the transportation of persons or freight, except school children, and who receives any compensation for such service in wages, commission or otherwise, paid directly or indirectly, or who as owner or employee operates a motor vehicle carrying passengers for hire or freight for hire, commission or resale, including drivers of ambulances, passenger cars, trucks, light delivery, and similar conveyances except when such operation by the owner is occasional and merely incidental to his principal business."

Therefore, it appears that a chauffeur's license will be required of any person coming within the terms of the above definition. It is to be noted that the above statute is divided by the conjunction "or" following the word "indirectly" and that "chauffeur" includes *any person who operates a motor vehicle* under specified conditions, as well as *an owner or employee* who operates a motor vehicle under certain other specified conditions.

Now, if no charge whatsoever is made by the patrons who transport contestants, as indicated in your statement of facts, the operator of such vehicle would not be a chauffeur because the element of "compensation" or "hire" is an essential part of each division of the definition, and this element would be lacking under the statement of facts as set out by you. We are of the opinion that the furnishing of gasoline and oil, or the cost of such fuel, to such patrons under the above circumstances, is not such compensation, wages, or commission as are contemplated by the statute. We believe that it cannot be said that such operator receives compensation for his service when merely the cost of oil and gasoline is paid to him.

This question has frequently been discussed by the courts in connection with liability under the so-called "guest statutes." Upon the proposition that pay-

ment of, or agreement to pay the cost of gasoline used on a trip by a passenger in a car does not constitute compensation for the transportation, see *Clendenning vs. Simerman*, 263 N. W. 248, and cases therein cited.

Furthermore, if the *owner* of the motor vehicle operates such, it is our opinion that transportation of the character indicated in your statement would fall within the exception set out in the statute, i. e., that such transportation "is occasional and merely incident to his principal business."

In view of the foregoing, it is our opinion that the occasional use of a private car in the transportation of contestants to and from school contests, if no compensation is paid for such service or if no more than the expense of gasoline and oil used on the trip is paid, would not necessitate the securing of a chauffeur's license by the owner or operator of such vehicle.

TAXATION: ASSESSMENT: BOARD OF REVIEW: COUNTIES: CITIES: Board of Assessment and Review has authority to require any board of review to reconvene and equalize assessments as between classes of property in townships, towns, cities. Board may make any order as to valuation of any property in township, etc. (Question raised as to City of Des Moines.)

September 9, 1937. *State Board of Assessment and Review:* We are in receipt of your letter of September 1st in which you request an opinion based upon the following statement of facts taken from your own letter:

"Now what we would like to know is first, whether or not we have the power to require the local Board of Review of Des Moines to reconvene and order it when reconvened, to equalize the values with properties in the city of Des Moines, to the end that all property in the city of Des Moines is assessed at the same per cent of its value * * * or (2) whether or not, omitting to do this, we could direct the Polk County Board of Equalization, which is the board of supervisors of Polk County, to likewise raise or lower the value of the property in the city of Des Moines, in the various districts shown by the assessment to the end that they be just and uniform.

"We would like very much to have your opinion touching on the matters specifically mentioned above, and in addition any suggestions that you may make as to what our real power is under the situation above presented.

"We would also like to have your opinion as to whether or not we would have a right to order the local board of review to reconvene, and fix the value of all the property in the city of Des Moines at the lowest percentage fixed by the assessor.

"* * * if we could do that then could we direct the county board of equalization to raise the percentage up to equalize the property in the city of Des Moines of the property in the rest of the state?" (We presume you mean "county.")

You present in your letter a statement of facts which you say appears to exist in Des Moines in connection with the assessment of city property. While we are not concerned with the particular situation that may exist in one community, we have reviewed these facts for the purpose of determining what the actual situation is in connection with the Des Moines assessment, and we were further advised of the facts in a conference we had with your board, to which you refer in your letter.

It may be unnecessary for us to review some of the taxing laws of this state, with which you are no doubt familiar and have reviewed many times yourselves. However, we are going to make mention of them because they must be considered in connection with the question you present.

Section 6959 provides that real estate shall be listed and valued in 1933 and every four (4) years thereafter, and which, of course, provides for a listing and valuation in 1937.

Section 6962 provides for the method of description.

Section 7109 provides:

"7109. *Actual, assessed, and taxable value.* All property subject to taxation shall be assessed at its actual value which shall be entered opposite each item. The terms 'actual value' and 'taxable value' shall hereafter be construed as referring to 'actual value.'

"The tax rate shall be applied to the actual value, except as otherwise provided.

"In arriving at said actual value the assessor shall take into consideration its productive and earning capacity, if any, past, present, and prospective, its market value, if any, and all other matters that affect the actual value of the property; and the burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate, or inequitable."

The above section provides that all property shall be assessed at its actual value. The method of arriving at this value is set forth. At this point it may be noted that Section 7109 as it appeared in the 1931 Code provided that all property shall be assessed at 25 per cent of its actual value, and the 45th General Assembly and the 45th General Assembly in Extraordinary Session changed the law to read as it now appears. We also desire to call your attention to the fact that Section 7109 of the 1935 Code provides that the burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate or inequitable.

Section 7119 of the 1935 Code provides that your board shall from time to time prepare and certify to each county auditor such instructions as to uniform method of making up the assessment rolls as it thinks necessary to secure compliance with the law and uniform rolls. In connection with this section, it is our understanding that you have prepared such instructions, and we have examined your form No. 2 (revised in May of 1936) and which was the form for assessment roll for 1937, and which provides for listing real estate at its actual value.

Section 7121 of the Code provides for the oath to be taken by the assessor, in which he swears that he has diligently and by the best means in his power endeavored to ascertain the true value of the property reported.

Section 7122 of the 1935 Code provides that the assessment roll shall be laid before the local board of review in cities of ten thousand population and over, on or before the first Monday in May of each year.

Section 7129 provides for a local board of review and said section provides that in cities of the size of Des Moines the city council shall act as the local board of review, and that they shall meet on the first Monday of May and complete their duties not later than the first day of June.

Section 7132 of the 1935 Code relates to complaints to the board of review, and provides that any person aggrieved by the action of the assessor may make oral or written complaint thereof to the board of review and a statement of facts as may lead to the correction in any assessment.

Section 7133 provides for appeals from the action of the board of review with reference to any complaints to the District Court of the county in which such board holds its sessions, within twenty days after its adjournment, or within twenty days after June 1, as provided for in section 7129, 1935 Code.

Section 7134 provides that the court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the amount of the assessment or the liability of the property to assessment, and the decision

of the court shall be certified by the Clerk to the county auditor who shall correct the assessment books in his office.

We now want to call your attention to Section 7137, which relates to the county board of review, and provides that the board of supervisors which constitutes a county board of review, shall adjust the assessments of the several townships, cities and towns of its county at the regular meeting in June, and add to or deduct from the assessed value of the property as the state board adjusts assessments of the several counties of the state. We call your specific attention to the provisions of this statute which gives the county board of review only the power to adjust assessments as between townships, cities and towns of its county.

Section 7138 provides that appeals may be taken from the action of the county board of review by any city, town or township aggrieved thereby.

Section 7139 provides that each auditor shall, on or before the 3d Monday in June, transmit to the state board of assessment and review an abstract of the real and personal property in his county in which he shall set forth, among other things, the aggregate actual and taxable values of real estate in each township, city and town in the county, returned as corrected by the county board of review.

From the foregoing, it will be noted that property shall be assessed at its actual value, and that any person having a complaint has a right to appeal to the local board of review and then to the court; further that the county board of review is composed of the board of supervisors and adjusts assessments of the several townships; that further an abstract of the county is transmitted to the state board of assessment and review and they constitute the state board of review for the adjustment of the valuation of property in the several counties.

The foregoing is an outline of the taxing system and the remedies pointed out are the only remedies of the taxpayer. It would appear from a review of these sections that an appeal from an assessment by a taxpayer must be taken to the board of review and then to the courts, and that an appeal by a city or town or township may be taken from the county board of review to the courts. There is also the requirement that the county auditor shall certify an abstract of the property to the state board of assessment and review and they shall adjust the valuations of the property in the several counties and give notice of any changes so that the counties may be heard.

This is one power the board of assessment and review has with reference to assessments in different counties, but we believe they have other powers as we shall now see.

The state board of assessment and review has other powers in connection with local assessments. We quote from Section 6943-c27 as the same was amended by the 47th General Assembly in Senate File 160, and which now appears in Chapter 188 of the Acts of the 47th General Assembly:

"To have and exercise general supervision over the administration of the assessment and tax laws of the state, over boards of supervisors and all other officers or boards of assessment and levy in the performance of their official duties, in all matters relating to assessments and taxation to the end that all assessments of property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law."

For the purpose of considering this matter further, we desire to break down this amendment, and for convenience we state it in the following manner:

1. To have and exercise general supervision

(a) over the administration of the assessment and tax laws of the state;
(b) over boards of supervisors and all other officers or boards of assessment and levy in the performance of their official duties;
(c) in all matters relating to assessment and taxation;
(d) to the end that all assessments on property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law.

The foregoing is a grant of rather broad powers to supervise officers or boards of assessment and levy in the performance of their official duties in all matters relating to assessment and taxation, to the end that all assessments upon property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law. At some length we have pointed out the method of determining the assessed values of property and the rights of appeal and review which taxpayers and taxing bodies have. We feel that the foregoing statute, however, gives the state board additional powers, and that it includes the right to supervise all taxing bodies to the end that assessments on property be just and uniform. This power to supervise, we believe, extends over any taxing body, and would include the city of Des Moines, and certainly carries with it the power to enforce the supervision and to require that all assessments in the city of Des Moines be just and uniform. In other words, if after a hearing, the state board finds that the assessments on property in a particular taxing district are not just and uniform, it has the power to require by an order that these assessments be made just and uniform.

Should there be any doubt about the power of the board of assessment and review to correct the assessments in the city of Des Moines, it would seem to be answered and determined by sub-section (9) of Section 6943-c27, which was amended by the Acts of the 47th General Assembly, and which now reads as follows:

"9. To require any board of review at any time after its adjournment to reconvene and to make such orders as the state board of assessment and review shall determine are just and necessary; to direct and order any county board of equalization to raise or lower the valuation of the property, real or personal, in any township, town, city or taxing district; to order and direct any county board of equalization to raise or lower the valuation of any class or classes of property in any township, town, city or taxing district, and generally to make any order or direction to any county board of equalization as to the valuation of any property or any class of property in any township, town, city, county or taxing district which in the judgment of the board may seem just and necessary."

Again for the purpose of convenience we desire to break down this section into divisions as follows:

9.
(a) to require any board of review at any time after its adjournment to reconvene and to make such orders as the state board of assessment and review shall determine are just and necessary;
(b) to direct and order any county board of equalization to raise or lower the valuation of the property, real or personal, in any township, town, city or taxing district;
(c) to order and direct any county board of equalization to raise or lower the valuation of any class or classes of property in any township, town, city or taxing district;
(d) and generally to make any order or direction to any county board of equalization as to the valuation of any property or any class of property in any township, town, city, county or taxing district, which in the judgment of the board may seem just and necessary.

Therefore it is our opinion that the Iowa state board of assessment and review has supervision over all boards of assessment and levy in the performance of

their official duties in all matters relating to assessment and taxation to the end that all assessments on property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law, and it is our further opinion that in accordance with the provisions of sub-section (9) of Section 6943-c27, the state board of assessment and review is given specific authority, for the purpose of making assessments on property just and uniform, to require any board of review at any time after its adjournment to reconvene and to make such orders as the state board of assessment and review shall determine are just and necessary.

Consequently, in answer to your first question, it is our opinion that you *do* have the right to require the local board of review of Des Moines to reconvene, and that you *do* have the right to order it, when reconvened, to equalize the valuations of properties in the city of Des Moines to the end that all property in the city be assessed at the same per cent of its value.

In answering the foregoing question, however, we presume that you will conduct a hearing for the purpose of determining the particular situation in Des Moines, and it is our opinion that after such a hearing, and after you have determined the facts, you have the right to make such an order. This must certainly be what the statute meant when it gave you supervisory power over the assessment and further gave you the right to order the local board of review to make assessments just and uniform.

Passing now to the second question which you ask and which concerns your right to order the Polk County board of equalization to raise or lower the value of property in the city of Des Moines in the various districts shown by the assessment, to the end that they be just and uniform. In answer to this question, we assume that you refer to the various taxing districts within the city of Des Moines. Again we refer you to the provisions of the statute we have set forth above with reference to your powers over local assessments, and again we find that your board is given general supervision over boards of supervisors, and further that you are given power to direct and order any county board of equalization to raise or lower the valuation of the property, real or personal, in any township, town, city or taxing district. We feel there is no question about your right or power to make an order requiring the county board of equalization to raise or lower the valuation of property in any township, town, city or taxing district.

However, we have examined the Iowa case of *Montis vs. McQuiston, et al.*, 107 Iowa 651. We quote:

"We now come to the real question in controversy, namely, whether the defendant board had power to make the increase that they did. The law as it was in 1897 vested the power to equalize individual assessments in township trustees and city councils. The county board was authorized to 'equalize the assessments of the several townships, cities and incorporated towns of their counties,—substantially as the state board equalizes assessments among the several counties of the state.' McClain's Code, Section 1313. The state board equalized among the counties by adding to or taking from the aggregate valuation of real property which they believe to be valued below or above its proper valuation. See McClain's Code, Sections 1309 to 1315 inclusive. It is not questioned but that, under these statutes, county boards could only equalize by adding to or taking from the aggregate valuations of the townships, cities, and incorporated towns of their counties; but it is contended that as the city of Des Moines was divided into districts, as authorized by Chapter 3, Acts Twenty-third General Assembly, with an assessor in each, the districts are for these purposes the same as townships, undistricted cities, and incorporated

towns, and that the districting of a city gives to the county board power to equalize as between the districts. That the law so framed would be symmetrical, and probably wise, may be true, but it is not so framed. The power of county boards is plainly limited to equalizing by adding to or taking from the aggregate valuation of townships, cities, and towns as a whole, and not as to parts thereof. It is urged in argument that inequality may exist in the valuations in different districts, and that, unless the county board may equalize among the districts, injustice will be done, for which no remedy is provided. The powers of the city board are ample to remedy such wrongs, by raising or lowering individual assessments throughout the city. Appellants cite *Getchell vs. Supervisors*, 51 Iowa 107. While some of the reasoning in that case is entitled to consideration, the conclusion does not support appellant's contention. It was held not competent for the county board to equalize between individuals, nor between different parts of the same city, then constituting one district. The facts in that case are so different from this that it is not controlling. * * *"

The above case, we feel, is conclusive on the point that the power of county boards of equalization is plainly limited to equalizing the valuation of townships, cities and towns as a whole and not as to parts thereof. We do not believe, therefore, you have any right to order them to make any changes of assessments within the city of Des Moines, but only to order them to make such changes in the whole assessment in the city of Des Moines so as to equalize the assessment with other cities and towns in Polk County. We feel that the order to the county board of equalization would have to be limited to this extent; but after hearing the evidence in connection with the assessments which have been made in the city of Des Moines, you may determine that an order should be made equalizing assessments in the city of Des Moines with those in other townships and towns of this county, and if you do so find, it is our opinion you can make such an order.

The opinion so far, we feel, disposes of the two main questions which you have asked in your request. We have examined the last two paragraphs of your letter with reference to your suggestion that you fix the value of all the property in Des Moines at the lowest percentage fixed by the assessor, and that you then direct the county board of equalization to raise the percentage up to equalize the property in the city of Des Moines with property in the rest of the county.

We have pointed out your rights in making an order directed to the board of equalization, and in connection with fixing the value of all property in Des Moines at the lowest percentage fixed by the assessor, we do not feel that this would be permitted because this department is of the opinion that while you have the right to make an order directing the local board of review to correct the assessments in the city of Des Moines in order that they may be just and uniform, we nevertheless feel that the rights of the individual taxpayers must be protected, and that you cannot by the making of any such order deprive them of their day in court, and consequently we cannot approve the suggestions of the last two paragraphs of your letter.

You also inquire of us in the third to the last paragraph of your letter with reference to any suggestions we may have as to what your real power is under the situation above presented. We believe we have answered this question with reference to your real power. In connection with the hearing which we expect you will conduct, we also suggest to you that it probably will be necessary that you take into consideration the local budgets which have been approved, and in making your order it would seem to us to be advisable that you take

into consideration the situation that may exist with reference to the local budgets of the city and the school districts of the city of Des Moines. In making an order with reference to the assessed value of the property in the city of Des Moines, we respectfully suggest that these things be kept in mind.

TAXATION: USE TAX: Gasoline which is used for the purpose of extracting oil from corn or soybeans for the purpose of obtaining starch, corn meal, etc., would not be subject to the "use tax" because of the exemption contained in subsection 3 of Chapter 198 of the Acts of the 47th General Assembly.

September 9, 1937. *Honorable Leo J. Wegman, Treasurer of State:* You ask the opinion of this department upon the following statement of facts:

The Clinton Company of Clinton, Iowa, purchases a gasoline product outside of the state of Iowa in tank car lots upon which they claim exemption from the Iowa "use tax." This gasoline product is used for the following purposes:

1. Running engines in their manufacturing plant;
2. As a fuel in a fire truck owned and maintained by the company;
3. For the purposes of cleaning machinery and other equipment;
4. For the purpose of extracting oil from corn and soybeans for the purpose of producing starches, corn syrup, corn meal, etc.

The word "use" is defined in the Iowa "use tax" act, Chapter 198, laws of the 47th General Assembly, as follows:

"1. *'Use'* means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in *'processing'* within the meaning of this subsection shall mean and include (1) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination, become an integral part of other tangible personal property intended to be sold ultimately at retail, (2) fuel which is consumed in creating power, heat or steam for processing or for generating electric current, (3) industrial materials and equipment, which are not readily obtainable in Iowa, and which are directly used in the actual fabricating, compounding, manufacturing or servicing of tangible personal property intended to be sold ultimately at retail."

Under subsection 2 in the above quoted definition, the fuel used in running engines used in a manufacturing plant would be specifically exempted from "use tax."

The fuel used for cleaning purposes, and for the fire truck, however, would not be exempt from "use tax," since gasoline put to these uses would not come within any of the exceptions enumerated above.

That gasoline which is used for the purpose of extracting oil from corn or soybeans for the purpose of obtaining starch, corn syrup, corn meal, etc., would not be subject to the "use tax" because of the exemption contained in subsection 2 above.

TAXATION: INCOME TAX: NON-RESIDENT WITHHOLDING: Since the elevator operator is a "withholding agent" it is necessary that he comply with all of the provisions of Section 5 of Chapter 184, Acts of the 47th General Assembly, particularly those sections dealing with the withholding 5 per cent of all gross income in excess of $1,500.00 and making the proper reports of such action to the board of assessment and review.

September 9, 1937. *Board of Assessment and Review:* You ask the opinion of this department upon the following statement of facts:

A farmer residing in Minneapolis, Minnesota, owns a farm in Iowa which is rented for a share of the crop. The tenant must deliver the owner's share to an elevator operator in Iowa, the elevator operator being instructed to remit

cash for the share of the crop so received directly to the owner in Minneapolis. The amount of crop thus delivered to the elevator operator and for which he remits cash to the owner in Minneapolis is in excess of $1,500.00 per year.

You are interested in knowing whether the elevator operator is a "withholding agent" under the non-resident income tax act passed by the last session of the general assembly.

Chapter 184, acts of the 47th General Assembly, provides for the collection of an income tax from non-residents. This act defines a "withholding agent" as follows:

"The term '*withholding agent*' means any individual, fiduciary, corporation, association, or partnership in whatever capacity acting, including all officers and employees of the state or of any municipal corporation or political subdivision of the state, that is obligated to pay or has control of paying to any non-resident any 'gross income,' within the meaning of Section sixty-nine hundred forty-three-f eight (6943-f8), in excess of fifteen hundred (1,500) dollars in any calendar year."

The elevator operator is a "withholding agent" in accord with the definition set forth above. He has control of paying in excess of $1,500.00 per year to a non-resident. Furthermore, he is obligated to pay this amount by reason of such agreement as he has with the non-resident. Since the elevator operator is a "withholding agent," it is necessary for him to comply with all of the provisions of Section 5 of Chapter 184, laws of the 47th General Assembly, particularly those sections dealing with the withholding 5 per cent of all gross income in excess of $1,500.00, and making the proper reports of such action by him to the board of assessment and review.

SCHOOLS: TUITION: There is no express authority which would permit a school district to pay tuition in excess of the maximum fee of $9.00, which limitation is set out in statute.

September 10, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* Reference is made to your letter of September 7, 1937, in which you request the opinion of this department upon the following question:

"May the board of a school district that does not maintain a four-year approved high school pay the high school tuition of resident pupils at a rate in excess of nine dollars per month if the board passes the resolution to that effect?"

Provision for a person of school age, who is a resident of a school corporation which does not offer a four-year high school course, to attend another public high school is made by Section 4275, 1935 Code, which is as follows:

"4275. *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."

Section 4277 then provides the manner in which the home district of such student shall reimburse the school in which district the child attends. The above section provides in part as follows:

"4277. *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 of four school years. * * *"

It is to be observed that the above section provides that the amount which the

debtor district shall pay is a fee "not to exceed nine dollars per month during the time he so attends." It is further to be noted that this section also makes reference to "the maximum rate authorized by law."

We are of the opinion that Section 4277 authorizes the payment by the debtor district of a maximum sum of nine dollars per month. The powers of school boards are restricted to those particularly conferred by statute, and such incident powers as may be necessary to carry into effect such expressly conferred powers. We are of the opinion that no express authority is granted by the statute which would permit a school district to pay tuition in excess of the maximum fee of nine dollars, which limitation is set out in Section 4277 aforesaid.

COUNTIES: LIMESTONE—AGRICULTURAL: PRICE: RELIEF LABOR: Relief labor furnished at no expense to county for purpose of manufacturing agricultural limestone does not constitute an element of cost which is required to be included in cost price of lime.

September 10, 1937. *Mr. R. H. Matson, State Planning Board:* We acknowledge receipt of your request for the opinion of this department upon the following question:

Is it possible for county boards of supervisors, when engaged in the production of agricultural limestone, to accept services from state or federal agencies, i. e., relief labor from the Works Progress Administration, without it being necessary for them to charge this as part of the cost of production?

Section (9) of Chapter 150, which is commonly known as the county liming act, relates to the cost price of such lime and provides as follows:

"Section 9. The cost price of this agricultural lime shall be fixed by the board of supervisors, at not less than the actual cost of production at the quarry with ten per cent added to provide for the cost of and depreciation on the equipment used in the production of said agricultural lime, together with any cost in transportation of the lime from the quarry to the farm of applicant."

Section (10) of said act proceeds to particularize the items which are to be included in calculating the cost price of such lime, providing as follows:

"Section 10. In calculating the cost price of the agricultural lime to the county as referred to in Section 9 herein, all elements of the cost of the operations, including the amortization of the purchase price of any quarries, lands, or equipment over the period during which any bonds, warrants or other obligations incurred by the county therefor shall mature, cost of all labor, proportionate and actual administrative overhead of county officials and other county executive employees in administering said act and conducting said business, repairs to plant machinery and equipment, wages of all employees and all other costs of production shall be kept in a separate system of accounts, and all books and records with respect to the cost of said agricultural limestone and the methods of bookkeeping and all records in connection with the production, disposal and sale of said agricultural limestone shall be open to the inspection of the public at all times."

It is assumed that labor can be made available for the use of the board in connection with the liming act at no expense to the county. This labor, we further assume, would be furnished at the expense of some agency other than the county and would, in effect, be donated to the board for the above purposes. Under the above assumption, such labor would not be an element of the cost of production for the reason that payment of such would not be made out of funds derived from the sale of the anticipatory warrants provided for by the act. Under this law, boards of supervisors are authorized, with certain restrictions, to acquire by purchase, condemnation or lease, quarries for the uses and

purposes of the act. Suppose some owner of a quarry were willing to donate or convey the same for a nominal sum to the county for the use of the county in producing agricultural lime, such advantageous acquisition would result in a lower cost price since the act does not require that *value* of capital or labor costs be the basis for figuring costs, but rather the purchase price or actual expense of the county.

Section (11) of said act provides as follows:

"Section 11. The board is specifically authorized to use relief labor in the production of agricultural lime as provided for in this act, but shall pay the prevailing labor scale for that type of work, customary in that vicinity."

The above provision clearly permits the use of relief labor by the board in the production of lime. If a board finds it advisable to employ relief labor in connection with the work, then it is provided that the prevailing labor scale for such work in that vicinity be paid, but this provision contemplates and is applicable only to such relief labor as shall be paid for out of the funds of the board. If such labor is donated for such purpose, payment is not made by the board and, therefore, the requirement of the section as to payment of the prevailing labor scale is not operative. It follows that such donated labor is not a real element in the cost of the production of the lime, and is not chargeable to the cost price thereof.

If the county uses relief labor which is furnished to it for this purpose at no expense to the county, the "cost price," if such labor costs are included therein, would reflect a substantial profit to the county. The act, by Section (10) thereof, specifically provides what elements are to be included in the "cost price to the county," and when all these required elements are so included, it appears that such price is to be the selling price to the land owner. The act does not contemplate that a profit should accrue to the county, and a profit certainly would accrue if the county charged to the price of lime the cost of donated labor.

In view of the foregoing, it is our opinion that relief labor furnished at no expense to the county for the purposes aforesaid does not constitute an element of cost which is required to be included in the cost price of the lime.

PRIMARY ROADS: CONSTRUCTION: HIGHWAY COMMISSION: SECTION 4755-b26: It is the opinion of this department that the highway commission may widen pavement at approach to new Fort Dodge viaduct to 34 feet and pay for same out of primary road fund.

September 13, 1937. *The Iowa State Highway Commission:* This department has considered your question whether or not you have the power to construct the pavement on the new road leading to the Fort Dodge viaduct at a width of 34 feet and pay for same out of the Primary Road Fund.

The broad inquiry is, whether Section 4755-b26, as amended by Chapter 154 of the Acts of the 47th General Assembly, limits the width of pavement to be paid for out of the Primary Road fund to twenty feet. The section so far as necessary to be considered in this case is as follows:

"The state highway commission is hereby given authority, subject to the approval of the council, to construct, reconstruct, improve and maintain extensions of the primary road system within any city or town, including cities under special charter, provided that such improvement shall not exceed in width that of the primary road system and the amount of funds expended in any one year shall not exceed twenty-five per cent of the primary road construction fund."

The purpose of the Fort Dodge project, as we are advised, was to furnish a

direct and usable route to facilitate travel from the south on U. S. Road No. 169 and the west on U. S. No. 20 through Fort Dodge.

We have been furnished with a description of the project as follows:

"The project as finally designed is approximately one mile in length, of which approximately one-fourth mile consists of a bridge over the Des Moines River and a viaduct over the Illinois Central and M. & St. L. Ry. tracks, and approximately three-fourths mile consists of approach cuts and fills, and fills connecting the bridge over the river and the viaduct over the railway tracks. In addition to the two major bridge structures, concrete arches of approximately 40 feet span have been built to carry the viaduct traffic over intersecting streets. Access to the viaduct and its approach fills is available only at or near the ends of the project. The cut at the south end of the project is approximately 25 feet deep. The fill south of the Des Moines River bridge is approximately 40 feet deep—north of the bridge, approximately 25 feet deep. The grade line of the viaduct over the railway tracks in places is as much as 50 feet above the natural ground elevation. The project as constructed is not a street in the usual sense of the word, in that it is of no value or use whatsoever to the property immediately adjacent to it."

We have further been advised that the preliminary estimate of the cost of the project was $500,000. That it was first submitted to the Bureau of Public Roads in January, 1934. This figure included the estimated cost of building a bridge across the Des Moines River, viaducts over the railroad tracks, and streets that were to be kept open, completing the earth fills and cuts and surfacing the same with pavement.

The construction work, that is, of the viaducts over the streets, and over the railroad tracks and over the river bridge, amounted to $249,735.06.

We are further advised that the work was started in the winter of 1933-34, at which time the building of approach fills was commenced as a CWA project for the purpose of providing employment for idle men. The state furnished supervision of the work and the CWA furnished labor. Material for making the fills were shoveled into trucks and hundreds of men given employment with a small expenditure of highway funds. This expense was additional to the amount paid for the construction of bridges and viaducts, and in addition to the contract operations, substantial expenditures were made by the State in securing right of way, supervising relief labor on grading operations, and furnishing hauling equipment and tools in connection therewith. The work is completed except for the building of the pavement and sidewalks on the approaches. Plans have been prepared for this work, and these plans contemplate surfacing the approaches with a pavement 34 feet in width—the same width of vehicular roadway provided on the bridge and viaducts heretofore constructed.

The new road leading from the south to the bridge and viaduct structures leaves highway No. 169 and No. 20 at a point about 1,500 feet south or southwest of the first bridge structure. As stated, it does not follow any established street, and is constructed through deep cuts and heavy fills. The grade leads down to the river from a point near the top of the hill, and leads on the north to the intersection with 12th street, likewise about 1,500 feet from the bridge and viaduct structures. In approaching 12th street the new road follows what is known as Fair Oaks Drive, near the top of the hill on the north side. Whether Fair Oaks Drive is or was an established street is now in dispute. A property owner abutting on Fair Oaks Drive is threatening proceedings against the Commission for damage to her property on the ground that Fair Oaks Drive was a private driveway and that the Commission had

no right to appropriate it. Whether Fair Oaks Drive was in fact an established street will have to be determined either by agreement or by litigation. But whether or not it was an established street, it had no established grade.

The entire project was designed as a cutoff to facilitate traffic, on the roads referred to, through the city. It eliminates a winding street from these highways and materially shortens the length of the road.

As stated, the original project was entered into with the cooperation of the Federal Government, and the funds for the bridges and viaducts were furnished by the government, and the major cost of the grading was borne by the government.

This extended statement of the situation seems necessary because of the unusual features involved in the determination of the questions you present.

In the first place, we have the proposition that the project is one in which the Federal Government extended direct and substantial aid. The original plan showed that the pavement was to be constructed, and the proposed pavement is a federal aid project.

Section 4755-b1 of the Code authorizes the State Highway Commission 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, and the benefit of all present and future allotments in aid of highway construction, reconstruction, improvement or maintenance.

In this case it would appear to be quite improbable that the Federal Government would have approved this project unless there was an implied understanding that the pavement would be of an adequate width, and that the project when completed would be fully completed in such manner as would provide the traveling public with an adequate, safe road.

It cannot be assumed that in enacting the revised section, 4755-b26, the Legislature intended to affect express or implied agreements made by the State Highway Commission with the federal authorities in connection with an improvement such as the one under consideration.

Again, Section 4755-d1, authorizes the construction of bridges and viaducts on primary road extensions in cities and towns.

The approaches to a bridge are usually considered a part of the bridge. In the days when the counties were held responsible for accidents occurring by reason of county bridges being unsafe, many cases arose involving the liability of the county for failure to properly maintain the approaches to the bridges.

The law was well established in these cases, in accord with the general rule, that where the approach is essential to enable persons to reach the main structure, and where without it the main structure would be incomplete, it is a part of the bridge. The following cases bear out that proposition:

Eginoire vs. Union County, 112 Iowa 558;
Moreland vs. Mitchell County, 40 Iowa 395;
Magee vs. Jones County, 142 N. W. 957, 161 Iowa 296.

Some distinction is made between an embankment and an approach made of timber, but the question whether or not an embankment constitutes an approach, so as to be a part of a bridge is generally considered a question of fact.

9 C. J. 422;
Nims vs. Boone County, 66 Iowa 272;
Sewing vs. Harrison County, 136 N. W. 200.

In the case of *Shope vs. City of Des Moines*, 188 Iowa 1141, 177 N. W. 79, an

attempt was made to enjoin the city of Des Moines from paying for a fill approaching a bridge. The exact length of the fill is not shown, but it is stated that it was more than 300 feet in length. The court found that it was competent for the city council to determine that the fill was essential to render the main structure accessible, and the court found that the city had the right to construct the fill and pay for it with funds obtained through a bond issue. The authorized bond issue was made under a section of the Code authorizing the city to contract indebtedness for the purpose of constructing bridges.

Unlike the statute authorizing cities to require railroad companies to build viaducts, there is no limitation in Section 4755-d1 on the length of approaches. In the chapter on viaducts to be built by cities it is provided that the approach to any viaduct shall not exceed a total distance of 800 feet.

In this particular case there can be little doubt on the proposition that the cuts and fills to the south of the first bridge constitute an approach throughout its length. There is no doubt on the proposition that the highway between the various structures is a part of the approach to them respectively. While the situation on the north is somewhat different, there is no question on the proposition that, except as to Fair Oaks Drive, it is a new street. Whether Fair Oaks Drive was an established street or not remains to be determined. If it was, it was of so little importance that the city did not give it a grade. We think that the entire length of the approach on both sides can be considered a part of the viaduct for the purpose of determining the width of the pavement, and the statute governing viaducts, Section 4755-d1, contains no limitations on the width. It not only leaves the width of the improvement to the discretion of the Highway Commission, but in its broad aspects it must be construed as a recognition that in building these expensive viaducts regard must be had not only for present traffic requirements, but for future traffic requirements that may be reasonably anticipated.

So, we have the fact that the Federal Government was a heavy contributor to the expense of this big project, and we have at least the implied obligation on the part of the Highway Commission to see that this road is completed so that it will be adequate for the purposes intended. And, we have the fact that, in practical effect, the roads leading to these structures, from both sides, are in fact approaches. Or rather, it would be competent for the Highway Commission to make a finding that they are approaches to the viaduct and necessary to the use of the viaduct. These two considerations of themselves justify the conclusion that the Highway Commission has the right to construct 34 foot pavement on these approaches to the structures referred to, and it is unnecessary to enter into a discussion of the question as to the limitation on the width of the pavement intended by the Legislature in enacting the revised section, 4755-b26. It is sufficient to say in this connection, at this time, that the 47th General Assembly in revising the section removed an express limitation to 20 feet, and provided instead that the "improvement shall not exceed in width that of the primary road system." There must have been some reason for removing the specific limitation, and we think that whatever the Legislature intended in the way of limitation, when it enacted the revised section, it did not intend to limit the discretion of the Commission in constructing pavement on a project such as this where, under the peculiar facts, the pavement could have been constructed by the Commission at a greater width than 20 feet and paid for out of the Primary Road fund before the section referred to was so

revised. This, notwithstanding the specific limitation then contained in Section 4755-b26, because of the other provisions of law referred to. And we think that, if the Highway Commission decides, in its discretion, that a 34 foot pavement is necessary under the particular circumstances of the case, it has authority so to do, and to pay for same out of the Primary Road fund.

BEER: PERMITS—LIMITATION OF: Permit issued with knowledge on the part of council that such permit is not to be exercised would be contrary to direction and purpose of statute.

September 13, 1937. *Mr. R. E. Duffield, County Attorney, Guthrie Center, Iowa:* We acknowledge receipt of your request for the opinion of this department upon a question presented by the following statement of facts:

"A town in this county has an ordinance which restricts the number of class 'B' permits to the minimum, which in this case would allow two permits to be issued by the council.

"The question is whether or not two permits can be issued to one person for the admitted purpose of preventing competition or the opening of two places for the sale of beer in the town."

So far as we are able to determine, this particular question has never been passed upon by this department, and there are no decided cases interpreting the particular provision of the statute which is involved in this inquiry.

Section 1921-f126, 1935 Code, confers upon cities and towns power to adopt ordinances providing for the limitation of class "B" permits within certain limitations. The statute provides that such ordinances may be passed allowing only one class "B" permit for each five hundred population, or fractional part thereof, up to twenty-five hundred, and allowing only one additional permit for each seven hundred fifty population, or fractional part thereof, over and above twenty-five hundred. The section provides, however, that in towns having a population of one thousand or less "two permits shall be allowed if proper application is made therefor in accordance with the requirements of the provisions of said chapter."

Chapter 93-F2, which relates to beer and malt liquors, contemplates that more than one class "B" permit may be issued to a person. This is evident in view of the provisions of Section 1921-f122 of the said chapter which provides as follows:

"1921-f122. *Separate locations—class 'B' or 'C.'* Every person holding a class 'B' or class 'C' permit having more than one place of business wherein such beer is sold shall be required to have a separate license for each separate place of business, except as otherwise herein provided."

We are of the opinion that under the statute, the council would have the authority to limit the number of class "B" permits to two only in towns having a population of one thousand or less; that if the council saw fit to issue these two permits to the same person, there is nothing in the statute that would limit this power of the council.

We note from statements made in the second paragraph of the above quoted facts, that it is suggested that one of the permits to be issued will not be an active permit and will remain dormant for the purpose of preventing competition within the town. We are of the opinion that the law contemplates that in towns of under one thousand population, permits shall be issued to at least two active places of business where beer is to be sold. The very fact that the legislature deemed it wise to permit cities and towns to regulate the number of class "B" permits indicates that the entire prohibition of the sale

of beer within a city or town was not intended. If we say that the requirement of the statute is satisfied simply upon the issuance of a permit without regard to whether or not that permit will be exercised, we are bound to reach the conclusion that it would be possible for individuals to acquire the maximum number of permits in a town with the intent that the same be not exercised and thus defeat the purpose of the statute.

We are of the opinion, therefore, that a permit issued with knowledge on the part of the council that such permit is not to be exercised would be contrary to the direction and purpose of the statute.

MOTOR VEHICLES: LENGTH OF: Words "length over all" as used by 47th General Assembly includes the load carried on the vehicle and/or trailer.

September 13, 1937. *Mr. Horace Tate, Acting Commissioner, Motor Vehicle Department:* We are in receipt of your request for an opinion on the following proposition:

Will you please refer to Section 480 of Chapter 134 Acts of the 47th General Assembly, and give us an opinion as to whether the load is considered a part of the vehicle length under this section? You will note that the load is considered in the height under Section 479 and also the load is considered in the width in Section 477.

Section 480 reads as follows:

"*Maximum length.* No motor vehicle, trailer, semitrailer or vehicle, except fire fighting apparatus, which exceeds thirty-three feet in length over all, nor any combination of such vehicles coupled together, which exceeds forty-five feet in length over all, shall be operated on the highways of this state."

It is clear under Section 477 that the limitation on the width of vehicles not only includes the vehicle itself, but the load thereon, as it is expressly so stated in that section. The same holds true as it pertains to passenger vehicles under Section 478. In writing Section 479 of the Act, the legislature, in restricting the height of vehicles, expressly limited the height to twelve feet, which includes the load. The section under consideration is so clear in that the legislature has used the words "length over all" in place of expressly saying "including the load."

Our question for determination is whether or not the legislature, by using those terms, in effect meant "including the load." As the section is pertaining to the motor vehicle alone or coupled with a trailer or semitrailer, it could be interpreted to mean that the restriction in length pertains only to the vehicle and/or trailer itself. That is, in saying "length over all" they used that term to designate the length of the motor vehicle and trailer or semitrailer.

On the other hand we do not believe that such interpretation is what the legislature contemplated in enacting the section. The fact that they have expressly limited the width and height of vehicles including the load, indicates to us that they intended the same restriction, that is the load included, under Section 480.

The primary purpose of the restriction on width, height and length is to make our highways more safe for the users thereof. To insure safety it is necessary that the length of vehicles be restricted the same as height and width. Vehicles of undue length are particularly dangerous on corners and curves in that drivers of other vehicles in passing are more likely to be crowded by reason of the excessive length of the vehicle and the load. The danger is just as great, if not more so, with the load extending ten feet beyond the back

of the vehicle than it would be if the vehicle or trailer was actually ten feet longer. Therefore we see that if we put the construction on the statute that it refers only to the vehicle and trailer itself and not to the load, that the legislature has done very little towards preventing the danger in excessive length. We therefore feel that although the legislature was not as plain and unambiguous as it might have been in using the term "length over all," that yet it is apparent from the restrictions they put on the load as far as height and width are concerned that they also meant it to include the length of vehicles, due to the fact that the section is enacted primarily for safety reasons, and that it would be of very little worth if a construction were put on the section that it included only the length of the vehicle and trailer itself over all, in that the danger would not be removed by such a construction of the statute.

Those who have loads to carry which by necessity must be longer than the maximum fixed by statute under Section 480, may make application as is provided in Section 491 and sections subsequent thereto, for a special permit for this purpose, therefore seeing that no particular hardship is placed upon anyone by reason of the construction we put on Section 480 in this opinion.

It is therefore our opinion that the words "length over all" as used in Section 480 of Chapter 134, Acts of the 47th General Assembly, include the load carried on the vehicle and/or trailer.

SCHOOLS: TRANSPORTATION: Transportation facilities may be extended to nonresident pupils by school district only if said district is fully reimbursed for such service. Power of board to so furnish transportation is discretionary with board.

September 13, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for an opinion of this department upon the following question:

"We shall ask your department for an official ruling on the question of whether an independent district that is not consolidated and in which district there are no resident pupils whom the board is required by law to transport, has authority to use its public school funds to finance the purchase of transportation vehicles for the purpose of transporting to its schools nonresident pupils, particularly high school pupils, who would come to such school if transportation facilities were provided?"

The authority and duty to transport children to schools other than consolidated schools is set out in Section 4233-e4, 1935 Code, which provides as follows:

"4233-e4. *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 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."

For the purpose of clarifying the nature of the duty thus placed upon boards by the above section, the following outline is presented:

The board in such district shall arrange for, and pay for out of the general fund, transportation costs

(1) when children enrolled in an elementary school live two and one-half miles or more from the school in their district, or

(2) when the school in such district has been closed and they (children) are thereby placed more than two miles from the school designated for their attendance.

In the above situation, the providing of transportation by the boards of districts or subdistricts is mandatory. Under the statute, however, boards are authorized to provide transportation for a less distance.

The question presented by your inquiry goes to the power or authority of a board to provide transportation facilities to children who are non-residents of the district where there are no resident pupils which the board, by law, is required to transport. There is no statute which expressly confers upon the school board of an independent district the authority to transport non-resident pupils to such schools. The general rule is that the powers of school boards are limited to those expressly conferred by statute, and to such added powers as may be incident or necessary to the carrying out of such express powers. The statute has provided that high school training be made available to children who reside in a district which does not maintain a high school.

"4275. *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."

Section 4277, 1935 Code, provides the manner in which the home district of such child shall reimburse the district which furnishes the school facilities. After providing that the debtor district shall pay a tuition fee of not to exceed $9.00 per month during the time school is so attended, the law provides:

"4277. *Tuition fees—payment.* * * *

"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 above language clearly contemplates that independent districts *may* furnish transportation to non-resident high school pupils. It would appear that incident to the authority to furnish schooling facilities to such non-resident pupils, the legislature has recognized the power to furnish transportation to such pupils. In recognizing this authority, however, the legislature has apparently deemed it advisable to regulate the exercise of this power by imposing the restrictions and requirements set out above. It is to be observed that this transportation service may be extended only in the event that the district which furnishes the same is fully reimbursed. In our opinion this would necessitate such charge for transportation as would cover all expenses connected therewith including amortization charge to retire the cost for any vehicle purchased.

In view of the foregoing, it is our opinion that the school board of an independent district has authority to use its funds for the purchase of transportation facilities to be used in the transportation of non-resident pupils to the school, provided that in all respects the requirements of Section 4277, supra, are observed. It is emphasized that the power of the board to so furnish such transportation is entirely discretionary with such board.

MOTOR VEHICLES: DRIVER'S LICENSE: STUBS: The stub from a driver's license may not be detached upon conviction of violation of a city ordinance regulating operation of motor vehicles on highways of this state.

September 13, 1937. *Mr. Horace Tate, Acting Commissioner, Motor Vehicle Department:* We are in receipt of your request for an opinion on the following proposition:

Under Section 238, Chapter 134, Acts of the 47th General Assembly, is it necessary that a court, upon conviction of a violation of a city ordinance regulating the operation of motor vehicles on the highways, detach a stub of the license of such operator or chauffeur?

Section 238, above referred to, reads as follows:

"*Record forwarded.* Every court having jurisdiction over offenses committed under this chapter, or any other law of this state regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted, and the department shall thereupon consider and act upon such recommendation in such manner as may seem to it best. Upon conviction in all cases where recommendation of suspension or revocation is not mandatory, every court shall detach one stub of the license of such operator or chauffeur and forward same to the department."

If there is any authority for a court having jurisdiction to detach a stub from the driver's license of a party convicted of a law regulating the operation of motor vehicles on highways, it is under the section just quoted.

The answer to our question turns principally upon the interpretation of the phrase "over the offenses committed under this chapter or any other law of this state." It is clear that the first part of that phrase is referring only to the provisions of Chapter 134, Acts of 47th General Assembly, which is very comprehensive in its regulation of motor vehicles. In addition to that the legislature added "or any other law of this state." We do not believe that by adding that phrase the legislature contemplated the removal of a stub from a driver's license for a conviction of the violation of a city ordinance regulating the operation of motor vehicles on the highways. In the first place there is no mention in that section of city ordinances, and we believe that if the legislature had contemplated the inclusion of city ordinances that it would have expressly used that term.

In the next place, as has been heretofore said, the new motor vehicle act is very comprehensive in that it defines what may be done and what may not be done under the state law; that is to say that there is not a great deal that can be left to the city to regulate by ordinance. It is provided in Section 266 of the act that the provisions of this chapter shall be applicable and uniform throughout the state, and that no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless they are expressly authorized to do so by law.

Section 267 of the act says that local authorities shall not enact or enforce any ordinances, rules or regulations in any way in conflict with, contrary to,

or inconsistent with the provisions of this chapter, but that they may by city ordinance regulate:

1. The standing or parking of vehicles;
2. Regulate traffic by means of police officers or traffic control signals;
3. Regulate or prohibit processions or assemblages on the highways;
4. Designate particular highways as one-way highways;
5. Regulate the speed of vehicles in public parks;
6. Designate any highway as a through highway, and require vehicles to stop before entering the city;
7. License and regulate the operation of vehicles offered to the public for hire and used principally in intra-city operation; and
8. Restrict the use of the highways as authorized in Sections 495 to 497, inclusive.

To sum up the provisions that have been heretofore set out, we may say that the city may enact ordinances governing the operation of motor vehicles on our highways as long as they are not inconsistent with, or in conflict with the state law, except only that they have exclusive jurisdiction under present statutes to enact ordinances governing the items set out in paragraphs 1 to 8, inclusive.

We, therefore, see that the state law covers virtually all the offenses so a person may be charged with a violation of the state law and, upon conviction, have the stub of his driver's license detached for any offense except those heretofore expressly set out. We do not believe that the legislature intended to require the detaching of a stub for a violation of those things heretofore set out which are to be regulated exclusively by the cities and towns, such as the standing or parking of vehicles. This is borne out by reading paragraph 3 of Section 241 of Chapter 134, Acts of the 47th General Assembly, wherein it says that the department is authorized to suspend the license of an operator or chauffeur upon a showing that the licensee is an habitual violator of the traffic laws. A person does not become an habitual violator by committing one or two offenses. If a stub were to be detached for a violation of a city ordinance, the license would be taken away from the licensee after having been three times convicted of the violation of a city ordinance. Therefore, if the legislature intended that a stub should be detached for a violation of a city ordinance, it would be surplusage to provide that the license could be suspended upon a showing that the licensee was an habitual violator of the traffic laws. We think that the above clearly shows the intention of the legislature.

We believe that when the legislature spoke of "any other law of this state," it was referring to any other state law not included in this chapter, and includes those that are now in force or any that may be hereinafter enacted.

It is, therefore, our opinion that the stub from a driver's license may not be detached upon the conviction of the violation of a city ordinance regulating the operation of motor vehicles on highways of this state.

CRIMINAL LAW: BANK DAY: LOTTERY: A plan whereby a merchant gives to each customer on a certain day a credit equal to that customer's purchase constitutes a lottery and as such violates Section 28, Article III of the State Constitution and Section 13218 of the Code.

September 14, 1937. *Mr. Charles P. Vogel, County Attorney, Grinnell, Iowa:* You ask the opinion of this department upon the following statement of facts:

The merchants of your county wish to put on what they call "bank day." By this plan it was agreed by the merchants to give to each of their customers

on some day of each month a credit equal to the amount of that customer's purchase on that particular day. The day picked by each individual merchant would be the day on which his sales were the lowest for the month. In other words by this plan the merchant keeps a record of all purchases made by his customers during the month. At the end of the month he figures up his sales for each individual day and thus determines on what day he had the least sales, then he gives to each purchaser *on that day* a credit equal to the amount of the customer's purchase.

It is the opinion of this department that the plan outlined above would constitute a lottery. Justice Powers in the case of *State vs. Hundling*, 264 N. W. 608, 220 Iowa 1369, said that there were three elements necessary to constitute a lottery: first, a prize to be given; second, upon a contingency to be determined by chance; and third, to a person who has paid some valuable consideration or hazarded something of value for the chance.

The foregoing outlined plan has all three of the elements of a lottery. In the first place, a prize is to be given in the nature of a credit to some people. In the second place, the recipients of the prizes are determined by chance, and third, everyone eligible for the prize has paid something in order to be eligible.

Only those persons who have dealt with a particular merchant are eligible for the prize. In this particular the above outlined plan differs from the bank night scheme which our Supreme Court had under consideration in the Hundling case. It is true the recipients of the prizes are not determined by the drawing of names as is done in bank night. Nevertheless, their names are determined by chance. The recipients are determined by a contingency, the happening of which none of them could help determine by merit or skill. Blind chance would have as much to do with determining the people who would constitute the winners as would any other element. The day of the month on which a merchant's sales were the lowest is usually determined by some contingency beyond the control of anyone. Such things as unforeseen weather conditions might be the element which would determine on what day of the month awards would be given, and consequently what persons were to share in the awards. A person's very effort to put himself in the class to whom the award is to be given might be the determining factor in preventing him from receiving an award. By being certain to be eligible for an award on a particular day, it would be necessary for a person to make a purchase. The making of such a purchase might be the exact element which would prevent that particular day from being chosen award day, for such a purchase might swell the total of purchases to make some other day the day on which such awards would be granted.

There can be no question but that everyone eligible for an award has paid some valuable consideration for the privilege, since only people who make a purchase are eligible. In this regard 38 *Corpus Juris*, 290, has this to say:

"Therefore, a scheme is none the less a lottery because it promises a prize to each ticket holder, if the prizes to be drawn are of different values, or because the purchaser of a chance is to receive the full value of his money in any event, if there is a chance that some purchasers may receive more than others, or because every participant ultimately becomes entitled to property of equal value, if there is an inequality dependent upon chance."

In the case of *P. & C. Guenther vs. Dewein*, 11 Iowa 133, the Supreme Court held a scheme, which differs in no particular from the one under consideration, illegal by reason of the fact that it was a lottery and as such violated both the Constitution of the State and the statutes dealing with lotteries.

It is the opinion of this department that the scheme outlined in your statement of facts constitutes a lottery and that as such it violates Section 28 of Article III of the State Constitution and Section 13218 of he Code.

BEER: PERMITS: CLUB PERMITS: BOARD OF SUPERVISORS: In particular instance cited, board of supervisors should determine whether or not permit should issue. (Question: Veterans of Foreign Wars wish to obtain a class "B" permit for location outside incorporated town and not within platted village VFW post incorporated in 1933 as social club. Can permit issue?)

September 14, 1937. *Mr. R. J. Kremer, County Attorney, Independence, Iowa:* We acknowledge receipt of your request for the opinion of this department in connection with which you have set out the following facts:

The Veterans of Foreign Wars has a post in this city organized and incorporated in 1932. On November 22, 1933, a motion was made, seconded, and carried by the organization that a social club be formed consisting of all members of the post. This group is now operating but has never been incorporated. The Post wishes to obtain a class "B" beer permit for a location outside the incorporated town and not within a platted village. Is the Post entitled to a club permit, either as an incorporated Post of the Veterans of Foreign Wars or as an incorporated social club under these circumstances?

Since the location of the proposed club room is outside the limits of an incorporated city or town, it is clear that no authority to grant a permit lies with the town council. Therefore, if a permit may be issued to such club, it will need to be granted by the board of supervisors and would be a country club permit.

Provisions of the statute relating to the authority of boards of supervisors to grant club permits outside cities and towns are as follows:

"1921-f99. *Power to issue permits.* * * * Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934, and to clubs as defined in Section 1921-f110 and to revoke same for causes herein provided, * * *"

"1921-f109. *Permits to clubs.* * * * The board of supervisors of any county shall issue class 'B' permits to clubs located in such counties outside of the limits of cities and incorporated towns."

"1921-f110. *Conditions.* * * * provided, however, that a golf or country club whose buildings are located outside the territorial limits of the city, town or special charter city, may be issued a class 'B' permit by the local board of supervisors, * * *"

It is to be noted that the word "shall" appears in Section 1921-f109, supra, in contrast to the use of the word "may" as used in Sections 1921-f99 and 1921-f110.

We are of the opinion that the matter of granting beer permits by a board of supervisors is discretionary with the board. Such power is conferred by Section 1921-f99, which is headnoted "Power to issue permits." This section states that the power given to boards of supervisors to issue class "B" and class "C" and club permits is discretionary.

You state that the social club which was formed in November of 1933 is not now incorporated. Such organization could not, as such, be granted a permit, since one of the conditions precedent to the granting of a club permit is stated in Section 1921-f110 as follows:

"c. Unless it is incorporated under the laws of the state of Iowa, and its charter is in full force and effect, and/or excepting regularly chartered branches of nationally incorporated organizations."

You ask further whether or not the incorporated post of Veterans of Foreign

Wars could be granted a permit under the above circumstances. Section 1921-f110, 1935 Code, prescribes certain conditions precedent to the granting of a club license, providing that no club shall be issued such permit:

"b. If it is a proprietary club, or operated for pecuniary profit.

"c. Unless it is incorporated under the laws of the state of Iowa, and its charter is in full force and effect, and/or excepting regularly chartered branches of nationally incorporated organizations.

"d. Unless such club has a permanent local membership of not less than fifty adult members.

"e. Unless the application for such permit is approved by a majority of the bona fide members of such club who are present at a regular meeting, or a special meeting called to consider the same.

"f. Unless it was in operation as a club on the first day of January, A. D., 1934, or being thereafter formed, was in continuous operation as a club for at least two years immediately prior to the date of its application for a class 'B' permit."

You further state that the Veterans of Foreign Wars is an incorporated organization, and we assume that its charter is in full force and effect at this time. It appears from the facts stated that such organization has been in operation for a period of time sufficient to satisfy that requirement of the statute. Whether the organization can meet all the requirements stated above is a question to be determined by the board of supervisors to which the application for such permit is to be presented. If such qualifications are established to the satisfaction of the board of supervisors, we see no legal objection to the granting of a club permit in this case. Such action, however, is within the discretion of the board.

Boards of supervisors are limited in the granting of regular class "B" and class "C" permits to locations in villages platted prior to 1934. This limitation does not apply to club permits. A reference to the language of 1921-f99, which is quoted above, indicates that club permits are not included with regular class "B" and class "C" permits insofar as the latter are affected by the aforesaid location requirement. The fact that most golf clubs and country clubs are not in fact situated within the area of platted villages indicates that the legislature intended that the platted village requirement should not apply to club permits.

In view of the foregoing, it is our opinion that the question of whether or not a club permit should issue to the organization mentioned is a matter to be determined by the board of supervisors.

LEGISLATURE: RETRENCHMENT AND REFORM: COMMITTEE ON: APPROPRIATION: CENTENNIAL: HISTORICAL, MEMORIAL AND ART DEPARTMENT: Committee on Retrenchment and Reform may allot funds to Historical, Memorial and Art Department for use in promoting an Iowa Centennial if said committee determines that a contingency within the meaning of Section 49, House File 477, exists.

September 15, 1937. *Committee on Retrenchment and Reform:* Mr. J. R. Bahne, Chairman of the Iowa Centennial Committee, has, under date of September 15, 1937, asked this department for an opinion upon the following question:

"Will you be good enough to direct to the Legislative Committee on Retrenchment and Reform a statement indicating whether or not the Historical, Memorial and Art Department of Iowa may legally request and secure an allocation of funds from the contingent fund for the purpose of suitably commemorating the centenary of Iowa's admission to territorial status, in the year 1938?"

While the request for this opinion comes to us from Mr. Bahne, we feel that answer should be directed to your committee since you are the ones who will eventually pass upon the matter.

Under date of August 31, 1937, the opinion of the Attorney General was requested upon a question substantially the same as that now presented with the exception that the former question inquired as to the right of the State Historical Society to ask and receive an allotment from your committee for the purpose of sponsoring the Iowa Territorial Centennial in 1938. In effect, the only difference in the questions presented in these requests is that sponsorship of the Centennial by the State Historical Society was proposed in the first instance, while in the present inquiry such sponsorship is contemplated by the Historical, Memorial and Art Department.

The Historical, Memorial and Art Department is a recognized department of the state government for which appropriations are made from state funds and for which the 47th General Assembly made an appropriation in Section (20) of House File 477, which was the appropriation act.

It is our opinion that the Historical, Memorial and Art Department occupies the same position as the State Historical Society with respect to the subject matter of this inquiry. References to the State Historical Society in the former opinion referred to may, we believe, be applied with equal effect to the Historical, Memorial and Art Department. For this reason we inclose herewith a copy of said former opinion.

Here, as in the former case, a fact question is presented. It is solely the province of the Committee on Retrenchment and Reform to determine from facts presented to it whether or not the request of the Historical, Memorial and Art Department for funds to use in the furtherance of a territorial centennial constitutes a contingency within the meaning of Section (49) of House File 477. If you determine by official action of the committee after reviewing the facts that the use of funds for such observance is a contingency within the meaning of said Section (49), then we can see no legal objection to your making available funds to the Historical, Memorial and Art Department for this purpose, as stated in the former related opinion. Since all the members of the Retrenchment and Reform Committee were members of th 47th General Assembly, such committee is particularly well qualified to make this determination of fact.

HOMESTEAD EXEMPTION: SOLDIER'S EXEMPTION: TAXATION: When a veteran is the owner of property, his soldier's exemption must apply to that property and not to property owned by his wife.

September 22, 1937. *Mr. Maurice E. Rawlings, County Attorney, Sioux City, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Where the homestead is owned by the wife of an ex-service man and occupied as a homestead by said wife and the ex-service man, and the wife has applied for the homestead exemption, can her husband require that the tax exemption to which he is entitled, by virtue of Section 6946 be applied to other property of which he is the owner in fee, or must his soldier's tax exemption be applied to his wife's property in which he resides?

Under Section 6946 of the 1935 Code the veterans of our various wars have been granted exemptions in certain amounts to be applied on the property of such veteran when returned for taxation, the pertinent part of the Act being as follows:

"*Military service—exemptions.* The following exemptions from taxation shall be allowed:

The property, not to exceed..........dollars in actual value * * *."

Under the foregoing section of the statute, one qualified by military service to be entitled to the exemption is permitted to deduct from the value of his property certain amounts, depending upon which war he participated in, returning only the overplus for taxation purposes.

Section 6947 of the 1935 Code provides as follows:

"All persons named in Section 6946 shall receive a reduction equal to their exemption, to be made from the homestead, if any; otherwise from other property owned by said persons. * * *"

To construe Section 6947, we must determine what constitutes a homestead, inasmuch as the reduction is to first apply to the homestead, if any. Section 10135 of the 1935 Code defines a homestead, the pertinent part of said section reading as follows:

"'*Homestead' defined.* The homestead must embrace the house used as a home by the owner, * * *."

The pertinent parts of Section 19 of the Homestead Tax Exemption Act read as follows:

"1. The word 'homestead,' shall have the following meaning:

a. The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this Act actually lives * * *.

2. The word, 'owner,' shall mean the person who holds the fee simple title to the homestead, * * * (and other listed exceptions)."

In *Bracewell vs. Hughes*, 235 N. W. 37, the Iowa Supreme Court at page 39 states:

"Moreover, the homestead must embrace the house used as a home of the owner, and it must necessarily, in order to be so preserved, be occupied by the owner and his family as a home."

It is therefore apparent that the ex-service man, not being the owner of the homestead, either within the meaning of Section 10135 or of Section 19 of the Homestead Tax Exemption Act, but being the owner of property within the meaning of Sections 6946 and 6947 of the Code could rightfully insist that his exemption be applied to his own property.

True enough, Section 6947 provides that the exemption is to be first applied to the homestead. This ex-service man does not own a homestead, but does own other property, and thus comes squarely within that part of Section 6947 providing for the application of the exemption to other property owned by the ex-service man where he does not own a homestead. If the ex-service man owned no other property, his wife, under subsection 4 of Section 6946 could claim the exemption under the other facts posited, but so long as he is the owner of other property and does not own a homestead he has the right to require that the exemption be applied to his own property.

STATE BOARD OF SOCIAL WELFARE: EMPLOYEES: RESIDENCE: CHILD WELFARE: Section 8, Senate File 373, Acts of 47th General Assembly. Field representatives employed by Child Welfare Division are employees of state board within meaning of above section and must be residents of the state of Iowa for at least 2 years immediately preceding their employment and must be selected from those who successfully qualified in examination given by state board or under its direction. State board is entitled to reasonable time in which to find qualified field representatives who will meet these requirements.

September 23, 1937. *Mr. Warren F. Miller, Chairman, State Board of Social Welfare:* This department is in receipt of your letter of July 22nd in which you ask the following question:

"The State Board of Social Welfare will employ field representatives to supervise maternal and child health services in the State of Iowa. These representatives are selected and employed by the State Board of Social Welfare, but will be paid entirely from federal funds made available for that purpose. Are these field representatives employees of the state board within the meaning of Section 8 of Senate File 373, Acts of the 47th General Assembly, so that they must be residents of the State of Iowa at least two years immediately preceding their employment and must take an examination?"

Section 8 of Senate File 373, Acts of the 47th General Assembly, commonly known as the Social Welfare Act, states as follows:

"All employees of the state board shall have been residents of the state of Iowa for at least two (2) years immediately preceding their employment and shall be selected from among those who have successfully qualified in an examination given by the state board or under its direction, covering character, general training, and experience. Such examinations shall be open to all persons, and persons taking such examinations, upon successfully qualifying, shall be classified according to the fields of work for which said persons are fitted, all in accordance with rules and regulations of the state board adopted and published by the state board."

The only question presented is whether these field representatives are employees of the State Board of Social Welfare.

From the question it appears that the State Board of Social Welfare selects and employs whatever field representatives it deems necessary and directs the manner in which their services shall be performed. This strongly indicates the relationship of employer and employee.

In *Volume 20 Corpus Juris at page 1241*, an employee is defined as follows:

"In its broad significance the term 'employee' is used to designate one who is employed, one who works for an employer or master, one who works for wages or salary, a person hired to work for wages as the employer may direct."

In *Minneapolis Iron Store Co. vs. Branum*, 36 N. D. 355, 162 N. W. 543 at 547:

"A distinguishing feature of the relations between master and servant is that the employer retains the control over the mode and manner of doing the work under the contract of hiring. Whether parties engaged in doing the work for another are his servants depends upon the control and the direction that he can rightfully exercise over them. If they are at his command and bound to obey his orders and directions in regard to the work and can be discharged by him, they are then his servants."

The fact that these field representatives are paid by the federal government does not of itself, in the opinion of this department, alter or affect the relation of employer and employee, for the source of payment is not decisive of the question.

Volume 39 Corpus Juris, Page 34, Par. 2, states as follows:

"The relationship of master and servant arises out of contract. The assent of both parties is essential. Hence, the relation does not arise between employees and one who has agreed with the owner to pay the salaries of employees."

It is, therefore, the opinion of this department that the field representatives referred to in your question are employees of the State Board of Social Welfare within the meaning of Section 8, Senate File 373, Acts of the 47th General Assembly, and must be residents of the state of Iowa for at least two years immediately preceding their employment and must be selected from among those who have successfully qualified in an examination given by the state board or under its direction as required by statute.

It is the opinion of this department that the State Board of Social Welfare is entitled to a reasonable time in which to find qualified field representatives who will meet these requirements.

BOARD OF SUPERVISORS: ASSESSORS: TAX SALE: Board of supervisors may hire deputy assessor (or anyone) to represent it at scavenger tax sale to enter county's bid (Section 7255-b1). However, such practice is discouraged as unnecessary expense.

September 24, 1937. *Honorable C. W. Storms, Auditor of State:* You request the opinion of this department upon the following question:

"Can the Board of Supervisors employ the chief deputy city assessor, whose compensation is paid by the county at the rate of $150.00 per month, as its bidder at tax sales held under Section 7255-b1 and pay him, in addition to his $150.00 salary, a salary of $50.00 for this service?"

Your inquiry presents two legal questions:

1. Has the Board of Supervisors the authority to hire anyone to act as bidder at tax sales held under Section 7255-b1?

This question was answered in the affirmative in an opinion issued by this department on March 8, 1937, a copy of which is enclosed herewith for your information.

2. If the Board of Supervisors has such authority, can a chief deputy city assessor be hired as such bidder and receive compensation for the services he renders as such bidder?

We are assuming that the chief deputy city assessor in question is hired by the board of supervisors to do work in a city of such size as would allow him to be paid the $150.00 per month salary mentioned in your letter. In other words, that the city assessor in question comes within the following provisions of Section 5669 of the 1935 Code:

"In cities under the commission form of government having a population of more than forty-five thousand, and in cities acting under special charter having a population of more than forty-five thousand, the board of supervisors shall fix the compensation of the assessor at twenty-five hundred dollars per annum, and the compensation of not more than two head deputy assessors at eighteen hundred dollars per annum.

"In cities under the commission form of government, having a population of more than one hundred twenty-five thousand, the city assessor may appoint six full time deputies, which appointment shall be approved by the city council and the city council and board of supervisors shall fix the annual compensation of the city assessor and such deputies, which compensation shall be paid by the county from its general fund.

"In cities where extra or special services are to be performed by the assessor, the board of supervisors may by special contract with the assessor determine the compensation to be paid."

In the case of *Burlingame vs. Hardin County*, 180 Iowa 919, the Supreme Court, in an opinion by Justice Weaver, held that compensation received by a public officer for the performance of duties which are in no wise imposed upon him as part of his official duties, belongs solely to that officer. In this case the court said:

"A county officer does not contract to give all his time to the public service in any such sense that all the money he may earn or receive from any and every source during his term of office must be accounted for to the county. 'His duties are fixed by statute, and when these are performed, he is not required to do more.' *Polk County vs. Parker*, 178 Iowa 936. If, for example, he receives payment or fees as a witness in a civil action, or for service as one of a board of arbitrators, or as a clerk of an election board, or as laborer in the harvest field, or indulges in literary work for which he receives more

or less in royalties, or, being a merchant or banker or mechanic, wins profits wholly disconnected with the duties placed upon him by statute, no one would soberly contend that the county, or any of its officers, could rightfully lay claim to any part of the income or earnings so accruing. In each and every case cited and relied upon by the appellee, the right of the county to compel an accounting by the clerk has been exercised solely upon the admitted or proved fact that the moneys in question were received by him in his official capacity."

It is the opinion of this department that the board of supervisors has the power to enter into this type of arrangement with the chief deputy city assessor. Acting as public bidder under Section 7255-b1 is not one of the official duties of a city assessor or any of his deputies. Nor is there anything in the position as bidder at tax sale which is incompatible with the position of chief deputy city assessor. The last paragraph of Section 5669 of the Code, which provides as follows:

"In cities where extra or special services are to be performed by the assessor, the board of supervisors may by special contract with the assessor determine the compensation to be paid."

recognizes that the board of supervisors has power to pay an assessor in addition to the compensation set by statute for extra and special services.

In spite of the fact that it is the opinion of this department that the Board of Supervisors has the right to hire a bidder to represent it at the scavenger tax sale for the purpose of entering the county's bid in accord with Section 7255-b1 of the Code, nevertheless this department feels that it is unnecessary for the Board of Supervisors to hire such a bidder, and that any money paid to such a bidder is an unnecessary expenditure of county funds. It would be possible and even desirable for the Board of Supervisors, at some meeting previous to the holding of the scavenger tax sale, to pass a resolution authorizing the county auditor, who must attend the sale in any event, to enter the county's bid in accord with Section 7255-b1. That is, to authorize the county auditor to bid the amount of the delinquent general taxes, interest, penalties, and costs at the scavenger tax sale in the event "no bid is received, or if the bid received is less than the total amount of the general taxes, interest, penalties and costs." At some meeting subsequent to the scavenger tax sale, the Board could by another resolution confirm the various bids entered by the auditor in accord with their previous resolution.

BUILDING AND LOAN ASSOCIATIONS: BORROWERS: A legal owner of stock pledged as security for a loan from the Building and Loan Association would be liable for his proportionate share of the losses on all stock owned by him whether pledged or not.

September 25, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following question:

If a member of a Building and Loan Association has $1,000.00 in fully paid shares and the Association loans him $500.00 taking his share certificate as collateral, would the Association be allowed to charge the member with his proportionate share of the losses over the reserve fund on the basis of his $1,000.00 share holding, or would they be allowed to charge only on the difference between the amount of shares and the share loan, namely $500.00?

Subsection 5 of Section 9329 of the 1935 Code gives to Building and Loan Associations the power "to make loans to members on such terms, conditions, and securities as the articles of incorporation and by-laws provide; said loans

to be made only on real estate security, or on the security of their own shares of stock, not to exceed ninety per cent of the withdrawal value thereof."

Subsection f of Section 3, Chapter 220 of the Acts of the 47th General Assembly reads as follows:

"Loans may also be made upon the security of the pledges of shares of the stock of the lending association held by the borrower, but shall not be made in excess of ninety per cent of the fair value of such pledged shares. No stock loans shall be made when applications for withdrawals have been on file and unpaid for more than sixty days because of lack of available funds, unless specifically authorized by the board of directors."

Although a member of such an association holding paid-up stock borrows on the same, he nevertheless continues to be the holder of the legal title to said stock and upon the repayment of his loan he is entitled to the return of his stock. If he were voluntarily to withdraw his money he would be subject to the provisions of Section 9352 of the Code which reads as follows:

"*Withdrawals.* The terms of withdrawal of a member from such association shall be such that any withdrawing member shall receive a sum not less than he has paid into said association, unless losses have occurred to said association, during the time that said withdrawing member was a member, which exceed the amount of the profits, or any fund created with which to pay such losses, and in that case such withdrawing member shall be charged with his proportionate share of the excess of the losses over the profits, and no more. Such association may provide by its articles of incorporation or by-laws or by resolution of its board of directors, the order in which withdrawals shall be paid, and when dividends shall cease on shares on which withdrawal demands have been made, and what portion of the association's funds or receipts shall be used for payment of withdrawals and matured shares."

If his loan is foreclosed, it would be subject to the provisions of Section 9331 which reads as follows:

"*Foreclosure—debit and credit.* In case of foreclosure, the borrower shall be charged with the full amount of the loan made to him together with the dues, interest, premium, and fines for which he is delinquent, and he shall be credited with the same value of his pledged shares as if he had voluntarily withdrawn the same."

A stockholder cannot by borrowing on his stock accomplish an indirect withdrawal free of the requirements of Section 9352 heretofore quoted.

It is therefore the opinion of this department that as the legal owner of the stock pledged, he would be liable for his proportionate share of the losses on all the stock owned by him whether pledged or not.

CITIES: PUBLICATION OF ORDINANCES: Publication of short form ordinance is not sufficient. Ordinances must be published in full. Same applies to charter cities.

September 29, 1937. *Dr. Walter L. Bierring, Commissioner, Department of Health:* We are in receipt of your request for an opinion upon the following statement of facts:

It is proposed that certain municipalities within the state of Iowa enact what is known as the United States Public Health Service Milk Ordinance. This ordinance is in force and effect in some six hundred cities throughout the United States.

You have enclosed with your request a copy of the proposed ordinance. The ordinance itself is quite long, covering fourteen pages in the pamphlet, which are typewritten in reasonably small type. You have also submitted a proposed short enabling form of the United States Public Health Service Milk Ordinance, which is also contained in said pamphlet, and which covers less than one page. The short form is more or less of a caption of the ordinance itself. That is to

say that by the reading of the same a person is apprised of the general nature and the things that are covered by the ordinance itself. Your question is whether or not municipalities, after adopting the ordinance in its complete form, may publish notice of the same as is provided by statute by publishing only the short form.

To determine the question as far as cities and towns not under special charters are concerned, we must look to Section 5720 of the 1935 Code of Iowa, which is the section which provides for the publication of ordinances of a general or permanent nature. That section reads as follows:

"5720. *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 be 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, one of which shall be at 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."

The proposed ordinance provides in part as follows:

"Any person who shall violate any provision of this ordinance shall be fined not more than $............ at the discretion of the court. Each and every violation of the provisions of this ordinance shall constitute a separate offense."

The proposed short form reads as follows:

"Any person, firm or corporation violating any provision of this ordinance shall, upon conviction, be punished by ...."

It is apparent, therefore, that the proposed ordinance carried with it a fine, penalty, or forfeiture.

The Supreme Court of the state of Iowa has never passed upon the precise question that confronts us here, so there is no precedent as far as Supreme Court decisions are concerned to fall back on in determining this proposition.

As a basis for this opinion, it is well to determine what the purpose of Section 5720, supra, is. A reading of the Code will show that it is not necessary that cities and towns publish in book form for distribution the compiled ordinances of a city. Such may be done under Section 5721, but it is not necessary. There may be, therefore, no accessible set of ordinances available to the public. The legislature, in enacting Section 5720, realized that the public might be confronted with such a situation, and that in order that a person would be advised of the enactment of new ordinances and provisions of the same, that the public should be given notice in some manner so that they might govern themselves accordingly. Therefore, Section 5720 was enacted by the General Assembly, and our Supreme Court on numerous occasions has held that the publication of an ordinance is mandatory and not directory. Citing *Dubuque vs. Wooten*, 28 Iowa 571; *Starr vs. Burlington*, 45 Iowa 87; *State vs. G & C Co.*, 113 Iowa 30, 84 N. W. 983.

It is therefore a prerequisite to the successful enforcement of an ordinance that the same be published as is provided by law.

That brings us to the controlling question of what constitutes a sufficient publication. Is the law complied with when the people are notified by publication that there is an ordinance which has been enacted covering certain conditions, or is the public entitled to the full and complete ordinance being pub-

lished so that it may know without searching the records of the city clerk what the provisions of the same are?

Supreme Courts of other states have been confronted with this proposition under substantially the same set of facts as are presented by you, and although they are not all in accord, still the weight of authority is to the effect that the ordinance must be published in full if it is going to have valid, legal and binding effect. Citing *Village of Durand vs. Love*, 236 N. W. 855, 254 Mich. 538; *Thompson Scenic Ry. vs. McCabe*, 178 N. W. 662, 211 Mich. 133; *Wolfe vs. Abbott*, 131 Pac. 386, 54 Colo. 531.

Again looking at Section 5720, we find nothing therein that would indicate that anything but the publication of the ordinance in full would suffice to satisfy that section. The section says that all ordinances with certain exceptions "shall be published." Publication of a short form, or a resume of the ordinance, is not a publication of the ordinance at all. As a matter of fact, the short form was never enacted by the city council. What they enacted was the full and complete ordinance. The short form itself was never acted upon by the council. It is only a resume of what some party thinks is contained in the ordinance itself.

We cannot feel, after examining the purpose of the enactment of Section 5720, that any such short form publication would suffice to satisfy the requirement of law, and in the absence of any Supreme Court decisions of the state of Iowa holding that the same can be done, we are constrained to hold that that section must be strictly complied with and that the ordinance must be published in full.

The next question is whether or not our holding is the same as far as cities acting under special charters are concerned, Section 6721 of the Code of 1935 provides as follows:

"Ordinances and resolutions shall be adopted and signed, recorded, published and evidenced, and be subject to veto by the mayor as in cities organized under the general law."

What we have said heretofore pertains to cities organized under the general law, and we see that the same provisions are applicable as far as special charter cities are concerned. Therefore the reasoning heretofore adopted and the law heretofore set forth are controlling as far as special charter cities are concerned, and our holding is the same as to them.

BASIC SCIENCE BOARD: EXAMINATIONS: Basic science board may use questions and answers of other examining boards, before whom an applicant has taken and passed an examination in the basic sciences, in determining whether the board will waive the examination and issue a certificate of proficiency.

September 30, 1937. *Mr. W. L. Strunk, Secretary, Board of Examiners in the Basic Sciences, Decorah, Iowa:* We are in receipt of your request for an opinion upon the following proposition:

May the basic science board use the questions and answers of other examining boards before whom the applicant has taken and passed an examination in the basic sciences in determining whether the board will waive the examination and issue a certificate of proficiency?

Chapter 114-G1 of the 1935 Code sets out the basic science law, and Section 2437-g20 thereof provides for the waiver of examination in the basic sciences, and that section reads as follows:

2437-g20. *Waiver of examination.* 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."

Before getting into the answer to your specific question, it is well to here observe that this opinion deals only with the waiver of the examination, and it is not to be confused with the use of the questions and answers of a former examining board by the basic science board in determining whether or not the applicant can pass the basic sciences. This opinion is intended to cover only the proposition of whether or not the basic science board may use these questions and answers that have been heretofore propounded to an appellant by some other board in determining whether or not the applicant should be exempted from taking any examination from the Iowa basic science board.

We have seen that the Code provides for a waiver of the examination. We also see that it is incumbent upon the basic science board to determine whether or not the applicant has passed an examination "as exhaustive as that required under authority of this chapter." The most accurate way to determine how exhaustive an examination an applicant has taken is to examine the examination itself and that, as we understand it, is exactly what the basic science board anticipates doing.

Section 2437-g16 of the Code sets out how exhaustive that examination should be. That section in part reads as follows:

"The examination shall be of such a nature as to constitute a reasonable test as to whether the person so examined has such knowledge of the elementary principles of the basic sciences as might be acquired after the completion of a course of study of the following subjects for the number of hours specified:

subject	hours
Anatomy	400
Physiology	200
Chemistry	200
Pathology	160
Bacteriology	100
Hygiene	40 * * "

That is to say that the examination should be based upon the applicant having spent those number of hours studying the subjects above enumerated.

An examination of the questions themselves would show to the satisfaction of the examining board whether the questions propounded were sufficient to properly examine an applicant in the basic sciences upon the basis of the hours of study that have been heretofore set out. If they feel that the examination is as exhaustive as required by our law, then, after they have determined that he passed the examination and that it was given by "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 in the United States, or any foreign country" they may waive the examination in the basic sciences and issue to the applicant a certificate of proficiency in the basic sciences.

It is therefore our opinion that the basic science board may waive the examination upon a showing being made to it by the applicant as is set out in this opinion.

TAXATION: HOMESTEAD TAX EXEMPTION: In cases where errors have occurred in the certification for homestead tax credit, the county treasurer may file an amendment to the certification showing the error, and then out of the excess money received over and above the amount required for the actual value of the homesteads in the county as certified, allow the corrected credit, returning whatever balance then remains to the Board.

September 30, 1937. *State Board of Assessment and Review:* This department is in receipt of your request for an opinion upon the following facts:

In isolated cases errors have crept into the county treasurer's certifications for homestead tax credit. Some of these errors occurred when treasurers overlooked the homestead and failed to certify. Still others occurred when treasurers erroneously certified to the valuation. Is it permissible to allow the county treasurer to file an amendment to the certification showing the error, and then out of the excess money that they receive over and above the amount required for the actual value of the homesteads in the county as certified allow the corrected credit, returning whatever balance then remains to the Board?

The mechanics of the homestead act provide that those entitled to the benefits thereof file applications, in the manner set out, with the county auditor, or after January 1, 1938 by delivering to the assessor a statement designating the homestead. The Board of Supervisors examine claims and either allow or disallow the same. All claims allowed by the Board of Supervisors are certified on or before July first in each year by the county auditor to the county treasurer who in turn certifies to the State Board of Assessment and Review the total assessed valuation of all homesteads so certified in an amount not to exceed $2,500.00 for each homestead.

From the funds received by the State under Chapter 329-F1 relating to income, corporation, and sales tax, there is to be apportioned the amounts specified in Section 6943-f63, and the amendment thereto set out in the homestead tax exemption act, to the various agencies and funds specified, and the balance is then to be held by the treasurer of state and distributed as the homestead credit fund on warrants drawn by the comptroller upon the direction of the Board under the provisions of the Act. The warrants are to be made payable to the various county treasurers of the state.

The revenue distributable is allocated every six months to the counties in the same proportion that the assessed valuation of all eligible homesteads in an amount not to exceed $2,500.00 for each homestead bears to the total assessed valuation of all eligible homesteads in the State. On October 1, 1937, and annually thereafter, the Board shall estimate the millage credit not to exceed twenty-five mills to be given to each dollar of eligible homestead valuation based upon the estimated revenue to be distributed and certify to the county auditors the millage credit. The county auditors are then to enter such credit against the tax levied on each eligible homestead in each county and the county treasurer is to apportion the amount of credit to the proper taxing district. All funds so apportioned in excess of the combined city and consolidated state and county levies for said district are to be remitted to the State Board of Assessment and Review to be re-deposited in the homestead credit fund for future re-allocation.

Under Section 17 of the Act, in the event that any claim for credit made is denied by the Board of Supervisors and such action is subsequently reversed on appeal, the same millage credit is to be allowed on the assessed valuation not exceeding $2,500.00 as was on all the other homestead valuations for the year or years in question, and the State Board of Assessment and Review, the

county auditor and the county treasurer are authorized and directed to make such millage credit and to change their books and records accordingly. The amount of such credit is to be allocated and paid from the surplus re-deposited in the homestead credit fund.

This department can see no reason why an owner who has complied with the provisions of the Act should be deprived of his credit, or a portion thereof, because of an inadvertent error on the part of the county auditor or treasurer. If the credit was originally denied and then allowed on appeal, the State Board, the county auditor, and treasurer are authorized to change their records and allow the credit, and the amount thereof is paid out of the surplus re-deposited.

From an analysis of the machinery for the payment of the credit, as above set out, and of the Act itself, it is clearly apparent that it was the intention of the Legislature that those who were entitled to the benefit of the Act should receive it to the full extent to which they had entitled themselves.

The proposed method of remedying the error is not in conflict with any of the provisions of the Act. In keeping with the provisions of Section 17, as herein stated, the Act would indicate that the method herein suggested was the method that the Legislature contemplated should be used in such a situation.

It is therefore the opinion of this department that the proposed method of correcting inadvertent errors by filing amendments to the certification and allowing the credit, from the balance to be returned to the Board, is a proper method.

TAXATION: HOMESTEAD TAX EXEMPTION: A lessee occupying property under a lease containing an option to purchase is not entitled to a homestead exemption unless the option has been exercised and a contract of purchase entered into and not less than one-tenth of the purchase price paid.

September 30, 1937. *Mr. Arthur F. Janssen, County Attorney, Maquoketa, Iowa:* This department is in receipt of your request for an opinion upon the following question:

"X" occupies a property under a lease containing an option to purchase. Is he entitled to a homestead exemption?

Subdivision 1, Section 19 of Chapter 195 of the Acts of the 47th General Assembly reads:

"The word 'homestead,' shall have the following meaning:

a. The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this act actually lives six (6) months or more in the year except that in the first year of ownership it shall be sufficient if the owner is living in the dwelling house at the time the claim for homestead credit is made, and makes an affidavit of his intention to occupy said dwelling house, in good faith, as a home."

Subdivision 2, Section 19 of Chapter 195 reads:

"The word, 'owner,' shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth (1/10) of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by blood relatives, or by legally adopted children, or where the person is occupying the homestead under a deed which conveys a divided

interest where the other interests are owned by blood relatives or legally adopted children."

Section 11 of Chapter 195 reads as follows:

"Any person who is the owner of a homestead, as defined in this act, and who desires to avail himself of the benefits provided hereunder for the 1936 taxes payable in 1937 and for the 1937 taxes payable in 1938 may do so by filing a verified statement with the county auditor of the county in which the claimed homestead is located on or before June 1, 1937, and the claim of the owner must be supported by the affidavits of at least two disinterested free holders of the taxing district in which the claimed homestead is located."

In defining the words, "owner" and "homestead" the Legislature has made its own definition. A lessee occupying under a lease containing an option to purchase clearly does not come within the definition of an owner as defined by the Act, and above set out. Neither does the property he occupies come within the definition of a homestead.

It is therefore the opinion of this department that a lessee occupying property under a lease containing an option to purchase is not entitled to a homestead exemption unless the option has been exercised and a contract of purchase entered into and not less than one-tenth of the purchase price has been paid.

TAXATION: PUBLIC BIDDER STATUTE: REDEMPTION: Senate File 167.) Where the tax deed has already issued, it is necessary for the county to reconvey the property to the owner upon the contract being entered into and the required installment and current taxes being paid. Upon reconveyance the legal title is then in the heirs and they would be entitled to possession and the income therefrom. Under Senate File 167 the items which are to be composed into one amount are specifically set forth, and there is no provision therein requiring or allowing cost of repairs made upon the property to be included in the amount required for redemption.

September 30, 1937. *Mr. Grant L. Hayes, County Attorney, Mt. Ayr, Iowa:*

This department is in receipt of your request for an opinion relative to the following situation:

A county has taken title to a small town property under the public bidder law. The property has not been sold or transferred. The property was owned by the children and heirs at law of one "W." "X," one of the heirs acting for all of the heirs has entered into a contract with the county for the redemption of said property under Senate File 167, has paid one-tenth of the amount due, and the current taxes. The county has been renting the property, collecting the rents and had made repairs upon the property prior to entering into the contract of redemption. "X" is demanding the possession of the property and the right to collect future rentals. Can the County include the expense of the repairs made in the amount required to redeem?

Section 6 of Chapter 191 of the Acts of the 47th General Assembly reads as follows:

"In any case where the period of redemption has already expired upon any tax sale certificate now held by the county, the period of time of redemption from such tax sale is hereby extended for a period of six (6) months following the effective date of this act, and in any case where the period of redemption has expired and the county has taken a tax deed to a piece of property, the county shall not sell said property until six (6) months after the effective date of this act, and any owner or owners of such property may during said six (6) months' period enter into a contract with the county for the payment of such taxes or the repurchase of said property from the county for the full amount of said taxes paid for any property to which the county has taken a tax deed less the accumulated penalties and interest or on which a tax sale certificate has been purchased by the county, under the terms and conditions

of this act as though said period of redemption had not expired or said tax deed had not been issued, provided, however, that where any piece of property is redeemed after the issuance of a tax deed, all of the liens of every kind which existed prior to the issuance of said tax deed shall be reinstated and take the order of preference they had prior to the issuance of said tax deed as though no tax deed had been issued."

From the foregoing, it is apparent that where the tax deed has already issued, it would be necessary for the county to reconvey the property to the owner upon the contract being entered into and the required installment and current taxes being paid. Upon reconveyance, the legal title to the property would then be in the heirs and they would be entitled to the possession of said property and the income therefrom. A reading of the entire act clearly shows that it was the intention of the Legislature to give to the owner, under the circumstances outlined in Section 6 of Chapter 191, a right to redeem as if no tax deed had been issued and to restore the situation to the status that existed prior to the issuance of the tax deed to the county.

The question as to the county's being reimbursed for money expended in repairs to the property remains to be answered. Section 7255-b1 of the 1935 Code provides for the purchase of property by the county, when the same is offered at tax sale under the provisions of Section 7255 and no bid is received therefor, in an amount equal to the delinquent general taxes, interest, penalties and costs. Section 10260-g1 reads as follows:

"When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the Board of Supervisors as provided in this chapter, except that any sale thereof shall be for cash and for a sum not less than the total amount stated in the tax sale certificate including all endorsements of subsequent general taxes, interests and costs, without the written approval of a majority of all the tax levying and tax certifying bodies having any interest in said general taxes. All money received from said real estate either as rent or as proceeds from the sale thereof shall, after payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums or any buildings located on said real estate and after expenditures made for actual necessary repairs and upkeep of said real estate, be apportioned to the tax levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

From the foregoing, it is apparent that counties have the right to make actual and necessary repairs to property to which they have acquired tax title, and that the income from said property, either by way of rental or sale, shall be allocated to the payment of taxes, insurance, and repairs before being apportioned to the various taxing bodies interested in the taxes for which the property was sold to the county. However, there is no provision in Senate File 167 for the inclusion of any amount spent by the county in repairing said property. The act specifically sets forth the items which are to be composed into one amount, and the form of the agreement, and nowhere therein is there a provision requiring or allowing repairs made upon the property to be included in the amount required for redemption. Had it been the intention of the Legislature to require the redeemer to pay the amount expended in repairs, the act would no doubt have so provided.

In the absence of such provision, it is the opinion of this department that the county cannot require the owner to reimburse it for money expended in repairing the property to which they had acquired the tax title.

TAXATION: HOMESTEAD TAX EXEMPTION: An owner of a homestead left the same for a visit to a foreign country and was absent from September 13, 1936 to August 16, 1937. Having lived more than six months in the home prior to his departure, he would be entitled to his 1936 exemption if his claim were filed within the time limit set by Section 9 of the Act. He cannot qualify, however, for the 1937 exemption, because he cannot bring himself within the six months' requirement of the Act.

September 30, 1937. *Mr. R. A. Knudson, County Attorney, Fort Dodge, Iowa:* This department is in receipt of your request for an opinion on the following set of facts:

"A" who owns and occupies his home left the same for a visit to a foreign country and was absent on his trip from September 13, 1936 to August 16, 1937. While away he left his home completely furnished and had a man in the house merely to take care of it for him. If proper application were filed, would "A" be entitled to his 1936 and 1937 homestead credit?

Subdivision 1-a of Section 19 of the homestead act, Chapter 195 of the Acts of the 47th General Assembly reads as follows:

"a. The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this act actually lives six (6) months or more in the year except that in the first year of ownership it shall be sufficient if the owner is living in the dwelling house at the time the claim for homestead credit is made, and makes an affidavit of his intention to occupy said dwelling house, in good faith, as a home."

The first paragraph of Section 11 of the Act reads as follows:

"Any person who is the owner of a homestead, as defined in this act, and who desires to avail himself of the benefits provided hereunder for the 1936 taxes payable in 1937 and for the 1937 taxes payable in 1938 may do so by filing a verified statement with the county auditor of the county in which the claimed homestead is located on or before June 1, 1937, and the claim of the owner must be supported by the affidavits of at least two disinterested free holders of the taxing district in which the claimed homestead is located. * * *"

Section 9 of the Act reads as follows:

"If any person fails to make claim for the credits provided for under this act as herein required, he shall be deemed to have waived the homestead credit for the year in which he failed to make claim."

Assuming that the application for exemption was filed on or before June 1, 1937 and that "A" had owned and occupied his home during the whole of 1936 prior to leaving on his voyage, it is apparent that having actually lived for six months or more in said home in 1936 he would be entitled to his 1936 exemption. Of course, if the claim for the 1936 credit was not filed within the time set out in Section 9 of the Act, the same would be unallowable.

"A," however, could not qualify for the 1937 exemption because he cannot come within the requirements of the Act that the owner actually live six months or more in the tax year in the dwelling house on which he seeks the homestead exemption.

It is therefore the opinion of this department that if proper and timely application were filed, "A" would be entitled to his 1936 credit, but could not qualify for the 1937 exemption.

TAXATION: HOMESTEAD TAX EXEMPTION: BOARD OF SUPERVISORS: If an owner disposes of his property prior to December 31, 1936 and the purchaser took possession of the property and occupied same as his homestead, the new owner would be entitled to the exemption if he qualifies as to other provisions of the Act and would be entitled to the refund or credit on the 1936 tax even though he did not reside in the property for a period of six

months during the first year of ownership. WRITTEN notice of rejection of application must be given.

October 1, 1937. *Mr. Harold J. Fleck, County Attorney, Oskaloosa, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. "A" purchased a residential property in October, 1936, and made application for the homestead exemption prior to June 1, 1937. He had been occupying the premises as a tenant for several years prior to October, 1936. After purchasing the property he continued to occupy the same as owner. Is he entitled to a homestead exemption on the 1936 taxes?

The Homestead Tax Exemption Act has placed its own definition upon the word "homestead." Section 19 of the Act defines the word "homestead" as follows:

"a. The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this act actually lives six (6) months or more in the year except that in the first year of ownership it shall be sufficient if the owner is living in the dwelling house at the time the claim for homestead credit is made, and makes an affidavit of his intention to occupy said dwelling house, in good faith, as a home."

The Act provides for a refund on the 1936 tax due and payable in 1937. So far as the 1936 tax is concerned, the Act is retroactive and in reality grants to those who qualify a bonus. This department has previously held that if a person were the owner of property, as person is defined in the Act, and occupied the same as his home for six months during the year of 1936 and was such an owner on January 1, 1937, he would be entitled to the benefits of the credit or refund even though he disposed of the property subsequent to January 1, 1937, and prior to applying for the refund on the 1936 taxes.

However, if such owner disposed of his property prior to December 31, 1936, and the purchaser took possession of the property and occupied the same as his homestead, the former owner, under the previous ruling of this department, would not be entitled to a refund. The new owner, however, if he came within the definition of an owner laid down in the Act and complied with the portion of Section 19 herein set out, would be entitled to the refund or credit on the 1936 tax even though he did not reside during the first year of ownership in said home for a period of six months.

It is the common practice in the sale of real estate to require the purchaser to assume the tax which will be charged against the property on January 1st of the following year, and this irrespective of the time of the year when the sale is made. There is no logical reason why the exception set out in Section 19 should apply to the 1937 tax and not to the 1936 tax.

It is therefore the opinion of this department that purchasers of property in 1936 who actually occupied said property as their home in 1936 would, upon compliance with the requirements of the Act as to application and affidavits, be entitled to the credit or refund even though they did not own or live in said home, during their first year of ownership, for a period of six months.

2. Must the Board of Supervisors notify the applicant of the rejection of his application?

The pertinent part of Section 11 of the homestead exemption act, Chapter 195 of the Acts of the 47th General Assembly provides as follows:

"The board of supervisors in each county shall forthwith examine all such claims and shall either allow or disallow same and establish the assessed value of the homestead where the same has been assessed with other real estate, and

in the event of disallowance shall notify the claimant of such action by mailing a written notice thereof addressed to claimant at his last known address."

In view of the foregoing provisions of the statute, the question presents no difficulty. The language of the Act above quoted is clear and unambiguous and does not require construction.

It is therefore the opinion of this department that written notice of the rejection of said application must be given in accordance with the requirements of the Act.

TAXATION: SALES TAX: CHURCH CELEBRATION: No sales tax need be collected on meals served by the Ladies' Aid of a church as the proceeds therefrom are expended for religious purposes. (Section 3, Chapter 196, Acts of the 47th General Assembly.)

October 1, 1937. *Mr. Waldo E. Don Carlos, County Attorney, Greenfield, Iowa:* This department is in receipt of your request for an opinion upon the following set of facts:

At a celebration the ladies of one of the churches managed a stand at which meals were served. Practically all the food sold was donated by the members of the church. This activity was under the auspices of the Ladies' Aid of the church and all proceeds were or are to be used for church purposes. No sales tax was charged for the meals served. Should a sales tax be paid on the meals sold at this stand?

Section 2 of Chapter 196 of the Acts of the 47th General Assembly reads as follows:

"*Tax imposed.* There is hereby imposed, beginning the first day of April, 1937, a tax of two per cent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this act, sold at retail in the state to consumers or users; * * *"

The pertinent part of Section 3 of said chapter reads as follows:

"There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax imposed by it, the following:
* * *

"d. The gross receipts from sales of tickets or admissions to state, county, district and local fairs, and the gross receipts from educational, religious, or charitable activities, where the entire net proceeds therefrom are expended for educational, religious or charitable purposes."

The situation outlined herein comes squarely within the exemptions provided by subdivision d of Section 3.

It is therefore the opinion of this department that no sales tax need be paid on the meals sold at this stand.

BUILDING AND LOAN ASSOCIATIONS: Under the provisions of Section 3, Chapter 220 of the Acts of the 47th General Assembly, Building and Loan Associations may have the power to make loans secured by first mortgage lien on certain types of real estate.

October 1, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following question:

Is it legal for a Building and Loan Association in making loans to take a note or bond made out for the actual amount borrowed but secured by a mortgage which reads:

"For the Consideration of One ($1.00) Dollar and to secure the payment of bond described herein, we..........................hereby sell and convey to ....the following described real estate, to-wit:"

Under the statute, subdivisions (a) and (d), Section 3, Chapter 220 of the

Acts of the 47th General Assembly, Building and Loan Associations have the power to make loans secured by first mortgage liens on certain types of real estate.

The question, therefore, is whether or not the mortgage above described sufficiently complies with the requirements of the law so if it is a first mortgage when taken and if properly recorded, it will take precedence over subsequent conveyances and mortgages. Section 10084 of the 1935 Code sets out the forms of conveyances. It is apparent from a reading of the statute that the form of the mortgage herein under consideration complies with the form of the statute.

In *Fetes vs. O'Laughlin, et al.*, 62 Iowa 532 the plaintiff sought to foreclose a duly recorded mortgage, which defendant Scofield, the holder of a junior mortgage, claims is invalid upon the grounds that it omits to recite the amount of the note which it is given to secure. The defendant Scofield insists that the recording of the mortgage, on account of its omission to show the amount of the note did not impart notice to him as a claimant under the junior mortgage. In said case the court said:

"The defect in the mortgage consists in the omission, through mistake probably, to state the amount of the promissory note secured by the conveyance. If such omission does not affect the validity of the instrument, the fact that it occurred through mistake cannot, of course, defeat the instrument.

A mortgage given as security for the payment of money operates to secure the debt contemplated by the parties, and will remain valid as long as the debt remains unpaid. This is so, even if there be changes in the note given by the debtor to the creditor, by the cancellation of the note first given and the execution of a new one. So the mortgage will secure the increase of the debt by interest. As long as the debt remains unpaid the mortgage is valid. The amount of the debt need not be shown upon the face of the mortgage, if reference be made to other evidence thereof from which the true amount of the debt may be determined. Were the rule otherwise, the increase of the debt by interest, or its diminution by payments, would affect the validity of the instrument. The true amount of the debt secured cannot always be discovered from the mortgage, however accurately the note may be described therein. But if there be such a reference to the note and the party executing it as will direct inquiry which will lead to the discovery of the amount of the debt, the mortgage is regarded as valid.

It is a familiar rule of the law that all written instruments referred to in deeds and contracts, with sufficient explicitness to identify them, are to be regarded as so far constituting a part of such deeds and contracts as to be read with them, in order to determine their terms and conditions. In the case before us, the note secured by the mortgage is referred to by its date, the name of the maker, the day of its maturity, the rate of interest provided for, and the time it becomes payable. Surely this reference is sufficient to identify the note and authorize it to be read in order to determine the terms of the mortgage. The record of the mortgage imparted notice to defendant that the amount of the note was to be determined by that instrument itself, to which reference was made. These conclusions are supported by the following cases. *Kellogg vs. Frazier*, 40 Iowa 502; *Clark vs. Hyman*, 55 Id. 14; *Burne vs. Littlefield*, 29 Me. 302; *Ricketson vs. Richardson*, 19 Cal. 330; *Gill vs. Pinneys Adm'r.*, 12 Ohio St., 38; *Tousley vs. Tousley*, 5 Id. 78; *Hurd vs. Robinson*, 11 Id. 232; *Babcock vs. Lisk*, 57 Ill. 327; *Booth vs. Barnum*, 9 Conn. 286; *Stoughton vs. Pasco*, 5 Id. 442; s. c. Am. Decisions, p. 72. See also *Michigan Ins. Co. vs. Brown*, 11 Mich. 266 and *Webb vs. Stone*, 24 N. H. 282."

In *Magirl vs. Magirl*, 89 Iowa 342 our Court quoted with approval the following language from the case of *Michigan Ins. Co. vs. Brown*, 11 Mich. 265:

"'The only question presented is whether a mortgage to secure all debts existing is good without specifying them. Upon review of the cases which

were cited in the argument, we are satisfied that there is no legal objection to such a mortgage. It affords the means of ascertaining by inquiry the amount claimed to be due at any time. The objection that a limit of liability should appear is more specious than sound. Such a limitation will always be made large enough to cover all contingencies, and leaves it still necessary to make inquiry to learn the real amount secured; and, so far as opportunities for fraud are concerned, such a maximum limit would be quite as convenient a medium of deceit as an open mortgage. As a matter of fact, even when mortgages have been given for specific debts, inquiry is usually necessary to learn the balance unpaid; while mortgages of indemnity introduce not only uncertainty in amount, but contingency of liability. As yet there is no respectable authority which vitiates these. * * * We are of the opinion that the law has been settled correctly, and that the supposed evils of permitting such transactions are no greater than those which attend very many other dealings of undoubted legality.' The appellants contend that the case was decided under some statute which renders it of no force as a precedent. No statute is referred to by the court, either in the statement of facts or opinion. The objection that this case related to a real estate mortgage is without force, especially as the ground upon which it was decided, the necessity of so describing the indebtedness as to put creditors upon inquiry, is the very questions made by the appellant in the case at bar."

In *Kellogg vs. Frazier*, 40 Iowa 502, the court said:

"It is only necessary that a mortgage should furnish a junior creditor the means, by the inspection of the record, and by common prudence and ordinary diligence, of ascertaining the extent of the incumbrance."

It is therefore the opinion of this department that the form of mortgage described sufficiently complies with the statute and the holdings of our court, and a Building and Loan Association, if it so desires, may use said form.

TAXATION: MOTOR VEHICLE FUEL TAX: The Davenport Oil & Supply Co., operating in Davenport sold 103,000 gallons of gasoline to a company in Silvis, Illinois. The gas was sold in the State of Iowa. The Davenport Oil Company reported the sale, claimed no exemption and paid the taxes thereon. The tax was received and credited to the proper fund. Having voluntarily paid these taxes, the Davenport Oil Company cannot now come in and demand a refund of said tax as having been paid under a mistake of law. The State Treasurer has no authority to refund any portion of the tax collected.

October 2, 1937. *Mr. Leo J. Wegman, Treasurer of State:* This department is in receipt of your request for an opinion upon the following matter:

The Davenport Oil & Supply Company operating in Davenport, for a period covering fifteen or more months prior to July 28, 1937, sold 103,000 gallons of gasoline to the Jacobsen Oil Company of Silvis, Illinois. This gasoline was sold in the State of Iowa. The Davenport Oil & Supply Company so reported the sale, claimed no exemption thereon for export and paid the taxes. The tax so received was credited to the proper fund and has been disbursed. The Davenport Oil & Supply Company is now seeking a refund from the State of Iowa because of the payment of tax to the State of Iowa which was not due the State. However, no formal application for a refund or permit for a refund has been filed with the treasurer's office. The question arises as to whether or not the Treasurer of State can authorize or permit the repayment of this tax.

Section 5093-f3 imposes a license fee of three cents per gallon on the sale or use of all motor vehicle fuel sold or used in this State for any purpose whatsoever, except that no license fee shall be imposed on motor vehicle fuel sold and exported from the State.

The sole question for our determination, therefore, is whether or not a tax which has been voluntarily paid without protest can be recovered.

In the case of *Ahlers vs. City of Estherville*, 130 Iowa 272, our Supreme Court

affirmed the principle that taxes voluntarily paid on a mistake of law cannot be recovered. *Kraft vs. City of Keokuk*, 14 Iowa 86; *Northwestern Union Packet Co. vs. City of Muscatine*, 45 Iowa 185; *Hawkeye L. & B. Co. vs. City of Marion*, 110 Iowa 468; *Newcomb vs. City of Davenport*, 86 Iowa 291; *Odendahl vs. Rich*, 112 Iowa 182; *Tatum vs. Town of Trenton*, 85 Ga. 468 (11 S. E. 705); *Peyton vs. Hot Springs County*, 53 Ark. 236 (13 S. W. 764); *Johnson vs. Atkins*, 44 Fla. 185 (32 South. 879); *Rutledge vs. Price Co.*, 66 Wis. 35 (27 N. W. 819). The foregoing rule has never been reversed, but has been affirmed in subsequent cases decided by our courts.

In the instant case, while it is true that if the Davenport Oil & Supply Company had complied with the requirements of the motor vehicle fuel tax act, no tax would have been due, it is also true that said gasoline was sold in the State of Iowa, so reported sold, no claim for export made, and the taxes paid without protest. Having voluntarily paid these taxes, the Davenport Oil & Supply Company cannot now come in and demand a refund of said taxes as having been paid under a mistake of law. Section 5093-f29 sets up the machinery whereby a refund may be secured. However, the refund provided for in said section refers to a refund to the purchaser and not the seller. Moreover, said claim for refund even by a purchaser must be made within 90 days of the purchase of the motor vehicle fuel.

Under the provisions of Section 5093-f4 the gasoline tax shall be paid to the State by the distributor or other person who first receives said motor vehicle fuel in this State or who manufactures, compounds, or blends motor vehicle fuel in this State at the times and in the manner therein provided and such distributor or other person having paid said tax or being liable for the payment thereof, shall collect the amount thereof from any person to whom said motor vehicle fuel is sold in this State as a part of the selling price thereof. Now then, if the Davenport Oil & Supply Company complied with the laws of the State of Iowa in the sale of said gasoline within the State of Iowa to the Jacobsen Oil Company, they collected the tax therefor and thereafter paid the State of Iowa said tax. To refund to the Davenport Oil & Supply Company the tax which they collected from the purchaser would result in an unjust enrichment to them.

It is therefore the opinion of this department that the treasurer's office has no authority to refund any portion of the tax collected from the Davenport Oil & Supply Company.

BEER: PERMITS—LIMITATION: Since population of Leon by census is 2,006, city council is empowered to adopt ordinance limiting number of class "B" beer permits to be issued in city to *five*. (Section 1921-f126.)

October 6, 1937. *Mr. Dio S. McGinnis, County Attorney, Leon, Iowa:* We acknowledge receipt of your request for the opinion of this department upon a statement of facts summarized as follows:

The city of Leon has a population of 2,006 according to the 1930 census. The city has adopted ordinances in accordance with the provisions of Section 1921-f126, 1935 Code of Iowa, providing for the limitation of class B permits. There are now four class B permits in effect here. Three new applications have been or will be made for such permits.

Would the city be within the law in issuing more than four permits for class B licenses, providing all requirements of the law are met by the applicants?

Section 1921-f126, 1935 Code, empowers cities and towns to adopt ordinances, providing for the limitation of class "B" permits, as follows:

"1921-f126. *Power of municipalities.* * * *

"Allowing only one class 'B' permit to be issued upon application meeting the requirements of this chapter, for each five hundred population, or fractional part thereof, up to twenty-five hundred, and allowing only one additional permit for each seven hundred fifty population or fractional part thereof, over and above twenty-five hundred, provided, however that in towns having a population of one thousand or less, two permits shall be allowed if proper application is made therefor in accordance with the requirements of the provisions of said chapter, * * *"

It appears that the city in question is one having a population of under twenty-five hundred, therefore under the provisions of the section above quoted, the council may, by ordinance, limit the number of class "B" permits to one for each five hundred population or fractional part thereof.

Section 63, sub-section 26, 1935 Code of Iowa, provides as follows:

"63. *Rules.* * * *

"26. Population. The word 'population,' where used in this code or any statute hereafter passed, shall be taken to be that as shown by the last preceding state or national census, unless otherwise specially provided."

There was no state census taken in 1935, therefore the last preceding census would be that of 1930.

According to the statement of facts, that census fixed the population of the city in question as of 2,006 inhabitants. It would appear, therefore, that under the provisions of Section 1921-f126 above quoted, the city council is empowered to adopt an ordinance limiting the number of class "B" beer permits to be issued in said city to the number of five.

TAXATION: SOLDIER'S TAX EXEMPTION: HOMESTEAD TAX EXEMPTION: The widowed mother of a deceased soldier would not be entitled to a soldier's exemption on her property.

October 7, 1937. *Mr. O. E. Anderson, County Attorney, Creston, Iowa:* This department is in receipt of your request for an opinion upon the following set of facts:

A mother of a world war veteran is a widow. During the veteran's lifetime she was dependent upon him for support. The veteran is now deceased. Is the mother entitled to a $500.00 soldier's exemption on her property?

Section 6946 of the 1935 Code allows to veterans of our various wars tax exemptions on their property in amounts depending upon the war in which they served. The pertinent parts of subsections 4 and 5 of Section 6946 read:

"4. * * * 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.

"5. The property, to the same extent, of the widow remaining unmarried and of the minor child or children of any such deceased soldier, sailor, or marine."

It is to be observed that the language of the portion of subsection 4 of Section 6946 set out herein is in the present tense. The language used requires a present dependency of the widowed mother upon her son for support. Had the Legislature intended the exemption to apply after the death of the veteran, it would have used the word "was" instead of "is." Moreover in subdivision 5 the Legislature has provided that in the event of the death of the veteran his unmarried widow or minor children would be entitled to the exemption. The mother of the deceased soldier is not included in the class therein mentioned. This omission could only have been by intention.

In the instant case irrespective of a liberal or strict construction, the plain language of the statute can leave no doubt in the mind of a person reading the same.

It is therefore the opinion of this department that the widowed mother of a deceased soldier would not be entitled to a soldier's exemption on her property.

TAXATION: HOMESTEAD TAX EXEMPTION: "A" owns two small business buildings on the same lot, occupying one partly as his home. He would be entitled to a homestead tax credit on the building occupied as his home. He would not, however, be entitled to any tax credit on the other building which is rented.

October 7, 1937. *Mr. Melvin L. Baker, County Attorney, Humboldt, Iowa:* This department is in receipt of your request for an opinion upon the following set of facts:

"A" owns a lot in the Town of Humboldt and on his lot are located two small business buildings, one of which "A" occupies and uses partly for business and partly as a residence. He rents the other building to "B." The building in which "A" resides is assessed at $1,700.00 and the building rented to "B" is assessed at $700.00. Should the valuation of both buildings be considered under the Homestead Tax Exemption Act for the credit to be given thereunder?

Section 19 of the Homestead Tax Exemption Act defines the term "homestead" and sets forth what it shall embrace. Under the definition and terms thereof a homestead must embrace the dwelling house in which the owner claiming the credit actually lives. Said homestead cannot consist of more than one dwelling house. The term "dwelling house" is defined to embrace any building occupied wholly or in part by the claimant as a home.

In the instant case "A," because he occupies one building partly as a home, is entitled to claim a homestead credit on the building so occupied. However, the building rented to "B" is not "A's" homestead, for he does not occupy the same as a home.

It is therefore the opinion of this department that "A" would be entitled to a homestead tax credit on the building in which he resides, but that he would not be entitled to a credit on the building leased to "B."

TAXATION: MOTOR VEHICLE FUEL TAX: The 90-day period during which the application for refund might be filed begins to run, not from the date that the distributor purchased the motor vehicle fuel, but from the date the distributor sold said motor vehicle fuel to the purchaser irrespective of who the purchaser is.

October 7, 1937. *Mr. Leo J. Wegman, Treasurer of State:* This department is in receipt of your request for an opinion upon the following set of facts:

A cleaning establishment purchased motor vehicle fuel for cleaning and dyeing purposes on May 29, 1937 and a claim for a refund was filed with the treasurer on September 3, 1937. The gasoline was shipped from Texas on May 29th and arrived at the cleaning establishment on June 10, 1937. Should the date the gasoline was purchased or the date it was received by the cleaners be used as the beginning of the period of computation for filing of claim?

The Motor Vehicle Fuel Tax Act provides for a license fee of three cents per gallon on the sale or use of all motor vehicle fuel sold or used in this state with certain exceptions set forth in Section 5093-f3. This license fee of three cents per gallon is paid to the State by the distributor who first receives the motor vehicle fuel in this State. Subdivision (a) of Section

5093-f2 defines a distributor as any person who receives from outside the State or who produces, refines, manufactures, compounds, or blends within the State any motor vehicle fuel to be used within the State or sold or otherwise disposed of within the State for use in the State.

The Act provides for the licensing of distributors and requires that they keep true and accurate records of all motor vehicle fuel received and sold by them. On or before the 20th day of each calendar month the distributor must file a report with the State Treasurer's office showing the total number of gallons of motor vehicle fuel received or produced. At the same time the distributor is to remit to the Treasurer the amount of the license fee on motor vehicle fuel received during the preceding calendar month. The Act provides that the distributor shall pass on this tax paid by himself by collecting the tax from any person to whom the motor vehicle fuel is sold. Section 5093-f29 provides a method whereby a purchaser of motor vehicle fuel may obtain a refund of the tax paid by himself providing that said purchaser can qualify under the provisions of the section and complies with the same. Said Section 5093-f29 reads as follows:

"*Refund.* Any person who shall use any motor vehicle fuel for the purpose of operating or propelling stationary gas engines, farm tractors, air crafts or boats or for cleaning or dyeing purposes or for any other purpose except in motor vehicles operated or intended to be operated upon the public highways of the state and who shall have paid the license fees for such motor vehicle fuel imposed by this chapter, either directly to the treasurer or indirectly by having the same added to the price of such fuel, and who shall have obtained a permit therefor as provided in this chapter, shall be reimbursed and repaid the amount of such license fees so paid, upon presenting to the treasurer a claim for refund, which claim shall be in a form prescribed by the treasurer and shall be verified by the oath of the claimant and shall have attached thereto the original invoice or invoices showing the purchase of the motor vehicle fuel on which a refund is claimed, and shall state the name of the person from whom the motor vehicle fuel was purchased, the date of purchase, the total amount of such motor vehicle fuel, that the purchase price thereof has been paid and that said price included the motor vehicle fuel license fee payable to the state under the provisions of this chapter, that such fuel was used by the claimant otherwise than in motor vehicles operated or intended to be operated upon the public highways of this state, the manner in which said motor vehicle fuel was used and the equipment in which used. Said claim shall also show whether or not the claimant used fuel for motor vehicle operated upon the public highway from the same tanks or other receptacles from which the motor vehicle fuel on which a refund is claimed was kept or withdrawn.

No refund shall be made on claims for motor vehicle fuel purchased more than ninety days prior to the filing of the claim for refund.

The treasurer shall have the right in order to establish the validity of any claim for refund of motor vehicle fuel license fees, to require the claimant to furnish such additional proof of the validity of the claim as the treasurer may determine and by himself or through his representatives, employees or agents to examine the books and records of the claimant for such purposes and the failure of the claimant to furnish such books and/or records for examination, shall constitute a waiver of all rights to the refund on account of the transaction questioned.

When motor vehicle fuel is sold to a person who shall claim to be entitled to a refund of the motor vehicle fuel license fees herein imposed, the seller of such motor vehicle fuel, shall make out separate invoices for each purchase on forms which shall be approved by the treasurer showing the name and address of the seller and the name and address of the purchaser, the number of gallons of motor vehicle fuel so sold, written in words and figures, and the nature and kind of fuel so sold, and the date of purchase, and shall state that

the purchase price includes the motor vehicle fuel license fee payable to the state; such invoice shall be legibly written and shall not be the basis of a refund, if any corrections or erasures appear upon the face thereof."

From the Act, it is apparent that the Legislature intended that the distributor pass the tax to the purchaser. In the instant case the cleaner occupies a dual position. First he is the distributor and second he is the purchaser. As the distributor he is required to pay the tax on motor vehicle fuel received the previous month on or before the 20th day of the next calendar month. As a distributor he might purchase any quantity of motor vehicle fuel he desired and might not dispose of the same to a purchaser for a period of many months. Upon selling the motor vehicle fuel to a purchaser he would issue an original invoice to the purchaser and the purchaser, upon complying with the above cited Section 5093-f29, could collect a refund for the tax paid to the distributor providing he filed his claim therefor within ninety days of the time he purchased said gasoline from the distributor, and this irrespective of the date that the distributor originally purchased said gasoline. There is nothing in the Act which forbids a distributor from purchasing from himself. In the instant case the cleaner, as a distributor, could sell to himself as purchaser from his stock any quantity of motor vehicle fuel he desired to purchase. Upon selling the same to himself he would issue an original invoice. After said motor vehicle fuel had been consumed by the cleaner in his capacity as purchaser, and upon filing the affidavit, invoice, and complying with the requirements of Section 5093-f29, he would be entitled to a refund upon the motor vehicle fuel so purchased from himself. The period during which a claim for the refund could be filed would begin to run from the date he purchased the fuel from himself, and the claim would have to be filed within ninety days from that date.

It is therefore the opinion of this department that the ninety day period during which the application for refund might be filed begins to run, not from the date that the distributor purchased the motor vehicle fuel, but from the date the distributor sold said motor vehicle fuel to the purchaser irrespective of who the purchaser is.

TAXATION: TAX SALE CERTIFICATE: REAL ESTATE: The property included in the tax sale certificate consisted of two lots which were not contiguous or in the same block. The treasurer had no right under the statute to list the two lots as one, lump the tax thereon and list the tax as one item. Under Section 7193 the delinquent tax was never properly brought forward and placed opposite each parcel of real estate, and therefore was invalid. The issuance of one tax certificate treating both properties as one item was contrary to the statute. The owner of the real estate would have the right to pay his taxes on either lot as though no sale had been made.

October 8, 1937. *Mr. Harry E. Coffie, County Attorney, Estherville, Iowa:* This department is in receipt of your request for an opinion upon the following set of facts:

On the 2nd day of December, 1935 a tax sale certificate was issued to "B." The property included in this tax sale certificate consisted of two lots which were not contiguous or in the same block, but both lots belong to "A." The lots were valued and assessed separately on the assessor's roll, but on the tax list the two lots were taxed as a unit, the separate tax against each lot not being shown. The lots were advertised as a unit and sold together for one lump sum. One tax certificate was issued, the separate tax on each lot not being shown on the certificate. "A" now desires to redeem just one of the two lots from the sale. Does he have this right?

Under the statutes of the State of Iowa the assessor is required to assess all property subject to taxation for its actual value and enter the actual value on the assessment roll opposite each item. The county auditor must then transcribe the assessments into the tax list and deliver the same to the county treasurer.

Section 7193 requires the treasurer, each year upon receiving the tax list, to enter upon the list opposite each parcel of real estate on which the tax remains unpaid for any previous year the amount of such unpaid tax. Unless the delinquent real estate tax is so brought forward and entered, it ceases to be a lien upon the real estate upon which the same was levied and upon any other real estate of the owner. Any sale for the whole or any part of such delinquent tax not so entered is invalid.

Annually on the first Monday in December the Treasurer is required to offer at public sale the real estate on which taxes for the preceding year or years are delinquent. The Treasurer is to publish a notice of such sale, which notice must contain a description of each separate tract of land to be sold and the amount of the taxes for which it is liable. On the day of the sale the treasurer must offer for sale separately each tract or parcel of real estate advertised for sale on which the taxes have not been paid. The Treasurer must prepare, sign and deliver to the purchaser of any real estate sold for nonpayment of taxes a certificate of purchase describing the real estate sold giving the part of each tract or lot sold and the amount of each kind of tax for each tract or lot. Not more than one such parcel or description can be entered upon each certificate of purchase.

The first question that we must determine is the meaning of the word "parcel" as used in the various tax statutes and particularly Section 7193. In *Griffin vs. Denison Land Co.*, 119 N. W. 1042, a North Dakota case, we find the following definition:

"The terms 'tract or lot,' and 'piece or parcel of real property,' or 'piece or parcel of land,' mean any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person or company. * * *, 'contiguous tracts of land' must be tracts or bodies of land which have one side, or at least part of one side, in common."

In *Dundy vs. Board of Commissioners of Richardson County*, 8 Nebraska 508 it was held that tracts of land not contiguous should be assessed separately and a failure to do so would render a tax deed based thereon invalid. In *State Finance Co. vs. Beck*, 109 N. W. 357, the North Dakota Supreme Court held that where two tracts of land are assessed and taxed as a single tract, the entire tax proceeding is a nullity.

Our Iowa Supreme Court has not passed directly on the meaning of "parcel of real estate," but from the foregoing definitions and the authorities, it is apparent that a parcel of real estate cannot include two lots which are not contiguous and are in fact located in different blocks.

In the instant case the treasurer had no right under the statute to list these two lots as one, lump the tax thereon and list the tax as one item.

Under Section 7193 above referred to, the delinquent tax was never properly brought forward and placed opposite each parcel of real estate. Therefore, under the terms of that section, the sale for such delinquent tax was invalid. The advertising, the sale, and the issuance of one tax certificate treating both properties and the tax thereon as a single item was contrary to the provisions of the statute above discussed.

It is therefore the opinion of this department that the purported tax sale and the certificate issued thereon were invalid. "A" would have the right to pay his taxes on either lot at the treasurer's office as though no sale had been made.

TAXATION: USE TAX: SALES TAX: CITIES AND TOWNS: MOTOR VEHICLE FUEL TAX: Cities and towns must pay sales tax and/or use tax on goods purchased by the municipality unless the goods come within the exceptions specified in the respective acts. Cities and towns are not exempt from the payment of the motor vehicle fuel tax by reason of their being municipal corporations or by reason of the said motor vehicle fuel being used for municipal purposes.

October 8, 1937. *League of Iowa Municipalities, Marshalltown, Iowa:* This department is in receipt of your request for an opinion upon the following questions:

1. Must cities and towns pay sales tax on goods purchased by the cities and towns?
2. Can the State collect a use tax from cities and towns on purchases by the municipalities?
3. Must cities and towns pay tax on gasoline purchased by the cities for municipal purposes?

Section 2 of Chapter 196 of the Acts of the 47th General Assembly reads as follows:

"There is hereby imposed, beginning the first day of April, 1937, a tax of two per cent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this act, sold at retail in the state to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing gas, electricity, water and communication service to the public in its proprietary capacity, except as otherwise provided in this act, when sold at retail in the state to consumers or users; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this act."

Section 6, Chapter 196 of the Acts of the 47th General Assembly reads as follows:

"Retailers shall, as far as practicable, add the tax imposed under this act, or the average equivalent thereof, to the sales price or charge and when added such tax shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts."

Subdivision (a), Section 1 of Chapter 196 defines "persons" as follows:

"'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number."

Section 2 of Chapter 198, being the Use Tax Act reads as follows:

"An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this act for use in this state at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the board as hereinafter provided."

Subdivision 8, Section 1, Chapter 198 reads as follows:

"'Person,' 'board,' and 'taxpayer' shall have the same meaning as defined in Section 1 of Senate File 316, Acts of the 47th General Assembly."

In view of the foregoing general provisions of the statute, we can see no difficulty with the first two questions presented. The only reasonable conclusion is that cities and towns must pay sale tax and/or use tax, as the case may be, on goods purchased by the municipality unless the goods come within the exceptions specified in the respective acts.

3. Must cities and towns pay tax on gasoline purchased by the cities for municipal purposes?

Section 5093-f3 of the 1935 Code reads as follows:

"A license fee of three cents per gallon or a fraction of a gallon is hereby imposed on the sales or use of all motor vehicle fuel sold or used in this state for any purpose whatsoever, except that no license fee shall be imposed on motor vehicle fuel sold and exported from the state, or on motor vehicle fuel sold to the United States or any of its instrumentalities or agencies, unless now or hereafter permitted by the constitution and laws of the United States."

The Supreme Court of Iowa in the case of *State vs. City of Des Moines*, 266 N. W. 43 has passed upon this question. In that case the City of Des Moines refused to pay motor vehicle fuel tax and obtain a distributor's license, contending that municipalities were not included within the purview of the Act and not subject to its provisions. The Supreme Court said:

"* * * it is 'clear from the nature of the mischiefs to be redressed,' and 'the language used,' that municipalities were intended to be included within this statute. What is the language used? '*All* motor vehicle fuel.' This means every gallon or fraction of a gallon, and the law exempts no one except the United States government and its instrumentalities, and this exception is only a conditional one. The maxim 'expressio unius est exclusio alterius' is applicable; that is, the specific, express inclusion of one of a class of users of motor vehicle fuel within the exception from the tax lends weight to the conclusion that the Legislature intended to include within the exception none other, but intended to exclude from the exception all others. The fact that the Legislature intended to include municipalities is emphasized further in Section 7, relating to the applicants for distributor's license, wherein it is stated that each applicant for distributor's license, except agencies of the state and municipal corporations in the state or other governmental subdivisions of the state, shall 'file with the Treasurer of State a bond,' etc."

From the statute as herein set out, and the ruling of the Supreme Court of Iowa, it is apparent that cities and towns, as such, are not exempted from the payment of the motor vehicle fuel tax by reason of their being municipal corporations, or by reason of the said motor vehicle fuel being used for municipal purposes.

It is therefore the opinion of this department that each of the foregoing questions must be answered in the affirmative.

TAXATION: USE TAX ACT was enacted as a complement to the Sales Tax Act. Under the strict construction of exemption and the language and intent of the Legislature, as manifested by the sales and use tax act, counties are subject to the provisions of the Use Tax Act. (Senate File 317, Chapter 198, 47th General Assembly.)

October 9, 1937. *Mr. Roscoe S. Jones, County Attorney, Atlantic, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Is the county subject to the provisions and terms of the Use Tax Act known as Senate File 317?

Section 2 of Chapter 198 of the Acts of the 47th General Assembly reads as follows:

"An excise tax is hereby imposed on the use in this state of tangible personal

property purchased on or after the effective date of this act for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the board as hereinafter provided."

Subdivision 8 of Section 1, Chapter 198 reads:

"'Person,' 'board,' and 'taxpayer' shall have the same meaning as defined in Section 1 of Senate File 316, Acts of the Forty-seventh General Assembly."

Subdivision (a), Section 1 of Senate File 316 reads:

"'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number."

The question therefore is, does a county come within a definition of "person" as defined by subdivision (a), Section 1 of Senate File 316.

The definition of "person" in the motor vehicle fuel act is not as broad or inclusive as the definition of "person" in the sales tax act. "Person" is defined in the motor vehicle fuel act as any individual, firm, partnership, joint stock company, association, trust, estate, joint adventure and/or corporation.

Yet in the case of *State vs. Woodbury County*, 269 N. W. 449, Woodbury County refused to pay motor vehicle fuel license fee on gasoline purchased by the County from outside of the State and billed and charged to the county. The gasoline was purchased solely for and actually used in county trucks and power maintainers in construction and maintenance work. The Supreme Court said:

"* * * The almost universal holding has been that, unless the county or city is specifically excluded from the operation of the law, the fact that it may use the gasoline as did this county, although it may have been used for governmental purposes, does not excuse it from paying the tax. (Citing numerous cases by states against counties in other jurisdictions.)"

In *State vs. City of Des Moines*, 266 N. W. 41, the Supreme Court in a case involving the contention that the city was not a person within the definition set forth in the gasoline tax act said:

"Surely in a sense, all corporations are persons, that is, artificial persons, and all municipalities are bodies corporate, and in a proper case the word 'person' has been held to not only include municipalities but every and any political subdivision, * * *."

In *Hale vs. Iowa State Board of Assessment*, 271 N. W. 166 the Supreme Court of Iowa held that taxation is the rule and exemption the exception, and, therefore strict construction of the statute under which the exemption is claimed is the rule. Grants of immunity from taxation in derogation of the sovereign power of the State are strictly construed. The authorities make it clear that the statutory exemption must be given a strict and somewhat narrow construction as distinguished from a liberal and broad construction.

The Use Tax Act was enacted by the Legislature as a complement to the sales tax act. Its purpose was to impose a tax on goods purchased outside of the State for use in the State equal to the sales tax that the buyer would have paid had he purchased said goods in the State of Iowa. The Act, therefore, provides that "person" shall have the same meaning as contained in the sales tax act.

Section 3 of the Sales Tax Act specifically exempts from the provisions of the Act and from the computation of the amount of tax imposed by it certain items. Said exception does not provide exemption to counties for goods pur-

chased by the county. The sales tax act does, however, contain machinery for a refund of the sales tax paid by a relief agency. Relief agency is defined in the Act as any state, county, city or any other agency engaged in actual relief work. Thus it is apparent that it was the intention of the Legislature that counties should pay sales tax as they were not included within the exceptions contained in the sales tax act and were specifically mentioned as being entitled to a refund for sales tax paid in connection with that portion of their activities involving actual relief work.

It is therefore the opinion of this department, that in view of the decisions of our court, the rule of strict construction of exemptions and the language and intent of the Legislature, as manifested by the sales and use tax act, counties are subject to the provisions of the Use Tax Act.

TAXATION: SHERIFF: DISTRESS WARRANTS: FEES: Fees received for serving distress warrants for collection of delinquent income or sales tax belong to the county and would not be a personal fee to the sheriff. The Board of Assessment and Review has no power to compromise the state's claim on taxes levied as provided in Section 288 of the 1935 Code.

October 14, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following set of facts:

1. In cases where either income or sales tax are delinquent and the ordinary methods of collection fail, the Board of Assessment and Review issue distress warrants. In tracing the disposition of distress warrants, we found that some county sheriffs have collected and retained, or billed the Board of Assessment and Review for their cost plus 5 per cent of the amount of the claim. Other county sheriffs have not received the 5 per cent. Is the county sheriff's office entitled to 5 per cent on these distress warrants?

In an opinion dated April 9, 1937 addressed to J. R. Ewing, this department ruling on the identical question held that sheriffs executing such distress warrants would be entitled to receive as fees 5 per cent of the amount collected as provided for in Section 7223 and an additional 5 per cent as provided for in Section 10637 of the Code, or a total of 10 per cent of the money received.

2. Would the fee so collected go to the county, or as a personal fee to the sheriff?

Section 5191 of the 1935 Code sets out the various fees and amounts that the sheriff shall charge and collect.

Section 5245 of the 1935 Code reads as follows:

"*Fees belong to county.* Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks shall belong to the county."

Section 5192 of the 1935 Code sets out the fees which may be retained by the sheriff. It provides that 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 the sheriff in addition to his salary. In accordance with the familiar rule of statutory construction—expressio unius est exclusio alterius—the mention of one thing implies the exclusion of another thing, it is apparent that the fee thus received would belong to the county and not go as a personal fee to the sheriff.

3. After a distress warrant is placed in the hands of a sheriff and property of the debtor is levied upon, does the Board of Assessment and Review have authority to compromise the State's claim by accepting a portion of the amount due in full settlement of the State's claim?

Section 6943-f21 of the 1935 Code deals with the computation of income tax, interest and penalties and authorizes the Board upon making a record of its reasons therefor to waive or reduce penalties and/or interest. Section 6943-c27 of the 1935 Code and Chapter 188 of the Acts of the 47th General Assembly, Sections 6943-f54, through f57, 7119, 7140 through 7142 set out the powers and duties of the Board. None of the powers therein contained give to the Board of Assessment and Review the power or right to compromise claims other than to the extent above indicated.

Had the Legislature intended that the Board should have such powers, specific provision would have been made for the same. Moreover, Section 288 of the 1935 Code which reads as follows:

> "*Compromise of claims.* The executive council, on a written report to it by the attorney general together with his opinion as to the legal effect of the facts, may determine by resolution to be duly entered in its official records, the terms on which claims of doubtful equity or collectibility, and in favor of the state, may be compromised and settled with all or any of the parties thereto. Such terms may be withdrawn prior to acceptance, or in case the debtor fails to comply therewith within a reasonable time. The attorney general shall have full authority to execute all papers necessary to effect any such settlement."

provides the machinery for compromising claims of doubtful collectibility in favor of the State.

It is therefore the opinion of this department that the State Board of Assessment and Review has no authority to compromise income or sales tax claims other than to the extent heretofore indicated.

STATE INSTITUTIONS: DEPENDENT AND NEGLECTED CHILDREN: ADOPTION: It is the opinion of this department that all rights of the parent or parents to custody or control of children cease with their legal commitment to named state institutions, and only consent of Board of Control required for their adoption.

October 14, 1937. *Board of Control of State Institutions:* This department acknowledges receipt of your request for an opinion on a question stated by you as follows:

> If a child is committed to the state for care as a "Dependent and Neglected" child or as a "Dependent" child, does the board of control have the right to give consent to the foster parents for the adoption of said child without first obtaining the signed release of one or both parents?

You state that the board has encountered difficulty with parents after children have been placed in foster homes demanding the child be returned to them.

Children legally committed to the state juvenile home or the soldiers' orphans' home by a juvenile court, pursuant to the provisions of Chapter 180, Code of Iowa, 1935, entitled "Care of Neglected, Dependent, and Delinquent Children," are wards of the State of Iowa. Sections 3698 and 3712, Code of Iowa, 1935.

We assume the children to whom you refer are those committed under Chapter 180, supra, and as provided in Section 3646 thereof.

Both of the named institutions are under the control and supervision of the Board of Control of State Institutions. Chapter 167, Code of Iowa, 1935.

The legislature has provided at Sections 3702 and 3716, Code of Iowa, 1935, two methods by which neglected and dependent children who have been legally committed to either of said institutions may be taken therefrom. One is by the execution of proper articles of adoption. The other is by what is called a "placement" contract.

In *Stephens vs. Treat*, 202 Iowa 1077, the supreme court of Iowa had before it a question which arises incident to the one presented, and the answer to which is determinative of the question here presented. In that case the court was confronted with the proposition as to whether or not the parent or parents longer had any right to the custody or control of his, her or their child after a due commitment of such child to a state institution on a legal adjudication that the child was neglected and dependent, and the court in holding that such parent was permanently deprived of all right to the custody or control of the child so committed, expressed itself in the following language taken from page 1082, et seq., of 202 Iowa.

"* * *. It is a matter of common knowledge that to permit a conflict of authority or of claims upon affection between the natural parents and the foster parents often breeds unhappiness and discontent, and greatly militates against the proper care, training, and development of a child of tender years. It is no doubt because of the knowledge of such conditions that the legislature, by express enactment, provided that a child which has legally become a ward of the state and has been placed in a home by adoption or contract should not be interfered with thereafter in any manner by the natural parent of such child. The state, by virtue of the statutes, steps in as parens patriae. It is to be noticed that the child becomes a ward of the state only after proper judicial proceedings, with notice and hearing and an adjudication that the child is in fact neglected, dependent, or delinquent. When such adjudication has been had, the child forthwith becomes a ward of the state. *The right of the parents to its custody and control, by virtue of their parenthood, is, by such decree, foreclosed and cut off. The state thenceforth assumes responsibility for the child as its ward.* The policy of the state, as evidenced by the statute, is clear and apparent. It is not only the right of the state to assume guardianship of its neglected, dependent, and delinquent children, but it is made the duty of the state so to do. Vested with this large responsibility in the care of neglected, dependent, and delinquent children within the commonwealth, the state authorities are clothed by statute with the corresponding power and duty to adequately care for such children. * * *

"In strict pursuance of the statutes, appellee was, after proper notice, adjudged to be a neglected and dependent child. *It thereupon became a ward of the state, and the right of the relator to the custody of such child because of her relationship as parent to said child ceased as effectively as though she had, by the execution of legal papers of adoption, transferred the right of the custody of said child to another party. The state then, by virtue of the legislative enactment, was clothed with the power to legally give said child to a third party; and this it could do as effectively as could its parents.*"

The court was definitely of the opinion, as is manifest by the foregoing quotation, that the legislature had in its wisdom seen fit to declare by legislative enactment that the parents of a child legally adjudged to be neglected and dependent, and committed to a state institution, should not thereafter interfere with the child in any manner.

Having thus far established the respective rights of the parent or parents and the state of Iowa, we may now turn to the pertinent provisions of Chapter 473, Code of Iowa, 1935, dealing with the subject matter of "Adoption." Of that chapter Section 10501-b3 provides as follows:

"*Consent, when necessary.* No person may assign, relinquish or otherwise transfer to another his rights or duties with respect to the permanent care or custody of a child under fourteen years of age except in accordance with this chapter. The consent of both parents shall be given to such adoption unless one is dead, or is considered hopelessly insane, or is imprisoned for a felony. or is an inmate or keeper of a house of ill fame, or unless the parents are not married to each other, or unless the parent or parents have signed a release of the child in accordance with the statute on child placing, *or unless one or*

both of the parents have been deprived of the custody of the child by judicial procedure because of unfitness to be its guardian. If not married to each other, the parent having the care and providing for the wants of the child may give consent. If the child is not in the custody of either parent, but is in the care of a duly appointed guardian, then the consent of such guardian shall be necessary. *Where the child is a ward of the state in a state institution the consent of the board of control of state institutions shall be first obtained before said adoption shall be effective.* If the child has been given by written lease to a licensed child welfare agency in accordance with the statute on child placing, the consent of the agency to whom the release was made shall be necessary. When the child adopted is fourteen years of age or over, his consent shall also be necessary."

The italicized portion of the cited section clearly and concisely establishes the instances when and by whom consent to adoption shall be given, namely, where the parents have been deprived of the custody of the child by judicial procedure and the child has become a ward of the state, then the board of control of state institutions in behalf of the guardian state of Iowa shall first give consent before the adoption of such state ward shall be effective.

It is accordingly the opinion of this department that all rights of the parent or parents to the custody or control of children here under consideration cease with their legal commitment to the state institutions named, and that the only consent required to the adoption of such children is the consent of the board of control of state institutions. Section 10501-b3, supra, does require, however, that in event the child is fourteen years of age or over such child's consent shall also be necessary.

TAXATION: BOARD OF ASSESSMENT AND REVIEW: DES MOINES—ASSESSMENT: Board of review of Des Moines shall reconvene as ordered by state board. Notice of reconvening shall be given to taxpayers, and they shall be allowed same length of time in which to file protests as they had when board first convened. Also taxpayers shall be allowed usual right of appeal to district court.

October 14, 1937. *Board of Assessment and Review:* On September 9th this department rendered your board an opinion with reference to your powers in connection with property assessments in the city of Des Moines. We quote from that opinion:

"Consequently, in answer to your first question, it is our opinion that you *do* have the right to require the local board of review of Des Moines to reconvene, and that you do have the right to order it, when reconvened, to equalize the valuations of properties in the city of Des Moines to the end that all property in the city be assessed at the same per cent of its value.

"In answering the foregoing question, however, we presume that you will conduct a hearing for the purpose of determining the particular situation in Des Moines, and it is our opinion that after such a hearing, and after you have determined the facts, you have the right to make such an order. This must certainly be what the statute meant when it gave you supervisory power over the assessment and further gave you the right to order the local board of review to make assessments just and uniform."

Consequently, we have previously determined that the Iowa state board of assessment and review has the right to order the local board of review in the city of Des Moines (which is the city council) to reconvene and after it reconvenes, to make the assessments of property in the city of Des Moines just and uniform. This is still our opinion, and we refer you to our previous opinion rendered as of September 9th rather than to set out the opinion in full herein.

In our previous opinion we suggested to you the advisability of conducting a hearing with reference to the particular situation in Des Moines. It is our understanding that in accordance with that suggestion, and probably in accordance with the general supervisory power which you are given under the statutes, you did conduct a hearing and we have been furnished with a mimeographed copy of an order made by your board on September 18, 1937, from which we quote:

"THAT all property in the city of Des Moines, Iowa, has not been valued and assessed in the manner and according to the real intent of the law; that all said assessments have not been made relatively just and uniform in substantial compliance with the law, and that the levy of taxes based thereon will accordingly fail to be relatively just and uniform substantially as required by law, and that there has been a division of the property of the city of Des Moines iuto various classes, resulting in discrimination."

We are making no attempt in this opinion to in any way ourselves pass upon the particular situation in Des Moines, but if after a hearing you determined that assessments in Des Moines were not just and uniform, we feel you were entirely within your rights in ordering the local board of review to reconvene for the purpose of making the assessments just and uniform. At this point we again quote from your order:

"NOW, THEREFORE, THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW DOES HEREBY REQUIRE, ORDER AND DIRECT that the local board of review of the city of Des Moines, Polk County, Iowa, composed of the members of the city council of said city as follows: J. H. Allen, Roy C. Welch, Henry L. HasBrouck, John MacVicar, and E. Lee Keyser, shall forthwith reconvene and carry out and perform the following orders and directions, to-wit:

"THE said local board of review will cause the present assessed valuation of real estate located in the respective sectional divisions of the city's eleven assessment districts, as described in the resolution of the council of the said city of Des Moines on July 22, 1937, roll call No. 2158, to be modified in the percentages herein indicated.

"Assessment District No. 1 (entire District) increase..............15.39%, etc. * * *"

In other words, you provided in your order that the assessed valuations in the city of Des Moines located in certain sectional divisions should be modified in accordance with the percentages set out in the order.

It is our opinion that while you have the right to order the local board of review to reconvene and to make assessments in the city of Des Moines just and uniform, that nevertheless the local board of review is the body to determine what the valuation shall be. You have found in this order that the present assessed valuations are not just and uniform and have ordered the local board of review to make them so. Consequently, when they reconvene as the local board of review, we certainly believe that it will be their duty to make the assessments just and uniform, but that the determination of the new valuations must be left entirely to them. Therefore, we construe that part of your order which directs and orders them to modify the valuations in the percentages indicated in your order as a directory provision only. Due to the fact that the percentages which you suggest are probably based upon the percentages in use in various sections of the state, we presume that the local board of review in the city of Des Moines will take them into consideration in determining the new valuations.

As a further reason for this idea, we suggest that in the event the percentages of valuation taken for assessment purposes in the city of Des Moines are out

of line with those in use in other townships in Polk County, or in other counties in this state, that then and in that event, the county board of equalization would have the right to require that the assessments in the city of Des Moines be made uniform with those in other townships in Polk County, and that your board would have the right to require that assessments in Polk County be made uniform in connection with the assessments made in the other counties of this state.

In view of the foregoing statements, we believe that the only question remaining to be decided is the question of the notice that must be given the individual taxpayers of any action by the local board of review. This question has also been raised by the local board of review (city council) in a resolution adopted by them, which was forwarded to us by Mr. Carl Burkman, county attorney of Polk County. The resolution sets forth eight questions which the city council would like to have answered. It does not seem necessary to set forth the questions asked in the resolution because they all seem to be directed to the question of notice.

We are of the opinion that notice *must* be given and that the individual taxpayer must be given the right to appear before the local board of review after it reconvenes and to at that time object to the assessed valuation of his property, and that in turn there must be preserved for him his right to appeal to the district court in the event that he feels he is aggrieved by the action of the local board of review, whatever that action may be. In other words, we feel that the individual taxpayer must be placed in the same position he occupied when the local board of review went into session on the first Monday of May in accordance with the provisions of Section 7129 of the 1935 Code. Under that section the local board of review was required to go into session on the first Monday of May which this year fell on May 3d, and to complete their duties not later than the first day of June. In other words, the taxpayer had a period of twenty-eight days in 1937 in which to appear before the local board of review for the purpose of making any objection he might have to his particular assessment.

When the local board of review reconvenes in accordance with your order, it is our opinion that the individual taxpayers in the city of Des Moines should be advised of the date upon which they will reconvene and of the period of time during which they will be in session.

Consequently, it is our opinion that your order of September 18th should be amended to suggest to the local board of review that notice be given to the taxpayers of the date upon which they will reconvene, and we respectfully suggest that it might be provided that this notice of the time at which they will reconvene be published in some newspaper of general circulation in the city of Des Moines before the date set for their meeting. We further suggest that the local board of review stay in session for a period of at least twenty-eight days following the date upon which they reconvene in order that the taxpayers may be given the same opportunity and the same length of time to appear that they had when the board met in accordance with the provisions of Section 7129 of the 1935 Code, and during which period of time they may proceed in accordance with the provisions of Section 7132 of the Code, to make oral or written complaint to the board of review, setting forth a statement of the errors complained of with such facts as may lead to their correction.

We also call your attention to the provisions of Section 7133 of the 1935 Code, which provide that appeals may be taken from the action of the board within twenty days after its adjournment by giving the chairman of the local board of review a written notice to that effect.

We further suggest, therefore, that after the period during which the board of review shall have been in session, that the individual taxpayer should then have the right, within twenty days after the adjournment of the local board of review, to take an appeal to the district court as provided for in Section 7129 of the 1935 Code. We also suggest that all of the foregoing information should be incorporated in the notice.

In view of the foregoing statement, we feel there can be no further question about your rights in this matter, and the rights and duties of the local board of review, and the taxpayers in the city of Des Moines, and that this opinion answers the questions raised by the city council of the city of Des Moines to whom we are forwarding a copy of this opinion. We respectfully suggest to your board that your order of September 18th be amended to conform with the suggestions of this opinion.

CONSERVATION COMMISSION: TRUCKS: FLARES: If the Conservation trucks are "designed primarily for carrying * * * freight of any kind," the same will be included in the statute requirement for carrying flares.

October 14, 1937. *Mr. M. L. Hutton, Director, State Conservation Commission:* We acknowledge receipt of your request for the opinion of this department upon facts which may be summarized as follows:

Section 471 of the Iowa motor vehicle law requires that motor trucks operating on the highways of the state outside business or residence districts are required to carry a sufficient number of flares or electric lanterns, and not less than three.

The state conservation commission operates a number of one-half ton pick-up trucks which, in the motor vehicle listings, are classified as passenger cars.

Are these trucks required to carry flares in the same manner as larger trucks?

The duty of operators of motor trucks to carry flares is imposed by Section 471, laws of the 47th General Assembly, which provides as follows:

"Section 471. *Trucks to carry flares.* No person shall operate any motor truck upon a highway outside of a business or residence district at any time from a half hour after sunset to a half hour before sunrise unless there shall be carried in such vehicle a sufficient number of flares, not less than three, or electric lanterns or other signals capable of continuously producing three warning lights each visible from a distance of at least five hundred feet for a period of at least eight hours, except that a motor vehicle transporting flammables may carry red reflectors in place of the other signals above mentioned.

"Every such flare, lantern, signal, or reflector shall be of a type approved by the commissioner and he shall publish lists of those devices which he has approved as adequate for the purposes of this section."

Therefore, if motor trucks are operated during the time of day specified in the statute, such flares, lanterns or other designated signals would need to be carried in such vehicle.

You state that your department operates a number of one-half ton pick-up trucks, which, in the motor vehicle listings, are classified as passenger cars.

It is to be noted that the provisions of Section 471, supra, which relates to the duty to carry flares, are applicable to *motor trucks*. Section (1) of Chapter 134 defines words and phrases as used in the chapter. The particular term "motor truck" is defined as follows therein:

"4. *Motor truck* means every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers."

This definition is controlling, and it appears that if the trucks in question are "designed primarily for carrying * * * freight of any kind * * *," that the same will be included in the requirement referred to above.

BUREAU OF LABOR: IOWA EMPLOYMENT SERVICE: UNEMPLOYMENT COMPENSATION COMMISSION: Supervision of private employment agencies rests in office of labor commissioner; no duty in this connection rests upon Iowa employment service. Iowa employment service under supervision of unemployment compensation commission.

October 14, 1937. *Mr. Edw. R. Herbert, Acting Director, Iowa State Employment Service:* We acknowledge receipt of your request for the opinion of this department upon a question arising out of the following facts:

"While the Iowa State Employment Service was a division of the State Bureau of Labor operating under Chapters 75 and 77, Code of Iowa, the chief clerk of the Iowa Employment Service was asked by the Labor Commissioner to perform certain duties in the investigation of private employment bureaus and agencies within the state as provided for under Section 1550, 1935 Code. He was required to call upon certain private employment agencies to examine records and papers of such agencies.

"It is desired that your office will construe the effect of the transfer of the State Employment Service, as provided in Senate File 447, acts of the 47th General Assembly with respect to the operation of Section 1550, supra."

Prior to the adoption of the unemployment compensation law by the 46th General Assembly extra session, and the 47th General Assembly, the state free employment bureau was a part of and under the jurisdiction of the bureau of labor. The labor commission was, by statute, authorized to appoint, with the approval of the executive council, a chief clerk to be designated as the officer placed in charge of such work. Under the law as it existed prior to the passage of the Iowa unemployment compensation law, such chief clerk was authorized to examine the records, books, and papers relating to the conduct of private employment agencies or bureaus, and was required to investigate any complaint made against such agencies or bureaus and to prosecute any discovered violation of the law. This authority and duty was conferred and imposed by the provisions of Section 1550, 1935 Code, which provides as follows:

"1550. *Investigation by labor commissioner.* The labor commissioner, his deputy or inspectors, and the chief clerk of the bureau shall have authority to examine at any time the records, books, and any papers relating in any way to the conduct of any employment agency or bureau within the state, and must investigate any complaint made against any such employment agency or bureau, and if any violations of law are found he shall at once file or cause to be filed, an information against any person, firm, or corporation guilty of such violation of law."

The unemployment compensation law, Chapter 4, laws of the 46th General Assembly extra session, Chapters 102, 103, laws of the 47th General Assembly, is a comprehensive measure which establishes the state administration of the Iowa unemployment compensation law and correlates the same with the federal social security act. Section 12-a of Chapter 102, laws of the 47th General Assembly, pertains to the state employment service, and provides in part as follows:

"Section 12(a). *State employment service.* The Iowa State Employment Service, as provided in Chapters 75 and 77 of the Code of Iowa, is hereby

transferred to the commission as a division thereof, which shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this Act and for the purpose of performing such duties as are within the purview of the Act of Congress entitled 'An Act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system, and for other purposes,' approved June 6, 1933 (48 Stat. 113; U. S. C., Title 29, Section 49, as amended). The said division shall be administered by a full-time salaried director, who shall be charged with the duty to cooperate with any official or agency of the United States having powers or duties under the provisions of the said Act of Congress, as amended, and to do and perform all things necessary to secure to this State the benefits of the said Act of Congress, as amended, in the promotion and maintenance of a system of public employment offices. The Iowa State Employment Service division is hereby designated and constituted the agency of this state for the purposes of said act. The commission is directed to appoint the director, other officers and employees of the Iowa State Employment Service. * * *"

By virtue of the above provisions, the Iowa state employment service was transferred from the bureau of labor to the unemployment compensation commission, and became a division of the latter body. The office of chief clerk of the state employment bureau is now non-existent. Under the new law, the state employment service functions as formerly with respect to the maintaining of free public employment offices but its duties are, and will in the future, be augmented by reason of additional responsibilities placed upon the service under the act of congress.

The labor commissioner, his deputy or inspectors, have authority, as before the passage of the above mentioned laws, to examine the records of private employment agencies or bureaus, along with the duty to prosecute violations of laws pertaining to such agencies.

No duty or authority to investigate or to in any way supervise private employment agencies is imposed or conferred upon the Iowa state employment service by virtue of the provisions of Chapter 102, acts of the 47th General Assembly, which transfer this agency to the unemployment compensation commission.

In view of the foregoing, we conclude that the supervision of private employment agencies contemplated by Section 1550, 1935 Code, now rests in the office of the labor commissioner, and that no duty in this connection rests upon the Iowa state employment service. This holding goes only to the legal duty or responsibility of the Iowa state employment service in this connection, and is not to be construed as discouraging the existing cooperation between your department and the office of the labor commissioner.

SCHOOLS: TRANSPORTATION: NON-CONSOLIDATED DISTRICT: Non-consolidated district may not provide free transportation for resident high school pupils. Transportation may be provided if district is compensated in full for the costs thereof.

October 15, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for a ruling of this department upon the following question:

May a non-consolidated district that maintains an approved high school provide resident pupils with transportation to such high school?

It is our understanding that the question is whether or not such transportation may be furnished at the expense of the district and not at the expense of the pupil or his parents.

Under date of September 13th, this department ruled that non-resident high school pupils might be transported to and from school by the district of their attendance, provided that such board collected in full for the transportation costs entailed. It was further held in the above opinion that the furnishing of such transportation was wholly within the discretion of the board.

The question of transportation of resident pupils within independent districts does not present a serious question for the reason that the distance to school ordinarily is not such as may require the furnishing of transportation to school. The same conclusion would be true with respect to rural districts, except possibly some few rural independent districts.

We understand that the instant question is prompted by the situation which exists in those districts which have established township high schools, provision for the establishment and discontinuance of such high schools being made in Section 4267, 1935 Code:

"4267. *Higher and graded schools.* The board may establish graded and high schools and determine what branches shall be taught therein, but the course of study shall be subject to the approval of the superintendent of public instruction. Whenever the board in a school township establishes a high school, such high school can be discontinued only by an affirmative vote of a majority of the votes cast for and against such proposition at an election which may be called by the county superintendent of schools upon a petition for such election being presented signed by twenty-five per cent of the electors in such township."

It appears that in certain school townships, the high school so established may be situated a considerable distance—ten or fifteen miles or more in some instances—from the residences of pupils of the district. Such high school is, of course, the only tuition free high school which resident pupils of the district may attend in the absence of consent by the board. Whether or not a non-consolidated district has authority to furnish free transportation to resident pupils must depend on whether or not such authority has been granted by statute. The statutes which confer upon school boards the authority or duty to transport children to school are as follows:

"4179. *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 duty imposed by the above section is confined, by the language of the statute, in its operation to consolidated school corporations. Thus this section is not applicable to the case of the township high school.

"4233-e4. *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 hereby placed more than two miles from the school designated for their attendance, the board shall arrange with any person outside the board for the transportation of such children to and from school and the cost of such transportation shall be paid from the general fund, but the board may provide transportation for a less distance."

The provisions of the above section are limited to "children enrolled in an elementary school," therefore the authority to transport to a township high school is not extended by virtue of this section.

It is provided by Section 4274-e1 that a school board may contract with

another board for the furnishing by the latter of elementary schooling to pupils of the former. It is also provided that such contract shall also include the furnishing of transportation to all children of school age from kindergarten to the eighth grade inclusive, living more than two miles from such school.

Transportation for pupils enrolled in the secondary grades is provided under the following restrictions:

"4274-e4. *Transportation generally.* The board may permit pupils enrolled in the secondary grades or any other pupils that are not entitled to free transportation to avail themselves of the transportation facilities provided their parents pay the pro rata cost of such transportation."

The only other section of the statute which refers to transportation is Section 4277, which provides that districts may furnish transportation to non-resident high school students, provided the district is fully reimbursed therefor. Thus a review of statutory provisions relating to the furnishing of transportation to school children reveals no authority for the transporting, at the district's expense, of children to and from secondary schools except in consolidated districts where such pupil is more than a mile from the school.

It is true that in many cases the territory comprising the township which maintains a township high school may be of greater area than that of a consolidated district. The need for transportation would appear to be as great in such district as in the consolidated district. Regardless of this situation, it must be borne in mind that the powers of school boards are limited to those expressly conferred by statute and to such incident powers as may be necessary to carry out powers expressly conferred. It does not appear that the legislature has seen fit to confer authority upon the boards of non-consolidated districts to provide and furnish transportation of resident pupils to high school.

In view of the foregoing, it is our opinion that the question submitted by you must be answered in the negative. It is our opinion, however, that such transportation may be provided by a district if it is compensated in full for the costs thereof.

TAXATION: BOARD OF SUPERVISORS: SUSPENDED TAXES: If the Board of Supervisors finds it advisable to suspend the current taxes of an owner of property redeeming under Chapter 191 the same does not constitute a breach of the agreement to pay the current taxes each year before they become delinquent.

October 15, 1937. *Mr. F. Ross Henry, County Auditor, Clarion, Iowa:* This department is in receipt of your request for an opinion upon the following question:

Can the current tax on property that is being redeemed from the county under Chapter 191 of the Acts of the 47th General Assembly be suspended without breaching the agreement?

Chapter 191 provides a method whereby an owner of property which has been bid in by the county under Section 7255-b1 can arrange to redeem the same from the tax certificate or tax deed held by the county by entering into a written agreement with the county auditor where said property is located to pay one-tenth of all delinquent taxes and costs upon the making of the agreement, the balance in nine equal annual installments and to pay the current taxes each year before they become delinquent.

Ordinarily taxes become delinquent as to the first half on the first day of

April after due and as to the second half on the first day of October after due as provided by Section 7211 of the 1935 Code, and each delinquent installment draws a penalty of three-fourths of one per cent per month as provided by Section 7214 of the 1935 Code.

However, under certain circumstances our Legislature has provided that the taxes against an owner's property may be suspended or even remitted.

The question arises as to whether or not taxes that are suspended are considered delinquent. Webster's Dictionary defines the word suspended as:

"To set aside or make temporarily inoperative; to cause to cease for a time; to stay; interrupted in motion."

Ballentine defines suspended as:

"Temporarily inactive or inoperative; held in abeyance."

If the suspension of the current tax on a property for any given year renders inoperative the statute making that particular tax delinquent if not paid by a certain date, it is apparent that there is no breach of the agreement to pay the current taxes each year before they become delinquent because the tax by virtue of the suspension does not become delinquent.

Moreover, Chapter 186 of the Acts of the 47th General Assembly requires the Board of Supervisors to suspend the taxes of persons receiving old age assistance upon being notified by the Division of Old Age Assistance of the fact that said person is receiving assistance. To hold that a suspension of taxes would breach the agreement would deprive this entire class of persons of their property without fault of their own.

There is nothing in the Act which forbids the owner, if he can qualify, from seeking the suspension of his current taxes.

It is therefore the opinion of this department that if the Board of Supervisors finds it advisable to suspend the current taxes of an owner of property redeeming under Chapter 191, the same does not constitute a breach of the agreement to pay the current taxes each year before they become delinquent.

SCHOOLS: BOARDING HOMES: CHILD WELFARE: LICENSES: Children's boarding home defined by Section 3661-a43, licensed by division of child welfare (formerly by board of control). Child has become a ward of state when he is committed (Chapter 180, 1935 Code). Licensing of children's boarding homes under division of child welfare.

October 15, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for the opinion of this department contained in a letter of which the following is a copy:

"Your attention is called to the fact that the 47th General Assembly enacted a statute which appears in the Acts of the 47th General Assembly as Chapter 123, amendatory to Chapter 215 of the Code, particularly Section 4283.

"In order that we may administer this law we shall ask you to answer the following questions in interpretation of certain provisions of this enactment:

"1. What constitutes a children's boarding home licensed by the state?

"2. Under what conditions may a child be construed as being a public charge of the state?

"3. What department of state government has charge of the licensing of boarding homes, and may such a license be secured by a private institution?"

Section (1) of Chapter 123, laws of the 47th General Assembly provides as follows:

"Section 1. Chapter two hundred fifteen (215), Code, 1935, is hereby amended by adding thereto the following:

"4283-h1. When any child of school age has become a public charge and is

being cared for in a children's boarding home licensed by the state, and the domicile of such child at the time it became a public charge was in another school district than the one wherein such boarding home is located, then, such child shall be entitled to attend public school in the school district in which such boarding home is located, or if such district does not maintain a school offering instruction in the grade in which such child is properly classified, then such child may attend upon such instruction in any approved public school in the state that will receive him. The tuition of such a child, at the rates established by law, shall be paid by the treasurer of state from any funds in the state treasury not otherwise appropriated, and upon warrants drawn by the state comptroller upon the requisition of the superintendent of public instruction. If such child was in the district at the time the regular biennial school census was taken, the semi-annual apportionments shall be deducted from the tuitions due the district under the provisions of this act. The superintendent of public instruction is hereby empowered to require such reports as are necessary properly to carry out the provisions of this act."

It is to be observed that certain duties are placed upon the superintendent of public instruction with respect to requiring reports that will enable her to requisition the proper amounts to be paid certain school districts out of the state treasury. To assist you in the administration of the duties imposed by the act, you have asked the above stated three questions, and we answer the questions respectively as follows:

(1) "Children's boarding home" is defined by Section 3661-a43, 1935 Code, which provides as follows:

"3661-a43. *'Children's boarding home' defined.* Any person who receives for care and treatment or has in his custody at any one time more than two children under the age of fourteen years unattended by parent or guardian, for the purpose of providing them with food, care, and lodging, except children related to him by blood or marriage, and except children received by him with the intent of adopting them into his own family, shall be deemed to maintain a children's boarding home. This definition shall not include any person who, without compensation, is caring for children for a temporary period."

Excluding the exceptions contained in the definition, it is to be observed that the essential elements which constitute a place a children's boarding home are "more than two children under the age of fourteen years." A person who receives fewer than three such children into his custody for the purposes contemplated by the statute would not be maintaining a children's boarding home within the definition set out in the statute. In other words, to constitute a children's boarding home, we believe that the statutes contemplate that there shall be at least three children under the age of fourteen boarded at such home, and that if fewer than this number were so maintained at the home, it would not be a children's boarding home within the statute. Section 3661-a44, 1935 Code, as amended by Chapter 118, acts of the 47th General Assembly, provides for the issuing of licenses to children's boarding homes by the subdivision of child welfare. Therefore, it is our opinion that a "children's boarding home licensed by the state" is such home as falls within the definition set out in Section 3661-a43, 1935 Code, and which has been granted a license by the subdivision of child welfare or has an unexpired valid license heretofore granted by the state board of control.

(2) For the purposes of Chapter 123, acts of the 47th General Assembly, referred to above, we are of the opinion that any child "has become a public charge" when his commitment has been made under the authority of Chapter 180, 1935 Code, relating to neglected, dependent and delinquent children.

(3) In answer to your third question, the authority to license children's

boarding homes is now vested in the subdivision of child welfare by virtue of the change in the law effected by Section (8), of Chapter 118, laws of the 47th General Assembly, which amended Section 3661-a44, 1935 Code. Prior to this amendment the power to license such homes was placed in the state board of control.

We see no restriction in Chapter 181-A3, 1935 Code, as amended, against the granting of a children's boarding home license to a private institution. The issuance of such license is dependent upon certain requirements of the chapter and such issuance is also within the discretion of the subdivision of child welfare.

Section 3661-a42 defines the terms "person" or "agency" as the same are used in the chapter last referred to, which section reads as follows:

"3661-a42. *'Person' or 'agency' defined.* The words 'person' or 'agency' where used in this chapter shall include individuals, institutions, partnerships, voluntary associations, and corporations other than institutions under the management of the state board of control or its officers."

It is our conclusion, therefore, that if a private institution complied with all the requirements of the chapter and if its application were in all respects approved by the subdivision of child welfare, that such institution might be licensed as a children's boarding home.

STATE INSTITUTIONS: BOARD OF CONTROL: Board of control has exclusive responsibility in control and supervision of children committed to state institutions under provisions of Chapter 180.

October 15, 1937. *Mr. G. S. Wooten, Secretary, Board of Control of State Institutions:* We are in receipt of your request for an opinion on a proposition stated by you as follows:

It was generally understood that the legislature did not intend the recent child welfare legislation to encroach upon the full and exclusive responsibility of the board of control in the control and supervision of all juvenile wards of the state committed to state institutions. However, Section 10 of Chapter 118, Laws of the 47th General Assembly, wherein there is substituted the words "subdivision of child welfare" in place of "board of control," in Sections 3655 and 3656, Code 1935, appears to create conflicting responsibility.

We would like to have your opinion as to whether Section 10 or any other section of Chapter 118, Laws of the 47th General Assembly, affects the exclusive responsibility of the board of control in the control and supervision of juveniles committed to state institutions.

Section 3655, Code of Iowa 1935, as amended by Section 10, Chapter 118, Laws of the 47th General Assembly, provides as follows:

"3655. *Approval of institutions.* The subdivision of child welfare shall designate and approve the institutions to which such children may be legally committed and shall have supervision and right of visitation and inspection at all times over all such institutions."

Section 3656, Code of Iowa 1935, as amended by Section 10, Chapter 118, Laws of the 47th General Assembly, now provides:

"3656. *Reports by court and institutions.* The juvenile court, and all institutions receiving such children, shall, between the first and fifteenth day of January of each year, make report to the subdivision of child welfare. The report shall embrace the number of children of each sex brought before the court during the past year, the number for whom homes have been provided, the number sent to state institutions, and the number in charge of each institution."

The amendments substitute "subdivision of child welfare" for "board of con-

trol" in each instance. Both of said sections appear in Chapter 180, Code 1935, styled "Neglected, Dependent and Delinquent Children."

In order to arrive at the apparent intention of the legislature as regards the act on its part in making the aforesaid substitution of words, it becomes necessary to review the legislative history of the two sections referred to, and as was contemplated by the legislature, coordinate them with related provisions of Title XI, Code of Iowa 1935, dealing with charitable, correctional and penal institutions.

The forerunner to Chapter 180, supra, contained within Title XI of the 1935 Code, was Chapter 5-B, Title III, 1913 Supplement to the Code of Iowa, bearing the title "Of Juvenile Courts, Detention Homes and Schools." The law, as it there appeared, provided for commitments by the juvenile court in the following manner:

"Section 254-a20. *Commitment—financial aid for widowed mother.* When any child of the age stated in Section 2 hereof shall be found to be dependent or neglected, within the meaning of this act, the court may make an order committing the child to the care of some suitable state institution, or to the care of some reputable citizen of good moral character, or to the care of some industrial school, as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for and obtaining homes for dependent and neglected children, which association shall have been accredited as hereinafter provided. * * *"

"Section 254-a23. *Optional commitments—parole.* In the case of a delinquent child, the court may continue the hearing from time to time, and may commit the child to the care or custody of a probation officer, and may allow said child to remain in its own home subject to the visitation of the probation officer, * * *; or the court may cause the child to be placed in a suitable family home, subject to the friendly supervision of the probation officer and the further order of the court; or it may authorize the child to be boarded out in some suitable family home, * * *; or the court may commit such child, if a boy, to an industrial school for boys; or, if a girl, to an industrial school for girls; or the court may commit the child to any institution within the county, incorporated under the laws of this state, that may care for delinquent children, * * *; or to any state institution which may be established for the care of delinquent boys or girls * * *."

This chapter then went on to provide at Section 254-a26, what substantially appears in the 1935 Code as Sections 3655 and 3656, supra, in terms as follows:

"*Supervision of institutions by board of control—annual reports.* The board of control shall designate and approve the institutions and associations to have charge of juveniles under this act, and shall have supervision, oversight and right of visitation (by all or any of its members, or by such persons as it shall appoint thereto) to all institutions and associations having charge of juveniles under this act, and said court, institutions and associations shall make annual reports in the first fifteen days in January each year to said board of control. The report of the court shall include the number of juveniles of each sex brought before it, the number for whom homes have been obtained, the number sent to state institutions, and the number under charge of such association."

There appeared in Chapter 5-B, supra, no mandatory legislative direction that dependent and neglected or delinquent children be sent to specifically named institutions, either state or private. Under the general provisions of Chapter 5-B, supra, it was apparent that there was a need for some state agency to see to it that the orders of commitment of the juvenile courts might be carried out and committed children placed in an institution or association suited for the purpose, most of which at the time were of a private character, and the board of control of state institutions was ordained the agency to

designate and approve institutions and associations to which juveniles might be committed under the provisions of Chapter 5-B, supra.

Subsequently, various provisions were grafted onto the law relating to dependent, neglected and delinquent children, one of which was the present provision for mandatory commitments, which we find set out in Section 3646, Code of Iowa 1935, and providing as follows:

"3646. *Mandatory commitments.* If commitment of any child is not made under the foregoing provisions of this chapter, or if made thereunder and the results, in the opinion of the court, are not conducive to the welfare of the child, the court shall proceed as follows:

"1. If the child is neglected or dependent and not delinquent, it shall be committed either to the soldiers' orphans' home or to the state juvenile home.

"2. If the child is delinquent and under the age of ten years, it shall be committed to the state juvenile home.

"3. If the child is over the age of ten years and, in the opinion of the court or judge, is seriously delinquent or so disposed, it shall be committed to the state training school for boys or for girls, as the case may be; but married women, prostitutes, and girls who are pregnant shall not be committed to the training school.

"4. If the child is over the age of ten years and, in the opinion of the court or judge, is not seriously delinquent nor so disposed, it shall be committed to the state juvenile home."

Commitments thereunder, being to specifically named state institutions, made it unnecessary for the board of control "to designate and approve the institutions" as required by Section 3655, Code of Iowa, 1935.

However, the duty of the board of control "to designate and approve the institutions" still obtained where commitments by the juvenile court were to other than state institutions, viz., in the case of alternative commitments as provided for at subsection three of Section 3637, Code of Iowa, 1935, reading as follows:

"3637. *Alternative commitments.* The juvenile court, in the case of any neglected, dependent, or delinquent child, may:

1. * * *

3. Commit said child to any institution in the state, incorporated *and* maintained for the purpose of caring for such children.

* * *."

This provision must necessarily be read in conjunction with Section 3661-a89, Code of Iowa, 1935, embraced within the chapter on "Child-Placing Agencies," which defines the authorized agencies to which commitments contemplated by Section 3637 (3), supra, may be made. We set out that part of said section that is applicable, as follows:

"3661-a89. *Authority to agencies.* Any institution incorporated under the laws of this state *or* maintained for the purpose of caring for, placing out for adoption, or otherwise improving the condition of unfortunate children may, under the conditions specified in this chapter and when licensed in accordance with the provisions of this chapter:

1. Receive neglected, dependent, or delinquent children who are under eighteen years of age, under commitment from the juvenile court, and control and dispose of them subject to the provisions of Chapter 180.

2. Receive neglected, dependent, and delinquent children under twenty-one and over eighteen years of age, under commitment from the juvenile court, and control and dispose of them as in this chapter provided.

3. Receive, control, and dispose of all minor children voluntarily surrendered to such institutions."

At this point we find it necessary to momentarily digress from the subject at hand to dispose of an apparent conflict between these sections as indicated

by the italicized word *and* in the former and the italicized word *or* in the latter. Unless we construe the word "and" in subsection three of Section 3637, supra, to mean "or" we strictly confine child-placing agencies to which commitments may be made under said section to those that are incorporated. Since Section 3661-a89 specifically refers to commitments under Chapter 180, and it is clear in said section that the legislature defined a dual classification, i. e., institutions incorporated in the state and institutions unincorporated, but both maintained for the purpose of caring for unfortunate children, and further, since to so confine authorized institutions to those incorporated could conceivably hamper and hinder the subdivision of child welfare from carrying out the intents and purposes of the recent child welfare legislation, we feel constrained to apply the well recognized rule of construction that when necessary to effectuate the intent of the legislature, conjunctive words may be construed as disjunctive and vice versa, (See: *Chicago, R. I. and Pac. Ry. Co. vs. Rosenbaum*, 212 Iowa 227, 237), and accordingly hold that the word "and" as used in subsection three of Section 3637 is to be construed as if it were "or" and thus arrive at apparent consistency between these related sections.

It is here apropos to refer to Chapter 182, Code of Iowa, 1935, as amended by Chapter 118, Laws of the 47th General Assembly, and styled "Private Institutions for Neglected, Dependent, and Delinquent Children." It has been so emasculated from its 1924 Code form that the extent of its operation is a hapless hodgepodge. Suffice it to say, for the purpose of this opinion, Section 3666 thereof, as amended by the 47th General Assembly, is but a repetition of the procedure authorized by Section 3621 of Chapter 180, and removes to a certain extent the uncertainty created by the use of the word "and" in Section 3637 heretofore discussed in that it makes clear the jurisdiction of the juvenile court to commit children to institutions as defined in Section 3661-a89, supra. The balance of the chapter is devoted to express restrictions and limitations on the authority of such private institutions and further defines the supervisory authority of the subdivision of child welfare.

Now then, by virtue of the amendatory provisions of Chapter 118, Laws of the 47th General Assembly, specifically Sections 9 and 10 thereof, the board of control of state institutions was relieved of, and there was enjoined upon the subdivisions of child welfare the duties (1) to designate and approve institutions *other than state institutions* to which commitments may be made by the juvenile court under Section 3637 styled "Alternative Commitments," and/or under the provisions of Section 3666, and (2) to license and supervise children's boarding homes (Chapter 181-A3), child placing agencies (Chapter 181-A4), and private institutions for neglected, dependent and delinquent children (Chapter 182).

In recapitulation of the foregoing, it may be said that the division of authority between the board of control and the subdivision of child welfare is as follows:

1. Children committed by the juvenile court to either the soldiers' orphans' home, the state juvenile home or the training schools, pursuant to Section 3646, Chapter 180, supra, are charges of the board of control of state institutions, and the named institutions are under the board's exclusive supervision and control.

2. Children committed to institutions defined in Section 3661-a89, supra, pursuant to Section 3637, particularly subsection 3, Chapter 180, and/or Sec-

tion 3666, Chapter 182, Code of Iowa, 1935, as amended, are the concern of the subdivision of child welfare in such respect as the subdivision has the power and authority to license, inspect and supervise such institutions, and as well, children's boarding homes to which children thus committed may eventually be placed. Such children are not wards of the state but are the legal wards of the institutions to which committed, and are all the while subject to the continuing jurisdiction of the juvenile court until adoption or commitment to a state institution.

There remains to be considered the requirements of Section 3656, as amended, supra. While the section is not entirely free from ambiguity, yet we construe the same to mean that there is enjoined upon the juvenile court the duty to report to the subdivision of child welfare on the dates specified in the statute, and on the matters therein set out, which includes "the number (of children of each sex) sent to state institutions"; that private institutions licensed and supervised by the subdivision must report on the dates specified as to such data as the subdivision may require, and that state institutions must make a like report to the subdivision of child welfare. In this connection attention is directed to the provisions of Section 5, subsection 6 of Chapter 118, Laws of the 47th General Assembly, wherein the subdivision is required to receive and keep on file annual reports from the juvenile courts of the state and from all institutions to which neglected, dependent and delinquent children are committed and compile statistics regarding juvenile delinquency, make reports regarding the same and study prevention and cure of juvenile delinquency. Attention is further directed to the provisions of Section 4, subsection 8, Chapter 118, Laws of the 47th General Assembly, providing that the state department of social welfare shall "cooperate with the juvenile courts of the state, and with the board of control of state institutions in its management and control of state institutions and the inmates thereof."

While from a review of the statutes herein alluded to, and the amendatory provisions of Chapter 118, Laws of the 47th General Assembly, this department reaches the conclusion and it is its opinion that neither Section 10 nor any other section of Chapter 118, Laws of the 47th General Assembly affects the exclusive responsibility of the board of control in the control and supervision of children committed to the state institutions under the provisions of Chapter 180, supra, yet it is the further opinion of this department that the legislature, in enacting the social welfare program, intended that there should be cooperation between the board of control and the state board of social welfare, but without encroachment by either of said agencies upon the authority of the other in their respective fields.

TAXATION: REDEMPTION: TAX CERTIFICATE: (Senate File 167.) When notice of the expiration of the right of redemption has been served upon owners as required by Section 7279 of the Code, and the owner fails to enter into a contract with the county as provided by Chapter 191 of the Acts of the 47th General Assembly, the county would not be required to again serve such notice, and the county would be entitled to a tax deed upon the expiration of the six months' period provided for in the Act.

October 16, 1937. *Mr. Edward P. Powers, County Attorney, Centerville, Iowa:* This department is in receipt of your request for an opinion on the following set of facts:

Appanoose County is the holder of a number of tax certificates acquired under

Section 7255-b1 of the 1935 Code. Notice of the expiration of the right of redemption has been served upon the owners and occupants in many cases in the manner required by Section 7279 of the 1935 Code. In the event that an owner who has been so served should fail to enter into a contract with the county as provided by Chapter 191 of the Acts of the 47th General Assembly, would the county be required to again serve notice of the expiration of the right of redemption?

Senate File 167 which is Chapter 191 of the Acts of the 47th General Assembly is an act to amend Chapter 348 of the 1935 Code, which is the chapter dealing with tax redemption, by adding thereto certain sections. The Act contains eight sections relative to tax deeds or tax certificates acquired by counties by virtue of Section 7255-b1 of the 1935 Code.

Section 6 of said Act reads as follows:

"In any case where the period of redemption has already expired upon any tax sale certificate now held by the county, the period of time of redemption from such tax sale is hereby extended for a period of six months following the effective date of this Act. * * *"

Section 7 of the Act provides as follows:

"In event that the owner or owners fail to enter into a contract with the county as herein provided within six months following the effective date of this Act, or if said owner or owners shall fail to pay any installment or installments provided for in any contract entered into with the county under the provisions hereof, the county at any time after the expiration of ninety days after the service of notice of the termination of the right of redemption as provided herein may sell for cash and assign such certificate of sale. * * *"

As is apparent from a reading of the entire Act, its purpose is to make special concessions to the owner of a property where a county is the holder of the tax certificate or the tax deed. Section 7279 of the 1935 Code gave the county the right to serve a notice of the expiration of the right of redemption after nine months had elapsed from the date of the tax sale held under Section 7255 of the Code. For a period of six months from April 22, 1937 Senate File 167 makes inoperative the provisions of Section 7279 where the county is still the holder of the certificate. The Act extends the period of redemption for six months from the effective date thereof. In all cases where the county had not obtained a tax deed the extension became effective irrespective of the length of time the county had held the certificate or when the completed service of the right of redemption was made.

Except to extending the period of redemption, where the same had expired, for an additional six months' period, the Act made no attempt to and did not nullify notices of expiration of the right of redemption served prior thereto. It simply said in effect that although notice had been served and the time to redeem had expired, or would expire within the next ninety days, nevertheless the owner would have until October 22, 1937 to enter into a contract with the county. However, in the event that the owner failed to take advantage of the provisions of the Act, then the county after October 22, 1937 could proceed to sell said certificate for cash for not less than the full amount of the purchase price thereof or to exercise its right under the other statutes relative to redemption.

It is therefore the opinion of this department that the owner having been served with notice once would not have to be served again, and the county would be entitled to a tax deed upon the expiration of the six months' period provided for in the Act.

COURTS: SHORTHAND REPORTERS: PER DIEM: Certification of judge upon his shorthand reporter's per diem statement is only prerequisite of payment by county auditor.

October 16, 1937. *C. W. Storms, Auditor of State:* You asked the opinion of this department relative to that portion of the law dealing with the amount of pay received by shorthand reporters in district courts. Your office is particularly interested in the question of whether or not the Board of Supervisors has any jurisdiction over the claims of court reporters. In fact, whether the certification provided for in Section 10809 of the Code is final or whether the per diem statements of the reporters can be gone into after they have received the certification of the judge for whom they work as provided for in the above named section.

There are two sections of the Code dealing with the method of payment of shorthand reporters. One of them is Section 10809 and the other is Section 5143. These provide as follows:

"10809. *Compensation.* Shorthand reporters of the district court shall be paid ten dollars per day for each day's attendance upon said court, under the direction of the judge, out of the county treasury where such court is held, upon the certificate of the judge holding the court."

"5143. *Issuance of warrants without audit.* The county auditor is hereby authorized to issue warrants as follows before bills for same have been passed upon by the board of supervisors:

* * *

"4. The per diem of the shorthand reporter of the district court upon certificate of the judge holding said court."

It is the opinion of this department that the certification provided for in Section 10809 by the judge of a district court on the per diem statement of his shorthand reporter is final, and that the procedure provided for in Section 5143 is a confirmation of this conclusion. All other county bills must be passed upon by the board of supervisors, with the exception of those listed in Section 5143, before warrants can be drawn by the county auditor for their payment by the county treasurer. However, the legislature has seen fit to make an exception of the per diem of shorthand reporters and has substituted for such approval by the board of supervisors, the certification of the county judge for whom such shorthand reporter works, and has then written into the Code, in Section 5143, authority to issue warrants without a Board of Supervisors first passing them.

The legislature, however, did not grant even to the judge of a district court, in the matter of payment of shorthand reporters, unlimited authority. In fact, the legislature wrote very definite limits on the amount which a judge can allow his shorthand reporter, in that it provided that the shorthand reporter should receive $10.00 per day "for each day's attendance upon said court under the direction of the judge." There are but little more than 300 days in which court can be held in any one year. Therefore, the legislature, in effect, placed a maximum amount that can be received from the county by a shorthand reporter in the neighborhood of $3,000 per year. The legislature further saw fit to place a minimum that shorthand reporters are to receive when it provided in Section 10810 that shorthand reporters were to be allowed $2,400 a year as a minimum whether they worked the required 240 days or not, in order to have earned $2,400 at $10.00 per diem.

For all of the foregoing reasons it is the opinion of this department that

the certification of a judge of the district court on his shorthand reporter's per diem statement is prima facie final.

CHATTEL MORTGAGES: CERTIFIED COPY: TRUE COPY: (Sections 10015-10016-10017, 1935 Code.) "True copy" as used in Section 10015 through Section 10018 of the Code does not mean a certified copy but contemplates and requires a duplicate original, sometimes called a carbon copy.

October 18, 1937. *Mr. Oliver J. Reeve, County Attorney, Waverly, Iowa:* This department is in receipt of your request for an opinion on the following question:

"Please advise me whether it is necessary for the county recorder to require a certified copy of a chattel mortgage to be filed under Section 10015 of the 1935 Code of Iowa. Likewise whether the phrase "true copy" in Section 10016 and 10017 of the 1935 Code must be construed as meaning a certified copy.

Sections 10015 through 10018 deal with the recording of chattel mortgages and conditional sales contracts. Said sections provide for the recording of the original instrument or a true copy thereof. The question arises as to the meaning of "true copy" contained in the sections above referred to.

The Supreme Court of Iowa has never passed on this precise question. However, in the case of *Johnson vs. Des Moines Life Insurance Co.*, 105 Iowa 273 the court passed upon the meaning of "true copy" as applied to an application tc be attached to an insurance policy. In that case the defendant insurance company contended that the words "true copy" as used in Section 1733 McClain's Code which provided that a true copy of any application must be attached to the policy meant a substantial copy while the plaintiff insisted that it must be exact, accurate, and not merely a substantial copy. The Supreme Court said:

"In determining this contention we must consider the purpose of the statute as well as the meaning of the words. An evident purpose of this statute is that when the application is made a part of the contract, as in this case, a true copy must be attached to the policy, so that the writings composing the contract may all appear together and that the insured may be in possession of the evidence of what his contract is. With this purpose in mind, we inquire what is intended by the words 'true copy.' "

After devoting a page to the consideration of the definitions of the word "true" and "copy," the court said:

"In view of these definitions and the purpose of the statute, we think it is clear that the statute contemplates more than merely a substantial copy, and yet not a true likeness or a facsimile. It must be so exact and accurate as that, upon cause it can be said to be a true copy without resorting to construction. If upon comparison it may be said that the copy conforms to the facts and in accordance with the actual state of things appearing in the original, then it may be said to be a true copy; but if the differences are such that construction must be resorted to to determine whether the meaning and proper effect are the same as the original, then it cannot be said to be a true copy."

In *Nations vs. Lowenstern*, 204 Pac. 60, both the plaintiff and the defendant based their claim to a lien on certain cattle by virtue of chattel mortgages given them by one Airhart. The State of New Mexico had a statute which provided that every chattel mortgage, or a copy thereof, should be filed in the office of the county clerk of the county in which the property affected was situated. The plaintiff was the holder of prior mortgages in point of time and chose to avail himself of the permission given in the statute to file as a permanent record copies instead of the originals. The court said:

"It takes no argument to demonstrate that the statute in providing that a copy may be filed instead of an original means a 'true copy.' A copy of an

instrument is a duplicate or reproduction of it. We do not lay down the rule that the copy, to conform to the statute, must be an absolute duplicate in every detail. * * * But certainly it must be substantially identical and a paper which omits such essential features as the signature of the maker and the certificate of acknowledgment cannot be said to be a copy of an original which contains them. How then has appellant complied with this statute? It provides that unless the mortgage is recorded, or a copy is filed, it shall be void as to subsequent mortgagees in good faith. The Nations mortgages were not recorded and the originals were not filed in conformity with the statute. No copies were filed; the instruments relied upon not being copies of anything. It follows that the statute was not obeyed, its penalty becomes effective and the mortgages are void as against the defendant who is admittedly a subsequent mortgagee in good faith."

In *Eherlich vs. Mulligan*, 140 Atl. 463 the New Jersey Court of Errors and Appeals said:

"The question presented to us is whether a 'true copy' is a 'certified copy.' We think these terms are not interchangeable and that a 'certified copy' implies more than a 'true copy' and that a true copy is not a certified copy."

In considering supra sections of the Code we must remember that upon the filing or recording of the conditional sales contract or chattel mortgage all creditors, subsequent purchasers and interested persons are charged with constructive notice of the existence of said lien. In order to avoid an abuse of the protection thereby afforded, our Legislature has provided that before such instruments are eligible for filing or recording they must be executed, acknowledged and signed by the acknowledging officer in the same manner as conveyances of real estate. To allow the recording or filing of an instrument not containing the original signature of the acknowledging officer would be to open the field to fraud and abuse.

By the term "true copy" as used in Section 10015 through Section 10018 our Legislature apparently contemplated that the common practice would be followed in the execution of such instruments of preparing, executing and acknowledging an original and one or more carbon or duplicate originals. It was to make possible the recording or filing of any one of these duplicate originals that provision was made for the filing or recording of a "true copy."

It is therefore the opinion of this department that "true copy" as used in Section 10015 through Section 10018 of the Code does not mean a certified copy but contemplates and requires a duplicate original, sometimes called a carbon copy.

CIGARETTES: TAX: VETERANS: BOARD OF SUPERVISORS: Chapter 153 confers no authority upon a board of supervisors to waive any of the requirements of Chapter 78, and no exemptions from provisions of Chapter 78 are granted by said Chapter 153.

October 20, 1937. *Mr. Ralph Wm. Travis, Assistant County Attorney, Waterloo, Iowa:* We acknowledge receipt of your request for the opinion of this department upon two questions which you have stated as follows:

"1. Will it be necessary for a disabled veteran, operating a stand in the lobby of the court house under the provisions of Chapter 153 of the laws of the Forty-seventh General Assembly, to pay the mulct tax provided by Section 1563 of the Code before he can be issued a permit to sell cigarettes at said stand?

"2. Would the provisions of Chapter 153 of the laws of the Forty-seventh General Assembly give the board of supervisors authority to waive the collection of the mulct tax provided by Section 1563 of the Code, in view of the fact that provisions of Chapter 153 provide for space, rent free, in the lobby

of the court house, for a stand to be operated by a disabled war veteran 'for the sale of news, tobaccos and candies?' "

Chapter 78, 1935 Code, relating to cigarettes and tobaccos, covers the statutory provisions dealing with the sale of cigarettes and cigarette papers. The relevant portions of the provisions of said chapter are as follows:

"1557. *Permit to sell.* No person shall sell cigarettes or cigarette papers without first having obtained a permit therefor in the manner provided by this chapter. Such permit may be granted by resolution of the council of any city or town under any form of government and when so granted, may be issued by the clerk of such city or town. If issued to a person for use outside of a city or town such permit may be granted by resolution of the board of supervisors and when so granted shall be issued by the auditor of the county. Such permit shall remain in force and effect for two years following the July first after its issuance, unless sooner revoked."

"1563. *Mulct tax.* No permit shall be granted or issued until the applicant shall have paid, for the period ending July first next following the issuance of such permit, to the treasurer of the city, town, or county granting such a permit, a mulct tax as follows when the permit is granted during the months of July, August or September:

"1. In towns and other places outside any city or town, fifty dollars.

"2. In cities of the second class, seventy-five dollars.

"3. In cities of the first class, one hundred dollars. * * *"

"1569. *Tax paid to general fund.* All mulct taxes provided for in this chapter for cities and towns shall be paid to the treasurer of the city or town wherein the business for which such tax is paid is located and shall go into the general fund of said city or town. If paid for conducting business outside of any city or town it shall be paid to the county treasurer and credited to the general fund of such county."

The law provides that no person shall sell cigarettes or cigarette papers without first having obtained a valid permit. Since it is contemplated that the sales here will be made from a place of business located in a city or town, the permit fee would be payable to the treasurer of the city or town, and issued by the city council.

The only question involved is whether or not Chapter 153, laws of the 47th General Assembly affects the requirements of the statutes referred to above.

House File 288, Chapter 153, laws 47th General Assembly, is entitled:

"AN ACT to permit honorably discharged veterans of the nation's wars to operate news stands in the court houses of the various counties of Iowa, and prescribing the duties of supervisors on application for such privilege."

The act provides as follows:

"Section 1. The board of supervisors of any county shall, on the application of any honorably discharged soldier, sailor, marine, or nurse of the Army or Navy of the United States in the late Civil War, Spanish-American War, Philippine Insurrection, China Relief Expedition, or War with Germany, who was disabled in said war, cause to be reserved in the court house of the county a reasonable amount of space in the lobby of said court house to be used by such applicant rent-free as a stand for the sale of news, tobaccos, and candies. Should there be more than one applicant for such reserved space, the board of supervisors shall award the same to the person in their opinion most deserving of the same. The supervisors shall prescribe the regulations by which the stands shall be operated."

We can see nothing in the above language to justify a conclusion that any existing statute is repealed or amended thereby. Authority to use such public space rent-free for the sale of tobaccos by the veteran cannot be construed as granting authority to sell without a required permit. This legislation confers additional powers upon boards of supervisors, but it does not clothe any persons with exemptions from the operation of existing statutes. The cigarette

permit is a requirement of the statute, and such could not be waived by an authority not imposing the requirement. This would be true even though such authority is under the statute permitted to retain the fees paid for such permit.

The power given to the supervisors by Chapter 153 to "prescribe the regulations by which the stands shall be operated" would presumably relate to opening and closing hours, use of lights, water, and such other details as might be incident to the tenancy. Repeals by implication are not favored by the law, and exemptions from taxation or license requirements likewise will not be presumed, but must be grounded upon express provisions of statute or constitution.

It is our opinion, therefore, that said Chapter 153 confers no authority upon a board of supervisors to waive any of the requirements of Chapter 78, and it is further our opinion that no exemptions from the provisions of Chapter 78 are granted by said Chapter 153.

SCHOOLS: BUSES: MOTOR VEHICLE: Two permits must be secured by one, who, for hire, transports children (other than his family) to and from school; one permit to be obtained from state—chauffeur's license, the other from the school district which he serves.

October 21, 1937. *Mr. Leon A. Grapes, County Attorney, Davenport, Iowa:* We acknowledge receipt of your request for the opinion of this department upon a question submitted to you by the Scott County superintendent of schools, which may be summarized as follows:

Pupils who have graduated from the rural schools of Scott County drive to Davenport to attend high school. These drivers pick up other boys and girls and transport them to the Davenport school. These pupils live in districts, either rural independent or school township, which are not required to furnish transportation to their graduates who so attend high school. There is no contract between the drivers of these cars and the Davenport district. In the above situation, the following questions arise:

(1) Are the vehicles, when operated under the above circumstances, school buses?

(2) If such vehicles are school buses, is there any authority for a school board to give the permission to the driver as is contemplated in Section 402, Chapter 134, laws of the 47th General Assembly?

Paragraph 24 of Section 1, Chapter 134, laws of the 47th General Assembly, defines "school bus" as follows:

"24. SCHOOL BUS means every vehicle operated for the transportation of children to or from school, except privately owned vehicles, not operated for compensation, or used exclusively in the transportation of the children in the immediate family of the driver."

If the operator of the vehicle under discussion in this case receives compensation for the transportation furnished to the children carried to and from school, then, under the above definition and the facts stated, such vehicle is a school bus.

Section 402, Chapter 134, supra, provides for the licensing of drivers of motor vehicles in use as school buses as follows:

"402. *License and written permission.* The driver of every motor vehicle in use as a school bus shall have a regular chauffeur's license issued by the department of motor vehicles and, in addition thereto, each such driver shall secure permission in writing signed by the president and secretary of the board of the school district for which he serves, and made a part of the minutes of said board; except that in the case of a driver under the age of eighteen

only a limited chauffeur's license may be issued, which limited license shall be valid for the purpose only of operating a motor vehicle to transport pupils to and from school. Such limited license shall be valid for the school year beginning July 1 and ending June 30, and shall be issued under the same requirements, except as to age, as apply to the issuance of regular chauffeur's licenses to those eighteen years of age or over."

It appears that the statute first defines such vehicles as we have under consideration as school buses. Next the statute requires the driver of every vehicle in use as a school bus to have a chauffeur's license, and in addition thereto

"each such driver shall secure permission in writing signed by the president and secretary of the board of the school district *for which he serves, and made a part of the minutes of said board.*"

The statute further provides that each such driver who is under eighteen years of age shall procure the limited chauffeur's license, which limits the driver's right to the transportation of pupils to and from school.

The portion of the above section which presents the problem here is "the school district for which he serves."

A driver of a car carrying pupils to and from school may not be in the employ of any school district in the case set out in the statement of facts; there exists no contract between the driver and either the home district or the district in which school is attended. The transportation is furnished not as a public school service, but rather as a private service. Notwithstanding this fact, the motor vehicle law and particularly the section above quoted, requires that such drivers of automobiles are to procure chauffeur's licenses. Such licenses cannot be exercised in the transportation of school children unless such drivers secure the written permission of the school board required by the statute.

Why was such provision incorporated in the statute? It would appear that such was so included in order that the board of a district interested in the education of the children of the district or of the school attended might exercise a degree of supervision over the transportation of such children. In other words, the law now requires that two permits be secured by one who for compensation transports children other than those of his immediate family to and from school. The one permit is secured from the state in the form of a chauffeur's license, and the other permit is procured from a local body, i. e., the school district.

No power is anywhere specifically granted to school boards to give this permission required by the statute. We believe, however, that the statute, which required that the board give such permission carries with it the implied authority of a school board to so act. The statute does not designate which particular school board is to give the permission, setting out that such is to be given by the board of the school district for which such driver serves.

We are of the opinion that here the board of the district of the residence of a child so transported or the board of the district in which such child attends school may give the permission required by the statute. No duty is placed upon a board by virtue of this statute. An opportunity is given to the board to pass upon the qualifications of one who is to transport, for hire, children to and from school. No obligation is assumed by a board in extending such permit to an applicant. For the purpose of the statute in question, for the reasons above stated, it is our opinion that the permission required by Section 402 of Chapter 134, laws of the 47th General Assembly may be granted by the board of the district in which such school child resides, or by the board of a

district in which such child attends school. A liberal interpretation of the phrase "the school district for which he serves" gives effect to the statute and creates no hardship or inequity.

ASSESSORS: COUNTY AUDITOR: HOMESTEAD TAX EXEMPTIONS: The County Auditor has no statutory authority for calling a special meeting of the assessors to discuss homestead tax matters. If such a meeting were held, the county could not pay the assessors for their time and mileage in attending said meeting.

October 23, 1937. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa:* This department is in receipt of your request for an opinion upon the following facts:

Our local county auditor desires to call a special meeting of the assessors of the county to discuss matters pertaining to the homestead exemption law, particularly with reference to preparations for taking applications for homestead exemption for next year. If such a special meeting were called, could the county pay the assessors for their time and mileage in attending the meeting?

Section 7114 of the 1935 Code reads as follows:

"*Meeting of assessors.* The county auditor of each county shall, before the third day of January annually, issue a call to all the assessors of his county to meet at his office, or some other place at the county seat, within ten days, for consultation, and to receive from such auditor such information as shall tend to the proper discharge by them of their official duties. It shall be the duty of each of such assessors to attend such meeting, and they shall be allowed pay of one day for such attendance, and mileage at ten cents per mile one way."

The language of the foregoing section is plain and needs no construction. It contemplates that each year before the assessors enter upon their duties the auditor shall call them together to give them such information as may have a bearing on the proper discharge of their official duties. For attending said meeting the assessors shall be allowed one day's pay and mileage. The above statute is the only authority conferring upon the auditor the right to call a meeting of the assessors. It limits the calling of the assessors at the county's expense to one annual meeting and one day's pay.

It is therefore the opinion of this department that there is no statutory authority for the calling of a special or additional meeting of the assessors by the auditor and that if such a meeting were held the county could not pay the assessors for their time and mileage in attending said meeting.

SCHOOLS: TUITION: RESIDENCE: Since school of child's residence is closed, child may attend school in another district at expense of his home district, provided tuition is not in excess of pro rata cost in entire township (school) during year immediately preceding.

October 27, 1937. *Mr. J. W. Thompson, County Attorney, Iowa Falls, Iowa:* We acknowledge receipt of your request for an opinion of this department upon a statement of facts submitted by you, which is as follows:

"Subdistrict No. 7 did not open its school in the fall of 1934 because it did not have the required number of pupils, and properly notified the patrons of the school district to attend subdistrict No. 8.

"During the year 1934-35 one of the pupils of subdistrict No. 7 did attend No. 8. He lived one and one-fourth miles from both number 8 and number 7, No. 8 being on a graveled road and it was not necessary that he cross a railroad track.

"In the fall of 1935 this boy of subdistrict No. 7 changed schools and started to attend a town school two miles away without consulting the school board.

Now the town school, which is outside the school township in which subdistrict 7 is located, insists that the school township pay this boy's tuition for the past two years.

"May I have from your office an interpretation of Section 4233-e1 of the 1935 Code as to whether or not in your opinion this school township in which subdistrict No. 7 is located is liable for this boy's tuition for the past two years."

We assume that the subdistrict school No. 7 remained closed during the time the boy attended the town school.

The answer to the question presented will be determined by the provisions of Section 4233-e1 of the 1935 Code, relating to school privileges when the school is closed, which provides as follows:

"4233-e1. *School privileges when school closed.* If a school is closed for lack of pupils the board of such corporation shall provide for the instruction of the pupils of the corporation by sending them to other schools of the corporation or by contracting for such facilities in another school corporation if a school in such other corporation is nearer to them than any public school of the corporation of their residence and such pupils are over two miles from any public school in their resident corporation. Immediately upon the closing of any school, the board shall notify the patrons of the school where their children are to attend; provided that when the school in a subdistrict of a school township has been closed, the residents of such subdistrict may, if they prefer, send their children to the public school of their choice outside the school township, provided the cost to the school township for each of such children will not exceed the pro rata cost in the entire school township during the school year immediately preceding."

The above statute specifically provides that under certain circumstances the residents of a subdistrict may send their children to the public school of their choice outside the township. In this case the school of the subdistrict of the child's residence was closed and this provision therefore became operative. This boy had a right to attend the town school at the expense of his home district provided the tuition cost was not in excess of the pro rata cost in the entire school township during the school year immediately preceding.

In view of the foregoing, it is our opinion that the board of the district in which said subdistrict 7 is located should pay to the district wherein the child attended school the amount of the tuition claimed not in excess, however, of the pro rata cost in the child's school township for each of the years preceding the year during which he so attended the town school. The amount so paid likewise is subject to the limitation provided in Section 4233-e3, 1935 Code.

SCHOOLS: TRANSPORTATION: COUNTY SUPERINTENDENT: Duty of county superintendent to arrange for school facilities as provided in Section 4233-e1 includes duty to arrange for such transportation as is required by law.

October 27, 1937. *Miss Agnes Samuelson, Superintendent, Department of Public Instruction:* We acknowledge receipt of your request for the opinion of this department upon a question raised by the following stated facts:

"Your attention is called to Section 4233-e1, which sets out the duties of a school board in the matter of school facilities where a school is closed for lack of pupils, and to Section 4233-e4, which sets out the conditions under which the board must provide transportation when a school is closed.

"Section 4233-e2 provides that where a school has been closed and the board has failed to arrange for school facilities, as provided in Section 4233-e1, the county superintendent shall notify the president of the board of such failure and upon further failure it is made the duty of the county superintendent 'to make such arrangements.'

"Our question is whether the provision 'to make such arrangements' is

broad enough to include arrangements for transportation as well as arrangements for school facilities."

In order to clearly understand the question presented, it is necessary to set out certain sections of the Code relating to school privileges when a school is closed, and another section relating to transportation. Section 4233-e1 of the 1935 Code provides as follows:

"4233-e1. *School privileges when school closed.* If a school is closed for lack of pupils the board of such corporation shall provide for the instruction of the pupils of the corporation by sending them to other schools of the corporation or by contracting for such facilities in another school corporation if a school in such other corporation is nearer to them than any public school of the corporation of their residence and such pupils are over two miles from any public school in their resident corporation. Immediately upon the closing of any school, the board shall notify the patrons of the school where their children are to attend; provided that when the school in a subdistrict of a school township has been closed, the residents of such subdistrict may, if they prefer, send their children to the public school of their choice outside the school township, provided the cost to the school township for each of such children will not exceed the pro rata cost in the entire school township during the school year immediately preceding."

Section 4233-e2 provides that where a board fails to make the arrangements provided in Section 4233-e1, the duty, after notice to the board, devolves upon the county superintendent of schools.

"4233-e2. *County superintendent—duties.* Where a school has been closed and the board has failed to arrange for school facilities, as provided in Section 4233-e1, at least twenty days before the time the school would otherwise begin, it shall be the duty of the county superintendent to notify the president of the board of such corporation of such failure, and if the board does not arrange for school facilities within ten days thereafter, it shall then become the duty of the county superintendent to make such arrangements."

Thus, the superintendent is required to make the arrangements for schooling for pupils whose district or subdistrict school is closed.

Under the provisions of Section 4233-e4, the board is required to arrange the transportation to and from school of children of a district or subdistrict in which the school is closed, and who live more than two miles from the school designated for their attendance.

"4233-e4. *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 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."

A duty is thus placed upon a board, under the circumstances set out above, to provide transportation to children who live in a district or subdistrict in which the school is closed. It may be presumed that where a board has failed to act under the provisions of Section 4233-e1, supra, it is not likely that such board will assume the duty of providing for the required transportation. Such children have the right under the statute to be furnished transportation to and from school.

Section 4233-e2, supra, provides that the county superintendent may act "where a school has been closed and the board has failed to arrange for school facilities as provided in Section 4233-e1 * * *." Section 4233-e1 makes no specific reference to the providing of transportation. We are of the opinion that all of the statutes quoted above must be read together to determine the

legislative intent; that the provisions set out in Section 4233-e1, supra, cannot be considered separately and apart from the provisions of Section 4233-e4; that one of the purposes, if not the chief purpose, of these statutes is to insure school facilities to children who have no school in their home district, and to provide for transportation to school if a child of such district lives more than two miles from the school designated for his attendance.

All of the above sections were enacted by the 45th General Assembly as a part of House File 47. A corrective amendment to the said file was passed by the same General Assembly, but it is clear that the essential provisions were considered together and as a whole.

In view of the foregoing, we are of the opinion that the duty of the county superintendent to arrange for "school facilities as provided in Section 4233-e1" includes the duty to arrange for such transportation as is required by law, since such transportation is necessarily incidental to such school facilities.

BOARD OF SUPERVISORS: TAX COLLECTOR: The Board of Supervisors has the authority to employ an attorney for the county other than the county attorney, but the board has no authority to authorize an individual to engage an attorney for the county and give him direct or indirect authority to institute actions in the name of the county. The county attorney, his assistant, or the attorney engaged by the board is the proper officer to bring such actions and not an attorney engaged by the tax collector.

October 29, 1937. *Mr. E. P. Murray, County Attorney, LeMars, Iowa:* This department is in receipt of your request for an opinion as to the validity of three contracts entered into between the Board of Supervisors of Plymouth County on behalf of Plymouth County and one L. E. Crowley. In determining the validity of these contracts we are going to consider each contract separately and in the discussions thereunder shall take up the legal questions so presented. For the purposes of discussion we shall designate these contracts as "A," "B," and "C." Contract "A" reads as follows:

"*Whereas,* it has come to the attention of the Board of Supervisors of Plymouth County, Iowa, that considerable property subject to taxation in Plymouth County, Iowa, has been omitted from assessment; and,

"*Whereas,* it is necessary that some suitable person be employed to assist the proper officers in the discovery of property not listed or assessed for taxation as required by law,

"*Now, therefore,* be it resolved by the Board of Supervisors of Plymouth County, Iowa, that L. A. Crowley be and hereby is employed by the Board of Supervisors for and on behalf of Plymouth County, Iowa, to assist the proper officers in the discovery of property omitted from assessment or taxation for a period of three years from September 15, 1937.

"AND the said L. E. Crowley shall receive as full compensation for his services in assisting said proper officers in the discovery of property omitted from taxation, a per diem of Twenty-five Dollars ($25.00) per day, provided such per diem shall not exceed an amount equal to eighteen (18) per cent of the total amount collected on property omitted from assessment and discovered by him in each year, or for which he is directly or indirectly responsible. That this resolution, upon the filing with the County Auditor or an acceptance in writing by the said L. E. Crowley, shall constitute a contract between the parties.

VOTE

Yea, D. S. Twogood
Yea, J. J. Ahmann
Yea, J. R. Graham
Yea, H. Grimjes
Yea, J. G. Miller, Chairman
Board of Supervisors,
Plymouth County, Iowa.

"I hereby accept the terms and stipulations as above set out.

L. E. Crowley."

It is apparent that the legality of contract "A" depends upon the meaning of Section 7161 of the 1935 Code, which reads as follows:

"*Discovery of property not listed.* It shall be lawful for the board of supervisors of any county to employ any person, corporation, or firm for a reasonable salary or per diem to assist the proper officers in the discovery of property not listed or assessed for taxation as required by law, and the amount allowed as compensation shall be apportioned pro rata to the funds benefited."

As an aid in determining the meaning of supra section, it will be instructive to review the legislative history of said section.

Prior to 1900 some counties entered into contracts with individuals to assist in discovering and reporting for assessment property which had been omitted from taxation in the county and agreed to pay said individuals, in many cases, an amount equal to 50 per cent of all money collected as a result thereof. The right of a county to enter into such contracts was sustained by the Supreme Court of Iowa in the case of *Disbrow vs. Board of Supervisors of Cass County*, 119 Iowa 538, as a power possessed by the Board of Supervisors under that subdivision of their general powers giving them the right to represent their county and have the care and management of the property and business thereof in all cases where no other provision is made.

To control this situation the 28th General Assembly in 1900 enacted Chapter 50 which specifically authorized Boards of Supervisors of any county to enter into a contract with any person to assist the proper officers in the discovery of property not listed and assessed as required by law. The total charges, fees and expenses authorized under said chapter were not to exceed 15 per cent of the amount paid into the treasurer.

In 1911 the 34th General Assembly repealed all of the provisions of Chapter 50 which had become Section 1407-a through "e" of the 1907 Code and enacted Chapter 66 of their Acts. Chapter 66 made it unlawful for any county to employ or contract with any person, firm, or corporation to assist the proper officers in the discovery of property not listed or assessed for taxation as required by law. However, in 1924 the Legislature withdrew its objections to such contracts and enacted the statute which appeared in the 1924 Code as Section 7161 and which is identical with our present Section 7161, supra, except that the words, "and amount allowed as compensation shall be apportioned pro rata to the funds benefited," were added to said Act by the 45th General Assembly.

From the foregoing review of the history and limitations on the right of the county to enter into contracts for the employment of persons to assist in the discovery of omitted property, it becomes apparent that it has been the intention of our Legislature to definitely limit and regulate the form of said contract ever since the year 1900, or none of the acts referred to would have been necessary since counties could enter into such contracts under the general power above referred to. Apparently, the Legislature felt that the fee authorized should be regulated and limited and so provided for a total fee of 15 per cent. This section was repealed and all contracts of this type were banned until the enactment of the present statute providing not for a percentage but for a reasonable salary or per diem.

The question, therefore, is whether or not contract "A" which provides for the payment of $25.00 per day for three years limited by the provision that the total per diem paid shall not exceed 18 per cent of the total amount col-

lected on the omitted property is of itself a violation of Section 7161. The language of the contract is not free from ambiguity. One cannot by reading the same ascertain whether it is necessary that Crowley actually devote a day's labor to be entitled to the $25.00 or whether, if 18 per cent of the total amount collected is sufficient to pay him $25.00 per day for every day in the year, Sundays and holidays included, he would not be entitled to the same, even though he only put in a few days actual work during the year in the discovery of omitted property.

As worded it is apparent that Crowley is to receive 18 per cent of the total of all omitted taxes collected during the year. However, in the event that 18 per cent of all omitted taxes collected during the year exceeds the sum which would be received by Crowley if he were paid $25.00 per day, then Crowley is to be limited to such sum. This is further borne out by the fact that if 18 per cent of the amount collected during the year does not provide an amount equal to the sum that Crowley would receive if he were paid $25.00 per day, then Crowley is to receive 18 per cent of said amount as full payment. In other words, it is an 18 per cent contract, limited, however, to an amount not to exceed a sum equal to $25.00 per day.

Mr. Crowley, in a statement published in the LeMars Sentinel on Tuesday, October 19, 1937, said the following as to the meaning of contract "A":

"What does this mean? Just this. That I receive 18 per cent of every hundred dollars collected by the county on omitted taxes. If that hundred dollars is collected in a day, week, or a month, *I still cannot receive more than eighteen per cent and not twenty-five dollars per day.* It is true that if the collections amounted to about $50,000 per year *the percentage* for the collections would total $25.00 per day. *Anyone familiar with county affairs knows or should know that this would be a wild estimate on this contract.*" (Italics are ours.)

Had the Legislature intended to allow a percentage of the collections instead of a reasonable salary or per diem, they would have re-enacted the provisions of the previous statute authorizing a percentage. This they did not do, but in its place they enacted the present law authorizing a reasonable salary or per diem.

Assuming that this is a straight per diem contract of $25.00 per day, much might be said about the meaning and definition of reasonable salary or per diem as bearing upon the question of whether or not this contract would come within the restrictions of the statute as being an unreasonable salary or per diem, or whether a contract of employment for a period of three years is a per diem contract. However, we will not discuss these phases of the contract, because we are unable to construe this contract as other than an agreement to pay Crowley 18 per cent of the total annual amount collected on omitted property, except that in the event that 18 per cent of the amount so collected exceeds the sum that would be received by him if he had been paid $25.00 per day, then Crowley is to be limited to such sum.

It is therefore the opinion of this department that contract "A" is illegal for the reasons heretofore set out.

II. Contract "B" reads as follows:

"*Whereas*, it has come to the attention of the Board of Supervisors of Plymouth County, Iowa, that the expense for the support and maintenance of Plymouth County patients in the following State institutions, to-wit: Institution for Feeble Minded at Glenwood, Iowa, State Sanatorium for the Treatment of Tuberculosis at Oakdale, Iowa, Mt. Pleasant State Hospital at Mt. Pleasant,

Iowa, Cherokee State Hospital for the Insane at Cherokee, Iowa, State Hospital and Colony for Epileptics at Woodward, Iowa, Iowa College for the Blind at Vinton, Iowa, Iowa School for the Deaf at Council Bluffs, Iowa, remain unsatisfied by those legally liable therefor as provided by the laws of the State of Iowa, and

"*Whereas*, it is necessary that a suitable person be employed as Assistant Counsel to act for said County and to assist the proper officer in the collection of such charges as by law provided;

"*Now, therefore be it resolved* by the Board of Supervisors of Plymouth County, Iowa, that L. E. Crowley be and he is hereby employed by the Board of Supervisors for and on behalf of Plymouth County, Iowa, as Assistant Counsel to act for said County and to assist the proper officers in the collection of such moneys as may be due Plymouth County as above outlined, for a period of three years from September 15, 1937, and that he shall receive as full compensation for his services and the professional services of other legal counsel, a sum equal to eighteen (18) per cent of all moneys collected or received, in compliance herewith, and

"THAT this resolution upon the filing with the County Auditor of an acceptance in writing by the said L. E. Crowley shall constitute a contract between the parties.

"VOTE:

Yea, D. S. Twogood
J. J. Ahmann
L. R. Graham
H. Grimjes
J. G. Miller, Chairman.

I hereby accept the terms and stipulations as above set out.

L. E. Crowley."

Chapter 254 of the 1935 Code deals with the powers and duties of Boards of Supervisors. Subdivision 6, Section 5130 provides that the Board of Supervisors shall have the power 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.

There can be little question but that under their general powers counties have the right to enter into proper contracts to recover sums due them where not otherwise limited or regulated by statute.

However, contract "B" provides for the employment of Crowley, a layman, "*as assistant counsel to act for said county.*" The contract provides that he shall receive for his services and the professional services of other legal counsel a sum equal to 18 per cent of all moneys collected or received by the county. Said contract vests in Crowley the right to "act for said county" which might be construed to include authority to compromise the claims he is handling and authority to employ legal counsel to assist him in any action he deems necessary to enforce collection. "As total compensation for his services and the professional services of other legal counsel, Crowley is to receive 18 per cent of the amount collected during the contract period."

In 15 Corpus Juris 545, Section 238, we find the following rule:

"County boards, in the absence of positive legal authority so to do, cannot in any case hire or employ an agent or servant to exercise powers which such board cannot themselves exercise. Neither can such boards designate to agents or servants employed by them the performance of official duties calling for an exercise of discretion on the part of the board."

The matter of compromising claims and the employment of an attorney for the county are matters involving the exercise of discretion vested in the board and cannot be delegated by the board to a third person.

The county has the right if it chooses to enter into a proper contract employing Crowley or any other person to assist the proper officer in the collection of such obligations as are herein under consideration. But the board cannot delegate to such person the doing of any acts which require the exercise of their discretion. They can hire a person to assist in collecting the full amount due or to report to them the status of the situation for their further action. They cannot employ a layman as "Assistant Counsel" with authority to engage "other legal counsel."

The county attorney is elected by the public as the attorney for the county. Part of his duties as defined by Section 5180 of the Code are:

"*Duties.* It shall be the duty of the county attorney to:

* * *

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

* * *

"7. Give advice or his opinion in writing without compensation, to the board of supervisors and other county officers and to school and township officers, when requested so to do by such board or officer, upon all matters in which the state, county, school, or township is interested, or relating to the duty of the board or officer in which the state, county, school, or township may have an interest; but he shall not appear before the board of supervisors upon any hearing in which the state or county is not interested."

The Board of Supervisors has the authority to employ an attorney for the county, other than the county attorney, but the board has no authority to authorize an individual to engage an attorney for the county and give to that individual direct or indirect authority to institute actions in the name of the county. The county attorney, his assistant, or the attorney engaged by the board is the proper officer to bring such actions and not an attorney engaged by the tax collector, who might institute numerous unwarranted actions involving the county in considerable expense and yet in no manner be responsible to the proper county officials.

It is a well established principle in the law of this State that where a contract provides for a doing of both legal and illegal acts, and they are so connected that they cannot be separated, the whole contract is void. *Baird vs. Bohner*, 77 Iowa 622; *Casady vs. Woodbury County*, 13 Iowa 113. However, whenever the unlawful part of a contract can be separated from the rest, it will be rejected and the remainder established. *Osgood vs. Bouder*, 75 Iowa 550; *Stewart vs. Pierce*, 116 Iowa 733; *Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa 234. The test laid down is that if the part to be performed by one party consists of several distinct and separate items and the price to be paid by the other is apportioned to each item to be performed, such a contract will generally be held to be severable. *Osgood vs. Bouder*, supra, but if the acts legal and illegal are so connected that they cannot be separated, the whole promise is void. *Casady vs. Woodbury County*, supra.

An examination of contract "B" shows that the 18 per cent to be paid is not apportioned to any one act or item of service, but instead requires the actual collection and receipt of the money no matter what acts or court action might be necessary.

It is therefore the opinion of this department that contract "B" as drawn,

contains provisions which are illegal and void for the reasons heretofore given, and that these provisions, being part of an entire indivisible contract, invalidate the entire contract.

III. Contract "C" provides for the employment of the same L. E. Crowley by the county for the same period as contracts "A" and "B" as collector of all delinquent personal taxes. The county agrees to certify to Mr. Crowley all personal taxes now delinquent or which during the life of the contract may become delinquent. The county to pay Crowley 5 per cent of the total amount collected by him after said taxes shall first become delinquent and 10 per cent of the total amount collected by him on or after November 1st following the date upon which said personal taxes become delinquent. Section 7225 reads as follows:

"*Personal property tax collectors.* The boards of supervisors may in their discretion authorize the appointment by the treasurer of one or more collectors to assist in the collection of such delinquent personal tax as the board may designate, and may pay such collector as full compensation for all services rendered and expenses incurred a sum not to exceed ten per cent of the amount collected, which sum shall in no event be paid or allowed until all such taxes collected have been paid over to the county treasurer by such collector."

Section 7226 reads as follows:

"*Current taxes—when delivered for collection.* In no case shall delinquent taxes of the current year be turned over for collection, whether designated by the board or otherwise, before the first day of November. The provisions of this section shall not apply to counties having a population of eighty thousand or more."

From an examination of the above cited sections, it is apparent that that portion of contract "C" relating to the payment of 5 per cent of the total amount collected by Crowley after said taxes first become delinquent is invalid and contrary to Section 7226 inasmuch as Plymouth County does not have a population of eighty thousand or more.

A portion of said contract "C" reads as follows:

"NOW, on this 13th day of September, 1937, it is therefore agreed by and between Plymouth County, Iowa, party of the first part, and L. E. Crowley, party of the second part, as follows, to-wit:

"The said party of the first part does hereby employ party of the second part as personal tax collector of Plymouth County, Iowa, for a period commencing with the fifteenth day of September, 1937, and ending on the 15th day of September, 1940, at 5 o'clock P. M.

"Second party agrees to, with all due diligence and his best efforts, collect all delinquent personal taxes as shown upon the books of the County Treasurer of Plymouth County, Iowa.

"The party of the first part agrees, in consideration therefor, to certify to the second party, all personal taxes now delinquent or which may become delinquent during the period covered by this contract, and agrees to pay to the second party five (5) per cent of the total amounts collected by the second party, after said taxes shall first become delinquent and agrees to pay to the second party ten (10) per cent of the total amounts collected by the second party, on or after November first following the date upon which said personal taxes become delinquent.

"IN WITNESS WHEREOF, the first party by authority of the aforesaid resolution duly adopted and approved by the Board of Supervisors of Plymouth County, Iowa, has caused this contract to be executed by the Chairman of said Board of Supervisors and attested by the County Auditor, and the second party has executed this contract the day and year first above written."

The Board of Supervisors has no authority under any statute to appoint or employ a delinquent tax collector. That right is vested exclusively in the

county treasurer. The Board of Supervisors merely has the authority in its discretion to "authorize the appointment by the treasurer of one or more collectors to assist in the collection of such delinquent personal tax as the Board may designate," but the treasurer is the only one who can appoint and employ.

This contract, as well as contracts "A" and "B," extend for a period of over nine months beyond the term of any member of the Board and for a period of over a year and nine months beyond the present term of the county treasurer.

In most jurisdictions where a board appoints an officer or contracts for services, and the duties of the officer or the services to be rendered are duties delegated to the supervision of the Board, such appointment or contract for a period beyond the term of the Board is not valid. And the same rule applies to confidential relations, such as counsel for the Board. *Willett vs. Calhoun County*, 117 So. 311 (Ala.); *Milliken vs. Edgar County*, 32 N. E. 493 (Ill.); *Leglit vs. Lebanon County*, 292 Pa. 494. In 15 Corpus Juris 542, the following rule is laid down:

"Although it has been held in some cases that the contract of a county board may be valid and binding, even though performance of some part may be impossible until after the expiration of the term of the majority of the board as it then existed, yet the general rule is that contracts extending beyond the term of the existing board and the employment of agents or servants of the county for such a period, thus tying the hands of the succeeding board and depriving the latter of their proper powers, are void as contrary to public policy."

In *State vs. Platner*, 43 Iowa 140, the Board of Supervisors entered into a contract with Platner as steward of the poor house for a three-year period ending March 1, 1877. The statute gave the board the power to remove such officer at their pleasure. The question was whether said contract was binding. The Supreme Court said:

"But we are of the opinion that a board of supervisors cannot contract with a favorite appointee for such time and salary as they may see fit, so as to deprive subsequent boards, or even themselves, of all control over the matter."

Our own court has never been called upon to determine the precise question before us, but in view of the foregoing general rule, and the language in the Platner case, we cannot escape the conclusion that the Board exceeded its authority and that Contract "C" is illegal and void.

TAXATION: SALES TAX: A state sales tax should be collected by the Printing Board on all sales made at retail to private individuals.

October 30, 1937. *Mr. Tom J. White, Superintendent, State Printing Board:* This department is in receipt of your request for an opinion upon the following question:

Must the State Printing Board collect sales tax upon its sales at retail in Iowa other than those made to the State or Federal Government?

Chapter 196 of the Acts of the 47th General Assembly imposes a tax of two per cent, except as otherwise provided in the Act, upon the gross receipts from all sales of tangible personal property sold at retail in the State to consumers or users. The Act requires that the retailer add the tax imposed to the price and after collecting the same remit within twenty days of the month following the close of the quarterly period.

The Act provides that the meaning of the terms hereinafter listed shall be as follows: Retailer includes every person engaged in the business of selling

tangible goods, wares, or merchandise at retail; retail sale means the sale to a consumer or to any person; person includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal corporation, etc.

The question, therefore, is whether or not the State Printing Board comes within the definition of "retailer" and "person" as defined by the Act. In *State vs. City of Des Moines*, 266 N. W. 41, our Supreme Court held that "the Legislature is its own lexicographer in defining terms as applied to any given statute."

In the case of *State of Ohio vs. Helvering*, 292 U. S. 360, the Supreme Court held that a State is embraced within the meaning of the term "person" as used in a statute imposing an excise tax on persons selling liquor and providing that:

"Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person' as used in this title shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person. Whether the word 'person' or 'corporation' when used in a statute, includes a state or the United States, depends upon the connection in which the word is found." (Citing numerous cases holding that a state is a person or a corporation.)

In *State vs. City of Des Moines*, supra, the Supreme Court of Iowa said:

"Surely, in a sense, all corporations are persons, that is, artificial persons, and all municipalities are bodies corporate, and in a proper case the word 'person' has been held to not only include municipalities but every and any political subdivision, and also the state, and in some cases even the United State government."

An examination of the entire sales tax act reveals an intention on the part of the Legislature to impose a two per cent sales tax on all sales at retail, no matter by whom made. In the sale of Codes and Supreme Court Reports to individual attorneys and those wishing to purchase the same, the State Printing Board is acting in a proprietary capacity, engaged in the transaction of business in competition with other private businesses. When engaged in that manner, it is clearly the intention of the Act that a two per cent sales tax be collected and remitted in the same manner as such tax would be collected and remitted by any other retailer.

It is therefore the opinion of this department that sales at retail to private individuals by the State Printing Board are subject to the sales tax.

TAXATION: HOMESTEAD TAX EXEMPTION: Mr. "A" owns a farm and filed a claim for Homestead credit which was allowed for the year 1936 and "B" a corporation holds a mortgage on the farm and paid the taxes in full. Mr. "C" owns property that was sold at tax sale in December, 1936, and the owner filed claim for a Homestead credit for 1936 and the same was granted. Mr. "D," the tax sale purchaser has paid the taxes. Who is entitled to the refund? The opinion of this department is that the refund in both cases should be paid to the mortgagee or certificate holder who paid the taxes on the property.

November 1, 1937. *Iowa State Board of Assessment and Review:* This department is in receipt of your request for an opinion upon the following questions:

1. Mr. "A" owns a farm and filed a claim for Homestead credit, which is allowed for the year 1936, and "B," a corporation, holds a mortgage on this farm and in March, 1937 paid the taxes in full on this farm. In this particular county the treasurer paid all refunds by a check—now, the question is, who gets this check, Mr. "A" or "B," the corporation?

2. Mr. "C" owns a property that was sold at a tax sale in December, 1936,

and filed a claim for a Homestead credit for the year 1936 and the same was granted. Now, Mr. "D," the tax sale purchaser, has paid the tax and the treasurer, same as above, has paid all refunds by check. In this case, who is entitled to the refund check, Mr. "C" or Mr. "D"?

An examination of the Homestead Tax Exemption Act clearly shows that the purpose of the Act is to encourage the acquiring, occupancy and ownership of homesteads. To accomplish this the homestead credit fund is set up and allocated in such a way that the owner of a homestead receives a credit on his taxes and thereby the amount he personally pays is reduced. In many cases, because the Act did not become effective until March 25, 1937, the entire tax for 1936 had been paid and so provision was made in the Act for a refund of the credit allowed.

Section 14 of Chapter 195 of the Acts of the 47th General Assembly reads as follows:

"The county treasurer of each county shall enter a credit against the tax levied on each eligible homestead, being the tax for the year 1936, payable in 1937, said credit to be made as provided in Section 4 of this act. The county treasurer shall show on each tax receipt that said credit is received from the homestead credit fund. In the event that a taxpayer has paid one or both of the installments of the 1936 tax payable in 1937 on such eligible homestead, prior to the time of entering of such credit, the county treasurer shall, at the time he enters such credit, remit to such taxpayer the amount of such credit less unpaid portion of tax, if any."

The question presented is whether or not the Legislature in using the words, "*a taxpayer*," in supra section intended the same as a synonym for owner, or whether they anticipated just such situations as are suggested in the foregoing questions and sought to provide for the same by requiring a refund to "*a taxpayer*" instead of to an owner.

The Supreme Court of Iowa, as far as we can ascertain, has never judicially defined the term "taxpayer." In its ordinary every day sense it is defined in Webster's Dictionary as, "one who pays a tax." It is also thus defined in *Pocatello vs. Murray*, 23 Idaho 447, and *Leventhal vs. Gillmore*, 206 N. Y. S. 121. On the other hand, courts in many other jurisdictions have defined "taxpayer" as, "a person owning property subject to taxation on which he regularly pays taxes; one who is assessed and pays a tax." *State vs. Fasse*, 71 S. W. 745 (Mo.); *Hellsman vs. Faeson*, 57 S. W. 920 (Tex.); 61 C. J. 1748, and cases cited therein.

It is obvious that the owner of a homestead who has not paid the taxes thereon could not come within the provisions of Section 14, supra, authorizing a refund to a taxpayer who has paid one or both installments of the 1936 tax, regardless of which of the above definitions of "taxpayer" we might take.

Yet clearly the Act contemplates the right of the owner to a homestead credit, irrespective of his actual payment of the tax, if he has complied with the provisions of the Act.

The question then is, how can this right, this reduction in taxes on the homestead contemplated by the Act be secured for the owner whose taxes have been paid by a mortgagee or a holder of the tax certificate? Surely not by the payment of the refund to the owner. He would thus be obtaining a bonus for owning property without having paid any taxes thereon. But if the refund is given to the taxpayer, in this case the mortgagee or certificate holder, the owner is securing the full benefits of the Act, for the amount required to pay off the mortgagee or certificate holder is reduced by the amount of the refund.

In that way the intention of the Legislature to reduce the taxes of homesteaders and encourage home ownership and occupancy is carried out.

It is therefore the opinion of this department that the refund in questions 1 and 2 should be paid to the mortgagee or certificate holder who paid the taxes on the property.

TAXATION: PERSONAL TAXES: DELINQUENT PERSONAL TAXES: The delinquent personal taxes of a vendee of real estate become a lien on the property which he is purchasing under contract.

November 5, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion upon the following question:

"Does 'A' who is purchasing a house under a contract, which has been placed of record, but which retains title in the seller, have a title interest in the property to the extent that his personal taxes can be declared a lien against the property and the same sold for such personal tax if the tax is not paid?

Section 7203 reads as follows:

"*Lien of personal taxes.* All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December thirty-first of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December thirty-first of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect."

Cumming vs. First National Bank, 199 Iowa 666, is an action to quiet title in the plaintiff to certain real estate, as against the claimed lien of the defendant bank, arising on a judgment in its favor against plaintiff's vendor of the land described in the petition. The contract between the plaintiff and his vendor was entered into on October 16, 1922, to be performed on January 2, 1923. On December 8, 1922, the defendant secured a judgment against plaintiff's vendor. At page 668 and 669 the court said:

"The contract was in full force and effect on the date that Parkhill confessed judgment in the sum of $2,640.63 in favor of the defendant bank, to-wit, December 8, 1922. On this date, the agreement was not a mere option, but constituted a valid contract, and subject to specific performance. Here a landowner enters into a contract of sale, whereby the purchaser agrees to buy and the owner agrees to sell. The vendor retains the legal title until the purchase money is paid. No other condition is attached. *Under such circumstances, the ownership of the real estate, as such, passes to the purchaser; and from that time forth the vendor holds legal title as security for his debt, and as trustee for the purchaser. In re Estate of Miller*, 142 Iowa 563. *This is the recognized rule in Iowa. The title in equity passed to the vendee. It is not dependent upon a conveyance nor upon the payment of the purchase money; nor is possession or delivery of possession a necessary incident. O'Brien vs. Paulson*, 192 Iowa 1151. Had the vendor died before the deed passed, his personal representative would take; had the vendee died, his heirs would take. A judgment creditor is not a subsequent purchaser for value of the land. His right can rise no higher than that of his debtor in the land; and, therefore, an unrecorded contract affecting such land is paramount to the rights of such judgment creditor. The vendor's interest being personal property, it necessarily follows that a judgment obtained against the vendor after the date of such contract does not become a lien upon the land. *Beaver vs. Ross*, 140 Iowa 154; *Brebner vs. Johnson*, 84 Iowa 23." (Italics are ours.)

In the case of *In re Estate of Miller*, 142 Iowa 563, the Supreme Court of Iowa said at page 566:

"It has been held repeatedly by this court that when a landowner enters into a contract of sale whereby the purchaser agrees to buy, and the owner to sell, and whereby the vendor retains the legal title until the purchase money or some part thereof be paid, the ownership of the real estate, as such, passes to the purchaser, and that from such time forth the vendor holds the legal title as security for a debt and as trustee for the purchaser. The interest acquired by the vendee is 'land,' and the right and interest conferred by the contract upon the vendor is 'personal property.' In case of the death of the vendee his interest in the land would descend to his heirs. In case of the death of the vendor, his interest would pass as personal estate to his administrator. *A judgment against the vendee would become a lien on the land, inferior, of course, to the rights of the vendor.* A judgment against the vendor would not become a lien upon the land, nor could an execution thereunder be made by levy and sale of the land. *Baldwin vs. Thompson*, 15 Iowa 504; *Woodward vs. Dean*, 46 Iowa 499."

From the foregoing authorities it is apparent that upon the execution of the contract of purchase the vendor ceases to be the owner of the property and the vendee becomes the owner of said property in contemplation of law and within the meaning of Section 7203, supra.

In the case of *Bibbins vs. Clark & Co.*, 90 Iowa 230 the Supreme Court held:

That the statute making taxes due upon personal property a lien upon real estate owned by such person did not make the same superior to any lien then existing thereon. That such lien like the lien created by a judgment is subject to all prior liens upon the real estate of the party. That unlike the lien for real estate taxes which is against all persons the lien on realty for personal property tax come within the general rule that its priority is to be determined as of the time the lien attached.

It is therefore the opinion of this department that the delinquent personal taxes of the vendee become a lien on the property which he is purchasing under contract. That the same can be sold for said tax, but that the vendor's rights in the property cannot thereby be destroyed or impaired, and that all that can be transferred by such sale are the vendee's rights in said property.

CITIES AND TOWNS: MOTOR VEHICLE LAW: SPEED LIMITS: We think that municipalities have power to designate a sector of a through street as a special speed district, and another sector as a suburban speed district.

November 15, 1937. *Iowa State Highway Commission:* This department has received your request for an opinion on certain features of the new motor vehicle law, Chapter 134 of the Acts of the 47th General Assembly.

The questions you ask resolve themselves into two, as follows:

1. Have cities and towns the power to establish different speed limits in various sectors of a through street?

2. Where any city or town, assuming that it has the power to establish different speed limits for different sectors of the street, has enacted an ordinance with that end in view, has the city or town the right to designate the different sectors on signs, such as "suburban district," and "special speed district"?

Section 316 limits the speed per hour, except "as hereinbefore or hereinafter modified," to 20 miles per hour in any business or school district, and 25 miles per hour in any residence district.

Section 324 provides as follows:

"Local authorities in their respective jurisdiction may in their discretion authorize by ordinance higher speeds than those stated in Section 316 upon through highways or upon highways or portions thereof where stop signs have

been erected at the entrances thereto provided signs are erected giving notice of the authorized speed, but local authorities shall not have authority to authorize by ordinance a speed in excess of fifty-five miles per hour."

The power to establish graduated speed limits on through streets is not very clearly expressed, although the word "speeds" not "speed" is used. But in construing the section the object must be taken into consideration, and the wide variety of situations in various cities and towns must be considered. There are many cities and towns in the state where the city limits extend to a considerable distance beyond the built-up residence portion. In many of these cities and towns there is a sector of the street that has few, if any, houses, and then another sector where the houses are scattered and at a considerable distance from each other, and then a congested residence portion with possibly a business or school district; all this on the same street. In such case it seems rather obvious that if a change from the speed limits, as specified by the legislature in Section 316, is to be made, the situations are so different in these various sectors that the municipality might well be inclined to provide different speed limits for the sectors if the power so to do exists. By providing for a lower speed limit in business and school districts than in residence districts, the legislature recognized that if there is a residence district and school or business district on the same street in the same city the speed limits should be varied.

It must be assumed that the legislature intended that the cities and towns in exercising the powers of control given, should have the right to do so in a practical way. If only one speed limit could be provided for one through street, the municipality could not provide a relatively high rate of speed, (even up to 55 miles per hour) in an outlying district without allowing such speed in other sectors of the street where the allowance of such rate of speed would be unthinkable.

Therefore, we are of the opinion that the cities and towns have the right to establish graduated speed limits on these through streets from 55 miles per hour down to 20 miles per hour, as in the judgment of the municipal authorities seems proper in various sectors of the street.

II

"Cities and towns may exercise such powers as are expressly conferred by statute and such as are incidental to those granted and to the exercise of its governmental functions."

Brockman vs. City, 79 Iowa 587;
Town of Hedrick vs. Lanz, 170 Iowa 437.

"Ordinances may not contravene the policy of the State as expressed in its legislation."

Town of Decatur vs. Gould, 185 Iowa 203.

There is no express authority in the statute for the designation by name by a city or town of a special speed sector of a street or a suburban district.

The question whether municipalities have the implied power to designate the sectors of the street wherein greater speed than those specified in Section 316 is authorized, should be determined in connection with the duties of the Highway Commission in relation to signs.

Section 283 provides as follows:

"The state highway commission shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this chapter for use upon highways within the state. Such uniform system

shall correlate with and so far as possible conform to the system then current as approved by the American association of state highway officials."

Section 284 requires the Highway Commission to erect such signs on the primary roads. Section 285 prohibits the local authorities from maintaining any traffic control device on highways under the jurisdiction of the State Highway Commission, except by the consent of the Commission. Section 286 provides for local traffic control devices, and it provides among other things that all such local control traffic devices hereafter erected shall conform to the state manual and specifications.

It appears from the copy of your letter of August 16, 1937, which you sent to the various municipalities, that pursuant to Section 283 you have adopted certain standard speed signs; including one for business districts, one for school districts, one for residence districts, one for special speed districts and one for suburban districts; the signs being uniform, so far as they can be, with the different speed limit for the various districts.

The Legislature having designated three different districts, namely, school, business and residence, if uniformity is to be attained, these special speed limits must be called "districts," and if a city provides for a high rate of speed in the outlying sections, and a lower rate of speed where the houses are scattered, but are closer together than in the outlying sections, it is necessary that some distinction must be made between the two districts, and you have called one a suburban, and the other, a special speed district. So far as calling a district a suburban district is concerned, while the legislature repealed the law providing for suburban speed districts, it is obvious that certain districts are suburban districts and may be so designated.

We think, therefore, that the signs that you propose to provide are proper to be furnished any city or town that desires to adopt the 35 mile hour speed limit for a sector of a through street, or a 45 mile hour speed limit for a sector of a street. If any city or town does not care to provide for the 35 mile or 45 mile an hour speed limit, then it is free to adopt such limitation under 55 miles in any sector and, of course, you will have to furnish signs accordingly.

We think that the municipalities have the implied power to designate a sector of a through street as a special speed district, and another sector as a suburban speed district.

TAXATION: HOMESTEAD TAX EXEMPTION: Mr. "A" who lives in Washington, D. C., and owns a home in Ft. Dodge in which his furniture is kept and Mr. "B" who works for the State and lives in Des Moines maintains a residence in Spencer in which his furniture is kept would not be entitled to a homestead tax credit on their property as they cannot qualify because they do not live in their homes six months during the year.

November 22, 1937. *Iowa State Board of Assessment and Review:* This department is in receipt of your request for an opinion upon the following question:

Mr. "A" lives in Washington, D. C., and owns a home in Ft. Dodge which is not rented and in which he keeps all his own furniture. Mr. "B" who works for the State of Iowa is required to live in Des Moines while still maintaining a residence in Spencer which is not rented and in which his furniture is still kept. Would Mr. "A" and Mr. "B" be entitled to the homestead credit?

Section 19 of the Homestead Exemption Act provides that for the purpose of the Act the homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under the Act actually lives six months

or more in the year with certain exceptions as to occupancy during the first year of ownership.

The intention and purpose of the Act is to encourage the acquiring and occupancy of homesteads and not to reduce the taxes on all property irrespective of whether occupied by the owner or not.

The legislature by the plain and unambiguous language of Section 19 of the Act made mandatory the *actual occupancy of the homestead for six months of the year* except during the first year of ownership.

It is therefore the opinion of this department that if "A" and "B" would have the benefits of the Act, they must comply with the requirements above set out.

TAXATION: HOMESTEAD TAX EXEMPTION: Persons who owned property prior to June 1, 1937, but were not living on that property could not file for the homestead credit at that time. But since June 1, 1937 they moved on the property and established a residence. Under those circumstances they would not be entitled to a homestead credit on the 1937 taxes payable in 1938, because they did not bring themselves within the requirement of the Act.

November 22, 1937. *Iowa State Board of Assessment and Review:* This department is in receipt of your request for an opinion upon the following question:

We have received many questions from persons who owned property prior to June 1, 1937, but were not living on this property, consequently, they could not file for the homestead credit at that time. But since June 1, 1937 they have moved on the property and established residence. Would they be entitled to file for the homestead credit for the year 1937?

Previous rulings of this department have disposed of every situation in connection with the above question save the possible situation where "A" became the owner of a home in 1935, or prior thereto, and rented the same to some other person. Sometime subsequent to June 1, 1937, "A" moved into the house previously rented to "B," established the same as his residence and now seeks to obtain a homestead credit on his 1937 taxes payable in 1938.

The pertinent portion of Section 11 of the Homestead Tax Exemption Act reads as follows:

"Any person who is the owner of a homestead, as defined in this Act, and who desires to avail himself of the benefits provided hereunder for the 1936 taxes payable in 1937 and for the 1937 taxes payable in 1938 may do so by filing a verified statement with the county auditor of the county in which the claimed homestead is located on or before June 1, 1937, and the claim of the owner must be supported by the affidavits of at least two disinterested free holders of the taxing district in which the claimed homestead is located."

Section 9 of the Act reads as follows:

"If any person fails to make claim for the credits provided for under this Act as herein required, he shall be deemed to have waived the homestead credit for the year in which he failed to make claim."

The purpose of the homestead tax exemption act as set out in the title thereto is to encourage the acquiring and ownership of homesteads. Special provisions and exceptions are made in the Act to make the benefits of the Act available to new purchasers of homesteads. This obviously is to promote the purposes of the Act as above set out.

No provision, however, is made for an exception to Section 9 of the Act in a situation such as is above set out.

Much as this department would like to extend the benefits of the Homestead Tax Exemption Act to every owner of homestead property, we cannot without legislating change the language and obvious meaning of the Act. We therefore must hold that "A" would not be entitled to file an application for a credit on his 1937 taxes.

ROADS: MILEAGE: BOARD OF APPROVAL: HIGHWAY COMMISSION: The board of approval shall determine the method of arriving at the goal of giving each township an "equitable mileage of improved roads." The board's decision is final, and there is no tribunal that has any authority to say that the plan approved by the board of approval shall not be carried out.

December 10, 1937. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* We have your request for an opinion on the meaning of paragraph 3 of Section 4644-c34 of the Code. You ask whether "it is necessary or advisable for the board of approval to allot sufficient funds for the use of each township, to improve substantially the same mileage, irrespective of the costs thereof, or should the allotment be according to geographical size or population?" And you say, "it has been suggested to the local officials that it means the apportionment of mileage, rather than of money."

You say that the percentage of improved roads in your county varies in the different townships from 21 per cent to 64 per cent, the former being in one of the more sparsely populated townships and the latter in the township in which the county seat is located.

The paragraph you refer to reads as follows:

"The board of approval in planning said construction program shall distribute the improvements in such manner as will give to each township, as soon as may be, an equitable mileage of improved roads, and those townships which have heretofore improved their township roads shall not be discriminated against in this new improvement program."

We do not think that the legislature intended to lay down any hard and fast rule that would be binding upon all of the counties, but instead, that it intended that the board of approval in each county should exercise a rather wide discretion in the determination of the matters placed within its jurisdiction.

It may be that a certain county might have a township in which the roads were so hilly, or had so many streams requiring bridges, that if the mileage to be improved in that township were made to exactly correspond with the mileage to be improved in another township, the cost of the improvement in the first township referred to might be entirely out of proportion to the cost in the other one.

It will be noted that the section itself provides that the action of the board shall be final. This seems to emphasize the discretionary feature of the statute, and the paragraph referred to says: "equitable mileage of improved roads"—not a proportionate mileage of improved roads.

Some force is added to this construction by the consideration of paragraph four of the same section. In contrast with the provisions in paragraph 3 for "equitable mileage of improved roads," paragraph 4, which relates to maintenance, provides that in setting aside the funds available for maintenance in any township "the board shall use as a basis the relative mileage of local county roads in the township as compared to the entire mileage of local county roads in the county." And again it is said in paragraph 4, that there shall be

set apart the township's "proportionate share of the maintenance funds for said county devoted to local county roads."

We are, therefore, of the opinion that it is for the board of approval to determine the method of arriving at a goal wherein each township is given an "equitable mileage of improved roads," and that no one has any authority to tell the board how it should proceed in arriving at that determination.

In this connection we note an opinion rendered on January 30, 1930, by the then Attorney General. In that opinion it seems that he was discussing a question whether the board of approval could expend most of the 35 per cent of the secondary road construction fund in one township. The then attorney general said:

"We are of the opinion that under the above statutory provision (that is par. 3), the improvements on the local county roads must be distributed among the various townships on an equitable basis, and that an improvement program which would provide for the expenditure and use in one township of most of the 35 per cent of the secondary road construction fund which is pledged to use on local roads would not be an equitable distribution of this fund, and would be discriminatory against the other townships of the county."

It is not difficult to agree with the writer of that opinion on the point that the proposed plan would seem to be very inequitable. But whether the plan was inequitable or not, we think that the board's decision was final and that there is no tribunal that has any authority to say that the plan approved by the board of approval shall not be carried out.

SCHOOLS: TEXTBOOKS: SALES TAX: Sales of textbooks purchased and owned by school corporation, made by a depository agent appointed by the board, are exempted from sales tax.

December 15, 1937. *Miss Agnes Samuelson, Att. of Fred L. Mahannah, Department of Public Instruction*, and *Mr. Louis E. Roddewig, Board of Assessment and Review:* We acknowledge your joint request for the opinion of this department upon a question which may be stated as follows:

Where a school board purchases textbooks with public school funds and places such textbooks in the hands of a local merchant for sale to pupils, such seller being paid a commission on such textbook sales, are such sales subject to the sales tax?

Section 3, Chapter 196, laws of the 47th General Assembly, being the retail sales tax act, exempts certain transactions from the provisions thereof. Among such transactions are those set out in sub-section (d) of said Section 3, which provides as follows:

"d. The gross receipts from sales of tickets or admissions to state, county, district and local fairs, and the gross receipts from educational, religious, or charitable activities, where the entire net proceeds therefrom are expended for educational, religious or charitable purposes."

Thus, the gross receipts from educational activities, where the entire net proceeds therefrom are expended for educational purposes, are included within the exemption.

Since 1897 the law has provided for the sale at cost by school corporations of textbooks to school pupils. This law was amended by the 47th General Assembly to permit also the loaning and renting of textbooks to pupils by school corporations. Section 4447, 1935 Code, as amended by Chapter 124, laws of the 47th General Assembly, provides among other things that

"4447. *Custodian—bond.* The books and supplies so purchased shall be under the charge of the board, who may select one or more persons within the county

to keep said books and supplies as the depository agent of the board under such rules and regulations as the board shall adopt. * * *"

The statute therefore recognizes the sale of textbooks by a school corporation as a proper educational activity, and provides that school boards may appoint depository agents to conduct such sales for the board under rules and regulations adopted by the board.

Section 4446, 1935 Code, as amended by the laws of the 47th General Assembly, provides that the money received from the rental or sale of such textbooks "shall be returned to the general fund."

It appears, therefore, that a school district may appoint as its depository agent to handle the sale and rental of textbooks, any person within the county. This person acting in such capacity is subject to all regulatory provisions of the law and is the agent of the board. The entire net proceeds from the sale of textbooks, under the statute, must be returned to the general fund of the district. This fund can be used only for educational purposes.

In view of the foregoing, we are of the opinion that sales of textbooks purchased and owned by a school corporation, made by a depository agent appointed by the board in pursuance of the statute, are exempted from the sales tax.

CONSERVATION COMMISSION: RABBITS: Possession of more than 20 rabbits (statutory limitation), although obtained by purchase, is prohibited.

December 16, 1937. *Mr. M. L. Hutton, State Conservation Commission:* We acknowledge receipt of your request for the opinion of this department upon two questions arising out of the provisions of Section (46), Chapter 99, laws of the 47th General Assembly, which section reads as follows:

"Section 46. Except as otherwise provided, it shall be unlawful for any person to buy or sell, dead or alive, any bird or animal or any part thereof which is protected by this chapter but nothing in this section shall apply to fur-bearing animals or rabbits."

The questions presented are stated as follows:

(1) Is it lawful for anyone to purchase rabbits and have more than 20 in possession?

(2) Is it lawful for rabbits so purchased to be transported for sale?

The language of the section quoted above is clear. Rabbits are animals protected by the provisions of Chapter 99. The sale thereof, however, is not unlawful since the excepting clause removes rabbits from the operation of the section. Section (31) of Chapter 99, which is the conservation act of 1937, designates the fur-bearing animals, and rabbits are not included in this designation. Section (32) of the act classifies what is called "game" and the "Leporidae": cottontail rabbits and jack rabbits, are included within such classification.

In the conservation bill as the same was submitted to the legislature by the conservation committee of the Senate, the words "or rabbits," now appearing at the end of said Section (46), did not appear. Rabbits were included in the exception by a House amendment in which the Senate subsequently concurred (see House Journal, 47th General Assembly, page 176). It is probable that Section (46) was made a part of the original bill in order to permit the sale of fur-bearing animals to the end that trappers might dispose of their catches. The law fixes no bag limit or possession limit in regard to fur-bearing animals. By including rabbits within the classification of animals

which may be lawfully sold, the legislature has, for this particular purpose, placed rabbits upon the same basis as fur-bearing animals. A review of the statutes does not indicate that the law intends that rabbits otherwise are to be classified as fur-bearing animals.

The statute fixes a possession limit as applied to rabbits. Section (39), Chapter 99, laws of the 47th General Assembly provides as follows:

"Section 39. It shall be unlawful for any person except as otherwise provided, to wilfully disturb, pursue, shoot, kill, take or attempt to take or have in possession any game bird or animal at any time except during the open season period embraced within the dates, both inclusive, specified for each variety and each locality, respectively, or in the open season take in any one day in excess of the number designated for each variety and/or each locality, respectively, or have in possession any variety of game bird or animal in excess of the number allowed in possession as indicated in the following table:

"Kind and Locality	Open Season	Bag Limit	Possession Limit
RABBITS—Cotton-tail and Jack—Entire state	August 1-March 1	10	20

The law thus provides that, except as otherwise provided, it shall be unlawful for any person to have in possession any game animal in excess of the number allowed by the statute. As stated above, we find no provision of the law that otherwise provides that the possession limit as regards rabbits is different from the statutory pronouncement.

Section 1780, 1935 Code, provides in part as follows:

"1780. *Transportation for sale prohibited.* It shall be unlawful for any person, firm, or corporation to offer for transportation or to transport by common carrier or vehicle of any kind, to any place within or without the state, for the purposes of sale, any of the fish, game, animals, or birds taken, caught, or killed within the state, or to peddle any of such fish, game, animals, or birds."

This statute by its terms forbids the offer for transportation or transportation for sale by common carriers or any vehicle of any kind to any place within or without the state of any game animal taken within the state.

In conclusion, it is our opinion that the law permits the sale of fur-bearing animals or rabbits. Rabbits, however, have not been classified as fur-bearing animals, and the law provides different requirements with respect to the former. Under the statute possession of more than 20 rabbits by any person, whether or not such animals have been acquired by purchase or otherwise, is unlawful. This provision is consistent with the statute permitting the sale of rabbits. Both statutes can be given effect. Repeals by implication are not favored, and there is no language in the statute which warrants a conclusion that the possession limit fixed by the law applicable to rabbits is to be relaxed in favor of one who may obtain such rabbits by purchase.

TAXATION: OMITTED PROPERTY: BUDGET LAW: (Sections 7156 and 7157.) It is apparent from the sections that the language of the local budget law has no reference to the action of the Treasurer in demanding omitted taxes, in instituting action to recover same, or in assessing omitted property.

December 16, 1937. *Mr. James C. Jenson, County Treasurer, Council Bluffs, Iowa:* This department is in receipt of your request for an opinion upon the following question:

"Does the budget law, Chapter 24 of the 1935 Code in any manner prevent me from collecting tax on omitted property or have any affect on my action?"

The local budget law as amended by the 47th General Assembly provides that no Municipality shall certify or levy in any year any tax on property subject to taxation unless and until certain conditions precedent, set out in the Act, are complied with. The word "Municipality" is defined by the Act as any city, town, school district, and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation.

Section 7155 of the Code reads as follows:

"When property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall, when apprised thereof, at any time within five years from the date at which such assessment should have been made, demand of the person, firm, corporation, or other party by whom the same should have been listed, or to whom it should have been assessed, or of the administrator thereof, the amount the property should have been taxed in each year the same was so withheld or overlooked and not listed and assessed, together with six per cent interest thereon from the time the taxes would have become due and payable had such property been listed and assessed."

Section 7156 of the Code reads as follows:

"Upon failure to pay such sum within thirty days, with all accrued interest, he shall cause an action to be brought in the name of the treasurer for the use of the proper county, to be prosecuted by the county attorney, or such other person as the board of supervisors may appoint, and when such property has been fraudulently withheld from assessment, there shall be added to the sum found to be due a penalty of fifty per cent upon the amount, which shall be included in the judgment. The amount thus recovered shall be by the treasurer apportioned ratably as the taxes would have been if they had been paid according to law."

Section 7157 of the Code reads as follows:

"The treasurer shall assess any real property subject to taxation which may have been omitted by the assessor, board of review, or county auditor, and collect taxes thereon, and in such cases shall note, opposite the tract or lot assessed, the words 'by treasurer.'"

It is apparent from the foregoing sections that the language of the local budget law has no reference to the action of the Treasurer in demanding omitted taxes, in instituting action to recover the same, or in assessing omitted property. The local budget law specifies conditions precedent required of Municipalities prior to their right to have property assessed. This has no bearing, relation to, or limitations on the rights of the Treasurer under the foregoing sections, because the Treasurer does not come within the definition of Municipality as contained in the Act.

Our courts have held time and again that the repeal of statutes by implication is not to be favored.

To hold that the local budget law makes inoperative supra sections of the Code would be to emasculate, without right or authority, from the body of our law essential statutes.

An analysis of the entire local budget law and the omitted property sections clearly shows that there is no conflict between the same.

It is therefore the opinion of this department that the local budget law does not in any manner prevent county treasurers from collecting tax on omitted property or have any effect upon their action, under supra sections.

As to the other questions set forth in your letter, we feel that it would be improper to attempt to answer the same inasmuch as litigation is contemplated

wherein the identical questions set out in your letter will be before the court for determination.

TAXATION: OLD AGE ASSISTANCE HEAD TAX: REFUND BY COUNTY TREASURER: Where taxpayer requests refund before January 1, 1938, and where no delinquent taxes are charged against him, then county treasurer to refund 1937 old age tax. Where there is no delinquent head tax, county treasurer should first credit 1937 tax on delinquencies.

December 20, 1937. *Mrs. E. R. Meredith, Assistant Superintendent, Division of Old Age Assistance:* In reply to your request for an opinion as to the interpretation of Section 3, Senate File 2, amending Section 5296-f34 and Section 5296-f35, Chapter 266-F1, of the 1935 Code of Iowa, which reads as follows:

"Section 3. Amend chapter two hundred sixty-six-F-one (266-F1), Code, 1935, by adding as a new section and following section fifty-two hundred ninety-six-g five (5296-g5), the following:

"Refund of 1937 Tax. The county treasurer shall make refund to any taxpayer requesting the same where the records of the 1937 per capita tax collections show said taxpayer to have paid the per capita tax heretofore levied for the year 1937 between the date of January 1, 1937, and the publication and effectiveness of this section. No refund shall thus be allowed after January 1, 1938. No refund shall thus be allowed where the individual is delinquent until as much thereof as is due has been credited on said delinquencies. The state comptroller shall return to the respective county treasurers, the amount of the 1937 per capita tax which has been delivered to said state comptroller, for the purpose of this refund. After January 1, 1938, the respective county treasurers shall remit any balance in said fund through the state comptroller to the old age pension fund."

and inquiring as to the duties of a county treasurer in crediting 1937 payment of head tax on delinquent old age assistance tax where no request for refund has been made by the taxpayers, we hereby submit the following:

The law is perfectly clear that where the taxpayer, before January 1, 1938, requests refund of said head tax and where no delinquent old age assistance head tax is charged against him, then and in that event, it is the duty of the county treasurer to refund said 1937 old age assistance head tax to said taxpayer upon request. It is also clear that where the refund is requested by the taxpayer and delinquent old age assistance head tax is charged against the said taxpayer, it is the duty of the county treasurer to first credit said 1937 old age assistance head tax payment on said delinquencies. Also, where no delinquency exists and no request is made by the taxpayer on or before January 1, 1938, then no further refund shall be allowed.

Now, as to the specific question on which an opinion is requested, viz., where no request for refund has been made by the taxpayer and where a delinquent old age assistance head tax is charged against the said taxpayer, it is the opinion of this department that the county treasurer should credit the said 1937 head tax on any delinquent old age assistance head tax existing prior thereto, for the reason that the fair and reasonable interpretation of this section of the Code is that the Legislature intended that the taxpayer should receive credit for said 1937 payment on any delinquent old age assistance head tax owed by the taxpayer, and that the Legislature did not intend that to enable the county treasurer to credit said tax, a request actually had to be made for a refund. However, to enable the taxpayer to secure a cash refund where no delinquency exists, an actual request for payment must be made.

It is also the opinion of this department that after January 1, 1938, any moneys collected for 1937 old age assistance tax and still in the hands of said county treasurer, shall be turned over to the State Comptroller for the old age assistance fund.

COUNTIES: AGRICULTURAL LIMING ACT: LIMESTONE PROGRAM: CHARITON RIVER BASIN: Funds appropriated by Chapter 22, laws 47th General Assembly may be expended to enable state to participate in county liming programs, subject to this limitation: funds to be used only in furnishing personnel to advise and assist county authorities. Method of procedure for inauguration program set out in detail.

December 22, 1937. *Mr. Charles A. Housh, Emergency Conservation Work:* We acknowledge receipt of your request for the opinion of this department as to whether or not a submitted proposal for Extension of Agricultural Limestone Program in the Chariton River Basin is legally acceptable. The said proposal is subjoined hereto for purposes of reference.

Chapter 150, laws of the 47th General Assembly, provides in general for the acquisition by counties of limestone quarries, for the purchase and sale of limestone by county boards to farm owners, and provides machinery for the sale and distribution of such limestone to such owners.

Chapter 22, laws of the 47th General Assembly, provides for the appropriation of the sum of $125,000 for each semi-annual period of the biennium, to be expended for the purposes set out in Section (1) of said chapter, which section provides as follows:

"Section 1. There is hereby appropriated for each semi-annual period of the biennium from July 1, 1937, to July 1, 1939, out of any funds in the state treasury not otherwise appropriated, the sum of one hundred twenty-five thousand ($125,000) dollars, which sum is to be used to enable the state of Iowa to participate in the program of the Civilian Conservation Corps, the Works Progress Administration and with federal and other agencies for conservation purposes and for acquiring, developing and administering submarginal lands which have become distressed or tax delinquent, to be used for reforestation, game development, grazing or other soil conservation purposes; to provide for the purchase or rental of supplies, materials, and equipment and the employment of the necessary personnel not provided by the federal government, and to purchase such additions to park and recreational areas now under improvement as may be expedient."

The general question presented by your inquiry is this:

To what extent may funds appropriated by Section (1), Chapter 22, laws of the 47th General Assembly, supra, be used to further programs for the furnishing of limestone to Iowa land owners?

It is to be noted that the language of Section (1), Chapter 22, above quoted, is general in its terms. Authority is given for the use of the appropriated fund "to enable the state of Iowa to participate * * * with federal and other agencies for conservation purposes."

The county liming act referred to above contemplates the cooperation of the counties with land owners to the end that through such cooperation depleted lands may be restored to a higher degree of productivity. It is apparent that a primary object of the legislation is to promote conservation and to improve the land, a natural resource of the state.

It is our opinion that funds appropriated by Chapter 22, laws of the 47th General Assembly, may be expended to enable the state to participate in the county liming programs. Such expenditures, however, are subject to specific

limitations. Such funds, in our opinion, can be properly expended in the furnishing of personnel to advise and assist the county authorities in instituting or co-ordinating their liming programs. Such participation would be in the interests of a soil conservation program which has been recognized by the legislature by the enactment of Chapter 150 aforesaid. Participation to this extent by the state in the liming programs of the counties, we believe, is permitted under the law.

Beyond this, it is apparent from the language of Chapter 150, that the legislature intended that the liming programs of the counties were to be self-sustaining and self-operating within the terms of the enactment. The said chapter vests control and management of such programs in the boards of supervisors and provides in detail the procedures to be followed in administering the law. It is our opinion that the program as outlined by the statute proper is exclusively the function of the county. Encouragement and assistance to enable counties to set up the programs contemplated by the statute can properly be extended by the state through its conservation agencies.

You have requested that this office submit a suggested form of procedure to be followed by counties which may desire to operate under the provisions of Chapter 150, laws of the 47th General Assembly. An examination of the said chapter indicates that the following procedure might be followed by counties under the provisions of the act:

(1) The county board should determine the lowest possible price at which lime in large quantities may be contracted for at the quarry or crusher. Competitive bidding could be arranged for if deemed likely to secure price advantage.

(2) After the cost price to the county is determined, a survey should be made by interested soil conservation groups or persons to determine the number of prospective purchasers and the approximate quantity of lime that can be sold, and also the payment plan desired by each prospective purchaser.

(3) At the time of such survey there should be available soil analyses of the land involved with recommendations as to amount of lime indicated, time of application, manner of application and other informative details which might be discussed with the prospective purchasers.

(4) At the time this survey is made, pledges should be obtained from prospective purchasers. The price basis to the purchasers should be that determined by the cost of lime to the board, plus the proportionate cost of the expense entailed by the county in carrying out the program. At the time such pledges are secured, the signers should also endorse a petition to be used as a basis for the supervisors acting under Section (3) of the act.

(5) If delivery of the lime is not taken at the source of supply by the user, the cost of transportation should, of course, be included as an item of the cost. It is believed that a more satisfactory result would follow the practice of uniformly requiring the purchaser to take delivery at the source of supply.

(6) If it appears that there are sufficient purchasers in number and quantity of order to permit the county to procure the lime at the price offered the board, the board should, by resolution, adopt its contemplated liming program and thereafter enter into a purchase contract with the producer. Because of varied local conditions, it is recommended that such contracts be prepared and approved by the county attorney.

(7) It is expected that certain purchasers will pay cash to producer at the time of delivery. Others will pay (1) by special assessment on or before

December 1st following the receipt; or (2) by a special assessment in five equal annual installments, payable on March 1st of each year following the receipt. Delivery to purchasers in groups (1) and (2) will need to be checked by a county checker at the place of delivery. A daily report should be made by said checker to the county auditor's office so that the special assessment can be spread on the tax books immediately after the delivery of the lime. Purchasers in the latter class will be required to furnish to the checker before delivery is made a clearance certificate from a proper county official showing arrangement made for the spreading of the special assessment. It is probable that the county will need to employ a special employee at the court house, whose duty shall be to handle the assessment details and see that consent of any lien holders is given to the transaction. It will be necessary to require that such purchasers furnish certificates of title in connection with their applications so that the person in charge of the program at the court house can check lien holders' consents. It is urged that the application of the purchaser be drawn in the form of a contract, properly acknowledged, and that specific consent be given that upon delivery of the quantity of lime purchased, the value of the same shall constitute a lien upon the real estate.

Section (4) of said Chapter 150 does not definitely provide that lien holders shall consent that the lien of the liming assessment be prior and superior to their encumbrances. In the interest of salability of the warrants to be issued under the provisions of the chapter, it is suggested that counties may well require that the consent of lien holders to subordinate their liens to that of the assessment be obtained.

(8) As an initial step in the program, the board should take steps to determine that the warrants issuable under Chapter 150 will be salable. It is suggested that producers of limestone might consent to payments to them being made in this medium. Other investors could supply the funds necessary to pay the expense of the additional employees required in carrying out the program. As soon as it appears that any county is likely to proceed with the program, this office in conjunction with the state auditor's office will assist in outlining a mode of procedure in the issuance and sale of warrants.

SCHOOL FUNDS: INTEREST: 3.5 per cent interest shall be charged for 1937 interest whether sale or resale of land acquired for permanent school fund occurred before or after the effective date of amendments enacted by 47th General Assembly.

December 27, 1937. *Honorable C. B. Murtagh, State Comptroller:* We acknowledge receipt of your request for the opinion of this department. In your letter you set out the following statement, and inquiry:

"The Forty-seventh General Assembly in Chapter 125 amends several sections affecting permanent school fund interest.

"We are particularly interested in Sections 4506 and 4507, where it changes the rate of interest from 4½ per cent to 3½ per cent.

"The Comptroller is obliged to figure the interest and apportion the same on an annual basis, our problem is: shall we figure the interest from January 1, up to the effective date of Chapter 125, at the rate of 4½ per cent and for the balance of the year at 3½ per cent interest?"

The legislature has by statute provided the manner in which the permanent school fund is to be administered. Educational and school funds and lands are placed under the control and management of the General Assembly by the constitution of Iowa—Article 9 (2nd) Section 1. The duty is placed upon the

comptroller to charge the counties on January 1st of each year with the interest on such school funds held by them.

There are two sections of the Code 1935 which are related directly to the question under consideration. These sections, as amended by the laws of the 47th General Assembly, read as follows:

"4506. *Report as to sales—interest.* County auditors shall, on or before the first day of January of each year, report to the state comptroller the amount of all sales and resales made during the year previous, of the sixteenth section, five-hundred-thousand-acre grant, escheat estates, and lands taken under foreclosure of school fund mortgages, and the comptroller shall charge the same to the counties with interest from the date of such sale or resale to January first, at the rate of *three and one-half* per cent per annum."

"4507. *Interest charged to counties.* The state comptroller shall also, on the first day of January, charge to each county having permanent school funds under its control, interest thereon at the rate of *three and one-half per cent* per annum for the preceding year, or such part thereof as such funds shall have been in the control of the county, which shall be taken as the whole amount of interest due from such county. All interest collected above the *three and one-half per cent* charged by the state shall be transferred to the general county fund."

The italicized words in the above sections indicate the changes made by the amendatory law, Chapter 125, Laws of the 47th General Assembly. Prior to the said amendments, the law provided for the charging of *four and one-half per cent* rather than *three and one-half per cent* interest per annum. Otherwise the sections were unchanged.

Under the provisions of Section 4506, supra, the duty of the comptroller is to charge interest at the rate of three and one-half per cent per annum on funds obtained by the counties from sales or resales of land acquired for the use and benefit of the permanent school fund. There is no authority for charging any other rate of interest than that now prescribed by the statute, that is, three and one-half per cent per annum from the date of such sale or resale. In our opinion the law requires such charge for 1937 interest whether the sale or resale occurred before or after the effective date of the amendments referred to.

Section 4507, 1935 Code, requires that the comptroller on January 1st shall charge interest at the rate of three and one-half per cent per annum *for the preceding year* or such part thereof as such funds shall have been in the county's control. The statute prescribed that such sum *shall be taken as the whole amount of interest due from the county,* and that any surplus be transferred to the county general fund. The legislature, it is assumed, was familiar with the long-standing procedure whereby the comptroller computed these interest charges on the calendar year basis. The general assembly might have provided that the four and one-half per cent rate was to be charged up at the time the new law became effective, and that after such time the lower rate charged. Such provision was not made by the legislature, and it is our opinion that the comptroller should figure the interest rate for the entire year 1937 at three and one-half per cent per annum. Such is the clear direction of the language of the statute, and such construction does not appear to be in conflict with the purpose of the general assembly.

STATE BOARD OF SOCIAL WELFARE: EXEMPTIONS: CLAIM OF STATE FOR BLIND ASSISTANCE: SECTION 19, CHAPTER 144, Laws of the 47th General Assembly: Recovery for blind assistance granted, either by state or county, must be under above section which specifically states that any recovery by state is subject not only to all lawful exemptions allowed by law, but also

subject to expenses of recipient's burial and last sickness. After recovery by state, state pays county one-fourth of such recovery. Claim of state subject to any lawful homestead exemptions which surviving spouse, minor children or heirs may have.

December 27, 1937. *Mr. Frank T. Walton, Superintendent, Subdivision of Aid to the Blind:* In reply to your request for an opinion as to the interpretation of Section 19, Chapter 144, Laws of the 47th General Assembly, which provides that the state shall have a claim for assistance granted to the blind, said claim, however, being subject to the exemption now allowed by law, we submit the following:

The complete section on which interpretation is asked reads as follows:

"Section 19. *Reimbursement from estate.* Whenever it appears, after the death of any person who has received aid under the provisions of this act, that his estate, after deducting the exemptions now allowed by law, has property over and above a sufficient amount to pay the expenses of his burial and last sickness, such property shall be charged with the amount paid under this act to such person during his lifetime or for his burial. The amount so paid shall be allowed as a claim against his estate in favor of the state, and upon recovery, the state shall repay to the county its proportionate share of the amount paid for such assistance and funeral expenses. An action may be brought in the name of the state to recover the same at any time within five years after the death of the person receiving aid as above provided."

Before the enactment of the above section, Chapter 272, Code, 1935, authorized counties to grant assistance for the blind, and Section 5384-a1 of said chapter provided for reimbursements by the counties for blind assistance from the estates of deceased recipients. Said section reads as follows:

"5384-a1. *Reimbursement from estate.* Whenever it appears, after the death of any person who has received aid under the provisions of this chapter, that his estate, after deducting the exemptions now allowed by law, has property over and above a sufficient amount to pay the expenses of his burial and last sickness, such property shall be charged with the amount paid by the county to such person during his lifetime.

A claim may be filed against his estate by the county for the recovery of the amount.

An action may be brought in the name of the county by the county attorney to recover the same and the statute of limitations shall not be computed until after the death of person receiving aid as above provided."

However, Section 1 of Chapter 144, Laws of the 47th General Assembly, repealed the above section and Section 19 of the 47th General Assembly was enacted in lieu thereof.

It will be noted that the foregoing sections are similar in a good many respects, the main distinction being that the first section authorizes recovery of blind assistance by the state and the second authorizes recovery of blind assistance by the counties. However, the two sections are almost identical insofar as the claim for recovery for blind assistance is concerned.

It has been suggested further that Section 5309-c1, Chapter 267, 1935 Code of Iowa, which reads as follows:

"5309-c1. *Homestead—when liable.* When expenditures have been made for and on behalf of a poor person and his family, as contemplated by Section 5309, the homestead of such poor person is liable for such expenditures when such poor person dies without leaving a surviving husband or wife or minor children."

has some application to the question involved. However, we note that Section 5322 of the same chapter limits recovery by the counties under this section for certain specific aid furnished, viz., food, rent, clothing, fuel, lights and

medical expense, and limits the aid granted to each person in a sum not to exceed $2.00 a week.

We further note that Section 5309-c1, Chapter 267, 1935 Code of Iowa, limits the recovery by counties to any homestead rights which the surviving husband or wife or minor children have in said property. This section is still in force and was not repealed by Chapter 144, laws of the 47th General Assembly, but it is our opinion that it does not give the counties the right to recover for blind assistance granted by counties under the repealed section, viz., Section 5384-a1, nor under the assistance granted by the State Board of Social Welfare under Chapter 144, Laws of the 47th General Assembly, for the reason that at the time Section 5394-a1, 1935 Code, providing for recovery by counties for blind assistance, was in force, this section, viz., Section 5309-c1, Chapter 267, Code 1935, was also in force, which leads to the conclusion that the legislature did not intend for recovery by the counties for blind assistance under this section because they already had a separate section in force dealing with recovery for blind assistance; and for the further reason that the legislature specifically limits the relief which poor persons are entitled to under this section. This relief does not include aid to the blind.

It would seem, therefore, that any recovery, either by the state or county, for blind assistance granted, must be under Section 19, Chapter 144, laws of the 47th General Assembly, and this section specifically states that any recovery by the state is subject not only to all lawful exemptions now allowed by law, but also subject to the expenses of the recipient's burial and his last sickness. This section does not provide for recovery by the county itself although it does provide that after recovery by the state, the state shall pay back to the county one-fourth of such recovery.

As to the question of homestead rights, it is the opinion of this department that the claim which the state has for aid furnished the blind under this act is and must be subject to any and all lawful homestead exemptions which not only the surviving spouse and the minor children have, but any homestead rights which are granted under the statutes to any heirs.

It is also the opinion of this department that the claim of the state for blind assistance is subject to any other exemption or exemptions which the statutes give to any heirs in a deceased recipient's property and which exemption is in force at the time of such recipient's death.

SCHOOLS: BUS DRIVERS: INSURANCE: LIABILITY: School bus driver liable for his torts when his status is that of independent contractor; is not liable when status is that of a governmental agent performing a governmental function. School boards not authorized to pay premiums on liability insurance.

December 28, 1937. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for the opinion of this department on six questions which are set out below. For the purpose of more convenient reference, the questions are considered separately.

1. Can a school district be held liable for damages as the result of an injury to a person other than an employee of the district when such injury is caused by the misfeasance, nonfeasance, or malfeasance of the school board, of an employee, or of an agent of the school board?

Many cases might be cited upon the proposition that political corporations such as counties and school districts are not liable in tort for damages. The

recently decided case, *Shirkey vs. Keokuk County*, 275 N. W. 706, cited with approval the general rule stated in Addison on Torts, Volume 2, page 1298, as follows:

"A plainly marked distinction is made, and should be observed, between municipal corporations, as incorporated villages, towns and cities, and those other organizations, such as townships, counties, school districts and the like, which are established without any express charter or act of incorporation, and clothed with but limited powers. These latter political divisions are called *quasi* corporations, and the general rule of the law is now well settled that no action can be maintained against corporations of this class by a private person, for their neglect of public duty, unless such right of action is expressly given by statute."

In the same case, distinguishing the liability of political and municipal corporations, the court said:

"The question as to whether or not the corporation is exercising governmental functions does not have, in our view, the same bearing in this case that it would have in a similar case against a city or town. The city or town may, in the exercise of its governmental function, be absolved from liability. The absolution from liability of a county or school district, does not rest upon this ground, it rests upon the ground that the county or school district is simply a quasi corporation and not clothed with full corporate powers, and it cannot be sued in cases of this character without regard to the question whether or not they are in the exercise of a governmental power or duty."

The holding of the above case, arrived at after an exhaustive discussion of precedents, in our opinion is clear authority for answering your first inquiry in the negative.

2. Can the school board, collectively or individually, be held liable for damages because of the misfeasance, nonfeasance, or malfeasance of its agents or employees?

In our opinion the law of Iowa is to be considered as well settled upon this question, and is expressed in the following language in the case of *Snethen vs. Harrison County*, 172 Iowa 81, as follows:

"* * * agents who perform the governmental functions are no more responsible than the artificial body—the corporation for which they acted. We see no reason for departing from any of these established rules.

"The trial court was right in sustaining the demurrers * * *"

After a review of the Iowa decisions, the court in the case of *Shirkey vs. Keokuk County, et al.*, referred to above, states:

"As the rule in this state is, the agents of the county and the officers are not liable because the county isn't liable, and hence, if it is desired to make the agents liable, the appeal should be to the legislature and not the courts."

This pronouncement, while applied to members of a county board of supervisors, is applicable to a board of school directors while acting in pursuance of their duties under the law. The Shirkey case indicates that this parallel may be drawn with respect to the liability of the officers of the county boards of supervisors and directors of school districts.

3. Under what circumstances does a school bus driver stand in the relation of an independent contractor and when in the relation of an employee or agent of the board?

This question requires a discussion in particular of four Iowa cases, all having a direct relationship to the above question. In 1929, the Iowa Supreme Court decided the case *Arthur vs. The Marble Rock Consolidated School District*. The widow of Harry Arthur brought an action under the Workmen's Compensation Act to recover compensation for her husband's death which was caused by a collision between a train and a school bus Arthur was operating under

contract with the said school district. The Supreme Court reversed the lower court, holding Arthur to be an independent contractor and, therefore, not within the operation of the Workmen's Compensation Act.

The statutes do not define the term "independent contractor." The term has been many times judicially construed. No hard and fast rule can be made which can be universally applied to reach a determination as to when the status of an independent contractor as distinguished from employee may exist. The difficulty of defining these terms is recognized in a statement from 31 *Corpus Juris* 473, which is as follows:

"It is impossible to lay down a rule by which the status of men working and contracting together can be definitely defined in all cases as employees or independent contractors. Each case must depend on its own facts and ordinarily no one feature of the relation is determinative, but all must be construed together."

Our Supreme Court recognized this difficulty in the case of *Franks vs. Carpenter*, 192 Iowa 1398, where it is said:

"There is no absolute rule for determining whether, under a given set of facts, the one doing or having charge of the work is an independent contractor or an employee."

Tests frequently applied to determine the quality of this relationship are set out in the Marble Rock case referred to above, in the following language:

"Many tests, however, have been suggested. Of them, the following is most prominently mentioned: Does the employee contract to and accordingly accomplish the final result, as distinguished from merely undertaking to furnish, and therefore only furnishing, the means by which the master does the work? *Pace vs. Appanoose County*, 184 Iowa 498; *In re Estate of Amond* (203 Iowa 306) supra. Illustrative of this thought is the following quotation from *Pace vs. Appanoose County*, supra:

"'The test oftenest resorted to, in determining whether one is an employee or an independent contractor, is to ascertain whether the employee represents the master as to the result of the work, or only as to the means. If only as to the result, and he himself selects the means, he must be regarded as an independent contractor.'

"Another standard by which this status may be measured is 'the right to terminate the relationship at will, without involving liability for the breach of the contract.' *In re Estate of Amond* (203 Iowa 306), supra. Again, consideration has been given to the control which one party exercises over the methods and details of the undertaking. *Norton vs. Day Coal Co.*, 192 Iowa 160."

Applying the above tests to each particular case, therefore, will be the formula for determining whether the status of the operator of a school bus is an independent contractor or an employee of the district.

The written contract between Harry Arthur and the school board is set out at length in the Mable Rock case. The court determined that the following elements in the contract indicated that the school board did *"not hire services, but rather, purchased transportation"*:

(1) the driver furnished his own vehicle with the exception of the bus body which was furnished by the school district. Supervision and control over fuel purchase, tires, repairs and such incidentals were entirely under the control of the driver;

(2) comfortable and sufficient blankets and robes were to be furnished by the driver in connection with the transportation;

(3) only a portion of the driver's time was occupied under the contract. The contract moreover provided that another driver satisfactory to the board could be substituted by the contracting driver.

The above circumstances induced the court to hold that the driver was not an

employee of the board but was an independent contractor. As such, they held that he was not within the provisions of the Workmen's Compensation Act.

In December, 1933, the Supreme Court of Iowa deciding another case, *Hibbs vs. Independent School District*, 218 Iowa 841, involving the liability of a school bus operator for negligence in failing to close securely a door of the vehicle, which omission, it was claimed, caused the injury to a school child occupant. In this case the contract of the driver with the school district was not before the court. Moreover, it is significant that the plaintiff's petition in this case alleged that the defendant driver was an employee of the school district. The district was made a party-defendant in the action as was the driver of the bus who was the wife of the regularly employed driver. The lower court directed a verdict in favor of the school district, but declined to so rule upon the appellant driver's motion, which motion was based upon the theory that she, as well as the school district, was engaged in a governmental function at the time the accident occurred. Upon the appeal, the court reversed the lower court's ruling, holding that the immunity from liability which extends to political corporations and their officers, must be held to apply to their employees as well, stating:

"The rule of nonliability exists because the functions being performed are for the common good of all without any special corporate benefit or profit."

The rule announced in the Hibbs case, which is still the law of Iowa, seems to be that where a governmental agency performs a governmental function through an agent or employee, and retains substantial control of the means or details whereby the result of the work is obtained, then such employee while engaged in such employment, is not liable for his torts, nor is the employer.

In the recent case, *Olson vs. Cushman*, which decision was handed down December 14, 1937, a driver of a school bus was the defendant in an action at law for the alleged wrongful death of plaintiff's decedent which, it was claimed, resulted from injuries received when the school bus in which he was riding, and which was driven by defendant, overturned. Among other defenses, the defendant set up the defense that at the time of the accident he was acting in a governmental capacity and performing a governmental function. The contract of the driver with the school district was before the court. The defendant under the contract was to furnish the bus, pay all expense, both operating and repair; he was to collect the pupils at certain hours and to return to take them to their homes in the afternoon. He was either to drive the bus himself or furnish a suitable driver. While not so engaged, he was at liberty to do other work. So much per month was to be paid him for furnishing such transportation. The court observed that the form of the contract was almost identical with the contract involved in the Marble Rock case, referred to above. The holding in this case is that the defendant was an independent contractor and was, therefore, liable for his own negligence.

In the *Shirkey vs. Keokuk* case, 275 N. W. 706, referred to above as authority for the rule that neither the political corporation nor its officers are responsible in tort, the defendant Kelly was an employee of Keokuk County. It is alleged that at the time of the accident Kelly was driving a tractor pulling a maintainer at a high rate of speed along the left side of the road, proceeding after dark and without lights. The plaintiff sustained injury when his car collided with Kelly's vehicle. The defendant Kelly demurred to the plaintiff's petition on the ground that at the time of the accident he was engaged in the perform-

ance of a governmental duty and was, therefore, not subject to liability. The Supreme Court (Justice Mitchell dissenting) affirmed the action of the lower court in sustaining the demurrer of Kelly. The Hibbs case was cited with approval in the majority opinion, and the rule was reiterated that agents of a political corporation are not liable because their principal is not liable, and that if it is desired to make such agents liable, the appeal should be to the legislature and not to the courts.

In the dissenting opinion, Justice Mitchell set out the reasons for his disagreement with the holding in the Hibbs case. In the recent Olson case it was observed, however, by Justice Mitchell who wrote the opinion, that the rule expressed in the Hibbs case is still the law of Iowa.

In view of the foregoing, it appears that it would be difficult, if not impossible, to answer definitely your third question. Such answer would necessitate the framing of a rule which in its application would solve in each varied circumstance the question of whether or not the relationship of employee or of independent contractor existed. We can say that if a board contracts in the manner set out in the Marble Rock and Olson cases, then the status of independent contractor rather than employee results. The court observed in the Olson case that a striking similarity existed between the form of contract in the Marble Rock case and in the Olson case. We note that the form of the contract set out in the Marble Rock case follows, almost verbatim, the suggested form of bus driver's contract set out in the appendix to Iowa School Laws and Decisions, 1935, prepared by the Department of Public Instruction. This being true, it would appear that the status of a driver who entered into a written contract with a school district in the manner and form referred to above would be that of independent contractor rather than an agent of the district or an employee. In this connection it should be stated that in the Marble Rock case the driver of the bus owned the chassis, the district owned the body of the vehicle. In the Olson case it is indicated that the driver owned the vehicle in its entirety. In the Keokuk case, the grader and the maintainer, it is assumed, were owned by the county.

We find upon inquiry that there is no uniformity among school districts as regards ownership of the busses used in transporting children to and from school. In some cases the district owns the vehicle. In others the ownership is divided, the driver owning the chassis and the district owning the body. In other cases the driver, or another, may own the vehicle in entirety.

If ownership of a vehicle affects the degree of control which the district or the driver may exercise in connection with the transportation, such circumstance may have weight in determining the status of the driver. Such ownership by a district, coupled with other circumstances indicating that the district itself is supplying and managing the transportation, and as an incident to such enterprise is employing the personal services of a bus driver, would present circumstances different from those confronting the court in the Marble Rock and Olson cases. Following the rule expressed by the majority in the Keokuk County case, it would appear that such *employee* would not be liable in tort for damages when operating such conveyance as a school bus.

4. What is the personal liability under each of these relationships?

As above indicated, the rule as announced in the *Shirkey vs. Keokuk County* case, supra, which is the latest pronouncement of our court upon the question of the liability of governmental employees for acts of negligence occurring in

performance of their duties, is that the exemption from liability for such acts accorded to a public corporation and its officers extends likewise to agents and employees of such quasi corporation. An independent contractor is not clothed with the immunity to suit which in some cases is extended to governmental bodies and their agents, and is liable for his own negligence. If the status of a driver of a school bus is that of independent contractor, it is suggested that the written contract between the driver and the district might be so drawn as to include the provision that the intention of the parties is that such relationship is contemplated by virtue of the contract.

5. When a school bus driver stands in such a relationship to the district as to make him personally liable for his acts, how must a liability insurance policy be conditioned to cover such liability?

If a school bus driver is in fact an independent contractor, he is liable for his own negligence. If such is his status, then an ordinary policy of liability insurance, provided the same covered any damage arising while the vehicle is in operation as a school bus, would be sufficient.

6. May the school board pay the premiums on such a policy direct to the insurance company or must such premiums be paid by the bus driver personally?

No statutory authority is conferred upon school boards to pay for insurance against the negligence of the drivers of school busses. Such boards are bodies of limited powers and must look to the statutes for their authority. As indicated by the cases cited above, there would be no liability for damage for tort to which the corporation or its officers in performance of their official duties, could be subjected. Therefore it is our opinion that a school board is, under the existing law, not authorized to pay such insurance premiums out of public funds. The independent contractor school bus driver is, by law, subject to liability for his own negligence. The responsibility of protecting himself against the consequences of his negligence is primarily his. We see no reason, however, why a school board may not require, as a condition precedent to contract with the driver, that he procure satisfactory liability insurance coverage. The school board is entitled to be assured that those with whom they contract are and will be responsible for their actionable negligence during the period the contract is in force.

LEGISLATURE: RETRENCHMENT AND REFORM COMMITTEE: VACANCY: Retrenchment and reform committee not authorized to appoint member to its committee to fill vacancy occasioned by death of chairman of ways and means committee of senate. Governor not authorized to fill vacancy. Senate in session alone empowered to fill vacancy.

December 30, 1937. *Honorable Roy Stevens, Committee on Retrenchment and Reform:* We acknowledge receipt of your request for the opinion of this department upon questions raised by the following motion adopted by your committee:

"Motion by McEnaney that Attorney General give his opinion as to whether or not the Retrenchment and Reform Committee has the right to fill the vacancy on said Retrenchment and Reform Committee caused by the death of one of its members.

"If the answer is the affirmative on the above question, we desire an opinion as to whether or not the ranking member of the Ways and Means Committee of the Senate shall automatically become chairman of Ways and Means Committee and be eligible to sit on this committee as a member."

The committee on retrenchment and reform is created by Section 39, Code 1935, which reads as follows:

"*Committee on retrenchment and reform.* The chairmen of the committees on ways and means, judiciary, and appropriations, of the senate and house, respectively, and two members from the senate, to be appointed by the president of the senate, and two members from the house, to be appointed by the speaker of the house, at each regular session, shall constitute a standing committee on retrenchment and reform."

The constituency of the committee is fixed by the statute. The committee is composed of the chairmen of the committees on ways and means, judiciary, appropriations, of the senate and house respectively, and two members from each of said branches appointed by the president of the senate and the speaker of the house, respectively.

The committee is created by the statute and its powers and duties are conferred by law. The general rule would be, therefore, that the committee possesses only those powers conferred by the statute and such incident powers as may need to be exercised to carry into effect the powers so conferred. No specific provision is made by the statute for the filling up of vacancies in its membership by the committee, and, without a grant of such authority, we are of the opinion that the committee on retrenchment and reform does not have power to fill a vacancy occurring in its membership.

The first question submitted by you, therefore, is answered in the negative.

Reference to the statute above quoted, Section 39, 1935 Code, discloses that six members of the committee on retrenchment and reform hold such position by virtue of their several appointments as chairmen of the three senate and the three house committees designated by the statute. These six legislators hold their several memberships in the committee on retrenchment and reform, not by reason of appointment to the latter body, but by virtue of the official status the respective branches of the general assembly conferred upon each. As soon as the committee appointments were confirmed by each branch of the assembly, the statute then operated to constitute the respective chairmen of senate and house ways and means committee, judiciary committee, and appropriations committee, members of the standing committee on retrenchment and reform.

Thus it appears that *chairmanship of a committee* is an essential accompaniment of membership in the committee on retrenchment and reform, except as to those four appointive members of the committee. Excepting the four appointive members, the statute is definite in its prescription that

"the chairmen of the committees on ways and means, judiciary, and appropriations, of the senate and house, respectively, * * * shall constitute a standing committee on retrenchment and reform."

The chairman of the ways and means committee of the senate, 47th General Assembly, accepted his position as chairman of the ways and means committee, and by virtue of this legislative designation, coupled with the operation of the statute, became a member of the committee on retrenchment and reform, which membership he also accepted. The death of this senator apparently leaves vacant his position on the committee on retrenchment and reform *which the law says shall be filled by the chairman of the ways and means committee of the senate.*

The questions presented by this situation, therefore, are these:

(1) Is there now a chairman of the senate ways and means committee?

(2) If such chairmanship is not now in being, what procedure is required to reconstitute such office?

It is apparent that if a successor to the chairmanship of the senate ways and means committee, formerly held by the deceased senator, is duly qualified and now acting as such, then such person, as chairman of the senate ways and means committee, would now be a member of the committee on retrenchment and reform.

This question necessarily involves the investigation of the legal status of a legislative committee, both before and after adjournment sine die of the assembly. A review of the proceedings of the senate of the 47th General Assembly relating to the selection of legislative committees shows that the senate committee on committees reported its appointments, and that report was approved January 20, 1937 (see Senate Journal, 47th General Assembly, page 89). The senate designated a chairman of the ways and means committee as well as a ranking member of such committee.

The functions and procedures of committees of the senate are not defined by statute, nor specified by senate rules. However, rule 45, rules of the senate, 47th General Assembly, provides as follows:

"The rules of parliamentary practice comprised in Robert's Rules of Order shall govern the senate in all cases to which they are applicable, and in which they are not inconsistent with the standing rules or orders of the senate, and joint rules of the senate and house of representatives."

Therefore Robert's Rules of Order may be referred to in order to determine whether or not the functions of the ranking member of a committee are discussed or defined. Section 52, Robert's Rules of Order (1915 edition), page 211, reads in part as follows:

"* * * Unless the assembly has appointed a chairman, either directly or through its presiding officer, the first named on a committee, and in his absence the next named member, becomes chairman, and so on and should act as such unless the committee by a majority of its number elects a chairman, which it has the right to do if the assembly has not appointed one, and which a standing committeee usually does. * * *"

It appears, therefore, that Robert's Rules of Order, which by incorporation are a part of the senate rules, is authority for the proposition that a "ranking member" becomes chairman of a committee in the absence of the first named chairman.

Therefore, during such time as the ways and means committee was an active committee of the senate, this rule would lend support to the view that the ranking member became chairman of the ways and means committee in the absence of the first named chairman with all the incidents pertaining to such chairmanship. It is of course true that the committee, being the creature of its creating authority, the senate, might be reconstituted in any manner that the senate may have provided by appropriate action during the legislative session.

However, there was no vacancy in the chairmanship of the ways and means committee during the last session of the senate which, during that time, effected the successorship of the ranking member of the said committee. If any succession to the chairmanship took place, such must have occurred after the adjournment sine die of the 47th General Assembly. Such succession could occur only if the ways and means committee of the senate was at the time of the death of the senator, a committee of the senate. In other words, there must have been a subsisting and real committee in being to admit of such committee's acquiring a chairman. Therefore our inquiry necessitates an in-

vestigation of the status of a legislative committee after the adjournment sine die of the body which it served.

Cooley, an eminent authority on legislative procedure, comments upon this subject in his work Constitutional Limitations, volume 1, 8th edition, page 276:

"The power of the committee will terminate with the final dissolution of the house appointing it."

Cushing, in his work Law and Practice of Legislative Assemblies, chapter 6, part II, par. 496, comments as follows:

"* * * The assembly itself has no authority, and can exercise none, except during a session, and while the assembly is duly organized for the transaction of business. So its authority terminates with the session * * * unless otherwise extended, all its orders, resolutions, and proceedings which are of a continuous nature, necessarily expire, with its own authority, at the end of the session."

Hines, in his Precedents of the House of Representatives, volume 4, par. 4545, an authoritative work dealing with legislative procedure in congress, comments as follows:

"* * * Neither house can constitute any portion of itself in any parliamentary function beyond the end of the session without consent of the other branch. When done, it is by a bill constituting them commissioners for that particular purpose."

It appears that the courts have consistently supported the opinions expressed by the text authorities cited above upon this subject. The Arkansas court, discussing this question in the case of *Tipton vs. Parker*, 71 Ark. 193, 74 S. W. 298, said:

"The committee, being a mere agency of the body which appointed it, dies when the body dies, unless it is continued by law; and it is not within the power of either house of the general assembly to separately enact a law, or pass a resolution having the force and effect of law. * * * The only legitimate office, power or duty of a committee of the senate, in the absence of a law, prescribing other functions and duties, is to furnish the senate which appointed it with information, and to aid it in the discharge of its duties."

The New Jersey Equity Court, in the case of *In re Hague*, 105 N. J. Eq. 134, 147 A. 220, said:

"All powers of the legislature, as such, cease upon the final adjournment of said body. All powers delegated to a committee appointed by a joint resolution of the senate and general assembly also cease."

The Supreme Court of Appeals of West Virginia in the case of *Ex Parte Caldwell*, 61 W. Va. 49, 55 S. E. 910, in reference to the various powers possessed by a branch of the legislature of that state, said:

"If the powers of that branch are at an end, the powers of a committee appointed by it are also at an end. The limb cannot exist after the body has perished. The agent or deputy cannot act after his principal is extinct. If the branch cannot act, how can a committee act deriving its life from the branch?"

In 1936 the Supreme Court of Pennsylvania, in the case of *Brown vs. Brancato*, 321 Pa. 54, 184 Atl. 89, considered legislative powers, and said:

"Legislative power is vested in the general assembly composed of the senate and house of representatives. * * * No power is vested in the house to act independently of the senate after the assembly adjourns sine die. * * * The legislative action of the general assembly in virtue of the session which convened * * * ended with its adjournment. After adjournment, the power of this committee of the house, if it had any power before, was effectually ended."

Other cases might be referred to in which the same general view is expressed.

We must conclude, and it is our opinion, that upon adjournment sine die of the general assembly, all functions of such body cease, except such as may be specifically preserved by statute, and that legislative committees necessarily become non-existent after such final adjournment. It follows, therefore, that no senate committee on ways and means could have survived the sine die adjournment of that body. The result is that there is now no chairman of the ways and means committee of the senate; thus no one now is qualified to hold the membership in the committee on retrenchment and reform designated for such chairman.

We have already determined that the committee on retrenchment and reform is not vested with authority to fill a vacancy in its own membership. The statutes do not provide for the filling of such. Reference is now made to Section (10) of Article IV of the constitution of Iowa, which relates to the power of the governor to fill vacancies in office, and which provides as follows:

"*Vacancies.* Section 10. When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy, 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."

Does the power of the governor, under the above provisions, extend to the filling of a vacancy in the membership of the committee on retrenchment and reform? If the answer is yes, then we must say that the governor has authority to appoint a chairman of a non-existent senate legislative committee. Under the statute the member who is to fill this seat must be the chairman of the ways and means committee of the senate. This vacancy, if such it may be called, exists only because there is not in being a chairman of the senate ways and means committee. There is a mode now provided for the constituting of a chairman of the senate ways and means committee, and in our opinion, that mode is exclusive. The senate, in regular or special session, is the only authority which has power to create its own committees and to designate the chairmen thereof. Since the mode exists for filling up this apparent vacancy, the governor has not the power to fill the same under the constitutional provision.

Until such time as a chairman of the senate ways and means committee is appointed, the senate in session being the only body with authority to create such office, there can be no one qualified to hold the place on the committee on retrenchment and reform formerly held by the deceased senator.

In this connection we respectfully suggest to the members of your committee, as legislators, that at the next session of the general assembly legislation be proposed to provide for the filling up of vacancies on the committee on retrenchment and reform which may be occasioned by interim contingencies.

SCHOOLS: BUS DRIVERS: LIABILITY: Section 511, Chapter 134, laws 47th General Assembly does not affect the general law applicable to liability for tort as applied to public corporations, including school districts. It does apply to an owner of a school bus who would be liable for negligence under the general law.

December 31, 1937. *Miss Agnes Samuelson, Department of Public Instruction:* We acknowledge receipt of your request for the opinion of this department upon a question which may be stated as follows:

Are school bus drivers or school districts liable for damages which may arise in connection with school transportation accidents by reason of the provisions of Section 511, Chapter 134, acts of the 47th General Assembly?

Section 511, Chapter 134, laws of the 47th General Assembly, provides as follows:

"Section 511. *Liability for damages.* In all cases where damage is done by any car by reason of negligence of the driver, and driven with the consent of the owner, the owner of the car shall be liable for such damage."

Chapter 134, laws of the 47th General Assembly, above referred to, comprises in part a revision of the Iowa motor vehicle laws. Prior to the passage of said chapter, Section 5026, 1935 Code, the forerunner of Section 511 above referred to, provided as follows:

"5026. *Liability for damages.* In all cases where damage is done by any car driven by any person under fifteen years of age and in all cases where damage is done by the car, driven by consent of the owner, by reason of negligence of the driver, the owner of the car shall be liable for such damage."

The language of the statute has been changed to some extent. The revised section does not include the provision that liability is attached in all cases where the car is driven with consent of the owner by a person under fifteen years of age. Excluding this provision, a study of the two sections leads us to conclude that the provisions of each are substantially the same.

We also have considered the words "person," "owner," and "driver" in the light of their definitions under the old laws as well as the revision, and, for the purpose of this opinion, there are not such changes in the legislative definitions of the above terms as to alter the similarity of the two sections.

In the case of *Bateson vs. Marshall County*, 213 Iowa 717, our supreme court construed Section 5026 referred to above. The question of whether or not the statute had application to ownership of property used for governmental purposes by a public corporation was considered by the court, which commented as follows:

"Quite apart even from this question, and reading the statute, in the light of its history and of its purpose we do not think that it has any reference to the ownership of public property by a municipality, when used solely for governmental purposes. We hold accordingly."

It is our opinion, in view of the foregoing, that Section 511, Chapter 134, laws of the 47th General Assembly, does not create any new liability as against school districts.

For a discussion of such liability under the general law, you are referred to an opinion of this department, addressed to the Superintendent of Public Instruction, under date of December 28, 1937.

The liability of the driver of a school bus for his acts of negligence occurring in the courts of his duties is determined by the status of his employment. This question is also considered in the opinion referred to above. We are of the opinion that the private owner of a school bus would be subject to the provisions of Section 511 when such vehicle is driven with his consent by another in any case where the defense of governmental immunity is not maintainable by such driver.

TAXATION: PUBLIC BIDDER ACT: DUTIES OF COUNTY ATTORNEY: 1. Extensive and careful investigation of records; 2. Extensive and careful investigation in regard to parties in possession; 3. Drawing and preparing necessary notices to be served; 4. Securing returns of service; and 5. Drawing affidavits of completed service.

December 31, 1937. *Mr. James E. Coonley, Chairman, County Attorneys Association, Hampton, Iowa:* This department is in receipt of your request for an opinion dated December 16th which reads:

"Whereas, in connection with the procuring of tax deeds for the County under the provisions of the Public Bidder Act, it is necessary that the following work be performed:

1. Extensive and careful investigation of records.
2. Extensive and careful investigation in regard to parties in possession.
3. Drawing and preparing necessary notices to be served.
4. Serving or procuring service of said notices.
5. Securing returns of service.
6. Drawing affidavits of completed service.

"We, the following Committtee appointed by the County Attorneys' Association of Iowa for the purpose of consulting with and procuring the opinion of the Attorney General of Iowa, desire your opinion as to whether or not it is the duty of the County Attorney to perform any or all of the above work."

On May 1, 1937 in an opinion written by this department and addressed to you, we held that it was the duty of the county attorney to render, without compensation, to the Board of Supervisors or any other officer such advice or service as is necessary in procuring tax deeds upon certificates of purchase issued at tax sales held under the public bidder's law, to-wit, Section 7255-b1 of the Code of 1935. A reference to said opinion and the reasoning therein contained, to a large extent, will provide the answer to the questions contained in your letter.

In addition to the specific statutes referred to in said opinion, may we call your attention to subdivision 6 of Section 5180 of the Code of 1935 which reads as follows:

"5180. *Duties.* It shall be the duty of the county attorney to:

* * *

"6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party."

Webster's Dictionary defines:

"*Prosecute.* To follow to the end; to press to execution or completion; to pursue until finished."

"*Proceeding.* An act, measure, or step in a course of business or conduct; a transaction; the course of procedure in an action at law."

Thus we see, by express statutory provision, it is the duty of the county attorney to commence and prosecute all proceedings in which the county is interested or a party. In the matter of the steps preliminary to the taking of a tax title, the county is both interested and a party.

We might add that it is not the duty of the county attorney to personally serve the notices required under the provisions of Section 7279. Section 7283 of the 1935 Code provides that the cost of serving the notices shall be added to the amount necessary to redeem and said notices should properly be turned over by the county attorney to the sheriff for service by him.

With the exception of the service of the notice, it is our opinion that it is the duty of the county attorney to perform all of the other matters listed in items 1 through 6 of your letter.

TAXATION: PUBLIC BIDDER LAW: TAX DEEDS: Interested taxing bodies in consenting to take a portion of the taxes due cannot make said consent contingent upon the sale to a designated individual; it is the duty of the board to obtain the highest possible price for property; the board should not sell property for fraction of taxes merely because interested taxing bodies have indicated willingness to accept same, unless it is best price that can be obtained; when an offer of portion of taxes is made to board they should, before accepting same, give some form of notice to public and give others opportunity to make better offer.

December 31, 1937. *Honorable C. W. Storms, Auditor of State:* This department is in receipt of your request for an opinion based on the following set of facts:

"Appanoose County has obtained tax deeds under the public bidder law to considerable property within the said county. Many of the former owners of said property, much of which is located in the towns of Mystic and Moulton, are securing the recommendation of the Mayor and Councilmen and the school board of their respective towns addressed to the county board of supervisors recommending that the specific property to which the county has obtained a tax deed, be sold to the former owner for 25 per cent of the amount stated in the tax sale certificate. The county board of supervisors acting upon these recommendations have been selling the property to said former owners in accordance with said recommendations without first attempting to secure a better price therefor. Is this procedure proper and legal?"

Section 10260-g1 of the Code of 1935 reads as follows:

"10260-g1. *Title under tax deed—sale—apportionment of proceeds.* When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the board of supervisors as provided in this chapter, except that any sale thereof shall be for cash and for a sum not less than the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interests and costs, without the written approval of a majority of all the tax levying and tax certifying bodies having any interest in said general taxes. All money received from said real estate either as rent or as proceeds from the sale thereof shall, after payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums on any buildings located on said real estate and after expenditures made for the actual and necessary repairs and upkeep of said real estate, be apportioned to the tax levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

From the foregoing section, it is apparent that it was the intention of the Legislature that the board of supervisors should not only control and manage the property to which the county had obtained a tax deed, but should also sell the same if the same were sold. The statute imposes a restriction upon said sale in that the same must be for cash and for a sum not less than the total amount stated in the tax sale certificate, including all indorsements of subsequent general taxes, interest and costs unless the written approval of a majority of all the tax levying and tax certifying bodies having an interest in said general taxes is first secured. The written approval by the other interested taxing bodies to the sale of the property for a lesser amount than the general taxes, interest and costs made before the Board has secured a buyer therefore is not improper, providing that such approval is not conditioned upon the sale of the property to a specified individual. In other words, it is entirely proper for a tax levying body to inform the Board that it consents to the sale of a certain property for a stated percentage of the taxes due thereon. Assuming then that "A" comes to the Board and makes an offer of 25 per cent of the taxes due thereon and turns over to the Board the written approval of two of the taxing bodies to the sale of the property at that price, it would then become the duty of the Board to exercise its discretion and determine whether or not the offer should be accepted. If they decide that it should be considered, they could by resolution move to accept the offer, if within a specified time after notice of such offer was published in the Board proceedings, no better offer was received. In this way the Board would give any interested person a chance to offer more, if he so desired, and thus secure for the taxing bodies the largest possible price.

It is therefore the opinion of this department that the interested taxing bodies in consenting to take a portion of the taxes due cannot make said consent contingent upon the sale to a designated individual; that it is the duty of the Board to obtain the highest possible price for the property; that the Board should not sell the property for a fraction of the taxes merely because interested taxing bodies have indicated a willingness to accept the same, unless it is the best price that can be obtained; that when an offer of a portion of the taxes is made to the Board they should, before accepting the same, give some form of notice to the public, and give others an opportunity to make a better offer.

HIGHWAY COMMISSION: SECONDARY ROADS: FARM-TO-MARKET ROADS: FEDERAL AID: Neither highway commission nor county board of supervisors has authority to enter into contracts for the construction of secondary road projects (with a view to procuring federal aid authorized to be given for "farm to market roads").

December 31, 1937. *Iowa State Highway Commission, Ames, Iowa:* In your memoranda of November 19, 1937, you inquire:

First: As to the power of the State Highway Commission to enter into certain contracts with county boards of supervisors for the construction by the Commission of certain secondary road projects, with a view to procuring federal aid for such projects. In other words, to procure the federal aid authorized to be given for "farm to market roads," and

Second: You inquire as to the boards of supervisors' right to enter into such contracts.

Your specific questions are:

Can the Commission legally proceed with this plan; and
can the boards of supervisors legally proceed with this plan?

The plan contemplates two contracts to be made with the counties. The first, or preliminary contract, sets out the conditions under which federal funds may be secured for use on secondary roads, as follows:

a. That not more than fifty per cent of the cost of any project may be paid from federal funds.

b. That the funds required to match the federal aid funds shall be furnished by the State, or by a sub-division of the State and shall be under the direct control of the State Highway Department.

c. That the State Highway Department shall be the responsible agency representing the State in all matters pertaining to the receipt and use of federal secondary road funds and the supervision and administration of federal secondary road projects.

d. That the State or the County shall guarantee the maintenance of any secondary road constructed as a federal aid secondary road project.

And it then recites that the Highway Commission has no funds available with which to maintain any federal aid secondary road or to pay for the portion of the cost of the improvement that is not payable by the Federal Government.

It then recites that both parties desire to secure for the county the benefits of federal aid, and the agreement is that the Commission will submit to the U. S. Bureau of Public Roads the specified secondary road project and request the Bureau to allot secondary road funds for use on the project, in an amount equal to 50 per cent of the estimated cost, but not exceeding a certain amount. It then provides, that in the event that said project is approved by the U. S. Bureau of Public Roads, surveys and plans will be made by the Commission,

but they are to be approved not only by the Commission but by the County before they are submitted to the U. S. Bureau of Public Roads. The necessary right of way is to be acquired by the county. After the approval of the plans and after the necessary right of way is secured, the Commission will advertise for bids and make a recommendation of award of the contracts, if satisfactory bids are received. The recommended contract award shall then be submitted to the Board and the U. S. Bureau of Public Roads for concurrence.

And then it provides:

"Should both of said parties concur in said recommended contract, the Commission will, on receipt of agreement by the Board to reimburse the Commission for funds advanced on account of the construction costs on said project, take final action awarding the contract."

It then provides, that the construction work shall be supervised by the Commission, and that cost of supervision, including engineering, inspection, etc., shall be a part of the construction costs and be paid accordingly.

It then provides that the cost of the project will be advanced by the Commission out of the primary road fund and "all such costs not reimbursed by the Federal Government will be reimbursed to the Commission by the Board."

It further provides, that when the Board concurs with the Commission in the recommended award, the Board shall enter into an agreement as required by the Commission for the payment of the county's portion of the construction costs advanced by the Commission and not reimbursed by the Federal Government. And that the Board shall enter into an agreement as required by the U. S. Bureau of Public Roads relative to the maintenance of the project after construction work is completed. And it further provides that the good faith of both parties is pledged to faithfully carry out the specific commitments.

The second contract, to be executed by the Board of Supervisors with the Commission, recites the receipt of the bids and the concurrence of the Board and the Highway Commission in the recommended contract, and in general is an agreement that the Board will reimburse the Commission for all sums advanced by the Commission in excess of the amounts received by the Commission from the Federal Government on account of the project; and that the payments will be made by the county promptly upon receipt of statements showing the amount due. And in consideration of the promise by the Board, the Commission agrees to make an award of the contract and to advance the payments on the project from the primary road funds.

It is noted that you have reason to believe that if these proposed contracts are found to be authorized by law, the Federal Government will consider this plan a compliance with its requirements, and that it will make allotments of federal funds accordingly.

The plan thus presented is well considered, and designed, we take it, to procure allotments from the federal government in aid of the construction of "farm to market" roads, in view of the fact that the 47th General Assembly failed to enact a law enabling the Highway Commission and the counties to comply with the federal requirements. The fact that the legislature considered an act which would have specifically authorized the Highway Commission and the counties to proceed to secure this federal secondary road aid is a consideration in the determination of the legality of this present plan. This act did not become a law, but at no time during its consideration was there any suggestion in the legislature that such a measure was not necessary, or that

present laws were sufficient. Nor was any such suggestion made in the controversy that arose over the Governor's veto. This fact clearly indicates the legislative construction of present laws affecting these matters. This is not conclusive. The legislative construction is not binding upon the courts, although the courts give such construction consideration in determining the state of the law.

It is appreciated that the object to be obtained by the plan you present is highly desirable, and if it can be legally carried out it would be a fine thing for the State. However, the questions you present must be answered by a consideration of the powers of the Highway Commission and boards of supervisors, respectively, in relation to roads, and if there is a lack of power, either on the part of the Highway Commission, or the boards of supervisors, to do the things required to be done by them, respectively, in carrying out the plan, then serious complications and possible loss of primary road funds might follow an attempt to put the plan into operation.

We have referred to these matters in appreciation of the importance of the questions presented.

Division I.

We will first consider whether the Highway Commission has the power to enter into the arrangement with the counties and with the Federal Government, as set out in the plan.

In substance, this plan provides for the use of the primary road funds for the improvement of secondary roads upon an agreement by the counties to reimburse this fund with all amounts expended that are not repaid to the Highway Commission by the Federal Government. In the numerous sections of the Code relating to the Highway Commission and its powers, we find the following pertinent sections.

Section 4755-b3 provides for the primary road fund, and Section 4755-b4 appropriates the primary road fund for the primary road system. Section 4755-b8 and following sections provide for the manner in which the Highway Commission shall proceed in the improvement of the primary road system.

The only sections of the Code authorizing the expenditure of primary road funds on secondary roads are, Sections 4626-f1, 4662, 4662-a1 and 4662-a3. Section 4626-f1 is as follows:

"Where funds have been allotted or appropriated or may hereafter be allotted or appropriated by the government of the United States for the improvement of streets and highways in this state, and the federal statutes or the rules and regulations of the federal government provide or contemplate that such work shall be under the supervision of the state highway commission, said commission is hereby authorized and empowered to let the necessary contracts for such construction work, to supervise and direct such construction work, to comply with the federal statutes, rules and regulations, and to cooperate with the federal government in the expenditure of said federal funds. In order to avoid delays, payment for such street and highway projects, or improvements constructed in cooperation with the federal government may be advanced from the primary road fund. When payments on said projects or improvements are received by the state from the federal government, the funds so received shall be credited to the primary road fund."

Sections 4662, 4662-a1 and 4662-a3 concern cases in which Boards of Supervisors of adjoining counties are unable to agree on the expense of making proper connections between the roads of the respective counties. The statutes provide that in such case the Commission shall notify the auditors that on a day named it will hold a hearing and make a decision and certify its decision

to the different boards. And the statute provides that the boards shall forthwith comply with the order. It then provides that if the boards, or either of them, fail to comply with the order within 60 days, the Commission "shall proceed to locate, construct, alter or improve said bridge or road in accordance with said decision."

And Section 4662-a3 provides that the bills of the commission for doing the work shall be forwarded to the auditors of the respective counties, and the auditors shall forthwith draw warrants for the amounts so audited and the county treasurer shall pay them the same as other county warrants.

So, we have authority given to the Highway Commission to use primary road funds in the two cases specified—one where it is a federal project and payment is to be received from the government, and the other in the making of connections between inter-county roads when the boards disagree.

Since the Primary Road Funds are expressly appropriated for the Primary Roads (this by Section 4755-b4), with these two statutory provisions allowing such funds to be advanced for the improvement of secondary roads in the instances specified, it would seem to follow that the legislature intended that only in the two instances specified could such funds be advanced for the improvement of secondary roads. If it be said that by this proposed procedure the Primary Road Funds would not in fact be depleted, but would in effect be loaned to the counties, this would not aid in validating the proposed action, for there is no authority in law for the Highway Commission to make such loans. The Highway Comission has only such powers as are conferred upon it by statute, and such powers as are incidental to the powers expressly conferred, and necessary and convenient in carrying out its functions. And as the legislature did not give the Commission the express power to enter into such an arrangement with the counties, and the entering into such arrangement would not be incidental to the carrying out of any powers expressly given, we do not think that the Highway Commission has authority to enter into the two contracts.

Division II.

But, if it be assumed that the Commission has the power to enter into the proposed contracts,—have the boards of supervisors of the several counties the right to enter into such contracts with the Highway Commission? By Section 4644-c1 of the Code, the duty to construct, repair and maintain the secondary road and bridge system is placed upon the boards of supervisors. Chapter 240 of the Code includes Section 4644-c1. It defines secondary roads and provides for the funds and for the allotment of 35 per cent to the improvement of local county roads, and then it pledges the balance of 65 per cent for certain specified purposes, including the payment of the cost of constructing the roads embraced in the existing county trunk road system. This chapter provides a comprehensive plan for the improvement and maintenance of the roads and provides for the appointment of an engineer, and in Section 4644-c23 all construction and maintenance work is placed "under the direct and immediate supervision of the county engineer who shall be deemed responsible for the efficient, economical and good faith performance of said work." The chapter provides for the manner of letting contracts, for the plan of the work, for the payment and a complete guide for the manner of expenditure of the secondary road funds. In many of the sections of the statute, provision is made for submitting various propositions, including the plan, and contracts

for an amount above a certain sum, to the Highway Commission for approval. And under Section 4626, sub-section 4, the Highway Commission is charged with the duty of investigating highway conditions in any county and reporting all violations of duty to the Attorney General.

In general, the line of demarcation between the duties of the Highway Commission, and the duties of the boards of supervisors with respect to roads is very clear. While the approval of the Highway Commission is required for many things that the boards of supervisors may do in carrying out their functions in constructing and maintaining the secondary roads, the fact remains that the boards of supervisors have the final say concerning these secondary roads. Nowhere in the statutes is any power conferred upon the Highway Commission to take over the actual work of constructing any secondary roads, except as provided in Sections 4626-f1, 4662, 4662-a1 and 4662-a3, as set out, supra.

It might seem that the boards of supervisors might well be authorized to allow the Highway Commission to take over the construction of a secondary road if it saw fit to do so, but the trouble is that the duties of the boards of supervisors with respect to secondary roads are .specifically prescribed in the statutes. While they have powers incidental to the performance of the functions expressly delegated to them, they have no power, except as expressly given by statute or impliedly given for the purpose of carrying out the powers expressly given.

The duty of constructing the secondary road system having been cast upon the boards of supervisors, have such boards the right to abdicate the functions so cast upon them by law and to delegate to the Highway Commission of the State the power to do the things that the statutes say they shall do? It is a general principle of law that delegated powers cannot be delegated. This applies in transactions between individuals, and it is a general principle that neither a public officer nor a public board can delegate discretionary powers. Of course, they may delegate ministerial duties. In the case of boards of supervisors, in the exercise of their discretion in the improvement of roads, they may let contracts for the actual doing of the work, but they cannot delegate their discretionary powers in relation to the roads. The case of *Kinney vs. Howard*, 133 Ia. 94, sets out the principle as follows:

"While it is a general rule that the powers conferred upon a public board or body cannot be delegated, yet a public corporation or municipality or instrumentality of government may, like a private corporation or person, do its ministerial work by agents or committees."

While the proposed contract carefully provides that the plan and specifications, and the contract, shall be approved by the board, there the power of the board ends. The Highway Commission then takes over the supervision of the work, and the county would be obligated to pay the commission whether the work done was satisfactory to it or not. Of necessity, if this sort of plan is to be adopted, the discretion of the board of supervisors must end with the approval of the contract. For if the board of supervisors were to retain its powers to accept or reject the work, then the Commission would not have the obligation of the county to repay it for the money expended. But a board of supervisors in giving up the duty cast upon it by law, and cast upon the engineer appointed by it by law to supervise the work, is giving up discretionary powers, and it has no authority so to do. It makes no difference as to the legal effect of the delegation of discretionary powers by an official whether the powers delegated be great or small. When the law

casts upon an official certain specified powers, no matter how petty, and no other official is given the right to execute such powers, the one on whom the powers are cast is the only official who can execute them. Boards of Supervisors, charged as they are with the duty of constructing secondary roads, have exclusive jurisdiction over the roads within the limits provided by law.

It is unfortunate indeed that the state of the law prohibits the Highway Commission and the Boards of Supervisors from taking action necessary to procure for the State the federal aid provided for "farm to market" roads, but the law being as it is, it is the opinion of this department that the Highway Commission and the Boards of Supervisors have no authority to enter into the proposed contracts, and that the contracts, if executed, would be invalid.

TAXATION: SALES TAX: PERSONAL PROPERTY: Where tangible personal property is purchased within the State of Iowa by a contractor fulfilling a lump sum contract he should be required to pay retail sales tax upon the purchase of materials used in the fulfillment of all such contracts irrespective of the fact that the project may be paid wholly or in part from State or Federal funds.

January 3, 1938. *Mr. Louis E. Roddewig, Chairman, Board of Assessment and Review:* This department is in receipt of your request for an opinion based on the following question:

1. Where tangible personal property is purchased within the State of Iowa by a contractor fulfilling a lump sum contract for a specified amount including both materials and labor necessary in the fulfillment of such contract, should the retail sales tax be paid by the contractor upon the purchase of all materials used in the fulfillment of such lump sum contract including materials which form a component part of the finished project notwithstanding the fact that the contract or project may be paid for wholly or in part by Federal or State funds.

Chapter 329-F1 of the Code of 1935 as amended by Chapter 196 of the Acts of the 47th General Assembly imposes a tax of two per cent upon the gross receipts from all sales of tangible personal property, except as otherwise designated, sold at retail in the State to consumers or users.

Section 3 of Chapter 196 of the laws of the 47th General Assembly provides:

"Sec. 3. *Exemptions.* There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax imposed by it, the following:

"a. The gross receipts from sales of tangible personal property which this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state.

"b. The gross receipts from the sales, furnishing or service of transportation service.

"c. The gross receipts from sales of tangible personal property used for the performance of a contract on public works executed prior to the ninth day of March, 1934.

"d. The gross receipts from sales of tickets or admission to state, county, district and local fairs, and the gross receipts from educational, religious, or charitable activities where the entire net proceeds therefrom are expended for educational, religious or charitable purposes."

It is thus apparent that with the exception of tangible personal property purchased for use in the performance of contracts on public works executed prior to the 9th day of March, 1934, our Legislature intended to and by the express provisions of the Act as amended did impose a sales tax on tangible personal property purchased by a contractor to fulfill a lump sum contract paid wholly

or in part by State or Federal funds, unless it can be said that such contract comes squarely within subdivision "a" of Section 3, supra.

At the outset it might be well to call attention to the well established principle that taxation is the rule and exemption the exception; that statutes granting exemptions are to be strictly construed; and that one who claims immunity to taxation has the burden of proof. *Sioux City vs. School District*, 55 Iowa 150; *Hale vs. Iowa State Board of Assessment and Review*, 271 N. W. 168; *Pacific Company vs. Johnson*, 285 U. S. 480.

There is no provision in the Constitution of the United States providing that a State may not tax the Federal Government or its instrumentalities, nor does the Constitution prohibit the Federal Government from taxing the State, its agencies, or instrumentalities. However, a long line of United States Supreme Court decisions lay down the rule that neither the State nor the Federal Government may tax the other or its respective instrumentalities in such a manner as to destroy the taxing power of the other or curtail in any substantial manner the exercise of its powers. This rule has been limited to the extent which will permit both governments to function with a minimum of interference so that neither government will seriously impair the taxing power of the other. *Flint vs. Stone Tracey Co.*, 220 U. S. 172; *Metcalf vs. Mitchell*, 269 U. S. 514; *South Carolina vs. United States*, 119 U. S. 437.

The question therefore is whether or not the imposition of such a tax on materials purchased by private contractors to fulfill lump sum contracts awarded by the State or Federal Government and paid for wholly or in part by State or Federal funds comes within the prohibition of subdivision "a" of Section 3, supra.

There is nothing in the Constitution of the State of Iowa which prohibits the imposition of a sales tax upon materials used by private contractors to fulfill state contracts. The Legislature recognized this fact when it passed the Act and by subdivision "c," Section 6943-f40 of the 1935 Code, exempted materials purchased for the performance of a contract on public works executed prior to the effective date of the Act. This department by a previous ruling has squarely held that even counties are subject to the provisions of the sales tax and the use tax act.

As to the implied prohibition prohibiting the State from taxing the Federal Government or its instrumentalities, it should be sufficient to state that the Supreme Court of the United States in three well considered cases, two of them decided within the last month, has held that private contractors performing United States contracts are not Federal instrumentalities within the rule prohibiting the imposition of the State tax upon Federal instrumentalities.

In *Trinityfarm Construction Co. vs. Grosjean*, 78 L. Ed. 918 the State of Louisiana imposed a gasoline tax upon gasoline consumed by the contractor in the performance of a contract that said contractor had with the United States Government for the construction of levees. At page 921 the court said:

"The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi River and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the Federal government is a party or in which it is immedi-

ately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net received by the contractor. The exaction in respect of its relation to the federal undertaking is wholly unlike those considered in *Choctaw, O. & G. R. Co. vs. Harrison*, 235 U. S. 292, 59 L. ed. 234, S. Ct. 27; *Indian Territory Illuminating Oil Co. vs. Oklahoma*, 240 U. S. 522, 60 L. ed. 779, 36 S. Ct. 453; and *Gillespie vs. Oklahoma*, 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171. Appellant is an independent contractor. *Casement vs. Brown*, 148 U. S. 615, 622, 37 L. ed. 582, 13 S. Ct. 672. It is not a government instrumentality. *Cf. Metcalf vs. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172, *Group No. 1 Oil Corp. vs. Bass*, 283 U. S. 279, 75 L. ed. 1032, 51 S. Ct. 432. Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. *Thomas vs. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 S. Ct. 340; *Metcalf vs. Mitchell, supra* (269 U. S. 524, 70 L. ed. 392, 46 S. Ct. 172); *Wheeler Lumber & Bridge Supply Co. vs. United States*, 281 U. S. 572, 74 L. ed. 1074, 50 S. Ct. 419. Appellant's claim of immunity is without foundation."

In *James vs. The Dravo Contracting Company*, reported at Section 93,046 of the Prentice-Hall Tax Service, the Supreme Court of the United States on December 6, 1937, had occasion to pass upon the following set of facts:

The Dravo Contracting Company, a Pennsylvania Corporation, contracted with the Federal Government for the erection of locks and dams in the Kanawha and Ohio Rivers. West Virginia had a statute known as the gross sales and income law which imposed a two per cent tax upon the gross income of all persons engaging in the business of contracting within the State. The Dravo Company claimed that the tax imposed by West Virginia was void upon the grounds that it laid a burden upon a Federal instrumentality. The court said:

"Is the tax invalid upon the ground that it lays a direct burden upon the Federal Government? The Solicitor General speaking for the Government supports the contention of the State that the tax is valid. Respondent urges the contrary. The tax is not laid upon the Government, its property or officers. *Dobbins vs. Commissioners*, 16 Pet. 435. The tax is not laid upon an instrumentality of the Government. *McCulloch vs. Maryland*, 4 Wheat 316; *Osborn vs. The Bank of the United States*, 9 Wheat. 738; *Gillespie vs. Oklahoma*, 257 U. S. 501; *Federal Land Bank vs. Crosland*, 261 U. S. 374; *Clallam County vs. United States*, 263 U. S. 341; *New York ex rel. Rogers vs. Graves*, 299 U. S. 401. Respondent is an independent contractor. The tax is non-discriminatory. The tax is not laid upon the contract of the Government. *Osborn vs. Bank of the United States, supra*, p. 867; *Weston vs. Charleston*, 2 Pet. 449; *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S. 429; *Telegraph Company vs. Texas*, 105 U. S. 460; *Leloup vs. Port of Mobile*, 127 U. S. 640; *Williams vs. Talladega*, 226 U. S. 404; *Federal Land Bank vs. Crosland, supra; Willcuts vs. Bunn*, 282 U. S. 216; *Panhandle Oil Company vs. Knox*, 277 U. S. 218; *Indian Motocycle Company vs. United States*, 283 U. S. 570; *Graves vs. Texas Company*, 298 U. S. 393. The application of the principle which denies validity to such a tax has required the observing of close distinction in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system. In *Weston vs. Charleston, supra*, and *Pollock* vs. *Farmers' Loan & Trust Co., supra*, taxes on interest from government securities were held to be laid on the government's contract—upon the power to borrow money—and hence were invalid. But we held in *Willcuts vs. Bunn, supra*, that the immunity from taxation does not extend to the profits derived by their

owners upon the sale of government bonds. We said (Id., p. 225): 'The power to tax is no less essential than the power to borrow money, and, in preserving the latter it is not necessary to cripple the former by extending the constitutional exemption of taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' Many illustrations were given."

The same conclusion was reached by the United States Supreme Court in the case of *Silas Mason Company, et al. vs. The State of Washington,* decided on the 6th day of December, 1937. This was a suit brought to restrain the enforcement of the occupation tax act of the State of Washington as applied to the gross income received by the Mason Company under contracts with the United States Government for work performed in connection with the building of the Grand Coulee Dam on the Columbia River. The court held that its ruling in the Dravo case in respect to the validity of a similar tax imposed by West Virginia was controlling.

We are not unmindful of the fact that this question has heretofore been before this department and a contrary opinion given by our predecessor. No doubt had our predecessor had the benefit of the above cited opinions, he would have reached a different conclusion, and the previous opinion is therefore withdrawn.

It is accordingly the opinion of this department that where tangible personal property is purchased within the State of Iowa by a contractor fulfilling a lump sum contract, he should be required to pay retail sales tax upon the purchase of materials used in the fulfillment of all such contracts irrespective of the fact that the project may be paid for wholly or in part by State or Federal funds.

2. Further, in the event the contract is being fulfilled within the State of Iowa and the contractor purchases materials directly from a supplier without the State of Iowa for the same purposes and under the same conditions as above, should the contractor be required to report and pay to the State of Iowa the two per cent personal property use tax upon all tangible personal property used in the fulfillment of the contract, in the event such tax has not been paid to his supplier?

In a previous opinion of this department addressed to Roscoe S. Jones on October 9, 1937, we said the following in discussing the use tax act:

"The use tax act was enacted by the Legislature as a complement to the sales tax act. Its purpose was to impose a tax on goods purchased outside of the State for use in the State equal to the sales tax that the buyer would have paid had he purchased said goods in the State of Iowa."

The same reasoning contained in the discussion of question No. 1 being applicable, question No. 2 should be answered in the affirmative.

SCHOOLS: TUITION: PROMOTION: CERTIFICATE: Since student did not pass successfully the 8th grade examinations, he is not entitled to a certificate of any kind. Under circumstances (where quasi certificate issued) school board not authorized to pay high school tuition.

January 8, 1938. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for the opinion of this department upon a question arising under the provisions of Section 4276, 1935 Code, which pertains to the requirements for admission to high school of a pupil who has completed an elementary course in a corporation, which corporation does not maintain a high school.

Section 4276 provides as follows:

"4276. *Requirements for admission.* Any person applying for admission to any high school under the provisions of Section 4275 shall present to the officials thereof the affidavit of his parent or guardian, or if he have neither, his next friend, that such applicant is entitled to attend the public schools, and a resident of a school district of this state, specifying the district. He shall also present a certificate signed by the county superintendent showing proficiency in the common school branches, reading, orthography, arithmetic, physiology, grammar, civics of Iowa, geography, United States history, penmanship, and music.

"No such certificate or affidavit shall be required for admission to the high school in any school corporation when he has finished the common school branches in the same corporation."

It is stated in your letter that it is common practice for county superintendents to hold examinations and to base the issuance of the certificate of proficiency upon the grades received in such examination.

In the instant case, it appears that the county superintendent conducted such an examination. That a certain pupil failed to pass all the examination given. That the county superintendent permitted said pupil to attend the graduation exercises, and there presented to such pupil a "certificate" in the following form:

"PUBLIC SCHOOLS"
This Certifies That

....

has completed the Course of Study prescribed by Law for the Common Schools of Iowa, and therefore merits this

CERTIFICATE

Given at Newton, Iowa, this........day of.................., 193....

....
County Superintendent"

The form is dated and signed by the county superintendent.

To those pupils who passed the examination, the county superintendent delivered another form of certificate entitled "Certificate of Promotion to High School," and also a "Certificate of Admission to High School," in which latter certificate the grades received by the pupil in the various subjects included in the examination are set out.

The question you ask may be stated as follows:

Does the possession of the "certificate" held by the pupil first referred to above entitle him to attend an approved public high school and obligate his own district to the payment of his high school tuition?

What is the purpose of the requirement that the pupil shall present the certificate of proficiency? Manifestly, it is to furnish evidence that the child is fitted to carry high school work. Such is the purpose of the examinations which are given by the county superintendent, and upon the result of which the issuance of a certificate is determined

The "certificate" given to this child sets out that the holder has "completed the course of study prescribed by law for the common schools of Iowa." By its terms it would appear that high school as well as elementary course of study had been completed by the pupil, since high schools are a part of the common school system of this state. The certificate on its face is misleading and its language infers that the holder has successfully completed a course of study in the elementary schools.

We are of the opinion that the certificate given in this case is not such as the statute contemplates, and that it may not be so used. The recipient was

advised prior to the time of delivery of the so-called "certificate" that his eighth grade examinations had not been successfully passed so as to entitle him to a certificate of admission to high school. He was advised that if he wished to enter high school it would be necessary for him to take additional work in eighth grade subjects and finally pass a later examination. This information was given to the pupil in a letter addressed to him by the superintendent prior to the time of the graduating exercises.

The pupil was not qualified to be certified as proficient within the intendment of the statute. This fact was known to all the interested parties. These facts control the ambiguous language of the so-called "certificate." While the "certificate" appears to be a form of diploma, it is not in fact a certificate of proficiency and was not intended as such by either the superintendent or the pupil who received it.

In view of the foregoing, it is the opinion of this department that the certificate issued to the pupil under the above circumstances does not entitle the holder to attend an approved public high school and obligate his home district for payment of tuition costs. It is further our opinion that a county superintendent of schools does not have authority to issue a form of official diploma to a pupil who has not demonstrated the proficiency required to permit him to attend high school.

NARCOTICS: PHYSICIANS: DENTISTS: VETERINARIANS: PHARMACISTS: LICENSES: As long as physicians, dentists, pharmacists and veterinarians stay in regular course of legitimate professional activities, they are not subject to a license.

January 10, 1938. *Mr. John Heerema, Secretary-Treasurer, Board of Pharmacy Examiners:* We are in receipt of your request for an opinion upon the following question:

Are pharmacists, physicians, dentists, and veterinarians required to be licensed under Section 3, Chapter 114, Acts of the 47th General Assembly, to sell narcotic drugs in the State of Iowa?

Section 3 of that chapter reads as follows:

"No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a *wholesaler* shall supply the same, without having first obtained a license to do so from the Iowa pharmacy examiners. The fee for such license shall be five (5) dollars. Every license shall expire on the thirtieth day of June following the date of issuance of such license and shall be renewed annually. The renewal fee shall be two (2) dollars. Provided, however, that this section shall not apply to pharmacists, physicians, dentists, and veterinarians in the regular course of their legitimate professional activities."

"Wholesaler" is defined under paragraph 6, section 1, of that chapter as follows:

" 'Wholesaler' means a person who supplies narcotic drugs that he himself has not produced nor prepared, on official written orders, but not on prescriptions."

"Official written order" is defined in paragraph 17 of section 1, as follows:

" 'Official written order' means an order written on a form provided for that purpose by the United States commissioner of narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law."

You inform us that pharmacists, physicians, dentists and veterinarians do not produce or prepare narcotic drugs. You also tell us that physicians, dentists

and veterinarians dispense or administer said drugs in the same state in which they receive them, but that pharmacists do compound or mix them. Our first question then, is to determine whether or not a pharmacist is a wholesaler. Referring again to paragraph 6 of section 1, we note that a pharmacist does not produce or prepare narcotic drugs.

We turn next to the question of whether or not a pharmacist dispenses the drugs on "official written orders," as set forth in the definition. Turning to paragraph 3 of Section 6, we find that a pharmacist may, upon an official written order, sell to a physician, dentist or veterinarian, in quantities not exceeding one ounce at a time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty per cent of the complete solution to be used for medical purposes. That is the only authority found in the act that a pharmacist has for dispensing drugs on official written orders. He, of course, may fill written prescriptions for drugs properly given as is set forth in the first paragraph of Section 6, but these prescriptions are not on official written orders, but are on regular prescription orders of the physician, dentist or veterinarian.

Turning our attention again to paragraph 6 of Section 1, we find that to a limited extent a pharmacist may dispense drugs on official written orders, and that he has authority to dispense on prescriptions. It is probably true, therefore, that a pharmacist does come within the classification of those persons required to obtain a license under Section 3 of the act, although there is some question in our mind as to whether or not a pharmacist can be classified as a wholesaler within the definition of the act when his dispensing on official written orders is so restricted as hereinbefore set out. Be that as it may, he nevertheless is exempted from procuring a license under that section if he dispenses in the regular course of his legitimate professional activities as a pharmacist. What is meant by his regular course of legitimate professional activity? We think that means his customary practice as restricted by law. We have heretofore seen that it is customary and legal for the pharmacist to dispense limited amounts of narcotic drugs upon "official written orders," and, therefore, we must come to the conclusion that in so doing he has remained within the exemption just referred to, and therefore is not required to be licensed.

We do not mean to say that a pharmacist could not so conduct himself as to not come within the provisions of the exemption. He might enter into the field of growing and cultivating narcotic drugs and thereby be required to procure a license. He might become a manufacturer and be required to procure a license, or he might become a wholesaler and dispense drugs as provided in Section 5 of the act, on official written orders, and thereby be not subject to the restrictions that have been heretofore set out in paragraph 3 of section 6. In other words, we do not mean to say that just because a person is a pharmacist that under no conditions is he required to procure a license, but we do say that if he dispenses narcotic drugs in the regular course of his legitimate professional activity and sells on official written orders, as is prescribed in paragraph 3 of section 6, he comes within the exemption provided by law, and it is not necessary that he be licensed to so carry on his business.

Turning next to physicians, dentists and veterinarians, we find that they have no authority whatsoever to dispense on official written orders. They are limited, as is shown by Section 7 of the act, to giving prescriptions, admin-

istering and dispensing narcotic drugs. That is to say that they may give a person a written prescription for narcotic drugs, and that person could have the same filled by a pharmacist. They may also administer drugs to patients, or they may dispense the same. In order for them to dispense narcotic drugs, it is first necessary that they procure them, and they may do so on official written orders either from pharmacists or from manufacturers or wholesalers, as is authorized in Section 5 of the act.

It is clear then that physicians, dentists and veterinarians do not come within the definition of the word "wholesaler," because they do not dispense on official written orders. You have also informed us that they do not manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and such being the case, they are not required to procure licenses to dispense narcotic drugs. In any event, they are also exempted from the provisions of the licensing section as long as they act in the regular course of their legitimate professional activities.

What has been said heretofore in regard to pharmacists establishing themselves in the field of growers, manufacturers and wholesalers of narcotic drugs and therefore subject to a license, is also true in regard to physicians, dentists and veterinarians. Our holding is that as long as they stay in the regular course of their legitimate professional activities, they are not subject to a license as is prescribed in section 3 of the act.

SCHOOLS AND SCHOOL DISTRICTS: VOCATIONAL EDUCATION: TRAVEL: EXPENSES: Local school boards are authorized to pay travel expenses of vocational teachers, occasioned by supervision of vocational students' activities, when such travel is approved by state board and local school board as integral part of program.

January 12, 1938. *Mr. Forest E. Moore, Board for Vocational Education:* This department acknowledges receipt of your request for an opinion upon the following question:

"Is it within the legal province of the boards of various school corporations to use local public school funds to pay the travel expenses of vocational agriculture teachers to agricultural fairs, Future-Farmer assemblies and similar meetings and for trips made for the purpose of securing livestock, seed, finances and supplies needed in connection with the supervised farm practice work of agricultural students when these trips involve the supervision of those vocational agriculture student activities, which are accepted by the Iowa state board for vocational education as being integral parts of the program of vocational education in agriculture?"

The George-Deen Vocational Education Act (Public No. 673, 74th Congress) makes provision for the further development of vocational education in the several states and territories through the authorization of an appropriation in the sum of $12,000,000. Among other provisions of the act, it is provided that one-third of the sum so appropriated each year shall be allotted to the states and territories in the proportion that their farm population bears to the farm population of the states and territories to "be used for the salaries and necessary travel expenses of teachers, supervisors, and directors of agricultural subjects in such States and Territories." The act provides further that the several states and territories shall be required to match by state or local funds, or both, 50 per cent of the appropriations authorized under the provisions of the act until June 30, 1942. After 1942 the proportionate part which the state or territory is required to expend increases until the year

1946, after which time the beneficiary state or territory is required to match dollar for dollar the federal appropriation.

In Iowa the state board for vocational education is the statutory agency which directs and supervises the disbursement of such federal funds. The state board for vocational education was created by an act of the 37th General Assembly, which became effective April 21, 1917. The duties and powers of the said state board are defined by the law, which appears in Chapter 191, 1935 Code.

Under the Iowa law, "the local community" is required to match the amount of money which it receives in any year from the federal fund. The George-Deen act, which is quoted in part above, specifically provides that necessary travel expenses of vocational teachers may be expended out of the federal fund appropriated. It is apparent from a review of the activities which are carried on in connection with such vocational education, that a considerable part of the program necessarily must be carried on beyond the territorial limits of the school house. Laboratory work and field trips, crop inspection, stock selection and judging, and the like are a few of the activities which require that such training be extended and projected beyond the confines of the class room.

Among other duties placed upon the state board for vocational education by the statute is the following:

"3840. *Duties of board.* The board shall:

* * *

"7. Establish standards for, and annually inspect as a basis of approval, all schools, departments, and classes, and all teachers' training schools, departments, and classes, applying for federal and state moneys under the provisions of this chapter."

The state board, in pursuance of the exercise of the above duty, has determined that certain travel on the part of vocational agriculture teachers is necessary and an integral part of the vocational education program contemplated by the law. The federal act recognizes such travel as necessary and incident to the carrying out of the purposes of the act, and permits the payment of the cost of such out of federal funds. We understand further that the federal board has approved the Iowa state board's proposals for the allowance of travel expense to vocational agriculture teachers which may be incurred in connection with the activities set out in your question. Both the federal government and the state board recognize such expense as a part of the cost of the instruction in vocational subjects.

It is our opinion that the legislature intended that the boards of school corporations be authorized to cooperate with the state board for vocational education to the end that the full advantages of the federal program be enjoyed by the local communities. Section 3846, Code 1935, provides as follows:

"3846. *Powers of district boards.* The board of directors of any school district is authorized to carry on prevocational and vocational instruction in subjects relating to agriculture, commerce, industry, and home economics, and to pay the expense of such instruction in the same way as the expenses for other subjects in the public schools are now paid."

In view of the foregoing, it is the opinion of this department that school boards are authorized to pay travel expenses of vocational agriculture teachers, occasioned by the supervision of vocational agriculture students' activities, when such travel is approved by the state board and by the local school board as an integral part of the program of vocational education.

STATE CONSERVATION COMMISSION: GAME REFUGES: HUNTING: PARKS: Law permits organized hunt for predatory animals within state park, provided such hunt is carried on under specific authority and direction of state conservation director.

January 24, 1938. *Mr. M. L. Hutton, State Conservation Commission:* We acknowledge receipt of your request for an opinion of this department upon a question arising under facts which may be stated as follows:

Certain state parks have been established as state game refuges under the provision of Chapter 86, Section 1709-a1, Code 1935. The conservation commission is interested in predator control, and one of the main predators is the fox, on which there is a continuous open season.

Would it be permissible under the law for an organized hunt to be participated in by citizens under the direction and supervision of the state conservation director, to engage in the hunting and shooting of foxes within a state park which is a state game refuge?

Section 1709-a2, 1935 Code, provides in part as follows:

"1709-a2. *Hunting on game refuges* It shall be unlawful to hunt, pursue, kill, trap or take any wild animal, bird, or game on any state game refuge so established at any time of the year, and no one shall carry firearms thereon, providing, however, that predatory birds and animals may be killed or trapped under the authority and direction of the state conservation director."

Chapter 99, laws of the 47th General Assembly, Section 120, provides as follows:

"Sec. 120. The use by the public of firearms, fireworks, explosives and weapons of all kinds is prohibited in all state parks and preserves."

The first section quoted above prohibits the carrying of firearms on any state game refuge. The section then provides that predatory animals may be "killed or trapped" under the authority or direction of the state conservation director. Section 120 of Chapter 99, laws of the 47th General Assembly, set out above, prohibits the use "by the public" of firearms in all state parks and preserves.

In construing the above sections of the Code, we must consider the intent and purpose of the legislature in enacting the above provisions. Each of the provisions was enacted as parts of acts dealing with conservation of natural resources. The purpose of each is to insure against hunting in state parks or state game refuges. If hunting of non-protected animals were permitted generally in such park areas, there would be ready opportunity for the hunter also to shoot protected animals upon such reservations. The legislature has provided against this by banning the carrying of or the use of firearms in such areas.

It is our opinion, however, that effect must be given to the provision which authorizes the killing or trapping of predatory animals or birds when such is done under the direction and authority of the state conservation director. Such supervised extermination of predators may be necessary to protect properly the wild life and game within such areas, and it is assumed that such would result in a general benefit to the public. It is therefore our conclusion that the law permits an organized hunt for predatory animals within a state park which is a state game refuge, provided such hunt is carried on under the specific authority and supervision and at the direction of the state conservation director.

MINES AND MINING: FOREMAN: MINE INSPECTOR: Mine foreman is included in the statutory terms "agent or superintendent of any mines" and may not take the examination for mine inspector.

February 14, 1938. *Mr. William Jervis, State Board of Mine Examiners:* We acknowledge receipt of your request for the opinion of this department upon

the construction to be given Section 1231, 1935 Code, relating to examinations for qualification of mine inspectors. Your specific question is as follows:

Is a mine *foreman* included in the statutory terms "agent or superintendent of any mines," as the same appear in Section 1231?

Section 1228, 1935 Code, provides that the board of mine examiners shall, on the first Monday of March of each even numbered year, examine applicants for certificates of competency for mine inspectors.

Section 1231, 1935 Code, pertains to the examination and qualifications, and provides as follows:

"1231. *Examination—mine inspector.* The examination for mine inspectors shall consist of oral and written questions in theoretical and practical mining and mine engineering, on the nature and properties of noxious and poisonous gases found in mines, and on the different systems of working and ventilating coal and gypsum mines. During the progress of examination, access to books, memoranda, or notes shall not be allowed, and the board shall issue to those examined and found to possess the requisite qualifications, certificates of competency for the position of mine inspector; but certificates shall be granted only to persons of twenty-five years of age or over, of good moral character, citizens of the state, and with at least five years' experience in the practical working of mines, and who have not been acting as agent or superintendent of any mines for at least six months preceding such examination."

By the terms of the above statute, certificates can be granted only to persons who "have not been acting as *agent* or *superintendent* of any mines for at least six months preceding such examination."

The words "agent" and "superintendent" are generic terms. They are words of broad and varied meaning, depending upon the manner in which they may be employed, and the same should be defined in the light of the particular subject matter with which they are here connected, i. e., mines and mining. The term "mine foreman" is defined by statute in Section 1286, 1935 Code:

"1286. *Mine foreman defined.* The term 'mine foreman' as used in this chapter and the law of this state, shall mean and be construed to be one in charge of the underground workings or departments of the mine or any part thereof, either by day or night."

Section 1292, 1935 Code, enumerates the specific duties of foreman or "pit boss." An examination of the requirements of the statute with reference to the duties of a mine foreman indicates that he is charged with the primary responsibility in the direction of mine employees. The foreman also is charged with the duty of inspection and is required to make daily examinations and to report his findings to the office of the mine. It is our understanding that the hiring and discharging of mine employees is generally supervised by the foreman. We are advised further that the foreman is generally a salaried employee, as distinguished from the mine employee whose compensation is based upon his volume of production.

It is our opinion that the statutory duties of foreman, considered alone, are sufficient to constitute him an "agent" or "superintendent" within the meaning of Section 1231, supra.

It is further our opinion that weight should be given to the administrative construction which has been placed upon the words "agent" or "superintendent" as the same appear in Section 1231. If it be conceded that there is ambiguity in these words, then reference may be made to and reliance placed upon the practical construction given to the language by the administering board.

It appears that for over thirty years it has been the uniform practice of the board to include mine foremen within the language "agent or superintendent

of any mines." A bill, Senate File 450, introduced in the 45th General Assembly, regular session, would by amendment have stricken from the statute the provisions excluding the agent or superintendent from eligibility for a certificate. This bill failed of passage.

In view of the language of the statutes to which reference is made above, and in view of the practical construction placed upon the provisions by former boards of examiners, we are of the opinion that prior rulings of boards of mine examiners with respect to the matter herein discussed ought not to be disturbed.

COUNTIES: BOARD OF SUPERVISORS: COUNTY ROADS: BRIDGE FUND: Problem can be solved without a special bridge fund.

February 17, 1938. *Mr. John E. Miller, County Attorney, Albia, Iowa:* Your letter of January 10, 1938, advising that your local board of supervisors desires to set up a bridge fund to be used on local county roads, and that it wishes to take the money for said fund from the 35 per cent pledged to local county roads, and your letter of February 2, 1938, explaining that the reason your board desires to do this, is that you have one township which has so many bridges that these bridges require all of the township's fund for their maintenance and repair, and "after that is done, there is no money left even for dragging," have been received and considered.

While, as stated, your second letter indicates that your board is particularly concerned with the maintenance and repair of these bridges, yet since you speak of using the 35 per cent of the construction fund, we assume that the replacement of some of these bridges is involved. By Section 4644-c1 of the Code the duty to construct, repair and maintain the secondary road and bridge systems is imposed on the board of supervisors, and in the following sections the Code defines the road system and the bridge system. But the funds for both of these systems are the secondary road construction fund and secondary road maintenance fund. So far as the construction fund is concerned, there seems to be no distinction made in the law between road construction and bridge construction. We call your attention to Code Section 4644-c34; this gives the board of approval blanket authority in providing the road construction program on the local roads. That board may, if it desires, provide for the construction of these bridges out of the 35 per cent fund, even though the cost would be much greater than what might be considered the township's proportionate share of the construction fund. The law does not require the proportionate distribution of these improvements among the townships, but instead provides in substance that the board shall make an equitable program of construction, and the decision of the board is final.

As to maintenance and repair of the bridges, we call your attention to Code Section 4644-c14, as follows:

"The secondary road maintenance fund is hereby pledged:

1. To the payment of the cost of maintaining the secondary roads according to their needs.
2. To the payment of the cost of bridge repairs, culvert material, machinery, tools and other equipment.
3. To the payment of all or any part of special drainage assessments which may have been, or which may hereafter be, levied on account of benefits to secondary roads."

The section thus makes the distinction between the cost of maintaining the secondary roads and the cost of bridge repairs, etc.

In an opinion rendered January 22, 1930, (found on page 254 of the 1930 Attorney General's Report), the then attorney general discussed briefly the question whether the board of supervisors could retain the matter of maintaining bridges and culverts on local county roads, even though it left the work of maintaining these roads to the township trustees, and he said:

"We are of the opinion that where a county board of supervisors adopts the plan provided for in Section 35, Chapter 20, Acts of the Forty-third General Assembly, and provides for the maintenance of the local county roads by the township trustees that said section only contemplates the maintenance of the local county roads and does not contemplate the maintenance and repair of bridges and culverts on said roads.

"The work of maintaining, repairing, and constructing bridges on all roads of the county is the work of the board of supervisors and, in our opinion, cannot be delegated to the township trustees under the provisions of Section 35, Chapter 20, Acts of the Forty-third General Assembly."

(While the opinion says Section 35 of Chapter 20, it evidently refers to Section 34.)

We agree with the opinion thus expressed.

In the performance of its duty of maintaining and repairing the bridges on the secondary roads the board must designate and retain a portion of the maintenance fund for that purpose.

Section 4644-c14 in providing for three separate uses of the maintenance fund implies that the board of supervisors may budget that fund for the three purposes referred to.

So far as maintenance is concerned, there seems to be no provision for the maintenance of the county trunk roads separate and distinct from the maintenance of the local roads; however, since under Section 4644-c34 the board of supervisors may turn over to the townships the work of maintaining their local roads, it necessarily follows that if a county does this, it must retain a sufficient fund for the maintenance of the county roads.

It will be noted that the provision in Section 4644-c14 for the maintenance of the secondary roads, is to expend the fund for the maintenance of such roads *according to their needs*. Necessarily, if the maintenance of local township roads is left to the township trustees, the amount of money to be set apart to the various townships for that purpose, would be the balance of the local road maintenance fund after the appropriation of the estimated required amount for maintaining the county roads, and after the appropriation of the estimated required amount for the maintenance and repair of the bridges on the secondary roads.

So, without expressing any opinion on the question as to whether or not a county might, under some circumstances, establish a special fund, not provided for in the statutes, we are of the opinion that the problem of your board of supervisors can be solved without undertaking to establish a separate bridge fund.

CORPORATIONS: STOCK: (Sections 8413-8414) A corporation must make application under Sections 8413 and 8414 of the 1935 Code when it proposes to: Issue stock in exchange for the cancellation of an outstanding liability; (See opinion for further provisions.)

February 19, 1938. *Mr. Ross Ewing, Secretary, Executive Council of Iowa:* We are in receipt of your request for an opinion based upon the following statement of facts:

"Should a corporation make application under Sections 8413 and 8414 when it proposes to issue stock in exchange for the cancellation of an outstanding liability?

"In detail, the questions with which we are confronted are cases where a corporation proposes to do the following:

Issue stock in exchange for outstanding stock of an equal face value, a lesser face value, or a greater face value;

Issue stock in exchange for outstanding bonds of an equal face value, a lesser face value, or a greater face value;

Issue stock in exchange for outstanding bonds plus accrued interest, such bonds plus interest being equal to the proposed issue of stock;

Issue par value stock in exchange for non par value stock or issue non par value stock in exchange for par value stock;

Issue stock in exchange for the cancellation of accounts payable."

In answer to your questions we find that Chapter 385 of the 1935 Code covers the issuance of stock by a corporation and Section 8412 thereof provides as follows:

"*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.*"

Section 8413 provides as follows:

"*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."

Section 8414 provides as follows:

"*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 important provisions of the above quoted sections of the Code are italicized.

A consideration of the above sections and of Chapter 385 leads us to the conclusion that if a corporation desires to issue any certificate of a share of capital stock or any substitute therefor, it must receive the par value therefor in money and that if it is proposed to pay for said capital stock in any other thing than money, the corporation must apply to the executive council for leave so to do. The application to the council must set forth the amount of stock proposed to be issued and set forth specifically the property or other thing to be received in payment for said stock.

While, as we have stated, there does not seem to be any doubt as to the meaning of the foregoing sections, we nevertheless set forth some of the general rules with reference to the issuance of stock in corporations, and we find this rule stated in *Fletcher on Corporations*, Vol. 11, Chapter 58, Section 5186:

"The power of the corporation to take property in payment for stock and the character of the property which may be so taken is to be determined by the law of the state where the corporation is organized. It is sometimes provided that all payments must be made in money, unless it is stated in the charter that the capital stock or some designated portion thereof shall be pay-

able in property, labor or services, and if the statutory requirement is that payment must be made in 'money' for stock subscriptions, then property other than money cannot be received."

We also find a number of cases cited in Fletcher on Corporations supporting this rule and we quote from a few of them. In *Knox vs. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578, the court said:

"It has been held that where the statute provides that subscriptions 'must be payable in money,' a subscription by which it is agreed that land shall be conveyed to the corporation in payment is prohibited and unenforceable."

In *Maine vs. Butler*, 130 Mass. 196 (approved in *Wing vs. McCallum*, 244 Fed. 199) the Massachusetts Supreme Court said:

"Where the statute provides that 'nothing but money shall be considered as payment of any part of the capital stock,' an agreement to issue stock for patents is illegal and unenforceable."

In *Linden Bros. vs. Practical Elec. & Eng. Pub. Co.*, 309 Illinois 132, 140 N. E. 874, the Illinois Supreme Court said:

"When the law requires subscriptions to stock to be paid in 'money or money's worth,' cash or its equivalent is intended."

Again we find the rule stated in *Corpus Juris*, Vol. 14, Section 593 at page 429 as follows:

"The consideration for which a corporation may lawfully issue its capital stock is generally prescribed or regulated by charter or statutory provision, and sometimes by constitutional provision; and of course such provisions must substantially be complied with in good faith to relieve subscribers from further liability on the ground that the stock is fully paid for, or, it may be, even to render a subscription or the issue of stock valid. A quite common constitutional or statutory provision is that no corporation shall issue stock except for money, labor done, or property actually received. * * * Even aside from statutory or constitutional provisions the officers of a corporation are trustees for its stockholders, and in a sense for its creditors, and their trust cannot be defeated by anything short of actual payment for shares in good faith. This payment need not always be in money; but the rule, often expressly or in effect declared by statute, is that 'if a man contracts to take shares he must pay for them, to use a homely phrase, "in meal or in malt"; he must either pay in money or in money's worth' and that 'if he pays in one or the other, that will be a satisfaction.' "

There are many cases cited in support of the rule stated in Fletcher on Corporations and in Corpus Juris. We have examined a large number of these cases and they support the conclusion we have heretofore reached that, in Iowa, corporations must receive *money* for capital stock or secure the approval of the executive council for the issuance of stock for anything other than money.

It may be important therefore to determine what is mean by the word "money." And while there is no definition in our Iowa statutes of the word itself, we find that the courts have defined it many times and we also find a Constitutional provision which we think is important. Section 8 of Article I of the Constitution of the United States provides as follows:

"Section 8. The Congress shall have Power * * * To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; * * *"

Therefore, the coinage of money and the fixing of the value thereof is left to the Congress of the United States, and as we shall point out hereafter, the Congress of the United States has exercised this power. We do find a provision of our Iowa statutes which may be applicable in Section 9403 of the 1935 Code which reads as follows:

"9403. *Denominations of money.* The money of account of this state is the dollar, cent, and mill, and all public accounts, and the proceedings of all courts in relation to money, shall be kept and expressed in the above denominations. Demands expressed in money of another denomination shall not be affected by the provisions of this section, but in any action or proceeding based thereon it shall be reduced to and computed by the denominations given."

It would seem to us, therefore, that the word "money," where it is used in our Iowa statutes, means the dollar, cent and mill, and that when payment is to be made in money, it shall be made in dollars, cents and mills. This question was discussed by our Iowa Supreme Court in the case of *Federal Land Bank vs. Wilmarth,* 218 Iowa 339, at page 350 which was a mortgage foreclosure action and in which the defendant contended that a court of equity should intervene in his behalf because money (at the time the action was commenced) was more valuable than when the loan was made and that $20,000, the amount of the loan, would buy, on the markets of the country, at the time the loan was made, only half as much, or as much as $10,000 now will purchase and that these radical changes in value were not contemplated when the note and mortgage were executed. The defendant further contended that the plaintiff had come into equity with its foreclosure proceeding and therefore must do equity and if equity were done, the mortgage should either be not foreclosed, or the judgment scaled down to at least $10,000. The court said in its opinion:

"According to the note, the appellant was to pay the appellee $20,000 on an amortized plan. Therefore the $20,000 is to be paid according to the terms of the contract. Such payment may be made by the appellant in any legal tender authorized by the Congress of the United States. So far as shown by the record, this is a private debt and can be paid only in legal tender of the United States. In Section 8, Article I, of the Constitution of the United States, it is provided, among other things, that the Congress of the United States shall have power: '* * * * To coin Money, regulate the Value thereof, and of foreign Coin. * * *' Congress, and not the state, has the power, under our constitutional system, to determine with what money private debts shall be paid. (Citing cases)

"When contracting in the case at bar, the appellant and the appellee did not provide that the debt created could be satisfied by adjusted dollars, trade dollars, or any other dollar, except the legal tender authorized by the Congress of the United States. * * * Equity cannot arbitrarily grant relief in the face of the Constitution of the United States and the laws thereof, *to which the state is subject.*" (Italic ours)

We think it fair to assume, from a consideration of the foregoing case, that the word "money" means the legal tender authorized by the Congress of the United States and the Congress of the United States has defined "legal tender" in Chapter 9, Title 31 of the United States Code Annotated, and principally the definition is set forth in Section 462 of Title 31, Chapter 9 of the United States Code Annotated as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Therefore, legal tender designated by the Congress of the United States, is the ordinary coins and bills used in business generally throughout the United States, and it is our opinion that the use of the word "money" in the statutes under consideration means legal tender defined by the Congress of the United States.

The Iowa Supreme Court in the Wilmarth case refers in the opinion to some decisions of the Supreme Court of the United States which we have examined and which are the leading authorities upon the question of legal tender. These cases are cited as authority for the statements we have heretofore quoted from the Wilmarth case, but we set forth a few excerpts from these cases themselves. The first, *Knox vs. Lee—Parker vs. Davis* (legal tender cases) 79 U. S. (12 Wall.) 457; 20 L. Ed. 287. We quote from page 549:

"Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. * * * The obligation of a contract to pay money is to pay that which the law recognizes as money when the payment is to be made. * * * We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a *tender of legal values*. Contracts for the delivery of specific articles belong exclusively to the domain of State legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money."

And we quote from *Juilliard vs. Greenman*, (legal tender case) 110 U. S. 421; 4 Supreme Court 122; 28 L. Ed. 204, at page 448:

"This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals. * * * Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution 'to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States,' and 'to borrow money on the credit of the United States,' and 'to coin money and regulate the value thereof and of foreign coin;' and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States.'"

However, we are not without some authority on this question in the decisions of our Iowa Supreme Court, some of which were cited in the Wilmarth case.

In *Warnibold vs. Schlicting*, 16 Iowa 243 at page 247 our court said:

"Complainant's obligation was to pay so many dollars ($700) and not a commodity or so much gold. This gold had and has a statutory value. *It circulated as money.* The parties dealt with it as having an artificial value, as so many dollars, and not as a commodity having a specified and agreed intrinsic worth

or value. Legally, each dollar passed for one hundred cents; and legally, it had no other value. Congress has given a like value to another medium, and when the same number of dollars and cents are returned, in this other equivalent medium, as are due in the medium loaned, or which passed from the lender to the borrower, the demand is satisfied. * * * The creditor's right was to have his debt paid in lawful money, whether it should be called coin or paper. * * * A judgment in such a proceeding is necessarily for so much; not gold, not silver, not treasury notes, not any kind of money by name, but such a sum, payable of course in whatever the law esteems lawful, and has made a legal tender."

In the *State of Iowa vs. Boomer*, 103 Iowa 106 our Supreme Court said:

"The deposits which the statute which creates the offense of fraudulent banking is designed to prevent are of any kind of money, bank bills, or notes, treasury notes issued by the United States, currency, or other notes, and bills or drafts circulating as money or currency; and it is wholly immaterial whether the deposits be of money issued by the general government or not. The statute does not specify 'lawful money of the United States.' In a general sense, such money is any lawful money which is circulated in the United States. In a comprehensive sense, money is 'any currency usually and lawfully employed in buying and selling.' It includes 'whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin.' In view of the purposes of the statute, and the popular understanding of the term 'lawful money,' and the absence of any more definite designation than 'lawful money of the United States,' we conclude that the indictment was designed to include any money which was lawfully circulated in the United States."

Our Supreme Court in the case of *State vs. Finnegean*, 127 Iowa 286 at page 290 stated:

" 'Money' is a generic term, and, as commonly understood, is anything that circulates as the ordinary medium of exchange in buying and selling property. Webster defines it as 'any currency usually and lawfully employed in buying and selling the equivalent in money, as bank notes and the like.' * * * In *Crutchfield vs. Robins*, 24 Tenn. 15, the court held that 'money' is a generic term, and covers everything which by consent is made to represent property, and passes as such currently from hand to hand, whether it be the iron of the Spartans, the cowrie of the African, the gold and silver of the world, or the paper of modern Europe and America. Current convertible bank paper has been invariably held, both in Europe and the United States, to be a good legal tender in payment of debts, unless it be objected to upon the ground that it is not gold and silver. This could never have been done, had it not been considered as money, as nothing but money can be tendered in payment of a debt. That bank notes are commonly regarded as lawful money is not open to debate."

We have also examined other definitions of the term "money" and we quote from the law dictionary of Ballentine where "money" is defined as follows:

"A generic and comprehensive term. It is not a synonym of coin. It includes coin, but more. It includes whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin. Almost everywhere, bank-notes lawfully issued actually current at par in lieu of coin, are money. When the word is used in a will in its ordinary signification, it will not include bonds, mortgages, or other choses in action."

In Webster's Dictionary "money" is defined as follows:

"Metal as gold, silver or copper, coined or stamped and issued by recognized authority as a medium of exchange; any particular form or denomination of coin or paper which is lawfully current as money. Any written or stamped promise or certificate such as government note or bank-note (often called paper money) which passes currently as a means of payment; syn: money, cash, currency, legal tender. Money is the general term. Cash means money in hand; currency, money in circulation; legal tender, money which a creditor must accept according to law."

We have examined many other definitions and they are substantially the

same. And after a review of the authorities, we again reach the conclusion that the use of the word "money" in the statutes under consideration means legal tender as defined by the Congress of the United States.

Therefore, it is our opinion that if it is proposed by a corporation to receive anything other than money, as defined herein, in payment for any certificate of a share of stock, it must be approved by the executive council.

In this connection, we desire to call your attention to Section 8416 of the 1935 Code which provides as follows:

"8416. *Certificate of issuance of stock.* It shall be the duty of every corporation, except corporations qualified under Chapter 386 or Chapter 417, to file a certificate under oath with the secretary of state, within ten days after the issuance of any capital stock, stating the date of issue, the amount issued, the sum received therefor, if payment be made in money, or the property or thing taken, if such be the method of payment."

This section requires that the corporation make a report within ten days after the issuance of any capital stock stating the date of issue and the amount received therefor if payment be made in money, or the property or thing taken if such be the method of payment. We think this statute serves to indicate further that the Legislature definitely had in mind that a careful check should be had upon corporations issuing stock for anything other than actual money.

It is therefore our opinion (in response to the separate divisions of your request) that a corporation must make application under Sections 8413 and 8414 of the 1935 Code when it proposes to:

Issue stock in exchange for the cancellation of an outstanding liability;

Issue stock in exchange for outstanding stock of an equal face value, a lesser face value, or a greater face value;

Issue stock in exchange for outstanding bonds of an equal face value, a lesser face value, or a greater face value;

Issue stock in exchange for outstanding bonds plus accrued interest, such bonds plus interest being equal to the proposed issue of stock;

Issue par value stock in exchange for non par value stock or issue non par value stock in exchange for par value stock;

Issue stock in exchange for the cancellation of accounts payable.

We think it proper to call your attention at this time to the provisions of Section 8414 heretofore set out in this opinion. Under the provisions of that section the executive council is required to make an investigation under such rules as it may prescribe for the purpose of ascertaining the real value of the property or other thing which the corporation is to receive for the stock. Each application will probably require a different kind of investigation, and the executive council can, and doubtless will, make such an investigation as they feel is necessary in each individual case. It occurs to us that some of the proposals which are set forth in your letter would require considerable more of an investigation than some of the others and that where the property of a corporation has already been appraised by the executive council some time in the past, it probably would require a much different kind of an investigation than in the case of a corporation where its property had never been appraised. We think this is what the Legislature had in mind when it provided that the executive council could make an investigation under such rules as it may prescribe.

This particular question was passed upon in 1935 by the then Attorney General, the opinion appearing at page 236 of the 1936 Report of the Attorney General, and in which opinion it was said:

"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."

And we are aware of the former Attorney General's opinion rendered in 1936 and appearing at page 572 of the 1936 Report of the Attorney General in which it was held that the approval of the executive council of the State of Iowa was not required as a condition precedent for the proposed exchanged of stock in which the Penn Electric Switch Company sought to issue a million dollars worth of par value stock in exchange for outstanding stock of the par value of a million dollars. That opinion is in conflict with the present opinion of this department and it is therefore overruled.

We are also familiar with the Attorney General's opinion written in 1936 and appearing in the 1936 Report of the Attorney General at page 622 in which it was held that the approval of the executive council of the State of Iowa was not required as a condition for the proposed exchange of stock where a corporation desired to issue shares of stock with a par value of $15.00 in exchange for outstanding no par value stock, share for share. That opinion also is in conflict with the present opinion of this department and is therefore overruled.

On August 5, 1937 this department answered an inquiry from your office based upon the following statement of facts:

"Do Sections 8413 and 8414 contemplate an exchange or reclassification of shares of stock under a reorganization by recapitulation of a corporation?"

In our letter to you of that date, we stated that it was our opinion that Sections 8413 and 8414 did not cover such a transaction. The statement contained in that letter is in conflict with the present opinion of this department and therefore we hereby overrule the statements set forth in that letter.

This opinion is not to be construed as affecting a situation where outstanding stock in a corporation is transferred from one individual to another, or where it is transferred to the heirs in an estate and new certificates are issued for the purpose of merely replacing outstanding stock and for the purpose of correcting the corporate records.

LEGISLATURE: RETRENCHMENT AND REFORM COMMITTEE: STATE FUNDS: SWEDISH TERCENTENARY COMMITTEE OF IOWA: Before disbursements from contingent fund can be made, retrenchment and reform committee must determine that such expenditure constitutes a "contingency."

February 19, 1938. *Mr. C. Fred Porter, Secretary, Retrenchment and Reform Committee:* We acknowledge receipt of your request for the opinion of this department upon the following question:

"Will you please render your official opinion as to whether or not the retrenchment and reform committee has the authority to allocate $1,500 from the contingent fund provided for in Chapter 1, Section 49, Laws of the 47th General Assembly, to take care of expenses in connection with the Delaware Swedish Tercentenary Committee of Iowa, appointed by authority of House Concurrent Resolution No. 19 of the 47th General Assembly?"

Under dates of August 31, 1937 and September 15, 1937, this department issued opinions to the Committee on Retrenchment and Reform, dealing with questions of allotments of money to certain state departments by the said committee for purposes of furthering the Iowa Centennial celebration. In each

of these opinions we expressed the belief, based upon the provisions of Section 49, Chapter 1, Laws of the 47th General Assembly, that before any disbursements from the contingent fund can be made, the committee on retrenchment and reform must determine as a matter of fact that any such proposed expenditure constitutes a "contingency"; that this determination should first be made by the committee on retrenchment and reform, since, as above stated, such finding of fact is a condition precedent to any disbursement out of the fund established by Section 49, Chapter 1, Laws of the 47th General Assembly.

We are of the opinion, therefore, that a ruling of this department should await a determination by the committee on retrenchment and reform as to whether or not this proposed allotment is approved by the committee as being a contingency contemplated by the statute.

REGISTRATION: OF "IOWA STANDARD FARM MUTUAL FIRE INSURANCE POLICY: SECRETARY OF STATE: TRADEMARKS, ETC.: To permit any one individual or association to register the above words to the exclusion of any other company would be in violation of Chapter 406 of the 1935 Code.

February 21, 1938. *Honorable Robert E. O'Brian, Secretary of State:* We are in receipt of your request for an opinion based upon the following statement of facts:

"We should like to have an opinion relative to the application for the registration of the words 'Iowa Standard Farm Mutual Fire Insurance Policy, Recommended by the Iowa Association of Mutual Insurance Associations,' as filed by Mr. Henry H. Griffiths in behalf of said association.

"There is some doubt as to whether this name could be registered under the provision of Chapter 430 of the Code. The letter written to Mr. Griffiths is enclosed herewith, that you may know the position taken by the department in regard thereto."

The request was accompanied by a copy of an insurance policy which is captioned "IOWA STANDARD FARM MUTUAL FIRE INSURANCE POLICY," and these are the words which are proposed to be registered under the provisions of Chapter 430 of the 1935 Code of Iowa. The particular section applicable to registrations of this character is Section 9867, as follows:

"*Registration.* Every person, firm, association, or corporation that has heretofore adopted or shall hereafter adopt for their protection any label, trademark, or form of advertisement, may file the same for record in the office of the secretary of state by leaving two copies, counterparts, or facsimiles thereof with the secretary of state. Said label, trademark, or form of advertisement shall be of a distinctive character and not of the identical form or in any near resemblance to any label, trademark, or form of advertisement previously filed for record in the office of the secretary of state."

This particular section of the Code is interpreted by our supreme court in the case of *Iowa Auto Market vs. Auto Market & Exchange, et al.*, 197 Iowa 420, 197 N. W. 321, wherein the court said:

"Words that are generic, or which in their primary meaning are merely descriptive of the goods or business to which they are applied, or are in common use for that purpose, or which convey facts applicable with equal truth and right to others, cannot be exclusively appropriated as a trade-mark. It has been frequently said that no one can secure a monopoly upon the adjectives of the language."

We are of the opinion that the words proposed to be registered are generic and certainly are in common use for the purpose of describing a particular form of an insurance policy. We also call your attention to the provisions of Sec-

tion 9036 of the 1935 Code, with reference to the form of fire insurance policy. This section is as follows:

"*Approval by commissioner.* Neither shall any association issue policies of insurance until its articles of incorporation, by-laws, and form of policy shall have been submitted to the commissioner of insurance and if upon examination of same he finds them to conform to the provisions of this chapter he shall at once issue to the association a certificate authorizing it to transact an insurance business."

The above section requires that the form of policy proposed to be used by a company shall first be submitted to the commissioner of insurance, and if the particular policy complies with the provisions of Chapter 406, then the insurance commissioner approves the form. Therefore, the words proposed to be registered in this case indicate that the policy is the standard form in use in the state of Iowa, and to permit any one individual or association to register these words to the exclusion of any other company would, in our opinion, be against public policy, and in violation of Chapter 406 of the 1935 Code. Therefore, for this additional reason we think you were correct in refusing to register the proposed words under Chapter 430.

NOTARIES PUBLIC: NOTARY'S SEAL: EXPIRATION DATE: Notarial seal must be affixed to papers and documents authenticated by notaries public. Not necessary to show expiration of commission. Section 1198, tenure of appointment.

February 25, 1938. *Mr. Buel A. Williamson, Manager, Social Security Board:* You request the opinion of this department on the question as to whether or not the notarial seal must be fixed to all papers and documents authenticated by a notary public, and whether or not the state of Iowa demands that the date of expiration of commissions be shown on the jurat.

Section 1200, Code of Iowa, 1935, requires that before a notarial commission is delivered to a person appointed notary public by the Governor of the state, such person shall (1) procure a seal on which shall be engraved the words "notarial seal" and "Iowa," with his surname at length and at least the initials of his christian name, and (2) execute a bond to the state of Iowa upon which, or upon a paper attached thereto, shall appear his signature and a distinct impression of his official seal. This section is embraced within Chapter 65 of the Code entitled "Notaries Public," and while there is no express provision appearing in said chapter, requiring authentication by seal, yet, the supreme court of the state of Iowa in *Stephens vs. Williams*, 46 Iowa 540, was of the opinion that while the statute did not in terms prescribe that the acts of a notary shall be authenticated by a seal, yet "there could have been no other purpose in requiring him to procure a seal." And in *Tunis vs. Withrow*, 10 Iowa 305 that "the official acts of a notary public should be authenticated by seal and signature, and that an affidavit is not proved to have been made, unless the jurat is authenticated by both such seal and signature." See also *Koht vs. Towne*, 201 Iowa 538, 541; *Neese vs. Farmer's Insurance Company*, 55 Iowa 604; *Pitts vs. Seavey*, 88 Iowa 336; and *Koch vs. West*, 118 Iowa 468.

Furthermore, in connection with the recordation of instruments affecting real estate, the legislature provided at Section 10098, Code of Iowa, 1935, that "the certificate of proof or acknowledgment may be given under seal or otherwise, according to the mode by which the officer making the same usually authenticates his formal acts." In considering this section, the supreme court

of Iowa in a leading case, *Jones vs. Berkshire*, 15 Iowa 248, held that when no seal of the officer is attached to the certificate of acknowledgment, as contemplated by the statute, it is insufficient, and in *Pitts vs. Seavey*, supra, and *Koch vs. West*, supra, held that a notary's certificate of acknowledgment to a deed must be authenticated by his seal.

It is accordingly the opinion of this department that the notarial seal must be affixed to all papers and documents authenticated by notaries public.

As to your second question, concerning the necessity of a showing in the certificate or jurat as to the date of expiration of the commission, it is our opinion that no such showing need be made. The statute is silent as to any such requirement. It is stated in 46 Corpus Juris 520, p. 33, that the failure to state the date of expiration of the notary's commission does not make it void. The precise question was raised in the case of *Sheridan County vs. McKinney, et al.*, (Neb.) 115 N. W. 548. It appears in that case that the notary who authenticated the mortgage involved in litigation failed to certify the date of the expiration of his commission, and it was contended that his failure to do so rendered the acknowledgment void. The court held otherwise because of the particular wording of the Nebraska statute, and in the course of its opinion took the occasion to say, as quoted from page 549 of 115 N. W.:

"* * * Where an acknowledgment is actually taken by an officer, having power to act, who certifies the fact in due form and authenticates his act in the manner provided by law, it would be unreasonable to hold, in the absence of a statute requiring it, that his failure to state that his commission had not expired renders the acknowledgment void. If the commission of a notary has in fact expired, and he has no power to take an acknowledgment, his statement that it is still in force cannot serve to change the existing fact or validate his action. On the other hand, if he is still such officer, and has the power to perform the official act, his action is valid without regard to his statement or declaration concerning that fact. * * *"

Likewise in *Brown Manufacturing Company vs. Gilpin*, (Mo.) 96 S. W. 669, it was held that the failure to certify the date of expiration of the commission will not invalidate the certificate.

With respect to the tenure of appointment of notaries public, attention is directed to Section 1198, Code of Iowa, 1935, providing as follows:

"*When appointments made.* Such appointments if for a full term, shall be made on July 4, 1924, and on the same day each three years thereafter. All commissions shall expire on the fourth day of July in the same years. No commission shall be for a longer period than three years.

PAUPERS: WIDOWS' AID: WIDOW DEFINED: JUVENILE COURT: If person about whom inquiry is made can furnish proper proof to Juvenile Court, bringing into operation legal presumption of death, she is a widow, within the contemplation of Section 3641, Code, 1935.

February 25, 1938. *Honorable Harry F. Bulow, Clinton, Iowa:* This department is in receipt of your request for an opinion on the question involved in the following statement taken from your letter. You write:

"An inquiry has been made of me as to whether or not the mother of two small children residing in Clinton County, Iowa, who has not heard from her husband for over a period of seven years is entitled to a widow's pension, as provided for in Section 3641, Code of Iowa, 1935."

The section referred to provides as follows:

"*Aid to widow in care of child. If the juvenile court finds of record that the mother* of a neglected or dependent child is and has been a resident of the county for one year preceding the filing of the application, and *is a widow* and

a proper guardian, but, by reason of indigency, is unable to properly care for such child, and that the welfare of said child will be promoted by remaining in its own home, it may, on ten days' written notice to the chairman of the board of supervisors, of said application, by proper order determine the amount of money, not exceeding two dollars and fifty cents per week, necessary to enable said mother to properly care for said child. The board of supervisors shall cause said amount to be paid from the county treasury as provided in said order. Such order may, at any time, be modified or vacated by the court. No payment shall be made after said child reaches the age of sixteen years, or after the mother has remarried, or after she has acquired a legal residence in another county, or after she has become a nonresident of the state.

"No person on whom the notice to depart provided for in Chapter 267 shall have been served within one year prior to the time of making the application, shall be considered a resident so as to be allowed the aid provided for in this section."

In addition the legislature, in Section 3643, Code of Iowa, 1935, undertakes to extend the ordinary meaning of the term "widow" by providing in substance that any mother whose husband is an inmate of any institution under the care of the board of control, shall be considered a widow during such time as the husband is so confined.

The sole question presented by your inquiry is whether or not the term "widow," as employed in Section 3641, supra, is sufficiently broad to embrace one who is "in care of child," and has not received intelligence from her husband for the period of time, to-wit: seven years, after which a presumption is raised in law that such husband is dead.

The word "widow" is defined by lexicographers as "a woman who has lost her husband by death, and remains unmarried." Webster's New International and the New Standard Dictionaries; 68 Corpus Juris 263. The quoted definition was referred to by the supreme court of Iowa in *Debrot vs. Marion County*, 164 Iowa 208, 214, wherein it was held that a woman who had been divorced, her divorced husband still living, would not come within the purview of Section 3641, supra. In that case a demurrer to the answer, which answer set up the defense that the husband was alive, and that by reason of that fact the plaintiff was outside the scope of the statutory provision, was overruled and such ruling affirmed on appeal. The supreme court, in referring to what is now Section 3643, supra, the provisions of which extend the ordinary meaning of the word "widow," stated:

"* * *. The effect of this section in broadening the term is, according to all the canons of construction, to exclude all other persons who might, by interpretation or construction, be thought to be within the terms or spirit of the original act, although not within its letter. The old maxim, 'Expressio unius est exclusio alterius,' is especially applicable * * *."

However, we do not take this to mean that there is excluded from the meaning of the term "widow," as used in the statute, one who by the operation of a legal presumption may be a widow, within the ordinary connotation of that term, namely, one who has lost her husband by death. It must be borne in mind that the court in the Debrot case, supra, was considering the status of a divorced woman whose husband, and father of her children, was still living, and, therefore, it was entirely consistent for the court to apply the rule that where stated things are enumerated, things not named are excluded.

Now it is well established in the law of Iowa, as well as in the law of other forums, that a presumption of death arises from an unexplained absence of seven years. 17 Corpus Juris 1167, p. 6 (b); *McCoid vs. Norton*, 207 Iowa 1145;

State vs. Henke, 58 Iowa 458; *Tisdale vs. Insurance Company*, 26 Iowa 176. Thus, in the McCoid case, supra, our court said, quoting from page 1147 of 207 Iowa:

"'A presumption of the death of a party does not arise until he has been absent, without intelligence concerning him, for the period of seven years.'"

The question then arises whether or not the woman in question, upon proper proof bringing into operation the legal presumption of death, is a widow, within the contemplation of Section 3641, supra, and, if so, what manner of proof need be offered to establish the fact.

The juvenile court has and is empowered to exercise the jurisdiction and powers provided by law. Section 3605, Code of Iowa, 1935. In quoted Section 3641, supra, the legislature has endowed juvenile courts with jurisdiction and power to find of record that a mother of a neglected or dependent child is a widow. Therefore, an application for widow's pension having been made to the juvenile court, and that court having jurisdiction, the situation is in nowise distinguishable from the case of *McCoid vs. Norton*, supra, and *Oziah vs. Howard*, 149 Iowa 199. Both of these cases were partition actions instituted in district court,—a court of competent jurisdiction. In both, one of the plaintiffs praying partition of the premises claimed an interest in the realty by virtue of alleged heirship to one who had been absent for more than seven years. On submitted proofs, which were not rebutted, the court, in each of these cases, held that the presumption of death must be entertained, and that the plaintiffs had made their case. We quote as follows from the opinion in the McCoid case, supra, appearing at page 1148 of 207 Iowa:

"The defendants insist, however, that plaintiff has not brought himself within the provisions of Chapter 506, Code of 1924, and that he must do so before he is entitled to recover herein. With this we cannot agree. This chapter of the Code, Sections 11901 to 11911, inclusive, is intended only for the purpose of administering the estate of one who has absented himself for over seven years, as therein provided; and, of course, if it were sought to take out administration on the estate of *Thomas vs. McCoid* these sections would control. But this is not an action of the character covered by said chapter of the Code, but a partition case; and under the rule we have recognized, where the plaintiff proves that the defendant has been absent from the state for more than seven years, that no communication has ever been received from him by his relatives or friends who would have been most likely to have received such communication, and a diligent search has been made for him, and nothing can be found in relation to his present condition or whereabouts, then the presumption of death prevails. Of course, it is rebuttable and the defendants would be entitled to produce any evidence which would tend to weaken or destroy this presumption; but, under the admitted and stipulated facts, there can be but one conclusion, and that is that the plaintiff made a case."

So in the case of the person about whom inquiry is made, it is the opinion of this department that if, on application for widow's pension to the juvenile court, proof is made of an absence of the husband from the state for more than seven years, that no communication has ever been received from him by relatives or friends who would most likely receive such communication, and diligent search has been made for him, and nothing can be found in relation to his present condition or whereabouts, then the presumption of death prevails, and the juvenile court, in the absence of any evidence tending to weaken or destroy this presumption, could properly find of record that the applicant is a widow, within the contemplation of Section 3641, supra, and, the proof otherwise disclosing the applicant's eligibility for a widow's pension, the court

could properly proceed as provided in said section. This ruling is consonant with the theory underlying the statute, namely, that it shall become the duty of the county to contribute to the support of destitute children where there is no father to provide the necessary income.

COUNTIES: TAXATION: FAIR GROUND FUND: BOARD OF SUPERVISORS: Board of supervisors has authority to levy one-eighth mill tax for fair ground fund (Section 2905) and proceeds therefrom can be used for purpose of payment of indebtedness incurred in the purchase of fair grounds.

March 2, 1938. *Mr. A. R. Corey, Secretary, Iowa State Fair Board:* Receipt is acknowledged of your request for the opinion of this department upon a question submitted by you, which is as follows:

"The Davis County Agricultural Society is incorporated under the laws of the state of Iowa and is the owner of the legal title to 60 acres of real estate. In 1926 the society purchased 40 acres of land for parking space and additional building ground and incurred an obligation of approximately $7,000, for which a first mortgage was given by the society on all of the real estate and buildings. This real estate mortgage is now long past due and the society must refinance the same.

"Under Section 2905 of the 1935 Code of Iowa, the board of supervisors has the authority to levy one-eighth of a mill for fitting up or purchasing fair ground buildings or real estate.

"The society has received the following proposition from the holder of the mortgage: That he is willing to accept $6,000 in cash in full of the entire mortgage and in full of the interest to that date.

"The board of supervisors of Davis County is willing to levy the one-eighth of a mill and the bank in Bloomfield is willing to furnish the money providing the board makes the levy of one-eighth of a mill and $1,000 of this levy is applied on the mortgage, this mortgage having been originally given by the society for the purchase of the additional real estate, and it seems to us because of the fact that the indebtedness was made by this purchase that Section 2905 would apply, granting the board the authority to make the levy of one-eighth of a mill in order to pay off this mortgage.

"We would appreciate an opinion from your office at your earliest convenience stating whether or not the board of supervisors would have the authority to levy the one-eighth of a mill as provided by the above referred to section and the society to use this money to pay off this indebtedness."

It is assumed that in addition to the real estate, this society owns buildings and improvements thereon of at least $8,000 in value, and is a "society" as defined by Section 2894, 1935 Code.

Section 2905, 1935 Code, provides for the levy of a tax and the uses to be made of the proceeds thereof as follows:

"2905. *County aid.* The board of supervisors of the county in which any such society is located may levy a tax of not to exceed one-eighth mill upon all the taxable property of county, the funds realized therefrom to be known as the fair ground fund, and to be used for the purpose of fitting up or purchasing fair grounds for the society, or for the purpose of aiding boys' and girls' 4-H Club work in connection with said fair, provided such society shall be the owner in fee simple, or the lessee of at least ten acres of land for fair ground purposes, and shall own buildings and improvements thereon of at least eight thousand dollars in value."

The express provision is made in the above section for a tax not to exceed one-eighth mill, the proceeds of which may be used for the purpose of purchasing fair grounds for the society.

In 1926, according to your statement of facts, the above society purchased 40 acres of land for fair grounds purposes. Payment has not been made in full by the purchaser, and a purchase money mortgage remains unsatisfied.

It is our opinion that the statute contemplates that this obligation incurred for a purpose authorized by the statute, can be paid out of the fair ground fund provided for in Section 2905. The fact that some time has elapsed since the society purchased the grounds is not a material circumstance. The statute authorizes the use of the fund for the purchase of such grounds, and all sums applied to reduce a purchase money mortgage indebtedness, or a refinanced equivalent thereof, against the property, would be expended in effecting the purchase.

It is, therefore, our opinion that under the statute, the board of supervisors of Davis County has authority to levy a tax of not to exceed one-eighth mill for the fair ground fund under the provisions of Section 2905, 1935 Code, and that the proceeds therefrom, or so much thereof as may be necessary, can be used for the purpose of payment of indebtedness incurred in the purchase of fair grounds.

TAXATION: INCOME TAX: The officers and employees of the Iowa State Unemployment Compensation Commission are subject to the Iowa net income tax law.

March 7, 1938. *Mr. Claude M. Stanley, Vice Chairman, Iowa Unemployment Compensation Commission:* You request the opinion of this department as to whether or not officers and employees of the Iowa Unemployment Compensation Commission are subject to taxation on their salaries and wages under the Iowa Net Income Tax Law.

The Iowa Unemployment Compensation Commission was created by Senate File 191, Chapter 103 of the Acts of the 47th General Assembly. The salaries, duties and powers of the Commission are set out in Section 10 of Chapter 103 and Section 11 of Chapter 102 of the Acts of the 47th General Assembly. The right to employ personnel to administer the Act is granted to the commission by Section 11 of Chapter 102. The Commissioners are appointed by the Governor of the State of Iowa and they in turn employ the necessary personnel.

Section 13 of Chapter 102 creates a special fund in the Treasury of the State of Iowa to be expended solely for the purpose of defraying the costs of the administration of the Unemployment Compensation Act, the fund to consist of all moneys appropriated by the State of Iowa and all moneys received from the United States Government or any agency thereof.

It is claimed that all of the funds required and used for the administration of the Unemployment Compensation Act are obtained from moneys granted to the State by the United States Government and paid into the special fund heretofore referred to and that therefore the employees are not subject to the Iowa Income Tax Law.

The Income Tax Law of the State of Iowa as found in Chapter 329-F1, Section 6943-f3, paragraph 2 of the Code of 1935 defines the word "taxpayer" as:

"The word 'taxpayer' includes any person, corporation, or fiduciary who is subject to a tax imposed by this chapter."

Paragraph 1, Section 6943-f8 of Chapter 329-F1 likewise defines "gross income" 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, or from professions, vocations, trades, business, * * * and income derived from any source whatever and in whatever form paid. The amount of all such items shall be included * * *."

The statute excludes from gross income certain sources of income and provides that such income so excluded shall not be required to be included in the gross income of the taxpayer.

Paragraph 2 of Section 6943-f8 is as follows:

"The term 'gross income' does not include the following items, which shall be exempted from taxation under this division.

* * *

e. Salaries, wages, pensions, and other compensation received from the United States by officials, employees or veterans thereof which are or shall be exempt from state taxation by federal law."

The question therefore is whether or not employees or officers of the State Unemployment Compensation Commission can be termed employees, officials, or veterans of the United States Government whose salary is exempt from taxation by the State by Federal law.

We have been unable to find any Federal law which declares the employees of the Iowa Unemployment Compensation Commission to be employees, officials, or veterans of the United States Government or which exempts their salaries from taxation by the State.

On the contrary, the Federal Bureau of Internal Revenue under an Income Tax Unit Ruling dated March 13, 1937 recognizes employees of the State Compensation Commission to be employees of the State, but subject, nevertheless, to Federal income taxation. We call attention to the press release from the Federal Bureau of Internal Revenue which is as follows:

" 'Commissioner of Internal Revenue Guy T. Helvering pointed out today that under a recent ruling of the Bureau of Internal Revenue, State employees engaged upon the administration of unemployment compensation laws, who are paid from Federal funds granted to the State from the Federal Government are subject to the Federal Income Tax.

" 'The decision was made in the case of the Pennsylvania Unemployment Commission, in which it was ruled that inasmuch as the administrative expenses incurred in the administration of the Pennsylvania Unemployment Compensation Act are paid from Federal funds granted to the state by the Federal Government, it be held that the compensation of the employees which is paid from such funds must be included in gross income for Federal Income Tax purposes as it would place no burden upon the State to subject such compensation to taxation by the Federal Government. This ruling is based upon Section 301 of Title III of the Social Security Act. Section 301 reads as follows:

'For the purpose of assisting the States in the administration of their unemployment compensation laws, there is hereby authorized to be appropriated for the fiscal year ending June 30, 1936, the sum of $49,000,000 to be used as hereinafter provided.'

" 'This ruling will be equally applicable to the employees engaged upon similar duties in each of the States which have approved compensation laws.'

"The formal ruling above referred to is I. T. 365 and reads as follows:

'Advice is requested relative to the taxable status for Federal income tax purposes, of compensation received by the employees of the State of Pennsylvania whose services are rendered in connection with the administration of the Pennsylvania unemployment compensation law.

'It is stated that the administration of that law is placed in the department of labor and industry. Funds are granted to the State by the Federal Government under Title III of the Social Security Act, from which the administrative expenses of the Pennsylvania unemployment compensation law are paid.

'In order for the compensation received by an individual for services rendered to a state or political subdivision thereof to be exempt from Federal income tax, such compensation must be received by him from the state or political subdivision as an officer or employee thereof and his services must be rendered in connection with the exercise of an essential governmental function. Such

compensation is subject to Federal income tax unless taxation would so burden the state or political subdivision as to result in interference by the Federal Government with the discharge by the state of such a function.

"The effect which the source of the funds from which the compensation is paid has upon the exempt status of the compensation of State officers and employees is shown by the following statement of the court in *Miller vs. McCaugh*, 22 F. (2d) 165, affirmed 27 F. (2d) 128:

'* * * The compensation must not merely come to a state officer or employee, but it must come to him from the state to be exempt. Unless this second line is drawn and drawn where we have drawn it, it is difficult to determine where it should be drawn. A moment's thought will bring to mind scores of instances in which the recipient might well be held to be such "officer or employee" but in which the compensation does not come directly or indirectly from the state, otherwise than in the sense that he would not be in the enjoyment of it, were it not for the relation of officer or employee of the State which he enjoys. Here, what the plaintiff receives comes wholly from the surety companies whose financial resources he reports. It is true the corporation does not pay it directly to him, but to the clerk of court, from whom he receives it. * * *'

"Inasmuch as the expenses incurred in the administration of the Pennsylvania unemployment compensation law are paid from Federal funds granted to the State by the Federal Government, it is held that the compensation of the employees which is paid from such funds must be included in their gross income, for Federal income tax purposes, as it imposes no burden upon the State to subject such compensation to taxation by the Federal Government. (I. T. 3065; xvi-15-6638.)"

The Unemployment Compensation Commission is a state agency. Its employees are employees of the State of Iowa. The appointment of employees and the fixing of their compensation is fixed by statute and by the commissioners. The employees are not in any way beholden to the United States Government for their jobs. The funds from which they are paid are derived from payments made from a special fund in the Treasury of the State of Iowa. True enough, the Federal Government grants to the State the sums necessary to pay the cost of administration, but this point is immaterial for the grant is to the State of Iowa and not to the employees.

It is a well established rule that one who claims immunity to taxation has the burden of proof. Neither exemption from taxation nor immunity is favored under the law. See *Hale vs. Iowa State Board of Assessment and Review*, 271 N. W. 168; *South Carolina vs. School District*, 55 Iowa 150. The authorities make it clear that the statutory exemptions must be given a strict and somewhat narrow construction as distinguished from a liberal and broad construction. In *Pacific Co. vs. Johnson*, 285 U. S. 480 the United States Supreme Court said:

"Grants of immunity from taxation in derogation of a sovereign power of the State are strictly construed."

The rule that neither the State nor Federal Government may tax the other, nor its respective instrumentalities is limited to the extent which will permit both Governments to function with the minimum of interference, so that neither Government may curtail or impair the taxing power of the other. *Metcalf vs. Mitchell*, 269 U. S. 514; *South Carolina vs. United States*, 119 U. S. 437.

The foregoing ruling of the Income Tax Unit of the Federal Bureau of Internal Revenue clearly recognizes the status of officials and employees of State Unemployment Compensation Commission as that of state employees, but holds that they are nevertheless subject to Federal taxation, for the reason that the

imposition of the tax does not impose a burden upon the State Government and does not interfere with the functioning of the State Government.

Clearly the employees or officers of the Unemployment Compensation Commission are not officers or employees of the Federal Government, or an instrumentality of that Government, nor are they paid from funds belonging to the United States. They are, by the very law which creates the Commission, employees of the State of Iowa, and agents thereof. The funds from which they are paid are funds granted to the State of Iowa. Such funds do not belong to the United States Government at the time the officers and employees receive their compensation.

The implied constitutional provision of immunity should receive a practical construction so as not to impair the taxing power of the State of Iowa.

It is therefore the opinion of this department that officers and employees of the Iowa State Unemployment Compensation Commission are subject to the Iowa net income tax law.

TAXATION: COUNTIES: Who have obtained tax titles to property cannot sell the same to the original owner, or any other purchaser, on a credit plan under a real estate contract.

March 8, 1938. *Mr. M. C. Williams, County Attorney, Boone, Iowa:* You ask the opinion of this department as to whether or not a county, after perfecting its tax title to real estate, can sell the same to the previous owner thereof on a credit plan under a real estate contract.

The pertinent portion of Section 10260-g1 of the 1935 Code of Iowa reads as follows:

"When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the Board of Supervisors as provided in this chapter, except that any sale thereof shall be for cash * * *."

The question therefore is whether or not a sale on a credit plan under a real estate contract is cash within the contemplation of the statute. The common meaning of the word "cash" is money. Sometimes it means ready money. *Hooper vs. Flood,* 54 Cal. 218; *Offutt vs. Trole* (Mo.) 139 S. W. 483. Cash in its ordinary sense is the antonym of credit as generally understood and defined by the courts. *Parrish vs. American Ry. Pub. Co.* (Cal.) 256 Pac. 590. Cash is synonymous with money. *Commercial Credit Corporation vs. Lafayette,* 234 N. Y. S. 436. Ballentine's Law Dictionary defines cash as:

"Ready money or money in hand either in current coin or other legal tender or in bank bills and checks paid and received as money."

Our Supreme Court in the case of *State vs. Finnegean,* 127 Iowa 286 at page 290 stated:

"'Money' is a generic term, and, as commonly understood, is anything that circulates as the ordinary medium of exchange in buying and selling property. Webster defines it as any currency usually and lawfully employed in buying and selling; the equivalent in money, as bank notes and the like."

In view of the foregoing decisions and definitions, it would be difficult, without doing violence to the unambiguous language of the statute, to hold that a sale of the property on a credit plan under a real estate contract would be the equivalent of cash.

It is therefore the opinion of this department that counties who have obtained tax titles to property cannot sell the same to the original owner, or any other purchaser, on a credit plan under a real estate contract.

ELECTIONS: Special elections may be held at the same time as primary elections for the nomination of candidates, and the same judges who conduct the primary elections may act as judges of the special elections.

March 11, 1938. *Honorable Robert E. O'Brian, Secretary of State:* In your letter of March 8, 1938, you request the opinion of this department upon the following proposition:

"The question has arisen as to whether a special election may be held in connection with the Primary Election and if so whether the same judges and clerks appointed to act in the Primary Election may also serve as such in connection with the special election held on the same date. The election supplies, ballots, etc. would be entirely separate."

There is no specific provision in the law providing for the holding of a special election at the same time a primary is held. Neither, however, is there an express prohibition preventing such elections being held at the same time.

Chapter 36 of the 1935 Code of Iowa contains the statute providing for nomination by primary elections. Section 531 of this chapter provides as follows:

"*Applicable statutes.* The provisions of Chapters 40, 41, and 605 shall apply, so far as applicable, to all said primary elections, except as hereinafter provided."

Chapter 40 of the 1935 Code of Iowa contains the law of Iowa relative to the method of conducting elections. Section 719 of this chapter provides:

"*Elections included.* The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections."

Sections 761, 767 and 768, found in Chapter 40 of the Code of Iowa, provide as follows:

"761. *Constitutional amendment or other public measure.* When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon a *separate ballot*, preceded by the words, 'Shall the following amendment to the constitution (or public measure) be adopted?' "

"767. *Printing of ballots on public measures.* All of such ballots for the same polling place shall be of the same size, similarly printed, upon yellow colored paper. On the back of each such ballot shall be printed appropriate words, showing that such ballot relates to a constitutional or other question to be submitted to the electors, *so as to distinguish the said ballots from the official ballot for candidates for office*, and a facsimile of the signature of the auditor or other officer who has caused the ballot to be printed."

"768. *Indorsement and delivery of ballots.* Ballots on such public measures shall be indorsed and given to each voter by the judges of election, as in case of ballots generally, and shall be subject to all other laws governing ballots for candidates, so far as the same shall be applicable."

From all of the foregoing quoted sections of the Code, it will be seen that it was the intention of the legislature that primary elections be conducted in the same way as general elections, and that all of the laws relative to general elections apply to primary elections. From Section 761 through Section 768 of the Code, it is apparent that the legislature contemplated that special elections could be held at the same time and place as general elections. Section 768 specifically indicates that it was the intention of the legislature that the same judges, who were conducting the elections for candidates for office, should also conduct special elections.

Therefore, it is the conclusion of this department that special elections may be held at the same time as primary elections for the nomination of candidates, and that the same judges who conduct the primary elections may act as judges of the special elections.

SCHOOLS: NORMAL COURSE: No school shall be entitled to state aid for normal course unless a class of ten or more shall have been organized, maintained and instructed during the preceding semester.

March 11, 1938. *Miss Agnes Samuelson, Superintendent of Public Instruction:* Receipt is acknowledged of your request for the opinion of this department upon the following question submitted by you:

"Your attention is called to Section 3900, which provides that:

" 'No high schools shall be approved as entitled to state aid unless a *class of ten or more* shall have been *organized, maintained,* and *instructed* during the preceding semester in accordance with the provisions of this chapter and the regulations of the superintendent of public instruction.'

"If before the close of the preceding semester the enrollment in a normal training class fell below ten, would the superintendent of public instruction have authority to issue a requisition for a warrant upon the state comptroller, as provided in Section 3904, for state aid to such school?"

Chapter 194, 1935 Code, makes provision for the establishment and maintenance of normal courses in approved high schools. Section 3902, 1935 Code, provides that state aid to the amount of $750.00 per annum, payable in two equal installments at the close of each semester, be made available to schools which qualify under the provisions of the chapter. Section 3904, 1935 Code, provides that money allowable as state aid is to be made available to the school entitled to the same upon receipt of a report satisfactory to the superintendent of public instruction, such report, under the provisions of Section 3903, 1935 Code, to be made at the close of each semester. Section 3900, 1935 Code, which you set out in connection with your question, prescribes certain conditions precedent to the allowance of state aid, providing that such benefit may not be paid

"* * * unless a class of ten or more shall have been organized, maintained, and instructed during the preceding semester in accordance with the provisions of this chapter and the regulations of the superintendent of public instruction."

The statute is clear in its requirement that a class of ten or more must have been organized, maintained and instructed during the semester for which the aid is asked.

Suppose a school organizes a class of ten students at the beginning of the semester period. Then assume that during the semester two of the members leave the class. Clearly, at the semester end, it could not be said that a class of ten or more was maintained or instructed during the semester, and such school could not qualify for aid. Suppose a class of twelve normal training students is organized at the beginning of the semester. Then assume that three of these students leave school shortly before the end of the semester. A class of ten or more would not have been maintained and instructed during the semester. Upon an average daily attendance it might be said that a quantum of instruction was given which would equal that supplied to ten students for a full semester period. The statute, however, does not authorize this method of computation.

After a consideration of the language of the statutes we conclude that the legislature intended to provide that a definite standard as to attendance be maintained by schools to enable them to participate in state aid. The statute not only requires the organization and instruction of a class of ten or more, but also that a class of such number be *maintained* during any semester for which the assistance is claimed. The following definition of the word "main-

tain" is given in Funk and Wagnalls standard dictionary: "to hold or preserve in any particular state or condition."

In view of the foregoing, it is our opinion that in order to qualify for the state aid provided in Chapter 198, 1935 Code, an enrollment of not less than ten in a normal training class must be actually maintained through the semester for which the aid provided by the statute is sought.

PEDDLERS: LICENSES: Peddler's license required of one who manufactures harness in another state and sells the same at farm sales in Iowa. (Manufacturer employs 20 men.) Does not fall within exception of "persons selling their own work."

March 12, 1938. *Mr. Ralph M. Crane, County Attorney, Carroll, Iowa:* Receipt is acknowledged of your request for the opinion of this department upon a question arising out of the following facts submitted by you:

A resident of South Dakota, immediately after the war, started making harness. At first, it seems, he and an assistant made the harness and other agents sold the same in that vicinity. His business has now increased to such an extent that he is employing twenty men in his shop to produce the harness, and he has agents who come into Iowa, hauling the harness by truck, and said agents go to all farm sales held in Carroll County and sell and dispose of the harness. Neither these agents nor the manufacturer himself have obtained licenses, as provided by our law dealing with peddlers, being Sections 7174 to 7178, inclusive.

Section 7177 provides for exceptions granted certain persons, and one of which is "persons selling their own work or production either by themselves or employees."

The question which I am interested in is whether, under the circumstances, the harness which is manufactured by him and his employees is such an article as would come under the exception above stated.

Section 7174, 1935 Code, provides for a county tax on peddlers plying their vocations outside of cities and towns, as follows:

"7174. *Peddlers.* Peddlers plying their vocations in any county in this state outside of a city or incorporated town shall pay an annual county tax of twenty-five dollars for each pack peddler or hawker on foot, fifty dollars for each one-horse or two-wheeled conveyance, and seventy-five dollars for each two-horse conveyance, automobile, or any motor vehicle having attached thereto or made a part thereof a conveyance for merchandise or samples."

Section 7176, 1935 Code, extends the definition of the word "peddler" to include other occupations, providing as follows:

"7176. *'Peddlers' defined.* The word 'peddlers' under the provisions of Sections 7174 and 7175, and wherever found in the Code, shall be held to include and apply to all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or future delivery."

Under the facts set out in your letter, these vendors take their merchandise in bulk to various localities in your county and there sell and deliver such goods directly to purchasers.

It is our opinion, under the facts submitted, that the persons so engaged in trade are itinerant vendors within the meaning of Section 7176, supra. They are, therefore, subject to the tax unless the exceptions set out in Section 7177, 1935 Code, operate to exclude them from the effect of the law. Section 7177 sets out certain exceptions, providing as follows:

"7177. *Exceptions.* The provisions of Sections 7174 to 7176, inclusive, shall not be construed to apply to persons selling at wholesale to merchants, nor to transient vendors of drugs, nor to persons running a huckster wagon, or selling and distributing fresh meats, fish, fruit, or vegetables, nor to persons selling their own work or production either by themselves or employees."

It is obvious that none of the exceptions of this section are in any manner applicable to this inquiry except the last clause thereof which includes "persons selling their own work or production either by themselves or employees."

It is a familiar rule of statutory construction that in construing the effect of exception or exemption provisions, that the same are to be strictly construed. As was stated in the case of *Eddington vs. Northwestern Bell Tel. Co.*, 201 Iowa, at page 72, in which the court discussed the effect of exception clause in the workmen's compensation act:

"It should always be borne in mind as the polestar of construction of any statute that the *rule* is broader than the *exception;* that the exception is specific, rather than general; and that, therefore, doubts and implications should be solved in favor of the rule, rather than of the exception."

The general rule as to the construction of exception clauses contained in statutes is set out in 59 C. J. 1092, Section 643, as follows:

"Exceptions, as a general rule, should be strictly, but reasonably construed; they extend only so far as their language clearly warrants."

We are of the opinion that articles of manufacture produced in a factory employing many hands cannot be said to be the "own work or production" of the owner or manager of such establishment. It is our opinion that the words "own work" constitute a phrase of limitation which strictly but reasonably construed, refers to products devised or produced by the personal handiwork of the vendor.

It is, therefore, our opinion that the vendors referred to in your letter are subject to the annual county tax as provided in Section 7174, 1935 Code.

BEER: "UNION BAR": POSTERS: SIGNS: Printed certificates of local unions evidencing the union membership of the employees of places of business of beer permit holders are not forbidden by statute since such signs do not advertise the business of the permit holder.

March 14, 1938. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa:* We acknowledge receipt of your request for the opinion of this department upon a question presented by the following facts:

Local organizations of "Hotel and Restaurant Employees' International Alliance" and "Bartenders' International League of America," groups affiliated with the American Federation of Labor, desire to display in places of business of certain beer permit holders, certain printed certificates which evidence the union membership of the persons employed at such establishments. The certificate is in printed form, being 11x6 inches in dimensions, and the words "Union Bar" appear upon the face of the certificate. The certificate bears the seal of the organization and facsimile signatures of the president and secretary-treasurer thereof. A reproduction of the certificate has been furnished to us, and your question is whether or not a display of such certificate in places of business of beer permit holders is permissible under the law.

Section 1921-f114, 1935 Code, provides among other things, the following:

"1921-f114. *Prohibited sales and advertisements.* 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. * * *"

It would appear that the legislature intended to prohibit the use of the certain words designated in the statute, when the same are used for purposes of advertising or calling attention to the character of the place of business of the permittee. It is to be observed that the statute prohibits exhibition or display of *signs* or *posters* containing the word "bar."

A sign is defined by Funk and Wagnall's New Standard Dictionary as follows:

"A board, plate or representation of any sort * * * used to indicate a *place of business*, amusement or resort." (Italics supplied.)

Webster's New International Dictionary (2d edition) defines the word "sign" as

"A lettered board or other conspicuous notice, placed on or before a building, room, shop, or office *to advertise the business there transacted, or the name of the person or firm conducting it* * * *" (Italics supplied.)

A sign, it thus appears, is a device employed to advertise or indicate a place of business.

Under the circumstances involved in this inquiry, the function of the certificate can hardly be said to be that of advertising a place of business—its purpose, rather, is to point out that the employees in such place of business, as distinguished from the business itself, are affiliated with certain organizations.

In view of the foregoing, we are of the opinion that the certificate is not a "sign" within the meaning of the statute.

According to the authority last mentioned above, "poster" is defined as follows:

"An advertising sheet of considerable size, usually printed, and often illusstrated, and bearing large letters so that when posted on a wall it may be easily read."

Again we find that the element of advertising is incorporated in the definition.

The section we are considering here was enacted by the 45th General Assembly in extra session, after the repeal of the Eighteenth Amendment to the Constitution. The legislature may have felt that the words "bar," "saloon," and words of like import, when used for advertising purposes, would describe falsely and in a misleading manner the places of business sanctioned by the new law. The provision was made for the prohibition of such advertising media about such places of business.

We conclude that the certificate of membership above referred to cannot be said to fall within the inhibition of the statute prohibiting the display of certain signs and posters.

This conclusion is reached after consideration of the form of certificate which accompanied your request and the particular circumstances surrounding the issuance and use of such certificate. The application of this opinion, therefore, must necessarily be limited to the particular subject matter and the specific question herein considered.

SCHOOLS: TRANSPORTATION: School board is not required to send bus to residence of all children entitled to attend school. Routes are fixed by the board and statutes provide methods for taking care of the transportation of those children who may reside off fixed route of travel.

March 14, 1938. *Mr. W. D. Daly, County Attorney, Garner, Iowa:* We acknowledge receipt of your request for the opinion of this department upon facts which may be stated as follows:

A resident of a consolidated school district in Hancock County sends several of his children to school via a district school bus which passes his house. This resident, however, has one child who has been "farmed out" to another resident of the district. It will cost $1.00 a day to send the bus to where this boy now resides.

Can the district be required to furnish bus transportation to this child under the above circumstances?

The general provisions as to transportation to school of children residing in consolidated school districts are set out in Section 4179, 1935 Code, which provides as follows:

"4179. *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 parent of the child in this case undoubtedly has the right to place the child in this other home. The child, being of school age and living within the corporation, is entitled to be transported to the consolidated school. The specific question arising is whether or not the bus will need to change its route to accommodate the child.

Section 4181, 1935 Code, provides that the parent of a child living an unreasonable distance from the school may be required to transport such child to a point of connection with the bus route. Sections pertaining to the establishment of such route and to the certain discretion given to school boards with respect to transportation in consolidated districts are as follows:

"4180. *Transportation routes—suspension of service.* The board shall designate the routes to be traveled by each conveyance in transporting children to and from school. The board shall have the right on account of inclemency of the weather to suspend the transportation on any route upon any day or days when in its judgment it would be a hardship on the children, or when the roads to be traveled are unfit or impassable."

"4181. *By parent—instruction in another school.* The school board may require that children living an unreasonable distance from school shall be transported by the parent or guardian a distance of not more than two miles to connect with any vehicle of transportation to and from school or may contract with an adjoining school corporation for the instruction of any child living an unreasonable distance from school. It shall allow a reasonable compensation for the transportation of children to and from their homes to connect with such vehicle of transportation, or for transporting them to an adjoining district. In determining what an unreasonable distance would be, consideration shall be given to the number and age of the children, the condition of the roads, and the number of miles to be traveled in going to and from school."

The above sections were construed by the supreme court of Iowa in the recent case, *Lanphier vs. Tracy Consolidated School District, et al.*, decided February 15, 1938, not yet reported. In this case a parent of children residing in a consolidated district sought a writ of mandamus to compel the school board to furnish transportation to his five children who lived more than one mile from the school and not within the limits of any city, town or village. It appeared that the petitioner's residence was within three-fourths mile of the route traveled by the school bus. The court denied the writ, holding that discretion lies with the board, in cases where children live an unreasonable distance from the school, to require the parent or guardian to transport such children a distance of not more than two miles to connect with a school bus. In the course of the above opinion the court commented as follows upon sections 4180 and 4181, supra:

"A reading of the last two sections shows that a patron of the school district cannot require the school board to transport children from their homes to the school when they live an unreasonable distance from the school and where the roads to be traveled are unfit or impassable. In such a case the board may require the parents to transport their children a distance not exceeding two

miles, to connect with the regular school bus route. Certainly, no one can say that this is an unreasonable requirement. If the bus was required to travel unfit or impassable roads it might delay arrival on time at the school, it might work an unnecessary hardship on other children, and the cost might be prohibitive. In the case at bar the pleadings show that the regular school bus route passed within three-fourths of a mile from appellant's home. Under this condition he is obliged to transport his children that distance, and the school board is obliged to allow him reasonable compensation for so transporting them."

It is therefore our opinion that the child in question is entitled to transportation to the school; that the parent of such child may be required to furnish the transportation from the child's residence to a connection with the route of the travel of the bus, provided the distance is not in excess of two miles; that if such requirement is made, the parent is entitled to receive a reasonable compensation for furnishing such transportation. Also, if the child lives an unreasonable distance from school, the board may contract with an adjoining corporation for the instruction of such child.

It is clear that the board is not required, in all events, to send the bus to the residence of all children entitled to attend school. Routes are to be fixed by the board and the statutes cited above provide methods for taking care of the transportation of those children who may reside off the fixed route of travel.

NARCOTICS: PHARMACY EXAMINERS: PODIATRISTS:

I. The pharmacy examiners have the right to require accountability of narcotics from state, county, municipal hospitals, institutions, and county dispensaries dispensing to relief patients.

II. The definition of the uniform narcotic law is broad enough to include a podiatrist. Chapter 117 of the 1935 Code grants a podiatrist the right to use narcotics as local anesthetics, but a podiatrist may not prescribe or dispense narcotics since the use of narcotics by a podiatrist is limited to that of a local anesthetic.

March 17, 1938. *Mr. John Heerema, Secretary, Iowa Pharmacy Examiners:* In your letter of March 11, 1938, you raise two questions on which you wish to have this department issue an opinion. They are:

1. Have the Pharmacy Examiners the right to require accountability of narcotics from state, county, municipal hospitals, institutions, and county dispensaries dispensing to relief patients?

2. Shall the podiatrist be approved under the Uniform Narcotic Law? Shall he or she be limited to the use of narcotics for local anesthesia? Shall he or she be permitted to prescribe, dispense, or administer only?

The general assembly passed what is known as the uniform narcotic law. This law is now found as Chapter 114, laws of the 47th General Assembly. Section 2 of this act provides as follows:

"Sec. 2. *Acts prohibited.* It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this act."

Section 1, subsection 9, defines the word "hospital" as follows:

"(9) *'Hospital'* means an institution for the care and treatment of sick and injured, approved by the Iowa pharmacy examiners as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist, or veterinarian."

From this definition, it will be seen that those institutions enumerated in your question No. 1 would come under the classification of hospitals, and that your board has been given the specific power to approve such institutions as places

where narcotic drugs may be kept for use in conformity with all of the drug statutes.

Section 5 of the uniform narcotic law deals with the method of sale of narcotic drugs. Subsection 1 of this act provides:

"Sec. 5. *Sale on written orders.* (1) A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons, but only on official written order:

* * *

"(c) to a person in charge of a hospital, but only for use by or in that hospital;

* * *."

Section 9 of the uniform narcotic law provides that a record shall be kept by everyone who deals in narcotic drugs. In this respect, subsection 1 of Section 9 specifically provides as follows:

"Sec. 9. *Record to be kept.* (1) Every physician, dentist, veterinarian, *or other person who is authorized to administer or professionally use narcotic drugs,* shall keep a record of such drugs received by him and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this subsection if any such person using small quantities of solutions or other preparations of such drugs for local application shall keep a record of the quantity, character and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients."

This act specifically gives the board of pharmacy examiners the power to approve or disapprove hospitals as dispensaries for narcotic drugs, and further provides that sale may be made to hospitals. Section 9 of the act then lays down detailed regulations as to the keeping of records, and in this regard provides:

"Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record etc. etc."

In other words, every hospital that has drugs must keep a record of the disposition of such drugs, and this record must comply strictly with the provisions of Section 9.

It is therefore the conclusion of this department that your question No. 1 should be answered in the affirmative.

Your second question divides itself into three parts, the first one of these being:

A. Shall a podiatrist be approved under the uniform narcotic law?

The definition given to a physician is as follows:

"Section 1. * * * (2) 'Physician' means a person authorized by law to practice medicine in this state and *any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment.*"

This definition is broad enough to include a podiatrist since Chapter 117 of the 1935 Code provides for the licensing of a podiatrist and the regulation of the profession of podiatry. A podiatrist, in Chapter 117, is specifically authorized to diagnose and give medical and surgical treatment to ailments of the human feet, and in this regard, is empowered to use local anesthetics.

It is therefore the conclusion of this department that the definition of a physician in the uniform narcotic law is broad enough to include a podiatrist.

B. Shall he or she be limited to the use of narcotics for local anesthesia?

This question is readily answered by the very terms of the regulations imposed upon a podiatrist in Chapter 117 of the Code. Section 2546 provides:

"*Amputations—general anesthetics.* A license to practice podiatry shall not authorize the licensee to amputate the human foot or toe, or use any anesthetic other than local."

Thus, if narcotic drugs are to be used as anesthetics, they may be used by a podiatrist, but may only be used as local anesthetics.

C. Shall he or she be permitted to prescribe, dispense, or administer only?

There can be no question but that a podiatrist may administer such narcotics *as he uses* as an anesthetic. However, *he may only administer* them as anesthetics in the course of his practice, and then only as local anesthetics.

Therefore, it is the conclusion of this department, in regard to your second question, that the definition of the uniform narcotic law is broad enough to include a podiatrist. Furthermore, Chapter 117 of the 1935 Code grants a podiatrist the right to use narcotics as local anesthetics, but a podiatrist may not prescribe or dispense narcotics since the use of narcotics by a podiatrist is limited to that of a local anesthetic.

STATE BOARD OF SOCIAL WELFARE: BLIND ASSISTANCE: RESIDENCE QUALIFICATION: LEGAL SETTLEMENT: Senate File 375, Sections 3 and 23. Applicant in order to file for blind assistance from a county does not need to show legal settlement in said county in order to file—if applicant moves, the county to which he moves is charged with costs after 6 months' residence. Legislature did not mean words "resident" and "residing" to mean legal settlement.

March 22, 1938. *Mr. Frank T. Walton, Superintendent, Subdivision of Aid to Blind:* We have your request dated March 13, 1938, requesting an Attorney General's opinion as to the proper legal interpretation of the residence qualification as set out in paragraph 3, Section 3, and Section 23, of Senate File 375, Acts of the Forty-seventh General Assembly, said act being entitled "Aid to the Needy Blind Act of 1937" and which sections are as follows:

"Sec. 3. *Eligibility for assistance to the needy blind.*

* * *

3. Has resided in the state of Iowa for at least five years during the nine years immediately preceding the date of the application for assistance under the provisions of this act, and has resided therein one year immediately preceding the application for assistance. If, however, such person has become blind while a resident of the state or is blind and a resident of the state at the time of the passage of this act, he is eligible even though he has not resided for five years within the state; * * *."

"Sec. 23. *Removal to another county.* When any recipient moves to another county he shall be entitled to continue to receive assistance which shall be chargeable to the county from which he has removed, for a period of six months and shall thereafter be charged to the county in which he then resides."

Your first question is as follows:

1. Does paragraph 3 of Section 3 of said act require an applicant for blind assistance to first show that he has a legal settlement in some county of the state before he is eligible to receive assistance under said act and before the county from which the application comes can be charged with one-fourth of the administrative expenses within the county incident to blind aid and one-fourth of all of the assistance and benefits paid to blind persons within said county as provided in Section 21 of said act which is set out as follows:

"Sec. 21. *County appropriation.* The county board of supervisors in each county in this state shall appropriate annually, and pay in the manner herein-

after specified from the county poor fund, such sum as will result in the payment by the county board of one-fourth of all administrative expenses within the county incident to aid to the blind, as determined and certified by the state board, other than compensation of members of the county board and their expenses, and one-fourth of all assistance and benefits payable to blind persons resident within the county under this act, and shall include in the tax levy for such county the sum or sums so appropriated for that purpose. * * *"

2. If legal settlement is necessary for eligibility under the state act and necessary in order to charge said counties with said one-fourth of administrative expenses and benefits under said act, then can Section 23 of said act, as above set out, be reconciled with the Iowa laws governing legal settlement as set out in Section 5311 of Chapter 267, 1935 Code of Iowa?

We submit the following:

The acts entitled "Aid to the Blind" which became effective on July 4, 1937, after passage by the Forty-seventh General Assembly, and set out as Senate File 373 and Senate File 375 of said Forty-seventh General Assembly, were acts repealing Sections 5379 to 5384-a1, inclusive, of Chapter 272, of the 1935 Code of Iowa, and were enacted in lieu thereof. Said acts were enacted primarily to enable the state of Iowa to receive blind assistance funds from the federal government under and through the Social Security Act, Public Bill No. 271, enacted by the Seventy-fourth Congress of the United States and approved August 14, 1935. Chapter 272 of the 1935 Code which contained the now repealed sections, was a chapter enabling counties of this state to provide for blind assistance for needy blind and to pay for said assistance from their county treasury. However, we note that the language contained in the new acts closely follows the language used in many instances in the repealed sections, as, for instance, the repealed Section 5379 of the 1935 Code of Iowa which authorized blind aid for "needy persons who have *resided* in Iowa for five years and in the county one year immediately before applying therefor."

In defining the residence qualification necessary for blind assistance under Chapter 272, and repealed sections thereof, Justice Stevens, in the case of *In re: Estate of Hugus*, 203 Iowa 607, at page 609, states:

"Decedent (who was a recipient of blind aid) was not a pauper nor does the act so classify those who may become beneficiaries of the provisions of Chapter 272, Code of Iowa, 1935."

It is, therefore, evident that the Supreme Court of Iowa did not consider legal settlement to be a necessary requisite for blind assistance under said repealed act and not necessary in order to enable counties to pay for said assistance from their county treasury and said court did not consider the words "residing" and "residence" as used throughout said act, to mean legal settlement.

Legal settlement is a purely statutory requirement and is set out in our law at Section 5311 of Chapter 267, 1935 Code, said chapter being entitled "Support of the Poor." Chapter 272, now repealed and Senate File 375, enacted in lieu thereof, are entirely separate and distinct chapters from that chapter providing for the support of the poor.

We further note that the Social Security Act, from which the state of Iowa derives half of its fund for blind assistance, provides as follows:

"(b) The Board shall approve any plan which fulfills the conditions specified in subsection (a), except that it shall not approve any plan which imposes, as a condition of eligibility for aid to the blind under the plan—

(1) Any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preced-

ing the application for aid and has resided therein continuously for one year immediately preceding the application; or

(2) Any citizenship requirement which excludes any citizen of the United States."

We must, therefore, assume that the Forty-seventh General Assembly which passed Senate File 373 and Senate File 375, before the passage of said acts, considered the following:

1. The fact that the Social Security Act prohibited the state from requiring legal settlement as a qualification for blind assistance.

2. The fact that the residence requirements in the repealed sections of our county blind act did not require legal settlement.

3. The fact that the above assembly passed an act, viz., Section 23, requiring the counties to assume their share of the costs of administration and blind assistance of a recipient who, after six months, merely moves into said county, this, a clear distinction with the definition and requirements for legal settlement as set out in the law.

It is, therefore, our opinion that the words "residing" and "residence" as included in the sections under Senate File 375, Acts of the Forty-seventh General Assembly, do not mean legal settlement as set out in the Poor Act and that an applicant, in order to file for blind assistance from a county in the state, does not need to show legal settlement in said county in order to file from said county and in order that said county may be charged with the one-fourth of administration and assistance granted under said Blind Act in said county, we further are of the opinion that if a recipient moves from one county to another, then the latter county is chargeable with the costs as set out in said act after six months of residence by said recipient in said latter county. To hold otherwise would be to defeat the very purpose of the act. Regardless of legal settlement, a blind person, because of his special physical condition, is entitled to care and protection under said act and may make application from whatever county he resides within. The humane purpose of the legislature might even be defeated if legal settlement were held to be necessary.

If legal settlement were required before a blind person could be entitled to aid, the participation by the federal government and contribution of federal funds to aid in said blind act might be in danger of termination.

We believe it apparent, therefore, that if the legislature intended legal settlement to be a necessary requirement for participation under the Blind Act and necessary to charge the county with its one-fourth contribution, that it would have so stated in clear and explicit language. It is more reasonable to assume that the legislature, with full knowledge of the law, did not intend the words "resident" and "residing" as used throughout said sections to mean legal settlement.

HISTORICAL, MEMORIAL AND ART DEPARTMENT: CURATOR: BOOKS: Curator of Historical, Memorial and Art Department may order books not yet published or written, to be delivered in future. He may refuse books ordered in the past.

March 26, 1938. *Mr. O. E. Klingaman, Historical, Memorial and Art Department:* Receipt is acknowledged of your request for the opinion of this department upon two questions which may be stated as follows:

(1) Is there legal authority for the curator to give an order for a book not yet published or written, to be paid for at some future date and "if and when the book is published"?

(2) Is there any obligation on the Historical, Memorial and Art Department to accept and pay for books ordered over four years ago for delivery "if and when published," when such books are not now desired for the department?

Under the provisions of Section 4525, paragraph (2), 1935 Code, the curator, under the direction of the board of trustees of the Historical, Memorial and Art Department, is given authority to collect books illustrative of certain objects, the statute providing as follows:

"4525. *Duties of curator.* The curator shall:

* * *

"2. *Custody, display, and publication of material.* Under the direction of the board, collect, preserve, organize, arrange, and classify works of art, books, maps, charts, public documents, manuscripts, newspapers, and other objects and materials illustrative of the natural and political history of the territory and state and of the central west, and of the traditions and history of the Indian tribes and prior occupants of the region, and publish such matter and display such material as may be of value and interest to the public."

The above authorization would include the power, we believe, to subscribe to an appropriate volume to be written and published in the future, where the same is to be paid for out of current appropriations made to the department. In certain cases it may be that such publication could be issued only if advance orders were sufficient in number to justify preparation of such volume. Under such circumstances, we see no reason why the Historical, Memorial and Art Department cannot subscribe to such a publication for future delivery. The publisher, however, who may enter into such an agreement, is bound to know that certain limitations may operate in the future which may affect the contract for delivery of the book, which limitations are referred to hereinafter.

In answer to the second question set out above, it is our opinion that a suit could not be maintained to enforce the terms of such transaction. The reason for this is based upon the principle of the immunity of the state and its agencies from suit, which principle is firmly established in Iowa. See *Hollingshead vs. Board of Control*, 196 Iowa 841; *State vs. Cameron*, 177 Iowa 262; *Wilson vs. Louisiana Purchase Exposition Commission*, 133 Iowa 586; *Mills Publishing Company vs. Larrabee*, 78 Iowa 97.

The particular transaction, therefore, does not constitute an enforcible legal obligation as against the state or your department. Whether or not such expenditure is proper and desirable at this time is a matter now to be determined by you. Persons contracting with the state and its agencies are bound to know the extent of authority under which the agents of the state act. Approval of this claim by you as curator and as the director of the Historical, Memorial and Art Department is a prerequisite to its payment. If you decide that such payment should not be made, then whether or not the claimant has a just claim upon the conscience of the state, is a question which can be determined only by the legislature.

It is respectfully suggested that if there are, in your department, other outstanding executory agreements of the above character under which you will not desire to accept future delivery, that the interested parties be notified of your intentions.

SCHOOLS: ELECTIONS: When deviation of hours in a school election is slight, and no person is deprived of his rights as a result; such deviation will not invalidate the election.

March 28, 1938. *Mr. Joseph P. Hand, County Attorney, Emmetsburg, Iowa:*

We acknowledge receipt of your request for the opinion of this department upon a question arising out of certain facts stated by you as follows:

"In a sub-district school election held last Monday, notice was posted that the polls would be open from 9:00 a. m. to 11:00 a. m. A few minutes before 11:00, four persons entered the polling place but did not cast their ballots until a short time after 11:00. Shortly after 11:00, five more persons entered the building and cast their ballots. The question presented to this office is whether such votes should be counted. * * * I might also state here that had these last five ballots not been counted, it would have made a difference in the results of the election as I understand that there was only a difference of two or three votes for or against the present director. Therefore, this fact might have to be considered."

I.

We shall first consider the question of the validity of the votes of the four persons who entered the polling place before 11:00 a. m.

Section 4216-c9, 1935 Code, provides for the hours of voting in the various school corporations, and prescribes the following rules with respect to subdistricts:

"4216-c9. *Opening polls.* * * in subdistricts the polls shall open not earlier than nine o'clock a. m. nor later than seven o'clock p. m., but shall remain open not less than two hours."

Section 4216-c33, 1935 Code, provides as follows:

"4216-c33. *Application of general election laws.* So far as applicable all laws relating to the conduct of general elections and voting thereat and the violation of such laws shall, except as otherwise in this chapter provided, apply to and govern all school elections."

"491-a1. *Voters entitled to vote.* All persons entitled to vote at said election who are within said polling places at the time said polling places are closed shall be permitted to vote."

Therefore, in view of the above provisions of the statute, we conclude that the votes of the four persons who entered the polling place before 11:00 a. m., were cast in conformity with the law.

II.

Whether or not the ballots cast by the five persons who entered the polling place shortly after the closing time were valid depends, basically, upon a determination of whether or not the language of the statute is to be construed as directory or mandatory.

Section 4216-c3, 1935 Code, provides for notice of election and the manner of posting the same in subdistricts as follows:

"4216-c3. *Notice of election.* There shall be a written notice of all regular or special elections, which notice shall be given not less than ten days next preceding the day of the election, except as otherwise provided in this section, and shall contain the date, the polling place, the hours during which the polls will be open, the numbers of directors or officers to be elected and the terms thereof, and such propositions as will be submitted to and be determined by the voters.

* * *

"In subdistricts said notice shall be posted by the subdirector in three public places within the subdistrict, one of which shall be on the front of the school building. * * *"

The statute fixing the duration of the voting period in subdistricts prescribes that the polls shall remain open "not less than two hours." In the present case it appears that the polls were kept open slightly in excess of the period fixed by the notice of election. The following general discussion of the subject matter herein considered is found in Section 111, page 1107, Ruling Case Law:

"Where the legislature has prescribed the time, the effect of a failure of the election officers to comply with the requirements is a matter of some concern. The decisions on the question are based on the distinction between mandatory and directory provisions of statutes. Ordinarily a provision as to the time of opening and closing the polls is considered directory, on the general principle that a statute is to be regarded as directory if the directions given to accomplish a particular end may be violated and yet the given end be in fact accomplished and the merits of the case unaffected. The particular hour of the day in the case of an election is not of the essence of the thing required to be done, and where the law fixes the opening and closing of the polls at sunrise and sunset the election should not be invalidated because the polls were closed a few minutes before or were kept open a few minutes after sundown. But this rule applies only to unsubstantial departures from the law. There may be such radical omissions to comply with the provisions of a directory statute as will lead to the conclusive presumption that injury must have followed. And so where the polls were open from one p. m. until six p. m., instead of from one hour after sunrise to sunset as required by law, the election was held invalid. It is generally held that an election will not be declared invalid where it is apparent that the votes cast while the polls were not properly open are not sufficient to change the result of the election; but the weight of authority is to the effect that such votes are themselves invalid, though it has been held that a reasonable latitude is allowable in this connection, so that under some circumstances such votes may be counted."

We find four Iowa cases which discuss the matter of irregularity as to the hours of holding elections.

At the time the early case, *District Township of Hesper vs. Independent District of Burr Oak*, 34 Iowa 306, was decided, the statute provided for organization of independent school districts following a favorable vote of the electors of proposed districts. The statute further provided that the polls should be open from 9:00 a. m. to 4:00 p. m. The election was ordered and held at 1:00 o'clock in the afternoon. The court held the election void by reason of this deviation, and spoke as follows:

"The township trustees had no power to order an election to be held at a time not authoreized by law, and it was therefore illegal. The action of the electors, deciding upon the organization of the district, being unauthorized and void, must be regarded for naught, and the district itself as having no legal existence."

It should be observed that in the above case the election was called for a different hour than that prescribed by law. The circumstances in the above case were such that the court deemed that something more than an irregularity existed.

The case *Lincoln Township vs. Independent District of Germania*, 112 Iowa 321, likewise involved a vote on the formation of an independent school district. The law then required that the polls remain open from 12 o'clock noon to 7 o'clock p. m. The polls were in fact open from 9:00 a. m. until 4:00 p. m. The court, which sustained the validity of the election after determining that every elector in the district had voted save one who did not desire to vote, used the following language:

" 'It appears that a statute requiring that the polls shall be opened at sunrise and kept open until the setting of the sun, is so far directory that, before an election can be set aside because of deviation from the statute in this respect, it must be shown that legal votes were excluded, or illegal votes received in consequence thereof. Whether the fact of closing the polls before the hour fixed by statute, or keeping them open after such hour, will of itself, vitiate the election, must depend upon the terms of the statute. A slight deviation from the direction of the statute in this respect will not render void the election,

unless it is fraudulent, and operates to deprive legal voters of their rights, or unless the statute in express terms makes the hour of opening and closing the polls of the essence of the election. The better opinion seems to be, however, that a considerable deviation from the hours fixed by law for keeping open the polls must render the election void.'

"Under the facts of this case, the hours of opening and closing the polls are not a matter of substance. If, by reason of the departure as to the hours, any person entitled to vote might have been deprived of the privilege, or if some person not entitled to vote had done so, or if doubt might exist as to the result, then the hours might be a matter of substance, and the statute mandatory, but not so under the facts as they here appear. We conclude that the court erred in holding the election in question invalid."

In the case *Chambers vs. Board of Directors*, 172 Iowa 340, a school district bond election was involved. The notice fixed the time of election between the hours of 9:00 a. m. and 6:30 p. m. The statute provided that the hours be set between 1:00 p. m. and 6:00 p. m. In sustaining the validity of the election in this case, the court said:

"That the election was held from 9 a. m. to 6:30 p. m., instead of from 1 to 6 p. m., was also a mere irregularity. The case differs essentially from one where the polls are held open for too short a time, and there is reason to apprehend that someone entitled to vote was deprived of the right to do so, because of lack of time. Here the election was held from 1 to 6 p. m., and the mere fact that the polls were also held open for four hours before 1 p. m. and for half an hour after 6 p. m. was surely nonprejudicial. This proposition is settled by *District Township of Lincoln vs. Independent School District of Germania*, 112 Iowa 321."

In the case *State vs. Consolidated Independent District*, 193 Iowa 853, the election involved a vote on consolidation. It was contended that three votes were cast after 6:00 p. m., the hour fixed by the statute for the closing of the polls. This case rather emphasizes the fact that the result of the election was not affected by the votes admitted after the closing of the polls. The facts presented in your inquiry indicate that the results of the election held in the subdistrict might be affected by the five votes cast after the time fixed in the notice for closing the polls. The court, in the case last mentioned, however, in holding the election valid, employed broad language as follows:

"The inadvertence of judges of election in permitting the polls to remain open for a few minutes after the closing hour does not invalidate an election. The complaint is purely technical and under the evidence no prejudice resulted. *Chambers vs. Board of Directors*, 172 Iowa 340.

"Our government recognizes the rule of the majority, and the will of the majority finding expression in the manner and form provided by law must not be thwarted for slight or transient reasons."

It is apparent that each particular case must turn upon its own circumstances. After considering the facts presented in your inquiry in the light of the decisions of the Iowa court referred to, we conclude that there was not in this case such a substantial deviation from the requirements of the law to vitiate the election. In this case the time was not definitely fixed by statute. In fact, under the statute, the polls might have been open at the time of the voting, had the notice of the election so prescribed. No one was deprived of a vote, and there is no showing that, except for the time element, any irregularity occurred. The deviation was slight and on the whole we conclude that the same constituted an irregularity of such character as not to invalidate the election.

SCHOOLS: TUITION: CONTRACT WITH OTHER SCHOOLS: Directors of school corporation may contract with directors of school corporation of another state for the schooling of the former's children, and may pay tuition for the said children.

March 28, 1938. *Mr. E. F. Kennedy, County Attorney, Sibley, Iowa:* Receipt is acknowledged of your request for the opinion of this department upon a question with which you have supplied certain facts which are set out as follows:

"Do the directors of an independent school corporation have the right to send grade school children living just south of the state line in Iowa to a grade school just over the line in the state of Minnesota? If they can send the children to this school in Minnesota do they have the right to pay the tuition and transportation of the pupils?

"The directors and all of the parents involved want the schools closed and the pupils sent to the school at Bigelow, Minnesota. The two schools involved are too small for state aid and it will be much cheaper for the district to send the pupils to Bigelow and pay their transportation and tuition than it will be to keep these two schools open. In addition the pupils will benefit by being able to attend a bigger school where they will receive better instruction."

It is clear that under the statutes a high school pupil may, under proper circumstances, attend a high school in an adjoining state and bind his district for the cost of tuition entailed.

"4275. *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."

"4276. *Requirements for admission.* Any person applying for admission to any high school under the provisions of Section 4275 shall present to the officials thereof the affidavit of his parent or guardian, or if he have neither, his next friend, that such applicant is entitled to attend the public schools, and a resident of a school district of this state, specifying the district. He shall also present a certificate signed by the county superintendent showing proficiency in the common school branches, reading, orthography, arithmetic, physiology, grammar, civics of Iowa, geography, United States history, penmanship, and music.

"No such certificate or affidavit shall be required for admission to the high school in any school corporation when he has finished the common school branches in the same corporation."

If authority for such procedure exists, it is to be found in the statutory provisions hereinafter cited. Section 4274-e1, 1935 Code, provides as follows:

"4274-e1. *Contract for school privileges.* For the purposes of furnishing elementary school facilities to the children of school age within the district, the board of one or more such districts may enter into a contract for such facilities, jointly or individually, with the board of one or more school districts where such facilities up to and including the eighth grade are approved by the superintendent of public instruction; provided that such schools are the most conveniently located with respect to the children to be accommodated."

"4274-e2. *Terms of contract.* Such contract may cover a period not exceeding three years; it shall be in writing and shall state the monthly tuition rate, the period during which the contract is to run, and such other matters not in conflict with law as may be mutually agreed upon."

Sections 4274-e3 to 4274-e6 make provisions for transportation of children attending school under the above circumstances.

Section 4274-e7 provides as follows:

"4274-e7. *Effect of contract.* A contract entered into as provided in Sections 4274-e1 to 4274-e6, inclusive, shall not be construed as in any way impairing the corporate identity of the contracting districts nor as affecting the legal powers of the respective boards except as specifically set out in said sections, nor as entitling any person to a right of reversion in any schoolhouse site."

The above statutes contemplate that elementary schooling, if the same is adequate and approved, may be arranged for in a district or districts other than the district of residence of the children concerned. The sections last above referred to were enacted together as House File 46, acts of the 45th General Assembly, regular session, the same according to its title being:

"An act to authorize the school board in one or more districts to enter into a contract jointly or individually with the board of another district to provide for elementary school facilities including transportation under certain conditions for the children of their respective districts."

A careful consideration of the language of the act leads to the conclusion that its purpose was to permit the closing of schools in districts, where the board deemed such action wise, and to provide means whereby the children of such districts could be assured of adequate school facilities. That the act contemplates the actual closing of schools rather than that its provisions be available only to children in "going" subdistricts or districts, is evidenced by the language of Section 4274-e7, which is set out above.

The conclusion must be reached that the directors of your district would have authority, under the provisions set out above and acting in accordance therewith, to contract for the schooling of the children in another Iowa school corporation.

May such contract be consummated with a school corporation outside the state of Iowa? Under the terms of the statute, the school which is to furnish the facilities must be "the most conveniently located with respect to children to be accommodated." Your school corporation is an entity, capable of entering into contractual relations, and it is assumed that the Minnesota corporation is likewise qualified. We see no reason why, in the light of the foregoing statutory provisions, the Iowa district and the Minnesota district cannot effect as valid an agreement as might two Iowa corporations.

The case *Dermit vs. Sergeant Bluff Consolidated Independent School District*, 220 Iowa 334, recognizes the power of a school district of this state to contract with a district of an adjoining state. In the course of the opinion, holding the Iowa district liable for transportation where it had previously allowed and paid tuition to a Nebraska school, the court states:

"One other question is raised in the case, and that is that the school corporation does not have the power to incur liability for transportation of grade pupils outside of the state. We do not think that this contention can be available to the defendant. It performed its first duty in furnishing to plaintiff a school for his children at Homer, Neb., and paying the tuition for same. No question is raised about its power to do this, and we think that when it furnished this school to the plaintiff for his children, in accordance with the statutory duty placed upon it, it is immaterial whether it was inside or outside of the state of Iowa; and when it did this and paid the tuition for these children at Homer, Neb., this carried with it the duty to furnish them with transportation to and from said school; and the defendant having tendered the Homer school to the plaintiff, and he having accepted the same, as a compliance with its statutory duty, we do not think the defendant is in a position to raise the question that the same was across the line in the state of Nebraska."

The school facilities to be offered by the Bigelow school must be approved by the superintendent of public instruction. The amount of tuition to be paid to the Minnesota district by the Iowa district would be limited by the provisions of Section 4233-e3.

SCHOOLS: DISCONTINUANCE: In independent school districts, the establishment, as well as the continuance or discontinuance of high schools or high school courses of study, are matters left for the sole determination of the school boards of such districts.

March 28, 1938. *Mr. C. G. Nystrom, County Attorney, Decorah, Iowa:* We acknowledge receipt of your request for the opinion of this department upon the following question:

"Can the board of directors of an independent school district, which has established and maintained a regular four-year high school, by a motion passed by a vote of the majority of the directors discontinue the 11th and 12th grades of said high school?"

Section 4250, 1935 Code, provides as follows:

"4250. *Right to prescribe.* The board shall prescribe courses of study for the schools of the corporation."

This general grant of authority to the board of directors is restricted by certain provisions requiring that designated courses be taught in the public schools. These provisions are found in the following sections: 4252, 4255, 4256, 4257, 4259, 4264, and 4263. In addition to the courses required by statute as aforesaid, Section 4217, paragraph (3) provides as follows:

"4217. *Enumeration.* The voters at the regular election shall have power to: * * *

"3. Determine upon additional branches that shall be taught."

Authority is vested in boards of directors to establish high school by virtue of the provisions of Section 4267, which is as follows:

"4267. *Higher and graded schools.* The board may establish graded and high schools and determine what branches shall be taught therein, but the course of study shall be subject to the approval of the superintendent of public instruction. Whenever the board in a school township establishes a high school, such high school can be discontinued only by an affirmative vote of a majority of the votes cast for and against such proposition at an election which may be called by the county superintendent of schools upon a petition for such election being presented signed by twenty-five per cent of the electors in such township."

It is to be noted that high schools established in *school townships* can be discontinued only by a vote of the electors of such township by following the procedure outlined in the statute. The requirement for the discontinuance of a high school by a vote of the electors, applies only to school townships under the provisions of the foregoing section. Apart from the above provisions, we find no other statute which limits the power of a board to prescribe courses of study for the schools of a corporation.

Where a statute enumerates the things upon which it is to operate, it should be construed as excluding from its effect all those not expressly mentioned. Application of this well-founded rule of statutory construction results in requiring an election for discontinuance only in cases of high schools established in school townships.

There are two types of school districts existent in Iowa, namely, school townships and independent districts. The legislature has seen fit to require that a high school established in a school township be discontinued only by the

direction of the voters of such district. In independent school districts, the establishment, as well as the continuance or discontinuance of high schools or high school courses of study, are matters left for the sole determination of the school boards of such districts.

ROADS AND HIGHWAYS: VACATION OF: BOARDS OF SUPERVISORS—AUTHORITY: Vacation of roads governed by provisions of Section 4560 et seq. of the Code.

March 28, 1938. *Archie R. Nelson, County Attorney, Cherokee, Iowa:* This department is in receipt of your letter of the 14th inst., supplemented by your letter of the 21st inst.

You request our opinion as to whether or not the board of supervisors has the power to vacate certain roads that were established many years ago, and which have never been improved and used as roads, without requiring a petition to be filed for such vacation.

We note that you have given a tentative opinion to your board in which you say you are submitting the matter to this department. We agree with your position in the opinion given to your board that the matter is governed by Section 4560 et seq. rather than by Section 4607 et seq. of the Code.

The general procedure for the vacation of roads, as prescribed by Section 4560 et seq. provides among other things for notice to certain landowners affected, and Section 4621 provides for notice to certain landowners affected where it is proposed to abandon any part of a highway already established. Whether there is any particular significance in the use of the word "abandon" in the latter section, as distinguished from "vacation" as used in prior sections, is not particularly material, except as hereinafter referred to.

Section 4607 was originally contained in the Code of 1897, so far as it provides for the change in the course of a road to avoid a stream or watercourse, etc. It was changed by the enactment of Section 1521-r1 of the Supplemental Supplement of 1915, to require a petition of ten freeholders, but it included the present purposes of straightening a road or to cut off dangerous corners, etc.

Section 4621 first appeared as Section 1527-r7 of the Supplemental Supplement of 1915. Sections 4560 et seq. providing for the establishment, vacation and change had been in the law for many years prior to the enactment of what is now Section 4607 and Section 4621 of the 1935 Code.

Something might be said in support of the proposition that by the enactment of the later statutes, it was intended to provide a special method for the vacation of roads, while the original statutes provided for the establishment as well as for the vacation. But in view of the fact that the major portion of what is now Section 4607, and all of what is now Section 4621, were both contained in the same chapter, being Chapter 271 of the Acts of the 36th General Assembly, we think that Section 4621 refers to changes made pursuant to Section 4607, and that the powers given to the board in Section 4607 are limited to the changes therein specified.

The case of *Jenkins vs. Iowa State Highway Commission,* 218 N. W. 258, 205 Iowa 523, contains some language that if standing alone might allow the inference that Section 4607 in practical effect supplants Section 4560, et seq. so far as vacation or abandonment of established roads is concerned. In the course of that opinion the court said:

"It will be noted that this section (4621) not only recognizes the power to

change, but also the power to abandon and to vacate a highway already established, and to do so without use of the power conferred by Section 4560 and without resort to the procedure provided in the following sections. This distinction permeates all subsequent legislation on the subject of roads and their improvement."

But the question determined in the Jenkins case was the power of the highway commission to change the road, and as to what constitutes a change. We think that if the legislature intended to make Section 4607 applicable to the vacation of all roads, that the board of supervisors might desire to abandon or vacate, it would have used language expressly conferring this power. But in the absence of the use of such language we do not think that the provisions of Section 4560 et seq. can be considered as being impliedly repealed by the later provisions. Therefore, as stated, we concur in your opinion given to the board of supervisors.

ROADS AND HIGHWAYS: BOARD OF SUPERVISORS: LOCAL ROAD PROJECT: MAINTENANCE FUND: Construction and maintenance work distinguished.

March 29, 1938. *Mr. E. A. Jinkinson, County Attorney, Primghar, Iowa:* This department is in receipt of your letter of March 25, 1938, in which you ask the opinion of this department on the following question:

"O'Brien County, Iowa, is receiving WPA funds and has been expending these funds for the purpose of placing gravel on dirt roads. There is no question of resurfacing a gravelled road involved in this question. The project on which the work is being done was not approved by the Board of Approval, nor has any engineer's survey been made of the same. The adjoining landowners to the roads being gravelled are contributing a share of the cost. WPA money is being expended for a share of the cost, and the remaining money is being paid out of the maintenance fund of O'Brien County. No construction work other than the placing of gravel is being done. Approximately 850 yards of gravel are being placed to the mile, whereas generally the county places 1,100 to 1,200 yards of gravel to a mile. The question is, can the county legally expend money from the maintenance fund of the county to assist in this project?"

We do not find that the Supreme Court has passed upon the question, but we have been called upon from time to time to answer specific questions as to whether or not certain work constitutes maintenance or construction work.

While the word "maintain" has various meanings, as applied to different situations, the following definitions, found in 38 Corpus Juris, 335, seem to apply with respect to what is maintenance of a road. It is there recited that it has been held that the word means:

"To hold in an existing state or condition."

"To hold or preserve in any particular state or condition; to keep from change; to keep from falling, declining, or ceasing; to keep in existence or continuance; to keep in proper condition; to keep in repair; to keep up; to preserve."

We think that the legislature in providing for the construction and maintenance of the roads, and in providing separate funds therefor, and specific directions as to the manner of expenditure of the construction fund, used the words "maintenance" and "construction" in their ordinary meaning. The Code provides in Chapter 4, Section 63, that words and phrases shall be construed according to the text, and the approved usage of the language.

If a distinction is to be maintained between construction and maintenance, it seems to us that it necessarily follows that the placing of approximately

850 yards of gravel on a dirt road cannot be considered as maintaining a road. In the ordinary acceptation of the term "improvement," such work would be an improvement of the highway. If a county can gravel its dirt roads out of the maintenance fund, it would be only a step further to allow them to pave the roads out of the maintenance fund. The fact that no survey was made and that the board of approval did not act upon the project, (we are assuming from what you say that the road that is being gravelled is a local road and not a county trunk road), has no bearing upon the question. If it is maintenance work, the board has the right to have it done without such survey and such approval by the board of approval; if it is construction work the board has no right to have it done without having a survey and plan made, and without such approval.

The statutes are clear that the legislature intended that construction work be handled in a certain way, and the boards of supervisors have no right to do what is in fact construction work under the name of maintenance work. It is true that sometimes the line between what is construction work and what is maintenance work is not well defined, and a particular work might be called either construction work or maintenance work without doing violence to the ordinary meaning of the words, but we do not regard your problem as such a close question. It seems clear that the work your board is proposing to do is construction work as distinguished from maintenance.

It is appreciated that in a case like yours, where a part of the money required is being contributed by the landowners, and part of the labor required is being furnished by WPA labor, it may be more convenient to handle the matter as a maintenance project, but however that may be, the legislature has seen fit to make a broad distinction between the two classes of work, and these distinctions must be observed by the boards of supervisors.

We are of the opinion that the expenditure of the maintenance fund of your county on this project is unauthorized and that it would be contrary to the law for your board of supervisors to treat it as a maintenance project, and we think that the work is construction work governed by the statutes relating thereto.

TOWNSHIP: TRUSTEES: VACANCIES: OFFICERS: Appointment and qualification of one trustee to fill two succeeding trustee offices occasioned by vacancy discussed.

March 30, 1938. *Mr. E. P. Murray, County Attorney, LeMars, Iowa:* Receipt is acknowledged of your request for the opinion of this department upon certain facts which you have stated as follows:

"A party here was holding office as a township trustee and was also elected in the fall election of 1936 for a new term which commenced last January. After the election he filed a written resignation resigning as township trustee. I do not have a copy of this resignation but I understand that it was general in its terms and was broad enough to cover the term for which he was elected as well as the term that he was serving during the time that the fall election of 1936 took place. After the resignation was filed the remaining trustees appointed another party to fill the vacancy and he qualified. The trustees who were in office after January 1, 1938, appointed another party to fill the term that commenced on January 1, 1938 and did so on the advice of an attorney who held that the first appointment covered only the remainder of the first term.

"I advised them that in view of the fact that he resigned after he was elected there was a vacancy in the remainder of the old term and in the new term

commencing January 1, 1938 and that the appointment to fill the vacancy, made under these circumstances would be for a term until the next general election and the first appointee having qualified it was not necessary that he qualify again at the commencement of the term beginning January 1, 1938, this being on the theory that the tenure of office of the first appointee was until the next general election."

Section 521, 1935 Code, relates to the election of township trustees, and provides as follows:

"521. *Board of supervisors and township trustees.* There shall be elected, biennially, in counties and townships, members of the board of supervisors and township trustees, respectively, for a term of three years to succeed those whose terms of office will expire on the second secular day of January following said election; there shall also be elected a member or members for a term of three years to succeed those whose terms will expire on the second secular day in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office."

Upon the resignation of the elected trustee in 1936, two vacancies in office arose—one, a vacancy in the balance of the current term of office, and the other in the term of office which was to commence January 1, 1938. Each of these constitutes a separate and distinct office, notwithstanding the circumstance that the same person happened to be the incumbent as well as the one chosen for the future term.

The filling of vacancies in township offices is provided for in Section 1152, paragraph (7), 1935 Code, as follows:

"1152. *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 vacancy existing in the balance of the old term was, therefore, properly filled by the then board of trustees.

We may now inquire as to whether or not there was an immediate vacancy in the term which was to commence January 1, 1938, by reason of the resignation tendered and accepted in the fall of 1936.

The circumstances which create vacancies in office are enumerated in Section 1146, 1935 Code, and the material provision thereof, for the purpose of this opinion, is found in paragraph (4) of said section, which reads as follows:

"1146. *What constitutes vacancy.* Every civil office shall be vacant upon the happening of either of the following events:

* * *

"4. The resignation or death of the incumbents, or of the officer elect before qualifying."

In the present case, an officer elect resigned before qualifying. Therefore, upon such resignation a vacancy existed as to the office of township trustee beginning January 1, 1938.

It is not clearly indicated in the above statement of facts whether or not the 1936 board of trustees specifically acted to fill the vacancy in the term commencing January 1, 1938. Some question may exist as to whether the 1936 board should have filled a vacancy existing in an office, the term of which was to commence at a future date. While, under the statute, a vacancy in the future office existed as soon as the resignation became effective, yet since it was not a vacancy in a presently subsisting office, there may be reason for saying that the board in office as of the time the vacancy affects the member-

ship of the board, should appoint. It is our opinion, however, that this particular question need not now be determined since the disposition of this particular case must turn upon another consideration.

If it be conceded that the 1936 board had authority to and did appoint for the term beginning January 1, 1938, it appears that the appointee did not properly qualify following such appointment, and that therefore he cannot now claim to hold the office.

Vacancy in a civil office occurs upon

"A failure of the incumbent or holdover officer to qualify within the time prescribed by law." (Section 1146, paragraph (2))

According to the facts set out in your letter, it appears that the term commencing January 1, 1938, was construed simply as a continuation or extension of the term which expired December 31, 1937. It is assumed from the facts stated in your letter that the appointee qualified only for the office which he immediately assumed. Section 1052, 1935 Code, sets out the following requirements concerning qualification for office of persons appointed to fill vacancies:

"1052. *Appointee to fill vacancy.* Persons elected or appointed to fill vacancies, and officers entitled to hold over to fill vacancies occurring through a failure to elect, appoint, or qualify, as provided in Chapter 59, shall qualify within ten days from such election, appointment, or failure to elect, appoint, or qualify, in the same manner as those originally elected or appointed to such offices."

In view of the foregoing, it is our opinion that the original appointee to the unexpired term (if it be conceded that he was effectually appointed for the term beginning January 1, 1938) has not and cannot at this time properly qualify for the term which commenced January 1, 1938, and that he cannot lawfully hold the office unless he be now appointed by the present board and qualify following such appointment.

SCHOOLS: ATTENDANCE: District is required to furnish school facilities to all pupils of the corporation regardless of whether the children actually attended the school that is closed or were merely pupils of said district.

March 31, 1938. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for the opinion of this department upon a question stated by you as follows:

"Is the board of an independent district obligated to provide public school facilities for the children of all residents of the corporation, regardless of whether such children were enrolled in its school at the time it was closed?"

The statute relating to furnishing of school facilities to the children of an independent district wherein the school is closed for lack of pupils, provides as follows:

"4233-e1. *School privileges when school closed.* If a school is closed for lack of pupils, the board of such corporation shall provide for the instruction of the pupils of the corporation by sending them to other schools of the corporation or by contracting for such facilities in another school corporation if a school in such other corporation is nearer to them than any public school of the corporation of their residence and such pupils are over two miles from any public school in their resident corporation. Immediately upon the closing of any school, the board shall notify the patrons of the school where their children are to attend; provided that when the school in a subdistrict of a school township has been closed, the residents of such subdistrict may, if they prefer, send their children to the public school of their choice outside the school township, provided the cost to the school township for each of such

children will not exceed the pro rata cost in the entire school township during the school year immediately preceding."

The essential portion of the above statute to be construed in answering the question submitted, is as follows: "shall provide for the instruction of pupils of the corporation." The answer to your question depends upon the determination of who may be "pupils of the corporation" within the meaning of the statute.

The above quoted section was enacted as House File 47, Chapter 60, laws of the 45th General Assembly, regular session, which enactment repealed the forerunner of this section which appeared as Section 4232, 1931 Code, and which provided as follows:

"4232. *Pupils of closed school—tuition.* If a school is closed for lack of pupils, the board of such school corporation shall provide for the instruction of the pupils of said school in another school as convenient as may be, and shall pay to the secretary of the school corporation in which such children attend the average cost of tuition and other expenses in such school."

It will be observed that under the old law it was required that if a school was closed for lack of pupils, the board should "provide for the instruction of the pupils *of said school*" (italics supplied).

Under the present law, the duty of a board runs to the "pupils of the corporation" while under the repealed statute the obligation ran to the pupils "of said school," the antecedent being a closed school. In the case *Kruse vs. Independent District of Pleasant Hill,* decided November 21, 1929, 209 Iowa 64, the supreme court construed the language of the old statute, holding that the board was not required to pay the cost of tuition and transportation of children residing in the corporation where such children had not been pupils of the closed school. In the above case the appellant had been sending his children to a school outside the district. The board of the district notified appellant that unless he sent his children to the school of his own district, the latter would be closed for lack of pupils. Appellant continued to send his children to a school outside the district, and such school closed. Thereupon appellant asked for an order of mandamus to compel the board of his district to pay for his tuition costs in the other district on the ground that the home school was closed and his children were "pupils of said school." The opinion refers to Section 4231, 1931 Code, which prohibits or restricts, as does the present law, the employment of a teacher in a school wherein the average daily attendance for the last preceding term was less than five. The language of the court is as follows:

"Code Section 4232 provides that, if a school is closed for lack of pupils, the board shall provide for the instruction of the *pupils of said school* in another school. Appellant's contention is that his children, because they resided in said school district and are of school age, come within the provisions of this statute, and were 'pupils of said school.' When Sections 4231 and 4232 are read together, it is clear that the power of the board to close the school for lack of pupils is because the average attendance in said school in the last preceding term was less than five. In said sections the reference is to 'pupils in said school' and 'the pupils of said school.' The appellant's children never were pupils of said school. A child, even of school age, residing in a school district, cannot, in any legal sense, be said to be a 'pupil in (or of) said school' when such child never attends said school. A child of school age residing in a school district who is ill and unable to attend school is not a 'pupil in said school.' A child who attends a public, private, or parochial school outside a school district is a pupil of the school he attends, not of the school in his district which he does *not* attend.

"In order to bring the appellant's children within the provisions of this statute, they must have been pupils of said school. This they never were. The appellees were not required to keep said school open for the benefit of appellant's children when they were not pupils in said school and did not attend the same, nor are they compelled to pay the cost of tuition and transportation of said children in some other school, because they were not 'pupils of said school' which was closed."

Under the terms of the then existing statute, the court was compelled to hold as it did. While in the Kruse case the effect was to refuse aid to one who, by his own actions, had caused his own district school to close, the application of the doctrine of the Kruse case to other circumstances would, it appears, produce hardships. For example, if a child moved into a district in which the school had been closed for lack of pupils, under the old statute as construed by the Kruse case, such child would not be entitled to have school privileges furnished to him because he was not "a pupil of said school." Under the old statute as construed by the Kruse case, when a district had fulfilled its obligations to the "pupils of said school," its duties would be at an end so long as the school remained closed, and as younger children of the district attained school age, a board might refuse to pay tuition for such children for the reason that they were not pupils of the closed school.

At any rate, the 45th General Assembly saw fit to change the law as construed by the Kruse case and to provide that the "pupils of the corporation" rather than the "pupils of said school" should be entitled to the school facilities.

Our conclusion is that the statute now provides for the instruction of all resident children of school age within the district where the school is closed for lack of pupils. This conclusion must be reached for the reason that such children are pupils of the corporation even though they may not be pupils of the closed school. In view of the repeal of the statute upon which the Kruse case turned and the enactment of a new and different provision, the rule in the Kruse case no longer is applicable.

CORONER: FEES: COUNTY OFFICERS: BOARD OF SUPERVISORS: The Code of Iowa requires the coroner to report all deaths due to accidental or violent means to the proper authorities. The making of such reports is one of the burdens pertaining to the office, for which the coroner will receive no compensation and the Board of Supervisors would have no authority to allow claims filed with it by the coroner for the making of such reports.

April 1, 1938. *Mr. J. W. Pattie, County Attorney, Marshalltown, Iowa:* We are in receipt of your request for an opinion upon the following question:

"Section 5214-c1 of the 1935 Code requires the county coroner to report all deaths due to accidental or violent means to the State Bureau of Investigation. Section 301, Chapter 134, Laws of the 47th General Assembly requires the coroner to report the death of any person as the result of an accident involving a motor vehicle to the motor vehicle department. Our coroner has filed claims for compensation from the county for making reports of the above type. Can the Board of Supervisors allow the same?"

Section 5214-c1 reads as follows:

"*Violent deaths.* The coroner shall also immediately report to the state bureau of investigation, all deaths coming within his jurisdiction due to accidental or violent means, and said report shall be upon such forms as shall be prescribed and furnished by the state bureau of investigation."

Section 301, Chapter 134 of the Laws of the 47th General Assembly reads as follows:

"*Coroners to report.* Every coroner or other official performing like functions

shall on or before the tenth day of each month report in writing to the department the death of any person within his jurisdiction during the preceding calendar month as the result of an accident involving a motor vehicle and the circumstances of such accident."

It will be observed that Section 5214 provides that the coroner shall report to the Clerk of the District Court "all cases of death which may call for the exercise of his jurisdiction; with the cause or mode of death in accordance with forms furnished by the State Department of Health." There can be no question but that this provision requires the coroner to report those matters which regularly come within his jurisdiction under other provisions of Chapter 260 so that a complete record may be kept in the office of the Clerk of the District Court of all death cases which the coroner has attended. Section 5214-c1 follows Section 5214 and provides that the coroner shall also immediately report to the State Bureau of Investigation all deaths coming within his jurisdiction of the type specified in the statute. This latter provision does not enlarge the scope of the coroner's investigating duties. All it requires is that the coroner shall report to the State Bureau of Investigation all deaths which he has investigated under and pursuant to his duties as required by the other provisions of law, which deaths are due to accidents or violent means only. The purpose of Section 5214-c1 is to advise the State Bureau of Investigation of accidental and violent deaths so that the Bureau may have that information to use in connection with any criminal investigation it may make or care to make in connection therewith. Therefore, this section does nothing more than require an additional report of a part of the investigating activities of the coroner as prescribed by other provisions of law and does not enlarge the scope of investigation by him.

The only provision for compensating a coroner for the services rendered is Section 5237 of the 1935 Code which reads as follows:

"*Coroner—fees.* The coroner is entitled to charge and receive as his compensation the following fees, which shall be paid out of the county treasury, and the county shall be permitted to file and collect a claim against the estate of said decedent for said fees.

1. For examining each dead body upon which no inquest is held, where there is no medical attendant at death and where such examination is necessary to comply with Chapter 110, the sum of five dollars.
2. For examining each dead body upon which an inquest is held or where the death occurred under such suspicious circumstances as to make advisable prompt investigation of the facts and the preservation of weapons and finger prints, including investigating, preserving weapons, finger prints and evidence of crime and tragic death and making a permanent memoranda of any important identification marks, evidence, conditions, suspicious circumstances and other significant facts observed by the coroner in viewing the dead body and the location where found, the sum of ten dollars.
3. For issuing each subpoena, warrant, or order for a jury, twenty-five cents.
4. For docketing each case, one dollar.
5. For each mile traveled to and returning from an examination or inquest, five cents.
6. For taking down in writing the evidence of witnesses, when no stenographer is employed as hereinbefore provided, ten cents per one hundred words.
7. For returning a copy of the verdict with minutes of the testimony to the state inspector of mines, as provided by law, three dollars.
8. For all other services, the same fees as are allowed sheriffs in similar cases, to be paid in like manner."

It will be observed from a reading of the foregoing section that none of the provisions thereof provide compensation for the making of the reports required

of the coroner by the foregoing sections. The question, therefore, is, how is the coroner to be compensated for the services rendered? In 46 C. J. at page 1014 we find the following principle:

"Public officers have no claim for official services rendered except where, and to the extent that, compensation is provided by law, and, when no compensation is so provided, the rendition of such services is deemed to be gratuitous."

In 46 C. J. at page 1017 we find the following rule of law:

"Fees are only collectible when expressly authorized by law, and an officer demanding fees either from the public, or the state or other governmental bodies, must point to a particular statute authorizing them. No usage in regard to making such charges can legalize them without such authority."

In the case of *Palo Alto County vs. Burlingame, et al.*, 71 Iowa 201, loc. cit. 202 we find the following language:

"An officer is entitled to charge and receive only such fees as the statute provides he is entitled to as compensation for services he may perform."

In the case of *Howland vs. Wright Co.*, 82 Iowa 164, loc. cit. 166, we find the following language:

"It was said in *Jefferson Co. vs. Wollard*, 1 G. Greene, 430, in effect, that a person who accepts a public office takes it with all the honors, emoluments, and burdens pertaining thereto; that the government is not compelled to compensate its citizens for any services rendered; and that an officer cannot recover compensation for which the law makes no provision, however meritorious his services may be. 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. * * * 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. It follows that a county cannot be made liable for such compensation."

Irrespective of whether or not the reports required by the section heretofore quoted are simply additional reports to those which the coroner would have to make anyway, and assuming for the purpose of this opinion that the reports required necessitate some investigation by the coroner, nevertheless, in view of the foregoing authorities, the coroner cannot be compensated for his services in making such reports unless there is statutory authority for the allowance of such compensation.

A careful analysis of Section 5237 and of its various subdivisions clearly shows that none of said subdivisions apply to the reports herein under consideration.

It is therefore the opinion of this department that the making of these reports is one of the burdens pertaining to the office for which the coroner will receive no compensation and that the Board of Supervisors would have no authority to allow claims filed with it by the coroner for the making of such reports.

PAUPERS: NOTICES TO DEPART: OVERSEER OF THE POOR: If the overseer of the poor has been appointed for all of the townships in the county, he has the same authority to cause notices to be served on any pauper residing in a township that is possessed by the township trustees.

A warning to depart could be served by a social worker, or any other person competent to make service, providing the provisions of Section 5316 are complied with.

April 1, 1938. *Mr. Leon A. Grapes, County Attorney, Davenport, Iowa:* We are in receipt of your request for an opinion on the following questions:

1. "Has the Overseer of the Poor the authority to cause notices to be served on any pauper under Section 5316?"
2. "Can the notice be served by a social worker after the Overseer of the Poor has signed the order and the notice to depart?"
3. "Is the Board of Supervisors required to pass a Resolution causing these notices to be served, or is the order of the Overseer of the Poor, properly signed and filed, enough authority for causing the notice to be served?"

Section 5315 of the 1935 Code reads as follows:

"*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 5316 reads as follows:

"*Service of notice.* Such warning shall be in writing, and may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors, which, if not made by a sworn officer, must be verified by affidavit.

"In the event such person cannot be found within the county, any person attempting to make such service shall file with the board of supervisors an affidavit that diligent search has been made and that such persons cannot be found within the county and the same shall constitute sufficient service of warning as provided herein."

Section 5321 of the Code reads as follows:

"*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. Said overseer shall receive as compensation an amount to be determined by the county board and may be paid either from the general or poor fund of the county."

The situation really resolves itself into a question of whether or not the overseer of the poor, by virtue of Section 5321, has the same authority granted to the Board of Supervisors or the Township Trustees in the matter of ordering the service of notice to depart. Section 5321 of the 1935 Code was not contained in the Code of 1873, but in Section 1361 of that Code we find as a part of said section the following provisions:

"But where a city of the first or second class is embraced within the limits of any township, the Board of Supervisors may appoint an overseer of the poor, who shall have within said city all the powers and duties conferred by this chapter on the township trustees."

In *Hoyt vs. Black Hawk County*, 59 Iowa 184, the Supreme Court of this state had occasion to pass upon Section 1361 of the Code of 1873. In that case the City of Waterloo had appointed for the city an overseer of the poor. The overseer of the poor refused to provide relief for a pauper residing within the city. The Supreme Court at page 185 said:

"The question presented is as to whether the city overseer is to be deemed to have exclusive control of the city poor, or whether his power is to be exercised concurrently with that of the township trustees, either having the power to provide relief whenever the occasion should seem to require. In our opinion the power conferred upon the city overseer is exclusive. That of the trustees is exclusive in the township outside of the city, and that is expressly made the measure of the overseer's power within the city. The language used is 'all the powers and duties conferred,' etc."

The Board of Supervisors of Scott County saw fit to appoint an overseer of

the poor. Section 5321 gives the Board of Supervisors authority to appoint such an overseer for any part or all of the county. If, under Section 1361 of the Code of 1873 the Supreme Court of this state took the position enunciated in the case of *Hoyt vs. Black Hawk County*, supra, it surely would make no different pronouncement under the present statute.

It is therefore the opinion of this department that if the overseer of the poor has been appointed for all of the townships in the county, he then has the same authority to cause notices to be served on any pauper residing within a township that is possessed by the township trustees.

In making this ruling we are not unmindful of the holding of the Supreme Court of Iowa in the case of *Emmet County vs. Dally, et al.*, 248 N. W. 366, wherein the court held that the statutory powers to give warning to indigent persons to depart must be exercised strictly according to statute.

In the event that the overseer of the poor has not been appointed such for the entire county, but only for part thereof, he could order notices served only in those townships of the county for which he had been appointed overseer. In other words, the overseer of the poor could exercise no authority outside of that district for which he was appointed. In all of the territory of the county in which he had been appointed overseer of the poor he would have the authority, under Section 5321, to exercise all of the powers and duties that might otherwise be exercised by the township trustees of the specific townships within his territory.

It is further the opinion of this department that the notice of warning to depart could be served by a social worker, or any other person competent to make service, providing the provisions of Section 5316 supra are complied with.

The foregoing discussion answers and disposes of question No. 3.

CRIMINAL LAW: REAL ESTATE BROKER: EXCEPTIONS: LICENSE: The person in question is not amenable to penal provisions of Real Estate Law. Because he contracted with other heirs to dispose of their interest in land, does not place him in category other than owner of property.

April 4, 1938. *Honorable Robert E. O'Brian, Secretary of State:* You request an opinion of this department on the following matter:

"An estate was probated in Linn County, Iowa. 'A' was administrator and also one of the heirs. After the estate was finally closed there was an eighty-acre farm left in the estate. 'A' acted for himself and the other heirs in the sale of this land and is demanding a commission of $190.00.

"Is 'A' liable under the real estate license law for selling real estate without a license?"

(We have the benefit of your file in this case, and it appears that "A" in the posited facts was a party to a written contract between himself and the other heirs wherein it was provided he should receive compensation for services rendered in connection with the property.)

Your question requires an examination of the provisions of Chapter 91-C2, Code of Iowa, 1935, entitled "Real Estate Brokers." Section 1905-c23 embraced within said chapter provides:

"*License required.* It shall be unlawful for any person, copartnership, association or corporation, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman, without a license issued by the Iowa real estate commissioner."

Section 1905-c25 thereof defines the term "Salesman" as follows:

"*'Salesman' defined.* A real estate salesman within the meaning of this chapter is 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, or 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 partial vocation."

Specific provision as to the nonapplicability of this chapter is contained in Section 1905-c26 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 the state, acting within the powers granted in its charter; 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."

It is to be noted that while the legislature defined the term "salesmen," yet it gave no definition to the term "real estate broker." Clearly "A" in the suppostitious case is not a "real estate salesman" as that term is defined by the legislature. Is he then a "real estate broker?" The term "real estate broker" is defined in 9 Corpus Juris, 510, Section 7 as being:

"* * * one employed to negotiate the purchase or sale of real property; one who buys and sells lands, and obtains loans, etc., on mortgages; one who negotiates sales of real property; a person who is, generally speaking, engaged in the business of procuring purchases or sales of lands for third persons on a commission contingent on success. * * *."

Our own court, in defining the general term "broker," in *Younker vs. Western Union Telegraph Company*, 146 Iowa 499, 509, deemed a broker to be one whose occupation is to bring parties to a bargain or to bargain for them in matters of trade or commerce.

The California Real Estate Brokers Act provides that it shall be unlawful for any person, etc., to engage in the business or act in the capacity of a real estate broker without first obtaining a license therefor. The definition given by the act to the term "real estate broker" is a person, etc. who, for a compensation, sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate * * *for others, as a whole or partial vocation. *One act, for a compensation, of buying or selling real estate of or for another* * * * *shall* constitute the person, * * * a real estate broker * * *."

Under this statute in *Wise vs. Radis*, 74 Cal. App. 765, 242 Pac. 90, it was held by the district court of appeals for the second division of California that the failure of one of two real estate brokers, who had agreed to carry on business and divide the proceeds, to obtain the license required by the law would render the acts jointly performed by such brokers illegal, thus rendering recovery against the owner of the property impossible.

Again in *Haas vs. Greenwald*, 196 Cal. 236, 237 Pac. 38, it was held under

the statute hereinbefore referred to that an attorney at law joining with licensed brokers in negotiating for the purchase of real estate could not recover a commission when not licensed, even though his acts constituted but a single transaction not in the course of business as a real estate broker. In considering these two decisions, however, sight should not be lost of the express provision in the California statute that one who performs a single act for compensation is within the definition of the term "real estate broker."

In *Stout vs. Humphrey*, 69 N. J. L. 436, 55 Atl. 281, the New Jersey Appellate Court, in the course of its opinion, reported in 55 Atl. 280, 282, defined the term "broker" thus:

"A 'broker' is defined to be a 'middleman or agent, who, for a commission or rate per cent on the value of the transaction, negotiates for others the purchase or sale of stocks, bonds, commodities, or property of any kind, or who attends to the doing of something for another.' Century Dictionary. It is a well-known fact that the business of a broker and that of a real estate agent is often carried on by many who never hold themselves out or advertise as such, and under the name of insurance agents, justices of the peace, and even attorneys, are constantly 'engaged in selling or exchanging land for or on account of the owner, * * *"

The court was of the opinion that to give a construction to this statute which would except such enumerated persons from its provisions would be a clear violation of the policy which caused its enactment.

The supreme court of Wisconsin in *Livingston vs. Linker Realty Company*, 231 N. W. 626, 627, after referring to the statute which contained the proviso "that any person, firm or corporation, * * * who, for another, and for commission, money or other thing of value; * * * (c) negotiates, or offers or attempts to negotiate a loan, * * * is a broker," was of the opinion that one entering into a contract to procure a loan for another, to be secured by a mortgage on real estate for a commission, holds himself out as a broker or salesman, and cannot recover the commission unless he has the requisite license.

And while the supreme court of California in *Davis vs. Chipman*, ——— Cal. ———, 293 Pac. 40, 44, stated "as an offer to sell property by an agent for a compensation cannot legally be made except by a person holding a license as a real estate broker, it follows that the act of the plaintiff in making said offer was illegal and will not support a promise to pay for said service," yet facts in that case do not parallel those in the one here considered.

A case more nearly in point is that of *Chadwick vs. Collins*, 26 Pa. 138. This was an action brought to recover the sum of twenty-five dollars for selling a house and lot. The claim was resisted on the ground that the plaintiff was not a licensed real estate broker, and, therefore, could not invoke the aid of the law to enforce a contract in violation of the act of the Assembly. The act referred to provided that "no individual or copartnership other than those duly commissioned under the provisions of this Act, shall use or exercise the business or occupation of a stock broker, or exchange broker, or a bill broker, under a penalty of * * *" By amendment this Act was extended to include real estate and merchandise brokers. The court thought it unnecessary to determine the question as to whether or not a person engaged in the business or occupation of a real estate broker, without being licensed as such, could enforce a contract made in pursuance of his unlicensed business or occupation for the reason that nowhere did it appear that the plaintiff in the action ever used or exercised the business or occupation of a real estate broker. The court, in the course of its opinion, took occasion to state:

"In making the use or exercise of the business or occupation of real estate brokers in Philadelphia and Pittsburgh a source of revenue to the Commonwealth, the legislature did not intend to prevent a person whose business or occupation was not that of a real estate broker from receiving compensation for services rendered in buying or selling real estate belonging to another.

"Any person may lawfully employ one who is not a real estate broker to buy or sell real estate, and where such employment takes place, and labour is done under the employment, it must be paid for; at all events, the law will not lend its aid to the employer to defraud the employee out of his just reward.

"Practically there is no difficulty in ascertaining who are engaged in the business or occupation of real estate brokers. It is those who hold themselves out to the public as such, generally having offices or places of business, the character of which is indicated by clear and unmistakable evidence. To such persons the language of the section in reference to the penalty is addressed, but it has no application to the plaintiff in this action."

The foregoing cases give an insight into the varied positions courts have taken, in some instances aided by statutes and in others not so aided. And while the holding of the New Jersey court in the Humphrey case, *supra*, is persuasive, yet we believe that the Pennsylvania Chadwick case, *supra*, is more nearly in point. From the facts stated, it appears that "A" does not hold himself out as a real estate broker. Furthermore we cannot overlook the express exception provided in Section 1905-c26, *supra*, to the effect that the chapter on real estate brokers shall not apply to any person who as owner or lessor performs any act with reference to property owned or leased by him, and where such act is performed in the regular course of, or as an incident to, the management of such property and investment therein, nor to persons acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation or performance of any contracting, leasing or exchange of real estate. It is our opinion that it was not the intention of the legislature that the provisions of the Real Estate Brokers Law should apply to a situation such as is outlined in the statement of facts.

It may be presumed that the person in question is holding the real estate involved as a tenant in common with the other heirs. It is well established that a tenant in common holds a several interest in the land. *Arends vs. Frerichs*, 192 Iowa 285, 294. And, therefore, the fact that he does not own the entire fee title would not deprive him of his right to deal with his undivided interest in the whole in the manner provided in the exception in the Real Estate Brokers Law. We do not believe that the fact that he contracted with other heirs to dispose of their interest in the land in any wise places him in a category other than the owner of property who himself deals and negotiates with respect to that property.

It is accordingly the opinion of this department that "A" is not amenable to the penal provisions of the Real Estate Brokers Law for having engaged in the sale of real estate in question without a license.

TAXATION: TELEPHONE DROP OR SERVICE LINES. The drop or service lines of a telephone company which connect the homes or business places with the pole lines of the company are not to be considered as part of the pole line mileage of the company.

April 6, 1938. *Iowa State Board of Assessment and Review:* You request an opinion upon the following question:

"Should the drop or service lines which connect houses or business places with the main lines of telephone companies be considered as part of the main

line? In other words, should the aggregate measurement of the drop or service lines be included in the number of miles of line of the company for assessment purposes?"

Chapter 336 of the 1935 Code relates to the taxation of telegraph and telephone companies. Section 7031 of that chapter requires every telegraph and telephone company operating a line in this state to annually file a report with the State Board of Assessment and Review showing, among other things:

(Subdivision 1). "The total number of miles owned, operated or leased within the state, * * *

(Subdivision 3). "The total number of miles in each separate line or division thereof, also the average number of separate wires thereon;

(Subdivision 14). "The total length of the lines of said company."

Section 7034 of Chapter 336 provides for the annual determination by the State Board of Assessment and Review of the actual value of all of the property, within the State, of each telephone and telegraph company. Section 7035, Chapter 336 reads as follows:

"7035. *Actual value per mile.* The state board of assessment and review shall ascertain the value per mile of the property of each of said companies within this state by dividing the total value, as above ascertained, by the number of miles of line of such company within the state, and the result shall be deemed and held to be the actual value per mile of line of the property of such company within this state."

Section 7038 of Chapter 336 reads as follows:

"7038. *Assessment in each county—how certified.* The state board of assessment and review shall, for the purpose of determining what amount shall be assessed to any one of said companies in each county of the state into which the line of the said company extends, multiply the assessed or taxable value per mile of line of said company, as above ascertained, by the number of miles in each of said counties, and the result thereof shall be by said state board certified to the several county auditors of the respective counties into, over, or through which said line extends."

Sections 7035 and 7038, supra, provide for the division of the total value by the number of miles of line and for the allocation to each county for taxation purposes of the number of miles in that county. Supra sections are not altogether clear as to whether or not they refer to pole line mileage or wire mileage. In that respect they are ambiguous and their construction is governed by the following applicable principles of construction:

1. The intention or purpose of the Legislature should be ascertained and given effect.
2. The legislative intention should be determined from the general construction of the whole act.
3. The object of the statutes should be kept in mind and such construction placed upon them as will effect that purpose.
4. If susceptible of more than one construction, that construction must be given which will best effect their purpose.
5. Words and phrases having a technical meaning are to be considered as having been used in their technical sense.
6. The meaning of a word used in a statute must be construed in connection with the words with which it is associated.

With the foregoing principles of construction in mind, let us again examine the entire act to attempt to ascertain if the Legislature in referring to "total length of the lines" and "miles of line" meant pole line mileage or wire mileage.

It is to be observed that subdivision 2 of Section 7031 requires a statement as to the average number of poles per mile and the whole number of poles on its lines in this state. Subdivision 3 of Section 7031 requires the setting out

of "the total number of miles in each separate line or division thereof, also the average number of separate wires thereon." These subdivisions cannot be construed to refer to other than pole miles because the average number of separate wires on the poles would be immaterial if construed to refer to wire miles instead of pole line miles.

Section 7044, among other things, requires the filing of a statement showing the length of pole line in each taxing district of each county when no map of the pole lines of such county is required.

Taking into consideration the foregoing provisions of the act and applying to the entire act the principle of construction heretofore set out, we are forced to the conclusion that the word *"lines"* as used means *"pole lines,"* and *"miles of line"* means *"miles of pole line."*

This interpretation is in keeping with a previous Attorney General's opinion as reported in the 1930 Report of the Attorney General at page 66. It is also in accordance with the departmental construction placed upon the identical statutes for over a period of nine years.

During the 47th General Assembly, Representative Johnson introduced H. F. 377 which was a bill for an act to amend, among other things, Section 7035 of the Code by striking from line six (6) the words "line of" and substituting therefor the words "wire owned and leased by." As thus amended Section 7035 would read:

"The State Board of Assessment and Review shall ascertain the value per mile of the property of each of said companies within this state by dividing the total valuation as above ascertained, by the number of miles of wire owned and leased by such company within the state, and the result shall be deemed and held to be the actual value per mile of line of the property of such company within this state."

This bill was introduced on March 10, 1937, and referred to the committee on Telephone and Telegraph and Express. On March 25th the committee reported, recommending indefinite postponement. On March 30th the author asked that the bill be re-referred to the committee. This was done and the bill died there.

Thus it is apparent that the construction heretofore placed upon "mile of line" as meaning "miles of pole line" was recognized by the Legislature and it refused to change the law so that it would mean "wire miles."

As we view the matter, the word "lines" and the words "miles of line" are technical terms and are to be considered as having been used in their technical sense, as meaning "pole lines." All wires supported between poles constitute part of the pole line mileage. If the distance from the main line to the house or business place is such that the wire leading thereto is supported between poles, then that portion so fastened constitutes part of the pole line mileage. It is only that portion of the wire line which leads from the house or building to the closest pole that is properly the drop or service line.

It is therefore the opinion of this department that the drop or service lines of a telephone company which connect the homes or business places with the pole lines of the company are not to be considered as part of the pole line mileage of the company.

TAXATION: REAL ESTATE: STATE OWNED LANDS: Land acquired by state or its agency after the levy of taxes, but before such taxes are due and payable is not affected by such tax. If real estate subject to such tax be sold, purchaser thereof acquires no rights enforceable as against the state's

interests in the land acquired. If real estate has not gone to sale, board of supervisors should authorize cancellation of such apparent lien.

April 6, 1938. *Mr. D. W. Celander, Office of Auditor of State:* You have requested the opinion of this department upon a question which may be stated as follows:

Where the state of Iowa takes title to real estate subsequent to the levy of taxes but prior to December 31 of a given year, shall the state pay such taxes?

It is assumed that no special agreement as to the payment of such taxes has been made by and between the vendor and purchaser. The question is one of considerable importance since numerous land acquiring agencies of the state are or may be affected.

As between the ordinary vendor and purchaser, no difficulty arises in this connection. The statute, Section 7204, provides that as between vendor and purchaser the lien of taxes attaches as of the 31st day of December of each year. In such cases the state and county are not interested in whatever agreement may be made as to payment of taxes between the vendor and purchaser since the property itself may be subjected to sale to satisfy the lien.

A different situation arises when the state becomes the purchaser because of the provisions of Section 7202, 1935 Code, which are as follows:

"7202. *Lien of taxes on real estate.* Taxes upon real estate shall be a lien thereon against all persons except the state."

Also, Section 6944, 1935 Code, provides that state property shall not be taxed.

"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."

At the time real estate is acquired in any year, except on December 31st of each year, the current taxes are not a lien and such taxes are not payable until the ensuing January 1st.

Our supreme court has held that land acquired by an educational institution, entitled to the statutory exemption from taxation, after assessment of taxes, but prior to the levy thereof, is freed from the lien of the taxes for the year in which such property was purchased. This is the holding of the case of *Iowa Wesleyan College vs. Knight*, 207 Iowa 1238. In the course of the opinion in this case the court spoke as follows:

"The question then is, When did the exemption statute become operative in favor of the plaintiff? We can conceive of no reason why it should not be deemed operative from the date of acquisition of the property and the filing of its deed for record. The property was that of the plaintiff, an 'educational institution,' on September 8th. In levying the tax, therefore, the supervisors acted in violation of Section 6944. Its levy was illegal. If plaintiff had known of such levy at the time, it could properly and successfully have resisted the same. It has an equal right to resist the collection thereof. It is entitled, therefore, to a quieting of its title and to a perpetual injunction, as prayed."

We have seen that under the statutes taxes are not a lien against the state. Moreover, the legislature has seen fit to provide that land held by the state for public purposes is not to be subjected to sale for taxes. This provision is made in Section 7268, 1935 Code, which provides as follows:

"7268. *School, agricultural college, or university land.* When any school, agricultural college, or university land sold on credit is sold for taxes, the purchaser shall acquire only the interest of the original purchaser therein, and no sale of any such lands for taxes shall prejudice the rights of the state, agricultural college, or university. In all cases where the real estate is mortgaged or otherwise incumbered to the school, agricultural college, or university

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

The Iowa supreme court has construed provisions similar to those set out in the above section in the case of *Independent School District of Oakland vs. Hewitt*, 105 Iowa 663. The statute under which the above case was decided, which first appeared as Chapter 101, acts of the 17th General Assembly, was not identical to Section 7268, supra, but as applied to the question herein discussed, is of such essential similarity that the case referred to may be cited as authority in this discussion. There the plaintiff district acquired title to real estate by condemnation on February 27, 1890. Defendant acquired a tax certificate covering 1889 taxes issued to his assignor at a tax sale on December 1, 1890, and claimed title under a tax deed issued December 21, 1893. In deciding that such taxes could not be collected by sale of real estate, the court said:

"The defendant insists his tax deed is valid because the lots were assessed, and the taxes for which they were sold levied, before the property had been condemned to the public use. With this proposition we cannot agree. Under Section 797, the lots were not exempt from taxation. The assessment and levy were valid. But Chapter 101, Acts Seventeenth General Assembly provides that 'all lands exempted from taxation by the provisions of this title, including lands * * * of any * * * school district,' shall not be affected by any sale made for taxes, and 'no assessment or taxation of such lands, nor the payment of any such taxes by any person, or the sale or conveyance for taxes of any such land, shall in any manner affect the right or title of the public therein, or prejudice the public thereto, nor shall any such payment or sale, confer upon the purchaser or person who pays such taxes any right or interest in such lands, adverse or prejudicial to the public right, title or ownership thereto.' The meaning of this is clear and unequivocal. Prior to the enactment of this statute, land devoted to the public use might be sold for taxes levied before its acquirement for that purpose, and to obviate such a sale this law was enacted."

In view of the foregoing, we conclude that a sale of real estate for general taxes levied in a given year which land is acquired by the state after the date of levy but prior to December 31st of said year, will not support any claim of the purchaser as against the interest of the state in such real estate. We are also of the opinion that such taxes cannot be paid by the state since there is no authority for making payment thereof. This being true, such real estate should not be offered at tax sale, and it is our opinion that boards of supervisors are authorized to cancel or remit any and all taxes within the above classification.

While, as stated above, it appears that taxes so levied against real estate owned by the state are not collectible by sale, it may be claimed that there is nevertheless a duty on the part of the state to pay such taxes.

In the case of *First Congregational Church of Cedar Rapids vs. Linn County*, 70 Iowa 396, the plaintiff, a religious corporation, purchased a city lot for the purpose of erecting thereon a church. Title to this lot was acquired in August of 1880, and was consequently such property as was included within the statute according exemption from taxation to religious institutions. The lot had been

assessed in the name of plaintiff's grantor, and the taxes were levied in September. The opinion does not disclose upon what precise question the case turned, and for this reason the application of the holding is not entirely clear. The court, in holding that the property was liable for tax for the year 1880, said:

"It is not necessary to inquire whether the tax was lien from the assessment. It is sufficient to know that for seven months of the year it was subject to taxation, and that during all that time it was subject to assessment and other proceedings preliminary to the levy of the tax for the whole year, whereby it was brought within the exercise of the taxing power. The lot, being subject to taxation, certainly ought to pay taxes for that time. But there are no provisions of the law under which the tax may be apportioned. The state must lose the whole tax, or the plaintiff must pay it. In the exercise of its power to protect its revenue the state may enforce the tax for the whole year. The exemption from taxation, under Code, 797, was not intended to act retrospectively, and exempt from prior taxes, or prior liability for taxes. The provision was intended to operate prospectively, and to exempt property from future liability."

It is also significant that in the Hewitt case, referred to above, the court, while holding that the exempted property could not be sold for taxes, said:

"*First Congregational Church vs. Linn County*, 70 Iowa 396, is relied on. It is there held the property, prior to its use for religious purposes, was subject to taxation. The same is true of these lots. How these taxes may be collected cannot be determined in this action. It is sufficient that the statute prohibits collection by sale. Besides, the district court required the amount bid at the sale, with penalties and interest, and subsequent payment, with interest, to be paid by the district, and this has been done."

A search of the statutes reveals no provision which would authorize payment by the state of general taxes assessed against real estate acquired by the state. A review of the statutes and holdings in other jurisdictions leads to the conclusion that with the exception of the state of Michigan, the rule is as stated in an editorial note found at page 413, A. L. R., volume 30:

"* * * with the exception of the supreme court of Michigan, the cases are agreed that where property, subject to the lien of the tax, is acquired by the state or any of its agencies for a public purpose, it thereby becomes freed from such lien and further steps to enforce it are without effect."

Illustrative of the reasoning which supports the holdings in practically all jurisdictions is the following language quoted from the case, *State vs. Locke* (New Mexico), 219 Pac. 790, 30 A. L. R. 407:

"The exemption granted to the property of the United States is perhaps compulsory; that to the state, all counties, towns, cities, and school districts arises from public policy, which repudiates, as being utterly futile, the theory of the state taxing its own property in order to produce the funds with which to operate its own affairs. To tax it would merely require and render it necessary to levy new taxes to meet the demand of those already laid; that the public would thus be taxing itself to produce the money with which to pay to itself the taxes previously assessed, thereby benefiting no one except the officers employed to collect and disburse such revenues, whose compensation would merely serve to increase the burden of this useless and idle ceremony. Th object of taxing property is to produce the revenues with which to conduct the business of the state; it is entirely inconsistent with our theory of government for the property of the state to be taxed, or sold for taxes, in order to produce the money to be expended by the state. Such a procedure is but taking the money out of one pocket and putting it in the other. Another consideration, which should not be overlooked, is that if public property, that is to say, property owned by the state, is to be burdened with a tax lien, the public might lose it entirely through oversight or carelessness of its agents in failing to pay the taxes when due, and allowing the same to be sold and the title pass to third parties.

"And we think these unanswerable reasons for exempting the property of the state from the levy of taxes thereon lead to the conclusion that when property is acquired by the state in its sovereign capacity, it thereupon becomes absolved, freed, and relieved from any further liability for taxes previously assessed against it, and which are unpaid at the time it becomes so acquired; that, from the moment of its acquisition, the power to enforce the lien is arrested or abated."

Another case frequently cited is *Foster vs. Duluth*, 120 Minn. 484, 140 N. W. 129, from which the following is quoted:

"We think, logically and reasoning from these premises, that it must be held that all proceedings taken after the property became public property were void, notwithstanding that the taxes for the current year may have been a lien on the property before its transfer. It by no means follows, as counsel for plaintiff insists it does, that, because there was a valid lien, the proceedings to enforce that lien were valid. Nor is it important here what becomes of the lien. We need not consider whether it still exists as an unenforceable lien, whether plaintiff is entitled to refundment, or whether the lien is merged in the fee title. All that is necessary to decide, and all that we do decide, is that all proceedings to assess the land for taxes, taken after it became public property, and all proceedings in attempting to enforce and collect the tax, were void. This decision is the only one that will prevent the disastrous result of property, through the carelessness of public officials, lost to the public on tax judgments and sales, and is, we think, in entire accord with the settled policy of the state that public property shall not be subject to taxation, or to the laws in regard to proceedings to enforce the collection of taxes."

In view of the foregoing, we are of the opinion that land acquired by the state or an agency thereof after the levy of taxes but before such taxes are due and payable is not affected by such tax. If real estate subject to such tax or purported tax be sold, it is our opinion that a purchaser thereof acquires no rights enforceable as against the state's interests in the land acquired. If the holder of a tax certificate, or a tax deed based upon a sale such as described above, refuses to assign or quit claim his seeming interest, a quiet title suit could be brought to extinguish his claim. If such real estate has not gone to sale, it is our opinion that a board of supervisors should, upon proper application by the proper state agency, authorize the county treasurer to cancel such apparent lien of record. Since the rule of law makes such tax unavailable, it must be that the board of supervisors has authority, under its general powers, to order that the county records be corrected accordingly.

Nothing herein should be construed as being applicable to taxes upon real estate which may be acquired under the provisions of Chapter 85-G1, 1935 Code. It is our understanding that no lands thus far have been so acquired.

TAXATION: LIBRARY BUILDING FUND: CITIES AND TOWNS: If at some prior time a city or town had authorized the establishment of a public library, it can now levy a tax, under subdivision 20 of Section 6211, for the purpose of redecorating its library and installing a stoker therein.

April 7, 1938. *Library Commission, Historical Building:* We are in receipt of your request for an opinion on the following question:

"Does a city have the power to levy a tax for the purpose of securing funds with which to decorate its public library and purchase a stoker therefor?"

Section 6211 of the 1935 Code reads as follows:

"6211. *Taxes for particular purposes.* Any city or town shall have power to levy annually the following special taxes:

* * *

"20. *Library building fund.* When the establishment of a public library has been authorized, not exceeding three-fourths mill, which shall be used only to

purchase real estate and to erect thereon a building or buildings for a public library or to pay the interest on any indebtedness incurred for that purpose and to create a sinking fund for the extinguishment of such indebtedness. When a library building has been fully completed and paid for, no further levy shall be made for that purpose, but may be made for the purpose of providing funds for improvements and repairs and to pay rental for space leased by the board of library trustees for the establishment and operation of branch libraries and stations in districts where no branch library buildings have been acquired or erected by said municipality. Any balance remaining in the building fund may be transferred to the maintenance fund."

Prior to April 6, 1927, subdivision 20 of Section 6211 of the 1924 Code, read as follows:

"20. *Library building fund.* When the establishment of a public library has been authorized, not exceeding three mills, which shall be used only to purchase real estate and to erect thereon a building or buildings for a public library or to pay the interest on any indebtedness incurred for that purpose and to create a sinking fund for the extinguishment of such indebtedness. When a library building has been fully completed and paid for, no further levy shall be made for that purpose. Any balance remaining in the building fund may be transferred to the maintenance fund."

On February 1, 1927, the then Attorney General, in response to an inquiry from the Iowa Library Commission held that cost of repairs could not be paid for out of the "Library Building Fund."

Thereafter, on April 6, 1927, the 42nd General Assembly amended subdivision 20 of Section 6211 by:

"Change the period (.) after the word 'purpose' in the eleventh line thereof to a comma (,) and add thereafter the following: 'but may be made for the purpose of providing funds for improvements and repairs.' "

In view of the foregoing history of Section 6211, subdivision 20, it is apparent that the amendment was enacted to provide a fund from which repairs and improvements could be made.

It is therefore the opinion of this department that if at some prior time the city or town in question had authorized the establishment of a public library, it can now levy a tax, under subdivision 20 of Section 6211, for the purpose of redecorating its library and installing a stoker therein.

TAXATION: ERRONEOUS TAX: REFUNDING TAX: The Board of Supervisors has no authority to refund any portion of amount paid by "X" to redeem, since no portion of that amount was an erroneous or illegally exacted tax within the purview of Section 7235 of the 1935 Code.

April 8, 1938. *Honorable C. W. Storms, Auditor of State:* You request the opinion of this department upon the following set of facts:

"A county treasurer sold certain real property to pay delinquent general and personal taxes. A portion of the taxes for which the property was sold was unpaid personal taxes of the owner which were a lien upon the real property. The purchaser of the tax certificate paid subsequent real and personal taxes of the owner after the same became delinquent in order to protect his certificate. "X" was the owner of a mortgage on the property given by the owner thereof at a time prior to the original tax sale and prior to the owner's personal taxes becoming a lien on said land. "X" redeemed from the tax sale by paying to the auditor the full amount of the real and personal taxes for which the property had been sold plus interest, costs and penalty. "X" now asks that the Board of Supervisors refund that portion of the amount he paid in redeeming which represented the personal taxes of the owner. Can the Board legally make such refund?"

Section 7235 of the 1935 Code reads as follows:

"7235. *Refunding erroneous tax.* The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

It is to be observed that supra statute relates to an erroneous or illegally exacted tax. In the instant case the delinquent personal taxes of the owner by virtue of Section 7203 of the 1935 Code were a lien upon the property. Section 7244 of the 1935 Code required the treasurer to sell the property for all of the taxes due and unpaid, and this of necessity included the personal taxes which were a lien upon the property. Section 7266 of the 1935 Code authorized the tax certificate holder to pay subsequent taxes to protect his certificate and provided for the filing of a duplicate receipt of such tax payment with the auditor. Section 7272 of the 1935 Code relates to redemption of real estate and is as follows:

"7272. *Redemption—terms.* Real estate sold under the provisions of this chapter and Chapter 347 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and four per cent of such amount added as a penalty, with six per cent interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest, and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six per cent per annum on the whole of such amount or amounts from the day or days of payment."

Thus it will be noted that "X," in redeeming from the tax certificate, paid the auditor the amount he was legally required to pay. True enough, under the holding of *Bibbins vs. Clark*, 90 Iowa 230, the lien of taxes assessed on personalty is subject to mortgages on such real estate that are prior to the lien of such personal property tax. Accord: *Bibbins vs. Polk County*, 100 Iowa 490.

Under the provisions of Chapter 501, "X," the mortgagee in question, could have paid the real property tax due on the realty on which he held a mortgage, after the same was delinquent and prior to any tax sale, and in this manner his lien would have been protected. Instead of doing so, he sat back and allowed the property to be sold for all of the taxes that were a lien against it. The treasurer by virtue of said sale marked these taxes "paid by sale of the property" and they are no longer a charge on the tax books against the owner of the property.

The county auditor, before allowing "X" to redeem, properly required the full amount for which the property was sold at tax sale and the subsequents. "X," having sat back and allowed the property to be sold for the real and personal taxes against it, cannot now seek to be reimbursed for that portion required to redeem which represented the amount of the personal taxes. As said in *Everson vs. County of Woodbury*, 118 Iowa 99, a Board of Supervisors has no authority to remit any tax legally assessed.

No part of the tax for which the property was sold was an erroneous or illegally exacted tax within the contemplation of Section 7235. The personal taxes were properly a lien upon the real estate and the same was properly sold to satisfy that tax. True enough, "X" could have paid the real property taxes before the sale and if the property were then sold for the delinquent personal taxes the same would be subject to "X's" superior mortgage. However, not having done so, he cannot now recover any portion of the amount paid to effect

redemption. To hold otherwise would cause the entire personal tax to be lost to the county because the property was sold for enough to cover all of the taxes of the owner and the tax records were accordingly so marked.

It is therefore the opinion of this department that the Board of Supervisors has no authority to refund any portion of the amount paid by "X" to redeem, since no portion of that amount was an erroneous or illegally exacted tax within the purview of Section 7235 of the 1935 Code of Iowa.

This opinion overrules all previous holdings, if any, of this department in conflict herewith.

TAXATION: COMPROMISING TAXES: BOARD OF SUPERVISORS: Boards of Supervisors do not have the power under Section 7193-a1 to compromise taxes against real property which has been offered by county treasurers for sale for taxes for two consecutive years and not sold.

April 8, 1938. *Mr. Oliver J. Reeve, County Attorney, Waverly, Iowa:* We are in receipt of your request for an opinion upon the following question:

"Does the Board of Supervisors of the county have authority under the provisions of Section 7193-a1 of the 1935 Code of Iowa, or any other statute, to compromise delinquent taxes where the real estate has been offered for sale for taxes at the General Tax Sale in the year 1931 and not again offered at the General Tax Sale until the year 1935 (there being no intervening tax sales held in Bremer County, general or scavenger, between the years 1931 and 1935) when said real estate remains unsold at both of these tax sales and when said real estate has not been offered at any Scavenger Tax Sale and when no Tax Sale Certificate has been issued?"

At the outset we might state that we are at a loss to understand why the treasurer failed to hold tax sales, general or scavenger, between the years 1931 and 1935. Section 7244 of the 1935 Code reads as follows:

"7244. *Annual tax sale.* Annually, on the first Monday in December, the treasurer shall offer at his office at public sale all lands, town lots, or other real property on which taxes of any description for the preceding year or years are delinquent, which sale shall made for the total amount of taxes, interest, and costs due and unpaid thereon, provided, however, that no property, against which the county holds a tax sale certificate, shall be offered or sold."

However, irrespective of that situation and assuming, for the purpose of this opinion, that the property in the instant case had been offered for sale for taxes for two consecutive years and not sold, the question then remains as to whether or not the Board of Supervisors has authority under the provisions of Section 7193-a1 of the Code, or any other statute, to compromise the delinquent taxes. Section 7193-a1 reads as follows:

"7193-a1. *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."

At first blush it might seem that supra section does give to Boards of Supervisors the power to compromise taxes under the circumstances and conditions therein outlined. However, this is a taxing statute and must be construed in conjunction with other taxing statutes. The other material taxing statutes relating to this question are Section 7255 and Section 7255-b1, which read as follows:

"7255. *'Scavenger sale'—notice.* Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained 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."

"7255-b1. *County as purchaser.* When property is offered at a tax sale under the provisions of Section 7255, and no bid is received, or if the bid received is less than the total amount of the delinquent general taxes, interest, penalties and costs, the county in which said real estate is located, through its board of supervisors, shall bid for the said real estate a sum equal to the total amount of all delinquent general taxes, interest, penalties and costs charged against said real estate. No money shall be paid by the county or other tax levying and tax certifying body for said purchase, but each of the tax levying and tax certifying bodies having any interest in said general taxes for which said real estate is sold shall be charged with the full amount of all the said delinquent general taxes due said levying and tax certifying bodies, as its just share of the purchase price."

Section 7193-a1 was enacted by the 41st General Assembly in March of 1925. Section 7255-b1 was enacted by the 46th General Assembly in March of 1935.

It is a well established rule in the construction of statutes that statutes in *pari materia,* those which relate to the same things or which have a common purpose or subject, should be read in connection with or as together constituting one law, although they were enacted at different times and contain no reference to one another. It is not to be presumed that the Legislature intended to leave on the statute books two contradictory statutes, but if there is an irreconcilable conflict, the latest enactment will control or will be regarded as a qualification of the prior statute.

The purpose of all taxing statutes is of course to obtain for the State of Iowa and its subdivisions the funds with which to carry on the machinery of government. Prior to the enactment of Section 7255-b1, property would be sold at "scavenger" tax sale to private individuals for any amount that it would bring, irrespective of whether the amount obtained was equal to the full amount of delinquent taxes, interest and penalty. The Legislature no doubt felt that owners of real property should have the right to keep their property in preference to allowing the same to become the property of some individual who had or would purchase the same at a "scavenger" tax sale for a fraction of the general taxes, and so Section 7193-a1 was enacted into law. However, some ten years after that section was enacted, Section 7255-b1 was passed by the Legislature for the very purpose of putting a stop to the destruction of public revenue by the sale of property at "scavenger" tax sale for a fraction of the general taxes. By the passage of this act, the counties were assured either of the full amount of the total general tax, or they became the holders of the tax certificate and later the owners of the property.

If the Board of Supervisors under Section 7193-a1 now have the authority to compromise taxes after the property has been offered for sale for two consecutive years and all the boards would so exercise this purported authority, there would be little property in the State that would be offered for sale at a "scavenger" sale. If this were the law, few taxpayers would pay their taxes until after their property had been twice offered for sale, because they could then come before the Board of Supervisors and attempt to secure a compromise of their taxes. Such practice was not contemplated by the Legislature when

it enacted Section 7255-b1. To allow such a procedure would be to destroy the salutary effect of Section 7255-b1.

As a result of the enactment of that statute, the various taxing bodies are now securing the full amount of their general taxes, interest and penalty or are becoming the owners of the property, and as such have a voice in thereafter deciding whether or not the property shall be sold for less than the full amount of the taxes due thereon. In order that the spirit of the taxing statutes shall be carried out, it is essential that there be no compromise of the taxes by the county boards of supervisors prior to the sale of the property at what is known as the "scavenger" sale.

In view of the foregoing discussion and of the purposes to be effectuated by the taxing statute, it is the opinion of this department that boards of supervisors do not have the power under Section 7193-a1 to compromise taxes against real property which has been offered by county treasurers for sale for taxes for two consecutive years and not sold.

This opinion overrules all previous holdings of this department, if any, in conflict herewith.

COUNTY OFFICERS: BOARD OF SUPERVISORS: VACANCY: APPOINTEE: The appointee would hold office until November 8, 1938, the date on which the next regular election is held, and the supervisor appointed would hold over for the short term from November 8 to January 1, if there is no one elected to fill this term at the general election, provided, however, that this holdover supervisor will have to qualify once more in the same way as he qualified when he was first appointed.

April 8, 1938. *Mr. Harold J. Fleck, County Attorney, Oskaloosa, Iowa:* In your letter of March 21, 1938, you asked the opinion of this office upon the following statement of facts:

A member of the board of supervisors died on March 16, 1938, and pursuant to Section 1152 of the Code of 1935, the clerk of the District Court, the auditor, and the recorder made an appointment to finish the unexpired term.

(1) Does the appointee hold office until January 1, 1939, or until November 8, 1938, at which time a general election will be held?

(2) Provided the appointee holds office until November 8, 1938, and there are no candidates for this office for the term from November 8th to January 1st, when the regularly elected supervisor would take office, would the appointee hold over from November 8th to January 1st?

It is the opinion of this office that the appointee would hold office until November 8, 1938, the date on which the next regular election is held. Section 1157, 1935 Code, and Section 1155 cover this situation, these two sections providing as follows:

"1157. *Vacancies—when filled.* If a vacancy occurs in an elective office in a city, town, or township ten days, or a county office fifteen days, or any other office thirty days, prior to a general election, it shall be filed at such election, unless previously filled at a special election."

"1155. *Tenure of vacancy appointee.* An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified."

The answer to your second question is contained in Sections 1146 and 1145 of the Code. In the event there is no candidate for the short term from

November 8, 1938 to January 1, 1939, then a vacancy will exist in accord with Section 1146 which provides:

"1146. *What constitutes a vacancy.* Every civil office shall be vacant upon the happening of either of the following events:
1. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over.
2. A failure of the incumbent or holdover officer to qualify within the time prescribed by law.
3. The incumbent ceasing to be a resident of the state, district, county, township, city, town, or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised.
4. The resignation or death of the incumbent, or of the officer elect before qualifying.
5. The removal of the incumbent from, or forfeiture of, his office, or the decision of a competent tribunal declaring his office vacant.
6. The conviction of incumbent of an infamous crime, or of any public offense involving the violation of his oath of office."

Every civil office shall be vacant upon the happening of either of the following events:
1. A failure to elect at the proper election, or to appoint within the time fixed by law unless the incumbent holds over.
2. A failure of the incumbent or holdover officer to qualify within the time prescribed by law.

It should be noted, however, that Section 1155 provides that an appointed officer shall hold over until his successor is elected and qualified, this section providing as follows:

"1145. *Holding over.* Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law."

However, should the holdover appointee fail to qualify, the office would be vacant. See sub-section 2 of Section 1146 above.

From all of the foregoing, it is the conclusion of this office that the supervisor appointed in accord with Section 1152 of the Code will hold over for the short term from November 8th to January 1st if there is no one elected to fill this term at the general election, provided, however, that this holdover supervisor will have to qualify once more in the same way as he qualified when he was first appointed.

The Supreme Court in *State vs. Claussen,* 216 Iowa 1079; 250 N. W. 195, discussed at length the various sections of the Code with which we are confronted in this opinion. The case is not directly in point, since the vacancy which occurred and which was the basis of the controversy did not occur within the stipulated number of days previous to the election to make the vote on the filling of that vacancy mandatory. There is language, however, in the opinion from which inference can be drawn supporting the holding which we have reached on the questions presented by you.

TAXATION: BOARD OF REVIEW: Irrespective of whether or not it is a year for assessing real property, the board of review has the authority, under the statute, to act upon the proper complaint of an aggrieved taxpayer and within the limits of the statute, change the value of real property.

April 11, 1938. *Mr. Paul L. Kildee, Assistant County Attorney, Waterloo, Iowa:* We are in receipt of your request for an opinion upon the following question:

"Does the local Board of Review have the authority to revalue the real

property of an aggrieved taxpayer even though it is not the year for assessing real estate?"

Prior to March 22, 1933, real property was valued by the assessor in each odd-numbered year. The 45th General Assembly passed Chapter 119 which amended Section 6959 by providing that thereafter real estate should be listed and valued in 1933 and every four years thereafter. Chapter 119 of the Laws of the 45th General Assembly also amended Section 7129 by adding thereto what appears in the Code of 1935 as Section 7129-e1.

The 47th General Assembly passed Chapter 188 of the Laws of the 47th General Assembly. This chapter stripped from the State Board of Assessment and Review, among other things, the power to raise or lower the valuation of any piece of property in any taxing district. Chapter 188 also amended Section 7129-e1 of the Code by giving the local board of review enlarged powers.

As amended, Section 7129-e1 now reads as follows:

"7129-e1. *Revaluation and reassessment of real estate.* In any year after the year in which an assessment has been made of all the real estate in any taxing district, it shall be the duty of the local board of review *to meet at the times provided in Section* 7129, *and* where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the true value thereof, *and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years.* If the assessment of any such property is raised, or any property is added to the tax list by the board, the clerk shall give notice in the manner provided in Section 7131, provided, however, that if the assessment of all property in any taxing district is raised the board may instruct the clerk to give immediate notice by one publication in one of the official newspapers of said county, and such published notice shall take the place of the mailed notice provided for in Section 7131, but all other provisions of said section shall apply. The decision of the local board as to the foregoing matters shall be subject to appeal *to the district court within the same time and in the same manner as provided in section seventy-one hundred thirty-three* (7133)." (Italic portions are those added by the amendment.)

The language of Section 7129-e1 as amended gives any aggrieved taxpayer the right to petition for a revaluation of his property. And the local board of review has the power to reduce, refuse to reduce, or to increase the valuation of complainant's property, but that power is limited by the provision that "no reduction or increase shall be made for prior years."

It is therefore the opinion of this department that irrespective of whether or not it is a year for assessing real property, the board of review has the authority, under the statute, to act upon the proper complaint of an aggrieved taxpayer and within the limits of the statute, change the value of real property.

TRAILERS: TAXATION: MOTOR VEHICLES: Trailers are exempt from personal property tax.

April 11, 1938. *Board of Assessment and Review:* We are in receipt of your request for an opinion upon the following proposition:

Are trailers exempt from the personal property tax under the provisions of Chapter 134, Acts of the 47th General Assembly?

Under Section 1, paragraph 2, of that act, a motor vehicle is defined as follows:

"Motor vehicle means every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. The terms car or automobile shall be synonymous with the term motor vehicle."

Section 160 of that act provides as follows:

"Sec. 160. *Fees in lieu of taxes.* The registration fees imposed by this chapter upon private passenger motor vehicles, other than those of manufacturers and dealers, shall be in lieu of all taxes, general or local, to which motor vehicles may be subject. Provided, however, no motor vehicle registered under this act shall be subject to a personal property tax."

Chapter 134 was passed by the 47th General Assembly. It is what is known as the uniform motor vehicle law which has been proposed and adopted by many states throughout the Union. It was enacted in lieu of Chapter 251 of the Code of Iowa 1935. Our law, as it was prior to the adoption of Chapter 134, and as it pertains to this question, is set forth in paragraph 1 of Section 4863 of the Code of Iowa 1935, which reads as follows:

"4863. *Definitions.* In all laws of this state regulating motor vehicles, except where otherwise expressly provided:

"1. The term 'motor vehicle' shall include all vehicles propelled by any power other than muscular power except traction engines, road rollers, cranes, corn shellers, wood saws, sprayers, disc sharpeners, and other articles of husbandry of a like or similar nature, and such vehicles as are run only upon tracks or rails."

The provisions for the collection of license fees, in lieu of other taxes, was provided for in Section 4927 of the Code of Iowa 1935, which states as follows:

"4927. *Fees in lieu of taxes.* The registration fees imposed by this chapter upon motor vehicles, other than those of manufacturers and dealers and used car dealers, shall be in lieu of all taxes, general or local, to which motor vehicles may be subject."

A reading of those sections and other pertinent provisions of the act show that the material parts thereof were not changed by the last legislature, although the wording is somewhat different, for the reason that a whole new motor vehicle act was enacted in lieu of the old act. Upon investigation, we find that under the old law, the Board of Assessment and Review interpreted those provisions as being applicable to trailers as well as motor vehicles as defined in that chapter, and, therefore, there was never any endeavor made on the part of that department to subject trailers to the personal property tax.

Trailers, of course, are subject to license under Section 154 of the new act. Some light is thrown upon the intention of the legislature in reading that section along with Section 150 and Section 153. Section 150 provides for the fee to be paid by trucks with pneumatic tires. Section 163 provides the fee to be paid for truck tractors and road tractors, they being the type of vehicle that is used for pulling trailers, and it is to be noted that the total fee required of the truck or road tractor along with the trailer is commensurate with, and in many instances exactly the same as, the fee required of trucks. In other words, the total fee exacted by the state for truck or road tractors and trailers is practically the same as the fee exacted by the state for trucks. It does not seem logical, with the above facts in mind, that the legislature would exempt the trucks from taxes other than the license fees and not also include in that exemption trailers. If there were a decided difference in license fees, and the truck tractor and trailer were allowed to use the highways by the payment of a much smaller fee, we can see where the legislature might have intended to subject the trailer to taxes other than the license fee, but when the taxes exacted are nearly the same in both instances, we cannot believe that the legislature intended that trailers were not to be exempted.

It is therefore our opinion that the license fee paid for trailers is in lieu of personal property taxes under Section 160 of Chapter 134, Acts of the 47th General Assembly.

STATE INSTITUTIONS: UNIVERSITY OF IOWA: SEWAGE DISPOSAL PLANT: University of Iowa empowered to pay its proportionate share into sinking fund, provided such fund is to be used only for operating and maintenance costs and not to retire bonds or be transferred to any other fund.

April 11, 1938. *Mr. W. H. Cobb, Business Manager, State University of Iowa, Iowa City, Iowa:* We acknowledge receipt of your request for advice upon certain questions arising out of the operation of the municipal sewage disposal plant at Iowa City in which the state university of Iowa is interested. In your letter you submit certain facts relative to the inquiries. You also inclose copies of material ordinances, a proposed new ordinance, and the agreement now in force between the city of Iowa City and the Iowa state board of education relating to collection and treatment of sewage in Iowa City. The following is transcribed from your letter:

"The 47th General Assembly appropriated approximately $110,000.00 to pay in full the university of Iowa's share of the capital cost of the plant which eliminates the university from any future liability in the way of payments on the interest and on bonds which are now outstanding and which were sold to finance the city's share of the plant. In the agreement drawn up, the university agreed to pay their share of the operating expenses of the plant in proportion to the volume of water pumped in the sewage plant. This has been found to be about 42 per cent, based upon the last two years' operation, which would make us liable for 42 per cent of the operating expenses of the plant.

"We are now informed by the manager of the Iowa City sewage disposal plant (see copy of letter dated March 30, 1938, attached) to the effect that the city of Iowa City intends to add to their operating budget a sum of $4,500.00 annually to create an operating reserve. This operating reserve, they report, is required in accordance with section (8) of an ordinance authorizing the issue of the bonds. You will note that section (8) of the attached ordinance authorizes the creation of this reserve as an auxiliary reserve fund to meet an emergency in the event there is a deficiency in the sinking fund. If the creation of this reserve fund in the amount of $4,500.00 is added on to the operating expenses of the plant, and the university pays 42 per cent of the operating expenses, we would, of course, be contributing 42 per cent to this reserve fund. Then, in later years, if the reserve fund were used as part of the sinking fund to retire bonds and interest, it is entirely possible that the state of Iowa would be paying for part of their share of the capital cost of the sewage plant twice. I, therefore, raise the following questions:

"Can the city of Iowa City, under their agreement with the state board of education and by virtue of the ordinance financing the sewage disposal plant, charge the university with its share of a reserve fund which can be used for emergencies, including the emergency of meeting any deficiency in the regular sinking fund?

"We would also like to have your opinion as to what rights of the university are as to agreeing to the amount which shall be included as overhead expense. Is the university liable for all overhead expenses of the plant which the Iowa City council chooses to assess? Do we have any rights to object to any amounts which we think excessive? For example, you will note in the attached budget that their operating budget includes an item of $1,200.00 a year charge for the accounting office located in the city hall. This is a charge to the sewage plant budget and a credit to the city's general budget. The expense of this office is largely caused in collecting the monthly charge from private owners of Iowa City for use of the sewage disposal plant. While the university of Iowa recognizes the need for an accounting office for any plant, can we object if we feel that this cost is somewhat excessive?"

We begin with the proposition that the university is, by reason of its prepayment of its proper share of construction costs, absolved from any assessment or charge of any character, the proceeds of which are applied or may be applied to retirement of capital costs. It is obvious that any payments applied to such

purposes would be unauthorized and improper since the state has already paid its fair share of construction costs.

The rights and duties of the respective parties are to be determined by the provisions of the agreement designated "Memorandum of Agreement Concerning Collection and Treatment of Sewage in Iowa City, Iowa." This memorandum agreement was ratified and confirmed by the Iowa state board of education on January 17, 1935, and by the city of Iowa City on February 15, 1935. The validity of this agreement is not questioned by either party, and therefore it should be the basis of determining the questions submitted. That portion of the said agreement pertaining to the duty of the university to pay sewer rentals is paragraph (2) thereof which provides as follows:

"2. That, provided the general assembly should make the necessary appropriation of funds, and provided the university should continue to discharge all of its sewage into the city sewers, the sewer rentals to be paid by the university after the plant shall have been constructed and put into operation, should, in the event that the university should pay outright the share of the construction cost as set forth in the preceding paragraph, consist of the fair share of the annual cost of maintaining and operating the said treatment plant as the sewage load from the university bears to the total sewage load on the treatment plant; such sewage load will be understood to mean the quantities of sewage flowing from the respective sources, except, that sewage of such character as to be assessed a special sewer rental rate by city ordinance, should be considered as composing a quantity modified to be commensurate with the sewer rental rate; it is further understood that the most practical index of the quantity of sewage contributed from any source is, at present, the quantity of water consumed at that source.

"That, if the university should not pay outright its share of construction costs in accordance with the preceding paragraph (1), then the university should pay sewer rentals on the same basis as residents of Iowa City, namely, in proportion to the quantity and character of sewage contributed; that in any case university representatives shall have the right and privilege to make or take tests of any kind at any time to ascertain the proportions of sewage and charges; that the books of account of the city of Iowa City, Iowa shall be open at all times to be audited by representatives of the university so that they may ascertain the propriety of the amount and share of the cost of operating the said system allocated against the university, and that no change of the basis of allocating the shares of the cost of operating and maintaining the said plant shall be made excepting by agreement of the Iowa state board of education and the city of Iowa City, Iowa."

Under the agreement, "the sewer rentals to be paid by the university * * * should * * * consist of the fair share of the annual cost of maintaining and operating the said treatment plant as the sewage load from the university bears to the total sewage load on the treatment plant."

The agreement, therefore, fixes the basis for determining the university's share of the cost of operation and maintenance. There is, we understand, no difficulty in the method of apportioning the university's share of such costs. Before 1938 the manager of the plant had estimated the operating expenses for each year commencing April 1st and ending March 31st of the following year. Regular payments against such estimated costs have been made by the university, and after March 31st of each year settlement has been made upon the basis of actual expense during the year. Heretofore the following items have made up the cost of maintaining and operating the sewage treatment plant:

(1) Administration expense

(2) Plant expense

The maintenance and operating costs for the year April 1, 1937, to March 31,

1938, have been determined, and it is noted that the items "Administration Expense" and "Plant Expense" are the only two items of costs billed to the university.

In setting up the budget for 1938-1939, the plant superintendent has added a third item designated "operating reserve," and has set opposite the same a charge of $4,500.00.

We understand that this additional charge is made pursuant to a proposed ordinance which the council now has under consideration, and in which are included the following provisions:

"Section 1. That the sum of $4,500.00 shall be paid from the Sewer Rentals received each year into a Reserve Fund to be used to meet possible future deficiencies which may arise.

"Section 2. That when the amount of the Reserve Fund equals 10 per cent of $251,000.00 no further payments shall be made into such Reserve Fund, after all bonds have been retired.

"Section 3. Such Reserve Fund shall not be available for any City activity other than that of the Sewage Treatment Plant."

Of this proposed additional charge of $4,500.00, the university is asked to pay the same proportionate share as, in the past, it has paid for administration and plant expense.

If this special fund referred to as the "reserve fund" is to be used solely for maintenance and operation, and if it is assured that no part of such fund will be used to retire bonds or interest on bonds, we believe the university may contribute to such fund in the proper proportion. The contribution to a fund, in reasonable amount, as a reserve for operating and maintenance costs would be permissible and would fall within the terms of the agreement providing for the payment of the fair share of "operating and maintaining said treatment plant." Such a fund may, we believe, properly be set up as a cost of maintenance.

The proposed ordinance providing for the establishment of the reserve fund does not clearly limit the use of such fund to maintenance cost. The ordinance provides that such fund is "to be used to meet possible future deficiencies which may arise," and "shall not be available for any city activity other than that of the sewage treatment plant."

It is our opinion that the ordinance *should specifically limit the use of such reserve fund to costs of operating or maintaining the plant*, and that the same should provide that in no event shall such fund be used to retire bonds or to pay interest on bonded indebtedness, and that in no event shall any part of said fund be transferred to any other fund or funds.

We now respond to that part of your inquiry relative to the payment of administrative expense. The university has the authority, of course, to pay its proper share of office expense and plant expense. At present the quantum of that share is determined by the quantity of water consumption by the university. The various items of operation and maintenance are set out in the annual report of expenditures for the year ending March 31, 1938. This report does not disclose any items of expenditure which are palpably excessive or unreasonable. If any items of expense are unreasonable, the university, through its business manager, can file a protest setting up the grounds of objections to such charges. It is our opinion that such matters should be formally presented to the council as indicated, if it be determined that there is reason for such action.

CIGARETTES: PERMITS: LICENSING BODIES: AUTHORITY OF: VENDING MACHINES: Without deciding whether or not the discretion of a council or board of supervisors is absolute or limited, it is held that it lies within the power of the authority issuing such cigarette permits to refuse to issue a license for the sale of cigarettes through vending machines.

April 11, 1938. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* We acknowledge receipt of your request for the opinion of this department upon two questions which may be stated as follows:

"May the city council issue licenses to persons who contemplate selling cigarettes through cigarette vending machines? If you find that licenses can be issued under such circumstances and cigarette vending machines are legal in this state, then I would like to submit this question: does the city council have the right, in the event that an application is made for a cigarette license by reputable people, with the express intention on the part of the licensee of dispensing the cigarettes through a vending machine, to refuse to issue a permit, basing their refusal on the ground that a vending machine would enable minors to buy cigarettes and increase the difficulty of properly policing said licensees?"

While the above inquiries present questions of considerable public interest, no other request for the opinion of this department upon this subject matter has been made subsequent to January 2, 1937. A former attorney general ruled in an opinion, dated October 29, 1931, that the owner and proprietor of a cigarette vending machine is liable for any illegal sales effected through the machine in like manner as he would be for personal sales. This opinion is reported at page 138, 1932 Attorney General's Report, and states in part:

"Your attention is called to the provisions of Section 1553 which state that no person shall 'furnish to any minor under twenty-one years of age by gift, sale, or otherwise' any cigarette, etc.

"It is also provided in said section that no person 'shall directly or indirectly by himself or agent, sell, barter, or give to any minor under sixteen years of age any tobacco in any other form,' except upon the written order or consent of his parents or guardian.

"The plain mandate of the statute is that no cigarettes shall be furnished or sold to minors. If any person furnishes any cigarettes to any minor by any means whatsoever, he is guilty of a violation of this law.

"We are of the opinion that any person placing in operation a vending machine which furnishes cigarettes or tobacco to a minor, is liable just the same as though he had personally sold the cigarettes or tobacco to the minor."

It will be noted that the above opinion recognizes, and inferentially approves the machines which vend cigarettes, holding, however, that the permittee who employs such device is liable as a seller.

The statute authorizing permits to sell cigarettes is Section 1557, 1935 Code, and provides as follows:

"1557. *Permit to sell.* No person shall sell cigarettes or cigarette papers without first having obtained a permit therefor in the manner provided by this chapter. Such permit may be granted by resolution of the council of any city or town under any form of government and when so granted, may be issued by the clerk of such city or town. If issued to a person for use outside of a city or town such permit may be granted by resolution of the board of supervisors and when so granted shall be issued by the auditor of the county. Such permit shall remain in force and effect for two years following the July first after its issuance, unless sooner revoked."

Insofar as the above opinion places entire liability upon the permittee who uses a vending machine to dispense cigarettes, we are in accord with the holding. There is no specific language of the statutes which prohibits the sale of cigarettes by machine. Any person who furnishes, through a machine or

otherwise, any cigarette or cigarette paper to any minor under twenty-one, would be, in our opinion, within the province of Section 1553, 1935 Code, which provides:

"1553. *Sale or gift to minor prohibited.* No person shall furnish to any minor under twenty-one years of age by gift, sale, or otherwise, any cigarette or cigarette paper, or any paper or other substance made or prepared for the purpose of use in making of cigarettes. No person shall directly or indirectly by himself or agent sell, barter, or give to any minor under sixteen years of age any tobacco in any other form whatever except upon the written order of his parent or guardian or the person in whose custody he is."

The second part of your inquiry goes to the question of the authority of a city council to condition the issuance of permits to sell cigarettes upon the non-use of vending machines by permittees. The Supreme Court has had occasion in three opinions to construe the provisions of Section 1557 which is set out above.

Before the enactment of the present law, the sale of cigarettes was prohibited in Iowa by the provisions of Section 5006, Code 1897. Their sale is still prohibited unless a permit for such sale is procured as provided in Section 1557, supra.

In the first case which construed the language of Section 1557, *Ford Hopkins Co. vs. City of Iowa City,* (not reported in Iowa reports) 240 N. W. 687, the court construed the section as a "local option" statute, that when a municipality determined that cigarettes might be sold within its jurisdiction, then every applicant who complied with the requirements of the statute would be entitled to a permit. The court then pointed out that the only requirement as to qualifications imposed upon an applicant is that he must be a person "owning or operating the place from which sales are to be made under the permit." Justice Albert speaking for the majority of the court, used the following language:

"Aside from the use of the word 'may' in the section above quoted, there is no provision in Chapter 78 which purports to confer upon the city council any power of selection, discrimination, or favoritism between applicants, and this chapter does not confer upon the city council any power or discrimination to refuse a permit except for the reasons above specified.

"The power conferred by the Legislature upon the city council imposes upon it the corresponding duty to exercise this power obediently to the terms and conditions of the statute without discrimination. To grant a permit to one and refuse it to another who has conformed with all of the statutory conditions is clearly arbitrary and discriminatory. It being conceded in this matter that all of the requirements of the statutes as conditions precedent have been complied with by the applicant, to refuse a permit under such conditions is purely arbitrary and in violation of the duty marked out by statute."

Four members of the court joined in a dissenting opinion written by Mr. Justice Faville. The theory adopted by the minority was that the statute conferred upon local councils and boards an absolute discretion to determine in individual cases who might or who might not be granted a permit. The following language appears in the said dissent:

"We have a general statute of the state making the sale of cigarettes a crime. Then we have this mulct law statute providing that persons may sell cigarettes without being criminally liable therefor upon two conditions, namely, (1) that they obtain a permit from the city council or board of supervisors, and (2) that they pay the mulct tax provided by the statute. The whole history, theory, and purpose of the statute is to make the permit a trust granted by proper local authority which renders the holder immune from prosecution for that which, but for the permit, would be a crime. It is most distinctly and essentially a police regulation. By the very terms of the statute the duty is imposed upon

the city council (or board of supervisors) to determine who *may* be thus rendered immune from criminal prosecution. The Legislature used the word 'may' advisedly and intentionally. By express, direct, and unambiguous language it placed a discretion and a responsibility as well upon the local authorities."

In the case of *Bernstein vs. City of Marshalltown*, 248 N. W. 26, an applicant was refused a permit to sell cigarettes. The facts showed the applicant was "a person owning and operating the place" from which sales were to be made. There was evidence tending to show that in his place of business the applicant had kept and sold certain objectionable magazines, trinkets, etc. The court, again divided, held that the statute conferred certain discretionary powers upon the council and reversed the lower court which had allowed a writ of mandamus against the city. This opinion inclines toward the position taken by the dissenting members in the first Ford Hopkins case cited above. The following is quoted from the opinion:

"Evidently, therefore, because of all the reasons above suggested, the Legislature advisedly used the word 'may,' and clearly intended that the city council should have a discretion to grant or deny the application for a permit to sell cigarettes. Under the legislation, the local authorities are burdened with a great responsibility. It is that of granting immunity to persons who otherwise would be guilty of a public offense. Such responsibility under the statute involves more than merely ascertaining whether or not the applicant 'owns or operates the place' where the cigarettes are to be sold. * * * Manifestly, the statute was intended to make the granting of a permit a personal and individual matter between the particular applicant and the city council to whom the application is thus addressed. When the application is made, the city council *may*, under the statute, grant or refuse a license according to its discretion."

Judge Utterback, with whom three justices joined, including the writer of said Ford Hopkins opinion, dissented for reasons expressed in the majority opinion in the last mentioned case.

The court in the Bernstein case, however, did not decide squarely the question whether the statute confers an absolute or a legal discretion upon the issuing authority. Its holding was that the facts in the Bernstein case were such that in passing upon the matter the council exercised a legal discretion. The court explained its position as follows:

"Because of the facts presented in the case at bar, it is unnecessary to decide, and therefore it is not decided, whether the Marshalltown city council has an absolute right to discriminate or act arbitrarily in refusing to grant to the appellee his application for a permit to sell cigarettes. This is true because under the facts here presented the city council acted clearly within a legal discretion when refusing the permit. When the city council acted upon the appellee's application, there was evidence before it that the applicant had conducted an immoral place. He had been arrested for keeping, exhibiting, and selling obscene and lewd magazines."

The opinion in a second case involving (apparently) the same facts and parties as were involved in the *Ford Hopkins Co. vs. City of Iowa City*, supra, is the latest expression of the supreme court upon the question under consideration. This case is reported at 216 Iowa 1286, 248 N. W. 668, and supersedes the earlier Ford Hopkins case, which opinion is not reported in the Iowa reports, nor is it referred to in any cases which succeeded it.

In the last Ford Hopkins case the court, without dissent, affirmed the power of the city council to refuse to grant in excess of fifty-one permits in the city of Iowa City, which number the council had fixed as a maximum. The court referred to the Bernstein case, supra, and adopted its holding that the granting of a permit was discretionary with the issuing body. As in the Bernstein case,

however, the court again felt it unnecessary to determine whether the discretion of the council is absolute or limited. Since the council denied the permit "because it desired to limit the number of permits to sell cigarettes in Iowa City," the court held that there was a substantial basis in fact as well as in law for the limitation and that their action in denying the application for a permit was not arbitrary, capricious nor discriminatory.

A review of the above pertinent Iowa decisions leads to the following conclusions:

(1) City councils or boards of supervisors have discretionary power with respect to the granting of cigarette permits.

(2) Whether such discretion is absolute or limited is uncertain.

(3) Councils or boards may refuse to grant a permit where such refusal is substantiated by facts which establish that the granting of such permit may be inimicable to the health or morals of the community or where such granting may hinder law enforcement.

Obviously the sale of cigarettes by vending machine is different from a personal sale. It is not probable that the operator of a place of business where such machine is installed can constantly observe all transactions. Although such operator is responsible under the law, it cannot be said that cigarettes would not be made more available to minors. A cigarette vending machine would not refuse to deal with a child as would a reputable merchant. The above reasons, with others which undoubtedly exist, lead to the conclusion that sales of cigarettes through vending machines are in a different classification than ordinary personal sales. Such a classification is not unreasonable, capricious nor arbitrary. The city of Iowa City was upheld in its refusal to grant permits in excess of the number of places of business it could adequately police. The city of Marshalltown was sustained in its refusal to grant a permit to an applicant on moral grounds. Without deciding whether or not the discretion of a council or board of supervisors is absolute or limited, it is our opinion that it lies within the power of such issuing authority to refuse to issue a license for the sale of cigarettes through vending machines.

IOWA STATE HIGHWAY COMMISSION: SECONDARY ROAD LAW: COUNTIES: BOARD OF SUPERVISORS: BOARD OF APPROVAL: Opinion of this department that approval of plan for construction should be withheld until county adjusts plan to comply with requirements of the law.

April 11, 1938. *Iowa State Highway Commission, Ames, Iowa:* Your letter of March 31, 1938, requesting an opinion concerning the approval by the Commission of a secondary road construction program in one of our counties, has been considered.

The question involved seems to be the lack of compliance with certain requirements of the secondary road law.

You state that the board of supervisors intend to advertise for bids for grading work, but on bridge and culvert construction the board reports that it expects to build a large quantity of small box culverts, and that the county has already purchased the gravel and reinforcing steel for the work. The county claims to have a well organized day labor bridge and culvert organization. From the letter of your District Engineer it appears that 105 culverts are to be built. Of these, 37 are on the county trunk system and 68 on the local road system. It seems that the county has built culverts in this manner for a number of years, and they have a crew that would be thrown out of work if the culverts are built by contract. The county does not require the engineer

to prepare plans for these culverts because the concrete foreman and the engineer decide what is to be done and then it rests with the foreman to build the culverts from the standard plans. It further seems there is not provided a situation plat for the site of the culverts. This would require a survey and a certain amount of figuring on the part of the engineer. Further it appears from the engineer's letter that in this county the board of approval is not called upon at all. The board of supervisors line up the work on the local system and do not consult the township trustees.

It does not take an extended study of Chapter 240 of the Code to arrive at the conclusion that the board of supervisors of this county is not proceeding as required by the statutes. In the matter of local township roads the law expressly provides for the approval of the plan of construction by the board of approval. The board of supervisors have no right to ignore this law.

The matter of dividing up the construction work so that each culvert will cost less than $1,500 has been passed upon at various times by this department. In an opinion rendered January 27, 1933 (1934 Report, page 81), the then Attorney General ruled that where a county would use more than $1,500 worth of gasoline in road and bridge construction work during the year, it was necessary that bids be taken, this although the gasoline was to be purchased as needed and paid for monthly. That opinion referred to the case of *State vs Garretson*, 207 Iowa 627, 233 N. W. 390, and quoted from that case as follows:

"This statute (Section 4544-c42 of the Code), cannot be avoided by the subterfuge of buying, in disregard of the statute, material in quantities much exceeding said amount, on the plea that the amount used on each subsequent, individual work of repair will be much less than $1,000 in value."

Again, on July 8, 1935, the then Attorney General ruled (1936 Report, page 216) that the board of supervisors did not have the right in the case of an emergency created by a flood, to construct bridges without advertising and having a letting as required by Section 4644-c42.

In the case of *State vs. Garretson*, above referred to, the court said among other things:

"Repeatedly, appellant persisted in letting public contracts without the engineer's estimate and advertisements, in direct violation of Sections 4647 and 4648, supra. How can it be said that the county was not prejudiced? Who knows? Answer to these questions cannot be known without the advertisements and the resulting opportunity for prospective materialmen to bid. It is not for appellant to say that no good reason exists for the requirements of the law. The prerogative to decide the wisdom of those legislative enactments is confined to the lawmakers, and they deemed the legislation wise and adopted it."

The particular sections referred to in that opinion have been repealed, but the reasoning applies to the construction of Section 4644-c42. The spirit of the law contemplates a plan and sufficient surveys to justify the plan. Construction work as distinguished from repair work is required to be by plan approved by the Highway Commission. The local authorities, that is, representatives of the various townships, are given the right to pass upon the plan for the improvement on local roads. There is a specific requirement that there must be a survey in the case where grading and draining is estimated to cost over $1,000 per mile, this under Section 4644-c37. And Section 4644-c39 gives the requirements for the surveys, and the requirements for an estimate of the cost of the roads on the basis of permanent bridges, culverts, tile and road work.

The engineer's estimate determines the question whether a particular piece of work must be advertised for a public letting of the work.

It surely cannot be the intention of the law that a board of supervisors may avoid the requirement for advertising for bids by the expedient of omitting the requirement of an engineer's estimate. Perhaps the board of supervisors of this county believes that it has such a good organization that it may thereby perform the work at less cost than if done by letting contracts. But, as stated in the Garretson case, supra, how may such facts be proved unless the board first advertises for bids? The board has the statutory right to reject bids and perform the work by day labor or by private contract at a figure not exceeding the lowest bid. Section 4644-c42. But first, it must advertise for bids and, if all bids are rejected and the board thereafter performs the work by day labor, the statute requires that the engineer file with the auditor a statement of the costs and a duplicate thereof with the Highway Commission. Section 4674. And Section 4673 of the statute specifies that before commencing the construction of any permanent bridge or culvert by day labor or by contract, the plans, specifications, estimate of drainage area, estimate of costs and specific designation of location of bridge or culvert, shall be filed in the county auditor's office.

If the board of supervisors proceeds as it intimates it intends to do, there will result a direct violation of the law; the board would violate the law in ignoring the provisions of the statute for action by the board of approval so far as concerns local township roads. The fact that the board considers that it has a good organization for the building of these culverts and that it feels that it can build them at less expense than it could build them by proceeding as required by law, is not material, except possibly as bearing upon the good faith of the officers. But in view of the fact that the statute is designed to make a permanent record of the actual cost of such improvements, so that anyone interested can compare the bids made with the actual cost of doing the work by day labor, and the system proposed to be adopted by this board will prevent such a comparison being made, may have some effect upon the question of good faith if that question were involved. But the point is, that the provisions of the statute are mandatory, and there seems to be no reasonable excuse for failure to observe them. The Board has a wide discretion within the law, but no option to evade it.

Therefore, it is the opinion of this department that the approval of the plan for construction work of the county in question should be withheld until the county so adjusts its plan as to comply with the requirements of the law.

STATE INSTITUTIONS: BOARD OF CONTROL: CONTRACTS: C. I. O.: Board created for purpose of managing state institutions. Legislature did not grant it authority to enter into contract such as here proposed, namely, with C. I. O.

April 12, 1938. *The Board of Control of State Institutions:* On March 24th, Mr. G. S. Wooten, your secretary, forwarded to this office a proposed form of contract between the members of the Board of Control and the State, County and Municipal workers of local union No. 76, affiliated with the Committee for Industrial Organization, and in your letter accompanying the contract you stated:

"Kindly give us an opinion as to the power of the board under existing statutes legally to enter into such an agreement."

In answer to your inquiry, we want to make it clear that your question is strictly limited to the power of the Board, under existing statutes, to legally enter into such an agreement. It in no way involves the right of any state employees to join a labor organization of their own choosing, a right which we believe they have, and one which we do not believe should be interfered with by your Board or any other department of government. The question of entering into a contract between a governmental agency created by statute and a labor organization is quite different from the question of a contract entered into between a private employer in business and a labor organization.

The Board of Control was created by statute for the purpose of managing the institutions which care for the unfortunate and handicapped people of this state. The care of these people is a most serious responsibility, and the legislature has, therefore, seen fit to definitely set forth in the laws of this state the board's power and duties with reference to the care of these people and the control of the institutions. The legislature has not seen fit in the present statutes, which now control your duties and powers, to grant you the authority to enter into a contract such as the one proposed, and because the legislature has not given you such authority in the present statutes, we do not feel that you can legally enter into such a contract.

COUNTY OFFICERS: COUNTY ATTORNEY: STENOGRAPHIC SERVICE: REIMBURSEMENT: Opinion of this department that there is no legal obligation on part of county to reimburse you for stenographic service in connection with your duties as county attorney without previous approval.

April 16, 1938. *Mr. Joseph W. Newbold, County Attorney, Keosauqua, Iowa:* This department acknowledges receipt of your request for an opinion on the question as to whether or not you, as county attorney, are entitled to stenographic service in the discharge of your official duties as such county officer to the extent that such service is reasonable, just and necessary.

You state that you have submitted to the board of supervisors a bill for reimbursement of compensation paid by you to the stenographer employed in your office in the amount of fifty per cent of the total compensation paid such stenographer.

Similar questions have been before this department in the past. See: 1917-18 Report of Attorney General, 306; 1919-20 Report of Attorney General, 613; 1923-24 Report of Attorney General, 140; 1928 Report of Attorney General, 307; 1932 Report of Attorney General, 157; and 1934 Report of Attorney General, 421.

Sections 5133 and 5134, Code of Iowa, 1935, require county boards of supervisors to furnish offices at the county seat to the county attorney, among other county officers, and as well, to furnish fuel, lights, blanks, books and stationery necessary and proper to enable them to discharge the duties of their respective offices. Boards are expressly inhibited in the latter section from furnishing the county attorney with law books or library. While there is a familiar rule of statutory construction that where stated things are enumerated, things not named are excluded, yet we are not disposed to hold thereby, that it is beyond the power of the county board of supervisors to defray the expense of clerical or stenographic work incident to the proper functioning of the county attorney's office.

Previous opinions of this department (see references *supra*) have held such

power and authority resident in boards of supervisors by virtue of Section 5130, subsection 6, Code of Iowa, 1935, which provides as follows:

"To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made."

In considering this subsection, the author of the opinion reported at page 306 of the 1917-18 Report, *supra*, concluded as follows:

"It will be observed that the powers conferred by paragraph 11, of Section 422 (Section 5130, subsection 6) exercised in all cases where no other provision has been made, and if other provisions have been made, then such power does not exist.

"A stenographer is employed not for the purpose of transacting the law business in the county attorney's office, but for the purpose of facilitating the accomplishment of that business by the county attorney and his assistants. * * *

"We therefore hold that it is a part of the business of the county in connection with which the board would be authorized to act under subdivision 11 of Section 422 of the Supplement to the Code, 1913, (Section 5130, subsection 6), and that it is a matter in which the board are authorized to use and exercise their discretion, and if in their judgment it facilitates the work of the office of the county attorney, they have the same right and authority to employ clerical assistance under such circumstances as they would have for any other officer in the county."

In the opinion reported at page 421 of the 1934 Report, *supra*, the conclusion was reached that "the board of supervisors should also pay the proper portion of the expense of a clerk or stenographer for the county attorney's office in the handling of the county's affairs therein."

The Iowa Supreme Court, in construing the cited subsection in the case of *Wilhelm vs. Cedar County*, 50 Iowa 254, held that the board of supervisors of Cedar County had the power to employ one to assist in the collection of taxes not collectible by the county treasurer. The court was of the opinion that the fact that the statute failed to expressly authorize the board to employ an agent or attorney to assist in the collection of uncollectible taxes did not preclude the implied power to do so, the collection of taxes comprising a part of the business of the county.

While we concur in the conclusions expressed in the opinions in the 1918 and 1934 Reports, yet we are not disposed to place entire reliance for such conclusions upon the statutory provision quoted hereinbefore. Rather, it is our opinion that express authority to furnish stenographic assistance for the county attorney to the extent that such assistance is required in the discharge of the official business of that office is to be found in the provisions of Chapter 262, Code of Iowa, 1935, entitled "Deputy Officers, Assistants, and Clerks." Section 5238 thereof provides:

"Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, coroner, and county superintendent of schools, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. *The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board.*"

Section 5239 provides:

"When any such appointment has been approved by the board of supervisors, the officer making such appointment shall issue in writing a certificate of such appointment, and file the same in the office of the auditor where it shall be kept."

Section 5242 provides:

"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."

It is accordingly the opinion of this department that there is express statutory authority (without regard to the implied authority resting in the provisions of subsection 6 of Section 5130 *supra*) for a board of supervisors, in the exercise of its discretion, to furnish stenographic assistance for the county attorney to the extent that such assistance is required in the discharge of the official business of that office.

However, as a condition precedent to the incurring of a legal obligation on the part of the county for the expense of stenographic assistance in the office of the county attorney, the appointment of such an assistant or clerk must have the approval of the board by resolution made of record in the proceedings of the board. At such time of approval of the appointment it would be incumbent upon the board of supervisors to fix the compensation to be paid the appointee. What the amount of such compensation should be is necessarily a question that alone can be determined by the board, dependent upon the extent to which service will be rendered the county in aid of the discharge of the official duties arising in the office of the county attorney.

Therefore, if we are to assume in the instant case that no such approval was had, it is the opinion of this department that there exists no legal obligation on the part of Van Buren County to reimburse you for the services of your stenographer performed in connection with your duties as county attorney under the facts and circumstances in this case.

CITIES AND TOWNS: FIREWORKS: SPARKLERS: Sale or use of sparklers is prohibited in this state. City or town councils may grant permit for display under certain conditions.

April 18, 1938. *Senator Frank C. Byers, Cedar Rapids, Iowa:* We are in receipt of your request for an opinion upon the following proposition:

Does Chapter 181, Acts of the 47th General Assembly, prohibit the sale and use of sparklers in this state?

Section 1 of Chapter 181, Acts of the 47th General Assembly, reads as follows:

"The term fireworks shall mean and include any explosive composition, or combination of explosive substances, or article prepared for the purpose of producing a visible audible effect by combustion, explosion, deflagration or detonation, and shall include blank cartridges, toy pistols, toy cannons, toy canes, or toy guns in which explosives are used, balloons which require fire underneath to propel the same, firecrackers, torpedoes, sky-rockets, Roman candles, Daygo bombs, or other fireworks of like construction and any fireworks containing any explosive or inflammable compound, or other device containing any explosive substance."

Section 2 thereof provides in substance that it is unlawful to offer for sale, expose for sale, sell at retail, or use or explode any fireworks as defined in the preceding section, providing also that the council of any city or town, or trustees of any township may grant a permit for the display of fireworks under certain conditions. That section also authorizes the sale of any kind of fireworks provided the same are to be shipped out of the state.

The following section provides that any person violating the provisions of this act shall be guilty of a misdemeanor.

It is our understanding that a "sparkler" consists of a solid compound, molded around a wire which, when ignited, makes something of a crackling noise, produces a flame close to the compound, and throws off sparks.

Section 1, supra, is broad and comprehensive in its terms. In the first part thereof the legislature defines certain types of fireworks, the principal purpose of which is to produce noise. Thereafter the legislature specifically numerates the types of fireworks which it intends to expressly include within the prohibitions of the statute. Expressly included therein are "sky rockets" and "Roman candles." Now it is known to all that neither of these produce any material sound, but there does occur a combustion or explosion, and yet the legislature saw fit to expressly enumerate them within the definition of fireworks as defined in the first part of Section 1 of the Act. The combustion or explosion of a "sparkler" is very nearly the same as the combustion or explosion of either "sky rockets" or "Roman candles," and we could probably safely say that "sparklers" are prohibited by the definition set forth in the first part of Section 1, but we need not rely exclusively upon that part of the definition because the legislature, after enumerating the specific forms of fireworks that it intended to include, also adds "or other fireworks of like construction and any fireworks containing any *explosive or inflammable compound*, or other device containing any explosive substance."

Funk and Wagnall's dictionary defines "inflame" as: "to cause to burst into flame; kindle; to break into flame, to become heated or glowing." That dictionary defines the word "explode" as: "to cause to expand violently or pass suddenly from a solid to a gaseous state. To flash noisily into gas or flame, as gun powder itself. To come suddenly to an end as by bursting."

When a "sparkler" is lit, the solid compound changes to some extent, at least its form, from a solid to a gas. It is the gas itself which ignites. That gas, when ignited, bursts into flames and definitely becomes glowing.

It seems clear to us that the result is inescapable that a "sparkler," when ignited, becomes inflammable, and that being true, it is expressly within the definition of the term "fireworks" and its sale or use is prohibited except under certain conditions hereinbefore mentioned.

LOAN COMPANIES: LICENSE FEES: REFUNDS: If a person takes out a license to operate a small loan business and at the end of two weeks without having done any business he ceases operations, this license fee may not be refunded.

April 19, 1938. *Mr. R. L. Bunce, Deputy Superintendent, Department of Banking:* We are in receipt of your request for an opinion upon the following proposition:

A person made application for and received a license under the provisions of Chapter 419-F1, being the small loan act. His investigation fee of $50.00 and his license fee of $75.00 were paid. About two weeks after receiving his license, he decided to quit business and now asks for a refund of those two fees. In the meantime he made no small loans.

Your question is whether or not he is entitled to a refund of either the $50.00, the $75.00, or both. This party opened up an establishment for the conducting of a business for making small loans, but during a period of about two weeks he was unable to make any loans and therefore quit business.

We have examined Chapter 419-F1 of the Code of Iowa 1935, and find therein provisions for the licensing of those persons who desire to conduct a small loan business, and also requirements for the payment of an investigation fee before granting a license. Nowhere in the chapter is there any provision for the remitting of either of those fees or any part thereof. In the absence of any such provisions, your department is without authority to make the remission.

No question of a mistake or the collection of a license fee under an unconstitutional statute is herein involved. The party was bound to procure a license before entering into business, and was also bound to pay his $50.00 for an investigation of his plan of operation, etc., before being eligible for his license. This was all complied with, and he was given his license. That license was good for a period of one year unless sooner suspended, revoked, or surrendered. He operated under that license for a period of two weeks, and in the absence of any provision in the statute authorizing a remission of the fees exacted or any portion thereof, your department is without authority to make any such remission.

MOTOR VEHICLES: DRIVER'S LICENSE: REVOCATION OF: Operator's license and motor vehicle registration certificate and plates may be suspended, even though judgment was recovered prior to date law became effective.

April 20, 1938. *Senator Edward Breen, Fort Dodge, Iowa:* We are in receipt of your request for an opinion on the following proposition:

May an operator's license and motor vehicle registration certificates and plates be suspended under Section 306 of Chapter 134, Acts of the 47th General Assembly, where the judgment was recovered prior to the date upon which this law became effective?

Section 306 of Chapter 134, Acts of the 47th General Assembly, reads as follows:

"*Suspension of licenses.* Whenever a final judgment is recovered in any court of record of this state in an action for damages for injury to or death of a person or for injury to property caused by the operation or ownership of any motor vehicle on 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 commissioner and thereupon the commissioner shall forthwith suspend the license, if any, of the judgment debtor or debtors, as the case may be, to operate a motor vehicle on the highways of the state and shall forthwith suspend the registration of any and every motor vehicle registered in the name of such judgment debtor or debtors, and the commissioner shall forthwith notify such owner or owners by registered mail of such cancellation and the owner or owners so notified shall immediately upon receipt of such notice surrender to the county treasurer all registration plates so suspended, and such suspension shall not be removed nor such registration plates returned by 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 or debtors until proof that such judgment has been stayed, satisfied or otherwise discharged of record shall be filed with the county treasurer."

An analogous section to the one just quoted was passed by the 43rd General Assembly in Chapter 118 thereof, and was incorporated in the 1931 Code as Section 5079-c4. That section remained intact until the last General Assembly met, being the 47th General Assembly, when the new motor vehicle act was passed. Section 527 of the new motor vehicle act reads as follows:

"Chapter two hundred fifty-one (251), and all amendments thereto, Code 1935, are hereby repealed."

Section 5079-c4 of the 1931 Code was designated by that same number in the 1935 Code, and was a part of Chapter 251 which was repealed by the new motor vehicle act. You will recall that virtually our whole law pertaining to the operation of motor vehicles was repealed by the last General Assembly and the new act passed in lieu thereof.

As we understand it, your inquiry is prompted by the theory that Section 306 of the new act could not be retroactive, and, therefore, if the judgment was obtained prior to the date when the old law was repealed and the new one enacted, that the person against whom the judgment was obtained would not be subject to the provisions of Section 306 of the new act. Under our interpretation of this statute it will be unnecessary to decide whether or not Section 306 of the new act is or could be retroactive. It is a rule of statutory construction that where a law is repealed and simultaneously it is re-enacted in substantially the same form, that portion of the law which was re-enacted will not be considered as having been re-enacted, but rather as continuing. A reading of Section 5079-c4 of the 1935 Code shows that it was re-enacted virtually verbatim except only that under the new law the commissioner is the party who is authorized to suspend the licenses instead of the county treasurer, and, instead of granting the license ten days in which to surrender the licenses as was provided under the old law, it is made mandatory that he, immediately upon receipt of the notice, surrender the licenses. We then see that the material portions of the old section were re-enacted, but the procedure was slightly changed.

It is also to be noted that the new act became effective on July 4, 1937, and it was under the provisions thereof that the old act was repealed, so immediately upon the repeal of the old act the new one became effective.

As has heretofore been said, we construe the old act as having been a continuing one under the rules of statutory construction. In the case of *Amerpohl vs. Wisconsin Tax Commission*, 272 N. W. 472, the court said at page 475 thereof:

"Even where a statute has been repealed and then reenacted, the statute is regarded as a mere continuation of the old statute. *Cox vs. North Wisconsin L. Co.*, 82 Wis. 141, 144, 51 N. W. 1130; *Husting Co. vs. Milwaukee*, 200 Wis. 434, 228 N. W. 502."

In the case of *State ex rel. Time Ins. Co. vs. Superior Court of Douglas County*, 186 N. W. 748 (Wisconsin), the court on page 750 thereof stated as follows:

"Even if by the amendment, the statute had been repealed, and re-enacted in the same words by an act which takes effect at the same time as the repealing act, the portion of the statute re-enacted would continue in uninterrupted operation such former statute, and there would be no change in the law. *Laude vs. C. & N. W. Ry. Co.*, 33 Wis. 640; *Glentz vs. State*, 38 Wis. 549, 554; *State vs. Gumber*, 37 Wis. 298; *Fullerton vs. Spring*, 3 Wis. 667; *Hurley vs. Town of Texas*, 20 Wis. 634."

In the case of *Hancock vs. Dist. Twp. of Perry*, 78 Iowa 550 at page 555, the court quoted the following with approval from the case of *United Hebrew Association vs. Benshimol*, 130 Mass. 327:

"'When statutes are repealed by acts which substantially retain the provisions of the old laws, the latter are held not to have been destroyed or interrupted in their binding force. "In practical operation and effect, they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and the re-enactment of new, ones."'"

In the case of *State of Iowa vs. Prouty*, 115 Iowa 657, the court said on page 662:

"* * * The repeal and simultaneous re-enactment of substantially the same statutory provisions is not to be construed as an implied repeal of the original statute, but as a continuation thereof, so that all interests, under the original statute, remain unimpaired. *Hancock vs. Perry Tp.*, 78 Iowa 555; *United Hebrew Association vs. Benshimol*, 130 Mass. 327; *Fullerton vs. Spring*, 3 Wis. 667; *Wright vs. Oakley*, 5 Metc. Mass. 400; *Pacific Mail Steamship Co. vs. Joliffe*, 2 Wall. 450, (17 L. Ed. 805). The same rule applies to general provisions of existing laws that are substantially re-enacted. *Sheftels vs. Tabert*, 46 Wis. 439. And also to criminal statutes. *State vs. Wish*, 15 Neb. 448, (19 N. W. Rep. 686); *State vs. Gumber*, 37 Wis. 298. In practical operation and effect, the new statutes are to be considered as a continuance and modification of old laws, rather than as an abrogation of the old and the re-enactment of new ones. See, also, *Pratt vs. Commissioners*, 139 Mass. 563, (2 N. E. Rep. 675); *State vs. Bemis*, 45 Neb. (64 N. W. Rep. 350); *Stenberg vs. State*, 50 Neb. 127, (69 N. W. Rep. 851); *State vs. Kibling*, 63 Vt. 643, (22 Atl. Rep. 613); *Anding vs. Levy*, 57 Miss. 58. * * *"

In the case of *Robinson vs. Ferguson & Son*, 119 Iowa 325, the court said on page 329:

"* * * The repeal of the prior tax laws and the simultaneous re-enactment of substantially similar ones is not to be construed as relieving defendants from any duty under the old law. As said in *State vs. Prouty*, 115 Iowa 657: 'The repeal and simultaneous re-enactment of substantially the same provisions is not to be considered as an implied repeal of the original statute, but as a continuation thereof, so that all interests under the original statute shall remain unimpaired. The same rule applies to general revisions of existing laws which are substantially re-enacted. In practical operation and effect, the new statutes are to be construed as a continuance and modification of the laws rather than as an abrogation of the old and the re-enactment of the new ones.' See also, *Gorley vs. Sewell*, 77 Ind. 316. * * *"

In the case of *Schneider vs. Davis*, 192 N. W. 230, (Nebraska) the court in passing upon this proposition, said as follows:

"The contention that no fee can be allowed because the act permitting such a fee was repealed by Chapter 134, Laws 1919, before the fee was allowed, must also fail. The act of 1919 added the following words to the statute:

"'And in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court, or courts.'

"This was the only change made. The simultaneous repeal and re-enactment of all the other provisions of the law had the effect to continue the uninterrupted operation of the statute. *State vs. McColl*, 9 Neb. 203, 2 N. W. 213; *State vs. Bemis*, 45 Neb. 724, 64 N. W. 348; *Quick vs. Modern Woodmen of America*, 91 Neb. 106, 134 N. W. 433; *Bauer vs. State*, 99 Neb. 747, 157 N. W. 968."

In *Gooch Milling & Elevator Co. vs. Chicago, B. & Q. R. Co.*, 192 N. W. 231 (Nebraska), the court in passing upon an analogous proposition, stated as follows:

"Appellant also complains of the trial court in allowing the plaintiff an attorney's fee of $50, and asserts that there is no statutory authority for the allowance of such fee. It is conceded that Section 6063, Rev. St. 1913, authorizes the allowance of such fee, but this statute was repealed in 1919 and re-enacted by the same act (Laws 1919, c. 104), and now appears as Section 5422, Comp. St. 1922. Appellant insists that the repeal of Section 6963 without a saving clause prevents a recovery under that section, and that, the new Section 5422, Comp. St. 1922, not having been enacted until after the filing of the claim, no allowance can be made thereunder. We are unable to agree with this contention. Section 6063, Rev. St. 1913, was re-enacted by the enactment of Chapter 134, Laws 1919. It has been frequently held by this court that the simultaneous repeal and re-enactment of a law has the effect of continuing the uninterrupted operation of the statute."

In the case of *Bauer vs. State*, 157 N. W. 968 (Nebraska), the court in passing upon this proposition stated as follows:

"The rule seems to be that the simultaneous repeal and re-enactment of the statute in terms or in substance is a mere affirmance of the original act, and not a repeal in a strict or constitutional sense of the term."

To the same effect, see *Board of Education of Ogden City vs. Hunter*, 157 Pac. 1019, 48 Utah 373.

A reading of the cases above cited leads us to the conclusion that Section 5079-c4 is a continuing statute except only as changed by Section 306 of the new motor vehicle act by reason of the fact that in the repeal of the same there was a simultaneous re-enactment, and we so hold. With this construction placed upon the statutes, the question of whether or not Section 306 of the new motor vehicle act is retroactive, becomes mooted.

It is therefore our opinion that an operator's license and motor vehicle registration certificate and plates may be suspended under Section 306 of Chapter 134, Acts of the 47th General Assembly, even though the judgment was recovered prior to the date upon which the new law became effective.

CITIES AND TOWNS: LIBRARY TRUSTEES: TRANSFER OF FUNDS: INSURANCE PROCEEDS: Local authorities have no right to transfer insurance proceeds from maintenance fund to building fund, but may make application to state board, and if approval is given, such transfer may be made.

April 20, 1938. *Miss Julia A. Robinson, Executive Secretary, Library Commission:* We are in receipt of your request for an opinion on the following proposition:

A library building and all of its contents were totally destroyed by fire. The books and other chattels in said library were insured for a considerable sum of money. The building itself was insured for only $1,000.00. The insurance company has paid all of the insurance.

The library trustees wish to transfer all or a part of the sum of money received from the insurance company for the loss of books and chattels to the building fund so that a new building may be erected. May such a transfer legally be made?

There are no provisions in the law pertaining to the use to be made of funds received from an insurance company as a result of a fire in an instance such as this, and we have been unable to find any Supreme Court decisions from this or any other state covering the question involved. We do find under Section 5851 of the Code of Iowa 1935, that the mayor, with the approval of the city council, appoints a board of library trustees "in any city or town in which a free library has been established." Under Chapter 299 of the Code that board of library trustees has general supervision and control over said library. Paragraph 8 of Section 5858 of the Code, as amended, provides that said board of library trustees has exclusive control over the expenditures of all taxes levied for library purposes as provided by law, and of the expenditure of all moneys available by gift or otherwise for the erection of library buildings and of all other moneys belonging to the library fund including fines and rentals collected under the rules of the board of trustees.

Under Section 5865 all money received and set apart for the maintenance of such library is to be deposited in the treasury of the city or town to the credit of the library fund, and is to be kept by the treasurer separate and apart from all other moneys, and is to be paid out upon the orders of the board of trustees, signed by its president and secretary.

These are the pertinent sections, insofar as the board of library trustees is concerned, which have any bearing upon the question involved. Section 6239 (6) authorizes cities and towns to erect a building or buildings for public libraries, and subsections 19 and 20 of Section 6211, as amended, provide as follows:

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

"19. *Library fund.* When a free public library has been established, not exceeding one and one-fourth mills, which shall be used only for its maintenance. Provided that said maintenance levy may be not to exceed two and one-half (2½) mills in any city of more than ten thousand population and less than 75,000 population and having situated therein a state-owned educational institution with a regular attendance of more than three thousand students, and also a state commission regularly employing more than one hundred heads of families. The rate of levy for this and the fund created by the following subsection shall be determined and certified to the council by the board of library trustees before the first day of August in each year. The council shall make such levies accordingly. Any monies appropriated to the library fund and not expended during the fiscal year shall remain part of the library fund for the ensuing year, without re-appropriation, and will be available for expenditure by the board of library trustees."

"20. *Library building fund.* When the establishment of a public library has been authorized, not exceeding three-fourths mill, which shall be used only to purchase real estate and to erect thereon a building or buildings for public library or to pay the interest on any indebtedness incurred for that purpose and to create a sinking fund for the extinguishment of such indebtedness. Provided the levy for said purposes may be not to exceed one and one-half (1½) mills in any city of more than ten thousand (10,000) population and less than seventy-five thousand (75,000) population, and having situated therein a state owned educational institution with a regular attendance of more than three thousand students, and also a state commission regularly employing more than one hundred heads of families. When a library building has been fully completed and paid for, no further levy shall be made for that purpose, but may be made for the purpose of providing funds for improvements and repairs and to pay rental for space leased by the board of library trustees for the establishment and operation of branch libraries and stations in districts where no branch library buildings have been acquired or erected by said municipality. Any balance remaining in the building fund may be transferred to the maintenance fund."

It will be noted that the library fund and the library building fund are two separate and distinct funds. Under paragraphs 19 and 20 above set forth, it is apparent that moneys received as a result of a levy for the building fund can be used only as is provided in that paragraph. In other words, it is not available for use in the maintenance of said library. Of course, the same is true as far as the maintenance fund is concerned. That is to say those funds cannot be used for the purpose of building a library. They are separate and distinct funds, and the legislature has set out for what purposes each of them is to be used. If the funds received as a result of a tax levy cannot be used for a purpose other than the one for which they were levied, we cannot see how these insurance proceeds could be transferred by the board of trustees or the city council from one fund to another. Certainly books and furniture in a library could not be sold and the proceeds from the same used for the erection of a building. Nor could part of the library site be sold and the proceeds derived therefrom be used for maintenance purposes. We believe the same reasoning is applicable to insurance proceeds as is applicable to sales above set forth. The legislature has spoken and has provided for the use of these separate funds, and we can find no authority for the city council or the library

trustees to dispose of said funds in any manner other than that provided by statute.

Under Section 388 of the Code, a transfer of funds may be consummated. The pertinent part of said section provides that with the approval of the state board, it shall be lawful to make either a temporary or a permanent transfer of money from one fund of the municipality to another thereof. It would therefore be proper for the local authorities to petition the state board for authority to make a transfer of this money from the maintenance fund to the building fund, and, if their approval is received, that transfer could be made.

It is therefore our opinion that the local authorities have no right to make a transfer of any insurance proceeds from the maintenance fund to the building fund, but that they may make application to the state board for the approval of such a transfer, and, if it is received, such transfer can be legally made.

SCHOOL FUND MORTGAGE: CITY REAL ESTATE: LOANS: School fund loans may be made on city real estate, provided the assessed valuation of such real estate, exclusive of buildings thereon, is double the amount of the loan.

April 21, 1938. *Mr. Edward P. Powers, County Attorney, Centerville, Iowa:* Receipt is acknowledged of your request for an opinion of this department upon two questions stated by you as follows:

"1. Can school fund loans be made upon city property?"

"2. If so, must the loan be limited to one-half of the appraised valuation of the city property, which valuation does not take into consideration the buildings upon the lands?"

Section 4488, 1935 Code, as amended by Chapter 125, Section (1), acts of the 47th General Assembly, provides as follows:

"4488. *Terms—appraisement—fee.* Each loan shall be made for at least one and not more than five years, evidenced by promissory notes bearing not less than four per cent per annum, payable annually, and delinquent interest to draw the same rate, to be secured by a mortgage on unincumbered real estate situated in the county in which the loan is made, and appraised, as hereinafter provided, for at least double the sum borrowed; the appraisement to be made by three persons under oath, selected by the county auditor, who shall not in making the valuation take into consideration the buildings upon the lands; for such service each shall be allowed fifty cents, to be paid by the borrower, who shall also pay for recording the mortgage."

There is no specific provision in the statute which excludes city property as security for a school fund mortgage. There is, however, the specific provision that real estate taken as security must be of an appraised valuation equal to at least double the sum borrowed. Buildings upon such real estate may not be taken into consideration in arriving at the appraised valuation. Therefore, if a loan of school funds is made, secured by a mortgage upon city real estate, the value of such real estate, exclusive of buildings thereon, must not be less than twice the amount of the loan.

It is our opinion, therefore, that a loan of the school fund may be made against real estate situated within a city or town, but only where the statutory requirements as to appraised valuation, exclusive of buildings upon such real estate, are complied with.

TAXATION: INCOME TAX: EMPLOYEES OF CARRIERS: The imposition of an income tax such as is imposed by the Iowa law upon employees of carriers engaged in interstate commerce is not in conflict with the Federal or State Constitution and does not impose so direct a burden upon inter-

state commerce as to amount to an unconstitutional interference with or regulation of commerce among the states.

April 21, 1938. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* You request the opinion of this department on the following questions:

1. "Where a railroad engineer resides in Savannah, Illinois but operates a locomotive on the Milwaukee Railroad into Iowa—is part of his income subject to the Iowa State Income Tax?"

2. "Where a man resides in Council Bluffs, Iowa and operates a locomotive to Grand Island, Nebraska—is all or part of his income subject to the Iowa State Income Tax?"

Chapter 184 of the Laws of the 47th General Assembly, as indicated by its title, is an act to amend the law pertaining to taxation of incomes, as previously contained in the 1935 Code, by, among other things, imposing a tax upon incomes of non-residents derived from sources within this State. Section 3 of Chapter 184 reads as follows:

"Sec. 3. Section sixty-nine hundred forty-three-f eight (6943-f8), Code, 1935, is hereby amended by adding at the end thereof a new subsection four, which shall read as follows:

4. In the case of a non-resident, the term '*gross income*' shall only refer to such gross income, as herein defined, as is derived from any property, trust or other source within this state, including any business, trade, profession or occupation carried on within this state, but shall not include income received by a non-resident in the form of annuities, interest on bank deposits, interest on bonds, notes or other interest bearing obligations, or dividends from corporations, whether received by the non-resident directly or as beneficiary of a trust, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this division.

If any income is received from a business, trade, profession or occupation carried on partly within and partly without the state, only such portion of such income as is fairly and equitably attributable to that part of the business, trade, profession or occupation carried on within the State of Iowa shall be included within such gross income, and such allocation shall be made under rules and regulations prescribed by the board, which shall, in any event, require the entire amount of such income and the allocation made, to be shown in the return which said non-resident shall, and must, file pursuant to Sections sixty-nine hundred forty-three-f thirteen, (6943-f13) to sixty-nine hundred forty-three-f nineteen (6943-f19) inclusive, Code, 1935."

The pertinent part of Section 6943-f5 of the 1935 Code as amended by Section 2 of Chapter 184 of the Laws of the 47th General Assembly reads as follows:

"A tax is hereby imposed beginning the first day of January, 1934 upon every resident of the State, *and beginning on the first day of January, 1937 upon that part of the income of any non-resident which is derived from any property, trust, or other source within this state, including any business, trade, profession or occupation carried on within this State,* which tax shall be levied, collected and paid annually upon and with respect to his entire taxable income as herein defined which reads as follows: * * *" (Italic portion added by amendment.)

Subdivision 1 of Section 6943-f8 of the Code of 1935 reads as follows:

"6943-f8. *'Gross income' defined—exceptions.*

1. 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 re-occurring 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 amount of all such items shall be included in the gross income of the tax year in which received by the taxpayer, unless, under the methods of

accounting permitted under this division, any such amounts are to be properly accounted for as of a different period."

The foregoing statutory provisions relating to the taxation of incomes leave little question as to the answers to the foregoing questions. As applied to Question 1, it is apparent that the Illinois railroad engineer will have to pay an Iowa income tax upon that portion of his income derived from that part of his occupation carried on within the State of Iowa. As applied to Question 2, it is apparent that the engineer residing in Iowa will have to pay an Iowa income tax upon his entire income.

Some question has been raised as to the constitutionality of that portion of the Iowa State Income Tax Law which imposes a tax upon that portion of the income earned outside of the State of Iowa or upon the portion of the income earned within the State of Iowa by a non-resident.

In the case of *Travis vs. Yale & Towne Mfg. Co.*, 252 U. S. 60, the Supreme Court of the United States said:

"That the State of New York has jurisdiction to impose a tax of this kind upon the incomes of non-residents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the State, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent); and that such a tax, so enforced, does not violate the due process of law provision of the Fourteenth Amendment, is settled by our decision in *Shaffer vs. Carter*, this day announced, ante, 37, involving the income tax law of the State of Oklahoma."

In *Shaffer vs. Carter*, 252 U. S. 37 the Supreme Court of the United States held that a State may tax income derived from local property and business owned and managed from without by a citizen and resident of another State, such power being consistent with the Constitution, Article IV, Section 2, guaranteeing privileges and immunities and the equal protection clause of the Fourteenth Amendment. At page 52 of the opinion the court said:

"And we deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a joint control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to non-residents, *New Orleans vs. Stempel*, 175 U. S. 309, 320, et seq.; *Bristol vs. Washington County*, 177 U. S. 133; *Liverpool & c. Ins. Co. vs. Orleans Assessors*, 221 U. S. 346."

In supra case it was also urged that the income tax as imposed by the State of Oklahoma amounted, in the case of appellant's business, to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. The Supreme Court at page 57 of 252 U. S. Report said:

"Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, * * * but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. *U. S. Glue Co. vs. Oak Creek*, 247 U. S. 321."

In the case of *U. S. Glue Co. vs. Oak Creek*, 247 U. S. 321, the State of Wisconsin, through its income tax law, sought to tax the income from sales to customers outside of the State of goods delivered from the company's factory within the State and from sales to such customers and shipment from the company's branches in other states of goods previously made at its factory

within the State and sent to such branches. The question was whether or not the levying of a general income tax upon the gains and profits of a domestic corporation may include in the computation the net income derived from transactions in interstate commerce without contravening the Commerce Clause of the Constitution of the United States. The Supreme Court at page 329 of the opinion said:

"A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government *from which persons AND corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States.* And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the States." (Italics ours.)

In *Shaffer vs. Howard*, 250 Fed. 873, l. c. 875 the Federal District Court for the Eastern District of Oklahoma in discussing the nature of an income tax imposed upon a non-resident said:

"The income here involved arose solely from production of oil wells and appliances within the State of Oklahoma, managed by plaintiff from his city residence, Chicago, Ill. Unless the state has given protection or benefit to this income, it has no reason or right to ask contribution therefrom. *McCulloch vs. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Cleveland, P. A. R. Co. vs. Pennsylvania*, 15 Wall. 300, 21 L. Ed. 179; *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S. 194. Plaintiff says no such protection has here been given because the levy is 'a tax on this plaintiff because of his income.' In one sense all taxes might be said to be a tax on the taxpayer because of his land or his personalty or of his business or of some privilege. But what the plaintiff means, as he says further in his brief, is that 'the tax is directed against the individual and not against the property.' By way of further elucidation, he quotes with approval from *State ex rel. Sallie F. Moon Co. vs. Wisconsin Tax Comm.*, (Wis.) 163 N. W. 639, a portion of which is that:

'It is the recipient of the income (tax) that is taxed, not his property. * * * The tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property.'

"It does not necessarily follow from this definition that the plaintiff is subject to income tax only in the state of his residence. It means, rather, that he is subject to income taxation only in those jurisdictions which protect him in the production, creation, receipt, and enjoyment of his income. If he lives in Illinois, and has in Oklahoma the property or the business from which his income flows, does not the latter state truly protect him in the privilege of producing, creating, receiving, and enjoying that income when it permits and protects his business from which the income flows? How is that affected by his residence? Both the property in Oklahoma and the intelligence in Illinois contributed to this income. Each was necessary to the result. Each had protection from the state in which it was. It is impossible to separate the two elements for taxation purposes. It is impossible, if material, to determine which was most potent in the result. Can either state be told it cannot be compensated for its protection of a necessary component element of this income, or that it cannot measure such compensation by that income? If, through accident or design, an individual dwells in one state, while his business is in part or wholly located in other states, so that he needs, commands, and receives the protection of several states, can his income therefrom escape imposition? It may be true that the state which protects the person of the one who creates,

receives, or enjoys an income may require of him therefore a tax measured by his ability to pay from his entire income. That is no reason why the state which protects the business which contributes to his income may not also demand, as pay for that protection, a tax measured by that part of his income which came from that business. If in the one case the state of residence can tax the right to create, receive, and enjoy an income, why cannot another state tax his right to create and receive an income from business within its borders?

"A tax upon an income of the instant character (from a business) is directed at neither the person who receives nor the property from which the income arises, but at the privilege of making, producing, creating, receiving, and enjoying the income itself. The right to lay such tax depends upon the protection of the person who receives or of the business which helps create that income."

From the foreoing decisions it is apparent that the right of a State to impose an income tax upon the earnings of a resident, no matter where the same was earned, or on that portion of the income of a non-resident arising by virtue of the exercise of his occupation within the State, has received the approval of the highest courts of our land.

It is therefore the opinion of this department that the imposition of an income tax such as is imposed by the Iowa law upon employees of carriers engaged in interstate commerce is not in conflict with the Federal or State Constitution and does not impose so direct a burden upon interstate commerce as to amount to an unconstitutional interference with or regulation of commerce among the states.

STATE: OFFICERS: EMPLOYEES: AUDITOR'S OFFICE: EXAMINERS OF: LEAVE OF ABSENCE: Examiners in State Auditor's office work on per diem basis. Therefore, when an examiner is unable to work because of illness he receives no pay.

April 22, 1938. *Honorable C. B. Murtagh, State Comptroller:* We are in receipt of your request for an opinion on the following proposition:

Can an examiner in the State Auditor's Department, appointed under Section 51 of Chapter 1, Acts of the 47th General Assembly, receive his regular pay during a leave of absence on account of sickness?

You further advised that such pay has never been allowed.

We find in the Acts of the 47th General Assembly under Chapter 1 thereof the following:

"Sec. 51. The auditor of state is hereby authorized to employ county, municipal, and school examiners and assistants at a per diem not exceeding seven dollars ($7.00) each, and their actual and necessary expenses while engaged in the performance of their duties, to be paid in the manner provided in Sections 125 and 126, Code of 1935."

Section 57 of the Act provides 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. 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."

Sections 125 and 126 of the Code of 1935 read as follows:

"125. *Bills.* Each examiner shall, on the completion of an examination, file with the auditor of state a detailed, itemized, and sworn voucher of his per diem and expenses, which voucher, when approved by said auditor and by the state comptroller, shall be paid from any unappropriated funds in the state treasury."

"126. *State reimbursed.* Upon payment by the state of the per diem and expense aforesaid, the auditor of state shall at once file with the warrant-issuing officer of the county, school or municipality whose office was examined, a copy of the vouchers so paid by the State, and thereupon said warrant-issuing

officer shall at once draw his warrant for said amount on the general funds of his county, school or municipality in favor of the auditor of state, which warrant shall be placed to the credit of the general fund of the State."

From a reading of the foregoing sections, we see that examiners appointed under Section 51 of Chapter 1, Acts of the 47th General Assembly, in the auditor's department are not paid by the year or month, but by the day, and their pay is contingent upon the performance of work. In other words, if for a period there are no examinations to be made, the examiner draws no pay for that period, as the legislature has set up no provisions for pay except only for examinations made, and although the compensation is paid in the first instance by the State of Iowa, the primary obligation for the payment of that examination rests upon the county, school or municipality whose office is examined. It is therefore apparent that the pay for these examiners is in fact to be made from funds other than those of the state. That being true, we come to the conclusion that there is no provision made by statute authorizing or allowing pay to such examiners, and that the provision in Section 57 of Chapter 1, Acts of the 47th General Assembly, are not applicable to the employees in question as their pay is contingent upon the performance of work as set out in Section 125 of the Code 1935, and when no work is performed, there is no fund set up from which they can be paid.

CITIES AND TOWNS: CIVIL SERVICE: SENIORITY: Seniority dates from date of appointment or employment where persons were in employ of city prior to date of certification by commission in position which comes under civil service act.

April 23, 1938. *Mr. Sam Orebaugh, Assistant City Solicitor, Des Moines, Iowa:* We are in receipt of your request for an opinion upon the following proposition:

Are seniority rights under the civil service law, as amended, computed from the date of appointment if the appointment is made prior to the date of certification or is it computed from the date of appointment after certification in determining who is first subject to suspension or removal where an office is abolished or employees are diminished?

Section 5698-h1 of Chapter 156, Acts of the 47th General Assembly, reads as follows:

"*Seniority.* For the purpose of determining the seniority rights of civil service employees, seniority shall be computed, beginning with the date of appointment to or employment in any positions for which they were certified or otherwise qualified and established as provided in this chapter, but shall not include any period of time exceeding sixty (60) days in any one year during which they were absent from the service except for disability.

"In the event that a civil service employee has more than one classification or grade, the length of his seniority rights shall date in the respective classifications or grades from and after the time he was appointed to or began his employment in each classification or grade. In the event that an employee has been promoted from one classification or grade to another, his civil service seniority rights shall be continuous in any department grade or classification that he formerly held.

"A list of all civil service employees shall be prepared and posted in the city hall by the civil service commission on or before July 1st of each year, indicating the civil service standing of each employee as to his seniority."

Seniority is important in civil service under Section 5712, as amended by the Acts of the 47th General Assembly, which section authorizes the diminishing of employees and provides in substance that persons having seniority of the shortest duration shall be removed first. Generally speaking, it is necessary that all persons take a civil service examination and be certified by the civil

service commission in order to hold a position under civil service. An exception is made under Section 5695 as amended, which section reads as follows:

"*Preference by service.* Any person regularly serving in or holding any position in the police or fire department, or a non-supervisory position in any other department, which is within the scope of this chapter on the date this act becomes effective in any city, who has then five years of service in a position or positions within the scope of this chapter, shall retain his position and have full civil service rights therein.

"Persons in non-supervisory positions, appointed without competitive examination, who have served less than five years in such position or positions on said date, shall submit to examination by the commission and if successful in passing such examination they shall retain their positions in preference to all other applicants and shall have full civil service rights therein, but if they fail to pass such examination they shall be replaced by successful applicants.

"Provided, that persons who have heretofore been certified by the commission as eligible for appointment to any position in which they are regularly serving on said date, and persons regularly serving on said date in any position with civil service rights by reason of long and efficient service rendered prior to October, 1924, shall retain such position and shall have full civil service rights therein without further examination. Other persons regularly serving in supervisory positions in departments other than police or fire on the date this act becomes effective shall be eligible for appointment to said positions after qualifying in competitive examination.

"Provided, further, however, that nothing in this section shall apply to any persons temporarily acting in a position regularly held by another, or in a vacancy, except to establish his rights in his own regular position."

It is therefore apparent that some employees do not have to take the civil service examination, but automatically come under civil service by reason of five years' service in a non-supervisory position, which comes within the provisions of the civil service law.

Another class of employees are required to take the civil service examination if they were holding supervisory positions at the date the new civil service act became effective by the laws of the 47th General Assembly, or if they held non-supervisory positions for a period of less than five years. In those instances it was necessary that they take the examination and become certified, but if their names were placed upon that certified list they are given preference under the act over those who were not in the employ of the city at the date the act as amended became effective.

With those facts in mind, it is easier to determine the meaning of the following language contained in Section 5698-h1 as amended—"seniority shall be computed beginning with the date of appointment to or employment in any positions for which they were certified or otherwise qualified and established as provided in this chapter." It is our interpretation of that language that the legislature has stressed the date of appointment or employment as being the date when seniority begins and not the date of certification, as the language seems to convey that intent. The theory behind giving preference to seniority is that the persons having rendered the longest faithful service should be entitled to the reward of being given a preference over those who acquired positions subsequently. With that background in mind, it seems apparent that seniority should be rewarded from the date of appointment or employment and not from the date of certification because a number of persons may have been certified on the same day, whereas a part of that group had held those positions prior thereto, and should be entitled to preference by way of seniority where a number of employees are diminished as is set out in Section 5712 of the Code as amended.

It is therefore our holding that seniority dates from the date of appointment or employment where the persons were in the employ of the city prior to the date of certification by the civil service commission in a position which comes under the civil service act. As to those persons appointed to a position under civil service after having taken an examination, and having been certified by the civil service commission, we hold that their seniority rights date from the date of their appointment or employment and not from the date that they were certified by the civil service commission.

TAXATION: BOARD OF REVIEW: ASSESSMENT OF REAL PROPERTY: Even though it is not the year for assessing property, local Boards of Review have the authority to revalue property upon which complaint has been made if proper showing is made. Also where local Boards of Review find that there has been a change in the value of all of the real estate within the taxing district since it was previously assessed, they have a right to revalue or reassess the same even though no complaint has been made.

April 22, 1938. *Mr. Edward J. Grier, County Attorney, Ottumwa, Iowa:* You request an opinion from this department on the following matters:

1. Does the local board of review have the authority to revalue or reassess the property of a complaining taxpayer even though it is not the year for assessing real property?
2. Does the local board of review have the authority to reassess property upon which no complaint has been made, even though it is not the year for assessing real property?

Your first question is answered in the affirmative by the opinion of this department issued on April 11, 1938 to Paul L. Kildee, Assistant County Attorney at Waterloo, Iowa and you are referred thereto.

Section 7129-e1 as amended by the Acts of the 47th General Assembly now reads as follows:

"7129-e1. *Revaluation and reassessment of real estate.* In any year after the year in which an assessment has been made of all the real estate in any taxing district, it shall be the duty of the local board of review *to meet at the times provided in Section* 7129, *and* where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the true value, *and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years.* If the assessment of any such property is raised, or any property is added to the tax list by the board, the clerk shall give notice in the manner provided in Section 7131, provided, however, that if the assessment of all property in any taxing district is raised the board may instruct the clerk to give immediate notice by one publication in one of the official newspapers of said county, and such published notice shall take the place of the mailed notice provided for in Section 7131, but all other provisions of said section shall apply. The decision of the local board as to the foregoing matters shall be subject to appeal *to the district court within the same time and in the same manner as provided in Section seventy-one hundred thirty-three (7133)*" (Italic portions are those added by the amendment).

It is to be observed that supra statute makes it the duty of the Board, where it finds that all of the real estate within the taxing district assessed in some previous year has changed in value, to revalue and reassess such real estate at its true value. It follows of course that the Board must find that there has been a change in the value of all of the real estate since it was previously assessed, or it will have no right to revalue or reassess the same.

It is therefore the opinion of this Department that even though it is not the year for assessing property, local Boards of Review have the authority to

revalue property upon which complaint has been made if proper showing is made.

It is further the opinion of this department that local Boards of Review, where they find that there has been a change in the value of all of the real estate within the taxing district since it was previously assessed, have a right to revalue or reassess the same even though no complaint has been made, but that unless complaint has been made by the individual taxpayer, the Boards have no authority to revalue or reassess real property within the taxing district unless they find that there has been a change in the valuation of all of the property since it was previously assessed.

In the event that the valuation is increased, notice thereof should be given in compliance with Section 7131 of the 1935 Code.

COUNTIES: BOARD OF SUPERVISORS: ADVERTISING OF BIDS: LETTING: In the absence of a statute prescribing the kind of advertisement to be published and how published, the manner of complying with the statute is discretionary with the board of supervisors providing there is reasonable notice.

April 25, 1938. *Mr. C. H. Taylor, County Attorney, Guthrie Center, Iowa:* Your second question in your letter of April 15th, in which you ask the opinion of this department as to "whether or not the County Board of Supervisors should cause to be published in an official newspaper of the county, notices to bidders of letting contracts such as grading, graveling, oil and lumber, etc., rather than, or in addition to, publishing the same in the Highway Commission bulletin at Ames," has been considered.

The secondary road law, Section 4644-c42, does not specify the type of advertising that is required. It merely provides for an advertisement and letting of contracts at a public letting.

Again, Section 4748 provides for advertising for bids, without specifying what kind of advertisement is required. Chapter 23 of the Code, relating to public contracts and bonds, provides in Section 352 that where the public improvement is to cost $5,000 or more, the governing body shall fix a time and place for hearing and "give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before the hearing." But that chapter relates to contracts in municipalities. Section 351 provides, among other things, as follows:

"The word 'municipality' as used in this chapter shall mean county, except in the exercise of its power to make contracts for secondary road improvements, city, * * *"

Clearly, that chapter is not controlling. Section 5131, in the chapter relating to the powers and duties of boards of supervisors, provides that no building shall be erected or repaired, when the cost thereof will exceed $2,000, except under an express written contract and upon proposals therefor invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done. The drainage statute, Section 7459, relating to advertisement for bids, requires notice to be given "by publication once each week for two consecutive weeks in some newspaper published in the county wherein such improvement is located, and such additional advertisement and publication elsewhere as it (the board) may direct."

Section 5411, providing what shall be published in the official newspapers, makes no provision for advertisement for bids on proposed contracts.

So in the absence of a statute prescribing the kind of advertisement to be published, and how it shall be published, the manner of complying with the statute is discretionary with the board of supervisors, provided, of course, that fair notice of the letting and proposed work is given.

"Public Letting" is defined in 50 *Corpus Juris*, page 856, as follows:

"A letting of a contract that is open to all—notorious; a letting that furnishes fair and reasonable public notice and secures to the public equal competition in bidding and becoming contractors."

The only limitation on the power of the boards of supervisors to decide as to the kind of advertising that they will give to the letting is, that it should be reasonable notice. We think that it is customary to publish such a notice in one or more local papers, and to give notice of the letting in the Highway Commission bulletin. By so doing the matter is given wide publicity, and this would seem to be sufficient.

FIREWORKS LAW: SPECIAL CHARTER CITIES: Prohibitory and penal provisions of Chapter 181, acts of 47th General Assembly, are applicable and enforcible in special charter cities.

April 29, 1938. *Honorable E. P. Corwin, Fruitland, Iowa:* We acknowledge receipt of your request for the opinion of this department upon a question stated as follows:

Does Chapter 181, acts of the 47th General Assembly, relating to fireworks, apply to special charter cities?

It is assumed that you desire an answer as to whether or not persons residing in special charter cities must observe the provisions of the above mentioned chapter.

Section 6730, 1935 Code, provides as follows:

"6730. *Applicability of provisions.* The provisions of this chapter shall apply only to cities acting under special charters. No provisions of this Code, nor laws hereafter enacted, relating to the powers, duties, liabilities, or obligations of cities or towns, shall in any manner affect, or be construed to affect, cities while acting under special charters, unless the same have special reference or are made applicable to such cities.

"In all laws hereafter enacted such reference or application shall be in a separate section in the act."

The above section is the only provision of the law which may give rise to question as to whether or not the provisions of Chapter 181, referred to above, are applicable to special charter cities. It will be noted that the last quoted section excludes special charter cities from the operation of laws "relating to the powers, duties, liabilities or obligations of cities or towns."

The fireworks law, providing as it does for personal penalties, clearly is not related to the powers, duties, liabilities or obligations of municipalities. That the said Chapter 181 is a police measure is evidenced by the following provision set out in Section (2) of the said act:

"Sec. 2. Except as hereinafter provided it shall be unlawful for any person, firm, co-partnership, or corporation to offer for sale, expose for sale, sell at retail, or use or explode any fireworks; provided the council of any city or town or the trustees of any township may, upon application in writing, grant a permit for the display of fireworks by municipalities, fair associations, amusement parks, and other organizations or groups of individuals approved by such city, town, or township authorities when such fireworks display will be handled by a competent operator but no such permit shall be required for such display of fireworks at the Iowa state fair grounds by the Iowa state fair board nor of incorporated county fairs nor of district fairs receiving state aid."

Section (3) of the said act provides a penalty for violations of the provisions thereof, as follows:

"Sec. 3. Any person, firm, co-partnership, or corporation violating the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding ninety days, or by both such fine and imprisonment."

It is our opinion that legislation enacted under the police power of the state, prohibitory in character, and providing penalties of fine and imprisonment for violations, is to be given effect uniformly throughout the state. This particular legislation expresses a rule of action to be observed by persons, and cannot be said to relate to municipal administration.

In view of the foregoing, it is our opinion that the prohibitory and penal provisions of Chapter 181, acts of the 47th General Assembly, are applicable and enforcible in special charter cities as well as cities organized under the general law.

SCHOOL FUND MORTGAGE: STATE FUNDS: SCAVENGER TAX SALE: TAX DEED: School fund mortgage cannot be satisfied and should not be released on the strength of the acquisition by the county of a tax deed covering the real estate. If title to real estate encumbered by school fund mortgage is to be taken by state for benefit of permanent school fund in satisfaction of such mortgage, such title should be acquired through foreclosure proceedings.

April 29, 1938. *Mr. C. B. Murtagh, Comptroller of State:* We acknowledge receipt of your request for the opinion of this department upon a question stated by you as follows:

"Can the county buy scavenger tax sale property upon which there is a permanent school fund mortgage and use the tax deed in lieu of the regular foreclosure proceedings, and will the tax deed be binding and a guarantee to the State of Iowa of the rights and privileges, the same as foreclosure proceedings and the sheriff's deed?"

The purchaser of real estate at tax sale takes the same subject to the lien of a school fund mortgage, if such real estate is so encumbered at the time of such sale. It is well established that such purchaser can acquire only the interest of the title holder in such real estate, the lien of the school fund mortgage being in no manner prejudiced by the sale. In support of the above proposition, see *Jasper County vs. Rogers*, 17 Iowa 254; *Crum vs. Cotting*, 22 Iowa 411; *Miller vs. Gregg*, 26 Iowa 75; *State vs. Shaw*, 28 Iowa 67; *Lovelace vs. Berryhill*, 36 Iowa 379; *Winnebago County vs. Brones*, 68 Iowa 682.

When a board of supervisors on behalf of the county acquires title to real estate under provision of the so-called public bidder law enacted as Chapter 83, laws of the 46th General Assembly, it holds the same as trustee for the benefit of the interested taxing bodies. No sale can be made for other than cash in amount equal to the sum stated on the tax sale certificate, plus subsequent taxes, interest, and costs, unless a majority of all the interested taxing bodies approve of a sale under other terms, in writing. See Section 10260-g1, 1935 Code.

The permanent school moneys constitute a state fund which is under the statute, Section 4483, to be held and managed by the boards of supervisors in the counties wherein such funds may be loaned. The board of supervisors, with respect to this particular trust fund, acts as an agency of the state rather than as a trustee for the various taxing bodies of the county.

The issuance of the tax deed to the county would have no effect whatsoever

on the school fund mortgage, which would remain unimpaired and unsatisfied.

Certainly the state should not permit the expenditure of the permanent school fund for real estate, the title to which rests upon a recent tax deed. This would be the practical result if a board released the school fund mortgage and accepted in lieu thereof a deed emanating from a recent tax sale. For a five-year period following the issuance of such tax deed, and for a much longer time where the rights of minors and persons under disability are concerned, such title would be insecure and probably not readily merchantable.

In view of the foregoing, we are of the opinion that a school fund mortgage cannot be satisfied and should not be released on the strength of the acquisition by the county of a tax deed covering the real estate. It is also our opinion that a conveyance by such county of its rights under such tax deed to the state for the use and benefit of the permanent school fund would not warrant a release of a school fund mortgage covering real estate so sold for taxes. If a board of supervisors determines that title to real estate encumbered by a school fund mortgage shall be taken by the state for the benefit of the school fund in satisfaction of such mortgage, such title should be acquired through foreclosure proceedings to which all junior lien holders, including tax deed or tax certificate holders, are made parties, or by conveyance from the title holder and all persons holding any right, title, or interest in such real estate.

SHERIFF'S FEES: PRISONERS: JURY: Fees collected for lodging prisoners as well as fees for summoning condemnation jury are payable into county treasury and not to sheriff.

April 30, 1938. *Mr. Robert B. Organ, County Attorney, Council Bluffs, Iowa:* We acknowledge receipt of your request for an opinion of this department on the following propositions:

1. Whether or not fees for lodging prisoners in the custody of the county sheriff under an order of the court of the United States and
2. Whether or not fees collected for summoning a jury to assess damages to the owners of lands taken for works of internal improvement, etc., are payable to the sheriff or into the county treasury?

According to the statement of facts contained in your letter, the sheriff of Pottawattamie County was allowed in excess of $250.00 for lodging prisoners in the county jail at Council Bluffs, the excess apparently being made up of money received from the United States government for lodging federal prisoners in the said jail. In addition, he retained a number of fees collected for summoning a condemnation jury to assess damages. The county has been reimbursed by the sheriff for these amounts, and arising out of these circumstances the foregoing questions are submitted for our determination.

Section 5191, Code of Iowa, 1935, provides in part as follows:

"*Fees.* The sheriff shall charge and be entitled to collect the following fees:
* * *

"11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and fifteen cents for each night's lodging. But the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for any calendar year. In counties where district court is held in two places and jails are maintained in two places the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for each of said jails for any calendar year.

"12. For waiting on and washing for prisoners, the sum of five cents per prisoner per day."

Section 5192, Code of Iowa, 1935, 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."

From the foregoing statutory provisions, it is to be noted that a sheriff, in addition to the salary provided by statute, is entitled to an allowance for mileage, actual and necessary expense paid by him, and for board, washing and care of prisoners remanded to his custody. The question then arises whether or not the ceiling of $250.00 expressed in Section 5191, subsection 11, for the lodging of prisoners applies, irrespective of whether or not the prisoners in the sheriff's custody are committed and confined under sentence of a court of this state or of the United States.

Section 5511, Code of Iowa, 1935, provides that the expense for the safekeeping and maintenance of prisoners committed or detained by the authority of the courts of the United States must be paid by the United States to the county. There is no provision for the payment of such expenses to the sheriff except in counties having a population in excess of eighty thousand. See Chapter 259-D1, Code of Iowa, 1935.

Section 5191, subsection 11, *supra*, makes no distinction between a person committed under an order of the United States court or a court of this state. The phrasing of the supra subsection is clear and unambiguous. It definitely limits the aggregate sum for any calendar year for lodging prisoners to an amount not in excess of $250.00. Lodging a prisoner is unquestionably a part of the maintenance of such prisoner, and it is for the expense of safekeeping and maintenance of prisoners that boards of supervisors are authorized to allow to the sheriff any amount in excess of the statutory salary. Section 5192, *supra*.

Such expense in the aggregate amount of $250.00 is paid to the sheriff from the county treasury, and the allowance of such expense bears no relation whatsoever to the amount that the county may actually receive from the United States government for the safekeeping and maintenance of federal prisoners in the county jail.

Since a public officer is entitled to only such compensation as the law allows, and since the allowance prescribed by law for the lodging of prisoners is limited in amount to $250.00 for a calendar year, and further since the expense of safekeeping and maintaining federal prisoners is payable to the county and not to the sheriff, it is the opinion of this department, in answer to the first question propounded, that the fees collected for lodging prisoners in the sheriff's custody under an order of the court of the United States is payable into the county treasury and not to the sheriff of the county.

The second question presented involves a construction of subsection 5 of Section 5191, *supra*, which provides as follows:

"*Fees.* The sheriff shall charge and be entitled to collect the following fees:

* * *

5. For summoning a jury to assess the damages to the owners of lands taken for works of internal improvement, and attending them, five dollars per day, and necessary expenses incurred. This subsection shall not be so construed as to allow a sheriff to make separate charges for different assessments, which can be made by the same jury and completed in one day of ten hours."

In considering this statutory proviso the sole inquiry is whether or not the sheriff of a county is entitled to retain the $5.00 per diem collected by him for

summoning a condemnation jury. Section 5192, *supra*, is conclusive of the proposition. The $5.00 per diem collected by a sheriff for summoning a condemnation jury is not within the purview of those fees allowed in addition to the statutory salary as expressly provided in said section of the statute. Furthermore, Section 5245, Code of Iowa, 1935, provides as follows:

"*Fees belong to county.* Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county."

It is a well established canon of construction that all provisions of statutes in *pari materia* must be construed together and each given effect. To allow the sheriff to retain the $5.00 per diem provided by subsection 5 of Section 5191, *supra*, would be in complete derogation of the provisions of both Section 5192, *supra*, and Section 5245, *supra*. No other construction can be given these sections of the statute than that the $5.00 per diem fee is a fee belonging to the county, and that the sheriff must account for the same under penalty of law. Section 5197, Code of Iowa, 1935.

It is accordingly the opinion of this department that the fees collected for summoning a condemnation jury are payable into the county treasury, and may not be retained by the sheriff.

This opinion overrules all previous holdings of this department, if any, in conflict herewith.

ELECTIONS: PRIMARY BALLOTS: EXPENSE: BOARDS OF SUPERVISORS: Maximum amount that may be allowed by the board of supervisors for the expense of printing primary ballots of 1936 is controlled by Section 774, Code of Iowa, 1935.

May 2, 1938. *Mr. Joseph Hand, County Attorney, Emmetsburg, Iowa:* In your letter to this department you present the following question for our opinion:

A statement was submitted to the county auditor for the cost of printing primary ballots for 1936. The amount charged, as reflected by the statement, was $60 to $65 per thousand. The question arises whether or not the section of the statute applicable to the cost of printing official election ballots appearing in Chapter 40, "Method of Conducting Elections" applies to the printing of primary ballots.

Section 774, Code of Iowa, 1935, provides as follows:

"*Maximum cost of printing.* The cost of printing the official election ballots shall not exceed twenty-five dollars per thousand ballots or fraction thereof except in presidential years, when the cost shall not exceed thirty dollars per thousand where two thousand or more ballots are printed for a county. Where less than two thousand ballots are printed the price shall not exceed thirty dollars per thousand, except in presidential years when the price shall not exceed forty dollars per thousand or fraction thereof."

Section 531, Code of Iowa, 1935, provides:

"*Applicable statutes.* The provisions of Chapters 40, 41, and 605 shall apply, so far as applicable, to all said primary elections, except as hereinafter provided."

Since there is no express provision contained in Chapter 36 entitled "Nominations by Primary Election" with reference to the cost of printing primary ballots, and nothing is contained in said chapter in this regard as an express exception to the provisions of the chapters enumerated in Section 531, *supra*, it is the opinion of this department that Section 774, *supra*, applies to the cost of printing primary ballots. Therefore, the maximum amount that may

be allowed by the board of supervisors of Palo Alto County for the expense of printing the primary ballots of 1936 is controlled by the provisions of cited Section 774, *supra.*

SCHOOLS: ELECTIONS: COURSES OF STUDY: DIRECTORS: ELECTORS: Board of directors may prescribe courses of study for schools of the district, and electors may, by favorable vote at regular election, add to such courses.

May 2, 1938. *Mr. Z. Z. White, County Attorney, Storm Lake, Iowa:* We acknowledge receipt of your request for the opinion of this department upon a question which may be stated as follows:

Does the board of directors of a consolidated school district have authority to add the course of music as a branch of instruction, or is such authority exclusively vested in the voters of the district?

The statutes set out the following provisions with reference to the powers and duties of boards of directors to determine what branches or courses of study shall be taught in the public schools. Section 4250, 1935 Code, provides:

"4250. *Right to prescribe.* The board shall prescribe courses of study for the schools of the corporation."

Section 4267, 1935 Code, provides in part as follows:

"4267. *Higher and graded schools.* The board may establish graded and high schools and determine what branches shall be taught therein, but the course of study shall be subject to the approval of the superintendent of public instruction. * * *"

It is clear, in view of the above provisions, that such boards have authority and are charged with the duty to prescribe courses of study for the schools of the corporation, which may be in addition to those courses specifically required by law. The broad discretion which rests in boards of directors in connection with the prescription of courses of study is referred to in the case of *Security National Bank vs. Bagley*, 202 Iowa 701, at page 704, where the court states:

"The legislature, in addition to the broad powers conferred by said statute, has definitely prescribed that certain things,—namely, reading, writing, spelling, arithmetic, grammar, geography, physiology, United States History, principles of American government, American citizenship, American history, civics of the state and nation, physical education, agriculture, domestic science, manual training, the effect of alcoholic stimulants, narcotics, and poisonous substances, —shall be taught in all or a part of the grades in the public schools of this state. Chapter 214, Code of 1924. Outside of the definite and specific things which are required to be taught in the public schools, a very large discretion is vested in the board of directors with regard to prescribing what courses of study shall be taught. The legislature has not vested such power in the courts or in any other tribunal."

Section 4217, 1935 Code, enumerates the powers of voters at school elections. Material portions of the provisions of said section are as follows:

"4217. *Enumeration.* The voters at the regular election shall have power to: * * *"

Under the above section, the patrons are empowered to determine upon *additional* branches which shall be taught in the schools of the district.

It is our opinion that there is no conflict as between the powers of boards of directors and the electors. Boards of directors may prescribe courses of study for the schools, including the study of music, and if, in addition to such courses, the voters of the district desire that additional branches be taught, such end may be accomplished by a favorable vote of the electors. The provi-

sions of Section 4217 quoted above are permissive in character, and are supplementary to the provisions of Sections 4250 and 4267, supra.

TAXATION: EXEMPTION: FRUIT TREE RESERVATIONS: The assessor should receive the sworn statements of those owners claiming fruit tree reservations each year and should report the same to the auditor; the exemption can be granted in any intermediate year and there is no necessity of waiting until the next regular period for assessing real estate.

May 2, 1938. *Mr. Carl A. Burkman, County Attorney, Des Moines, Iowa:* You request the opinion of this department on the following statement which you submit:

"There is a question in the mind of the assessor as to how fruit tree reservation exemptions should be handled. People now go to the assessor's office and state that they have planted fruit trees in the required amount on vacant ground in the Fall of 1937 and after the assessor made the 1937 assessment. The question is whether or not the assessor is in a position to grant the exemption for fruit tree reservations for each and every year that the claimant makes claim therefor, or will he be unable to grant the exemption until the time of assessing real estate for the next period, to-wit, 1941?"

In attempting to reach a conclusion concerning your question let us first examine the pertinent provisions of the 1935 Code which are as follows:

"2605. *Tax exemption.* Any person who establishes a forest or fruit-tree reservation as provided in this chapter shall be entitled to the tax exemption provided by law."

"2606. *Reservations.* On any tract of land in the state of Iowa, the owner or owners may select a permanent forest reservation or reservations, each not less than two acres in continuous area, or a fruit-tree reservation or reservations, not less than one nor more than ten acres in total area, or both, and upon compliance with the provisions of this chapter, such owner or owners shall be entitled to the benefits provided by law."

"2611. *Fruit-tree reservation.* A fruit-tree reservation shall contain on each acre, at least forty apple trees, or seventy other fruit trees, growing under proper care and annually pruned and sprayed. Such reservation may be claimed as such, under this chapter, for a period of eight years after planting."

"2616. *Assessor.* It shall be the duty of the assessor to secure the facts relative to fruit-tree and forest reservations by taking the sworn statement, or affirmation, of the owner or owners making application under this chapter; and to make special report to the county auditor of all reservations made in the county under the provisions of this chapter."

"7110. *Forest and fruit-tree reservations.* Forest reservations fulfilling the conditions of Sections 2605 to 2617, inclusive, shall be assessed on a taxable valuation of four dollars per acre. Fruit-tree reservations shall be assessed on a taxable valuation of four dollars per acre for a period of eight years from the time of planting. In all other cases where trees are planted upon any tract of land, without regard to area, for forest, fruit, shade, or ornamental purposes, or for windbreaks, the assessor shall not increase the valuation of such property because of such improvements."

"2617. *County auditor.* It shall be the duty of the county auditor in every county to keep a record of all forest and fruit-tree reservations within his county; and to make a report of the same to the state conservation commission on or before June fifteenth of each year."

"6959. *Personal property—real estate—buildings.* Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in 1933 and every four years thereafter, and in each year in which real estate is not regularly assessed, the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter

the taxable value of such buildings on the tax list as a part of the real estate to be taxed; but if such buildings are erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property, but buildings and fixtures erected on real estate held under a lease of longer than three years' duration shall be assessed as real estate."

While it is true that under the provisions of Section 6959 real estate is ordinarily listed and valued every four years, yet certain exceptions are contained in the statute. The statute provides that the assessor shall list and assess any real property not included in the previous assessment and also any buildings erected since the previous assessment and that the auditor shall thereupon enter the same for taxation. Thus it is contemplated that a change of circumstances might occur which would affect the taxable value of the real property.

It is apparent from the provisions of supra sections that the special tax rate accorded to those who qualify shall be applied from and after the first annual assessment period after the time of planting.

All of the above statutes must be construed in *pari materia* and the intention of the Legislature given effect. It is apparent that it was not the legislative intention that those who qualified under the foregoing exemption statutes should have to wait until the next regular period for assessing real estate since it might well be that in any one of the three years intervening an owner would qualify.

Under the provisions of the statute the exemption runs for a period of eight years after the planting. To require the owner to wait until the next regular period for assessing real estate would result in depriving that owner of a portion of the exemption given to him by statute, because a part of his eight-year period would have expired, and to that extent the person entitled thereto would have been deprived of this exemption.

It is therefore the opinion of this department that the assessor should receive the sworn statements of those owners claiming fruit tree reservations each year, should report the same to the auditor; that the exemption can be granted in any intermediate year, and that there is no necessity of waiting until the next regular period for assessing real estate, to-wit, 1941 to grant the exemption.

ELECTIONS: JUDGE OF MUNICIPAL COURT: NOMINATION: A judge of the municipal court is eligible to seek the nomination and election to the office of the county attorney.

May 9, 1938. *Mr. Carl A. Burkman, County Attorney, Des Moines, Iowa:* This department acknowledges receipt of your request for an opinion on the following proposition:

Honorable Don Allen, one of the judges of the municipal court in and for the city of Des Moines, and being still in office as such judge, has filed nomination papers seeking election to the office of county attorney for Polk County, Iowa. Is he, while holding the office of such judge, eligible to run for the office of county attorney?

The question arises by virtue of a constitutional inhibition contained in Article V, Section 5, of the State Constitution, as follows:

"The District Court shall consist of a single judge, who shall be elected by the qualified electors of the District in which he resides. The Judge of the District Court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; *and shall be ineligible to any other office, except that of Judge of the Supreme Court, during the term for which he was elected.*" (Italics ours.)

and the possible application of such prohibition (that part italicized) to the judges of a municipal court by reason of the section of the "Municipal Court Law" that may be labeled the general application section, viz., Section 10664, Code of Iowa, 1935, reading as follows:

"*All provision of law relating to the district court and the judges and jurors thereof shall, so far as applicable and when not inconsistent with this chapter, apply to the municipal court and the judges thereof.* The judges of the municipal court shall adopt and promulgate rules of practice which shall conform, as nearly as may be, to the rules of the district court of the district in which said municipal court is located. If not established by statute or rule, the judge hearing the cause may prescribe the method of procedure. (Italics ours.)

The particular facts here posited present a question of first impression, although appearing at page 616 et seq. of the 1934 Report of the Attorney General is an official opinion wherein it was held that a municipal court judge may seek the nomination and election as judge of the district court of Iowa while holding office as municipal court judge. We quote as follows the general conclusion expressed in that opinion:

"* * * The Municipal Court is purely the result of legislative enactment. It is apparent that it was the intention of the Legislature in the passage of Section 10664 of the 1931 Code of Iowa to make the legislative enactment applicable to district courts apply to the municipal court. There is no legislative enactment that would disqualify a judge of the municipal court from being a candidate during the term of his office for the office of the Judge of the District Court. The object of the framers of the State Constitution in the adoption of Section 5 of Article V of the Constitution was to keep judges from aspiring to any political office except a higher judicial one. Therefore, the object of this constitutional provision will not be defeated in any manner by a judge of the municipal court in aspiring for the office of judge of the district court for the term during during which he was elected.

"It is therefore the opinion of this department that the judge of the municipal court mentioned by you in your above request is eligible to seek the office of the judge of the district court and may be nominated and elected by his friends if they so desire." (id., page 618.)

The foregoing was arrived at on the theory that the words "all provisions of law" as employed in Section 10664, *supra*, referred only to legislative enactments and to the exclusion of the organic law embodied in the state constitution. Parenthetically it should be stated, however, that while the meaning given the words "all provisions of law" in that opinion, if sound, would perhaps control the instant case, yet the view expressed in said opinion as to the intendment of the constitutional proviso to which we have alluded, i. e., "The object of the framers of the State Constitution in the adoption of Section 5 of Article V of the Constitution was to keep judges from aspiring to any political office except a higher judicial one," would, if subscribed to, bar the Honorable Don Allen from seeking the nomination and election to the office of county attorney of Polk County.

To construe Section 10664, *supra*, as embracing the constitutional proviso inhibiting the eligibility of a district court judge for any other office than that of a justice of the supreme court during the term for which he is elected, will foreclose the right of the Honorable Don Allen to seek the nomination and election to the office of county attorney of Polk County. Now it is settled in the Iowa law that there is no absolute right to hold office or to be a candidate therefor. *State ex rel. Jones vs. Sargent, et al.*, 145 Iowa 298, 124 N. W. 339, 28 L. R. A. (N. S.) 719. On the other hand it is likewise well settled

that all persons are normally eligible and qualified for office unless they are excluded by some constitutional or legal disqualification. 22 *R. C. L.*, page 400, section 40, and note. There is nothing contained in Chapter 475, Code of Iowa, styled "Municipal Court" which would prevent the named person from seeking the office of county attorney of Polk County while judge of the municipal court in and for the city of Des Moines. Section 10648 of said chapter requires that a judge of such court be a practicing lawyer, an elector of the district in which such court is situated, and that he take the same oath as judges of the district court. Otherwise it is silent. May it be said then that there exists a constitutional disqualification?

In approaching the question presented for our determination, attention should first be given to the history of Section 10664, *supra*. The municipal court legislation originated in the 36th General Assembly, being Chapter 106 of the laws of that assembly. Section 20 of said chapter and law provided in terms as follows:

"Sec. 20. *Applicability of general laws.* All statutes governing the district court as to pleading, and practice, parties, evidence, commencement of actions, jurisdiction, process, modes of trial, judgment, execution, attachment, garnishment, replevin and limitation of actions, shall apply to and govern the municipal court except when the same are inconsistent with the provisions of this act."
(Section 6860, Compiled Code of Iowa, 1919.)

Compare this with the first sentence of the section in its existing form, viz.:

"10664. *Laws applicable—rules.* All provisions of law relating to the district court and the judges and jurors thereof shall, so far as applicable and when not inconsistent with this chapter, apply to the municipal court and the judge thereof. * * *"

The present language of the section is the handiwork of the code revision session of the legislature in 1924. Manifestly the language constitutes a radical departure from that of the section which it supedsedes. The change was officially made by the code revision session of the general assembly—this section, among others, being enacted in lieu of the old—so the change in meaning, if any there be, must be given effect. 10 *Iowa Law Bulletin* 1.

This brings us then to a consideration of those matters which attended the enactment of the revised legislation on municipal courts. A bill known as the Code Commissioners' Bill No. 220 originated in the house as House File 220 and was styled "Municipal Courts." The original draft as prepared by J. H. Trewin contained the following:

"General Explanation
This bill *clarifies* ambiguities and remedies defects fund in the municipal court law and *repeals* C. C. 6874, 6882, and 6892, making the law with reference to the matters contained in those sections, the same as with reference to the district court."

No one of the three sections mentioned in this explanatory note as being repealed is that making the statutes governing the district court applicable to municipal courts. (See Section 6860, Compiled Code of Iowa, 1919, the exact language of which is quoted *supra*. Vide: Section 20, laws of the 36th General Assembly.) The title to House File 220 reads as follows:

"An Act
To Amend, Revise, and Codify Sections Six Thousand Eight Hundred Forty-one (6841) to Six Thousand Eight Hundred Forty-three (6843), Inclusive, *Six Thousand Eight Hundred Forty-five* (6845) *to Six Thousand Eight Hundred Eighty-seven* (6887), *Inclusive*, * * * Of the Compiled Code of Iowa, * * Relating to Municipal Courts."

The italics indicates that Section 6860 of the Compiled Code of Iowa, 1919, was among those amended, revised and codified, and this very same language is repeated in the bill proper following the enacting clause. Section 6860 of the 1919 Compiled Code (being Section 20 of Chapter 106, laws of the 36th General Assembly), and being present Section 10664, appeared as Section 23 in House File 220. The first sentence thereof as it appeared in the Code Commissioners' draft read as follows:

"All provisions of law relating to the district court and the judges thereof shall, so far as applicable and when not inconsistent with this chapter, apply to the municipal court and the judges thereof * * *."

Neither the senate nor house journals for the extraordinary session of the 40th General Assembly reveal when the foregoing was changed to include the words "and jurors," but this is immaterial to our present consideration. In any event House File 220 passed both houses of the legislature in substantially the same form as the original draft (last above quoted) of the Code Commissioners' Bill No. 220. See Senate and House Journals, extraordinary session, 1923-1924.

No one can gainsay that prior to the code revision the constitutional inhibition had no application to judges of the municipal court, for Section 20 of Chapter 106, laws of the 36th General Assembly (Section 6860, Compiled Code of Iowa, 1919) prescribed that "all statutes governing the district court," etc., "shall apply to and govern the municipal court," etc. All "statutes" not "law" were made applicable in specifically named respects. It is to be noted, however, that the applicable statutes were directed to the court as such in contradistinction to the court and judges thereof, whereas present Section 10664, supra, embraces not only the law applicable to the district court but likewise the law applicable to the judges thereof. Is it to be said that this change in phraseology results in a distinction without a difference, or does it go to a change of substance? If a change in substance was worked by the 1924 revision of this section of the statute then we are inclined toward the view that the constitutional inhibition applies alike to district and municipal court judges. In this regard we are compelled to reject the reasoning of the opinion of the attorney general appearing at page 616 et seq. of the 1934 report, wherein the conclusion was reached that the words "all provisions of law," as employed in Section 10664, supra, excludes the organic law embodied in the constitution. For authority see:

Hoffrichter vs. State, 102 Oh. St. 65, 130 N. E. 157, 158;
State vs. Brantley, 113 Miss. 780, 74 So. 662, 666;
Los Angeles Gas & Electric Company vs. Los Angeles County, 21 Cal. App. 517, 132 P. 282, 283, (cited in former opinion);
Woods vs. Bragaw, 13 Idaho 607, 92 P. 576, 578 (which points out the real distinction);
State vs. Hickman, 9 Mont. 370, 23 P. 740;
Railroad Company vs. McClure, 10 Wall. (U. S. Sup. Ct.) 511, 515;
36 *Corups Juris*, page 964, section 32, notes 12 to 15, inclusive.

Hence, if we are to reach a result here that will permit of a construction of the statute enabling the person named to seek the nomination and election to the office of county attorney of Polk County while judge of the municipal court, we must do so on other grounds.

Professor O. K. Patton of the University of Iowa law faculty, who took a leading part in the 1924 Code revision, in an article appearing in 10 Iowa Law Bulletin 1, took occasion to state:

"It has been pointed out that only about one-half of the sections in the Code of 1924 were enacted at the special code revision session and a great many of these sections were merely restatements of existing law; *there was no intention on the part of the drafters to change the law in these instances; their plan was merely to simplify it* * * *."

(Italics ours.)

This is but an expression of opinion of one learned in the law but one who played an instrumental part in the revampment of the codified law of Iowa, and that it is a sound conclusion is supported by the pronouncements of the supreme court of this state. For instance, in *Dennis vs. Independent School District of Walker, et al.*, 166 Iowa 744, 148 N. W. 1007 (1914), the supreme court in being confronted with the construction of a statute appearing in the Code Supplement of 1907 and which was a re-enactment of the law as it had appeared in the 1897 Code, the 1873 Code, and the laws of the 13th General Assembly, and wherein a change in language had been worked, stated, quoting from page 750 of 166 Iowa:

"* * * It is rule of construction that changes made by a revision of the statutes will not be construed as altering the law, unless it is clear that such was the intention, and, if the revised statute is ambiguous or susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining the intention of the legislature. (Citing cases.)"

Again in *East Boyer Telephone Co. vs. Incorporated Town of Vail, et al.*, (Iowa), 129 N. W. 298, the Iowa supreme court stated (id., page 300):

"* * * a mere change of phraseology does not indicate an intention on the part of the legislature to change the meaning of a provision as incorporated into the new Code. *Eastwood vs. Crane*, 125 Iowa 707, 101 N. W. 481. If it had been intended ...., we are sure that such change would have been expressed in unequivocal language. * * *"

See also:

Eastwood vs. Crane, supra;
King vs. Carroll, 129 Iowa 364, 105 N. W. 705;
State vs. Prouty, 115 Iowa 657, 84 N. W. 670; and
Hancock vs. Township of Perry, 78 Iowa 550, 43 N. W. 527.

With respect to some of the cited decisions, Professor Patton continues in his article:

"In view of these decisions it seems clear that the greater portion of the legislation enacted by the special session of the Fortieth General Assembly is a continuation of the old law as well as that portion of the Code of 1924 which is merely a compilation of the law as it existed prior to the special session, since the bulk of the code revision work consisted merely in a restatement of existing law."

Furthermore, it may be said that the legislative intent is disclosed to some extent by the comments which accompany the Code Commissioners' Bill. We have heretofore set out the explanatory note prefacing the bill proper. *Vide:* page 7. In addition, immediately following the various sections embraced in the bill, appear notations as to the source of each of the provisions contained in the revamped section of the bill. In the case of Section 23 of the Code Commissioners' bill there appears, among other notations, the following:

"C. C. 6860, entire."

In other words it was the apparent intention to carry Section 6860, Compiled Code of Iowa 1919, into the revised section in its entirety. As in all instances of new provisions, comment was made that such was new to the law. No such comment appears with reference to the language "all provisions of law." And in this regard it is material to point out that the Iowa Supreme Court has held

that in construing a statute and arriving at its interpretation, the history of legislation on the subject should be regarded, and for this purpose consideration is to be given to the Code Commissioners' report and recommendations. See: *Des Moines City Ry. Co. vs. City of Des Moines*, 152 Iowa 18, 131 N. W. 43; *Dennis vs. Independent School District of Walker, et al.*, supra; 11 *Iowa Law Review*, 336, 349.

Having thus been furnished this insight into the purpose behind the 1924 code revision, and with the expressed attitude of the Iowa Supreme Court toward the construction of revised statutes in mind, we may momentarily pass to other considerations.

By virtue of Article V, Section 1, of the Iowa Constitution, the legislature is empowered to create such other courts inferior to the supreme court, as it may desire. The municipal court is such a creation. The duties, powers, limitations, etc., thereof are by statutory prescription. It is stated in *Mechem on Public Officers*, page 296, section 465:

"Where * * * an office is created by statute, it may in the absence of constitutional prohibitions, be entirely abolished, or its term may be increased or diminished, or the manner of filling it may be changed, or its compensation may be altered, or its duties may be diminished or increased, at the will of the legislature at any time, even though done during the term for which the then incumbent was elected or appointed.

"So the legislature may declare the office vacant, or may transfer its duties to another officer, although the effect may be to remove the officer in the middle of his term, or abolish his office by leaving it devoid of duties."

Again it is said (id., page 39, section 96):

"Where the Constitution has prescribed the qualifications, the possession of which shall entitle an individual to hold office under the state, it is not within the power of the legislature to change or add to them, unless such power be given to the legislature either in express terms or by necessary implication."

Clearly, there is no self-executing provision of the constitution of Iowa prescribing the qualifications of judges of the municipal court. The legislature is the sole judge of those qualifications and there can be no question but what the legislature in creating municipal courts could legislate to the effect that a judge of the municipal court shall be ineligible for any other office, without exception, during the term for which he is elected. And as stated in *Mechem on Public Officers*, supra, the legislature may abolish the court altogether or completely change its character. It is apparent from an examination of the municipal court law that the legislature did not, by unequivocal language, declare judges of the municipal court ineligible to any other office during the term for which elected. Did it then intend to do so by incorporating by reference the constitutional inhibition when it prescribed in Section 10664, supra, that "all provisions of *law* relating to the district court and the judges * * * thereof shall, * * * apply to the municipal court and the judges thereof?" In our opinion, no! It should be borne in mind that the amendment and revision of Section 10664, supra, came about in an extraordinary session of the legislature that specifically met as a code revision assembly. As expressed by Professor Patton who was close to the scene of activity, "there was no intention on the part of the drafters to change the law in these instances; their plan was merely to simplify it." The express language used in the title and subsequent to the enacting clause in House File 220 belies any notion that the legislature contemplated a complete change in the section under consideration. The revision bill was designed to amend, revise and codify existing law

relating to municipal courts. While we have not attempted to collate and digest the decisions of the supreme court, undoubtedly a question as to the applicability of the statutes pertaining to district courts in such respects as were enumerated in the forerunner to Section 10664, *supra*, i. e., Section 6860, Compiled Code of Iowa, 1919, arose and doubt was cast as to the exact application of statutes relating to the district court and pertaining to pleading, practice, parties, evidence, process, jurisdiction, judgment, execution, modes of trial, etc. to municipal courts. Obviously simplification was intended whether or not it was accomplished. Furthermore, attention should be called to the fact that embraced within Chapter 476, Code of Iowa, 1935, styled "Superior Court," appears Section 10716, providing:

"10716. *Court of Record—laws applicable.* The superior court shall be a court of record. All statutes governing the district court as to venue, commencement of action, jurisdiction, process, pleadings, practice, modes of trial, judgment, execution, and costs shall apply to and govern the superior courts, except when the same may be inconsistent with the provisions of this chapter."

Now then, while the creation and establishment of a municipal court in a given city does away with a superior court, yet it is to be noted that the jurisdiction of the latter court is as great, and in some instances, more extensive, than is the jurisdiction of the former. No one will seriously contend that the constitutional prohibition applies to superior court judges. And while it would be a *non sequitur* to say that because of such fact *a fortiori* municipal court judges are likewise excluded, yet as bearing on the intention of the legislature it can be said to be of importance for the reason that it is just as essential that superior court judges be free of political ties and devoid of political aspirations. In this connection, it would be well to quote the language of the supreme court of Kansas in *State ex rel. Watson vs. Cobb*, 2 Kan. 32, as to the intendment behind such a constitutional provision as is contained in Article V, Section 5, of the Iowa constitution. (id., page 56 et seq.):

"* * * The object sought to be accomplished by this provision, is that our high judicial officers may be removed as far as possible from the temptation to use the power and influence of their positions and authority for their own advancement. To prevent their minds from being distracted from their legitimate duties by ambitious hopes and struggles for preferment, to raise them above those political and partisan contests so unbecoming the desired purity, impartiality and calmness of the judicial character. Its effect is to prevent the acceptance of any other office by a judge or justice the term of whose judicial office has not expired, and to render such acceptance void . . . ."

See also:

Abbott vs. McNutt, et al., 218 Cal. 225, 22 P. (2nd) 510, 89 A. L. R. 1109, note 1113;
Rowe vs. Tuck, et al (Georgia), 99 S. E. 303, 5 A. L. R. 113, note 117;
Briefs and Arguments filed in *Richman vs. Letts*, 202 Iowa 973, 210 N. W. 93 (filed in office of clerk of the supreme court);
12 Iowa Law Review 203, et seq.

But we are not concerned with the wisdom of applying the constitutional prohibition to municipal judges. Rather our sole question is whether or not the legislature in fact disqualifies a municipal court judge from running for any other office except that of judge of the supreme court, during the term for which such municipal judge is elected. As stated, the prohibition does not extend to superior court judges. Section 10716, supra, contained in the chapter on "Superior Court's," and providing that all statutes governing the district court shall in named respects apply to the superior court, first appeared in the

1897 Code. The provisions of said section have been the codified law of Iowa for years prior to the creation of municipal courts. It was contained in the law on the event of the amendment and revision of the municipal court law in 1924. The language thereof was almost identical to the language contained in the forerunner to Section 10664, supra, viz., Section 6860, Compiled Code of Iowa 1919. It was not changed.

In *Boody vs. Sawyer, Judge*, 201 Iowa 496, 207 N. W. 589, this court stated (id., page 498 of 201 Iowa):

"By Section 10664, as we have seen, procedure in the municipal court is governed by the provisions of the law relating to the district court, so far as applicable and when not inconsistent with the statutes relating to municipal courts. Section 10681 provides that motions to set aside defaults may be made in the municipal court within ten days after the entry thereof. With this exception, the setting aside of defaults in the municipal court is governed by the statutes relating to like proceedings in the district court. *While there has been some change in the wording of the statute in the Code of* 1924, *there is no change in the SUBSTANCE OF the law, or in the requirement of the statute in this respect from what it was in the prior statutes.*" (Italics ours.)

Thus in at least one instance the supreme court of Iowa has spoken on the change worked by the code revision session in the municipal court law.

From the foregoing discussion we arrive at the conclusion and it is the opinion of this department, that the 40th General Assembly of Iowa, in extraordinary session, as a code revision session, in the enactment of House File 220, present Chapter 475 of the 1935 Code, did not intend to work such a complete and material change in the substance of Section 10664, *supra*, as would make a municipal court judge ineligible to any other office, except that of judge of the supreme court during the term for which he is elected. Or, in other words, that it was not the intention of the legislature, in amending and revising Section 10664, *supra*, to enlarge the field of law applicable to municipal courts to include the constitutional provision contained in Article V, Section 5 of the state constitution.

It is accordingly our opinion that the Honorable Don Allen, one of the judges of the municipal court in and for the city of Des Moines, is eligible to seek the nomination and election to the office of the county attorney of Polk County.

SCHOOLS: BOARD OF DIRECTORS: CLAIMS: CITIES AND TOWNS: Board of directors of a school district has authority to determine for district amount of damage caused by a change in grade of a road or street, and upon payment of an amount which will satisfy such damages, board may authorize execution of release and satisfaction of such claim.

May 17, 1938. *Mr. T. J. Mahoney, Iowa State Highway Commission, Ames, Iowa*, and *Mr. Henry B. Bailey, City Attorney, Washington, Iowa:* We acknowledge receipt of your request for the opinion of this department upon a question stated as follows:

"Has the board of directors of an independent school district in the state of Iowa power and authority to bind the school district corporation to the terms expressed in the attached instrument referred to as a 'release' providing, of course, that a resolution authorizing one or more officers to sign the same is legally passed and the instrument is completed and then duly executed by the officer or officers authorized in the resolution?"

While it is not the regular practice of this department to issue opinions to other than state officers and county attorneys, it appears that the state highway

commission is interested in this particular subject matter, and for this reason the following opinion is given.

Briefly, the facts underlying this question are as follows: The city of Washington desires to change the grade of a certain street which abuts upon real estate owned by the independent school district. The question is whether or not the board of directors of the school corporation has authority to bind the school district by an agreement of release which provides for payment to the district of the damages to the school property occasioned by such change in the grade of said street. You have submitted a form of this release agreement which in substance provides for relinquishment of all claims for damages arising out of change in grade in consideration of the payment to the district by the city of a stipulated amount.

Cities and towns are given authority to provide for the grading of their streets under the provisions of Section 5951, 1935 Code, which reads as follows:

"5951. *Grades and grading.* They shall have power to establish grades and provide for the grading of any street, highway, avenue, alley, public ground, wharf, landing, or market place, the expense thereof to be paid from the general or grading fund, or from the highway or poll taxes of such city or town, or partly from each such funds."

Section 5953, 1935 Code, provides as follows:

"5953. *Change.* When any city or town shall have established the grade of any street or alley, and any person shall have made improvements on the same, or lots abutting thereon, according to the established grade thereof, and such grade shall thereafter be altered in such a manner as to damage, injure, or diminish the value of such property so improved, said city or town shall pay to the owner of such property the amount of such damage or injury."

Sections 5954 to 5961, inclusive, 1935 Code, provide procedure for the determination of the amount of damages thus sustained by property owners by means of appraisal by a board of three appraisers selected by the parties. Provision also is made for appeals from such awards.

No question is raised as to the authority of the city to proceed to change the grade of the street. The real question involved goes to the authority of the board of directors of the school corporation to direct the execution of the instrument in question in the absence of a vote of the electors.

Section 4217, 1935 Code, enumerates the powers of voters of school districts, and provides among other things, as follows:

"4217. *Enumeration.* The voters at the regular election shall have power to:
* * *

"2. Direct the sale, lease, or other disposition of any schoolhouse or site or other property belonging to the corporation, and the application to be made of the proceeds thereof.* * *"

The above provision appeared in the 1897 Code in the identical language set out above.

In referring to the particular provision quoted above in the case of *James vs. Gettinger*, 123 Iowa 199, the court at page 202 said:

"Moreover, the provisions of Section 2749, relied upon, has reference only to a sale or other disposition of school houses, sites, etc., whereby a district makes conveyance of the title thereto, and hence part, with all further rights and interests in the property as property. As a preliminary to such proceedings, the Code provision requires a vote of the electors."

Although the above pronouncement constituted dictum in the above case, we conclude the rule in Iowa is that property of the school district should not be disposed of without a prior authorization by the voters of the district.

We have been unable to find any cases which are particularly helpful in reaching a conclusion in this matter. In the present case, no tangible property of the district is to be disposed of. The district retains all of its real estate. The claim of the district is in the nature of an unliquidated claim for damages recognized by the statute. Under the circumstances of the present case, the board of directors is not called upon to exercise any powers reserved to the voters. It appears that the absolute power of the city to change the grade exists, and that a vote of the electors would be a useless act since the statute directly authorizes such alteration of grade and an expression by the voters could not affect the right of the city to proceed.

Let us assume that the board of directors refused to deal with the city with respect to the damage claim. The city might then proceed under the statute to procure the appraisement and award. Certainly it cannot be said that the proposition of whether or not such an award was to be accepted or an appeal taken therefrom is a question which could be submitted to the voters of the district. Logically, the board of directors would then determine whether or not the award should be accepted or whether an appeal should be taken therefrom.

Under the statute, Section 4123, 1935 Code, school districts are bodies politic and as such may sue and be sued. This authority conferred upon such quasi-corporations by the statute authorizes a board of directors to prosecute claims of the district, and would include a proper settlement of such claims.

General power of direction of school affairs is given to boards of directors by Section 4125, 1935 Code, which reads as follows:

"4125. *Directors.* The affairs of each school corporation shall be conducted by a board of directors, the members of which in all independent school districts shall be chosen for a term of three years, except that in independent school districts which embrace a city and which have a population of one hundred twenty-five thousand or more, the term of directors shall be six years, and in all subdistricts of school townships for a term of one year."

Under this general authority, we believe that a board of directors of a school corporation has authority to dispose of claims for damages which may exist in favor of the corporation.

It is our opinion that the board of directors of this particular school district has authority to determine on behalf of the district the amount of damages caused by the change of grade, and upon the payment of an amount which, in the judgment of the board is sufficient to satisfy such damages, that such board of directors may properly authorize the execution of an instrument of release and satisfaction of such claim.

ELECTIONS: SOLDIERS: CCC CAMP ENROLLEES: VOTING RIGHTS: Soldier stationed at Ft. Des Moines, whether single or married, may gain voting residence in this state if he resides in state and off army reservation with intention of establishing residence in this state. Same applies to CCC Camp enrollees and officers when camp is not on military reservation.

May 18, 1938. *Honorable Robert E. O'Brian, Secretary of State:* This department acknowledges your request for an opinion on the following questions:

1. Can United States soldiers living off the military reservation vote in the county in which they reside?

2. Can CCC enrollees vote in the county in which the camp is located?

3. Can an officer of a CCC Camp vote in the county in which the camp is located, and can he vote in this county whether or not he lives in the camp?

The following constitutional and statutory provisions are applicable. Article II, Section 1, of the Iowa Constitution provides:

"*Electors.* Section 1. Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State six months next preceding the election, and of the County in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

Article II, Section 4, of the Iowa Constitution provides:

"*Persons in military service.* Sec. 4. No person in the military, naval, or marine service of the United States shall be considered a resident of this State by being stationed in any garrison, barrack, or military or naval place, or station within this State."

Section 727, Code of Iowa, 1935, provides:

"727. *Proper place of voting.* No person shall vote in any precinct but that of his residence, except as provided in Section 5628."

Section 5628, Code of Iowa, 1935, provides:

"5628. *Residence in precinct—exception.* Each qualified elector may vote at said election, who, for ten days has been a resident of the precinct in which he offers to vote. Electors who are registered and otherwise qualified and who change residence from the precinct where registered to another precinct within ten days preceding the election, may vote in the precinct where registered except at elections when councilmen are to be elected by the voters of a ward or district."

At the outset it is pertinent that the terms "residents," "residence" and "domicile" be given brief consideration. It is to be noted that both of the constitutional provisions speak of resident,—"who shall have been a resident of this State," * * * and "shall be considered a resident of this State," whereas statutory provisions speak of residence. As a noun, the sense in which the term "resident" is used in the Constitution has been held to mean one who dwells or resides permanently in a place, or who has a fixed residence as distinguished from an occasional lodger or visitor; as a person coming into a place with intent to establish a domicile or permanent residence, and who in consequence actually remains there. 54 *Corpus Juris*, 712, 713, section 2. The term "residence" in its statutory signification depends upon the legislative purpose as well as the context of the statute, or in other words the term must be construed in every case in accordance with the object and intent of the statute in which it occurs. 54 *Corpus Juris* 708, 709, section 7. It is stated in 54 *Corpus Juris* 709, section 8, that:

"Among definitions of the term given in statutes are the permanent home and the place to which, whenever absent for purposes of business or pleasure, one intends to return; that place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively; the place adopted by a person as his place of habitation, and to which whenever he is absent he has the intention of returning; the place where one remains when not called elsewhere for labor or other special or temporary purposes, and to which he returns in seasons of repose."

Again in 20 Corpus Juris 68, section 26, it is said:

"* * * The term 'residence' as used in constitutional and statutory provisions relating to the qualifications of electors is synonymous with home or domicile, denoting a permanent dwelling place, to which the party when absent intends to return. While one cannot by intention alone fix his dwelling place, yet the fact of residence for the purpose of voting depends largely on the intention of the person offering to vote, and a sojourn in a place, however long, without the intention of making it a permanent home, will not qualify the

sojourner as an elector, unless it is otherwise provided by constitution or statute. Hence the right to vote in a certain precinct requires the concurrence of two things—the act of residing coupled with the intention to do so. Residence in a state means a residence at some particular place therein, and the time required for acquiring a residence does not begin while a person is in transit to such place. While there is no absolute criterion by which to determine one's place of residence, but each case must depend upon its particular facts and circumstances, yet three rules seem to be reasonably established: (1) That a man must have a residence somewhere; (2) that when once established it is presumed to continue until a new one is established; and (3) that a man can have but one domicile of citizenship at a time. When circumstances are such that a man may claim a domicile at either one of two places, the place he regards as his home or domicile will be his residence for the purpose of voting."

And while in 19 *Corpus Juris* 395, section 2, it is stated that the terms "domicile" and "residence" although frequently used synonymously are not in fact, when accurately used, convertible terms, yet at section 3, page 397 of *Corpus Juris* 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 the early Iowa case of *State vs. Savre*, 129 Iowa 122, 105 N. W. 387, 3 L. R. A. (NS) 455, the supreme court of Iowa, having before it a criminal prosecution for illegal voting, concluded that the word "residence" as employed in the election statutes of this state is synonymous with "home" or "domicile," and that the term meant a fixed or permanent abode or habitation to which the party when absent intends to return. See also: *Vandepoel vs. O'Hanlon*, 53 Iowa 246, 5 N. W. 119; *Powers vs. Harton*, 183 Iowa 764, 167 N. W. 693, (wherein it was held that a farm hand who made his headquarters at the place where he was working, but who frequented the residence of his parents some miles away, was a qualified voter in the precinct in which he resided with his employer, the court being of the opinion that his home was where he was living, and it was not necessary that it be a permanent home.); *Taylor, et al. vs. Independent School District of Earlham*, 181 Iowa 544, 164 N. W. 878; *In re Colburn's Estate*, 186 Iowa 590, 173 N. W. 35, (wherein it was held that one's voting residence is at the place which he treats as his home, and to which he intends at all times to return when not employed at other places); *Dodd vs. Lorenz*, 210 Iowa 513, 231 N. W. 422, (wherein it was held that an adult unmarried school teacher became a resident of the county in which she taught within the meaning of the constitutional provision governing suffrage, when the employment is entered upon with the good faith intention of making the place of employment her permanent home or residence so long as the employment continued. The court quoted from Goodrich on Conflict of Laws to the effect that one may have a settled place of abode even though he knows that in the future he may possibly or even probably change it for another, and that a domicile of choice may be acquired by persons for whom it is impossible to establish a life-long home, and it is sufficient that the intent be to make a given place a home here and now); *Fisher, etc., vs. The First Trust Joint Stock Land Bank of Chicago*, 210 Iowa 631, 231 N. W. 671, 69 A. L. R. 1340; 15 Iowa Law Review 309; *Klutts vs. Jones*, 21 N. M. 720, 158 Pac. 490, L. R. A. 1917A 291; *Anderson vs. Pifer*, 319 Ill. 164, 146 N. E. 171, 37 A. L. R. 134, and note 138; *Ballman, et al. vs. Cooper*, 362 Ill. 469, 200 N. E. 173, (wherein it was stated

that the intention of a party has an important bearing on the question of residence, especially where the party is unmarried and has no family). In *Dodd vs. Lorenz*, supra, the Iowa court concluded as follows, (id., page 520 of 210 Iowa):

"* * * The acquisition of a residence or domicile is largely a matter of intent. The undisputed evidence in the instant case shows that, as to each of said voters, there was the intent to make Traer a permanent residence for so long a time as the party was employed as a teacher in said school. The fact that the parental home was referred to as 'a sort of a home' does not change the legal status of the voter. It is a common thing for a person to refer to his birthplace or the residence of his parents as 'home,' although he may have an established residence and home of his own at another place."

In view of these decisions and the restatement of the law from Corpus Juris, it is apparent that no hard and fast rule may be laid down to determine a person's residence for the purpose of exercising one's voting franchise; rather each case must be determined upon its own peculiar facts. However, this much may be said of certainty: the right to vote in a certain state, county or precinct ordinarily requires the concurrence of two things,—the act of residing coupled with the intention to do so, and that in election statutes wherein the word "residence" appears it is almost universally interpreted as meaning "domicile."

The first question presented no doubt refers to the soldiers stationed at Fort Des Moines, which is a regular army post or reservation. The United States government, by purchase or otherwise, from the period 1900 to 1908 obtained title to certain lands within the boundaries of the state of Iowa which became the army reservation or post known as Fort Des Moines. In regard to the acquisition of this land, attention is directed to the provisions of Chapter I of Title I, Sections 3 and 4, Code of Iowa, 1935, and an act of the 29th General Assembly, ceding to the United States exclusive jurisdiction of certain lands or lots acquired by that government for public purposes within the state of Iowa, and authorizing the acquisition thereof.

In view of the express provision of Article II, Section 4, of the State Constitution, quoted *supra*, it may be said that a soldier stationed at Fort Des Moines cannot by virtue of residence within the army post or reservation acquire a voting residence in this state and Polk County. See: *McMahon vs. Polk*, 10 S. D. 298, 73 N. W. 77, 47 L. R. A. 930; *Re Highlands*, 48 N. Y. S. R. 795, 22 N. Y. Supp. 137; *Opinion of Justices*, 1 Met. (Mass.) 580, 583; *Sinks vs. Reese*, 19 Ohio St. 306, 316, 2 Am. Rep. 397. In 20 *Corpus Juris* 74, section 33 it is stated:

"Since land which has been ceded by the state to the United States for the use of some department of the general government, without any reservation of jurisdiction except the right to serve civil and criminal process thereon, ceases to be a part of the state, such land cannot become a voting residence in the state in which it is situated, * * *"

See cases cited *supra*. Also *State vs. Willett*, 117 Tenn. 334, 346, 978 S. W. 299; *Ft. Leavenworth R. Co. vs. Lowe*, 114 U. S. 525, 5 S. Ct. 995, 29 L. ed. 264.

1.

Is the rule otherwise with respect to a soldier stationed at Fort Des Moines, but who has established a residence for himself or for himself and family outside the army post or reservation? The question finds answer in the dictum of the Iowa Supreme Court in its decision in the case of *Harris vs. Harris*, 205 Iowa 108, 215 N. W. 651. That case was an action for divorce instituted

in Polk County by the plaintiff, a soldier in the United States army stationed at Ft. Banks, Mass. A special appearance was filed by the defendant wife, denying the jurisdiction of the district court of Iowa in and for Polk County, on the ground that the plaintiff was not a resident of this state. The special appearance was overruled, and, on appeal to the supreme court, the order of the lower court was affirmed. The court was of the opinion, after reviewing the evidence taken by way of deposition and oral testimony adduced on the hearing, that while the plaintiff at all times in question was in the military service of the United States government and was stationed in places over which that government had complete and absolute control, yet it was quite apparent that the only residence plaintiff ever had was Des Moines, Polk County, Iowa. The plaintiff's testimony was to the effect that whenever the government released him from his duties, he intended to return to Des Moines and make that his future home. We quote the following pertinent excerpts from the opinion (id., page 109, et seq., of 205 Iowa):

"The one controlling question, although novel, finds easy solution. The question is whether a person who is an officer in active service in the army of the United States can acquire a domicile in the army post or camp where he is stationed, even though he establishes his family there.

"The numerical weight of judicial authority answers the question in the negative. (Citing cases.) The legal principle is declared and approved by the American Law Institute. See Conflict of Laws, Restatement No. 1, Topic 3.

"A naval officer cannot acquire a domicile at his station or on his vessel, for the same reason,—that his going and staying at his post when so ordered are not a matter of his choice. *Knowlton vs. Knowlton*, 155 Ill. 158 (39 N. E. 595) (reversing 51 Ill. App. 71); *Brown vs. Smith*, 15 Beav. 444.

"An officer may ask for a post, and may, on his application, be assigned to it; but this is entirely in the will of his superior officer, and the choice is not in the power of the applicant. Nor does an officer under martial discipline, when detailed for special duty in a certain place, acquire a domicile there, although he may take his family there (*Knowlton vs. Knowlton*, supra; *Remey vs. Board of Equalization*, 80 Iowa 470); and a person who enters the army of another country gets no domicile in the country whose army he joins. *Ex parte Cunningham*, 13 L. R. Q. B. D. (1883-84) 418. Therefore, a person under such circumstances cannot, in any proper sense of the term, have a residence anywhere other than the home he has left, since he has no choice as to where he goes, the time he can remain, or when he shall return. To gain either an actual or legal residence, there is, of necessity, involved at least the exercise of volition in its selection, and this cannot be affirmed of the residence of either a soldier or a sailor in active service. *Radford vs. Radford*, supra.

To this point in the opinion it would appear that a soldier, sailor, marine or one similarly situated, could not in any manner establish a voting residence in this state when stationed in this state by military order. However, the Iowa court goes on to say (id., page 110 or 205 Iowa):

"It is true that an officer or a private may establish a home near his military station, and thus acquire a domicile there, but this must be established by independent evidence of a change of domicile to that place. *Ex parte White*, 228 Fed. 88.

"If a soldier stationed at any army post is permitted to live outside the post, it was held *In re Cunningham*, 45 Misc. Rep. 206 (91 N. Y. Supp. 974), such person may acquire a domicile there. *There seems to be no doubt that a soldier may acquire a new domicile apart from the army, and the fact that he cannot stay in the new home if called away to the army does not prevent his forming the animus manendi and acquiring the domicile there. Mooar vs. Harvey*, 128 Mass. 219; *Hodgson vs. De Beauchesne*, 12 Moore P. C. 285; *President of the United States vs. Drummond*, 33 Beav. 449; *Attorney General vs. Pottinger*, 30 L. J. Ex. 284.

* * *

"A residence once established continues until a new one is acquired. A change of residence does not consist solely in going to and living in another place, but it must be with the intent of making that place a permanent residence. The temporary absence from the state of one domiciled there will not be held a change of residence, unless to the fact of residence elsewhere be added animus manendi; for a domicile, having once been acquired, continues until a new one is actually acquired, animo et facto. 9 Ruling Case Law 403."

The court then reflected:

"The intent of the plaintiff has been declared; and, although he never voted in Des Moines, he would have been so privileged, had the opportunity been presented. * * *"

In the cited case of *Ex parte White*, 228 Fed. 88, the federal district court for New Hampshire, assumed, without deciding, that a soldier may change his domicile and establish it at any place he may see fit while engaged in military duty, but stated that it still remained that the intention to change must be clear, and must be associated with something fixed and established as indicating such a purpose.

However, in *Mooar vs. Harvey*, 128 Mass. 219, a case involving a suit on certain promissory notes, the question arose as to whether or not the defendant had changed his domicile from Lawrence, Mass., to Washington, D. C. The court stated (id., page 220):

"* * * the defendant was in the military service subject to the orders of his superior officers, but it is not true, as contended by his counsel, that therefore he could not gain a new domicil in any place to which he was ordered. In all matters not involved in his military duties, he was sui juris, and had the capacity to change his domicil to any place if he saw fit. The jury would be justified in finding that, since 1864, he has actually lived in Washington, with short occasional absences. This is one essential element of domicil in Washington.

"The remaining element is the intent with which he lived there. The burden was upon the plaintiff to prove that he lived there with the intent to make it his home or domicil; and the only exception now insisted upon is to the ruling of the court that there was sufficient evidence to be submitted to the jury upon this question. But, as we have before said, he lived in Washington, and all the outward *indicia* which usually determine the domicil of a person pointed to that place as the place where he resided and had his home. The evidence tended to show that he had not paid taxes nor voted in Lawrence since 1862. This failure to perform the duties and avail himself of the privilege of a citizen is a significant fact pointing to a change of domicil."

And in the cited case of *In re Cunningham*, 45 Misc. Rep. 206, 91 N. Y. Supp. 974, the inspectors of election refused to place the names of certain persons on the register on the ground that they were members of the Fifth United States Infantry, and thus under the Constitution could not acquire a voting residence in the particular ward wherein they sought to register. Said the county court (id., page 974 of 91 N. Y. Supp.)

"* * * This contention is based on the following provision of the Constitution:

'For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States.' State Const. art. 2, sec. 3.

"This provision of the Constitution is aimed at the participation of an unconcerned body of men in the control through the ballot box of municipal affairs in whose further conduct they have no interest, and from the mismanagement of which by the officers their ballots might elect they sustain no injury. Its effect is not to disqualify such persons from gaining or losing a residence, but renders the fact of sojourn or absence impotent as evidence either to create or destroy it; in other words, presence or absence has primarily no effect upon

the political status of such person. The question in each case is still, as it was before the adoption of this provision of the Constitution, one of domicile or residence, to be decided upon all the circumstances of the case. *Silvey vs. Lindsay*, 107 N. Y. 55, 13 N. E. 444. The soldier may acquire a residence in the new locality. His calling the place his home, or believing it to be his home, does not legally make it such. It is not his view of the fact that governs. The facts themselves govern the question. Mere intention is not alone sufficient. It must exist, but must concur with and be manifested by resultant acts which are independent of the presence of the soldier in the new locality. *It appears from the evidence produced on the part of the applicants that they have resided outside of the military reservation, within the state and Ward No. 6 of the city of Plattsburgh, during the year past.* * * * I think the proof sufficient to establish a residence in the ward for over a year last past, * * *" (Italics ours.)

In *Ames vs. Duryea*, 6 Lans. 155, 157 (aff. 61 N. Y. 609 mem.) it was held that although a soldier while in the army neither acquires nor loses his residence in the state in which his domicile was when he entered the army, yet it is as competent for a soldier to abandon a domicile and acquire a new one as it is for any other citizen; and his purchasing or renting a dwelling house to which he removes his family and in which he lives are evidence of a change of domicile, in the absence of any fact manifesting an intention not to remain permanently in such new domicile. See also *Wood vs. Fitzgerald*, 3 Ore. 568, 572, wherein the court stated that it could not see the legal force or propriety of placing such a construction upon the constitution as would preclude an employee of the United States or state government from making any change in his domicile that he would desire to make, and that though such a one cannot gain or lose a residence by reason of his presence or absence when employed in the service, yet he cannot establish his domicile and gain a residence at such a point as he may see fit by taking the proper and appropriate steps so to do independent of his employment. Accord: *Hunt vs. Richards*, 4 Kan. 549.

In 19 *Corpus Juris* 418, section 39, it is stated as follows:

"The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being temporarily stationed in the line of duty at a particular place, even for a period of years. *A new domicile may, however, be acquired if both the fact and intent concur.* * * *" (Italics ours.)

The reason that may be assigned for the rule that the domicile of one in military service remains unchanged is that in order to gain either an actual or legal residence, there is, of necessity, involved at least the exercise of volition in its selection, and this cannot be affirmed of the residence of a soldier or sailor in active service who is subject to military order. See: *Radford vs. Radford*, 26 Ky. L. 652, 82 S. W. 391. However, the courts that have had this question before them invariably hold that a new domicile may be acquired if both the fact and the intent concur, and notwithstanding the fact that one in military service is subject to immediate assignment elsewhere.

In *Remey vs. Board of Equalization of City of Burlington*, 80 Iowa 470, 45 N. W. 899, it was held that the wife of one in the naval service of the United States government, such wife having resided in Burlington, Iowa, but who subsequent to her marriage had taken up her residence in Washington, D. C. and Norfolk, Virginia, by virtue of her husband being stationed there a part of the time since she left this state, no longer had a residence in this state for the purpose of taxation.

In the 1934 Report of the Attorney General, page 331, et seq., it was held that the legal settlement of the wife of an enlisted man stationed at Fort Des Moines, and who had established a home for her near Fort Des Moines, but outside the reservation, was Polk County, Iowa, and that Polk County would be obligated to furnish to her medical assistance.

In view of the various decisions cited and quoted from, the former opinion of this department, and the express wording of Section 4, Article II, *supra*, which prevents the acquisition of a voting residence by virtue of one in military service being "stationed in any garrison, barracks, or military or naval place or station within this state," it is the opinion of this department that a soldier garrisoned at Fort Des Moines, whether he be single or married, may gain a residence in this state, and by virtue thereof exercise the elective franchise *if* there be a concurrence of the two essentials, viz., (1) the act of residing in this state outside and off the army reservation or post, and (2) with the intention of establishing a residence in this state,—the *animus manendi* coupled with the overt act of residing in this state outside the reservation or post.

2.

In considering the second question it should be observed that CCC camps are not invariably located on United States government owned lands. Usually such camps are leased, and they are not of the character of army reservations or posts. We are informed, however, that the camp established in Polk County is located within the Fort Des Moines army reservation or post. It should be observed further that there is nothing expressly contained in the Constitution inhibiting an enrollee in the corps from acquiring a residence in this state and in the county in which the camp is located,—when such enrollee's presence within the state is occasioned by his enrollment in the Civilian Conservation Corps. May it be said then that the very act of residing at the camp for the requisite period of six months, sixty and ten days respectively, could result in the establishing of a voting residence in this state and in the county and precinct where the camp is located, *if* the enrollee intends to establish his residence there? This question has been answered in the affirmative by this department in an opinion appearing in the 1934 Report of the Attorney General, page 720, et seq. The conclusion expressed in that opinion is that single men who came to the camp with the intention of establishing a residence there would be entitled to vote in the precinct in which the camp is located. The same conclusion was expressed with respect to married men, providing they came to camp with like intent and moved their families and established homes for them in the county in which the camp is located.

Reference may be made to the New York case of *In Re Geis*, 162 Misc. 398, 293 N. Y. Supp. 577. Therein certain prospective voters were living at "Camp Elmsford,"—a camp organized and maintained pursuant to the provisions of an act of Congress known as the Federal Conservation Law. These persons claimed to be employed in that branch of the service known as the National Park Service. When they appeared for registration in the election district in which the camp was located, their right to register was challenged, and each of said persons subscribed and swore to a challenge affidavit. The court, in examining the affidavits, found that in no instance was any member of the camp whose name was sought to be stricken from the registry a resident of the

election district in which the camp was located at the time such member entered the camp. Their right to vote was challenged because they were conceded federal employees, and under the New York Constitution could neither gain nor lose a voting residence while engaged in such employment. We quote as follows from the opinion of the court appearing at page 578 of 293 N. Y. Supp.:

"* * * The affidavits are identical except as to minor changes such as the length of time they have resided at the camp, salary received, etc., and each claiming that Camp Elmsford is his legal home and residence. The challenge affidavits, however, disclose that many of the applicants for registration have wives living in various parts of the country. Many others if they have voted at all, voted at places far distant from this election district. It appears further from the affidavits in opposition that the men are all paid a certain wage per month by the Government and from this amount there is deducted a certain portion to cover the cost of their board and sustenance. They are clearly 'federal employees' as defined by the State Constitution and Section 151 of the Election Law, and their names must be stricken from the roll for the reason that they are not entitled to vote in the district in which the camp is located unless there are extraneous circumstances to show that they have an intention of making such election district their domicile and place of residence irrespective of their employment in Camp Elmsford. The replying affidavits are bare of any facts to show a change of residence or intention to change their residence outside of their attendance at the camp. Under such circumstances, it has been held repeatedly that they are not entitled to vote. See In re McCormack, 86 App. Div. 362, 83 N. Y. S. 847, wherein it was held by Appellate Division in this department that a seminarian residing at St. Joseph's Seminary, City of Yonkers, could not gain a voting residence by merely declaring that he intended to make the Seminary his permanent home. See also, In the Matter of Garvey, 147 N. Y. 117, 41 N. E. 439; In re Blankford, 241 N. Y. 180, 149 N. E. 415. In order to entitle the occupants of this camp to become legally entitled to registration, there must be some evidence other than their mere attendance at the camp, to show that the applicant has chosen a new residence.

"I am aware that there are cases where such findings have been made. Matter of Cunningham, 45 Misc. 206, 91 N. Y. S. 974.

* * *

"It is perfectly apparent from reading this record that each one of these prospective voters is a temporary resident at Camp Elmsford and to permit them to vote would be a flagrant violation of the Constitution of the State of New York and of the Election Law."

The cited Cunningham case has been alluded to hereinbefore, and wherein it was held that soldiers who resided outside the military reservation within a city for a year would be entitled to register under the election law, the evidence being sufficient to establish a residence for such purpose. The New York court recognized that if there was evidence separate and apart from the mere attendance at the camp indicating a choice of a new residence at the situs of the camp, then, dependent upon the circumstances in each case, it might be held that a voting residence could be established in the election district in which the camp was located. As indicated in the opinion, the prospective voters there involved were employed by the United States government under Section 585 (16 U. S. C. A.) of the Federal Conservation Law. It should be mentioned that the Civilian Conservation Corps appears in 16 U. S. C. A. as Section 584, et seq., of the Federal Conservation Law. Hence, the reasoning and result of In Re Geis, *supra*, may be said to be directly applicable here.

In *McBeth vs. Streib*, (Tex.), 96 S. W. (2nd) 992, the appellant challenged eighteen ballots cast by members of the Civilian Conservation Corps on the ground that by reason of their enrollment in said corps and subjecting themselves to the rules necessary or incident to such employment and status, they

had not acquired and could not acquire residence in the precinct where they lived and in fact voted. The Texas statute defining "residence" for voting purposes provided that the residence of a single man is where he usually sleeps at night. In the case before the court each of the eighteen voters who were challenged was a single man, and they usually slept where they lived and worked. The court in holding the votes properly received took occasion to state, (id., page 995):

"* * * There is no provision or intimation that if they sleep on the grounds of a state park, or eat at a dining hall furnished by the federal or any other government, they are not residents of the locality or precinct in which they actually live.

"In any event, it is well settled, we think, that the question of one's residence in this state is distinctly one of intention and of fact. (Citing cases.)

* * *

"The presumption, of course, obtains here, as generally in this state, that every man has the right and privilege of fixing his residence according to his own desires. This applies to single men as well as married men, though it is a matter of common knowledge that single men do change their places of residence more frequently than married men. That fact, however, does not change or take away their definite legal rights, if, as, and when they comply with the law and acquire same under a change of residence or otherwise. It is equally true that a man is presumed, ordinarily, to 'reside' where he 'lives,' and this is true for voting privileges, provided he has lived there for the length of time prescribed by law; and certainly this is true if he declares such to be his intention and he proceeds to perform the acts and duties incident to legal residence, such as securing his poll tax receipt or exemption certificate, and for the very purpose of so doing, and then actually votes, at the local or precinct elections of his residence.

* * *

"It is clear to us that these citizens all being single men, even though they were at the time, and now are, members of the Civilian Conservation Corps, and subject to all its rules and regulations, were not then, and are not now, disqualified to vote in the precinct of their 'residence' by reason of their membership in such organization."

See also: *Attorney General ex rel. Miller vs. Miller*, 266 Mich. 127, 253 N. W. 241.

If under all of the circumstances there be a concurrence of the act of residing, separate and apart from mere attendance at the camp, with the intention of establishing a residence in the county and precinct wherein the camp is located, it is the opinion of this department that CCC camp enrollees, whether they be single or married, and whether or not they reside within or without the camp, may establish a residence in the county and precinct in which the camp is located.

In the case of the enrollees of the CCC camp located at Fort Des Moines, and within that army reservation or post, it is the opinion of this department that such enrollees could not establish a voting residence in Polk County and in the precinct in which such camp is located unless, as in the case of soldiers stationed at said Fort, they establish a residence outside the army post or reservation with the intention of establishing a residence there. See: *McMahon vs. Polk*, supra; *Sinks vs. Reese*, supra; 20 Corpus Juris, 74, section 33.

3.

As to the third question, it should be first pointed out that CCC camps are under the supervision and control of the Department of War of the United States government. The officers in charge are either regular commissioned army officers or reserve officers on active duty. They are stationed at the

camp pursuant to military order. Such camp is their station insofar as their superior authority is concerned. Therefore, notwithstanding the difference in character between a CCC camp and a military reservation or post, it is the opinion of this department that the constitutional prohibition contained in Section 4, Article II, *supra*, applies with like force to officers in charge of such camps so as to prevent their acquiring a voting residence in this state or in the county wherein the camp is located where such residence is occasioned by assignment to the camp in the line of duty. The prohibition applies not by reason of the fact that the United States government has exclusive jurisdiction and control over the camp, as in the case of military reservations or posts, but rather for the reason, as we interpret the Constitution, that no person in the military service of the United States shall be considered a resident of this state by being stationed in any garrison, barracks or military or naval place or station within this state. Therefore, the same rule obtains here as in the case of a soldier stationed at Fort Des Moines, and a voting residence could be established only in the manner as has been pointed out with reference to such soldier stationed at Fort Des Moines.

In the final analysis, each of the questions submitted is a fact question that can be determined only by a consideration of all of the circumstances involved. One proposition definitely settled is that a soldier, be he commissioned or non-commissioned, cannot by virtue of his residence within an army post or reservation, or in the case of an officer stationed at a CCC camp, pursuant to military order, acquire a residence for the purpose of exercising his elective franchise.

It should be borne in mind that any person offering to vote may be challenged as unqualified by any judge or elector, and it is made the statutory duty of the judges to challenge any person offering to vote whom they know or suspect not to be duly qualified, whereupon no ballot shall be received from such person until he shall establish his right to vote. Section 796, Code of Iowa, 1935. The procedure followed when a voter has been challenged is set out in Sections 797 and 798, Code of Iowa, 1935.

The constitutional requirement as to residence is an absolute requirement,—just as absolute as the requirement that the voter shall have reached the age of twenty-one years. *Taylor vs. Independent School District of Earlham, et al.*, supra. The prerogative to challenge should be jealously guarded, and while it should not be employed promiscuously, yet in cases such as those presented in this inquiry where the right to vote is dependent upon the facts, the judges of election should exercise such prerogative with wise discretion.

ELECTIONS: ELECTION BOARD: BOARD OF SUPERVISORS: SECTIONS 730 TO 733 INCLUSIVE: Not more than two judges nor more than one clerk of election board may belong to same party. Board of supervisors to complete election board from membership of parties casting largest and next largest vote at last general election.

May 21, 1938. *Honorable Robert E. O'Brian, Secretary of State:* You request the opinion of this department as to the interpretation of Sections 730 to 733, inclusive, Code of Iowa, 1935, relating to election boards. The question is prompted by the fact that the Farmer Labor Party, by reason of having cast at least two per cent of the total vote cast at the last general election for its candidate for governor, is a political party, within the purview of Section 528, Code of Iowa, 1935. There now being three political parties in this state, at

least in the primary election, the question is whether or not each of said parties is entitled to representation on various election boards throughout the voting precincts of this state.

The sections cited provide as follows:

"730. *Election boards.* Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors of another party qualified and willing to act as such judge or clerk. Nothing in this chapter shall change or abrogate any of the provisions of law relating to double election boards.

"731. *Judges in cities and towns.* In cities and towns, the councilmen shall be judges of election; but in case more than two councilmen belonging to the same political party or organization are residents of the same election precinct, the county board of supervisors may designate which of them shall serve as judge.

"732. *Judges and clerk in township precincts.* In township precincts, the clerk of the township shall be a clerk of election of the precinct in which he resides, and the trustees of the township shall be judges of election, except that, in townships not divided into election precincts, if all the trustees be of the same political party, the board of supervisors shall determine by lot which two of the three trustees shall be judges of such precinct.

"733. *Supervisors to choose additional members.* The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented."

By virtue of Section 559, Code of Iowa, 1935, providing as follows:

"559. *Judges and clerks.* Judges and clerks of primary elections shall be selected, appointed and shall organize, and vacancies shall be filled, as in case of general elections. Judges are authorized to administer oaths as hereinafter provided."

sections 730 to 733, inclusive, *supra,* are made applicable to primary elections.

From the foregoing quoted sections of the Code it will be seen that an election board shall consist of five persons, three of whom shall be judges and two of whom shall be clerks. No more than two judges and no more than one clerk may belong to the same political party. Therefore, the remaining judge and clerk must necessarily belong to some other political party, providing, of course, there is at least one elector of another political party qualified, willing and able to act as such judge or clerk. Section 730, *supra.*

This division remains the same in all precincts whether they be in cities and towns or in townships.

Where, by reason of the political complexion of a city or town council or board of township trustees (no more than two judges nor one clerk may be of the same political party), it becomes necessary to complete or make up in its entirety the election board for a given precinct, it is incumbent, under the law, upon the county boards of supervisors to complete or make up the election board from the membership of those parties casting the largest and next largest number of votes in the precinct at the last general election, providing, however, that no more than two judges and no more than one clerk of any election board can be members of the same political party.

BOARD OF SUPERVISORS: SECONDARY ROADS: ROAD PROGRAM 1935: County board of supervisors (Franklin County) is authorized to proceed with completion of the work. Section 4644-c24.

May 23, 1938. *Iowa State Highway Commission, Ames, Iowa:* You have presented the following proposition, and we have considered it.

It appears that Franklin County adopted a secondary road program for the years 1935, 1936 and 1937; that this program has not been completed; that the board of supervisors of the county, with the approval of the Highway Commission, have issued anticipatory certificates to procure funds with which to complete the program, and that they have these funds on hand. That the county trunk road system of the county has been completed, and the board does not care to add to it at this time, and that the work that is to be done is all on the local roads; that the completion of the former program is all the construction work that the board expects to do in the current year. That the county trunk road system of the county has been completed, and the board does not care to add to it at this time, and that the work that is to be done is all on the local roads; that the board of approval originally approved the program that is awaiting completion; that no meeting of the board of approval has been held since the approval of this program (probably in 1935).

You ask whether or not the board of supervisors of Franklin County can now proceed with the completion of that program without it being readopted, and whether or not, if readoption is required, the approval of the board of approval is necessary?

Section 4644-c24 of the Code 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 the section does not provide in express terms that the program must be completed within the period for which it is planned. It provides that the board shall adopt a program based upon the construction funds "estimated" to be available for such year or years. The following sections, on the action to be taken on the construction program, contain no limitation as to the date of completion.

In an opinion dated August 26, 1933, found on page 337 and following, of the reports of the Attorney General for the years 1933-1934, the then Attorney General expressed the opinion that the power to complete the program expires with the expiration of the period for which the program was adopted.

We are unable to concur in that opinion. We think that the program is still the program even though the board was unable to complete it by use of the funds actually received during the years for which the estimate was made. If the uncompleted work is only a part of the work to be done with the funds on hand for construction purposes, or rather the funds estimated to come to the board for that purpose during the ensuing year, the board would have no authority to do the additional work, over and above the completion of the former program, without calling in the board of approval and adopting a new program.

It is quite unlikely that many instances will occur where, as here, the board expects to confine its construction work during the current year to the completion of the former program. And so, ordinarily it will be necessary to call in the board of approval in order that the new program of construction may be passed on by that board. But here, as stated, the board expects to confine itself during the current year to completing the construction work authorized in the former program; funds are available for its completion; it has been approved by the board of approval and the Highway Commission; and anticipatory certificates were issued with the approval of the Highway Commission. And so, we see no obstacle in the way of completing this former program, and

we do not think that it is necessary to call in the board of approval, or to readopt the uncompleted program as and for the program for the ensuing year.

It is our opinion, therefore, that the Franklin County board of supervisors is authorized to proceed with the completion of the work.

BOARD OF SUPERVISORS: CONTRACT: SECONDARY ROAD: FINANCIAL STATEMENT: If financial statement is filed before award of contract is made it is filed in time, and board of supervisors (Washington County) has right to accept the bid and award the contract.

May 31, 1938. *Iowa State Highway Commission, Ames, Iowa:* In re: Approval of contract for Secondary Road Construction work in Washington County.

It appears that Washington County has made an award of a contract for construction work, but has held up the matter of signing the contract pending receipt of an opinion from this department on its power to make the award, in view of the fact that the successful bidder had no financial statement on file at the time the bids were opened.

We are advised that in this instance the board opened the bids, found the bid of the Hargrave Construction Company to be the low bid, called the attention of that company to the fact that it had no financial statement on file, and postponed making the award pending the filing of the financial statement, which the Hargrave Construction Company promised to file, and did file, within a short time, and that this statement was on file at the time the county made the award.

Section 4644-c41 of the Code, provides, among other things, as follows:

"Each bidder on secondary road construction work shall file with the board, statements showing his financial standing, his equipment and his experience in the execution of construction work. Said statements shall be on standard forms prepared by the state highway commission.

In the award of contracts, due consideration shall be given not only to the prices bid, but also to the financial standing of the contractor, his equipment, and his experience in the performance of like or similar contracts as shown by such statements."

We think that the filing of a financial statement is mandatory, and that the board has no right to make an award of a contract to a contractor who has failed to furnish such a statement. However, the statute does not fix the time within which such financial statement shall be filed, except that it provides that such statement shall be considered in making the award.

We are therefore of the opinion that if the financial statement is filed before the award is made, it is filed in time, and that the board of supervisors of Washington County has the right to accept the bid and to award the contract to the Hargrave Construction Company.

WORLD WAR ORPHANS' EDUCATIONAL AID FUND: ORPHANS' EDUCATION AID: STATUTES: Benefits of educational aid fund accrue only to those orphans whose parent or parents died in service in World War between April 6, 1917, and July 2, 1921, or as a result of such service during this period.

May 25, 1938. *Mr. J. J. Miller, Executive Secretary, Bonus Board:* We acknowledge receipt of your request for the opinion of this department upon a question arising under Section 3, Chapter 88, laws of the 47th General Assembly which authorized the world war orphans' educational aid fund. Your question is stated as follows:

"Are only the orphans of veterans killed in action or who died as a result of service between the above dates entitled to benefits from this act or are also the orphans of veterans who died as a result of service subsequent to July 2, 1921, the legal termination of the war, eligible to receive this aid?"

Section 3 of said Chapter 88 authorizes the granting of aid in an amount not to exceed $150.00 per year to a child who otherwise qualifies:

"* * * and who is the child of a man or woman who died during the World War between the date of April 6, 1917, and July 2, 1921, while serving in the army, navy, marine corps or nursing corps of the United States, or as a result of such service. * * *"

It is apparent that the statute lays down a clear limitation or restriction in the phrase "during the World War between the date of April 6, 1917, and July 2, 1921." The following two added qualifications both are consistent with the express intent to limit the benefits to children whose parent or parents died during the war period. In the first classification are those persons who died *while in service* during the said period. In the next classification are those persons who died during the said period while *not in the service* but as a result of such service. In this latter class would fall those persons who served their country in the World War, who were discharged from the service and who subsequently died as a result of such service *during the pendency of the war.* The benefits of the act may not be extended to a child whose father or mother died *after* the war period as a result of military service since the death would not have occurred during the World War period.

The above construction is consistent with the interpretation heretofore placed upon the statute by the state department which is administering the law. It may be said further that the national director of education of war orphans of the American Legion construes the Iowa statute herein referred to as being applicable to "war orphans" as distinguished from "post-war orphans." "War orphan" is defined by the director as follows:

"The term 'war orphan,' as herein employed includes children, boys and girls, whose fathers were killed in action or died from wounds or other causes during the period of the World War, between April 6, 1917, the date of the declaration of war, and July 2, 1921, the legal termination thereof. It applies to children whose mothers are still alive as well as to those who have lost both parents."

"Post-war orphan" is defined as follows:

"The term 'post-war orphan' includes children of World War veterans who have died since July 2, 1921, of disease or disability resulting from war service. Like the term 'war orphan,' it applies to children whose mothers are still alive as well as to those who have lost both parents."

The national director of education of war orphans has construed the Iowa act as applicable only to war orphans. See American Legion Handbook, Education of War Orphans, page 6.

While it is our opinion that the language of the statute referred to above is clear and unambiguous, it is to be noted that the extraneous sources referred to above confirm the conclusion we have reached.

In view of the foregoing, we are of the opinion that only the children of veterans who died during the World War between the dates designated by the statute are eligible to receive the aid granted by the law.

BOARD OF SUPERVISORS: WEED COMMISSIONER: NOXIOUS WEEDS: WEED ERADICATION: Statute requires that notice other than published notice be given where cost of weed destruction appears likely to exceed $25.00 on given property. Notice to be given by registered letter.

May 28, 1938. *Honorable Thomas L. Curran, Secretary of Agriculture:* We acknowledge receipt of your request for an opinion on the following question:

"In the event that the county board of supervisors has published the program of weed eradication mentioned in Section 4829 and Section 4829-a1 of Chapter 131, Acts of the 47th General Assembly, is it necessary that property owners be given an individual notice before the weed commissioner enters upon the land to destroy or keep from seeding any noxious weeds growing thereon, when (1) the cost will exceed $25.00 for such destruction, and (2) when the cost will not exceed $25.00 for such destruction?"

Chapter 131, Laws of the 47th General Assembly, was an act to repeal certain sections of the 1935 Code of Iowa, and to enact a substitute therefor, all relating to the eradication and control of weeds. Section 4829 of said chapter reads as follows:

"4829. The board of supervisors of each county shall each year, upon recommendation of the county weed commissioner, or township commissioners, by resolution prescribe and order a program of weed destruction to be followed by land owners or tenants or both, which in five years may be expected to destroy and immediately keep under control any areas infested with any primary noxious weeds on farm land, and shall designate the cutting dates to prevent seed production of all other varieties of noxious weeds. Quack grass in pasture land, rough timbered land or on the highways, railway rights-of-way and public lands, when acting as soil binder, may be exempt from such order if approved by the supervisor."

Section 4829-a1 provides:

"4829-a1. Notice of any order made pursuant to the foregoing section shall be given by one publication in the official newspapers of the county and shall be directed to all property owners. In cases where the cost appears likely to exceed twenty-five dollars, notice to property owners shall be by registered letters. Provided, however, that where any railroad company has filed a written instrument in the county auditor's office, designating the name and address of its agent, the county auditor shall send, by registered mail, a copy of said notice to such agent. Said notice shall state:

1. The time for destruction.
2. The manner of destruction, if other than cutting above the surface of the ground.
3. That unless said order is complied with the weed commissioner shall cause said weeds to be destroyed and the cost thereof to be taxed to the owner of the property."

By virtue of the second quoted section of the statute, it is clear that a program of weed destruction having been prescribed by resolution of the board of supervisors of a given county, it then is incumbent upon said board to give notice thereof, directed to all property owners, by one publication in the official newspapers of the county. It is required that the notice specify the time for destruction, the manner of destruction, if other than cutting above the surface of the ground, and a direction that unless the order of the board is complied with, the weed commissioner shall cause said weeds to be destroyed and the cost thereof to be taxed to the owner of the property. The statute requires further that in those cases where the cost (of weed destruction) appears likely to exceed twenty-five dollars (on a given property), notice (of any order made pursuant to Section 4829, supra) must be given such property owners by registered letter. Such notice is in addition to the published notice that is required to be directed to all property owners.

As has been stated, the published notice required by Section 4829-a1, supra, admonishes the property owner that unless the order of the board is complied with, the weed commissioner, or commissioners, shall cause the weeds to be

destroyed at the expense of the property owner. In this connection Section 4829-a3 provides as follows:

"4829-a3. In case of a substantial failure to comply with such order, the weed commissioner, or commissioners, shall forthwith cause such weeds to be destroyed, and the expense of such destruction and the costs of any special meetings, if any, shall be paid from the county general fund, and recovered later by an assessment against the property owner, as provided in section four thousand eight hundred twenty-nine-a six (4829-a6) hereof."

It is to be noted that the commissioner, or commissioners, must proceed forthwith in case of a substantial failure on the part of the property owner to comply with the board's order. "Forthwith" in its ordinary legal connotation means "within a reasonable time in view of the nature of the act required."

The question submitted was apparently provoked by the language of Section 4822, Chapter 131, supra, which contains the specific power and authority of the weed commissioner, or commissioners, and his or their employees, to enter upon any property to destroy weeds pursuant to the order of the board of supervisors. This section provides as follows:

"4822. Said weed commissioner, or commissioners, and all employees acting under his or their directions, due notice having been given to the land owners ten days previous, shall have full power and authority to enter upon any land within his jurisdiction upon which is growing any of the noxious weeds for the purpose of destroying said weeds."

The language of this section, in the opinion of this department, does not require other or further notice to individual property owners, but refers to the notice required under Section 4829-a1, supra. In other words, the "due notice" referred to is the notice given under Section 4829-a1, supra. Hence, ten days subsequent to the date set for the destruction of weeds in the published notice, and in the identical notice directed by registered letter to certain property owners, it becomes the duty of the weed commissioner, or commissioners, and his or their employees, to enter upon the property of any defaulting property owner and proceed forthwith to cause the weeds thereon to be destroyd.

ELECTIONS: PARTY AFFILIATION: A person may change his party affiliation on the day of the primary election.

June 1, 1938. *Honorable Robert E. O'Brian, Secretary of State:* You request the opinion of this department on the following question:

Can a person change his party affiliation on the day of the primary election?

It is the opinion of this department that a person may change his party affiliation on the day of the primary election. Under Section 572, Code of Iowa, 1935, an elector may go to the polls and call for the ballot of a political party other than that of which he is registered. If his right to such ballot is challenged, he may then swear or affirm that he desires to be a member of the party whose ballot he has requested. After taking the oath, the judges of election are required to deliver to him the ballot of such political party.

SCHOOLS AND SCHOOL DISTRICTS: CLAIMS: HIGHWAYS AND ROADS: School board may treat the taking of school-owned real estate by highway commission for highway purposes as a claim for damages existing in favor of the corporation. In settlement of that claim, the board may authorize the execution of a conveyance of the real estate sought to be condemned.

June 1, 1938. *Mr. Harold J. Fleck, County Attorney, Oskaloosa, Iowa:* Reference is made to your letter dated May 27, 1938, in which you state that the

board of directors of the named school has requested an opinion as to their right to convey land owned by the school corporation and lying adjacent to the highway, to the state of Iowa for highway purposes.

On May 17, 1938, this department rendered an opinion holding that a school district has authority to determine on behalf of the district the amount of damages caused by a change of grade in a street, and to authorize the execution of an instrument of release and satisfaction in payment of such claim.

The specific point involved in the opinion last mentioned is not entirely analogous to the question presented by you. It is conceded that the state, through the highway commission, has the power to condemn lands for highway purposes, and that this power would extend as against a subdivision of the state, providing such taking would not interfere with the functioning of the governmental agency from which such land is taken. This being true, it would appear that the school district in reality has a claim for damages against the state of Iowa for the value of the land so to be taken.

The question then arises as to whether or not a school district in Iowa has the authority to settle on behalf of the district, claims for damages which may arise in favor or against such school corporations.

As is pointed out in the opinion referred to above, school districts are bodies politic and under Section 4123 of the Code may sue and be sued as such, and it is our opinion that the authority so conferred upon such quasi corporations by the statute, would authorize a board of directors to prosecute claims of the district, and would include the right to arrive at a proper settlement of such claims.

We do not hold that in ordinary cases a board of directors of a school corporation has authority to convey real estate belonging to the district without authorization of the voters of the district. However, where a statute gives a paramount and absolute right to take for public purposes real estate belonging to a school corporation, we believe that compensation for the land so taken shall be considered as a claim to be prosecuted by the board of directors on behalf of the school district. Submission of the question to the voters could accomplish no purpose since a direction by the voters could not in any way affect the right of the state to take the real estate.

We have, however, found no case which holds expressly that a school district may convey real estate for highway purposes without authorization of the voters of the district.

For a discussion of the proposition that a conveyance of real estate (otherwise acquirable through eminent domain proceedings) by a title holder cuts off the right of dower as would condemnation proceedings, see *Caldwell vs. City of Ottumwa*, 198 Iowa 666. The theory is that the conveyance, under such circumstances, can be taken as the substantial equivalent of eminent domain proceedings. As was said in *Venable vs. Wabash Western R. Co.*, cited in the supra case, where conveyance was taken from a husband alone of lands for public purposes:

"Both are but *means to the same end:* both have the same object in view; for 'dedication is an appropriation of land to some public use, made by the owner of the fee' (Angell on Highways 3d Ed. Sec. 132), while condemnation is but the appropriation *in invitum* of the land, in the absence of the owner's consent. The only difference between them is, the former is *voluntary;* the latter *compulsory.* Both are *mere conduits* through which flows the consent of eminent domain."

The Iowa court in the Caldwell case cited above, said at page 676 of the opinion:

"We deem it clear that the grant in this case was obtained by the defendant city pursuant to its power of eminent domain, and that it may hold the same as securely against the claim of dower right as it could have done if it had acquired the same by condemnation proceedings."

It may fairly be concluded that the grant by the school corporation is the substantial equivalent of an acquisition by the state through eminent domain proceedings.

We believe, therefore, that it is proper for the board to treat this taking as a claim for damages existing in favor of the corporation, and in settlement of that claim, we believe that it would be proper for the board, acting under the general powers conferred by statute, to authorize the execution of a conveyance of the real estate sought to be condemned.

WEED DESTRUCTION: NOXIOUS WEEDS: BOARD OF SUPERVISORS: CITY AND TOWN COUNCILS: COUNTY AND TOWNSHIP WEED COMMISSIONERS: It is mandatory that board of supervisors prescribe a weed program providing commissioners have made recommendations. The board is not empowered to appoint a commissioner for a group of townships in the county. There is no mandatory duty on city or town councils to appoint commissioners but rests in council's discretion.

June 6, 1938. *Honorable Thomas L. Curran, Secretary of Agriculture:* You request the opinion of this department on certain questions enumerated hereinafter and arising under the provisions of Chapter 131, Laws of the 47th General Assembly, being the substituted "weed law."

1. Is it mandatory that county boards of supervisors prescribe and order a program of weed destruction, as mentioned in Section 4829?

Cited Section 4829, Chapter 131, *supra*, provides in part as follows:

"4829. The board of supervisors of each county *shall* each year, *upon recommendation of the county weed commissioner, or township weed commissioners, by resolution prescribe and order a program of weed destruction* to be followed by land owners or tenants or both, which in five years may be expected to destroy and immediately keep under control any areas infested with any primary noxious weeds on farm land * * *" (Italics ours.)

By virtue of the provisions of Section 4823, Chapter 131, *supra*, each weed commissioner for the territory under his jurisdiction is required on the first day of November in each year to make a written report to the board of supervisors of his county, setting out (1) the location of primary noxious weeds and any new weeds appearing to be a serious pest; (2) a detailed statement of the treatment used, and future plans, for eradication of weeds on each infested tract whereon he has attempted to exterminate such weeds, etc., and (3) a summary of the weed situation in his jurisdiction together with suggestions and recommendations.

Section 4823, *supra*, is couched in what is ordinarily regarded as mandatory language, as witness: "Each weed commissioner shall * * * make a written report to the board of supervisors.", and, in the opinion of this department, imposes upon the duly appointed weed commissioner, or commissioners, a mandatory duty to make such annual report to the board of supervisors of the county.

Now then, it is undoubtedly upon the basis of the weed commissioner's report that a board of supervisors could and would proceed to prescribe an intelligent

and comprehensive program of weed eradication and control,—and looking to the future—a program designed to prevent the spread and propagation of weed pests. That is the intendment of Chapter 131, *supra*, as observed from a reading of the act in its entirety. Furthermore the enforcement of said chapter, under penalty of law, is vested in the county boards of supervisors. Sections 4825, 4827, 4828, 4829-a4 and 4829-a7 to 4829-a9, inclusive, Chapter 131, *supra*.

It is to be observed also that while under the law the duly appointed weed commissioner or commissioners are endowed with certain specific powers and are charged with the performance of specific duties, yet they are in fact the representatives of the board to carry out the purposes contemplated by the law. Sections 4819 and 4820, Chapter 131, *supra*.

It is accordingly the opinion of this department that the duty of boards of supervisors to prescribe a program of weed eradication, control or treatment is mandatory, provided, however, the weed commissioner or commissioners have made the prerequisite recommendation. This conclusion is necessarily to be drawn from the language of the statute which reads "the board * * * shall * * * upon recommendation of the county weed commissioner, or township weed commissioners, * * * prescribe and order a program of weed destruction * * *". It is our further opinion that the reports of the commissioners fairly showing the need of adoption of such a program, there then devolves upon boards of supervisors the mandatory duty of carrying out the intent of Chapter 131, *supra*, by proceeding to the adoption of a weed destruction program to be followed by landowners or tenants or both, as specified in Section 4829-a1, Chapter 131, *supra*.

2. Is it possible for the board of supervisors to appoint one weed commissioner to serve in townships?

Section 4819, *supra*, provides as follows:

"4819. The board of supervisors of each county shall appoint either a county weed commissioner or one township weed commissioner for each township, whose term of or terms of office shall not exceed one year. In incorporated towns and cities each council may appoint a municipal weed commissioner, whose term of office shall not exceed one year. * * * The board of supervisors shall fix the compensation for said county commissioner or township commissioners. Subject to the approval of the board of supervisors of the county, the town or city council shall fix the compensation for the town or city commissioners. Said compensation shall be paid from the county general fund, * * *"

It is clear from a reading of this section that a board of supervisors must appoint a weed commissioner, but it is left to its discretion as to whether or not there shall be one commissioner for the entire county,—a county weed commissioner,—or a commissioner for each township of the county,—township commissioners. In event a board of supervisors appoints a county commissioner, such commissioner would have authority to act in each of the several townships of the county. In the opinion of this department, however, a board of supervisors is not empowered to appoint a commissioner for a group of townships within the county.

3. Is it mandatory that the city or town council in incorporated cities and towns appoint a municipal weed commissioner?

Quoted Section 4819, *supra*, provides that "In incorporated towns and cities each council may appoint a municipal weed commissioner whose term of office shall not exceed one year." While the term "may" as employed in the statute

is sometimes construed as "shall," yet we do not believe that in the instant case such construction of the word "may" is to be had. This is apparent from the language employed by the Legislature in Section 4819, Chapter 131, *supra.* The Legislature, when speaking of the appointment of a county weed commissioner or township weed commissioners, used the word "shall." However, as noted, the Legislature, in speaking of the appointment of a weed commissioner for cities and towns employed the permissive term "may." No doubt the Legislature had in mind the possible wasteful duplication of effort and revenue that might be occasioned by the appointment of city or town weed commissioners when there was already appointed by the board of supervisors a county weed commissioner whose authority to act in the absence of a duly appointed town or city weed commissioner would extend over such city or town.

It is accordingly the opinion of this department that there is no mandatory duty on city or town councils to appoint city or town weed commissioners, but that it rests in the council's discretion as to whether or not one shall be appointed.

Section 4829-a4, Chapter 131, *supra,* provides:

"4829-a4. The board of supervisors shall order the weed commissioner, or commissioners, to destroy or cause to be destroyed any new weeds declared to be noxious by the secretary of agriculture, the cost of which shall be borne by the county.

Section 4829-a6, Chapter 131, *supra,* provides in part:

"4829-a6. When the commissioner, or commissioners, destroy any weeds under the authority of sections four thousand eight hundred twenty-nine-a three (4829-a3), or four thousand eight hundred twenty-nine-a four (4829-a4), after failure of the landowner responsible therefor to destroy such weeds pursuant to the order of the board of supervisors, the cost of such destruction shall be assessed against and collected from the landowner responsible in the following manner: * * *"

Section 4829-a3, Chapter 131, *supra,* cited in Section 4829-a6, *supra,* refers, of course, to the noxious weeds ordered by the board of supervisors to be destroyed. Now it is conceivable that action on the part of the secretary of agriculture in declaring a new weed or weeds to be noxious would follow the adoption of a prescribed program of weed eradication, control or treatment, and that landowners would have no notice of such subsequent action. In such case, it is the opinion of this department that the clear language of Section 4829-a4, *supra,* places the burden, not only of destroying the weeds on the county through its board and commissioner or commissioners, but also the expense thereof. However, if a new weed or weeds are declared noxious, and their destruction or control is a part of the adopted program of which the landowner has notice, then, in the opinion of this department, the cost of destruction or control, in event the landowner fails to carry out the board's order, may be assessed against the defaulting property owner or owners.

HIGHWAYS AND ROADS: GRADING: DRAINING: STATUTES: The word "draining" as used in Section 4644-c37 includes the construction of necessary bridges, culverts, tile lines, etc.

June 6, 1938. *Mr. E. A. Jinkinson, County Attorney, Primghar, Iowa:* Your letter of May 31, 1938, asking the opinion of this department as to the meaning of Section 4644-c37 of the Code, has been received and considered.

The specific question you ask is whether or not the words "grading and draining" in said section includes bridges and culverts.

We think that Section 4644-c38 and Section 4644-c39 are to be considered in the interpretation of Section 4644-c37. Section 4644-c38 gives the nature of the survey, which "shall be on the basis of the permanent improvement of said roads, as to bridge, culvert, tile and road work." Section 4644-c39 requires that the survey shall show the bridges, culverts, the drainage, location and size of tile, necessary new bridges and culverts, estimate of the watershed having relation to each bridge and culvert, and an estimate of the construction cost on the basis of permanent bridges, culverts, tile and road work.

Bridges, culverts and tile lines are all made necessary because of surface water, and in a broad sense the draining of a section of road necessarily includes the construction of such bridges, culverts and sub-surface drains as may be necessary.

When we refer to drainage generally, we may refer to natural means and artificial means. If one is inspecting the drainage of certain land he notes the natural channels where the water naturally flows and observes the rivulets, creeks and other natural water courses, as well as what artificial drainage the land may have.

In Webster's International Dictionary, (2nd Ed.), one of the definitions for drainage is,—"The mode in which the waters of a country pass off by its streams and rivers."

Section 4644-c37 provides in general terms for a survey in certain instances; that is, where the grading and draining is estimated to cost over one thousand dollars per mile.

In view of the fact that the following sections provide, that when the survey is made, particular reference is required to the bridges, culverts, tile lines, etc., we think that there is no escape from the conclusion that the legislature intended that where the grading and the bridge, culvert and tile construction work is estimated to cost over one thousand dollars per mile, the survey must be made, and that the word "draining," as used in Section 4644-c37, includes the construction of the necessary bridges, culverts, and tile lines.

HIGHWAYS AND ROADS: CONTRACTS: CITIES AND TOWNS: PAVING: Under facts, of necessity there must be two contracts, the work under the contracts to be performed concurrently.

June 6, 1938. *Iowa State Highway Commission, Ames, Iowa:* Your inquiry as to the relative powers of the Highway Commission and the City of Pella to enter into a contract, as hereinafter particularly set out, has been considered.

The proposition is that the Highway Commission proposes to construct a strip of pavement twenty feet in width, several blocks in length, on the extension of U. S. Road No. 63 in Pella; that Pella desires to widen this twenty-foot slab out to the curb lines, and proposes to pay for its part of the work out of city funds without levying assessments against the abutting property. To simplify the handling of the work the city council desires to make an agreement with the Highway Commission by which the Commission would prepare the plans for the paving of the full width of the street, including not only the twenty-foot slab, being paid for by the Commission, but also the width being paid for by the city. The council also desires to have the Highway Commission receive bids, let the contract, and supervise construction work for the entire width of the pavement, and the City of Pella will agree to reimburse the Highway Commission for the cost of the additional width of pavement.

Doubtless many similar situations will arise in view of the added power given to the Commission by the 47th General Assembly to pave such primary road extensions in cities, and so the question is of much greater importance than the amount involved in this particular project.

If the law permits the plan proposed by the city council of Pella to be carried out, it would furnish a simple procedure and probably save some expense, both to the Highway Commission and to the city.

First, considering the question whether the Highway Commission has the power to enter into such a contract with the city. This would involve the use of primary road funds to pay for the work of construction of that part of the pavement to be paid for by the city, in the agreement by the city, to reimburse the Commission. The legislature has made but two exceptions to the general rule that primary road funds shall be used only for primary roads, (and in a limited way for primary road extensions in cities and towns). One is provided under Section 4626-f1 of the Code, authorizing the extension of credit to the Government; and the other gives the power to construct inter-county roads, bridges, etc., where the counties fail to agree; this under Sections 4662, 4662-a1 and 4662-a3 of the Code.

Inasmuch as the Highway Commission's powers are statutory, and there is no provision authorizing such expenditure or advance of primary road funds, we do not think that the Highway Commission could do this work for Pella on the promise of the city to reimburse it for the expense incurred.

Considering next the question whether the City of Pella has the power to pay the Highway Commission the expense involved in constructing a portion of the pavement to be paid for by it. As in the case of the Highway Commission the powers of cities and towns are derived from the statutes, and cities and towns have only such powers as the legislature has seen fit to confer upon them, including of course, such implied powers as are necessary to exercise the powers expressly given. Cities and towns have the right to improve their streets and pay the cost thereof out of city funds without making special assessments upon private property, but in letting contracts for such work they are restricted to certain procedure. In the first place, a city is required to adopt a resolution of necessity; this under Section 5991. And it is required to adopt a plat and schedule and give notice of the date fixed for the consideration of the proposed resolution of necessity. Then it is required to advertise for bids by giving notice by two publications in a newspaper published in said city; the first of which shall be not less than 15 days before the date set for the receiving of bids, and the city's contract for street improvements is required to contain a provision obligating the contractor and his bondsmen from the time of acceptance by the city to keep the street improvement in repair for not less than four years. (See Sections 5992 to 6004 inclusive.)

Further, the provisions of Chapter 23 of the Code allowing an appeal to the comptroller in case of such contracts aggregating more than $5,000 appears to apply. And under Section 6004 the city is required to let the contract to the lowest bidder. In the case of *Johnson County Savings Bank vs. City of Creston*, 212 Iowa 929, 231 N. W. 705, 84 A. L. R. 926, the court denied recovery on a contract for repair of the paving where sealed bids were not taken, and denied recovery on the claimed implied contract for the work done. This illustrates the force given to the requirements on cities that they follow certain procedure in letting these contracts.

The Highway Commission is not bound by similar limitations. We do not think that Pella is authorized to enter into the proposed contract, but think that in the improvement of its street it must comply with the statutory provisions for street improvements. However, the Highway Commission and the City of Pella can cooperate in doing this construction work in such way that the result would be substantially the same as the proposed plan. We suggest a procedure substantially as follows if it is desired to have the city's pavement and the Highway Commission pavement constructed at the same time.

That the Highway Commission in advertising for bids put in a special provision substantially to this effect: "Reserving to the bidder the right to withdraw this bid in the event he fails to receive the award of the contract by the City of Pella for the construction of the additional pavement to be constructed by that city concurrently with the work to be done under the contract with the Highway Commission." And that a similar provision be inserted in the advertisement for bids by the city; that is, a provision that the bid may be withdrawn unless the contractor is awarded the work of constructing the pavement to be done by the Highway Commission concurrently with the city's work. The matter of the supervision of the work, preparation of the plans, etc., can be agreed upon so that there will be no difficulty on these points. By so letting separate contracts, the Highway Commission will be paying for its own pavement, and the city will be paying for its pavement. Of necessity, there must be two contracts. We think it would be well to have the contracts recite that the work under the contract is to be performed concurrently with the work under the other contract. By this method, or some similar method, the statutes will be complied with and the final results desired can be accomplished. It is appreciated that this method is somewhat cumbersome, and it would be well if we had some additional legislation that would permit the plan proposed by the city of Pella to be carried out.

STATE SINKING FUND: OFFICERS: STATUTES: Provisions of the state sinking fund law applicable only to public officers included within scope of said law; prohibitions of said act do not apply to officers not subject to operation of sinking fund law.

June 8, 1938. *Mr. M. R. Pierson, State Board of Education:* This department acknowledges receipt of your request for our opinion as to whether or not the treasurer of Iowa State College may legally accept and retain, as treasurer, interest on certain demand deposits, deposited to the credit of Iowa State College of Ames, Iowa, in certain state and national banks.

Prior to the enactment of Chapter 194, laws of the 47th General Assembly, the law, as set out in Chapter 352-D1, 1935 Code, required the payment of interest on certain public deposits, and provided as follows with reference to the disposition of such interest:

"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 national banking act of 1935 provided in substance, among other things, that no interest could be paid on public deposits from and after August 24, 1937, by member banks of the federal reserve system.

To meet this situation, the 47th General Assembly, in Chapter 194, laws of

the 47th General Assembly, provided for the levying by the treasurer of state of assessments against depositories of public funds, the said act "relating to the interest paid on public deposits and the diversion thereof to the state sinking fund." Chapter 194, laws of the 47th General Assembly, repealed the above quoted Section 7420-d7, 1935 Code, and enacted in lieu thereof the following:

"Section seven thousand four hundred twenty-d seven (7420-d7), Code 1935, is hereby repealed and the following section enacted in lieu thereof:

" '7420-d7. No bank or trust company shall, directly or indirectly, by any device whatsoever, pay any interest to any public officer on any deposit of public funds, and no public officer shall take or receive any interest whatsoever on public funds.' "

The precise question involved in your inquiry is whether or not the provisions of the above section operate to prohibit the treasurer of Iowa State College from taking or receiving interest on the public funds deposited by him.

It will be remembered that deposits of Iowa state board of education funds are not subject to the provisions of the state sinking fund law. The statute, Section 3921, paragraph 8, now provides that the state board of education shall:

"8. Collect the highest rate of interest, consistent with safety, obtainable on daily balances in the hands of the treasurer of each institution."

In an opinion dated August 5, 1935, the then attorney general construed a provision of law, since repealed, amending the sinking fund act, which amendment related to interest payable on public deposits, and which provided as follows:

"7420-d6. *Interest on deposits.* * * * 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 will be observed that the language used above is general in character. However, the conclusion of the opinion referred to above, which is reported at page 249, 1936 attorney general's report, was as follows:

"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."

The above holding was supported by reasoning based on the historical background of the sinking fund law, and it is our opinion that the conclusion reached is correct.

We conclude that the provisions of Section 7420-d7, as enacted by the 47th General Assembly, have no application to public officers other than such as are within the scope and operation of the state sinking fund law. The prohibitions contained in said section do not apply as against an officer not subject to the operation of Chapter 352-D1, 1935 Code, relating to public deposits.

We are not called upon to rule, and we do not now decide whether or not a bank or trust company is prohibited from paying interest on a public deposit which is not subject to the provisions of the state sinking fund law.

POLITICAL PARTIES: ELECTIONS: CENTRAL COMMITTEE: CONVENTION: DELEGATES: Membership in county central committee not necessary to its chairmanship. Nothing in statute to prevent person from being a delegate to both district and state conventions. Delegates to district and state conventions do not need to be elected delegates to the county convention.

June 17, 1938. *Mr. Roger F. Warin, County Attorney, Bedford, Iowa:* We

acknowledge receipt of your request for the opinion of this department on the following questions:

1. Is it required under the law of Iowa that the chairman of the County Central Committee be selected from the committee membership?
2. Is it legal for the same person to be a delegate to the congressional and state conventions?
3. Is it required under the law of Iowa that a delegate to the congressional convention and to the state convention first be a delegate to the county convention?

Like requests for the opinion of this department on the first question stated above have been received from the county attorneys of Dubuque and Woodbury counties, respectively.

1.

Section 627 of the Code of Iowa, 1935, provides:

"627. *Central committee—vacancies.* The county central committee elected in the primary election shall organize on the day of the convention, immediately following the same.

"Vacancies in such committee may be filled by majority vote of the committee, but no two members thereof from the same precinct shall be of the same sex."

This is the sole statutory provision regarding the organization of the county central committee. The section has never been construed by the Supreme Court of Iowa. However, the Supreme Court of North Dakota had a similar question before it in *State ex rel. McArthur vs. McLean, et al.*, 35 N. D. 203, 159 N. W. 847, and, since that case is the only decision in point that our research has disclosed, we look to the opinion of the justices in that case for enlightenment in this present inquiry.

There was involved in that case the question as to whether or not membership in the state central committee was necessary to its chairmanship. The North Dakota Court, after considerable discussion of its jurisdiction in questions of purely a political nature, concluded (id., page 852 of 159 N. W.):

"There is an express provision that the executive committees of the counties shall be members of the county committees, and that the chairmen and secretaries of the county executive committees shall be members of the executive county committees, but when the same section of the statute later deals with the state central committee, no such provision is to be found. All it says is that:

'The members so selected as state central committeemen shall meet at the state capitol on the first Wednesday of September and organize by selecting a chairman, a secretary and treasurer, and shall adopt rules and modes of procedure and promulgate a platform or principles upon which its candidates shall stand.'

"We must assume that the Legislature in omitting this requirement as to membership of the committee in this subsequent clause and when it was dealing with the state central committee did so advisedly, and we have no right to interpolate words or provisions which they must be presumed to have purposely omitted. It has been the almost uniform ruling of the courts in the case of private corporations that the president, secretary, treasurer, and even the directors may be chosen from persons who are not even stockholders, unless there is some positive provision in the statute, the charter, or the by-laws prohibiting such a practice, and certainly the same construction of the statutes should be applied in the case of political committees as in passing on the acts which create and define the powers and duties of these corporations. (Authorities cited.) * * *

"The same thing is true of political state central committees. The chairman is a campaign manager rather than a presiding officer, and the duties of the secretary and treasurer are merely ministerial. It often happens that there is

no one among the members of these committees who has the time, ability, or inclination for this campaign and routine work. If, as is stated by the writers, the directors of a corporation may be considered in the light of agents merely, and as such, and in the absence of a statutory or charter provision, are required only to possess the usual qualifications of agents, much more must this be true of these political agents.

"If, too, the construction which is contended for by the petitioner applies, not only must the chairman be a member of the committee, but the secretary and treasurer also, for the offices are all treated together in the same connection and in the same sentence. The committee is instructed to select not a chairman merely but a 'chairman, secretary and treasurer.' When, however, we come to examine the records of the past we find that the secretary of the Republican state central committee was not such a member in 1898, 1900, 1902, 1904, 1906, 1910, and 1912, nor was the secretary of the Democratic state central committee in 1896, 1898, 1902, 1904, 1906, 1908, 1910. We also find that in 1896, 1898, 1908, 1910, 1912, and 1916 the chairman of the Republican state central committee was not such a member; nor was the chairman of the Democratic state central committee such a member in the years 1906 and 1910; nor was the treasurer of the Democratic committee a member in the years 1906, 1908, and 1910.

"The act which we are called upon to construe became a law in 1907. We must assume that at the time of its passage the members of the Legislature were cognizant of the political history and practices of the past, and that when they omitted the requirement of membership which they had expressly provided in the same section of the statute in the case of county and district committees, they did this advisedly. The practice also which has since been followed in the matter, and in both of the political parties mentioned, surely furnishes some proof of a contemporaneous construction. We, too, must remember that the Legislature contained representatives of and was legislating for both of the principal political parties of the state, and must therefore have considered the practices which prevailed in each."

The court further stated:

"We are satisfied that membership in the central committee is not necessary to its chairmanship, and this for the simple reason that the act of the Legislature does not make it necessary, and we have no right to interpolate anything into the statute. In order to hold that the chairman of the state central committee must be a duly elected member of that body we must interpolate."

and finally concluded (id., page 854 of 159 N. W.):

"But it is argued that a practice which would allow the selection of a chairman who was not a duly elected member of the committee would destroy the equal representation in that body and give to some one district two votes and two representatives. The force of this objection, however, is not apparent to us. * * * the selection as chairman of a meeting or committee does not necessarily carry with it any voting power. * * *"

The requirement of the North Dakota statute was that the state central committee "shall meet * * * and organize." The requirement of the Iowa statute is that the county central committee "shall organize." It is apparent, in view of the express wording of the Iowa statute, that it would be as necessary to interpolate to arrive at the construction that the statute requires membership in the committee as a condition to its chairmanship, as in the North Dakota statute. Furthermore, we are informed that the history of political party organization in this state reflects somewhat the same picture as noted by the North Dakota court in such respect that in many instances neither past state nor county chairmen have held membership in either the state or county central committees.

Therefore, in view of the fact that Section 624, *supra*, makes no requirement that the chairman of the county central committee be a member of that com-

mittee, it is the opinion of this department that membership in the county central committee is not necessary to its chairmanship. In reaching this conclusion we subscribe to the view of the North Dakota court, particularly in view of the fact that the statute involved in that case was in terms very nearly similar to the section of the Iowa statute here under consideration. As to the foregoing proposition, any opinions of this department in conflict herewith are expressly overruled.

2. and 3.

The remaining two questions may be treated together. They involve a construction of Section 624 of the Code of Iowa, 1935, which provides in part as follows:

"624. *Duties performable by county convention.* The said county convention shall: * * *

4. Elect delegates to the next ensuing regular state convention, to the state judicial convention, and to all district conventions of that year, including judicial district convention, upon such ratio of representation as may be determined by the party organization for the state, district or districts of the state, as the case may be. Delegates to district conventions need not be selected in the absence of any apparent reason therefor.

5. Elect a member of the party central committee for the senatorial and congressional districts composed of more than one county.

6. Elect the member, or members, of the judicial district central committee as required by the law relative to the nomination and election of supreme, district, and superior judges."

Delegates to county conventions are the only delegates chosen by the electorate. Section 617, Code of Iowa, 1935. Delegates to district (senatorial or congressional) and state conventions are chosen by county delegates assembled in regular convention. Section 624, supra. The members of the district central committees are likewise chosen by the county delegates. Section 624, supra. The members of the state central committee are chosen by delegates to the state convention. Section 638, Code of Iowa, 1935. No one of them occupies a public office within the ordinary connotation of that term. *State ex rel. McArthur vs. McLean, et al.*, supra; *Attorney General vs. Barry*, 74 N. H. 353, 68 Atl. 192. Hence, no question of incompatibility intervenes. Quoted Section 624, supra, does not require the selection of persons as delegates to the state and district conventions from the membership of the county convention. There is no requirement in the statute that the selection be from its number. It is accordingly the opinion of this department that nothing is contained in the statute which inhibits a person from being a delegate to both the congressional and state conventions. It is the further opinion of this department that Section 624, supra, makes no requirement that the delegates elected to the district and state conventions be, in the first instance, duly elected delegates to the county convention.

OFFICERS: STATE FUNDS: CONSERVATION COMMISSION: PERIODICAL: STATUTES: Conservation Commission does not have power to collect paid subscriptions for and to publish a periodical not generally available to the public.

June 18, 1938. *Mr. M. L. Hutton, State Conservation Commission:* We acknowledge receipt of your request for the opinion of this department upon the question of whether or not the state conservation commission can publish a monthly periodical with a fixed subscription rate and solicit subscriptions therefor.

There would be little question but that the commission could publish and distribute to residents of Iowa informative material relative to conservation matters under the authority of Section 1703-d11, 1935 Code, which makes it the duty of the commission to

"* * * disseminate information to residents of Iowa in conservation matters."

Under Section 1703-d12, 1935 Code, the commission is empowered to

"7. Pay the salaries, wages, compensation, traveling and other necessary expenses of the state conservation commissioners, state conservation director, state conservation officers and other employees of the commission, and to expend money for necessary supplies and equipment, and to make such other expenditures as may be necessary for the carrying into effect the purposes of this chapter."

It is clear that the conservation commission may make expenditures which are necessary to carry into effect the purposes of Chapter 85-D1, of the Code.

Boards and commissions are creatures of the statute, and are limited in authority to such powers as are expressly conferred by statute, or as may be necessarily incidental to expressed powers.

It is our opinion that the power given "to disseminate information to residents of Iowa in conservation matters" is not a grant of authority of sufficient scope to permit the commission to solicit paid subscriptions for and to publish a periodical not generally available to the public. Since, in our opinion, such enterprise is not within the expressed or implied powers conferred by existing statutes, the expenditure of state funds, and the utilization of the services of state employees in the furtherance of such activity cannot be approved.

TAXATION: EXEMPTIONS: IOWA STATE EMPLOYMENT SERVICE: FEDERAL INCOME TAX: INCOME TAX: Discussion of *Helvering vs. Gerhardt* case, with conclusion that claims of exemption from federal income tax by employees of Iowa State Employment Service may not be certainly sustained.

June 22, 1938. *Mr. Edward R. Herbert, Director, Iowa State Employment Service:* We acknowledge receipt of your request for the opinion of this department as to whether or not employees of the Iowa State Employment Service during the year 1936 are, with respect to such period of employment, subject to the federal income tax law.

You also ask if employees of the Iowa State Employment Service, with respect to employment subsequent to 1936, are subject to the federal income tax law.

It is assumed that you have divided your question as indicated above for the reason that after January 1, 1937, the Iowa State Employment Service was transferred from the jurisdiction of the Iowa Labor Commissioner to the Iowa State Compensation Commission.

The recent case, *Helvering vs. Gerhardt*, decided by the United States Supreme Court on May 24, 1938, holding the salaries of employees of the New York Port Authority (a public corporation engaged in a public function for the states of New York and New Jersey), subject to the federal income tax law, extended and more clearly defined the federal taxing power as applied to incomes of state instrumentalities. This case discusses at length the precedents, and sets out two principles of limitation for holding the tax immunity for state instrumentalities to its proper function:

1. Activities not essential to the preservation of the state governments, even though the tax be collected from the state treasury, may be subject to the federal taxing power.

2. A function which may be important enough to demand immunity from the tax of the state itself is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons.

After a careful review of the decision referred to above, which is now the controlling expression upon this particular subject matter, this department cannot advise with any degree of certainty that claims of exemption from federal income tax on the part of the employees of the Iowa State Employment Service would be sustained.

ELECTIONS: NOMINATION: OFFICE OF SUPERVISOR: A candidate who seeks nomination to the office of supervisor, where such office is to be filled by the electors of a supervisor district, by way of nomination by petition, must obtain the signatures of at least two per cent of the qualified voters residing in the supervisor district as shown by the total vote of all candidates for governor at the last preceding general election in such supervisor district.

June 24, 1938. *Mr. A. J. Hill, County Attorney, Forest City, Iowa:* We acknowledge receipt of your request for the opinion of this department as to the construction and application of Section 655-a17, Code of Iowa, 1935, in such situation as follows:

Winnebago County is divided into supervisor districts. One of such districts embraces four townships. The question is whether or not a candidate for the office of supervisor from such district, where nominated by petition under the provisions of Chapter 37-A2, Code of Iowa, 1935, is required to procure on his nomination paper or papers the signatures of two per cent of the qualified voters residing in such district as shown by the total vote of all candidates for governor at the last preceding general election in such district, or the signatures of twenty-five qualified voters, residents of the four townships comprising the district and in each of said townships.

Boards of supervisors are authorized in any even numbered year at the regular general meeting to divide their respective counties by townships into a number of supervisor districts corresponding to the number of supervisors in the county. Section 5111, Code of Iowa, 1935. When established, each of such districts is entitled to one member on the board of supervisors to be elected by the electors of the district. Section 5112, Code of Iowa, 1935. Section 520, Code of Iowa, 1935, specifies the county officers who are to be elected for terms of two years at each general election. Members of boards of supervisors are not included in said section, but provision is made in Section 521, Code of Iowa, 1935, for the election biennially in counties and townships of members of the board of supervisors and township trustees for a term of three years to succeed those whose terms of office expire on the second secular day of January following the general election.

Notwithstanding the exclusion of members of boards of supervisors from the provisions of Section 520, *supra*, members of boards of supervisors are county officers. In this connection it was stated by the supreme court of Iowa Re: In the matter of the Assessment of the Farmers Loan & Trust Company of Sioux City, Iowa, 155 Iowa 536, 540, 136 N. W. 543, as follows:

"The appeal was taken by the members of the board of supervisors in the name of the county as directed, but appellant contends that the supervisors are not county officers, and for this reason might not prosecute the appeal. The board of supervisors is composed of three, five, or seven members, and these may be elected by the qualified electors of the entire county or by designated subdivisions of the county. Sections 410, 416, Code, and Code Supp. Section 411. Whether elected by a district or the entire county, however, a member acts for the county, and only as a district is a part of the county can he be said

to be a representative thereof. Absence from the county, and not his district, vacates the office. Section 414, Code. His duties are as a member of the board through which he acts for the county in the management of its affairs, and only as a committee authorized by the board can he act alone, save as expressly empowered so to do. Section 422 of Code et seq. True, members of the board of supervisors are not enumerated in Section 1072, stating when officers mentioned shall be elected, but there was no occasion for this, as the time of their election previously had been defined in Section 411 of the Code as amended. That the board may exact reports or additional bonds from county officers, fix their compensation, and fill vacancies occurring, indicates the importance of its functions, rather than that its members are not to be classed as officers of the corporation whose affairs are so largely under their control. The definitions of office and officer were collected in *State vs. Spaulding*, 102 Iowa 639, and in the light of these it is manifest that members of the board are officers, and, as they act solely for and in behalf of the county, there is no escape from the conclusion that they are county officers."

Section 655-a17, Code of Iowa, 1935, provides as follows:

"655-a17. *Nominations by petition.* Nominations for candidates for state offices may be made by nomination paper or papers signed by not less than one thousand qualified voters of the state; for county, district or other division, not less than a county, by such paper or papers signed by at least two per cent of the qualified voters residing in the county, district or division; as shown by the total vote of all candidates for governor at the last preceding general election in such county, district or division; and for township, city, town or ward, by such paper or papers signed by not less than twenty-five qualified voters, residents of such township, city or ward."

To apply the requirements of the above quoted section of the statute to the case at hand, it is necessary to restate what appears to be the applicable portion thereof, in the following manner:

"Nominations for candidates for county (offices), for district (offices) or for (offices) for divisions, not less than a county, by nomination paper or papers signed by at least two per cent of the qualified voters residing in the county, district or division, as shown by the total vote of all candidates for governor in the last preceding general election in such county, district or division."

In other words, in applying said section, it is necessary to first consider the office for which the nomination is to be made by petition, namely, whether it be a state office, a district office, a county office, etc. The office of supervisor is a county office. This being true, at first blush it would appear that to nominate by petition a candidate for supervisor, the signatures of at least two per cent of the qualified electorate of the county, as shown by the vote for all candidates for governor at the last general election in the county, must be procured. Is this necessarily true where such candidate can be voted for only by the electorate residing within a particular supervisor district? To so construe this section of the statute would lead to an absurd result, for it is conceivable that such candidate would be required to go outside his own supervisor district to procure the necessary signatures in order to meet the specifications of the statute, whereas only those qualified electors residing in the district would be eligible to vote for him. There is no logical reason known to the law why the electorate of the county at large should have a hand in the selection of a candidate by petition when but approximately one-third of that electorate can either accomplish or defeat his election to the office for which he seeks candidacy.

Further, to so hold, would be inconsistent with the spirit of the statutory provision under consideration. It is the voters of the entire state that elect a state officer, and to procure a nomination by petition, one thousand signers

from the state at large must append their signatures to the nomination papers. It is the voters of the entire county who elect a county officer, such as auditor, treasurer, sheriff, etc., and to procure a nomination by petition, the signers must be from the county at large. The same thing holds true with respect to each office for which a candidate is nominated by petition,—the office of state senator for a senatorial district, United States representative for a congressional district, state representative for a representative district, township trustee for a township, etc. In other words, it was the apparent intent of the legislature, in making provision for the selection of candidates for public office other than by primary ballot, caucus or convention, and specifically by petition, to place the selection of the candidate in the hands of those who were entitled to vote for such candidate at the general election.

It is well settled in the law of Iowa that in the interpretation of a statute, a construction should be avoided which would result in inconvenience or absurdity. *State vs. McGraw*, 191 Iowa 1090, 183 N. W. 593; *Quinn vs. First Nat. Bank*, 200 Iowa 1384, 206 N. W. 271; *Oliphant vs. Hawkinson*, 192 Iowa 1259, 183 N. W. 805, 33 A. L. R. 1433; that if a statute is ambiguous or obscure, the court will consider consequences in interpreting it. *In re King's Estate*, 105 Iowa 320, 75 N. W. 187; *Melody vs. Des Moines Union Ry. Co.*, 161 Iowa 695, 141 N. W. 438, 145 N. W. 466; that a statute is to be construed so as to carry out the intent of the legislature, though such construction may seem contrary to the letter of the statute. *District Township of City of Dubuque vs. City of Dubuque*, 7 Iowa (7 Clarke) 262; *Oliphant vs. Hawkinson*, supra; *Sexton vs. Sexton*, 129 Iowa 487, 105 N. W. 314, 2 L. R. A. (NS) 708. Each of these rules of statutory construction obtain where a statute is ambiguous and there is little question in the instant case but what an ambiguity exists by virtue of the legislature's use of the expression "not less than a county" immediately following the word "division" in line five of Section 655-a17, supra. But in addition to the principles of law enunciated above, we have the aid of another rule of construction, i. e., the doctrine of the "last antecedent." By this doctrine, relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote. 59 *Corpus Juris*, 985, section 583. Applied, the last antecedent is the last word which can be made an antecedent without impairing the meaning of the sentence. *Traverse City vs. Blair Township*, 190 Mich. 313, 157 N. W. 81, 84. See also: *State ex rel. Stewart vs. District Court*, 103 Mont. 487, 63 P. (2nd) 141.

Applying this doctrine as an aid in arriving at the correct construction of Section 655-a17, supra, wherein it reads "for county, district or division, *not less than a county*," it is at once apparent that the italicized clause must modify the antecedent noun "division" only. It cannot modify the noun "county," and to say that it modifies the noun "district" will lead to an absurd result, work an injustice, and prostitute the legislature's intention as gathered from a reading of the entire section of the statute. As held by the Michigan court in the Traverse City case, supra, such a construction would impair the meaning of the sentence.

It is accordingly the opinion of this department that a candidate who seeks nomination to the office of supervisor, where such office is to be filled by the electors of a supervisor district, by way of nomination by petition, must obtain

the signatures of at least two per cent of the qualified voters residing in the supervisor district as shown by the total vote of all candidates for governor at the last preceding general election in such supervisor district.

OFFICERS: COUNTIES: PEACE OFFICERS' CONFERENCE: POWER OF ATTORNEY GENERAL: EXPENSES: Attorney general is empowered to call attorneys (county) and peace officers into conference for study of legal matters and instruction in criminal investigation. Such officers are entitled to the reasonable and necessary expenses incurred.

June 25, 1938. *Mr. W. W. Akers, Chief, Bureau of Investigation:* We acknowledge receipt of your request for the opinion of this department on the following questions:

1. May the Attorney General call county attorneys and peace officers into conference for the study of legal matters and instruction in criminal investigation?

2. If so, would it not follow that these officers would be entitled to the reasonable and necessary expense incurred in attending such conference?

The foregoing questions are submitted for our consideration in view of the forthcoming law enforcement officers short course to be held at Iowa City, Iowa. This short course is conducted under the auspices of the State University of Iowa, College of Law thereof, in conjunction with the Department of Justice of the state of Iowa. It is designed for the purpose of training those charged with law enforcement in this state in the science of criminal investigation and prosecution. This year is the second anniversary of the short course, and it convenes pursuant to the proclamation of the Governor of the state of Iowa and the official order or call of the Attorney General of the state of Iowa. With these prefatory remarks we may pass to a consideration of the law pertinent to your inquiry.

1.

The Attorney General, as the official head of the department of justice, has supervisory powers over all county attorneys, and is charged with the effective administration of the criminal processes of the state of Iowa. Section 149, subsections 2 and 7, Code of Iowa, 1935. The Attorney General is expressly empowered to call to his aid in the enforcement of the law any peace officer. Section 13411, Code of Iowa, 1935. Furthermore, by reason of the express provisions of Chapters 615 and 616, Code of Iowa, 1935, it is contemplated that there shall exist between the department of justice and its bureau of investigation and the peace officers of the various counties, cities and towns of this state close cooperation in the enforcement of the criminal law of the state of Iowa.

Therefore, in answer to the first question propounded, it may be said categorically that the Attorney General is empowered to call county attorneys and peace officers into conference for the study of legal matters and instruction in criminal investigation.

2.

With respect to the second question propounded reference may first be made to county attorneys. Section 5228, Code of Iowa, 1935, provides in part as follows:

"5228. *County attorney.* * * *

The county attorney shall also receive his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence

and the county seat, which shall be audited and allowed by the board of supervisors of the county."

Hence, county attorneys attending the short course pursuant to the call of the Attorney General would be entitled to the reasonable and necessary expense incurred in such attendance.

In the case of sheriffs and constables implied authority exists for the payment from the county treasury of the reasonable and necessary expense of those peace officers incurred in the attendance at the short course. It might well be contended that such expense, not having been expressly provided for in the statutes specifying the compensation of these officers by way of either salary or fees, is nevertheless payable from the county treasury upon authorization by boards of supervisors pursuant to their general power to fix the compensation for all services of county and township officers not otherwise provided by law. Section 5130, subsection 10, Code of Iowa, 1935. In this regard it is stated in 15 Corpus Juris 505, section 172, as follows:

"In most jurisdictions it is held that a proper interpretation of the statutes authorizes the payment of necessary incidental expenses of the county officials, * * * from the county funds. Nevertheless such expenses must be necessary and reasonable in cost, must be incurred by an official entitled to reimbursement within the meaning of the statutes; must be official, rather than personal to the officer, * * * and must be incurred in connection with some public service rendered the county. * * *"

Peace officers such as marshals and policemen in cities and towns are in a different category. There can be little question that such officers attending the short course pursuant to the call of the Attorney General are entitled to reimbursement for their reasonable and necessary expense in so attending. Provision therefore, in sake of orderly procedure, should be by official resolution of the city or town council, as the case may be.

In view of the foregoing, it is the opinion of this department that the Attorney General is empowered to call county attorneys and peace officers into conference for the study of legal matters and instruction in criminal investigation, and that such law enforcement officers in attendance pursuant to an official call are entitled to the reasonable and necessary expense incurred by them in attending such conference.

The foregoing opinion applies only to the short course to be conducted this year. It is not authority for county boards of supervisors or cities and towns to reimburse their peace officers or other officials in attendance at the 1937 short course which was not officially sanctioned by proper state authorities.

TAXATION: PERSONAL PROPERTY TAXES: ESTATES: It is the duty of administrators and executors before closing an estate to make provision for the payment of personal property tax assessed against the property in their hands, but not due and payable until the following January.

June 28, 1938. *Honorable Charles W. Storms, Auditor of the State of Iowa:* This is to acknowledge receipt of your request for an opinion upon the following question:

"Before closing an estate should an executor or administrator make arrangements to pay personal property taxes which were assessed as of January 1st of the current year and which will be due on January 1st of the following year on moneys and credits and personal property held by the estate?"

Section 6956 of the 1935 Code of Iowa requires that:

"6956. Every inhabitant of this state, of full age and sound mind, shall list

for the assessor all property subject to taxation in the state, of which he is the owner or has the control and management in the manner herein directed: * * *

"4. The personal property of a decedent, by the executor or administrator, or if there is none, by any person interested therein."

Section 6957 of the 1935 Code of Iowa reads as follows:

"6957. Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs."

It is a well settled rule that the title to personal property of a decedent, testate or intestate, vests in the personal representative until administration is completed and the estate fully settled or distributed, or until he chooses or becomes forced to part with it earlier. (See *Blackhawk County vs. Dorris*, 116 Iowa 446, l. c. 450; 24 C. J., *Executors and Administrators*, page 201, section 710.)

The only purpose the Legislature could possibly have had in enacting the above cited statutes was to subject the personalty in the hands of the administrator or executor, and to which he has legal title, to taxation. It is not difficult to understand why the Legislature enacted the foregoing sections and in addition thereto required that executors and administrators make payment of all taxes and public rates before paying ordinary claims of the third or fourth class. (Section 11970 of the 1935 Code.)

In 24 C. J., Title, Executors and Administrators, section 550, we find the following rule:

"An executor or administrator is entitled to credit for taxes and assessments properly paid by him in the exercise of his duties as such * * *; *and conversely executors who have paid all the funds belonging to the estate to legatees are not thereby excused from paying taxes on the estate which they had neglected to pay while they had funds of the estate in their possession.*" (Italics ours.)

Again at Section 902 of 24 C. J., Title Executors and Administrators, we find the following rule:

"Personal assessments charged against the decedent during his lifetime, *or taxes or assessments chargeable rightfully against the personal estate in the due process of settlement, are payable by the representative on their preferential footing,* * * *." (Italics ours.)

With the foregoing general rules and statutes in mind, let us consider what, if any, duty an executor or administrator has in regard to the payment of personal taxes assessed against personal property or moneys and credits in his hands on January 1st and belonging to the estate.

First. By operation of law, he is vested with the title to the personalty.

Second. There is a duty on his part to list the same with the assessor in the same county in which he would be required to list the property if it were his own, except that he shall list it separately from his own and give the assessor the name of the person or estate to which it belongs.

Third. There is a duty on his part to pay claims filed against the estate in the order designated by Section 11970, et seq.

If an executor or administrator should close an estate after January 1st of the current year and after the assessments have rightfully been charged against the personal estate in his hands, in the due process of settlement, then it is his duty before closing the estate to make arrangements for the payment of said personal taxes by depositing the amount thereof with the Clerk of the

Court for the purpose of payment when the same becomes due, or by depositing the amount thereof with the Treasurer until the same becomes due.

It was never the intention of the Legislature that personal property in an estate should be exempt from taxation for the year in which distribution is made. This is evidenced by the fact that the statute specifically requires the administrator or executor to list said personalty with the assessor and further requires the executor or administrator to pay taxes before paying other claims or making distribution.

Our own court has passed upon this question inferentially in the case of *Blackhawk County vs. Dorris*, 116 Iowa 446. In that case, John F. Miller, deceased, died in Pennsylvania, a resident thereof. Prior to his death the deceased had placed in the hands of one W. W. Miller in Blackhawk County, Iowa, $19,000 for investment. After the death of the decedent, W. W. Miller applied to the District Court for appointment as ancillary executor of the will of the deceased. A contest ensued in which it was claimed that Miller was wrongfully appointed, and that the moneys and credits belonging to the deceased were being wrongfully retained in this state and should not therefore be subject to taxation. The court held that the fact that the property remained in the hands of the local executor longer than necessary, because of his wrongful prolongation of the ancillary administration, did not affect the state's right to tax the property during the entire period. The court further held that moneys and credits belonging to a citizen of another state, in the hands of an agent in this state, are taxable after the agency had been revoked by the death of the owner and the property has become subject to local administration, until said personalty is transferred by the order of the court to the administrator appointed in the state where the owner resided. At page 450 of the opinion, the court said:

"The funds upon which this particular tax was levied were admittedly sent to this state for investment, and were so being held by the agent at the death of the owner. They had been kept here for a period of over twenty years, earning large profits. During all that time they had enjoyed the protection of the law of Iowa, and, even upon appellant's theory, were taxable until the death of John F. Miller. *While the agency of W. W. Miller then ceased, the property remained here subject to local administration, demanding the attention and protection of the courts; and, in our judgment, until such administration was complete, and the proper order entered for the transfer of the funds to the nonresident executor, the right of taxation in this state continued.* The fact, if it be a fact, that the appointment of W. W. Miller as executor was an error, is entirely immaterial to the consideration of the question before us. Until that appointment was revoked, he was the legal custodian of the assets of the estate within this jurisdiction, and for the time being the legal title was also in him. It was his duty to list it for taxation, and it is likewise the duty of his successor in the ancillary administration to pay the tax. Code 1873, Section 803; Code 1897, Section 1312; *Doris vs. Miller*, 105 Iowa 570." (Italics ours.)

In *Findley vs. Taylor*, 97 Iowa 420, the court said:

"When the executor of an estate is possessed of sufficient means, over and above the expenses of administration, he is required, first, to pay the charges of the last sickness and funeral of the deceased; then, any allowance which may be made for the maintenance of the widow and minor children, if any. After that is done, if the funds at his command are sufficient, he is required to pay debts entitled to preference under the laws of the United States; then, public rates and taxes, and afterwards, claims duly filed and proved, and legacies. * * * There is no requirement in regard to filing claims for taxes, and the failure to file them does not release the estate from liability."

In *Clayton vs. Dinwoody*, 33 Utah 251, 93 Pac. 723, the court held that an executor or administrator is effected with notice of taxes levied against property of the estate in his custody or against property of decedent in his lifetime which has become part of the estate.

In *People vs. Overa*, 42 Cal. 492, it was said:

"Whatever may be the rule when taxes are assessed during the lifetime of the decedent, we are not called upon to express any opinion with reference to it,—it is clear that taxes assessed against the property of an estate pending administration, and while it is in the possession and under the management and control of an administrator, are not 'claims' against the estate which must be supported by an affidavit. The undivided property of deceased persons may be listed and the taxes assessed are charges upon the property, which should be paid as all necessary expenses in the care, management, and settlement of the estate are paid."

In view of the foregoing holdings there can be little question but that it is the duty of administrators and executors before closing an estate to make provision for the payment of personal property tax assessed against the property in their hands, but not due and payable until the following January.

It is the understanding of this department that because of a lack of uniform practice throughout the state and because of some degree of misunderstanding on the part of executors and administrators, that heretofore many administrators and executors have filed their final reports and made distribution without making proper provision for the payment out of the assets of the estate in their hands, of personal taxes assessed against them in their representative capacity. It is therefore suggested that hereafter, in order to avoid losses to the State of Iowa and to the counties, that county treasurers make it a practice to keep track of all estates that are opened, and that in those estates containing personal property, blanket claims for personal taxes due or to become due should be filed by all county treasurers.

It is further suggested that all referees in probate in checking final reports make definite investigation to ascertain whether or not arrangements have been made for the payment of personal property taxes chargeable against the property in said estate, but not payable until the following January first, and that if such arrangements have not been made, that that fact be called to the attention of the executor or administrator, the treasurer and the court, and that unless such arrangements are made, the county treasurer file objections to the approval of the final report.

This opinion is not intended to be retrospective in its effect, and of course cannot impose liability upon executors, administrators, guardians or trustees who have heretofore been discharged from further duty or responsibility upon final settlement where notice has been given in conformance with Section 12073 of the 1935 Code of Iowa.

OFFICERS: CONTRACTS: STATE LANDS: CONSERVATION COMMISSION: SALE OF RESOURCES FROM STATE OWNED LAKES: Sale of water or other resources from state owned lakes without permission of state conservation commission is illegal. Conservation commission could enter into such contracts of sale.

June 30, 1938. *Mr. M. L. Hutton, State Conservation Commission:* You have requested our opinion as to the legality of the sale of water from state owned lakes without the permission of the state conservation commission.

You advise us that a city which formerly obtained its municipal water supply

from a meandered lake now proposes or has entered into a contract for the sale of water from such lake to a railroad company.

Section 130, Chapter 99, laws of the 47th General Assembly, provides as follows:

"Sec. 130. No person shall remove any ice, sand, gravel, stone, wood or other natural material from any lands or waters under the jurisdiction of the commission without first entering into an agreement with the commission."

Section 131 of said chapter provides as follows:

"Sec. 131. The commission may enter into agreements for the removal of ice, sand, gravel, stone, wood, or other natural material from lands or waters under the jurisdiction of the commission if, after investigation, it is determined that such removal will not be detrimental to the state's interest. The commission may specify the terms and consideration under which such removal is permitted and issue written permits for such removal."

Section 1812, Code of 1935, provides as follows:

"1812. *Jurisdiction.* Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission. The commission, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

A reference to the above sections indicates a clear intent on the part of the legislature to confer upon the state conservation commission the jurisdiction and management of the state owned lakes and streams within the state.

The rights of riparian owners to the ordinary use of waters would not include the right to divert such resources for wholesale commercial purposes. It is our opinion that the prohibition expressed in Section 130 above, includes such a taking of water from state owned meandered waters.

It is our conclusion, therefore, that a private contract for the sale of such resources is invalid and contrary to the statute. It is our further opinion that under the authority of Section 131, Chapter 99, laws of the 47th General Assembly, the commission would have jurisdiction and authority to enter into such a contract of sale.

COUNTIES: PAUPERS: INSANE: SUPPORT: PARENTS AND RELATIVES: LIABILITY OF: Parent of an adult insane patient committed to a state hospital for the insane may be held liable for the support of such person while confined, if proper procedure is followed.

July 9, 1938. *Mr. William J. Kennedy, County Attorney, New Hampton, Iowa:* This department acknowledges receipt of your request for an opinion on the question as to whether or not a parent of an adult insane patient committed to a state hospital for the insane is liable for the support of such incompetent while confined in the state institution.

The precise question has been before this department on two occasions. On January 7, 1924, in an opinion recorded at page 315 of the 1923-1924 Report of the Attorney General it was held that a father is legally liable for the support of his minor son at the state hospital for the insane, but is not liable for the support of an adult son committed to the state hospital for the insane. On October 15, 1930, in an opinion recorded at page 356 of the 1930 Report of the Attorney General it was held that a parent of one who has been committed to an insane hospital is liable for the support of such incompetent whether he be a minor or an adult. The former opinion is neither referred to, distinguished nor overruled.

The pertinent section of the Code of Iowa is the following:

"3595. *Personal liability.* Insane persons and persons legally liable for their support shall remain liable for the support of such insane. 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."

In addition, we call your attention to the provisions of Sections 5298 and 5301, Code of Iowa, 1935, contained within Chapter 267 of the Code entitled "Support of Poor." These sections provide as follows:

"5298. *Parents and children liable.* The father, mother, and children of any poor person, who is unable to maintain himself or herself by labor, shall jointly or severally relieve or maintain such person in such manner as, upon application to the township trustees of the township where such person has a residence or may be, they may direct."

"5301. *Remote relatives.* In the absence or inability of nearer relatives, the same liability shall extend to grandparents, if of ability without personal labor, and to the male grandchildren who are of ability by personal labor or otherwise."

In order to arrive at a proper conclusion to the question submitted, it becomes necessary to interpret that language appearing in Section 3595, *supra*, reading "persons legally liable for their support."

In *Iowa County vs. Amana Society*, 214 Iowa 893, 898, 243 N. W. 299, the Iowa Supreme Court, in considering the construction to be placed upon the terms of Section 3595, *supra* (Section 2297, Code 1897) stated:

"Reading all these statutes together, the interpretation stands out plainly that the only persons within the legislative mind, to be held liable, *were such relatives as were liable at common law.*" (Italics ours.)

That case involved an action by Iowa county to recover from the Amana Society the amount expended by the county in support of a member of the society who was committed to and confined in the state hospital for the insane at Independence. The county predicated its case on the theory that the society was contractually obligated to support its members and that by virtue of Section 3595, *supra*, recovery could be had by the county. The court concluded as above quoted and went on to say (id., page 898 of 214 Iowa):

"The statute (3595) did not purport to create or pursue new or other liabilities, which might arise out of contract or out of tort. * * *"

In view of the court's language the question necessarily arises as to whether or not a parent is liable at common law for the support of an *adult* child. In this connection it is stated in 48 Corpus Juris, 511, section 179:

"*Aside from the common-law liability on the part of parents for the support* of their minor unemancipated children *and their adult children who are in such physical or mental condition as to be incapable of self-support*, the statutes in many jurisdictions have imposed on the parent, if of sufficient ability, a legal duty to support children who have become or are likely to become public charges, * * *" (Italics ours.)

Again at 46 Corpus Juris, 1259, section 47, it is said:

"In the absence of statute, a parent ordinarily is under no legal obligation to support an adult child; * * * *unless* * * * *it is in such a feeble and dependent condition physically or mentally as to be unable to support itself;* and the parent's liability having once terminated will not be restored by a subsequent change in the condition of the child, even though such child becomes incapacitated while continuing as a member of the parent's household. * * *" (Italics ours.)

We have examined a majority of the decisions digested under footnote (68), page 1269 of 46 Corpus Juris, and fail to find where any of the courts express as the common-law doctrine the liability of a parent to support an adult child

who is infirm, incompetent or otherwise incapacitated or unable to care for itself. Most of the decisions are based upon statute. The Kentucky Supreme Court alone appears to assume the existence of a common-law doctrine to that effect in both *Breuer vs. Dowden*, 207 Ky. 12, 268 S. W. 541, 42 A. L. R. 146, and *Crain vs. Mallone*, 130 Ky. 125, 113, S. W. 67, 22 L. R. A. (ns) 1165. In the former it was stated by the court,—quoting from page 148 of 42 A. L. R.:

"From the texts and cases cited by the parties we deduce the rule to be that a parent is not liable for the debts of his adult child, in the absence of a statute to the contrary, *unless* the child is in such a feeble and dependent condition physically or mentally as to be incapable of supporting himself; that if at the time the child becomes of age he is reasonably physically and mentally sound and fairly able, if willing to make and earn his own support, the parent is not liable for his debts or obligations thereafter contracted, even though he should later become sick or mentally unbalanced and therefore incapacitated to earn a livelihood. If, however, the child at the time of his arrival at the age of twenty-one is sick or otherwise incapacitated to earn a living for himself, and is, at the time, living in the home of the parent as a member of the household, the parent is liable for necessaries furnished him. * * *"

See also *Schultz vs. Western Farm Tract. Co.*, 111 Wash. 351, 190 P. 1007; *Howard vs. U. S.*, 2 F. (2nd) 170, 176, and 20 R. C. L. 586.

The Iowa Supreme Court has expressed itself as follows: In *Monroe County vs. Teller*, 51 Iowa 670, 2 N. W. 533, an action was brought by the plaintiff county to recover money paid by it for the keeping and treatment of the defendant's adult son in the Mount Pleasant state hospital. The patient was committed after reaching majority, although there was no showing as to whether or not at the time of commitment he resided with his father and was in fact supported by him. The court concluded (id., page 672 of 51 Iowa):

"A father is not legally bound to support his adult children at common law, nor under the statutes of this state. * * *"

In *Wright County vs. Hagen*, 210 Iowa 795, 796, 231 N. W. 298, being an action on the part of Wright County against one Tillie Heskett for the recovery of money expended by the county in the support of the defendant's adult daughter while an inmate of the Cherokee state hospital and the institution at Woodward. Here again the patient was committed after reaching majority. The court stated:

"The appellant contends that by reason of the aforesaid provisions of the Code (Sections 3595, 3471 and 3581), the mother of Ellen Lucksinger (the patient) is legally liable for her support as an insane person. *As to this contention, the appellant is in error.* See *Monroe County vs. Teller*, 51 Iowa 670. 51 Iowa 670. * * *"

"What is there said, relative to the liability of the father, is equally applicable to the claimed liability of the mother in the instant case. It is, therefore, apparent that the mother or her estate are not liable to the plaintiff county for the money expended by the county for the support of her adult daughter in the aforesaid institutions, as an insane person." (Italics ours.)

In *Lyons vs. Lyons*, 195 Iowa 1183, 193 N. W. 444, the Iowa court relied upon the rule of the Monroe County case, *supra*, in holding that the stepmother and relatives of an incompetent son residing at the stepmother's home were not legally bound to support such incompetent. Section 3595, *supra*, was not specifically referred to and it appeared that the incompetent son had an estate of his own.

In *Blachley vs. Laba*, 63 Iowa 22, 18 N. W. 658, it was held that a father is not legally liable, either at common-law or by statute, for necessaries furnished

an adult but unmarried daughter, at her request, even though the daughter was living with the father as a member of his family and the necessaries were furnished with the father's knowledge and without objection on his part. See also: *Holmes vs. McKim*, 109 Iowa 245, 80 N. W. 329; *Porter vs. Powell*, 79 Iowa 151, 44 N. W. 295, particularly Justice Beck's dissenting opinion; *Johnson vs. Barnes*, 69 Iowa 641, 29 N. W. 759; and *Dawson vs. Dawson*, 12 Iowa 513.

The Iowa Supreme Court held in *Guthrie County vs. Conrad*, 133 Iowa 171, 110 N. W. 454, that a father is liable at common-law for the support and care of his minor son; in *Wapello County vs. Eikelberg*, 140 Iowa 736, 117 N. W. 978, that a husband is liable for the support of his wife; in *Bradford's Heirs vs. Bodfish*, 39 Iowa 681, and *Gerdes vs. Weiser*, 54 Iowa 591, 7 N. W. 42, that a husband is liable for the support of his wife's minor children by a former marriage, if he takes them into his family; that a wife is not liable for her husband's support in an insane institution in *Black Hawk County vs. Scott*, 111 Iowa 190, 82 N. W. 492. And see: *Scott County vs. Townsley*, 174 Iowa 192, 156 N. W. 291; *Jones County vs. Norton*, 91 Iowa 680, 60 N. W. 200; *Delaware County vs. McDonald*, 46 Iowa 170.

Hence, while it is a perfect common-law duty of a parent to support his minor children until they attain the age of majority (*Dawson vs. Dawson*, supra) yet a parent is not legally bound to support his adult children at common-law (*Monroe County vs. Teller*, supra; *Wright County vs. Hagan*, supra, and *Young vs. Young*, supra).

Since the Iowa Supreme Court in *Iowa County vs. Amana Society*, supra, construed the language of Section 3595, supra, reading "persons legally liable for their support" as meaning those persons "legally bound" at common-law, it necessarily follows that a parent or other relatives are not liable to a county which has expended money in support of a patient related to such persons in one of the state insane hospitals, unless the common-law liability as recognized by the Iowa court has been abrogated by statute.

Do the provisions of Sections 5298 and 5301, quoted supra, abrogate the common law doctrine of liability for support, and as a consequence, the provisions thereof must be read into Section 3595? The question is answered in the negative by the Iowa Supreme Court in *Iowa County vs. Amana Society*, supra. In that case the court not only considered the provisions of Section 3595, supra, but also the provisions of Section 3597, Code of Iowa, 1935, providing as follows:

> "If the board of supervisors in the case of any insane patient who has been supported at the expense of the county shall deem it a hardship to compel the relatives of such patient to bear the burden of his support, or charge the estate of such patient therewith, they may on application relieve such relatives or estate from any part or all of such burden as may seem to them reasonable and just."

Both of said sections were originally embraced within an entire section of the Code. See Section 2297, Code 1897. Said the court (id., page 898 of 214 Iowa):

> "Assuming for the moment that the corporate society was liable contractually, and legally bound to its members to support them during life, did such obligation bring the defendant within the terms of Section 2297 as a person 'legally' bound? It will be noted that Section 2297 purported in the first instance to negative any implication that the obligation of the county should operate 'to release the estate of such persons nor their relatives from liability for their support.' The foregoing indicated a conception in the legislative mind of *existing* law. This was that in certain cases relatives might be held to a liability for service to a patient. At common law a father could be held for the support

of his minor child; and a husband could likewise be held for the support of his wife. These two illustrations meet what appears to be the legislative conception of vicarious liability. This same legislative conception appears in Section 3597, wherein power is conferred upon the board of supervisors to forgive the liability if it be deemed to work a hardship. The evident purpose of that statute was to give power to release not certain classes of persons so liable, but to release all of them. In conferring power upon the board to release the estate of the patient and likewise his relatives, there is no suggestion of a reservation of liability as against some non-related person. Reading all these statutes together, the interpretation stands out plainly that the only persons within the legislative mind, to be held liable, were such relatives as were liable at common law. The statute did not purport to create or pursue new or other liabilities, which might arise out of contract or out of tort. * * *

"In the interpretation of these statutes, we have never gone farther than to sustain the liability of the father for his minor son and of the husband for his wife. We deem it clear that the interpretation of the statute should go no farther than its terms.

"In the Monroe County case we said:

"'The word "relatives," as used in the first clause of the section, and "relatives," as used in the last clause, must be construed to mean the persons from whom the county may collect such claims; that is, "persons legally bound" for the support of the insane person.'"

Suppose, however:

That "A," the incompetent adult son of "B," is committed to Cherokee. They are residents of "X" township. An application is placed before the township trustees as specified in Section 5298, supra. Thereafter the trustees order that "A" support "B" in the institution on the ground that he is a poor person within the meaning of that term as defined in Section 5297, Code of Iowa, 1935. May it then be said that "B" in the supposititious case comes within the purview of Section 3595, supra, and is legally liable for the support of "A" in the institution?

No such case has been before our supreme court, but in *Wright County vs. Hagan*, supra, the court indulged in this interesting observation. We quote (id., page 799 of 210 Iowa):

"The appellant further contends that the daughter is a poor person, and for that reason the mother is liable for all of the money expended by the plaintiff for her support. The appellant is also in error as to this contention. As to the property qualifications and the physical and mental condition of the daughter, it may be conceded that the stipulation is sufficient to constitute the daughter a poor person in fact; but it requires more than this, under our statutory law, to make the mother and her estate liable for moneys expended for the support of the daughter as a poor person. Section 5298 of the Code, 1927, provides:

"'The * * * mother * * * of any poor person, who is unable to maintain himself or herself by labor, shall * * * relieve or maintain such person in such manner as, *upon application to the township trustees of the township where such person has a residence or may be, they* may direct.' (Writer's italics.)

"Sections 5302 to 5304, inclusive, of the Code, 1927, provide that the township trustees may apply to the district court of the county where such poor person resides, for an order to compel the relatives to maintain the poor person; that notice shall be given to the parties sought to be charged; that a hearing shall be held in a summary manner before the court; and that an order shall be made by the court, fixing and prescribing the liability of the relatives, etc. Section 5309 of the Code provides:

"'Any county having expended any money for the relief or support of a poor person, *under the provisions of this chapter*, may recover the same from any of his kindred mentioned herein, from such poor person should he become able, or from his estate; *from relatives by action brought within two years from the payment of* such expenses,' etc. (Writer's italics.)

"Section 5328, Code, 1927, provides that the poor must make application for

relief to the trustees of the township where they may be. We have held that, where an application for aid has been made to the township trustees by the poor person, or by someone for or in behalf of the poor person,—which application may be rather informal,—and the trustees have acted thereon, then the county may furnish the support and bring action to recover the amount expended for the support without resorting to the procedure outlined in Sections 5302, 5303, and 5304 of the Code, 1927. See *Boone County vs. Ruhl*, 9 Iowa 276; *Bremer County vs. Schroeder*, 200 Iowa 1285; *Hamilton County vs. Hollis*, 141 Iowa 477.

"While the appellant strenuously contends that the mother and her estate are legally liable for the money expended by the county for the support of the daughter as a poor person, yet it is apparent that the money expended by the county was for the support of only an insane person, committed as such to the Hospital for the Insane, and that the daughter was not a county charge, under our statutory law relative to the care and support of the poor. The appellant, in his argument, quotes and relies upon Section 5298 of the Code, hereinbefore quoted; yet there was no order or direction in the instant case by the township trustees, and no application to the trustees made by the daughter, or anyone for her, as required and exacted by said section. An application, although informal, by the poor person, or by someone for the poor person, to the trustees of the township where the poor person has a residence or may be, and action thereon, are the requisite initial steps which must be taken before there can be any liability on the part of the mother, father, and other designated relatives, for money expended by the county for the support of the poor person. See Section 5298 of the Code, 1927; *Hamilton County vs. Hollis*, 141 Iowa 477; *Bremer County vs. Schroeder*, 200 Iowa 1285; *Mansfield vs. Sac County*, 60 Iowa 11; *County of Clay vs. County of Palo Alto*, 82 Iowa 626; *Monroe County vs. Teller*, 51 Iowa 670; *Boone County vs. Ruhl*, 9 Iowa 276. It is obvious that, under the statutory law and the supporting authorities, the mother and her estate are not liable for the money expended by the plaintiff county for the support of the daughter, as a poor person.

"We have already found that the mother is not liable, under our law, for the money expended for the support of her daughter as an insane person. There is neither allegation nor proof of her liability as the mother of a poor person. As to whether relatives not legally liable for the support of an insane person committed to the Hospital for the Insane might be made liable if the procedure under our statutory law for support of the poor were followed, we make no pronouncement. Moreover, were the mother liable for money expended for the support of the daughter as a poor person, then, as held by the trial court, the two-year statute of limitations provided for in Section 5309 of the Code, 1927, would be applicable. See *Bremer County vs. Schroeder*, 200 Iowa 1285. * * *"

Again note the language of the court in *Monroe County vs. Teller*, supra, quoting from page 672 of 51 Iowa:

"A father is not legally bound to support his adult children at common law, nor under the statutes of this state. They owe him no service, and are as free from his restraint as though there were no kinship. He is no more liable on their account than a stranger, excepting as provided in Chapter 1, Title 11, of the Code, which provides for the support of the poor. It is not claimed in this case that at the time the defendant's son was sent to the hospital he was a pauper, nor that he was a county charge, nor that he ever has been, within the meaning of Chapter 1, Title 11. That chapter only has reference to relief for the poor; that is, to such as apply to the proper authorities for relief because of poverty."

In this same connection, Justice Beck in his dissent in *Porter vs. Powell*, supra, stated (id., page 160 of 79 Iowa):

"V. It may be that the parent would be under obligation to support a pauper child who is of full age, or that a promise would be inferred on the part of the father to render such support. But that point is not in this case, as it is not shown or claimed that the child for whose support the father was sued is a pauper, or not possessed of ample means to pay plaintiff for the services rendered by him."

While it may be said that Sections 5298 and 5301, supra, do not abrogate the common-law liability of a parent for the support of his adult off-spring (*Iowa County vs. Amana Society*, supra), yet the repeated intimations of the supreme court lead to but one conclusion, i. e., that a parent, child or other relative, as enumerated in Sections 5298 and 5301, supra, *may be liable* for the relief and maintenance of adult kin-folk committed to and confined in a state hospital for the insane on the ground that such incompetents are "poor persons." In this connection, Section 5297, Code of Iowa, 1935, defines "poor person" as follows:

"The words 'poor' and 'poor person' as used in this chapter (267) shall be construed to mean *those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor;* but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public." (Italics ours.)

It may be said that in a proper case an insane person may come within the purview of this definition. That being true, it is the opinion of this department that liability for the relief and maintenance of an adult insane patient may be established as against the father, mother, children, grandchildren, and with qualifications, grandparents, of such insane patient, provided the procedure contemplated by Sections 5298 to 5308, inclusive, Code of Iowa, 1935, has been pursued.

Therefore, in answer to your specific question, it is the opinion of this department that the parent of an adult insane patient committed to a state hospital for the insane *may be* held liable for the support of such incompetent while so confined if the proper procedure is followed.

Parenthetically we add, once the township trustees or the official charged with the oversight of the poor have ordered the relief and maintenance of an insane patient on the ground of his being a poor person, as provided in Section 5298, Code of Iowa, 1935, and the county thereafter relieves or maintains such person, it (the county) may institute an action for the recovery of the same without first adjudicating the question of liability under Sections 5302, et seq. *Hamilton County vs. Hollis*, 141 Iowa 477, 119 N. W. 978. However, recovery by a county would be barred within two years from the defraying of the expense of relief and support, except from the estate of the insane, in which case the county may institute an action within two years after the incompetent becomes able. Section 5309, Code of Iowa, 1935.

OFFICERS: STATE CONSERVATION COMMISSION: RIVER FRONT IMPROVEMENT COMMISSION: CITIES AND TOWNS: JURISDICTION OF: Conservation commission has police jurisdiction within areas subject to the control of the river front improvement commission.

July 11, 1938. *Mr. M. L. Hutton, State Conservation Commission:* We acknowledge receipt of your request for our opinion upon the following question:

Does the conservation commission have jurisdiction over meandered streams in the operation of boats and the enforcement of the boat and navigation laws within cities or towns named in Section 6596 of the Code of 1935 and under the provisions of Section 6597 of the Code of 1935?

Section 1703-e1, Chapter 85, 1935 Code, authorizes the appointment of conservation officers by the state conservation commission, and among other things provides as follows:

"Boat inspectors and conservation officers are herewith vested with the powers

and charged with the duties of peace officers, in enforcing the provisions of this chapter."

The 47th General Assembly, by amendment to the above chapter, added a somewhat detailed code of navigation laws to its prior existing provisions. Under the law, violation of such statutes is a misdemeanor. (See Section 1703-e10 as amended by Section 2, Chapter 99, laws of the 47th General Assembly.)

Section 1812, 1935 Code, confers general jurisdiction upon the state conservation commission over all meandered streams and lakes within the state. Said section provides in part as follows:

"Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission. * * *"

Section 6596 and Section 6597, 1935 Code, are found in Chapter 326 relating to government of cities by commission. Section 6596, supra, provides for the election of a river front improvement commission in such cities, and Section 6597 sets out the specific powers relative to meandered streams which are conferred upon cities under the commission plan which have so elected river front improvement commissions, said section providing as follows:

"6597. *Meandered streams.* Every city specified in Section 6596 shall have control of all the meandered streams within the boundaries thereof, and of the beds, banks, and waters of such streams. Said cities shall have power to prevent the placing or maintenance of nuisances and obstructions in such streams, or on or along the banks thereof, and to abate and remove such nuisances or obstructions therefrom, and to recover the expense thereof from the person or persons causing, placing, or maintaining such nuisances therein or thereon; to deepen, widen, straighten, or change the channels of such streams; to improve and beautify the banks of such streams; to construct levees, embankments, and other works to protect the city and its property and its inhabitants and their property from floods; to acquire and take by purchase or condemnation any real property necessary for any such works or improvements; to assess upon property benefited by any such works or improvements, the cost thereof, to the extent of the special benefits conferred thereby, but not in excess of such special benefit and not in excess of twenty-five per cent of the actual value of the property benefited; to provide funds for any of the expenditures herein authorized, by levy upon all the taxable property in such city of a continuous tax of not more than one-half mill on the dollar each year for not more than ten years, and to issue bonds in anticipation of such tax, and to pledge the proceeds of said tax to the payment of said bonds. The said special tax levy and the issuance of bonds in anticipation thereof, the general plans recommended by the riverfront improvement commission, and the estimated costs of said improvement based upon surveys, plans, and estimates made by the city engineer shall be provided for by ordinance."

It will be noted that the legislature has undertaken to go into detail with reference to the powers conferred upon cities relative to river front improvement. Under the familiar rule of statutory construction "expressio unius est exclusio alterius," which would have application in construing the above section, the authority of municipalities affected by the statute would be limited to the specific powers therein expressed. While broad powers are extended to cities and towns, within the scope of improving and beautifying such streams, we find no implications in the language of the above statute which could have the effect of suspending or modifying the penal laws of the state. Under the law, conservation officers are charged with the duties of peace officers in enforcing the provisions of Chapter 85, 1935 Code, as amended by Chapter 99, laws of the 47th General Assembly.

We conclude that the laws of the state pertaining to boats and navigation must be uniformly applied and enforced throughout the state, and that state conservation officers, under the statute, are charged with the duties of enforcement of such laws. The conservation commission, as the agency of the state charged with the administration and enforcement of boat and navigation laws, therefore has police jurisdiction within areas subject to the control of the river front improvement commission.

COUNTIES: BOARD OF SUPERVISORS: BOARD OF APPROVAL: SECONDARY ROAD CONSTRUCTION: The board of supervisors need not ask the board of approval to approve plan for the expenditure of 65 per cent on the local roads. The board of supervisors must procure the approval of the highway commission for its program for the expenditure of 65 per cent of the construction fund.

July 12, 1938. *Iowa State Highway Commission:* Your memoranda of July 8, 1938, submitting the following proposition has been received and considered.

You state:

"All of the county trunk roads in a certain county have been graded, drained and surfaced either with gravel, crushed stone or other suitable surfacing material."

You ask:

"Is it proper for the Board of Supervisors under such conditions to have the local Board of Approval approve a construction program that will involve the expenditure of 35 per cent of the secondary construction fund, leaving the remaining 65 per cent to be spent at the discretion of the Board of Supervisors without action by the Board of Approval?

And you ask the further question:

"If the answer to the above question is in the affirmative is it necessary for the Board of Supervisors to secure the Highway Commission's approval on the proposed secondary road construction program on which the remaining 65 per cent of the county's construction fund will be expended?

Section 4644-c1 of the Code provides as follows:

"The duty to construct, repair, and maintain the secondary road and bridge systems of a county is hereby imposed on the board of supervisors."

Section 4644-c9 pledges 35 per cent of the yearly secondary road construction fund to the improvement of local roads.

Section 4644-c10 pledges the balance of the secondary construction fund for certain purposes, including:

"6. The payment of the cost of constructing local county roads and expenditures pertaining thereto, but only when the construction work on the county trunk roads has been fully completed, and when the board deems it inadvisable to make additions to said trunk roads."

Section 4644-c25 provides for the submission of plans for the local roads by the boards of trustees of the townships. That section also provides that the board of supervisors, together with the county engineer shall plan a program of road construction of both county trunk and local county roads, "always observing the plans filed by the board of trustees."

In the following sections certain directions are given and requirements made.

In Section 4644-c34 it is provided that the action of the board of approval so far as it pertains to the local county roads to be paid for from the 35 per cent shall be final. The language used is: "but the action of the board shall be final except as it applies to the 65 per cent of the secondary road construction fund to be expended under the direction of the board of supervisors."

It will be noted that subsection 6, of Section 4644-c10, pledging 65 per cent of the secondary road fund, allows the use thereof on the local roads when the

construction work on the county trunk roads has been fully completed, and when the board deems it inadvisable to make additions to said trunk roads.

In Section 4644-c4 it is provided that roads which had been designated as county roads at the time of the adoption of the present road law (Chapter 20 of the Acts of the 43rd General Assembly), "shall hereafter be known as county trunk roads."

And Section 4644-c5 allows the county to make additions to, or modify, or relocate, county trunk roads, subject, however, to the approval of the state highway commission.

So, under the statutes the board of supervisors could control the expenditure of the 65 per cent by making the roads that it proposes to improve additions to the county trunk system. In doing so it would have to have the approval of the state highway commission, but the board of approval would have nothing to do with it. The language of Section 4644-c34, that the action of the board of approval shall be final on the road program "except as it applies to the 65 per cent of the secondary road construction fund to be expended under the direction of the board of supervisors" is quite significant.

In the case of *Robinson vs. Board of Supervisors of Davis County*, 269 N. W. 921, 222 Iowa 663, the court in referring to the sections providing for the board of approval used the following language:

"Such authority as the board of approval is given by these sections extends over the expenditure of 35 per cent of the secondary road construction fund and the authority of the board of supervisors extends over the remaining 65 per cent."

The questions you present were not directly involved, but in discussing the statutes the court used the language above quoted.

There is nothing in the statutes, so far as we can find that gives the board of approval any control over the expenditure of the 65 per cent of the secondary road construction fund, if and when the county trunk system is completed, and, as stated, the construction of the secondary roads is one of the duties of the supervisors. The statute gives the representatives of the local authorities control over the adoption of the plan for the construction of the local roads when such construction is to be done by the expenditure of the 35 per cent of the secondary road fund, and that seems to be the extent of its authority.

So we think that your first question should be answered in the affirmative, and that the Board of Supervisors need not ask the board of approval to approve its plan for the expenditure of the 65 per cent on the local roads.

The answer to your second question is found in Section 4644-c24, which provides that "before proceeding with any construction work on the secondary road system * * * 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." We think that section of the Code applies, and that the board of supervisors must procure the approval of the Highway Commission for its program for the expenditure of the 65 per cent of the construction fund.

TAXATION: SPECIAL ASSESSMENTS: CITIES AND TOWNS: STATE BOARD SOCIAL WELFARE: STATE FUNDS: STATE LANDS: STATUTES: Board of social welfare given authority to pay out of its funds special assessments upon property to which state has taken title. Special

assessments against such property for financing of certain primary or secondary roads to be taken from any funds in state treasury not otherwise appropriated.

July 12, 1938. *Mr. Frank G. Pierce, League of Iowa Municipalities, Marshalltown, Iowa:* We are in receipt of your request for an opinion upon the following proposition:

May special assessment taxes be levied and collected against property deeded to the state of Iowa under a deed given by a recipient of old age assistance as is authorized by Section 5296-f16 of the Code of Iowa 1935, as amended?

This opinion covers those situations where the state has *taken title* to the real estate of a recipient, but does not cover those situations where title is *not* taken by the state but a lien is filed against the property of the recipient by the State Board of Social Welfare.

At the outset, we refer you to the opinion of this department issued under date of July 23, 1937, written by Mr. Charles W. Wilson, Assistant Attorney General, and addressed to Mr. H. H. Bittinger. That opinion disposes of some of the questions herein involved and decides the following question pertinent to this inquiry:

1. That property deeded to the state by a recipient of old age assistance under the provisions of Section 5296-f16, as amended, is not subject to the current general taxes while owned by the state, but upon its reversion to the grantor recipient, his spouse, or heirs, those taxes will again become collectible. If the option to purchase is not exercised by the recipient, his spouse, or his heirs, and the land is sold by the state to a third party purchaser, that purchaser takes the land free and clear of such taxes.
2. That during the period that the state owns the land and the grantor recipient is receiving old age assistance, taxes cannot be recovered from his life estate as the taxes are suspended under the provisions of Section 6950-g1.

Your inquiry differs from the one answered by the opinion above referred to only by reason of the fact that your inquiry pertains solely to special assessments. The decision of the opinion heretofore referred to must necessarily be controlling unless the law pertaining to special assessments against property owned by the state makes provisions for the payment of the same.

The cost of any number of special improvements, such as the construction, maintenance, or repair of pavement, along with the construction, maintenance, and repair of sewers and like improvements, may be assessed against adjacent properties. Our question is whether or not those special assessments may be assessed and collected against property owned by the state and acquired under the provisions of the old age assistance act. First, let us turn to the assessment statutes themselves and examine their provisions. Chapters 307 and 308 provide for the opening, widening, repairing, etc., of streets, alleys, parks, etc., and for the paving, graveling and the like of streets, and the installation, repair, etc., of sewers and the like. Such improvements enhance the value of adjacent property and are for the benefit of such property, and therefore the cost of the same may be assessed against such properties. A reading of those two chapters will disclose that there is no mention of state-owned lands except by Section 5988, which authorizes the construction of sewers from such state-owned buildings through or under any city street, and also authorizes the connecting of said sewer with the city's sewer system "under the same regulations as are provided for private property owners." This section throws no light on our problem.

Turning to Section 6019 of Chapter 308 of the Code, we find privately owned property defined, and that section reads as follows:

"All property except streets, property owned by the United States, and property owned by the city, shall be deemed privately owned property."

It will be noted that all through the special assessment chapter "assessment" is authorized against "private property." From the definition of private property, we gather that the legislature meant that all land by whomever owned, except streets and land owned by the United States or the city, is to be considered as private property, but, even assuming that that was the intent of the legislature, the fallacy in the set-up, as far as the state is concerned, arises from the fact that it makes no appropriation for the payment of these special assessments.

After the section which defines private property (Section 6019, supra), the code editor refers us to Section 4634 of the Code, which section is under Chapter 239 and is captioned "State Roads," and which section reads as follows:

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

It will first be noted that the improvements therein provided for are not all of those contained in Chapters 307 and 308 heretofore discussed, but only draining, oiling, paving, or hard surfacing of roads are mentioned. Section 4634, supra, authorizes payment of special assessments for the draining, oiling, paving or hard surfacing of roads extending through or abutting upon land owned by the state by the executive council. That section would solve part of our problem except for the fact that here also the legislature has failed to make an appropriation to pay those special assessments. In the absence of an appropriation, the effectiveness of the section becomes nil. An appropriation is made to the executive council, but no part of it is appropriated for this purpose. This conclusion is borne out by an examination of the askings to the legislature by the executive council, which askings make no mention of an appropriation under this section, and no appropriation for the same is granted. No court has gone so far as to hold that a statute analogous to Section 4634, supra, is an appropriational statute in itself.

An examination of the procedure heretofore followed also shows that there has been a contemporaneous construction of the statute by the legislature. At each session of the legislature claims have been presented for payment which are authorized under the above section by the executive council, which claims generally have been honored by the claims committee and an appropriation made by the legislature to satisfy the same. So, our construction of the statute has been borne out by the past practices of the legislature, and, although contemporaneous constructions placed upon statutes by different departments for the legislature are not necessarily controlling, still they are entitled to some weight, and, in view of the wording of the statute, we feel that we must reach the conclusion that although the statute contemplates payment of these special assessments by the executive council, still, no appropriation for the same has been made, and, therefore, the statute is ineffective in accomplishing the purposes for which it was designed.

Next, let us turn to the Supreme Court decisions written prior to the adoption of Section 4634, supra, to determine whether special assessments may be levied against state-owned lands. Three early decisions are found on this point. The first is found in the case of *Polk County Savings Bank vs. State of Iowa*, and reported in 69 Iowa 24. That case held that cities did not have the power to assess a sewer tax against property owned by the state. The court went on to say that to hold otherwise would be to allow the state capitol to be sold for delinquent special assessments. With that holding, the case of *Ottumwa B. & B. Co. vs. Ainley*, 109 Iowa 386, concurs, and cites the Polk County Savings Bank case with approval. Judge Deemer, in the case of *E. & W. Con. Co. vs. Jasper County*, 117 Iowa 365, sums up the authorities on this point. That case holds that the general exemption from taxation under the statute, being Section 797 of the 1873 Code, was referring to ordinary taxes, and was not applicable to special assessments, but also holds that as far as the United States is concerned, and the state itself, they may not be made liable for special assessments without their consent, and states as follows:

"* * * There are certain implied exemptions because of the nature of the proceedings. Property held by the United States or by the state itself cannot be made liable for two reasons: First, because it cannot be sold on execution, nor may any lien be created against it; and, second, because neither the state nor the United States can be sued, nor may judgments be enforced against either. * * *"

We think that language is applicable to the statutes as they exist in this state today, and must therefore be controlling unless a provision is made for the payment of special assessments under the old age assistance act.

Section 5296-f16, as amended, being a part of the old age assistance act, reads in part as follows:

"If the state board 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; upon the taking of such deed the division shall pay any delinquent taxes against said property and said deed shall reserve to the grantor and his spouse a life estate in said property and an option to the grantor and his heirs to purchase said property by repayment of the total amount paid for the benefit of the recipient. Said option in so far as the heirs are concerned shall be for two years from the date of the death of the grantor or the grantor's surviving spouse, if any, and shall include an interest charge of three and one-half per cent during the period of the option to the heirs. Such property shall be managed by the division which shall credit the net income to the account of the person or persons entitled thereto. The state board 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."

From a reading of that portion of the section above set out, it is apparent that the state, through the State Board of Social Welfare, is to pay all taxes delinquent at the time the deed is taken from the grantor recipient by the state. There is no authorization to pay current special assessments unless it is found in the last sentence of that part of the section above quoted. That portion of the section authorizes the state board (being the state board of social welfare) to sell, lease or transfer such property * * * and to pay *all just claims against it*, and do all other things necessary for the protection, preservation and management of the property.

The question arises as to what is meant by "just claims." We have heretofore

seen that the legislature included state owned property in its conception of privately owned property under Section 6019, but the state has been precluded from paying special assessments against this property under Chapters 307 and 308 by reason of the fact that the legislature has failed to make an appropriation for the payment of the same in the act. We have also seen that the Executive Council is empowered to pay certain specials, but there also, the legislature failed to make an appropriation in the act for the payment of the same. We therefore see that the payment of such specials by the state was contemplated by the legislature, but by inadvertence the appropriation for payment was not made in the act. That defect is rectified, as far as property acquired from old age recipients is concerned, if such assessments can be classified as "just claims." There can be no doubt but what the value of the property is augmented by reason of the special improvements, nor can there be any doubt but what such state owned property should bear its proportionate cost of the betterment the same as other properties, and, further, that if the option to repurchase is exercised, the cost of repurchasing is enhanced by the amount of the special assessments paid by the state. The better reasoning points to the conclusion that such claims are "just claims"; that such property should bear its proportionate cost, and that the state should not be enriched by the added value of the improvements without expense to it; that the intention of the legislature, as heretofore set out, is carried out by holding as we do, and no undue burden is placed upon other property owners in the community.

As to special assessments made by reason of the financing of certain primary and secondary roads, as is set out in Chapter 241 of the Code of Iowa 1935, we refer you to Section 4753-a3, which specifically authorizes the payment of assessments against state owned lands in such cases from any money in the treasury not otherwise appropriated. This section further indicates the general intention of the legislature towards payment of special assessments as far as state owned lands are concerned. It is therefore our opinion that the board of social welfare is given authority to pay out of their funds special assessments upon property to which the state has taken title under the provisions of Section 5296-f16 as amended, and special assessments against such property for the financing of certain primary or secondary roads, as is specified under Chapter 241, are to be paid from any funds in the state treasury not otherwise appropriated.

OFFICERS: STATE CONSERVATION COMMISSION: SERVICE OF PROCESS: FEES: Conservation officers should be paid the statutory fees for the service of a warrant or other processes, if necessary from the county treasury.

July 12, 1938. *Mr. M. L. Hutton, State Conservation Commission:* We acknowledge receipt of your request for the opinion of this department upon a question which may be stated as follows:

Is a state conservation officer, acting within the scope of his duties, entitled to constable fees for the service of a warrant of arrest in townships having a population of more than ten thousand?

Section 10367, 1935 Code, provides that constables shall be entitled to charge and receive the sum of 75 cents for the service of each warrant of any kind. Section 10638 provides for payment of such fee out of the county treasury in cases where the prosecution fails, or where the costs are not made from the person liable for their payment. This section reads as follows:

"10638. *In criminal cases.* The fees contemplated in Sections 10636 and 10637, in criminal cases, shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit."

Section 10639 provides that in townships having a population of ten thousand or more, justices of the peace and constables shall receive in full compensation for their services performed in criminal cases certain fixed annual salaries. These salaries are scaled in proportion to the population of the township.

From the foregoing facts it appears clear that constables in townships having more than ten thousand population would have no claim against the county treasury for unpaid criminal fees. Such officers are compensated fully for such services by the fixed statutory salary.

For the purpose of the enforcement of the fish and game laws, state conservation officers are made peace officers by the provisions of Section 1713, 1935 Code, which reads as follows:

"1713. *Arrests—assistance of peace officers.* State conservation officers may arrest without warrant any person violating the provisions of this chapter. They may serve and execute any warrant or process issued by any court in enforcing said provisions, in the same manner as any peace officer might serve and execute the same, and they shall receive the same fee therefor. They may call to their aid any peace officer or other person, whose duty shall then be to enforce or aid in enforcing the provisions of this chapter."

The clear import of the language of the above section is that such officers may serve and execute a warrant and receive the same fee therefore as a peace officer might charge.

In townships having a population of over ten thousand, a constable could not receive such payment out of the county treasury as stated above because the fixed salary which the law allows such officer is received "in full compensation for such services." A conservation officer is not a constable and he receives no compensation from county funds in the nature of a salary. Had the legislature made no provision for the payment of fees to conservation officers, it would follow that none could be paid them. The provision of law with reference to the right of the conservation officer to be paid his fee is specific and effect must be given to the language of the statute.

We have examined the Iowa cases which discuss the payment of fees to persons who are permitted to serve in the place and stead of officers who may collect and charge statutory fees. None of these cases holds that where a statute specifically directs that a fee be paid, that such fee is to be withheld for the reason that the person claiming it is paid a salary.

We conclude, therefore, that conservation officers should be paid the statutory fees for the service of a warrant or other processes. The statute provides that such officer shall *receive* such fees. Therefore, if costs are not made from the defendant in a particular case, or if the prosecution fails, such costs should, if found to be proper in form and amount, be paid out of the county treasury as provided in Section 10638, supra.

The statute which authorizes the charging of this fee does not provide for the manner of disposition of the same. Section 1218, 1935 Code, provides as follows:

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

The salary of the conservation officer constitutes his entire remuneration. Public policy would not permit such officer to retain this fee for services performed in the line of his duties and to receive a salary from the state for the same transaction. The fees which the statute permits him to receive, therefore, must be accounted for and remitted to his principal, the state conservation commission. The statute provides that:

"All other sources of revenue arising under the fish and game act be allocated to the state fish and game protection fund."

Such fees, therefore, as are remitted to the commission by conservation officers should be credited to the said fund.

SCHOOLS: BOARD MEETING: School board may determine by its own rules of procedure whether or not board meetings are to be open to the public. Record of the meetings is a public record and would be open to any interested resident of the corporation.

July 13, 1938. *Mr. J. W. Pattie, County Attorney, Marshalltown, Iowa:* We acknowledge receipt of your request for the opinion of this department upon a question you have stated as follows:

"Whether or not a school board meeting at an official regular meeting or a called meeting, have the right to close that meeting as against citizens or tax payers in that particular school district."

We find no provisions of law which require a board of directors of a school corporation to admit other than members of the board, or the necessary officers thereof, to meetings. Section 4224, 1935 Code, provides as follows:

"4224. *General rules.* The board shall make rules for its own government and that of the directors, officers, teachers, and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules."

It is our opinion that the question of whether or not a meeting of the board of directors of a school corporation is to be open to the public or closed is to be determined by the board itself under the authority vested in the board to make rules for its own government.

Section 4308, paragraph (2), 1935 Code, provides that the secretary of the board shall:

"2. *Minutes.* Keep a complete record of all the proceedings of the meetings of the board and of all regular or special elections in the corporation in separate books."

Such record of the proceedings of a school board is a public record and as such would be available, under proper circumstances, to any interested resident of the corporation.

ELECTIONS: SPECIAL: COUNTING BOARD: BOARD OF SUPERVISORS: Election board at the special election (Warren County) should be composed in each precinct of the three judges and two clerks who served on the election boards in each precinct in the 1936 general election.

July 16, 1938. *Mr. J. Berkley Wilson, County Attorney, Indianola, Iowa:* We acknowledge receipt of your request for the opinion of this department on the following matter. You state:

There is to be submitted to the people of Warren County a public measure at special election as to whether or not a courthouse shall be erected and bonds issued for the payment of the indebtedness incurred at the erection of such courthouse. You inquire whether or not the board of supervisors must provide

a counting board for a special election, in view of the fact that a double board operated at the last preceding general and primary elections.

The pertinent provisions of the 1935 Code of Iowa are the following:

"730. *Election boards.* Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors of another party qualified and willing to act as such judge or clerk. Nothing in this chapter shall change or abrogate any of the provisions of law relating to double election boards."

"737. *Boards for special elections—duty of auditor.* The election board at any special election shall be the same as at the last preceding general election. In case of vacancies happening therein, the county auditor may make the appointments to fill the same when the board of supervisors is not in session."

"887. *Double counting board.* In all election precincts the board of supervisors may appoint for each primary and general election three additional judges and two additional clerks to be known as the election counting board."

According to your statement of facts, Warren County, in all election precincts in the 1936 general election, operated under double election boards, as provided in Chapter 42 of the Code of Iowa, 1935. Your question is whether or not the election board in each precinct at the special election to be held next month shall be comprised of the election board consisting of three judges and two clerks, as provided in Section 730, supra, who acted as such in the 1936 general election, *and* the three additional judges and two additional clerks appointed by the board of supervisors for the 1936 general election to comprise and act as an election counting board, as provided in Section 887, supra. Stated otherwise, your question is whether or not the election board contemplated in Section 737, supra, need be comprised only of three judges and two clerks who served as judges and clerks of the 1936 general election in each precinct.

Under the provisions of Chapter 42, supra, the election board provided for by Section 730, becomes a receiving board and does not function as a counting and certifying board except as specified in said chapter. On the other hand, the board, created under Chapter 42, supra, by appointment of the board of supervisors, is a counting board. There can be no question but what, under the provisions of the cited chapter, it is discretionary with a board of supervisors as to whether or not an election counting board will be created by appointment for any primary or general election. Furthermore, such board is specifically limited in appointment to primary and general elections. There is no authority vested in law for boards of supervisors to appoint a counting board for a special election. Therefore, if your question alone concerned the power of a board of supervisors to appoint a counting board for a special election, the answer necessarily would be that a board of supervisors has no such authority.

However, a counting board having been appointed and having performed its legal function in the last general election, may it then be said that the term "election board," as employed in Section 737, supra, contemplates a membership composed of the election board personnel, under Section 730, supra, and the counting board personnel, under Section 887, supra?

It may be pointed out that the board, whose creation is provided for in Chapter 42, is not designated an election board; it is known as an election counting board, It is, so to speak, an adjunct board, presumably created, when necessary, to facilitate a prompt and early determination of election results in both primary and general elections.

It is accordingly the opinion of this department that the term "election board," as used in Section 737, supra, refers solely to the election board contemplated by the provisions of Section 730, supra, or, in other words, that the election board at the special election to be held in your county next month should be composed, in each precinct, of the three judges and two clerks who served on the election boards in each precinct in the 1936 general election.

CITIES AND TOWNS: COUNTIES: BOARD OF SUPERVISORS: WEEDS: Primary duty upon cities and towns to cut, burn or otherwise destroy all noxious weeds and any other weeds growing within parkings, streets and alleys which make public travel unsafe.

July 16, 1938. *Department of Agriculture:* We are in receipt of your request for an opinion on the following question:

Is it the duty of cities and towns within their incorporate limits to cut and destroy all weeds, whether noxious or otherwise, growing within parkings, streets and alleys?

In a related opinion issued to your department, under date of July 30, 1937, and reported at page 408 of the current report of the attorney general, this department pointed out that, with certain exceptions, the substituted weed law, enacted by the 47th General Assembly (Chapter 131), deals primarily with noxious weeds. In that opinion we parenthetically stated that the problem of exterminating ordinary or other than noxious weeds growing within the incorporate limits of cities and towns is peculiarly that of the municipality just as it always had been.

The situation upon which the present inquiry is based, however, is not to be confused with that of private property upon which weeds, either noxious or ordinary, are growing. Chapter 131, supra, specifies the means and manner of destroying noxious weeds growing on lands and all other weeds growing on lands rendering street travel unsafe and hazardous. And as to the destruction of other than noxious weeds having no relation to street travel, cities and towns may well provide by ordinance or abate as a nuisance. See:

Section 5738, 1935 Code of Iowa;
Section 12396, 1935 Code of Iowa;
McQuillon on Municipal Corporations, vol. 7, section 1371; id., vol. 4, chapter 25, section 975 (2nd Ed.);
St. Louis vs. Galt, 179 Mo. 8, 77 S. W. 876, 63 L. R. A. 778.

The question here, however, is whether or not there is a primary duty on cities and towns to eradicate and control noxious and other weeds growing within parkings, streets and alleys in the corporate limits.

Section 4826, Chapter 131, Laws of the 47th General Assembly, provides as follows:

"4826. Each owner and each person in the possession or control of any lands shall cut, burn or otherwise destroy, in whatever manner may be prescribed by the board of supervisors, all noxious weeds thereon as defined in this chapter at such times in each year and in such manner as shall prevent said weeds from blooming or coming to maturity, and shall keep said lands free from such growth of any other weeds, as shall render the streets or highways adjoining said land unsafe for public travel."

Failure of a land owner or person in the possession or control of lands to substantially comply with the published order (of the board of supervisors) prescribing a program of weed control and destruction results in the enforcement of the order by the proper constituted authorities at the expense of such default-

ing person. Sections 4829-a3 and 4829-a6, Chapter 131, supra. Can it be said that cities and towns, with respect to parkings, streets and alleys, come within the purview of the quoted section?

It should be pointed out in the first instance that an abutting property owner in cities and towns has no title to any portion of streets and alleys which have been dedicated and accepted as such. An abutting property owner takes only to the lot line and not to the center of the alley or street.

Blennerhassett vs. The Incorporated Town of Forest City, et al., 117 Iowa 680, 91 N. W. 1044.

See also:

Clare vs. Wogan, 204 Iowa 1021, 1024, 216 N. W. 739.

And as a general rule in this state, the exception being in certain special charter cities, the fee title to streets and alleys is in the municipality.

Callaghan vs. City of Nevada, 170 Iowa 719, 153 N. W. 188;
Walker vs. City of Des Moines, 161 Iowa 215, 142 N. W. 61;
Incorporated Town of Ackley vs. Central States Electric Co., 204 Iowa 1246, 214 N. W. 879;
McQuillon on Municipal Corporations, Vols. 1 and 4, sections 248 and 1411, respectively, (2nd Ed.).

Such title is held by the city in trust for the public.

Lerch vs. Short, 192 Iowa 576, 185 N. W. 129;
McQuillon on Municipal Corporations, supra.

"Parking" in the ordinary acceptation of that term means the portion of a street between the lot line and the curb line; "a strip of sward in a street." *Funk and Wagnalls New Standard Dictionary.* "Person" may be extended to bodies corporate. Section 63, subsection 15, Code of Iowa, 1935. Cities and towns may incorporate. Chapter 286, et seq., Code of Iowa, 1935. In addition, cities and towns "* * * shall have the care, supervision, and control of all public highways, streets, avenues, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances."

Section 5945, Code of Iowa, 1935.

As was stated by the Iowa Supreme Court in *McFadden vs. Town of Jewell,* 119 Iowa 321, 323, 93 N. W. 302:

"Certain it is that in the matter of its control over the streets and alleys within the incorporate limits—and, to make the reference direct, in the matter of clearing the alley in question of weeds—the town was in the exercise of police powers possessed by it as an incident to its existence as a municipal corporation."

Section 4826, supra, requires "each owner and each person in the possession or control of any lands" to cut, burn or otherwise destroy, in whatever manner may be prescribed by the board of supervisors, all noxious weeds growing thereon, and further requires that such owner or person "shall keep said lands free from such growth of any other weeds, as shall render the streets or highways adjoining said land unsafe for public travel."

It is the opinion of this department that cities and towns come within the meaning of "owner" and/or "person" as those terms are employed in Section 4826, supra, and consequently that there is a primary duty upon cities and towns to cut, burn or otherwise destroy all noxious weeds growing within parkings, streets and alleys in the corporate limits, and any other weeds growing therein as render streets and alleys unsafe for public travel—that such duty can be enforced by mandamus or other appropriate remedy. Such duty would

extend, of course, to any other lands owned, possessed or controlled by the municipality either in a governmental or proprietary capacity.

Furthermore, as to weeds other than noxious weeds, we are of the opinion that Section 5945, *supra*, imposes upon cities and towns a mandatory duty to keep streets and alleys free of weeds, open for travel, and ingress and egress to properties—the very use to which they are dedicated. This latter is not a new problem. The substituted weed law was not designed to treat of the problem of controlling and destroying ordinary weeds, except as noted. It is and always has been that of cities and towns to meet in such way as the judgment of its officers, consistent with law, dictates. The duty is created by statute. The authority, independent of statute, is the police power. *McFadden vs. Town of Jewell*, supra.

Contention has been made that no such duty exists, as concerns either noxious or ordinary weeds, because of the provisions of Section 4820, Chapter 131, supra, which states in part:

"* * * Each commissioner shall, subject to direction and control by the county board of supervisors, have supervision over the control and destruction of *all noxious weeds* in this jurisdiction, *and of any other weeds growing along streets* and highways unless otherwise provided, and shall hire the labor and equipment necessary for the performance of his duties subject to the approval of the board of supervisors, which shall be paid for in the same manner as the weed commissioner's compensation." (Italics ours.)

It may be said categorically that this provision of the weed law in nowise relieves land owners or persons in possession or control of lands from the duty and obligations imposed by the weed law, *or otherwise imposed by statute.* Section 5245, supra. In the opinion of this department, the above quoted provision is but a definition of duty, a badge of authority which, when coupled with other specifications of law, enables the proper authorities to proceed with the enforcement of the law when the person primarily responsible fails in the performance of his duty. The fact that as against a municipality there probably could be no assessment for costs of enforced weed eradication and control does not, in our judgment, dispose of the municipality's primary duty to cut, burn or destroy weeds growing within parkings, streets and alleys. The duty remains which may be enforced by the invocation of the appropriate judicial machinery.

ELECTIONS: POLITICAL PARTY: CHANGE OF NAME: FARMER-LABOR PARTY: Name of the party is the very essence of the party. The only manner in which electorate of Farmer-Labor party may establish in the state of Iowa a political party known by some other name would be by pursuing the procedure set out in either Chapter 37-A1 or Chapter 37-A2 of the Code, and thereafter qualifying as a political party as defined in Section 528.

July 19, 1938. *Honorable Robert E. O'Brian, Secretary of State:* You request the opinion of this department on the following question:

"Is it possible under the law of Iowa for an established political party to change its name without sacrificing its legal status as a political party?"

We are advised that this inquiry is prompted by the fact that the Farmer-Labor party desires to change its name.

Section 528, Code of Iowa, 1935, defines a political party thus:

"The term 'political party' shall mean a party which, at the last preceding general election, cast for its candidate for governor at least two per cent of the total vote cast at said election. * * *"

Prior to the 1934 general election the Farmer-Labor party was known to the

Iowa law only as a political organization and not a political party. In that year this organization nominated by convention Wallace Short for governor, and Wallace Short, as a candidate for governor, appeared on the official *general* election ballot (in November, 1934) under the designation of Farmer-Labor. By virtue of his receiving, as candidate for governor, at least two per cent of the total vote cast at the November, 1934, general election, the Farmer-Labor political organization acquired the status of a political party within the statutory meaning of that term. Hence, in the 1936 primary election, it was entitled to nominate candidates for office by primary ballot in the same manner as the Republican and Democratic political parties. This it did with respect to a state ticket and local tickets in numerous counties. It bears repeating, however, that the Farmer-Labor party was entitled to do so only by reason of its having acquired the status of a political party in the 1934 general election. Had it failed of this accomplishment, then in 1936 it would have been in precisely the same situation as it was prior to the 1934 general election, and could have proceeded, not by way of a primary ballot, but only by the method of nominating candidates as specified in Chapters 37-A1 and 37-A2, Code of Iowa, 1935. This is borne out by the following Code sections: (Code of Iowa, 1935.)

"527. *Primary election defined.* The term 'primary election' as used in this chapter shall be construed to apply to an election by the members of various political parties: * * *"

"528. *Political party defined.* The term 'political party' shall mean a party which, at the last preceding general election, cast for its candidate for governor at least two per cent of the total vote cast at said election.

"A political organization which is not a 'political party' within the meaning of this section may nominate candidates and have the names of such candidates placed upon the official ballot by proceedings under Chapters 37-A1 and 37-A2."

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

"655-a1. *Political nonparty organizations.* Any convention or caucus of qualified electors representing a political organization which is not a political party as defined by law, may, for the state, or for any division or municipality thereof, or for any county, or for any subdivision thereof, for which such convention or caucus is held, make one nomination of a candidate for each office to be filled therein at the general election."

In other words, the primary election law of this state was initiated for the purpose of making nominations to office by political parties only. It makes no provision for a person to become a candidate for election to office except as the nominee of some party. It is not designed however to furnish the exclusive means by which all candidates for public office shall be nominated. The provisions of Chapters 37-A1 and 37-A2, supra, afford other means. It is, however, the exclusive means whereby "political parties" may nominate candidates for public office, except that appropriate provision is made for nominations by political party committees and conventions in those instances where there is a failure of the candidate or candidates on the primary ballot to receive the required percentage of votes for nomination or where there is a vacancy occurring that could not be filled by primary ballot, etc. Sections 604 to 614, inclusive, Code of Iowa, 1935. See also *Zellmer vs. Smith*, 206 Iowa 725, 221 N. W. 220.

By reason of the action taken at the polls in the November, 1934, general election by those of the electorate who affiliated themselves with the Farmer-Labor political organization, the Farmer-Labor political party evolved. For the purposes contemplated by the primary election law, it (the Farmer-Labor party) became moulded in Iowa political history just as did the Republican and Democratic parties years previous. Had anyone of these three parties failed to nominate at the 1938 primary, a candidate for governor, and, subsequently in convention, failed again to select, if authorized, a candidate for governor, the existence of such defaulting party would come to an end by operation of law. This necessarily is a proper legal deduction for the reason that the determination as to whether or not a political party exists in this state is dependent upon the number of votes cast for *the party* candidate for governor at the last preceding general election. Section 528, supra. So that it may be said that a political party in Iowa is not necessarily a continuing thing. Or as stated in 49 *Corpus Juris* 1076, section 15, a political party "may spring into existence from the exigencies of a particular election, and with no intention of continuing after the exigency has passed."

The Farmer-Labor party repeated in the general election in November, 1936. And in the June, 1938, primary it again placed in nomination candidates for public office by primary ballot. So it may be said that the Farmer-Labor party is definitely a political party in the state of Iowa as this opinion is written. Whether or not it will be a political party after November 6, 1938, depends entirely upon the number of votes that will be cast for its candidate for governor on general election day.

It is well established that political parties result from the voluntary association of electors, and have the inherent power to regulate their own affairs subject only to such legislative restrictions as may have been enacted. 46 *Corpus Juris* 1076, section 15; *State ex rel. Mills vs. Steward*, 210 Pac. 465, 64 Mont. 453; *People ex rel. Linstrand vs. Emmerson*, 165 N. E. 217, 219, 333 Ill. 606; *Morrow vs. Wipf*, 115 N. W. 1121, 1126, 22 S. D. 146. The cited cases and many others hold that political parties exist independently of and not from operation of law. In this state, however, the legislature has defined a political party as being a political unit or organization which in the last preceding general election cast for its candidate for governor at least two per cent of the total vote cast at said election. Hence, while we must recognize that a political organization may exist in this state independently of statute, not so a political party. The general assembly having legislated on the subject, the statute is all controlling.

Therefore, in 1940 when the electorate of this state is again confronted with a primary election the results of the November, 1938, general election must be reviewed to ascertain what political parties exist in this state. If the present Republican, Democrat and Farmer-Labor parties in the November, 1938, general election, and after the computation of votes cast thereat, meet the specifications of Section 528, *supra*, each will conitnue as a political party within the contemplation of the primary election law.

Assuming that the Farmer-Labor party on November 8, 1938, casts votes for its candidate for governor equal to two per cent of the total vote cast, it will continue as a political party. Would it be possible for this party to change its name in the interim, and in the June, 1940, primary election nominate candidates for public office by primary ballot under the new label?

It is the opinion of this department that this may not be done. It is our opinion that the name attached to the party at the time it graduated from a political organization into a political party inheres therein, and that thenceforth until it ceases to exist by operation of law it is the Farmer-Labor party and not some other party. In other words, we hold that the name is the very essence of the party; that while party platforms, principles and tenets may change from time to time, and the rank and file of its membership may fluctuate, yet the thing which permanently identifies the party as such is its name. Thus, it has been with the Republican and Democrat parties from the early history of this commonwealth.

To construe the section of the statute under consideration in such manner as would permit any political party promiscuously to change its name would lead to much confusion as between factions within the party,—those who desire the change and those who do not,—and to administrative difficulties in connection with the future certification of candidates. In this connection it should be stated that the candidates of the Farmer-Labor party who were nominated by primary ballot in June, 1938, must by virtue of Section 749, Code of Iowa, 1935, be designated on the general election ballot under that party name. Hence, it will be the Farmer-Labor party that will either continue or cease to exist as a political party, depending upon the action of the electorate affiliated with such party in the November, 1938, general election.

It has previously been stated that the primary election law was designed by the legislature as an exclusive means for nominating candidates for public office by political parties. The Farmer-Labor party having qualified under the law as a political party entitled to nominate candidates by primary ballot it cannot be said that this privilege inures to a new and different political organization. In so stating we are not unmindful of the possibility that the rank and file of the Farmer-Labor party may constitute in toto the rank and file of the new political organization, but again they may not. It is well established in the law that one may not do by indirection that which cannot be done directly. To permit the Farmer-Labor party to change its name in effect would be to allow a non-political party to nominate candidates for office by primary ballot. This the statute inhibits.

In conclusion it follows that the only manner in which those of the electorate affiliated with the Farmer-Labor party may establish in the state of Iowa a political party known in the history of this state as something other than the Farmer-Labor party would be by pursuing the procedure set out in either Chapter 37-A1 or Chapter 37-A2 of the Code of Iowa, and thereafter qualifying as a political party as defined in Section 528, *supra*.

TAXATION: DELINQUENT TAXES: There is no authority in the statutes authorizing a county to accept a deed from the owner of property in satisfaction of the delinquent taxes assessed against said property.

July 19, 1938. *Mr. John E. Miller, County Attorney, Albia, Iowa:* We are in receipt of your request for an opinion based upon the facts stated in the following question:

1. "We have several instances in this county where owners of real estate, being delinquent in payment of taxes, have offered to deed the same to the county in satisfaction of the taxes against the property. Would the county be authorized to accept said deeds and cancel the taxes due on the real estate?"

Chapter 347 of the 1935 Code of Iowa provides specific machinery for the collection of delinquent real property taxes. Nowhere in that chapter, or in any other chapter or section of the Code, is a county authorized to take a deed from the owner of property in satisfaction of delinquent taxes. Because a definite procedure and technique is provided by legislative enactment for the collection of delinquent taxes, the maxim "*expressio unius est exclusio alterius*" is applicable.

A tax deed creates a new and independent title cutting out all other liens against the property. To take a deed directly from the owner would necessitate the expenditure of substantial public sums in the preparation, continuation, and the examination of the abstract to the property. No provision is made by statute for such expenditure. Moreover, even after these expenditures are made, it might be discovered that there are intervening liens or clouds upon the title which destroy its merchantability unless the property is offered at tax sale or a quiet title action had. These considerations, no doubt, were persuasive with the Legislature and were of some influence in causing it to adopt the procedure set out in Chapter 347 of the Code.

Parenthetically, it might be added that the life blood of the interested governmental bodies, taxes, is dependent upon the continued taxability of property. The acquisition of ownership of property by a county destroys its taxability and is not to be encouraged. Counties are subdivisions of State Government —not realtors.

Only by offering a property, against which there are delinquent taxes, to the public at the regular tax sales can the maximum amount of property be kept taxable.

It is therefore the opinion of this department that there is no authority in the statutes authorizing a county to accept a deed from the owner of property in satisfaction of the delinquent taxes assessed against said property.

2. "Is it necessary that a county advertise for bids for real property to which it has obtained a tax deed?"

A previous opinion of this department directed to Honorable C. W. Storms, Auditor of State, squarely answers this question. We are, therefore, enclosing a copy of that opinion.

COUNTIES: BOARD OF SUPERVISORS: ABANDONMENT OF ROAD: ROADS: The procedure outlined for the vacation of roads in Section 4560, Code of Iowa, 1935, should be followed in the abandonment of a road.

July 25, 1938. *Mr. R. J. Kremer, County Attorney, Independence, Iowa:* Receipt is acknowledged of your letter of July 16, 1938, in which you state:

"There is a local road in this county, approximately one-half mile in length, which is no longer maintained by the county in any manner. It has been neglected for years and is barely passable. This road has been used very, very little for the reason that another road is being driven upon in preference to this unused road. In fact, this road is practically unused and the abutting owners are agreeable that said road should be abandoned."

And you ask the opinion of this department on whether or not the Board of Supervisors can abandon said road by resolution if consented to by the abutting owners, or if notice is served upon them.

From your statement we take it that this is not a case of a change in the road made under Section 4607 of the Code. So your inquiry involves the consideration of the question whether or not Section 4621 and Sections 4621-f1

to 4621-f5, inclusive, constitute a grant of authority to the board to abandon any road by complying with the procedure prescribed in these sections. Or, on the other hand, do these sections apply only to change in the road made pursuant to Section 4607. Section 4560 of the Code provides as follows:

"The board of supervisors has the general supervision of the secondary roads in the county, with power to establish, vacate, and change them as herein provided, and to see that the laws in relation to them are carried into effect."

Except that it now relates only to "secondary roads" instead of "all roads," Section 4560 is substantially like the sections of the earlier codes of Iowa relating to such establishment or vacation of roads.

The 21st General Assembly passed an act which became Section 427 of the 1897 Code. It allowed the board of supervisors on its own motion "to change and establish highways along streams where it can avoid building a bridge, or bridges over such streams." Chapter 271 of the Acts of the 36th General Assembly repealed that law and enacted a substitute which provided that upon petition of any ten freeholders of the county, or upon recommendation of the county engineer, the board of supervisors might change the course of a road, substantially as now provided in Section 4607. Among the requirements for the petition or recommendation of the engineer was the requirement that it specify "clearly the change recommended," and whether any highway already established should be vacated and abandoned and what part. Section 7 of that act provided as follows:

"Abandonment of highway. The foregoing provision with reference to changes in the highway shall not be construed as compelling the board to abandon any part of the highway already established, but if it be proposed to abandon any part of a highway already established, notice shall be served as herein provided, upon the said record owners as aforesaid through which or abutting upon which said highway so proposed to be abandoned, extends."

That section is now Section 4621 of the Code.

Chapter 8 of the Acts of the Extra Session of the 40th General Assembly revised the law as it then stood and eliminated the provision for the requirement that petition be by ten freeholders, and the provision for recommendation by the county engineer, and that act left the law as it now appears in Section 4607, except that the 44th General Assembly limited the power to change to apply only to secondary roads. But it will be noted that Section 4609 provides for a survey unless the action of the board is based on the recommendations of the engineer, accompanied by a report on the proposed change and a plat and survey thereof.

Between the time the 21st General Assembly provided for limited changes in the roads by the boards on their own motion, and before the 36th General Assembly met, the Supreme Court had decided in the case of *Stahr vs. Carter*, 116 Iowa 380, 90 N. W. 64, that the changes that the board were authorized to make under Section 427 of the 1897 Code, necessarily contemplated an abandonment of the old highway. The court said:

"The language as well as the intent of Section 427 clearly contemplates the abandonment of the highway in place of which the new one is established, because it expressly provides for a change, and there can be no change as contemplated unless there is an abandonment of the old highway."

So the first legislative expression concerning the abandonment of highways included the term "vacation" as a part of the abandonment. That is, it provided that the roads could be vacated and abandoned. But our court, long

before the 36th General Assembly had so acted, had recognized that a highway can be abandoned so affirmatively as to bar the rights of the public. In the case of *Davies vs. Huebner*, 45 Iowa 574, decided in 1877, it was held that where there had been a non-user of a highway for a period of thirty years, and half of the width thereof had been inclosed, fenced, and in open, notorious and adverse possession for more than ten years, the public would be estopped to claim any right in the part thus inclosed.

In later cases the court has continued to recognize that highways may be abandoned, but it seems to have had great difficulty in determining what constituted an abandonment. See *McCarl vs. Clarke County*, 148 N. W. 1015, 167 Iowa 14; *Lucas vs. Payne*, 141 Iowa 592, 120 N. W. 59; *Clare vs. Wogan*, 204 Iowa 1021, 216 N. W. 739; *Furgason vs. Woodbury County*, 212 Iowa 814, 237 N. W. 214; *Robinson vs. Board of Sups.*, 222 Iowa 663, 269 N. W. 921; *Arthur vs. Wright County*, 192 Iowa 683, 185 N. W. 602.

In general the thought runs through the cases that the abandonment on the part of the public must be intentional, and while the term "adverse possession" is used, the court pointed out in *Clare vs. Wogan*, supra, that the term as so used is not applied in its technical meaning, but by way of analogy. In that case the court said:

"Each case contains different controlling facts and every assertion of abandonment must rise or fall on the sustaining proof offered."

So it is a long established rule in Iowa that a road may be abandoned as distinguished from vacated. While the manner of vacation is prescribed by statute, the intention necessary to show an abandonment of a highway may be evidenced in various ways. But in the case of abandonment it seems to be the rule that the intention of the officials to abandon a road must be acquiesced in by the public.

In the statement of your problem you indicate that the road in substance has been abandoned by the officials and by the public. But we do not think that the court would hold that the road had in fact been abandoned. We are referring of course to a possible court action based on the nonuser and practical abandonment of the road without any action by the board of supervisors.

In view of the legislative history of Section 4621 we do not think that the legislature intended that the board of supervisors could affirmatively abandon any highway, but instead that the legislature intended that the power to abandon given in Section 4621 applies only to those parts of a changed highway that were not needed after a change had been made pursuant to Section 4607. But this does not mean that the action of the board in abandoning a highway other than one changed pursuant to Section 4607 would not be of material significance in the determination of the question whether or not such other highway had in fact been abandoned. Obviously, so far as the public is concerned, there is no difference between the abandonment of a highway and the vacation of a highway. In either case the public loses its right to use it. But the public is, or may be, very much concerned in the question whether any particular highway shall be discontinued. We call your attention to the case of *Fergason vs. Woodbury County*, 212 Iowa 814, 237 N. W. 214; particularly on the question of notice to an abutting owner. In that case it appears that the board of supervisors made a change in the highway, removed a bridge over the Little Sioux River, and had done nothing to maintain the old road, and

it had been in use for several years for farming purposes. An owner whose land did not abut on the highway, but whose access to his land was from this road over a strip of land owned by another, made claim for damages. It appeared that he had an oral arrangement for right of passageway over this parcel leading from his land to the public highway. He was held to be an abutting owner and entitled to damages as such. The court brushed aside any claim that there had been no legal vacation of the old highway, and the claim that the court had no jurisdiction because the board did not serve notice upon the abutting property owner, as provided for in the abandonment of a highway, and said:

"The power to vacate the road was within the general jurisdiction of the supervisors."

And again:

"It seems only reasonable that the board cannot avoid liability on the part of the county because it did not give the plaintiff notice and follow the details of the statutory provisions. The board did actually abandon the road and render it impassable by removing the bridge and permitting it to be farmed."

It is difficult to reconcile the decisions on damages for the vacation of roads.

In the case of *Brady vs. Shinkle*, 40 Iowa 576, it was held that no damages were allowable to the abutting owner for the vacation of a highway. This decision was followed in the cases for a long while. But in the case of *McCann vs. Clarke County*, 149 Iowa 13, 127 N. W. 1011, these decisions were overruled and damages were allowed to an abutting owner. That was an action to recover damages for the vacation; not an appeal.

In the case of *Yonata vs. Modrackek*, 189 Iowa 538, 178 N. W. 388, the court held that the case was ruled by the line of decisions based on the case of *Brady vs. Shinkle*, supra, and went on to say:

"It is said that this and like cases were overruled by *McCann vs. Clarke County*, 149 Iowa 13, 127 N. W. 1011, 36 L. R. A. (new series) 1115, and it is so said in that opinion. Such was not the effect of that decision. The reasoning on which *Brady vs. Shinkle* and like cases rest was disapproved in holding that recovery of damages peculiar to the complainant's property, and not shared by the public generally, may be recovered. But that was an action instituted in the district court and not brought there by appeal from an order by the board of supervisors, and therefore the right of appeal therefrom was not involved."

And the court went on to hold that the statute did not authorize the allowance of damages for the vacation of a road and that there could be no appeal from the action of the board. And the court said:

"Only applicants for damages caused by the establishment or alteration of any road are authorized to appeal, and as plainly appears claims for damages caused otherwise than by the establishment and alteration may not be filed."

The court reserved the question whether or not damages may be recovered for vacation in an independent action.

But in *Fergason vs. Woodbury County*, 212 Iowa 814, 237 N. W. 214, the court allowed damages for the abandonment of a highway. Apparently the board did not undertake to follow either Sections 4560 and following, or 4607 and following. No notice was served but the claimant filed his claim for damages with the board. The court said:

"Had the board of supervisors strictly followed the statutory provision by giving the notices required and appointing appraisers, surely it would not be contended that the plaintiff did not have the right to file his claim for damages."

And again the court said:

"The board, under the provisions of Section 4575 of the Code of 1927, might have given notice to the plaintiff that it was about to abandon the diagonal road by removing the bridge over the ditch and permitting Cord to farm that portion of the diagonal road lying northeasterly therefrom. The plaintiff might then have, under the provisions of Section 4580, filed his claim for damages, and if the board refused to allow the same, or if the plaintiff felt aggrieved by the action of the board, under the provisions of Section 4596, appeal to the district court."

Of course what was said in the Fergason case in relation to this was said by way of argument, and, as stated, that was an action on a claim that had been filed with the board, and not an appeal from the disallowance of damages.

In the later case of *Robinson vs. Board of Supervisors*, 269 N. W. 921, decided November 24, 1936, the court held that a highway had not been abandoned, although the court said that for a period of 20 years, more or less, preceding the trial, very little work had been done on the road. In the discussion of the situation it appeared that the road was very little used and had been practically abandoned, and some time before the trial a bridge over a stream was out, and part of the road was fenced in. So far as appears the board of supervisors had taken no action to affirmatively abandon it, but the court said nothing about the significance of the failure of the board to affirmatively act.

It may be that when a claim is again made to the court that a road has been abandoned, if the proposition is squarely put before the court, that in view of the fact that the statute authorizes the affirmative abandonment of a road by following certain procedure, the court might hold that there can be no abandonment of a road without such action on the part of the board.

However that may be, the question you present involves primarily the question of what is the best administrative practice.

As we have said, we do not think that the legislature intended that the board of supervisors should have the power to abandon roads generally by following the procedure outlined in Section 4621, but instead intended to give the board authority to retain portions of the old road from which the change was made, pursuant to Section 4607. But much can be said in favor of the proposition that if the board does follow the procedure authorized by Section 4621, as applied to a road such as you refer to, the result would be the actual abandonment of the road. But if the proper procedure is not followed there is danger of a possible claim for damages; this under the authority of *Fergason vs. Woodbury County*, supra, and *McCann vs. Clarke County*, supra.

We do not think that Sections 4621-f1 to 4621-f5, add anything to the powers of the boards of supervisors to abandon roads. We think that those sections are intended merely to provide for the closing of a road that has been either vacated in the manner provided by law, or abandoned in the manner provided by law.

The advantage in using the general procedure, that is, the procedure prescribed in Section 4650 and following, is in the fact that under Section 4575 notice by publication is given in all cases; while under Section 4612 there need be no publication if personal service can be made. It would seem that the publication under Section 4675 would require anyone interested, like the plaintiff in the case of *Fergason vs. Woodbury County*, supra, to file his claim and the board could be assured that there would be no further claims after the road had in fact been abandoned. For this reason, as well as for the reason that we do not think that Section 4621 was intended to apply except

where the road was changed, we think that in the abandonment of the road that you refer to it would be safer to follow the procedure outlined for the vacation of roads provided in Section 4560 and following.

COUNTIES: FAIR ASSOCIATION: STATE AID: As long as fair association owns ten acres of land and owns buildings to the value of $8,000, the mere fact that the land owned is not contiguous would not affect the association's receiving state aid.

August 10, 1938. *Hon. Lester S. Gillette, Senator, Fostoria, Iowa:* Under date of August 5, 1938, you requested an opinion from this office relative to the possibility of the Dickinson County Agricultural Association securing state aid for fairs in accord with Chapter 136 of the 1935 Code of Iowa, the facts as you recite them in your letter being as follows:

The Dickinson County Agricultural Association owns 10½ acres of land which they purchased for $2,250.00 and have leased an adjoining 2½ acres from Dickinson County on a long term lease. The association also owns a lot situated 3½ blocks east of the aforementioned 13 acres and connected with it by a street. On this lot they own a building 105 feet by 130 feet in which agricultural shows have been held for the past seven years. The value of this building has been conservatively estimated at $9,000.00. The association is duly incorporated under the laws of Iowa.

Chapter 136 of the 1935 Code of Iowa contains the Iowa law relative to county and district fairs and provides for the granting of state aid to such fairs under certain conditions. The first of these conditions is contained in Section 2894 of the Code which provides as follows:

"2894. *Terms defined.* For the purposes of this chapter:

"1. 'Fair' shall mean a bona fide exhibition of agricultural, dairy, and kindred products, live stock, and farm implements.

"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."

From the facts as they are outlined above, it is apparent that the Dickinson County Agricultural Association meets the incorporation requirement and the requirement of owning buildings of a value of at least eight thousand dollars. However, the ground which is owned by the association is not contiguous but is divided into two plots, one plot consisting of 13½ acres and the other plot consisting of a city lot. On the city lot, which is by far the smaller of the two plots of ground, is situated the building which the association owns and which would constitute the main show place for the association. Whether such division of land would constitute a disqualification for state aid is the question which needs decision.

It undoubtedly was the purpose of the legislature in passing statutes granting state aid to county and district fairs to aid agriculture in the state of Iowa. They expressed this purpose in Section 2895 of the Code as follows:

"2895. *Powers of society.* Each society may hold annually a fair to further interest in agriculture and to encourage the improvement of agricultural products, live stock, articles of domestic industry, implements, and other mechanical devices. It may offer and award such premiums as will induce general competition."

It was not the purpose of the legislature to promote the ownership of real estate by fair associations. The only reason for having written into the statutes property qualifications was to prevent irresponsible groups from procuring state aid.

It is the opinion of this department that as long as the association owns ten acres of land and owns buildings to the value of eight thousand dollars that it meets the *property* requirements of Section 2894 of the Code. The mere fact that the land owned is not contiguous is not controlling.

COUNTIES: BOARD OF SUPERVISORS: ROADS: Persons may improve a road at their own expense, but it should be done under supervision of county engineer.

August 15, 1938. *Mr. Ray A. Potter, County Attorney, Tipton, Iowa:* Receipt is acknowledged of your letter of August 13, 1938, in which you state:

"Several persons, farmers have petitioned the Board of Supervisors of Cedar County, Iowa, for permission to rock certain stretches of local county roads in our county at the whole expense of the farmers, the county to contribute nothing toward the project. These farmers will furnish the rock and the spreading of the rock on their respective roads."

And you ask the opinion of this department on the following question:

"In view of the above facts is it proper for the Board of Supervisors to sanction such a project where no expense is attached to the county?"

The Board of Supervisors has the duty to construct, repair, and maintain the secondary road and bridge systems; this under Section 4644-c1. The manner of the expenditure of the secondary road funds is specifically prescribed in Chapter 240, of which Section 4644-c1 is a part. But there is no statute prohibiting the acceptance of donations for the roads.

Section 5559 authorizes townships to accept gifts, devises or bequests, for certain purposes, including any public purpose. And under Chapter 445 provision is made for the acceptance of gifts to counties, etc.

We know of no reason why your board of supervisors cannot grant the petition and allow the petitioners to improve the roads at their own expense. However, the work should be done under the supervision of the county engineer.

IOWA STATE HIGHWAY COMMISSION: SUPPORT: MAINTENANCE: STATE FUNDS: The growing needs of the State Highway Commission, at the discretion of the commission, may be paid for out of maintenance fund provided in Section 4755-b31 of the Code.

August 25, 1938. *Iowa State Highway Commission:* You have requested the opinion of this department on whether or not the Highway Commission has the right to construct an office building and garage in Cedar Rapids, Iowa, and also to construct an office building and garage at the Commission's headquarters at Ames, Iowa, for the purpose of housing a portion of the Commission's employees and equipment; and whether or not you have the authority to pay for such structures out of the Commission's support fund, or maintenance fund, which is set up under Section 4755-b31 of the Code of 1935.

Section 4755-b31 refers to this fund as the "maintenance" fund, but in Section 4630-c1, providing for the salary of the special counsel for the Commission, it is referred to as the "support" fund. Said fund is likewise referred to as a "support" fund in Section 4755-b20, which provides that the premium on the bond of the Auditor of the Commission shall be paid from the "support" fund.

So the words "maintenance fund" and "support fund" for the Commission are used interchangeably.

As we are advised, the only building that has been constructed by the Highway Commission pursuant to express legislative direction, is the office building at Ames. This direction was contained in Chapter 328 of the Acts of the 40th General Assembly.

A brief review of the history of the legislation providing for the Highway Commission may be helpful on the question submitted. The State College at Ames was constituted as the Highway Commission of Iowa by Chapter 105 of the Acts of the 30th General Assembly; this was in 1904. By Chapter 122 of the Acts of the 35th General Assembly, enacted in 1913, the Highway Commission, independent of the College, was established, but it was provided in the Act that it be located at the College. And the 35th General Assembly provided in Chapter 133 for the support of the Commission as follows:

"Eight per cent of all moneys paid into the state treasury on and after January 1, 1913, pursuant to the provisions of this act shall be set aside and shall constitute a maintenance fund for the state highway commission, which apportionment of said money shall be paid over to the treasurer of the Iowa State College by the state treasurer on the first day of April, 1913, and quarterly thereafter, except that the payment for April, 1913, shall be made within thirty (30) days from the taking effect of this act. Said eight per cent shall be used for no other purpose than as a maintenance fund for said state highway commission, and shall be drawn out only on warrants drawn by the treasurer of the Iowa State College on itemized vouchers audited by the state highway commission; and such expenditures shall be entered upon the books of both the secretary and treasurer of the Iowa State College. A full and complete report of all said expenditures shall be published in the annual report required under the act creating the state highway commission."

This was modified somewhat by Chapter 237 of the Acts of the 38th General Assembly, which provides as follows:

"There is hereby created a fund for the maintenance of the state highway commission consisting of two and one-half per cent of all moneys paid into the state treasury under the act regulatory of licenses on motor vehicles. Said fund shall be used for no other purpose than as a maintenance fund for said state highway commission, and shall be drawn out only on warrants drawn by the auditor of state on itemized vouchers approved by the state highway commission. The expenditures of said commission shall be audited by the executive council, and a full and complete report of all of said expenditures shall be published in the annual report under the act creating the state highway commission. At the end of each biennial period, the unexpended funds remaining in the highway maintenance fund for said biennial period shall be placed to the credit of the primary road fund."

And the section was again re-enacted by the 42nd General Assembly in Chapter 101, as it now appears in Section 4755-b31, except that in the Acts of the 42nd General Assembly it was provided that the warrants be drawn by the auditor of state, while the present act calls for warrants drawn by the state comptroller; and the Act of the 42nd General Assembly provided that the expenditures of the commission be audited by the state board of audit, while the present act provides for auditing by the state comptroller.

Section 4755-b31 is as follows:

"There is hereby created a fund for the maintenance of the state highway commission consisting of two and one-half per cent of all moneys paid into the state treasury under the act regulatory of licenses on motor vehicles. Said fund shall be used for no other purpose than as a maintenance fund for the state highway commission and shall be drawn out only on warrants drawn

by the state comptroller on itemized vouchers approved by the state highway commission.

"The expenditures of said commission shall be audited by the state comptroller and a full and complete report of all said expenditures shall be published in the annual report under the act creating the state highway commission."

It will be noted that so far as concerns the purposes for which the fund may be used, there has been no change in the law since it was first enacted by the 35th General Assembly.

In 1919 the then Attorney General rendered certain opinions in relation to the use of this fund. In an opinion dated May 27, 1919, found on page 272, of the Attorney General's report for that year, the question considered was whether or not the Highway Commission had authority to lease ground, and to lease or construct sheds or storage buildings necessary for the storing of surplus war material and supplies allotted to the state of Iowa by the Federal Government. The Attorney General held that the Highway Commission had the right to lease such land as was necessary, and to lease or construct such a structure as was necessary for the care and preservation of such equipment, and that the expense of leasing such ground, or construction of such storage buildings could be paid out of the commission's maintenance fund.

Again on June 24, 1919 (see page 262, Attorney General's Report for that year), the question was considered, whether or not the Highway Commission had authority to pay rent on offices for its District Engineers. The Attorney General in ruling that the commission could do so said:

"The maintenance fund is for the purpose of maintaining a state highway commission; or in other words, this fund is for the purpose of paying the legitimate expenses of the commission incurred in the performance of its duties. The commission has authority to employ assistants; it has authority to employ engineers and draftsmen; it is required to make plans and specifications; it is required to inspect highway improvements; it is required to test the materials which go into these improvements; it is required to supervise the construction of the various improvements; and the expense incident to these various operations is to be paid from the maintenance fund.

"The legislature having indicated the work to be done by the state highway commission, certainly intended that it should be provided with a place where its operations could be most economically and efficiently conducted, and we are, therefore, of the opinion that if the state highway commission finds it necessary to rent a room or rooms for the use of one of its engineers charged with the supervision of a part of the work of the state highway commission, that the commission has authority to expend a reasonable sum for the payment of rent for such room or rooms."

Again on July 23, 1919 (see page 264 of the Attorney General's report for that year), the question was considered whether or not the commission had authority to make expenditures for the remodeling of certain office quarters occupied by the commission in buildings belonging to the Iowa State College. Among other things the Attorney General said:

"It is the opinion of this department that you may expend such reasonable sums from your maintenance fund as are necessary to furnish you proper office rooms."

The headquarters of the highway commission remained at the College at Ames until after the enactment of Chapter 328 of the Acts of the 40th General Assembly,—this was in 1923. That act not only authorized but directed the construction of an office building at Ames. The language used is significant. The title and Section 1 of the Act are as follows:

"AN ACT to provide more space for the engineering department of the Iowa State College without making an appropriation therefor, to provide offices for the state highway commission outside of the college buildings, and to provide for the acceptance of real estate donated by the citizens of Ames.

Sec. 1. *Office quarters—construction.* That in order to release to the college, rooms which the state highway commission now occupy in college buildings, and thus avoid the construction of a like amount of space for offices and laboratories for the engineering department of the college, the said commission shall each year construct such office space as can be paid from the said commission's maintenance fund after setting aside a sufficient amount to meet the ordinary running expenses of the said commission for said year, payable from said fund. As rapidly as offices are constructed hereunder, the commission shall move its force from the college buildings and shall release a like amount of space to the college. Provided that there shall be expended hereunder only such surplus as may remain in said commission's maintenance fund for the biennial period ending December, 1925. The total amount available for building under this act shall not exceed $125,000 and not more than $50,000 shall be expended in any one year, and after the land has been acquired without expense to the state."

Section 2 provided for the acceptance of the site if the citizens of Ames donated it, and authorized the construction of the offices referred to in Section 1.

It will be noted that the purpose was to release to the college certain rooms then occupied by the commission. And it appears that the legislature had in mind that by the construction of this building the state would be saved the expense of providing a like amount of space for the offices and laboratories of the engineering department of the college.

Because under the law, as it stood before the 40th General Assembly so acted, the college had to house the commission, the commission could not use the maintenance fund for the erection of an office building. While it had a free hand in providing the necessary facilities an office building was not required because the college furnished it. The act not only separated the commission from the college, but it established its headquarters at Ames, outside the college, for it allowed the construction of the office building on the land to be donated. While the act limited the expenditure to what was considered necessary to provide a building of such size that the space would be equal to that occupied in the college buildings, it also had the effect of enlarging the scope of the discretion of the commission in the expenditure of the maintenance fund, for thereafter the commission had to provide its own headquarters, and necessarily this would require repairs, extensions, and additions, etc., as the functions of the commission might be expanded.

We are advised that the storage sheds, adjacent to the main office building, were originally erected for the storage of government material in the years 1919 and 1920, and as we understand it, it is to replace two of these buildings, which have become obsolete that the proposed office building and garage at Ames is to be constructed. And that the office building and garage at Cedar Rapids is for the purpose of housing the district office and equipment in that place.

The original purpose for these storage sheds has long since been served, and they have been used for many years for the storage of equipment, and garage purposes, and now some of them are being used for office purposes.

From time to time the legislature has added to the functions of the commission, and especially the 42nd General Assembly in 1927, provided for a wide expansion of its activities in that it provided that thereafter the primary roads

should be maintained by the Highway Commission. But the legislature apparently recognizing that the maintenance fund was available for use by the commission for such purposes, did not see fit to make any express provision for the housing of the additional personnel and equipment that would necessarily be required for the widely expanded activities of the commission, and the commission in its discretion constructed maintenance buildings all over the state. Many sessions of the General Assembly have been held since the Highway Commission built the storage sheds at Ames, and since it started the program of building maintenance garages and offices all over the state, and the legislature has not seen fit to interfere in any way with this building program. From this it appears that the legislature has considered that the acquisition of land and the erection of such building is a proper function for which the maintenance fund may be expended. In 50 Corpus Juris, page 1030, it is stated:

"Executive construction is entitled to additional weight where it has been impliedly endorsed by the legislature; as by the re-enactment of the statute, or the passage of a similar one in the same or substantially the same terms, or by the failure of the legislature, with knowledge of such construction to change the law or adopt amendments urged."

The members of the legislature necessarily have had full knowledge of the practice of the Highway Commission in acquiring property and erecting these buildings all over the state. Evidently the legislature in enacting the provision for the maintenance fund looked into the future and took cognizance of the fact that as time ran on the commission's duties and responsibilities would be increased. And perhaps for this reason it specifically refrained from specifying the exact form and size of the organization which the Highway Commission should have, and in lieu thereof simply authorized the commission to "appoint assistants necessary to carry on the work of the commission, define their duties, fix their compensation and provide for necessary bonds and the amount thereof." This under Code Section 4626.

The expansion of the commission's duties and problems would necessarily call for adjustments and increases in the commission's working force with the resulting necessity for additional office space, and space for the housing of the commission's equipment.

We think, therefore, that it is reasonable to infer that the authority for the expenditure of this support fund, or maintenance fund, of the State Highway Commission, when it was created by the legislature, was intentionally made general in order that the commission could from time to time take care of the growing and changing needs. The fact that the legislature, with full knowledge of the expanding needs of the commission, and of its manner of handling the maintenance fund has not seen fit to impose any restrictions upon the use thereof, beyond the general terms originally provided in the statute, and still contained therein, is persuasive that the legislature is satisfied with the course pursued. We agree with the Attorney General who expressed the opinions rendered in 1919, above referred to, and following the thought expressed by him, we think that the erection of the district office building and garage at Cedar Rapids, and the replacement of the sheds at Ames by an additional office building and garage are both matters of discretion with the Highway Commission, and that if the Commission sees fit to build them, or either of them, it may pay the expense incurred out of the maintenance fund provided in Section 4755-b31 of the Code.

MOTOR VEHICLES: LICENSES: SUSPENSION OF: **A motor vehicle whose license has been suspended under Section 306 of the Act may be transferred by judgment debtor and plates procured for said vehicle.**

August 27, 1938. *Mr. Horace Tate, Motor Vehicle Department:* We are in receipt of your inquiry pertaining to the following set of facts:

A, a motor vehicle dealer, sold to B a Ford coupe under a conditional sales contract which was duly recorded. The sale was made on April 11, 1938, and the purchaser became delinquent in his payments and the vehicle was repossessed by the dealer on July 29, 1938. Prior to the date that B purchased this automobile, he was involved in an automobile accident as a result of which he was sued for damages and a judgment was rendered against him, which judgment was not paid within sixty days, and which remains unsatisfied to date. After A, the dealer, repossessed the vehicle, the transfer of registration from B to A was refused by the county treasurer under the provisions of paragraph 4 of Section 61, Chapter 134, Acts of the 47th General Assembly.

Your inquiry then is whether or not a motor vehicle, whose license has been suspended under the provisions of Section 306 of that act, may be transferred by the judgment debtor and registration plates procured for said vehicle.

Turning first to Section 306 of that act, we find that in substance it provides that if a final judgment is procured against a person, which judgment has grown out of an injury to a person or to property, caused by the operation or ownership if any motor vehicle on the highways of the state, and such judgment remains unsatisfied and unstayed for a period of sixty days after the entry thereof, then the commissioner of motor vehicles shall suspend the operator's or chauffeur's license of the judgment debtor and shall also suspend the registration of any and every motor vehicle registered in the name of the judgment debtor. Those licenses are to stand suspended until the judgment has been stayed, satisfied, or otherwise discharged of record.

The section also provides that no motor vehicle shall be registered in the name of the judgment debtor until such judgment has been stayed, satisfied or otherwise discharged of record. That section was first enacted by the 43d General Assembly, and has been amended only slightly since its first enactment.

It is important to note under the provisions of Section 306, supra, that the registration plates on all vehicles owned by the judgment debtor are to be suspended and also that he is prohibited from registering any other motor vehicles that he might subsequently acquire.

We now turn our attention to Section 61 of that act, under which section the county treasurer refused to register the vehicle in the name of the dealer. That section in part reads as follows:

"The treasurer shall refuse registration or any transfer of registration upon any of the following grounds: * * *

"4. That the registration of the vehicle stands suspended or revoked for any reason as provided in the motor vehicle laws of this state."

Other grounds for refusal set out in that section provide in substance that the transfer of registration shall not be granted if the application contains false or fraudulent statements, or if the vehicle is mechanically unfit or unsafe to be operated upon the highways, or if the treasurer has reasonable grounds to believe that the vehicle is stolen or embezzled or that the required fee or sales tax has not been paid. A casual reading of paragraph 4 of that section, heretofore set out, would seem to lead to the conclusion that its provisions are applicable to a suspension made under Section 306 of the act. There can be no question but what the registration of the vehicle has been suspended and prop-

erly so under Section 306. Paragraph 4 is unquestionably broad enough to include just such a situation, as it provides that the transfer of registration shall be refused if the registration of the vehicle stands suspended or revoked "for any reason as provided in the motor vehicle laws of this state."

In order to properly understand the meaning of paragraph 4, we must turn to Section 133 of the act, which provides in substance that the registration of motor vehicles shall be suspended or revoked when the department is satisfied that such registration card, plate, or permit was fraudulently or erroneously issued, or where the department determines that the vehicle is mechanically unfit or unsafe to be operated on the highways, or where the vehicle has been dismantled or wrecked, or where the required fee has not been paid, or where an improper registration plate is placed upon a vehicle, or where the owner of the vehicle has committed an offense under this chapter involving the registration of the vehicle, or where the department is authorized to suspend or revoke the registration under any other provision of law.

There can be no question but what Sections 61 and 133 are to be read together, and, further, that the legislature had Section 133 definitely in mind when it provided in paragraph 4 of Section 61 that no transfer of registration was to be consummated when the registration of the vehicle stood suspended for any reason as provided in the motor vehicle laws of this state.

It is not nearly so clear that the legislature also intended to include Section 306 of the act by reference which it made in paragraph 4 of Section 61. We are not unmindful of the rules of statutory construction that, where the language of the statute is plain and unambiguous, there is no occasion for construction. Even though other meanings could be found, courts cannot indulge in speculation as to the purpose or possible qualifications which might have been in the minds of the legislators, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of law or because the legislature did not use proper words to express its meaning. If the court did so, it would be assuming legislative authority.

On the other hand, we are also aware of the rule of statutory construction that where the language is of doubtful meaning, or where an adherence to the strict letter of the statute would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court to ascertain the true meaning. 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.

The Iowa court in the case of *Oliphant v. Hawkinson*, 192 Iowa 1259, 183 N. W. 805, in quoting from an Illinois decision, said as follows:

" 'The intention of the lawmakers is the law. This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. In construing a statute, the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute, though not within the letter. A thing within the letter is not within the statute, if not also within the intention. When the intention can be collected from the statute, words may be modified or altered, so as to obviate all inconsistency with such intention. (*Hoyne v. Danisch*, 264 Ill. 467.) When great inconvenience or absurd consequences will result from a particular construction, that construction should be avoided, unless the meaning of the legislature be so plain and manifest that

avoidance is impossible. (*People v. Wren*, 4 Scam. 269.) The courts are bound to presume that absurd consequences leading to great injustice were not contemplated by the legislature, and a construction should be adopted that it may be reasonable to presume was contemplated. (*2 Lewis' Sutherland on State Const.*, Section 489; *People v. City of Chicago*, 152 Ill. 546; *Canal Com. v. Sanitary District*, 184 Ill. 597.) A statute is passed as a whole, and not in parts or sections; hence each part or section should be construed in connection with every other part or section. In order to get the real intention of the legislature, attention must not be confined to the one section to be construed. (*Warner v. King*, 267 Ill. 82, and cited cases.)'

"We approve of this pronouncement. * * *"

In the case of *Sexton v. Sexton*, 129 Iowa 487, 105 N. W. 314, the court, in passing upon this same proposition, said as follows:

"* * * But we are not always restricted to the precise words employed, in getting at the meaning of a statute. And it is the real purpose and intent of the Legislature, as meant to be expressed, to which we are to give force of operation. *Noble v. State*, 1 G. Greene, 325; *Dilger v. Palmer*, 60 Iowa, 117. That which is clearly not within the intention of a statute, although within the letter thereof, is held not to be within the statute. *Crabell v. Wapello C. Co.*, 68 Iowa, 751. And a construction is not to be put upon a statute which would manifestly effectuate injustice, if it is susceptible of a different construction. *Smell v. Railway*, 50 Iowa, 338."

The case of *McGraw v. Seigel*, 221 Iowa 127, states as follows:

"* * * But we think the duty is imposed on courts to function, in the interpretation of statutes, in a manner more likely to ascertain the real intent of the legislature than would result from arbitrarily adopting the verbiage of a statute, without heeding other indications of legislative intent, and without considering the result of such arbitrary interpretation."

To the same effect see also *Smith v. Sioux City Stock Yards Co.*, 219 Iowa 1142, 260 N. W. 531.

We next turn to see whether the result would be absurd or if an injustice would be done if paragraph 4 of Section 61 were construed to include the provisions of Section 306. If such a construction were placed upon paragraph 4, we would find that after the period of sixty days had expired, as is provided in Section 306, that the judgment debtor would be precluded from transferring the vehicle to anyone. Suppose the judgment creditor waited until after the sixty days had expired and then got out an execution and attached the vehicle. If paragraph 4 is to be interpreted in its broadest aspect, we would have to conclude that even though the car was attached and sold at execution sale, no transfer of the vehicle could be made pursuant thereto unless the judgment was stayed, satisfied or otherwise discharged of record. It is apparent that a vehicle which is not subject to registration is of very little value, and consequently the price brought at execution sale would be greatly diminished by reason of the fact that said vehicle could not be registered and operated upon the highways. In other words, the judgment debtor would suffer a loss as would the judgment creditor, as the amount procured from the execution sale would be applied upon the judgment itself.

The same unreasonable and unjust results would be reached as far as mortgage holders are concerned if paragraph 4 is made applicable to Section 306. No transfer of the vehicle could be consummated after execution sale unless the judgment was first paid. In all probability the holder of the mortgage would have no notice of the pendency of an action, against the owner of the vehicle, and the mortgagee would find after the expiration of the sixty day

period that by reason of the suspension of the registration certificate and plates that the value of the security of the mortgagee would be greatly diminished. The obvious purpose of Section 306 is to make travel on highways less hazardous and to aid judgment creditors in the satisfaction of their judgments. If paragraph 4 is to be construed to include Section 306, we find that instead of the legislature aiding the judgment creditor in collecting his judgment, it has materially diminished the chances of satisfaction to the detriment of all parties concerned.

From the above illustrations, it seems to us that an extension of paragraph 4 to include Section 306 would lead to absurd results, and would also inflict upon not only the judgment debtor but also the judgment creditor or any mortgagee, a decided injustice.

It also seems to us that the suspension provided in Section 306 is one of a personal nature and not one that attaches to the vehicle if transferred to some other party. The judgment debtor is the party who has been negligent. He personally is the only one upon whom this suspension should be effective. The constitutionality of sections similar to this one have been universally sustained on the theory that under the provisions of such a section, the driver of a motor vehicle would become more cautious and careful in the operation of his vehicle if he knew that the registration of the same would be suspended if through his negligence an accident took place and a judgment was recovered against him which remained unsatisfied. In passing upon the constitutionality of a similar statute, the court in the case of *Watson v. State Division of Motor Vehicles*, 298 Pac. Rep. 481, 212 Col. 279, used the following language:

"* * * 'The manifest purpose of the proposed act * * * is to protect the public against injuries upon public highways. The power of the commonwealth over public ways is very broad. We think that the legislature may declare that no person shall have a license to operate a motor vehicle upon public ways until he has satisfied any outstanding judgment against him founded on previous operation of a motor vehicle. A statute of that nature may have a tendency to prevent conduct by a licensee capable of being the basis of such a judgment, and thus promote the public safety. It would have a tendency to keep off the highway those shown by their conduct to be dangerous to other travelers. It may be thought by the legislature that such a judgment debtor, who did not do what the law required of him, as declared by the judgment, to repair damages already done by him, was not a fit person to be instrusted again with the responsibility of operating a motor vehicle on the public ways. From the viewpoint of the common good and general welfare, the proposed statute cannot be pronounced obnoxious to the constitution.' * * *"

The language definitely indicates that the suspension is a personal one and not one running with the vehicle. It certainly cannot be said that it aids in safety to penalize the judgment creditor or the mortgagee by refusing registration of such a vehicle after transfer when the judgment creditor or mortgagee has no supervision or control over the vehicle or the judgment debtor.

The situation is an entirely different one under Section 306 than it is under Section 133. The grounds for suspension under Section 133 definitely attach to the motor vehicle. For instance: one ground of suspension is that the motor vehicle is mechanically unfit or unsafe to be operated upon the highways. Obviously the vehicle will be just as unsafe in the hands of the transferee as it would be in the hands of the transferor, and for that reason the legislature has concluded that such a vehicle shall not be registered after a transfer. The same thing holds true of a dismantled or wrecked motor vehicle. If the

registration of the vehicle was fraudulent, it is obvious that the vehicle is not properly licensed, and, in such condition, is not properly qualified for use upon our highways. In other words, the provisions of Sections 61 and 133 attach to the vehicle itself, and, until those objections are rectified, the vehicle is not one which can be operated upon our highways. But the provisions of Section 306 are penalties which run against the judgment debtor personally, and which should not be construed as running against the vehicle itself when the same has been transferred and proper registration offered.

It is also somewhat significant, although not controlling at all, that under Sections 232 to 246 of the act, inclusive, provisions are made for the revocation of operators' and chauffeurs' licenses to drive motor vehicles where the operator or chauffeur has been guilty of manslaughter resulting from the operation of a motor vehicle, or if he has driven under the influence of intoxicating liquor, or has committed a felony with the use of a motor vehicle. Other grounds are therein set out which are too numerous to mention. The point is that under those sections there is no suspension of the registration of the vehicle itself, and, of course, a vehicle owned by a person whose operator's or chauffeur's license has been suspended, may be transferred to any party, and the suspension or revocation has no effect whatsoever on the transfer. We call attention to these sections for the reason that we feel that they bear out to some extent the contention that the suspension under Section 306 is properly construed as a personal one and not one that runs with the vehicle.

It is also somewhat significant to notice that the provisions of Sections 61 and 133 are new. That is, they were first enacted into law by the 47th General Assembly, whereas Section 306, as has been heretofore stated, was enacted by the 43rd General Assembly. The greater portion of Chapter 134, including Sections 61 and 133, were taken from what is known as the Uniform Motor Vehicle Act, and it appears to us that in inserting Section 306 the legislature failed by inadvertence to modify Sections 61 and 133 to avoid a possible interpretation that those sections were to be read in conjunction with Section 306. Such inadvertence is not unusual where two separate acts are spliced together. The origin of the different sections of the act are therefore enlightening and to some extent significant.

It is therefore our conclusion that the suspension provided for under Section 306 is a personal one, and is not one that is contemplated by paragraph 4 of Section 61 of the act; that to extend paragraph 4 of Section 61 to include Section 306 would be to place an absurd and ridiculous interpretation upon those sections, and would do a great injustice to all parties concerned. In holding as we do, we feel that we have placed a reasonable construction upon the statutes consistent with the general principles of law.

ELECTIONS: CANDIDATE: WITHDRAWAL OF: Candidate nominated by primary ballot who desires to withdraw should make a written request, signed and acknowledged by him before an officer empowered to take acknowledgments of deeds, and file said request as specified in Section 655-a9, Code of Iowa, 1935.

September 2, 1938. *Honorable Robert E. O'Brian, Secretary of State:* This department is in receipt of your request for an opinion on the question as to the manner in which the withdrawal of a candidate for public office may be effected.

We assume that reference is had to candidates nominated by primary ballot.

The only express provision contained in the 1935 Code of Iowa governing the withdrawal of candidates nominated for public office is Section 655-a9, contained in Chapter 37-A1 entitled "Nominations by Non-Party Political Organizations." Said section provides in part as follows:

"655-a9. *Withdrawals.* Any candidate named under this chapter may withdraw his nomination by a written request, signed and acknowledged by him before any officer empowered to take acknowledgment of deeds. Such withdrawal must be filed as follows:

"1. In the office of the secretary of state, at least thirty days before the day of election. * * *"

By virtue of Section 531, Code of Iowa, 1935, Chapter 37-A1, supra, is not made applicable to nominations by primary election. In other words, the applicability of Section 655-a9, supra, would appear to be confined to nominations by convention, caucus, and, by reason of Section 655-a20, Code of Iowa, 1935, nominations by petition.

However this may be, the legislative history of Section 655-a9, supra, may well lead to the conclusion that as an administrative guide its terms should be applied to the withdrawal by a candidate nominated by primary ballot and as a consequence its specifications followed by such nominee for public office who desires to withdraw his nomination prior to the general election.

The forerunner to Section 655-a9, supra, was Section 1101, Code, 1897, providing:

"Sec. 1101. *Withdrawals.* Any candidate named by either of the methods authorized in this chapter may withdraw his nomination by a written request, signed and acknowledged by him before any officer empowered to take the acknowledgment of deeds, and filed in the office of the secretary of state fifteen days, or the proper auditor or clerk eight days, before the day of election, and no name so withdrawn shall be printed upon the ballot. In case of a special election to fill vacancies in office, such withdrawal papers shall be filed with the secretary of state seven days, and with the proper auditor or clerk four days, before the day of such special election."

Said quoted section was contained in Chapter 3 of Title VI, Code, 1897, styled "Of Elections and Officers." Section 1088 of said chapter and title provided:

"Section 1088. *All elections except school.* The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections."

Until 1907, the only methods known to the law of Iowa for naming candidates to public office were (1) by petition, and (2) by convention. In 1907, the general assembly enacted the primary election law providing for nominations by political parties by primary ballot. Chapter 51, Laws of the 32nd General Assembly. By virtue of Section 1 of Chapter 51, supra, Section 1101, Code, 1897, was made applicable to primary elections. Hence, a person nominated for public office, who desired to withdraw his nomination, was required to follow the procedure outlined in Section 1101, Code, 1897, whether his nomination was by petition, convention or primary ballot.

In the 1919 compilation of the code (a non-official code designed only for the use of the legislature), the code editor re-arranged many sections within chapters and by virtue of this shuffling, Section 1101 was renumbered Section 400 and placed in what was labeled Chapter 3 of Title IV (Compiled Code of 1919), and styled "Nominations by Convention or Petition." Section 1088 was renumbered Section 421 and was placed in Chapter 6 of Title IV (Compiled Code of

1919), styled "Method of Conducting Elections." Upon this foundation the code revision of 1924 was based, and in Chapter 5, Laws of the 40th Extra General Assembly, being an act to amend, revise and codify the law pertaining to nominations by primary election, at Section 5, it was provided that Chapter 6, Compiled Code of 1919, should apply to primary elections, but not so Chapter 3, Compiled Code of 1919. The law has thus continued to date, and Section 531, supra, as hereinbefore stated, in setting out the provisions of law applicable to primary elections, omits any reference to Chapter 37-A1, supra, of which Section 655-a9, supra, is a part.

There is no occasion for this department to give even remote consideration to the question as to whether or not the code revision, with its roots in an unofficial compiled code, was legally effective to accomplish the result wrought as pointed out in the historical review of Section 655-a9, supra, or whether it was but abortive. Rather, in order to reach a conclusion with respect to the best administrative policy to follow, we may stop short with an expression of opinion that the provisions of Section 655-a9, supra, should serve as a guide, if for no other reason than that it is within the spirit of Section 655-a9, supra, that nominees for office nominated by primary ballot should effect their withdrawal from nomination in the same manner as candidates named by either convention, caucus or petition.

It is accordingly the opinion of this department that a candidate nominated by primary ballot, and who desires to withdraw his candidacy, should make a written request for the withdrawal of his name as a candidate, signed and acknowledged by him before an officer empowered to take acknowledgments of deeds, and file said request in the manner and within the time specified in Section 655-a9, Code of Iowa, 1935.

SCHOOLS: TRANSPORTATION: NON-RESIDENT PUPILS: School bus driver may not offer transportation to non-resident pupils at rates less than the pro rata cost of such transportation.

September 16, 1938. *Honorable C. W. Storms, Auditor of State:* You have requested the opinion of this department upon the following question:

May a school bus driver employed by or under contract with a school board furnish school transportation to non-resident pupils at rates less than pro rata cost?

The above question involves consideration and interpretation of Section 4277, 1935 Code, which provides as follows:

"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 non-resident 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 non-resident 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 non-resident 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 tax payer 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."

Section 4277 appeared as follows in the 1924 Code:

"The school corporation in which such student resides shall pay from the general fund to the secretary of the corporation in which he shall be permitted to enter a tuition fee of not to exceed twelve dollars per month during the time he so attends, not exceeding a total period of four school years. Such tuition shall not exceed the average cost of tuition in such high school. The secretary shall deliver to the treasurer such tuition fees with an itemized statement on or before February fifteenth and June fifteenth of each year."

Chapter 62, laws of the 45th General Assembly, amended the said section as last quoted by placing a $9.00 limitation on tuition in lieu of the $12.00 provided above. The 45th General Assembly, extraordinary session, further amended Section 4277 as follows:

"Section 1. Section forty-two hundred seventy-seven (4277), Code, 1931, is amended by striking out all of said section following the period in line 8 thereof and inserting in lieu thereof the following:

" 'The tuition rate chargeable to the home district of such non-resident 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 non-resident 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.

" '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.' "

By the above provision, tuition costs, as well as transportation costs, were placed on a pro rata basis, and districts, subject to the $9.00 limitation, were authorized to pay a portion of transportation costs, provided the creditor district collected any balance due from the parents of children transported to school.

In view of subsequent legislation, to which reference will be made, it is apparent that the legislature was striving to eliminate special inducements to non-resident pupils at the expense of the district of attendance. This legislative purpose was definitely expressed in the enactment of Chapter 38, laws

of the 46th General Assembly, which by amendment added the following language to Section 4277:

"Section 1. Chapter forty-one (41) acts of the 45th General Assembly, extraordinary session, is hereby amended by adding thereto following the period in line 20 the following:

"'It shall be unlawful for any school district maintaining a high school course of instruction to provide non-resident 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 tax payer in any school district.'"

It is clear that under the provisions of Section 4277 the law will not permit a district to furnish either directly or indirectly, transportation free of charge or at a rate less than the standard fixed, which is placed upon the basis of pro rata costs for all children transported in the district. Superintendents or members of the boards of directors in no manner can be parties to any arrangement or understanding whereby the school transportation of a district can be made available to certain pupils at lesser rate than the pro rata cost fixed by the statute.

The statute provides that transportation costs shall in all cases be based on the pro rata cost of all pupils transported to school in such district. We are of the opinion, therefore, that the bus driver with whom the board contracts may not furnish transportation to non-resident pupils at a rate less than pro rata cost. The school bus, whether owned by the driver or the district, is an instrumentality of the school, and a board may not permit its use in such manner as to defeat the purposes of the statute.

ABSTRACTS OF TITLE: SCHOOL FUND MORTGAGES: COUNTY ATTORNEY: It is duty of county auditor to examine abstracts of title for school fund mortgages but if question as to sufficiency arises he may request advice of county attorney in connection therewith.

September 16, 1938. *Mr. Joseph P. Hand, County Attorney, Emmetsburg, Iowa:* You have requested the opinion of this office upon the following question:

"Is it the duty of the county attorney to examine abstracts which have been presented to the county auditor by persons proposing a loan from the permanent school fund?"

Section 4489, 1935 Code, relates to the application for loan from the permanent school fund, and provides as follows:

"All applications to borrow from the permanent school fund shall be made to the auditor of the county in which the land is situated which it is proposed to mortgage as security, who shall cause the proper appraisement to be made, and, if satisfactory, shall examine any abstract of title which the proposed borrower may submit, or he may cause an abstract to be prepared at such proposed borrower's expense. If the title is found to be perfect, and the lands unincumbered, he shall certify this fact and submit the application and all the papers connected therewith to the board of supervisors at its next meeting, regular or called, at which meeting the loan shall be approved or disapproved."

This question was the subject of an attorney general's opinion rendered July 12, 1911, reported at page 320, Attorney General's Report 1911-1912. That opinion holds that it is not the duty of the county attorney to examine such abstracts of title, but that it is the duty of the auditor to make such examination. The opinion further holds that if questions arise in the mind of the auditor as to the sufficiency of the title, that such questions may be submitted to the county attorney as advisor of this county officer for his opinion, which should be rendered without charge.

Under the revision of the Code of 1860, Section 1984 provided that

"The clerk shall examine the title to any real estate offered as security and make and preserve an abstract of such title, which should be certified by him and submitted to the board of supervisors at their first meeting thereafter; the clerk may charge a fee not to exceed two dollars for his services in making said abstract of title, to be paid by the party borrowing."

In the Code of 1873, Section 1864, it was provided that the duties formerly placed upon the clerk of court be performed by the county auditor. The provisions relative to the duty of the auditor to examine such abstract of title has remained substantially unchanged since 1873, except that the original fee of $2.00 was allowed in the early statutes for the *making* of the abstract of title.

It is doubtless true that since the time of the original enactment of the statute the examination of abstracts of title has become more and more an involved task warranting the services of an attorney. The statute, however, remains specific in its requirement that the auditor shall make the examination. No authority is given to charge the borrower for this particular service, nor is there any provision that such expense be paid by the county.

It must be concluded, therefore, that it is the duty of the auditor to make such examination of title. If questions as to the sufficiency of the title arise, the auditor, under the provisions of Section 5180, paragraph 7, 1935 Code, may request the advice of the county attorney in connection with such matters since the same relate to the duties of the auditor.

The legislature has made no substantial change in the above provisions for nearly eighty years. Boards of supervisors, as administrators of the school fund, should be given authority to procure examinations of such abstracts of title from attorneys and charge such expense to borrowers as a part of the loan costs. This procedure, however, would need to be authorized by the legislature and such proposal might well be addressed to it.

SCHOOLS: WEEK-ABOUT PLAN: TUITION: Under week-about plan students attend school part time and work part time. Tuition for such students should be charged only for actual time spent in attendance at school.

September 19, 1938. *Miss Agnes Samuelson, Superintendent of Public Instruction:* We acknowledge receipt of your request for the opinion of this department upon two questions arising out of facts stated by you as follows:

"A certain course in a certain high school requires students to attend high school full time during the ninth and tenth years, but during the eleventh and twelfth years students attend on what is known as a 'week about' plan—that is, they attend school one week and work in the shops the next week. Since these students are in school only half-time during the last two years of high school, it requires that they attend during a fifth year, still on the 'week about' plan. The question therefore arises as to how to collect tuition from the home districts of non-resident high school pupils during this third year under the 'week about' plan."

You have submitted the following questions:

"Could such a school charge the home district $9.00 per month for nine months during each of the eleventh and twelfth grades, then allow such student to attend the following year on a half-time basis, without tuition, on the grounds that the excess tuition paid by the home district during the eleventh and twelfth years would entitle such student to attend during the post-twelfth year on a half-time basis without tuition?"

"Could this high school charge the home district with the full tuition rate of $9.00 per month for two-thirds of a year during the eleventh grade, two-thirds of a year during the twelfth grade, and two-thirds of a year during the post-twelfth grade?"

The school laws relating to the payment of tuition fees of students attending high school outside their own districts contemplate the existence of the conventional four-year high school course. This is evidenced by the following provision of Section 4277 which requires payment of such tuition by the home district:

"4277. *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. * * *"

It will be noted that the statute limits the liability of the home district to payment of an amount not to exceed $9.00 per month during the time in attendance, not exceeding a total period of four school years.

"School year," as the term is employed in Section 4277, supra, has been construed by the department of public instruction to mean the full school year in the district where the child attends, even though it is a longer period than the school year of such child's home district.

If the term "school year" be construed strictly as meaning the conventional school year of nine months, then under the proposed "week about" plan, a home district could not pay a student's high school tuition beyond four years of attendance. As we understand the proposed plan, only one-half of a student's time after the second school year is devoted to classroom work, the remainder being spent in actual practice under supervision in private shops or establishments. Therefore, his home district should be charged the regular full tuition rate for only the portion of the conventional school year that the student is charged as being in attendance. If he is charged with half time attendance his home district may be charged the full tuition rate of half of a conventional school year. If he is charged with two-thirds time his home district may be charged the full tuition rate for two-thirds of the conventional school year.

We conclude that the purpose of the statute referred to above is to limit to four conventional school years the period of attendance for which the regular tuition rate may be charged against a home district.

Since the statute provides for the payment of high school tuition of a student by the home district "during the time he so attends" it is our opinion that the creditor district should charge the home district its regular high school tuition rate for such portion of the conventional school year as such student is in attendance.

OFFICERS: ASSESSOR: DEPUTY: COMPENSATION: BOARD OF SUPERVISORS: Deputy assessor is not entitled to extra compensation for having performed duties under Homestead Tax Exemption Act on theory

they are special services. Compensation for such services included in per diem allowance based upon actual time employed, as determined by board of supervisors.

September 26, 1938. *Mr. Harold W. Vestermark, County Attorney, Iowa City, Iowa:* This department acknowledges receipt of your request for an opinion on the following proposition:

The deputy assessor in and for Iowa City, Iowa, pursuant to an arrangement with the Johnson County board of supervisors, receives as his compensation for official services as such deputy assessor the sum of $5.00 per day. In addition to the regular duties incident to his deputyship said deputy assessor has performed, under the direction of the city assessor, the services contemplated by the provisions of the Homestead Tax Exemption Act, Chapter 195, Laws of the 47th General Assembly.

The question arises as to whether or not additional compensation may be paid said deputy assessor for the performance of such services.

We are informed in a letter from the city assessor that the deputy was appointed by him, and that the duties imposed upon the assessor by the provisions of the Homestead Tax Exemption Act have been assigned to the deputy by the city assessor. We are further informed that the city assessor, being of the opinion that such work was "extra or special service," requested additional compensation for said deputy.

Section 5669, Code of Iowa, 1935, provides in part as follows:

"5669. *Compensation of assessors and deputies.* Town assessors and assessors in cities of the second class, and their deputies, shall receive the same compensation as township assessors, which shall be determined in the same manner and payable from the county treasury.

"In cities of the first class having a population of more than twenty-five thousand and less than forty-five thousand the compensation of the assessor shall be eighteen hundred dollars per annum and in those of less population not more than eighteen hundred dollars per annum, or not less than five dollars per day for the time actually employed, to be fixed by the board of supervisors; and that of 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. * * *

"In cities where extra or special services are to be performed by the assessor, the board of supervisors may by special contract with the assessor determine the compensation to be paid."

The Homestead Tax Exemption Act, Chapter 195, Laws of the 47th General Assembly, provides at Section 5 as follows:

"Sec. 5. Any person who desires to avail himself of the benefits provided hereunder shall each year commencing January 1, 1938, deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement and designation of homestead as claimed by him, and the assessor shall return said statement and designation with the assessment roll to the county auditor with his recommendation for allowance or disallowance endorsed thereon; provided, that if the said verified statement and designation of homestead is not delivered to the assessor, the person may, on or before June 1 of any year, file with the county auditor such verified statement and designation, together with the supporting affidavits of at least two disinterested freeholders of the taxing district in which the claimed homestead is located."

In addition Section 8 thereof provides:

"Sec. 8. If the assessor who last listed and valued a claimed eligible homestead did not, in the description and valuation thereof, comply with the provisions of Section 6962, Code 1935, he shall, if still in office, on the written request of such claimant and without expense to the claimant or to the county, correct his listing and valuations of such claimed homestead and contiguous real property originally listed and valued by him, and file such corrected listing

and valuations with the county auditor, who forthwith shall certify the same to the county treasurer, and said county treasurer shall so correct his tax books; provided, that if the assessor who last listed and valued such property is not still in office, the assessor in office shall, on such written request and at the expense of the county, so correct such listing and valuations of said homestead and said contiguous real property."

The city of Iowa City, according to the Official Red Book, is classified as one of the first class, having a population of more than fifteen thousand inhabitants but less than twenty-five thousand inhabitants. Therefore, the compensation of the city assessor in Iowa city is either the sum of $1,800.00 per annum or not less than $5.00 per day for time actually employed, as determined by the board of supervisors of Johnson County, Iowa. Section 5669, paragraph 2, supra. By virtue of the same statutory provision, a deputy assessor in and for Iowa City would receive a compensation of not more than $5.00 nor less than $3.50 per calendar day, Sunday excepted, for time actually employed, as fixed by the board of supervisors of Johnson County, Iowa. In the instant case we are informed that the compensation of the deputy assessor in question was fixed by the board at $5.00 per calendar day for time actually employed.

Referring to the provisions of the sections quoted supra of the Homestead Tax Exemption Act, it appears that the legislature, in the enactment of that law, imposed upon assessors certain duties in connection with the proper administration of said law. According to quoted Section 5, any person who desires to avail himself of the benefits of the law is required to deliver to the assessor each year a verified statement and designation of homestead as claimed by him, and which statement the assessor is required to return with the assessment role to the county auditor with his recommendation for allowance or disallowance endorsed thereon.

Section 7106, Code of Iowa, 1935, provides:

"7106. *Listing and valuation.* Each assessor shall enter upon the discharge of the duties of his office immediately after the second Monday in January in each year, and shall, with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter upon the assessment rolls furnished him for that purpose the several items of property required to be entered for assessment. He shall personally affix values to all property assessed by him."

Reading these sections together it appears that one of the duties devolving upon the assessor, concededly a new duty since March 24, 1937, the publication date of Chapter 195, Laws of the 47th General Assembly, is that of returning to the county auditor with recommendation the verified statement and designation of homestead as claimed by any person eligible to avail himself of the benefits of the Homestead Tax Exemption Law.

While there is probably little question but what the new duties imposed upon an assessor by the legislature in the enactment of Chapter 195, supra, are considerable and onerous, yet the fact that the legislature enjoined the performance of such duties simultaneous with the discharge of existing duties of listing and valuing property, as provided in Section 7106, supra, without specifying that additional compensation shall be paid the assessor, is significant. In other words, it was the apparent intent of the legislature that an assessor could discharge the duties of his office, old and new, at one and the same time, and that the statute already provided adequate remuneration for official services. If then the city assessor of Iowa City himself were to perform the duties specified in Chapter 195, supra, it is the opinion of this department that the

compensation specified in Section 5669, supra, in the amount of either $1,800.00 per annum or not less than $5.00 per day for time actually employed, would prevail, and the board of supervisors would be without authority to grant him further compensation for having performed the services contemplated by the Homestead Tax Exemption Act.

This would be no less true of a deputy city assessor whose aggregate compensation is fixed by the county board of supervisors based upon actual time employed. In either event, the compensation should be fixed and determined by the board of supervisors in advance of the performance of the services. *Alderdice vs. Wapello County, et al.*, 202 Iowa 759, 210 N. W. 242.

In other words, it would be incumbent upon a board of supervisors, prior to the deputy assessor's entering into the performance of his official duties, to approximate the actual time for which he would be employed and to fix his compensation on a per diem basis accordingly, and as provided in Section 5669, supra, in advance. If in the instant case the board of supervisors of Johnson County has determined that the deputy assessor shall be employed for each calendar day of the year, excepting Sundays, then the compensation would necessarily be limited to not more than $5.00 per day nor less than $3.50 for that period of time, and the deputy assessor would not be entitled to, nor could the board of supervisors lawfully pay to him, any amount in excess of the sum agreed upon.

It should be borne in mind that the duties enjoined by the Homestead Tax Exemption Act are upon the assessor, and would devolve for performance upon the deputy assessor only in those instances where the assessor himself has delegated the duties to the deputy. Therefore, in any given case a board of supervisors should take into consideration the duties to be performed by the deputy for the purpose of computing the time for which he is to be employed, and the per diem he is to be allowed.

It is our further opinion that the duties to be performed by the assessor under the Homestead Tax Exemption Act are not extra or special services, within the meaning of those terms as used in Section 5669, supra. These terms, in our opinion, apply not to duties imposed by legislative fiat, as, for example, the duties under the Homestead Tax Exemption Act or under Section 3713, Code of Iowa, 1935. Rather their meaning is illustrated by facts presented in two previous opinions of this department, viz., the 1932 Report of the Attorney General, page 136, wherein it was held that an order of the State Board of Assessment and Review requiring boards of supervisors to report needed and desirable information on data sheets furnished by the state board, and which duty was delegated to assessors, constituted extra and special service on the part of such assessors. See also 1930 Report of the Attorney General, page 56.

In view of the foregoing discussion the following conclusions are expressed:

1. The deputy assessor in question would not be entitled to extra compensation for having performed duties under the Homestead Tax Exemption Act on the theory that they are extra or special services.

2. The compensation for such services would be included in the per diem allowance based upon time actually employed, as determined in *advance* by the county board of supervisors.

ELECTIONS: STUDENTS: RIGHT OF TO EXERCISE FRANCHISE AT SCHOOL SITUS: RESIDENCE: One who becomes a resident of a county

for the purpose of attending school, and who has formed no intention of remaining in such county except during the completion of the course, is not entitled to vote in such county.

September 30, 1938. *Honorable Fred Biermann, Decorah, Iowa:* This department is in receipt of your request for an opinion on the question as to whether or not college students residing in a college town are eligible to vote in the county and precinct wherein they reside while in attendance at the college.

The qualifications of an elector are provided for in Article II, Section 1, as amended, of the Constitution of Iowa, and Section 5628, Code of Iowa, 1935. These provide as follows:

"*Electors.* Section 1. Every * * * citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

"5628. *Residence in precinct—exception.* Each qualified elector may vote at said election, who, for ten days has been a resident of the precinct in which he offers to vote. * * *"

See also Section 727, Code of Iowa, 1935.

In these constitutional and statutory provisions it is to be noticed that the terms "resident" and "residence" are employed. Thus, for the purpose of determining the question presented, it is necessary for us to ascertain the meaning of these terms.

As was pointed out by this department in an opinion issued May 18, 1938, to the Secretary of State (page ... this report, supra):

"As a noun, the sense in which the term 'resident' is used in the Constitution has been held to mean one who dwells or resides permanently in a place, or who has a fixed residence as distinguished from an occasional lodger or visitor; as a person coming into a place with intent to establish a domicile or permanent residence, and who in consequence actually remains there. 54 *Corpus Juris*, 712, 713, section 2. The term 'residence' in its statutory signification depends upon the legislative purpose as well as the context of the statute, or in other words, the term must be construed in every case in accordance with the object and intent of the statute in which it occurs. 54 *Corpus Juris*, 708, 709, section 7. * * *"

While the terms "domicile" and "residence" are frequently used synonymously, yet in fact, when accurately used, they are not convertible terms. However, in 19 *Corpus Juris* 397, section 3, 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. * * *"

Turning to the pronouncements of the Iowa supreme court, it was held in *State vs. Savre*, 129 Iowa 122, 105 N. W. 387, 3 L. R. A. (NS) 455, that the word "residence" as employed in the election statutes of this state is synonymous with "home" or "domicile," and that the term meant a fixed or permanent abode or habitation to which the party, when absent, intends to return. In *Powers vs. Harton*, 183 Iowa 764, 167 N. W. 693, it was decided that a farm hand who made his headquarters at the place where he was working, but who frequented the residence of his parents some miles away, was a qualified voter in the precinct in which he resided with his employer. In this case the court was of the opinion that his home was where he was living, and it was not necessary that it be a permanent home. *In re Colburn's Estate*, 186 Iowa

590, 173 N. W. 35, stands for the proposition that one's voting residence is at the place which he treats as his home, and to which he intends at all times to return when not employed at other places. The comparatively recent decision of the Iowa supreme court, viz., *Dodd vs. Lorenz*, 210 Iowa 513, 231 N. W. 422, held that an adult unmarried school teacher became a resident of the county in which she taught within the meaning of the constitutional provision governing suffrage, when her employment is entered upon with the good faith intention of making the place of employment her permanent home or residence so long as the employment continued. In this case the court quoted from Goodrich on Conflict of Laws to the effect that one may have a settled place of abode even though he knows that in the future he may possibly or even probably change it for another, and that a domicile of choice may be acquired by persons for whom it is impossible to establish a life-long home, and it is sufficient that the intent be to make a given place a home here and now. See also *Fisher, etc., vs. The First Trust Joint Stock Land Bank of Chicago*, 210 Iowa 631, 231 N. W. 671, 69 A. L. R. 1340; *Taylor vs. Independent School District*, 181 Iowa 544, 164 N. W. 878; 16 *Iowa Law Review* 113; 15 *Iowa Law Review* 309.

In *Vanderpoel vs. O'Hanlon, et al.*, 53 Iowa 246, 5 N. W. 119, the plaintiff, who was a student at the State University of Iowa at Iowa City, in a March, 1878, election tendered his ballot to the defendants election judges, who refused to deposit the same in the ballot box. Plaintiff sued for damages on the theory that the defendants acted unlawfully, corruptly and maliciously in their refusal to deposit the ballot to the injury and damage of himself. On trial by jury judgment was rendered for the plaintiff which was reversed on appeal. According to the facts recited in the court's opinion, the plaintiff, prior to his matriculation at the State University, and while a minor, resided with his father in Mitchell County, Iowa. In January, 1875, he was sent by his father to the University for the purpose of completing his education, and was in attendance at the University in March, 1878, when he offered to vote. His father defrayed his expenses while at the University. The father's home in Mitchell County was plaintiff's headquarters during vacation periods. He was of age and single on the date he offered to cast his ballot. While on the witness stand and in answer to an interrogation by counsel as to his intention to make Iowa City his home after he ceased to attend the University, plaintiff answered: "I didn't know what I would do after I graduated. I was not aware that I would ever leave Iowa City. I did not know what I would do afterwards. I was at that time (when he offered to vote) without any intention."

On this state of the record the Iowa supreme court concluded as follows, quoting from page 248 of 53 Iowa:

"It is undoubtedly true that the residence of the plaintiff was in Mitchell county at the time he first went to Iowa City, and it must be equally true that it so continued until he acquired another. Another proposition will, we think, be conceded, and that is, that an individual cannot be entitled to vote in two different counties in this state at the same election. Yet he may, in a certain sense, actually reside in one and be a legal voter in another. He is entitled to vote only in the county where his home is—where his fixed place of residence is for the time being—and such place is, and must be, his domicile, or place of abode, as distinguished from a residence acquired as a sojourner for business purposes, the attainment of an education, or any other purpose of a temporary character. If a person leaves the place of his residence or home with intent of residing in some other place and making it his fixed place of residence, but never consummates such intent, it cannot be said his residence

has been changed thereby. But if he so intends, and does actually become a resident of another place, then the former residence will be regarded as abandoned and a new one acquired. The intent and the fact must concur. *Hinds vs. Hinds*, 1 Iowa 36; *The State vs. Minnick*, 15 Iowa 123; the opinion of the judges in 5 Met., 587; Fry's Election Case, 71 Penn St., 302.

"The instructions given the jury are not in accord with the views above expressed, and must, therefore, be regarded as erroneous. The Circuit Court seems to have been of the opinion that if the plaintiff resided in Iowa City for the required length of time, and had no present intention of leaving when he ceased to attend the University, that such place, in a constitutional sense, became his residence. Under this view, the plaintiff would become a resident and voter in Iowa City although he was there for a temporary purpose and has not formed affirmatively the intention to become a resident of such place. This we do not think is the law, and, for the error in the instructions, the cause must be reversed. We deem it proper to say that the seventh instruction asked embodies correct propositions and should have been given without modification."

In reliance upon the opinion in the Vanderpoel case, supra, this department, in an opinion appearing at page 388 of the 1928 Report of the Attorney General, held that a student in a college town is presumed not to have the right to vote in that town, although rules for determining his residence apply as in any other case. The case was also cited as authority in an opinion of this department reported at page 227 of the 1932 Report of the Attorney General, wherein it was held that persons temporarily employed, and having a temporary residence for a business purpose only, acquire no voting residence within the precinct. The facts in that opinion concern the employees of a grading gang whose places of residence were shacks on wheels in which they traveled from one grading job to another.

Again in the 1911-1912 Report of the Attorney General, at page 827, appears an opinion wherein it was held that a student who has the intention of returning to his former home as soon as his school work is finished is not a resident of the place where the school is located, within the meaning of the law, but that on the other hand the residence of a scholar of full age who has left the home of his parents on coming to school, intending to make the place where the school is located his residence until his school work is finished, and then intending to locate at some place other than his former home, is the place where the school is located. See also 1917-1918 Report of the Attorney General, 365.

In *Anderson vs. Pifer*, 315 Ill. 164, 146 N. E. 171, 37 A. L. R. 134, the Illinois supreme court held that the mere presence of a student at the place of the college is not sufficient to entitle him to vote there, but his residence there must be bona fide, with no intention of returning to the parental home. *Inter alia* the court was of the opinion that college students entirely free from parental control, who regard the college town as their home, and who have no other home to return to in case of sickness or other affliction, are legal voters. Citing *Welsh vs. Shumway*, 232 Ill. 54, 83 N. E. 49.

Courts generally have held that where a student attends college, intending to return to his former home after his graduation, he does not obtain a voting residence at the college. *Vanderpoel vs. O'Hanlon*, supra; *Anderson vs. Pifer*, supra; *Granby vs. Amherst*, 7 Mass. 1; *Hall vs. Schoenecke*, 128 Mo. 661, 31 S. W. 97; *Re Goodman*, 84 Hun. 53, 31 N. Y. S. 1043, 40 N. E. 769; *Wickham vs. Coyner*, 30 Ohio C. C. 765; *Allentown Contested Election Case*, 8 Phila. 575, affirmed 71 Pa. 302, 10 Am. Report 698; *Linger vs. Balfour* (Texas Civil Ap-

peals), 149 S. W. 795; *Seibold vs. Wahl*, 164 Wisc. 82, 159 N. W. 546, Annotated Cases, 1917C 400. In the last cited case it appeared that a student attending a university was accustomed to return to his parental home during his vacations, or whenever the opportunity offered, and the court was of the opinion that all the circumstances pointed to his residence at the university being merely temporary with an intention to return home after graduation.

On the other hand, it has been held that where it is manifest that a student does not intend to return home but to remain at the college town an appreciable length of time, he may vote from his college residence. See *People vs. Osborn*, 179 Mich. 143, 135 N. W. 921, 40 L. R. A. (NS) 168; *Shaeffer vs. Gilbert*, 73 Md. 66, 20 Atl. 434; *Sanders vs. Getchell*, 76 Me. 158, 49 Am. Report 606.

Thus, it was held that where a student who is self-supporting gives up his former residence and comes to college with the intention of remaining in the county, the situs of the college, after his studies are over, he acquires a residence for the purpose of voting. *Wickham vs. Coyner*, supra, *People ex rel. Saunders vs. Hanna*, 98 Mich. 515, 57 N. W. 738.

In *Sanders vs. Getchell*, supra, the Maine court adhered to the rule that attendance at a school or university, with the intention to make such place his home for an indefinite period of time, will give a voting residence, saying:

"It is clear enough that residing in a place merely as a student does not confer the franchise. Still a student may obtain a voting residence, if other conditions exist sufficient to create it. Bodily presence in a place, coupled with intention to make such place a home, will establish a domicil or residence. *But the intention to remain only so long as a student, or only because a student, is not sufficient. The intention must be not to make the place a home temporarily,—not a mere student's home, a home while a student,—but to make an actual, real, permanent home there; such a real and permanent home there as he might have elsewhere. The intention must not be conditioned upon or limited to the duration of the academical course. To constitute a permanent residence, the intention must be to remain for an indefinite period regardless of the length of time the student expects to remain at the college. He gets no residence because a student, but being a student does not prevent his getting a residence otherwise.*"

And in *Welsh vs. Shumway, supra*, it was held that a student may acquire a voting residence at the college if he supports himself entirely by his own efforts, is not subject to parental control, and regards the place where the college is situated as his home, even though he might at some future time intend to remove, but has the intention of making it his present abiding place, and has no fixed intention of where he will locate when he leaves; but his presence in the college town must be an actual bona fide one, with no intention of returning to the parental home upon the completion of his studies.

While some courts have held that a student attending college who has no intention of returning home, but is not certain as to the place of his future residence, he may vote at the college town. (*Parsons vs. People*, 30 Colo. 388, 70 Pac. 689; *Pedigo vs. Grimes*, 113 Ind. 148, 13 N. E. 700; *Berry vs. Wilcox*, 44 Nebr. 82, 62 N. W. 249) yet, as indicated by the language quoted from the Vanderpoel case, supra, the rule appears to be otherwise in the state of Iowa. In the cited case of *Berry vs. Wilcox*, supra, the supreme court disapproved of the Iowa decision. The facts before the Nebraska court, however, disclose that the students in question were emancipated from their parents, apparently had

no intention of returning to their parental homes, regarded University Place as their home, leaving it during vacation and going wherever they could obtain employment, but with the intention of returning to University Place at the close of vacation periods. Even though they were apparently uncertain as to their course upon graduation and had no particular future residence in view, yet the Nebraska court was of the opinion that they had lost their residence at the homes of their parents and were men without a country, if they had not acquired one at University Place.

From an analysis of the many decisions cited, it is apparent that no hard and fast rule may be laid down to determine the residence of a student while attending college or university for the purpose of such student's exercising his voting franchise. Students oftentimes, even though they have reached their majority, are being financed through college by their parents, return to their parents' homes during vacation periods, and in various ways are subject to parental control, *and it may be said that there is at least a presumption that their place of residence is the residence of their parents.*

It is accordingly the opinion of this department that while each case must be determined upon the facts peculiar to it, yet under the holding of the Iowa supreme court in the Vanderpoel case, supra, the rule that obtains in this state is that one who becomes a resident of a county for the purpose of attending college, and who has formed no intention of remaining in such county except during the completion of his college course, is not entitled to vote in such county.

COUNTIES: BOARD OF SUPERVISORS: MACHINERY: SECONDARY ROADS: Board of suprvisors cannot authorize the grading of farm lanes with public machinery where there is no benefit to the county road system, even though farmers offer to assume expense thereof.

October 5, 1938. *Mr. Ray A. Potter, County Attorney, Tipton, Iowa:* Receipt is acknowledged of your letter of September 28, 1938, in which you state the following facts:

"There are a number of farmers owning lands adjacent to secondary roads in our county and in some instances there are lanes leading to their farms for a distance of 40 to 80 rods in length. Some of these farmers have offered to furnish gasoline and pay Cedar County, Iowa, for the use of county machinery in grading their lanes, and it is understood that said lanes so graded would not be a benefit to the county roads. It is understood that the farmers would pay for the gasoline used plus the reasonable worth of the wear and tear of county machinery, oils and a reasonable worth of the services of men employed by Cedar County."

And you ask the opinion of this department on the following question:

"Under the above set of facts, could the Board of Supervisors of Cedar County, Iowa, authorize the grading of such lanes where there is no benefit to the county road system and accept compensation for such work providing the work does not exceed a few hours' time?"

Section 13316-e1 of the Code provides as follows:

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

Boards of supervisors are charged with the duty of constructing and maintaining secondary roads, pursuant to Chapter 240 of the Code.

Section 4644-c14 provides that the maintenance fund may be used for certain purposes, including the purchase of machinery, tools, and other equipment.

We can find no statute that either expressly or impliedly authorizes the boards of supervisors to engage in any private enterprise. The duties and the powers of the board are restricted to taking care of the business of the county.

Section 4659 of the Code provides as follows:

"The board of supervisors may permit private parties or municipal corporations to take materials from such acquired lands in order to improve any street or highway in the county, but it shall be a misdemeanor for any person to use or for the board of supervisors to dispose of any such material for any purpose other than for the improvement of such streets or highways."

In an opinion rendered May 21, 1931, the then Attorney General had under consideration the question whether or not under this section the board of supervisors was authorized to permit the use of gravel from county pits for the purpose of graveling private drives from the graveled highway to a farmer's residence. He expressed the opinion that the use of the county gravel pit by the board of supervisors for the purpose of graveling a private road was wholly unauthorized by the provisions of that section.

In the case of *Hilgers vs. Woodbury County*, 200 Iowa 1318, 206 N. W. 660, an attempt was made to hold Woodbury County liable for an injury sustained in an elevator accident. The county had leased certain rooms in the court house to a Post of the American Legion, at an agreed rental. The plaintiff was on certain business connected with the Legion. The opinion seems to assume that the evidence on the question of negligence was sufficient to take the case to the jury, but the court held that the question of liability rested on whether or not the board of supervisors had the right to lease the rooms in the court house, and held that the board had no such power. In passing, the court said:

"It is universally held that the board of supervisors of a county has only such powers as are expressly conferred by statute or necessarily implied from the powers so conferred."

It cannot be said that the power to construct and maintain public highways carries with it the implied power to construct private roads. As pointed out, the use of publicly owned machinery for a private purpose is expressly prohibited by statute, and there is no authority in the statute for the employment of the public highway construction crews on private work.

If it should be contended that the statutory prohibition of the use of the machinery for private purposes is intended only to prevent the gratuitous use thereof, we think that the language of Section 13316-e1 provides a sufficient answer.

Therefore, we are of the opinion that the question you ask must be answered in the negative.

IOWA STATE HIGHWAY COMMISSION: COUNTIES: BOARD OF SUPERVISORS: BONDS: INDEBTEDNESS: Section 4644-c48, et seq., gives to the board of supervisors the right to determine whether or not anticipatory certificates should be issued subject only to the approval of the state highway commission, and it is not intended that Chapter 23 apply to the issuance of such certificates.

October 5, 1938. *Iowa State Highway Commission, Ames, Iowa:* This department acknowledges receipt of your letter of September 30, 1938, in which you inquire whether or not the boards of supervisors which desire to issue anticipatory certificates for secondary road improvements, pursuant to Section 4644-c48,

et seq. of the Code, are required to follow the procedure prescribed by Section 363. That section is as follows:

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

The notice provided for gives an opportunity for the filing of objections, as provided in Section 364. Section 365 provides for a hearing before the comptroller, and Section 366 provides, among other things, as follows:

"If he finds that the bonds are to be issued and arrangements for payment have been made in accordance with law he shall approve the same, otherwise he shall recommend such modifications as in his judgment are necessary to comply with the provisions of the state law and if such modifications are so made he shall approve the same, and his decision shall be final."

The section further provides that in case there is no appeal the board or the municipality affected may issue such bonds or other evidence of indebtedness if legally authorized so to do.

Section 351, which like the sections above referred to, is contained in Chapter 23, provides that the chapter is applicable to a county except in the exercise of its power to make contracts for secondary road improvements.

Chapter 23 was enacted by the 40th General Assembly, Extra Session. Section 351, as originally enacted provided for the application of the chapter to a county except in the exercise of its power to make contracts for primary road improvements. The word "secondary" in Section 351 was substituted for the word "primary," by Section 65 of Chapter 20 of the Acts of the 43rd General Assembly. That act of the 43rd General Assembly was a reconstruction of the road law so far as concerns secondary roads.

While there have been some amendments, the general plan as provided by the 43rd General Assembly still governs. It will be noted that the general power given by Chapter 23 to the comptroller over contracts of municipalities does not apply to the exercise of the power by the boards to make contracts for secondary road improvements.

The authority given in Section 4644-c48, et seq., to boards of supervisors to issue anticipatory certificates, upon advice of the Highway Commission, goes beyond the matter of making secondary road contracts, although it is related to the general subject. And while the issuance of these anticipatory certificates is the issuance of evidence of indebtedness, such certificates are payable solely from the accruing secondary road construction fund. (Section 4644-c50.)

Whether or not the fact that these certificates are not general obligations of the county is material upon the present question, need not be determined. But on December 3, 1930, the then attorney general, in an opinion found on page 372 of the reports of that year, held that Section 363 is applicable to the issuance of special assessment certificates. Since that time the 45th General Assembly enacted what is now Chapter 303-F1 and Chapter 308-F1, and in enacting these chapters the legislature provided in what are now Sections 5903-f2 and 6066-f4, that Chapter 23, "*except Sections* 363 *to* 367, *inclusive, shall be applicable.*" The cost of armories under Chapter 303-F1 is to be paid from the earnings, and the bonds issued are payable only from the revenue derived

from the rentals. And so, Chapter 308-F1, authorizing self liquidating improvements provides that the bonds issued must be paid out of the special funds specified, and like the obligations for armories are not general obligations of the municipality.

When Chapter 23 of the Code was enacted by the 40th General Assembly, Extra Session, it was the evident intent of the legislature to place in the hands of an official of the state a degree of control over the issuance of evidence of indebtedness by the various municipalities. But when the county boards of supervisors by Chapter 20 of the Acts of the 43rd General Assembly were authorized to incur indebtedness by means of anticipatory certificates, the power to do so was restricted; in that before issuing such certificates the boards are required to seek the advice of the State Highway Commission. (Section 4644-c48.)

It certainly must have been intended that the boards should follow the advice given, or in other words, that the Highway Commission has authority to veto or to approve applications for authority to issue these anticipatory certificates.

In this connection Chapter 240 of the Code, which contains Chapter 20 of the Acts of the 43rd General Assembly, with some amendments not imparted to the question here involved, provides for a degree of supervision by the State Highway Commission over the boards of supervisors in their work of constructing the secondary roads. Among other things it is required that the program be approved by the Commission. (Section 4644-c24.) And the contracts in excess of certain figures must be approved by the Highway Commission. (Section 4644-c44.) So when a board proposes to issue anticipatory certificates the Highway Commission must be fully advised of what is proposed to be done with the money raised. Not only is this true, but the Highway Commission is fully advised as to the approximate revenues that any county will receive for its secondary road construction fund, in the year or two-year period for which such certificates may be issued. That is, it has the data of what has been received, and it is in a better position probably than any other state department to make an accurate estimate of such revenue.

It will be noted that under Section 366 the comptroller's decision is based upon his findings as to whether or not arrangements have been made for payment, in accordance with the law. But Section 4644-c48 to Section 4644-c57, providing for these certificates prescribes the exact procedure to be followed and provides for the payment out of the accruing secondary road construction fund. It seems to us that Section 4644-c48, et seq., gives to the board of supervisors the right to determine whether or not anticipatory certificates should be issued, subject only to the approval of the State Highway Commission, and that it is not intended that Chapter 23 apply to the issuance of such certificates.

The policy of the state to require approval by a state department of the issuance of evidence of indebtedness was carried into the secondary road law, and the approval is to be given by the department of the state that, as stated, exercises a degree of supervision over the actions of the counties in constructing the secondary roads.

We find nothing in the statutes that indicates that it was the intention of the legislature that the plan provided for the issuance of such certificates should not be exclusive and final, and we think that Chapter 23 has no application to the issuance of such certificates.

ELECTIONS: SUBMISSION OF PUBLIC MEASURES: BOARD OF SUPERVISORS: BONDS: VOTERS: Several distinct public measures may be printed on one ballot. Inconsistency between propositions is no bar if each is independent of the other so voter may indicate his choice on one or all.

October 6, 1938. *Mr. M. L. Mason, County Attorney, Mason City, Iowa:* This department acknowledges receipt of your request for an opinion on the following matter:

May the board of supervisors of Cerro Gordo County submit at the general election to be held on November 8, 1938, the proposition (1) of issuing bonds in the sum of $262,000.00 for the purpose of erecting and equipping a new court house, and at the same time and upon the same ballot the proposition (2) of issuing bonds in the sum of $100,000.00 for the purpose of remodeling the present court house?

You advise us that a petition has been filed with the board, pursuant to the provisions of Section 5272, Code of Iowa, 1935, wherein the board has been petitioned to submit the question of the adoption of the first enumerated proposition to the voters of Cerro Gordo County. By reason of such action, it is mandatory that the board submit said first proposition to the voters at any regular election or special election called for that purpose. Section 5272, Code of Iowa, 1935. No such petition has been filed with the board with respect to the second enumerated proposition. The board, however, *may* submit said second proposition at any regular election or at any special election called for that purpose by reason of the provisions of Section 5263, Code of Iowa, 1935, hereinafter set out.

Section 5261, Code of Iowa, 1935, contains the prohibition that a board of supervisors shall not "order the erection of, * * * or the remodeling or reconstruction of a court house, * * * when the probable cost will exceed ten thousand dollars, * * * until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by (at least sixty per cent of the total vote cast for and against the proposition—Section 1171-d4 of the Code), at a general or special elections * * *".

Section 5263, Code of Iowa, 1935, provides:

"5263. *Questions submitted to voters.* The board of supervisors may submit to the people of the county *at any regular election, or at any special election called for that purpose,* the question whether money may be borrowed to aid in the erection and equipment or the building of additions or extensions to, the remodeling or the reconstruction of any public buildings, or the procuring of a site or grounds for such public buildings, or for both such site and buildings, and either or both of said propositions and other local or police regulations may be submitted at the same general or special election." (Italics ours.)

In addition, Sections 761 to 767, inclusive, Code of Iowa, 1935, specify and prescribe the form of and manner of printing ballots on public measures. Of these, Section 766 provides as follows:

"766. *Different measures on same ballot.* If more than one constitutional amendment or public measure is to be voted upon, they shall be printed upon the same ballot, one below the other, with one inch space between the several constitutional amendments or public measures to be submitted."

This last quoted section, in the opinion of this department, is express authority for the printing of more than one public measure upon a single ballot.

The question arises, however, as to whether or not the two propositions set forth in the statement above, and as taken from your letter, are inconsistent or dissimilar in character so that they may not be placed upon a single ballot, and voted upon at the same election.

In considering this matter, we are compelled, by reason of a dearth of authority on the exact question, to look to those decisions treating of the subject as to whether or not a particular proposition submitted to the people with reference, for example, to the erection or purchase of a plant or other utility by the municipality is a single or double proposition. It appears, from an analysis of the authorities, that the rule in the majority of jurisdictions is that a proposition submitted to the people "to erect or purchase" a plant, public building, utility, etc., is a single proposition, and if placed upon the ballot as a single public measure, is not bad for duality. The minority rule appears to be that such a proposition submitted to the people is void and illegal in that it submits a dual proposition which defeats the right of the voter to express his choice or preference. See note to reported case, 5 A. L. R. 519 at 538; *Stern vs. City of Fargo, et al.*, (N. D.), 122 N. W. 403, 26 L. R. A. (NS) 665, and note. The Iowa supreme court has very recently subscribed to the majority view. *Keokuk Water Works Company vs. City of Keokuk*, 277 N. W. 291, 300; *Abbott, et al. vs. Iowa City, et al.*, 277 N. W. 437, 445. See also *Rock vs. Rinehart*, 88 Iowa 37, 55 N. W. 21.

In reviewing these decisions, we have observed *inter alia* that the proposition submitted in the City of Keokuk case, supra, read "shall the city * * * establish a municipal water works system by purchase and improvement of the existing water works or by constructing a new system * * *?". In the earlier Rinehart case, supra, the proposition was "shall the board * * * be authorized to order and contract for the erection of a court house * * * from the proceeds arising from the sale of * * * (swamp) lands * * *?". Both propositions were held to be single in objective and not bad for duality. As was stated by the Iowa court in the latter case: "There is but one object,— the erection of a court house * * *".

In contradistinction to these decisions, there is the early case of *Gray vs. Mount*, 45 Iowa 591, wherein the proposition submitted to the voters of Guthrie County was as follows:

> "Shall the swamp-land fund of Guthrie County, Iowa, be devoted by the board of supervisors * * * to the erection of a court house * * * and a county high school * * * in the proportion of two-thirds thereof to the erection of the court house, and one-third to the erection of said county high school building?"

In passing upon the legality of this proposition the Iowa court stated (id., page 595 of 45 Iowa):

> "The next matter urged against the validity of the proceedings is the union of two objects, and two separate appropriations for distinct objects, in one proposition, so that the elector could not vote for one and against the other. We think this presents a fatal objection to the legality of the proceedings.
>
> "The question to be submitted to the voters was not simply whether it was their will to appropriate the fund; but there must be an object for the appropriation in order to constitute the proposition to be voted upon. The object is of the essence of the proposition. This cannot be denied. The appropriation for a given object is the proposition submitted. If there be two objects and a specified amount of funds to be devoted to each, it is very plain that there are two propositions submitted at the same election. If they are submitted together, it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of choice. The plan of submitting

the questions, for there are two, resembles more the common device of an auctioneer in disposing of worthless goods, whereby a good article is mingled with them and made to draw bids, or the cunning tricks of gamesters to induce wagers of the unwary, rather than the open, direct and fair manner that always should prevail in elections by the people. The very letter as well as the spirit of our election laws condemns this plan. It has never been heard of that electors were, by any plan, denied the right of choosing one, and rejecting another candidate for office, to be voted for at the same election.

"This very point, the necessity of submitting to the electors distinct propositions for the outlay of money, so that they may exercise the liberty of choice in voting for one and against another, was presented in *McMillan vs. Boyles, et al.*, 3 Iowa 311, and decided in accord with the views we have just expressed. * * *

"* * * It is in both the same, namely: the voter is deprived of the liberty of voting against one proposition without giving a negative ballot to all. Indeed, the case before us is, if possible, more objectionable in its facts than *McMillan vs. Boyles, et al.* In that case the elector could vote upon the separate propositions; in this he could not."

Thus, we have situations where the Iowa supreme court has held that a proposition to establish a water works system by "purchase *or* construction" is not bad for duality for the reason that the purpose is the single one of establishing municipal ownership of a public utility, and the method of acquirement relates only to the means, and a proposition for the appropriation of the swamp-land fund for the erection of a court house and school is bad for duality, for the reason that there is a union of two objects and two separate appropriations for distinct objects in one proposition, so that an elector would be unable to vote his choice for or against one or the other of the two distinct propositions.

However, in the instant case we are not confronted with a union of two distinct objects in a single proposition, but rather the submission of two separate and distinct propositions, one, in event of a favorable vote, authorizing the issuance of bonds for the erection and equipping of a new court house, the other if the vote be favorable, authorizing the issuance of bonds for the remodeling of the existing court house, printed upon a single ballot and submitted in the same election. Now, it is apparent upon the face of these two distinct and separate propositions that there is an inconsistency in the means of accomplishing the objective of providing ample court house facilities for Cerro Gordo County. Nevertheless we submit that if there is not such inconsistency or dissimilarity of object in a single proposition for the "purchase or erection" of a utility, the City of Keokuk case, supra, as would render the submitted proposition dual and, therefore, bad, then *a fortiori* two separate and distinct propositions on a single ballot, though inconsistent, is not fatal to the validity of an election wherein such propositions are submitted as separate and distinct public measures.

As to either or both propositions, the elector has an absolute, free choice. He may express his vote for or against either or both, and want of that opportunity appears to be the reason why the courts have condemned the incorporation of two distinct objects in a single public measure. It is here apropos to refer to an early decision of the supreme court of Kansas, viz., *City of Leavenworth vs. Wilson*, 76 Pac. 400. Therein the proposition submitted read "to either purchase and procure the Leavenworth City and Fort Leavenworth Company's plant * * * or provide and contract for the construction of a new water plant." The Kansas court, which, incidentally, subscribes to the minority rule, held the submission bad for duality on the theory that the sub-

ject of purchasing a particular water works plant already in existence is utterly diverse from that of building a new one. However, there was contained on the statute books of that state a provision very similar to Section 766, supra, and being Section 2709 of the general statutes of Kansas. The Kansas court recognized that under the provisions thereof the single proposition, held bad as submitted, would nevertheless have been good if submitted as two separate propositions on the same ballot and in the same election. Said the court, quoting from page 402 of 76 Pacific:

"* * * 'It may be conceded that two or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together to stand or fall upon a single vote. * * *'

"Under the provisions of Section 2709 of the General Statutes quoted above, it was entirely permissible that both propositions should be submitted upon a single ballot; but they should have been separately numbered and printed, and separated by the broad, solid line there described."

See also *Truelsen vs. Mayor of Duluth*, (Minn.), 63 N. W. 714, 717, wherein the court commented that if the city council desired to place a proposition to erect a water and light plant or plants freely and reasonably before the voters as against a proposition to purchase the existing plant, the proposition should have been submitted so as to allow a free and full expression on the real merits of each.

We believe that this reasoning of both the Kansas and Minnesota courts, particularly in view of Section 766, supra, applies to the instant case, for if the two propositions are submitted as separate and distinct propositions, and are printed upon a single ballot in the manner prescribed by Section 766, supra, the voters will be enabled to pass upon the real merits of each.

It is accordingly the opinion of this department that (1) several distinct public measures may be printed on one ballot, and, (2) that inconsistency between the several propositions is no bar if each is independent of the other so as to enable the voter to indicate his choice on one or all.

Therefore, the board of supervisors of Cerro Gordo County is required to submit the first proposition to the voters, may submit the second proposition to the voters, and the same may be done at one election and on the same ballot.

ELECTIONS: PARTY CENTRAL COMMITTEE: CANDIDATE: CLERK OF DISTRICT COURT: A county central committee has no authority to nominate a candidate for office of clerk of the district court, and that such committee's action in certifying a name of a candidate to the county auditor is a nullity and of no force or effect.

October 10, 1938. *Mr. J. W. Pattie, County Attorney, Marshalltown, Iowa:* We acknowledge receipt of your request for the opinion of this department on the following proposition. You state:

"No person was voted for in the Democratic primary for the office of clerk of court. The county convention met and took no action whatsoever regarding filling the ticket as to this office.

"At this date, and prior to the time of printing the ballots, the county central committee has certified to the county auditor the name of a candidate for the office of clerk of the district court on the Democratic ticket. Can this be done?"

Your inquiry may be restated as follows:

Does a party county central committee have authority to nominate a candidate for the office of clerk of the district court where no candidate's name was

printed on the official primary ballot, no vote was cast for anyone for such office, and the name of no candidate, or candidates, for such office was written in by one or more voters?

Section 624, Code of Iowa, 1935, provides in part:

"624. *Duties performable by county convention.* The said county convention shall:

1. Make nominations of candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor. * * *"

Section 625, Code of Iowa, 1935, provides:

"625. *Nominations prohibited.* In no case shall the county convention make a nomination for an office for which no person was voted for in the primary election of such party, except nominations to fill vacancies in office when such vacancies occurred too late for the filing of nomination papers."

In addition, the following statutory provisions are pertinent:

"604. *Vacancies in nominations prior to convention.* Vacancies in nominations made in the primary election when such vacancies occur before the holding of the county, district, or state convention shall be filled:

1. By the county convention if the office in which the vacancy occurs is to be filled by the voters of the county.
2. By a district convention if the office in which the vacancy occurs is to be filled by the voters of a district composed of more than one county.
3. By the state convention if the office in which the vacancy occurs is to be filled by the voters of the entire state."

"605. *Failure of convention to fill.* If the convention does not fill such vacancy, the same shall, except in case of vacancy in the office of United States senator, be filled by the party central committee for the county, district, or state as the case may be."

Clearly, under the circumstances related in your request for this opinion, the Democratic party county convention would have no authority to nominate a candidate for office of clerk of the district court in view of Section 625, supra. (See also—1930 Report of Attorney General, pages 338, 364, as to township officers, however.)

The county convention lacking such authority, does the party county central committee then have the power or authority to make such nomination? If such authority resides in the party county central committee, it must necessarily result from the provisions of Section 605, quoted supra, or Section 609, Code of Iowa, 1935, which provides:

"609. *Vacancies in office subsequent to convention—United States senator.* Nominations occasioned by vacancies in office when such vacancies occur after the holding of the county, district, or state convention, or when they occur before said convention, but too late to be made thereby, shall be made by the party central committee for the county, district, or state, as the case may be, except that when the vacancy is in the office of senator of the United States and occurs thirty days prior to the holding of the regular November election, nomination shall be made by convention as provided in case of vacancies in nominations for such office."

Neither of these sections, in our opinion, give to the party county central committee any authority to nominate a candidate under the circumstances outlined in your letter. It is to be noted that the first of these sections authorizes such committee to nominate if the convention fails to fill the vacancy resulting as contemplated by Section 604, supra. The other section authorizes such committee to nominate in the case of vacancies in office, when such vacancies occur after the holding of the county convention or too late to be filled by the con-

vention. Clearly, this section contemplates a case where an incumbent officer of an office, the tenure of which has not expired, dies, resigns, removes or otherwise disqualifies himself from acting longer. The fact that no person was voted for in the primary election for the office of clerk of the district court on the Democratic ticket removes this case from the purview of Section 604, for the reason that there was no vacancy in nomination made in the primary election. That the instant case does not come within the purview of Section 609, supra, is clear without further comment.

Our conclusion, as hereinbefore expressed, being that the county convention would have no authority to nominate in the instant case, and it being our further opinion that the authority of the party county central committee can rise to no greater heights than that of the county convention, it is the opinion of this department that the Democratic Marshall County Central Committee had no authority to nominate a candidate for the office of clerk of the district court, and that such committee's action in certifying the name of a candidate to the county auditor is a nullity and of no force or effect whatsoever.

The foregoing opinion is strictly confined to the facts stated in the request for this opinion. Its operation is not to be extended to a case where a person was voted for at the primary election but failed to receive the required number of votes for nomination, and thereafter the county convention took no action to name a candidate for such office.

SCHOOLS: RESIDENCE: TUITION: Where county has moved families on relief into new school district, duty of furnishing school facilities rests upon the county as though those children were cared for at county home, expenses of such schooling to be paid from county poor fund; children have a residence for school purposes in the district to which they were moved. This conclusion applies only in this particular instance.

October 12, 1938. *Mr. Leon A. Grapes, County Attorney, Davenport, Iowa:* You have requested the opinion of this department upon certain questions arising out of the following facts:

Between July 1 and September 1, 1938, fourteen families on relief, all of which were legal residents of the city of Davenport and of the independent school district of Davenport, were evicted from their homes. The board of supervisors, being unable to find dwellings for these families in Davenport, leased quarters in Buffalo Township some distance from the city and in a different school district. District No. 5, Buffalo Township, in which these families now live, does not have school facilities to accommodate the sixteen children of the above families who are entitled to elementary schooling. There are four children in addition who desire to attend high school. The families involved all wish to return to the city of Davenport as soon as employment there can be obtained. At present schooling is being provided at the camp for the elementary pupils, the county supplying the teacher and the necessary books. It is proposed to send the high school pupils to the Buffalo, Iowa, high school and that the county pay the tuition. The following questions are presented:

(1) Do these children have a residence for school purposes in district No. 5, Buffalo Township, or is the Davenport independent school district their residence for school purposes?

(2) May the Scott county board of supervisors provide for their education by securing school equipment, textbooks, contracting with a teacher, and paying for the same out of the county poor fund?

(3) May the Scott county board of supervisors send those children eligible to attend high school to the Buffalo high school, purchase their high school textbooks, and pay for the tuition charges out of the county poor fund?

From the facts set out above, it appears that these families are actual residents of district No. 5, Buffalo Township. These families evidently have come into this district not for the primary purpose of securing schooling advantages, but to acquire homes, even though such homes be of temporary character.

Section 4273, 1935 Code, provides in part as follows:

"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. * * *"

Ordinarily where a child comes into a school district for the primary purpose of making his home there, and where he has no other established home, he will be entitled to the school privileges of such district. Were other factors not present, these children would be entitled to schooling in the district of their present residence at the expense of said district.

It is emphasized at this point that it is not here decided that these families are residents of the Buffalo Township for all purposes, but it does appear that the facts establish a school residence for the children in said district.

So far as the schooling of these children is concerned, we can see little if any practical distinction between the status of these pupils and that of children cared for at the county home. The statute provides as follows with reference to the education of children at the county home:

"5346. *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."

Provision is made in the above section that the county will provide for the cost of the education of children who are, by reason of indigence, removed from their legal school residences and brought into the school district in which the county home is situated.

In an opinion of the attorney general, dated June 19, 1935, page 197, 1936 Report of the Attorney General, it was held that where a family on relief was removed from a town where no housing facilities were procurable to another town in the county where a dwelling was available, that the county was liable for payment of the school tuition of such children.

In an opinion dated August 30, 1933, page 343, 1934 Report of the Attorney General, the then attorney general ruled that where a board of supervisors removed certain families from the county home into a town where the children attended school, that the county would be liable for the tuition.

In an opinion dated July 11, 1934, reported at page 614, 1934 Report of the Attorney General, the then attorney general ruled that a county was liable to pay tuition costs where an indigent family was placed in a rented house apart from the county home.

In the case of *Carbon Independent School District vs. Adams County*, 221 Iowa 1047, the court held that a county was not liable for the tuition of children in a school district where they lived in a dwelling owned by the county. This case does not determine the questions now before us for there

was no showing that the members of the family were county charges during the time in question. This case seems to be decided on the theory that the family had established a legal residence in the school district and therefore that the children were entitled to school privileges of such district on the same basis as other residents.

In the case of *Mt. Hope School District vs. Hendrickson*, 197 Iowa 191, the court recognizes a distinction between a residence for school purposes and a residence for other purposes, saying:

"Ordinarily the legal residence of a minor is the same as that of his parents, but a minor may have a residence for school purposes other than that of his parents. The test of residence which will confer school privileges is not the same as the test for taxation or for the exercise of the right of suffrage."

It may be that the parents of these children have not formed such intention to remain at their present residence as will be required to establish a legal residence in Buffalo Township. The facts indicate, however, that the children have no other home and their residence for school purposes is the district of their present residence.

In view of the foregoing discussion we answer your questions as follows:

(1) The children appear to have a residence for school purposes in district No. 5, Buffalo Township. They are not actual residents of the Davenport independent district, and therefore school privileges are not available to them in the latter district.

(2) The duty of furnishing school facilities to these children rests upon the county as would be the case were these children cared for at the county home. If the school of the district of their present residence cannot accommodate such children, the board of supervisors may provide the equivalent of such facilities and pay for the same from the poor fund.

(3) These children are entitled to school privileges equivalent to those enjoyed by other children of the district. For reasons above stated, the county rather than the rural independent district is chargeable with the cost of furnishing such schooling.

We conclude that the county can pay the cost of high school tuition for the four children who desire such schooling and that these children may attend the Buffalo high school upon the same basis that other children of the rural independent district might attend at the expense of their district.

The above holding is to be considered as applicable only to the particular facts and circumstances presented, i. e., to a situation which involves the moving of families by the county into a different school district as a part of a relief program.

MOTOR VEHICLES: DEPARTMENT OF: LICENSE PLATES: "DISTINGUISHING": "OFFICIAL": Iowa law authorizes issuance of ordinary license plates for motor vehicles owned by the state of Iowa, counties or municipalities provided a separate record thereof is kept as required by statute.

October 19, 1938. *Mr. Lew Wallace, Superintendent, Motor Vehicle Department:* We are in receipt of your request for an opinion upon the following proposition:

Does the Iowa law authorize the issuance of ordinary license plates for motor vehicles owned by the State of Iowa, any of the counties or municipalities?

You inform us that it has been the custom and practice for a period of

approximately eighteen years to issue ordinary license plates for some of the cars owned by the State of Iowa, the different counties and municipalities.

You further advise us that prior to the enactment of Chapter 134, Acts of the 47th General Assembly, which is the new motor vehicle law enacted by the last General Assembly, and which became effective July 4, 1937, that the very question herein involved was called to the attention of a great many of the legislators, and the practice of the department in issuing ordinary plates for some publicly owned cars was fully explained and those legislators discussed the advisability from the law enforcement angle of requiring the issuance of only official plates for public owned motor vehicles.

The section which authorizes the issuance of license plates free of charge in certain instances is set out in Section 50 of Chapter 134, Acts of the 47th General Assembly, which became effective July 4, 1938, and which reads as follows:

"Sec. 50. *General exemptions.* All motor vehicles owned by the government and used in the transaction of official business by the representatives of foreign powers or by officers, boards, or departments of the government of the United States, and by the state of Iowa, counties, municipalities and other subdivisions of government, and such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure or business nor for the transportation of freight, and all fire trucks, providing they are not owned and operated for a pecuniary profit, are hereby exempted from the payment of the fees in this chapter prescribed, but shall not be exempt from the penalties herein provided. The department shall furnish, on application, free of charge, distinguishing plates for motor vehicles thus exempted and keep a separate record thereof."

This section was first enacted in 1919, and is found in Section 14 of Chapter 275, Acts of the 38th General Assembly. This section as first enacted in 1919 contained virtually the identical language as it contained after its re-enactment by the 47th General Assembly. It is important to note that the last sentence of that section provided for the issuance of "distinguishing plates" and is in identically the same form now as it was when it was first enacted in 1919.

The legislature in using the phrase "distinguishing plates" certainly did not use a phrase which was clear and unambiguous. It seems obvious that the legislature in using the phrase "distinguishing plates" did not intend to have the meaning of said phrase be considered as synonymous with the meaning of the phrase "official plates." This is apparent by reading the provisions of Section 50 wherein the department is directed to issue distinguishing plates to "such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure or business nor for the transportation of freight." The vehicles referred to in that phrase above quoted are privately owned vehicles and are not used in the transaction of business for the state, the county, or the municipality. Certainly the legislature did not have in mind that vehicles of that class were to be issued official plates, as they are in no wise official cars, but are owned privately and used in the private business of the owner. Consequently, we see that the legislature did not intend that the meaning of the phrase "distinguishing plates" was to be the same as the meaning of the phrase "official plates."

We wish also to point out that in our opinion the legislature would have used the phrase "official plates" in place of "distinguishing plates" had it had in mind the issuance of only official plates for motor vehicles owned by the state, county, or municipality. The meaning of the phrase "official plates" is well understood as its usage is common and its meaning clear. As we have

heretofore pointed out, the very question herein involved was called to the attention of many of the legislators prior to the enactment of this new motor vehicle law, and, after due consideration as to the advisability of requiring distinguishing plates in place of official plates, the legislature retained the original phrase "distinguishing plates," which necessarily leads to the conclusion that the legislature did not have in mind the issuing of only official plates, but wished to retain a phrase broader in its scope granting more discretion to the department issuing such plates.

It is further to be noted that under the provisions of Section 50, supra, a separate record is to be kept by the department of all plates issued to motor vehicles which come within the provisions of that section. That record is open to the public for inspection at all times. The plates issued under this section are not identical, but each set of plates is different and distinct. That record is one that is kept separately, and from an inspection of the same a person can readily ascertain the motor vehicles which possess such plates.

We feel that the legislature used the phrase "distinguishing plates" advisedly. It seems apparent that the legislature realized that law enforcement would be seriously hampered if the law enforcing agent was required to have official plates on his car so his identity would be readily disclosed. For example: It is obvious that if a state agent operating out of the Bureau of Investigation were required to carry upon his car official plates while endeavoring to trace and identify bank robbers, his work would be seriously hampered by the identification placed upon his car in carrying official plates. It is a well known fact that secret service work, investigation work, and law enforcement generally can only be effectively carried out if the person's identification, who is carrying on such work, can remain undisclosed until the investigation has been completed. It is just as obvious that the work of an inspector for the Department of Agriculture would become far less effective if that inspector were required to carry official plates upon his car for the reason that upon his entering a community for the purpose of making an inspection, his identity would immediately become known not only to the inhabitants of the community, but particularly to those persons violating the law, and his investigation would therefore be seriously handicapped and his efforts would be of very little avail. The same thing holds true of investigators and inspectors for many departments such as game wardens, investigators for the Securities Department, inspectors for the State Department of Health, investigators for the Board of Assessment and Review, investigators for the Treasurer's Department and others. The legislature, when this act was first enacted in 1919, apparently had these very situations in mind in providing for the issuance of plates, and realized that effective law enforcement was difficult enough without placing the law enforcing agent at a further disadvantage. Consequently, the legislature used the phrase "distinguishing plates" and provided for the keeping of a separate record thereof so that all cars using such plates could be identified by a person making inquiry in good faith, and purposely refrained from requiring the using of official plates so that the law violator would not be further protected in the doing of his unlawful acts.

It is a well known rule of statutory construction that where a statute is ambiguous in its meaning and a department of government has placed an interpretation upon said statute, which interpretation has been used for a number of years, that the courts will not disturb the construction placed upon

the statute by the department without compelling reasons. It is also a well known rule of statutory construction that the courts will presume that the legislature, by the re-enactment without change of language in a statute, was satisfied with the construction placed upon said statute by the department and intended that it should continue. See *John Hancock Insurance Co. vs. Lookingbill*, 218 Iowa 373, 253 N. W. 604; *New York Life Insurance Co. vs. Burbank*, 209 Iowa 199; *Bankers Mutual Casualty Co. vs. First National Bank*, 131 Iowa 456.

Having those principles of law in mind and applying them to the facts in the question at bar, we find that back in 1919 the legislature provided for the issuance of "distinguishing plates"; that soon thereafter the department placed a construction upon said statute, which construction was that the statute was being complied with if ordinary plates were issued to motor vehicles coming within the provisions of that section, provided a separate record was kept of the numbers on the plates issued to such vehicles. The legislature is presumed to know the construction placed upon statutes by the different departments. In light of that presumption, the legislature met at more than ten different sessions and did not see fit to change the statute authorizing the issuance of distinguishing plates. Not only that, but at the last session of the legislature that section was re-enacted in identically the same form as it was originally written in 1919 as far as distinguishing plates are concerned, and under the rule of law heretofore set out the courts presume that the legislature, by the re-enactment without change in the language of the statute, was satisfied with the construction placed upon the statute by the department and intended that it should continue. We therefore see that for a period of approximately eighteen years there has been a departmental construction placed upon this statute, which construction is presumed to have been known by the legislature. That after that departmental construction had been followed for a period of approximately seventeen years, the legislature re-enacted that section in the same form in which it had previously existed insofar as distinguishing plates are concerned, and in so doing we must presume that the legislature was satisfied with the construction placed upon that statute by the department, and intended that it should continue.

It is therefore our opinion that the Iowa law authorizes the issuance of ordinary license plates for motor vehicles owned by the State of Iowa, any of the counties or municipalities, provided a separate record thereof is kept as required by statute.

TAXATION: DELINQUENT PAVING ASSESSMENTS: COUNTIES: Delinquent special assessments shall bear the same interest and the same penalty as ordinary taxes, and by the express provision of Section 7194, Code 1935, the penalty and interest on ordinary taxes is limited to four years. Therefore, a county is limited in collecting a penalty on delinquent paving assessments to a period of four years.

October 20, 1938. *Honorable C. W. Storms, Auditor of State:* This is to acknowledge receipt of your request for an opinion on the question of how many years' penalty and interest may be collected on delinquent paving assessments.

Section 7194 of the 1935 Code reads as follows:

"No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of

December of the year in which the tax books containing the same were first placed in the hands of the county treasurer * * *"

Section 6033 of the 1935 Code provides among other things 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. * * * (italics ours.)

From the foregoing it is obvious that the legislature by specific statute provided that delinquent special assessments shall bear the same interest and the same penalty as ordinary taxes, and by the express provisions of Section 7194, supra, the penalty and interest on ordinary taxes is limited to four years.

It is therefore the opinion of this department that you are limited in collecting a penalty on delinquent paving assessments to a period of four years.

MINORS: LABOR DEPARTMENT: REGISTRATION: Law does not require procuring of permit for employment of children under 16 years in or in connection with any store or mercantile establishment where not more than eight persons are employed.

October 28, 1938. *Honorable Milton Peaco, Labor Commissioner:* You have inquired whether or not the law of Iowa requires an employer to procure a work permit for employed children under the age of sixteen where such employment is in a store or mercantile establishment which does not employ more than eight persons. The answer to your question will be determined by the construction to be given the provisions of two sections of the 1935 Code, which are set out below.

Section 1526 limits the employment of children under fourteen years of age and provides as follows:

"No person under fourteen years of age shall be employed with or without compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in any livery stable, garage, place of amusement, or in the distribution or transmission of merchandise or messages; but nothing in this section shall be construed as prohibiting any child from working in any of the above establishments or occupations when operated by his parents."

Section 1530 conditions the employment of children under sixteen years of age and provides as follows:

"No child under sixteen years of age shall be employed, permitted, or suffered to work in or in connection with any of the establishments or occupations mentioned in Section 1526 unless the person, firm, or corporation employing such child procures and keeps on file, accessible to any officer charged with the enforcement of this chapter, a work permit issued as hereinafter provided, and keeps two complete lists of the names and ages of all such children under sixteen years of age employed in or for such establishments or in such occupations, one on file in the office and one conspicuously posted near the principal entrance of the place or establishment in which such children are employed.

"On termination of the employment of a child whose permit is on file, such permit shall be returned by the employer within two days to the officer who issued it with a statement of the reasons for the termination of such employment.

"A work permit shall be issued for every position obtained by a child between the ages of fourteen and sixteen years. The permit in no case shall be issued to the child, parent, guardian, or custodian, but to its prospective employer."

It will be observed that the requirement for work permits covering children under the age of sixteen is effective as to children employed in or in connection

with any of the establishments or occupations mentioned in Section 1526. The labor of children under fourteen years of age in stores or mercantile establishments is not prohibited by the Iowa law *unless such store or establishment employs more than eight persons.* It is clear that stores or mercantile establishments in which fewer than nine persons are employed are not subject to the provisions of said Section 1526. Such establishments, in legal effect, are not *mentioned* in Section 1526 since the language of the statute removes such stores or establishments from the operation of the law.

In view of the foregoing, it is our conclusion that Section 1530 does not require the procuring of a permit for the employment of children under sixteen years of age in or in connection with any store or mercantile establishment where not more than eight persons are employed.

IOWA STATE HIGHWAY COMMISSION: COUNTIES: BOARD OF SUPERVISORS: ROADS: STATE FUNDS: REIMBURSEMENT: We think that in the particular circumstances of this case the commission is entitled to be reimbursed for the amount expended from its primary road fund, and that the board of supervisors of the county (Crawford) has authority to make payment.

October 29, 1938. *Honorable C. W. Storms, Auditor of State:* Your inquiry concerning the validity of a resolution of the board of supervisors of Crawford County, Iowa, in connection with a certain allotment of Federal Works Progress funds for secondary road construction work, has been considered.

From the copy of the resolution presented it seems that the Highway Commission allocated $25,000.00 of Federal Works Progress funds for secondary road construction work in Crawford County; that the board of supervisors requested the Highway Commission to improve, by grading and necessary bridge and culvert work, some five miles of secondary roads in Boyer Township, and that the Highway Commission received bids and from these bids it was apparent that the cost of the improvement would be substantially in excess of $25,000.00, but as the resolution states,—"not in excess of $50,000.00." The board of supervisors requested the Highway Commission to proceed with the work and pledged the good faith of Crawford County to repay all construction costs advanced in excess of $25,000.00 incurred in completing the work. The Highway Commission proceeded with the letting of the contract, and having the work done, and it has been done, and the question is,—whether or not Crawford County has the power to pay, and should pay the Highway Commission the sum the Highway Commission expended over and above the $25,000.00 allocated by the commission from federal funds for this project, which excess, as we understand it, is approximately $25,000.00.

The question thus presented involves the respective powers of the Highway Commission and of the board of supervisors, and what can be done about it if in dealing with each other either the commission or board, or both, exceeded their powers.

It seems that this resolution was passed by the board of supervisors of Crawford County on the 20th day of August, 1936.

This department ruled, in an opinion dated December 31, 1937, that neither the county nor the Highway Commission has the authority under the statutes to enter into this kind of a contract. But that does not quite solve the problem. The contract was entered into in good faith by the commission and by the county board, everybody assuming that it would be valid. As stated, the

work has been done and the commission advanced $25,000.00 of its funds in the completion of work for which it has not been reimbursed. The secondary road fund of Crawford County has been thus enriched to the extent of that part of the cost contributed by the Highway Commission, and the primary road fund has been depleted to that extent.

We have referred to the arrangement between Crawford County and the Highway Commission as a contract, and in a sense it was a contract but it was not such a contract as could have been enforced by either party if either party desired to withdraw therefrom prior to the time that the work was done.

There is a theory of law that sometimes applies between a municipal corporation and a contractor where the contract entered into was invalid, but the contractor performed the work and the municipality received the benefit, and recovery is allowed upon the theory of unjust enrichment. Such cases are called cases of quasi or constructive contract. While our court does not appear to have allowed recovery in any case solely upon that theory, it has recognized the theory. In the case of *Johnson County Savings Bank vs. City of Creston*, 212 Iowa 929, 231 N. W. 705, 237 N. W. 507, the court denied recovery on an implied contract although the work had been done, and said in the course of the opinion:

"If the plaintiffs were seeking to recover the actual reasonable cost of the labor and material without profit, or the amount to which the city had been unjustly enriched thereby (as to which there is no allegation) we would have for determination an entirely different question."

And again in the case of *Horrabin Paving Company vs. City of Creston*, 262 N. W. 480, which involved the same contracts as were involved in the *Johnson County Savings Bank vs. City of Creston* case, supra, the court while denying recovery said in response to a claim made in behalf of the city:

"It is not true, however, that where a benefit has been received by a municipal corporation under an express ultra vires contract, there can be no recovery against a municipal corporation under any circumstances, on the ground of quasi contract or unjust enrichment."

And again the court said:

"Even though a municipal corporation may have derived a distinct benefit under an invalid contract, the party by whom such benefit was conferred has not always been allowed to recover on account thereof. Usually the ground for such refusal given by the courts has been that to allow a recovery under the facts of the case presented would be against public policy."

However, we need not consider whether or not the doctrine of unjust enrichment applies in this case, because that doctrine so far as we can find, has been applied by the courts only to cases involving invalid express contracts made by contractors with municipalities. Here, a somewhat different principle is involved, although there is an analogy between that principle and the rule in the cases where recovery is allowed to a contractor on the theory of unjust enrichment. The funds are all public funds; the road is a public road; the county is a subdivision of the state with certain powers delegated to it by the legislature to be applied within its borders.

The roads whether owned by the state, the county, or a town, are held in trust by the owner for the use of the public. The matter of constructing and maintaining primary roads has been entrusted to the State Highway Commission, and the matter of constructing the secondary roads has been delegated to the county boards of supervisors of the various counties. The board of supervisors of Crawford County had the unquestioned right to make the im-

provement that it has made. There is no question of unfairness, fraud, lack of competition, or any one of the incidents that interfere sometimes in a case between a contractor and a municipality to prevent the application of the theory of unjust enrichment. The secondary road funds of Crawford County should pay for this improvement, and the primary road fund should be reimbursed in the amount that it was depleted by the doing of the work by the Highway Commission for Crawford County. The situation would be somewhat different if the transaction was entered into by the commission and the board of supervisors in defiance of a statute prohibiting such a transaction. The good faith inference that the contract price was no higher than it would have been if the county had let the contract for the work in excess of the sum of $25,000.00. There was a difficulty, and is a difficulty, in the way of dividing the work so that the contract let by the commission would be for the exact amount of the federal fund and the county's contract would be for the balance of the work. There is nothing inherently wrong in the transaction; the only infirmity in it is the fact that, as we think, both the Highway Commission and the board of supervisors lacked the authority, under the statutes, to enter into the transaction, and both the commission and the board derive their authority from the statutes. If instead of doing this work the Highway Commission had advanced Crawford County $25,000.00 for the use of its secondary road fund, and the money was in the hands of the county treasurer, no one would question the proposition that the commission could force repayment. Instead, the fund did not get into the hands of the treasurer of Crawford County, and the funds already in the hands of the county were left untouched, whereas, they should have been used instead of using primary road funds in payment for the work. There is no hardship on the county in requiring that the money be repaid to the commission, but there would be a depletion of the primary road funds if the expenditures therefrom on the Crawford County roads are not repaid.

We think that in the particular circumstances of this case the commission is entitled to be reimbursed for the $25,000.00 of its primary road fund expended, and that the board of supervisors of Crawford County has authority to make payment.

ELECTIONS: VOTER: CHALLENGE: BALLOT: CITIES AND TOWNS: PERMANENT REGISTRATION: If a voter's ballot is challenged, he shall be tendered the oath, and after taking said oath his vote shall be received.

November 8, 1938. *Honorable Robert E. O'Brian, Secretary of State:* We acknowledge receipt of your request for the opinion of this department on the following matter:

You state that a request has been made of you for a ruling upon the following situation:

In the city of Des Moines where permanent registration is in effect, certain voters go to the polls to cast their ballots and their names do not appear in the duplicate registration list for the precinct which has been delivered to the judges of election of that precinct by the commissioner of registration; that such voters have in fact registered, but through inadvertence or mistake their names do not appear upon such duplicate registration list, nor do they appear upon the original registration list in the office of the commissioner; that these voters have been refused the right to cast their ballots for the reason that the judges of election apparently indulge in the presumption that they are not registered as required by law, and are not, therefore, entitled to cast their ballots.

The question as presented has in some of its phases been passed upon by this department in an opinion issued the 29th day of October, 1936, to the city clerk of Des Moines, which opinion appears at page 640 of the 1936 Report of the Attorney General.

It should be borne in mind that, as a general rule, 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 upon 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. *Younker vs. Susong*, 173 Iowa 663, loc. cit. 684, 156 N. W. 24; 20 Corpus Juris, page 87, paragraph 66. Thus an elector may not be deprived of his right to vote merely because of the registrar's negligent failure to enter his name, or because his name has been wrongfully or improperly erased from the registration list. *Bray vs. Baxter*, 171 N. S. 6, 86 S. E. 163; *State vs. Lattimore*, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797; *State vs. Jefferson County*, 17 Fla. 707; 20 Corpus Juris, page 87, et seq., paragraph 66.

It is accordingly the opinion of this department that if a voter presents himself at the polls who claims to be registered and entitled to vote in the precinct of the particular polling place, and his right to vote is challenged on the ground that his name does not appear in the registration list, such voter, if the challenge is not withdrawn, shall be tendered the oath by one of the election judges as provided for in Section 798, Code of Iowa, 1935, and after taking such oath his vote shall be received.

The oath provided in Section 798 is as follows:

"'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.'"

ELECTIONS: JUDGES OF ELECTION: VACANCY: POLITICAL PARTIES: Where a vacancy occurs in the office of the election board in a particular precinct on the day of election, such vacancy is to be filled by the remaining members of the board from the membership of the political party entitled thereto.

November 8, 1938. *Honorable Robert E. O'Brian, Secretary of State:* We acknowledge receipt of your request for the opinion of this department upon the following matter:

You state: that in one of the precincts in Des Moines, Iowa, one of the Democratic election judges did not qualify as such by reason of his removal from the city of Des Moines to Mason City, Iowa. That this fact was not known until the polls opened in that precinct. That thereafter the remaining members of the election board in that precinct selected an additional judge affiliated with the Reupblican party, so that the set-up of the election board in that precinct at the time the polls opened consisted of three Republican judges.

Section 736, Code of Iowa, in the opinion of this department, controls the described situation. It provides as follows:

"If at the opening of the polls in any precinct, there shall be a vacancy in the office of clerk or judge of election, the same shall be filled by the members of the board present, and from the political party which is entitled to such vacant office under the provisions of this chapter."

There is no question but what a vacancy existed in the office of one of the

election judges for this precinct. In virtue of such vacancy existing, it became the statutory duty of the remaining members of the election board present to fill the vacancy by selecting a judge from the political party entitled to such vacant office. In other words, under the stated facts, a Democratic judge must necessarily be selected to fill this vacancy. Furthermore, by virtue of the sections of the 1935 Code of Iowa pertaining to election boards, viz.: Sections 730 to 735, inclusive, such selected officer must be from the precinct wherein the board acts.

PAUPERS: LEGAL SETTLEMENT: NOTICE TO DEPART: AFFIDAVIT OF INTENTION AND STATUS: COUNTIES: But one notice to depart need be served except in instance where pauper files affidavit of status and intention to acquire settlement. Statutory provisions reconciled.

November 17, 1938. *Mr. Frank Lounsberry, County Attorney, Nevada, Iowa:* We acknowledge receipt of your letter of recent date wherein you request the opinion of this department on the question as to whether or not the law of Iowa governing the support of the poor requires the service of but one notice to depart upon a person who is a county charge, or likely to become such, and who does not have a legal settlement within the county. Similar requests have been received by this department from County Attorney Burr C. Towne of Waterloo, and County Attorney J. W. Pattie of Marshalltown.

The question arises for the reason that an apparent inconsistency or ambiguity exists in the statute embodied in the 1935 Code of Iowa as Chapter 267, styled "Support of Poor."

Section 5311 of said chapter provides in part, and pertinent to this inquiry, as follows:

"5311. *Settlement—how acquired.* 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.*" (Italics ours.)

At the outset it is important to call attention to the fact that the italicized language was amended into the law in 1933. (Chapter 99, Section 1, Laws of the 45th General Assembly.) Prior to this amendment there was no provision in the law for the filing of such an affidavit and thereafter acquiring a legal settlement if the county authorities fail to serve a notice to depart within one year from the filing of such affidavit. However, at the time of this amendment there was contained in said chapter of the Code what appears as Section 5315, Code of Iowa, 1935, and which statutory provision had been a part of the law since prior to the Code of 1897. This section then as now provided as follows:

"5315. *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 settlement except by the requisite residence of one year without further warning.*" (Italics ours.)

Once the italicized language of the quoted sections is read, the conflict is apparent. Our research has not disclosed any decision by the supreme court of Iowa touching upon the proper interpretation of the statute as it presently reads and with this apparent conflict existing. However, prior to the 1935 amendment the supreme court, in the course of its opinion in *Adams County vs. Maxwell*, 202 Iowa 1327, 212 N. W. 152, stated at page 1329 of 202 Iowa:

"* * * By Section 5311 it is provided that an adult may acquire a settlement in the county of his residence by residing there one year, without warning to depart. Under Section 5315, a person cannot, after such warning, acquire a settlement, except by the requisite residence of one year without further warning. It would seem that one might be a resident of a county for years, and yet, by reason of successive and timely warnings to depart, never acquire a legal settlement there."

Further, with respect to the law as it existed prior to the amendment alluded to, the then attorney general, in an opinion appearing at page 118 of the 1930 Report, held that "if * * * after notice to depart has been served, and the person served continues to live in said county for the period of one year without a further warning, said person acquires a legal settlement in said county." To like effect was the holding in an opinion of the attorney general appearing at page 224 of the 1932 Report. However, in an opinion issued in 1934 subsequent to the taking effect of the amendment of 1933, which opinion is reported at page 725 of the 1934 Report of the Attorney General, we quote *inter alia* the following:

"It will be noted from the reading of Paragraph 1, hereinbefore quoted, that the person who has continuously resided in the county for one year without being warned to depart, as provided in Chapter 267 of the Code of 1931, acquires a settlement in that county. The act further provides that if such person has been warned to depart, as provided in Chapter 267, then he can only acquire a settlement by filing an affidavit with the Board of Supervisors and residing in the county for one year after the filling of the affidavit. * * *"

In view of the dictum in the Adams County case, supra, and the opinions of the attorney general prior to the 1933 amendment, it might be contended that the legislature was aware of the interpretation that had been placed upon the provisions of Section 5315, supra, and, therefore, it was not intended by that body that the requirement of more than one notice should be modified by the later amendment. Or it might be contended that the language of said section being clear and unambiguous there is no room for construction,—this being a well settled rule of statutory construction. *Jefferson County Farm Bureau vs. Sherman*, 208 Iowa 614, 226 N. W. 182; *Sarby vs. Morey*, 207 Iowa 521, 221 N. W. 492; *Corell vs. Williams and Hunting Company*, 173 Iowa 571, 155 N. W. 982. Are these factors, however, material? It is an equally well settled rule of statutory construction that a court, in construing a statute, must seek the legislative intent from the statute as a whole, and that sections of statutes relating to the same subject matter should be construed together in determining their meaning. *Drazich vs. Hollowell*, 207 Iowa 427, 223 N. W. 253; *Oliphant vs. Hawkinson*, 192 Iowa 1259, 183 N. W. 805, 33 A. L. R. 1433; *State vs. Birdsall*, 186 Iowa 129, 169 N. W. 453; *State vs. Read*, 162 Iowa 572, 144 N. W. 310; *Rohlf vs. Kasemeier*, 140 Iowa 182, 118 N. W. 276, 23 L. R. A. (NS) 1284; *State vs. Biggins*, 28 S. D. 41, 132 N. W. 677; *State vs. Langlade County*, 204 Wisc. 311, 236 N. W. 125. There existing a conflict or ambiguity in the language employed by the legislature in Section 5311, subsection 1, and Section 5315, supra, it becomes necessary to construe the language thus used, and in doing

so to consider all of the language of not only these sections, but of the statute in order to arrive at the apparent legislative intent.

The Iowa supreme court has held innumerable times that a statute should be construed so as to avoid the result of inconvenience or absurdity, and that consequences will be considered in the interpretation of a statute, the meaning of which is ambiguous or obscure. *Quinn vs. First National Bank*, 200 Iowa 1384, 206 N. W. 271; *State vs. McGraw*, 191 Iowa 1090, 183 N. W. 593; *Melody vs. Des Moines Union Railway Company*, 161 Iowa 695, 141 N. W. 438, 145 N. W. 466; *In re King's Estate*, 105 Iowa 320, 75 N. W. 187.

Now the apparent intent of the legislature in enacting the affidavit provision which presently appears in the provisions of Section 5311, subsection 1, quoted supra, was to afford counties additional and needed protection against the influx of a pauper population which could conceivably establish a legal settlement in a county by reason of the failure of the county authorities to serve notices to depart prior to the expiration of each year's residence in the county. That this was the law prior to the amendment in 1933 is disclosed by the quotation supra from the Adams County case and the opinions of the attorney general appearing in the 1930 and 1932 reports. If we were to hold that this is still the existing law, the effect would be to emasculate completely the affidavit provision of Section 5311, supra. A pauper would be encouraged to play hide-and-seek with the relief authorities until such time as his residence had ripened into a legal settlement. Under the amendment, however, a pauper must go on record, and relief authorities, by reason of such record, are given an opportunity to protect themselves by employing the statutory machinery respecting the service of notice. It is not to be presumed that the legislature, in enacting the amendment, spread upon the statute books a meaningless provision. Rather the presumption is the other way. Yet that would be the effect of a holding that a notice to depart must be served prior to the expiration of each year's residence of a pauper in a particular county.

It is noted that the troublesome language in Section 5315 reading "after such warning such persons cannot acquire a settlement except by the requisite residence of one year without further warning" speaks of "requisite residence." It is altogether possible that the legislature considered this language sufficiently comprehensive to mean that the requisite residence is one which commences to run from the time of filing the affidavit required by Section 5311, subsection 1, supra. In this way both sections of the statute can be reconciled without doing violence to the language of either. Or again it might be contended that if the language is wholly irreconcilable, that the conflicting language of Section 5315, supra, was repealed by implication in the enactment of the 1933 amendment, even though repeal by implication is not favored in the law.

Irrespective of these factors, it is our thought that when these provisions of the statute are treated together in light of the apparent mischief which the legislature sought to remedy, and in view of the rule that reason and legislative intent must control over the strict letter of the statute to avoid absurdity, but one conclusion can be reached, viz., that the legislature contemplated that but one notice to depart need be served in any case to prevent a pauper from acquiring a legal settlement, except in the instance where the pauper has filed the affidavit specified in Section 5311, subsection 1, supra,—in which case a new notice must be served prior to the expiration of one year from the date

of the filing of the affidavit, and that is accordingly the opinion of this department.

TAXATION: EXEMPTIONS: SOUTH OMAHA BRIDGE: Neither the bridge nor the approaches leading thereto are subject to taxation by Pottawattamie County.

November 14, 1938. *Mr. Robert Organ, County Attorney, Council Bluffs, Iowa:* You request the opinion of this department as to whether or not Pattawattamie County can tax the South Omaha bridge or that part of the highway leading thereto which is situated in Pottawattamie County.

In connection with your question you have supplied us with both a copy of the Act of Congress under which this bridge was constructed and a copy of the consent and authority given by the board of supervisors of Pottawattamie County to the City of Omaha for the construction of the five miles of highway leading to the bridge.

From the facts given us it is apparent that the present status of the property under the Act of Congress is briefly this:

The bare legal title is in the corporate city of Omaha, which has been transferred to a trustee in trust to secure an obligation of something more than $1,250,000 owing to the United States of America as evidenced by certain revenue bonds. These bonds are supported by a pledge of the bridge, the avenue of access thereto and all the revenue derived therefrom. They are not the personal promise of the city of Omaha or anyone else to pay, but merely the promise to pay out of the revenue derived from the bridge and the bridge itself, if need be. The bonds are owned 100 per cent by the United States of America, the United States having furnished every dollar of money necessary to construct the bridge and approaches thereto and the avenues of access, and receiving in return therefor nothing but the pledge above referred to, securing the revenue bonds. The entire project was constructed under a grant of franchise of the United States. Under that congressional grant the city of Omaha, holder of the bare legal title, is legally required, as soon as the cost of structure is paid, surrender so much of it as is in the State of Iowa to the State of Iowa, without compensation or recompense. The city of Omaha does not now and never will receive any income of any kind, shape or form from the bridge, because the original act of congress authorized the charging of toll in an amount only sufficient to pay for the reasonable cost of maintaining, repairing and operating the bridge and its approaches under economical management, and to provide a sinking fund sufficient to amortize the amount paid therefor. After a sinking fund sufficient for the amortization of the amount loaned by the United States government is provided, the act requires that the bridge shall be maintained and operated free of tolls or that the rate of toll should thereafter be so adjusted as to provide funds not to exceed the amount necessary for the maintenance, operation and repair of the bridge and its approaches under economical management.

The bridge was originally built on the west side of the Missouri River on dry land in the state of Nebraska, and no part of the bridge was ever built in the state of Iowa. After the bridge was constructed, the channel of the Missouri River was artificially changed by the Army engineers, who moved the stream to the west and under the bridge. Prior to the construction of those approaches to the bridge which are located in Pottawattamie County, the consent and authority of the board of supervisors of Pottawattamie County to the operation and maintenance of a highway over the various county and township roads thereafter constructed was obtained, said consent appearing at page 99 of Minute Book 16.

With the foregoing facts in mind, it appears to us that there should be little difficulty in determining the question here before us. In the first place, no part of the bridge proper is located in the state of Iowa. In the case of

Nebraska vs. Iowa, 143 U. S. 359, the United States Supreme Court held that only natural imperceptible changes, occasioned by the process of accretion, change the boundaries of states, and any change which is unnatural, which is not gradual and imperceptible does not change the boundaries of the state. The change here was an unnatural change in that it was made by the Army engineers who had no authority whatever and no power to change the boundary between the states of Iowa and Nebraska, and anything which the Army engineers did could not put the bridge itself, which was built in Nebraska, over into Iowa. See also *Illinois vs. Iowa*, 147 U. S. 1; *Washington vs. Oregon*, 214 U. S. 205; *Arkansas vs. Mississippi*, 250 U. S. 39; and *Minnesota vs. Wisconsin*, 252 U. S. 273.

This leaves but one remaining question, and that is the question of whether or not the five miles of paving leading to said structure in Pottawattamie County, the title to all of which is in the South Omaha Bridge Commission, as trustee for the city of Omaha, who are trustees for the federal government, can be taxed.

A cursory examination of Section 6945, which provides as follows:

"Real estate occupied as a public road and rights of way for established public levees and rights of way for established open, public drainage improvement shall not be taxed."

clearly reveals that the paved approaches in Iowa fall within the exemption set out in this section.

We are informed that from the time of the opening of the bridge all of the highway lying from the east end of the bridge eastward has been open to public travel, devoted and dedicated to highway purposes, and under the agreement with Pottawattamie County heretofore referred to, was at the time of construction so arranged and so adjusted as to supplement the highway system of the county, to connect with the various roads, and render service in connection therewith to the traveling public without charge or hinderance.

Much might be said on the question of whether or not this bridge is such a federal instrumentality as to exempt it from state taxation, but because of the peculiar facts here involved and as heretofore set out, and because of the foregoing holdings, it is not necessary to pass upon that question.

In holding the bridge and the approaches thereto not subject to taxation by Pottawattamie County, we are not unmindful of the case of *People vs. City of St. Louis*, 126 N. E. 599, wherein it was held that a bridge between Illinois and Missouri, the title to which was in the city of St. Louis, could be taxed. It might be appropriate to point out that in that case the approach thereto, more than two miles long, was built expressly for railroad uses, was not a free public highway, and there was nothing to prevent the city of St. Louis from charging toll at any time for foot passengers, vehicles, street cars or railroad traffic if it decided so to do.

In the instant case the express provisions of the congressional act prohibit the charging of toll for purposes other than heretofore indicated, and, after the title to the bridge and the approaches is transferred to the respective states or their highway commissions, the act expressly forbids the charge of other than the nominal sums required to maintain and operate said bridge and the approaches thereto. We feel that on this basis the situation is readily distinguishable from the fact situation in the City of St. Louis case.

It is therefore the opinion of this department that neither the bridge nor the approaches thereto are subject to taxation by Pottawattamie County.

The conclusion expressed with reference to the second question considered is further fortified by information which has reached this department. We are informed that the five miles of paving leading to the bridge structure proper in Pottawattamie County connects the bridge with primary road No. 275; that it intersects another primary road approximately two miles west of primary road No. 275 and that traffic freely passes from the one primary road to the other and vice versa over the five miles of paving which constitutes the approach to the bridge. In addition, we are informed that there are some fifteen or twenty abutting property owners on the west three miles of the approach who have access to the five-mile strip of paving and that these property owners use said stretch freely in traveling in all directions from their respective properties. Furthermore, primary road No. 102 intersects this five-mile strip at grade. These facts are of some importance in considering the "public nature" of the five-mile strip of roadway.

Of even more significance is the fact that said five-mile strip is being deeded by the South Omaha Bridge Commission to the State of Iowa,—may in fact at this date have so deeded the same. Therefore, with respect to the approaches to the bridge, we reiterate the conclusion previously expressed that the same are not subject to taxation by Pottawattamie County.

PAUPERS: LEGAL SETTLEMENT: CONTEST OF BETWEEN COUNTIES: COUNTY AUDITOR: DUTIES OF: NOTICE TO DEPART: Where legal settlement is in another county and warning to depart has been served on pauper, no similar notice need be served on county of settlement. Where legal settlement disputed recovery of poor relief expended dependent on strict compliance with statute.

November 18, 1938. *Mr. Kenneth Mumma, County Attorney, Corydon, Iowa:* We acknowledge receipt of your request for the opinion of this department on the following matters:

On February 10, 1934, "A" family moved to Scott County from Lucas County where it had been living for several years. On January 21, 1935, Scott County served a notice to depart on "A" family. The county auditor of Lucas County was not notified of the service of said notice. In the month of January, 1938, Scott County notified Lucas County that it was returning "A" family to the latter county. However, instead of removing "A" family to Lucas County the Scott County authorities transported the family to Wayne County, and advised the head thereof to apply for relief in Lucas County. The Scott County authorities never notified the Wayne County authorities that "A" family had been brought to and left in Wayne County. Before the expiration of one year, however, Wayne County served a notice to depart upon "A" family, and so notified the county auditor of Scott County and thereafter served notice upon the county auditor of Lucas County. During the interim Lucas County had been furnishing temporary relief to "A" family.

In view of the foregoing facts, does Section 5317, Code of Iowa, 1935, require a county to notify the county auditor of the county of legal settlement that it has served a notice to depart upon a pauper residing within its confines, but having legal settlement in the other county?

Cited Section 5317, Code of Iowa, 1935, provides as follows:

"5317. *Contest between counties.* When relief is granted to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days after receipt of such notice, such auditor shall inform the auditor of the county granting relief if the claim of settlement is disputed. If it is not, the

poor person, if able, may be removed to the county of his settlement, or, at the request of the auditor or board of supervisors of the county of his settlement, he may be maintained where he then is at the expense of such county, and without affecting his legal settlement."

Thereafter provision is made for a trial in the form of an ordinary action to determine the issue of settlement. Section 5318, Code of Iowa, 1935. There then follows a statutory provision with respect to the liability of the county of legal settlement. This is Section 5319, Code of Iowa, 1935, which provides:

"5319. *County of settlement liable.* The county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person, and for the charges of removal and expenses of support incurred.

"When relief as herein provided is furnished by any governmental agency of the county, township, or city, such relief shall be deemed to have been furnished by the county in which such agency is located and the agency furnishing such relief shall certify the correctness of the costs of such relief to the board of supervisors of said county and said county shall collect from the county of such person's settlement. The amounts herein collected by said county shall be paid to the agency furnishing such relief. This statute as herein amended shall apply to services and supplies furnished as provided in Section 2277."

Apparently contention has been made that "A" family lost its legal settlement in Lucas County by reason of the failure of Scott County authorities to notify Lucas County that it (Scott County) had served a notice to depart upon "A" family. Hence, Wayne County, which apparently has protected itself by the service of notice to depart before the expiration of one year's residence by "A" family in Wayne County, is in a quandary as to the legal settlement of said family.

The language of Section 5317, supra, is clear and unambiguous. It makes no reference whatsoever to the provisions of the "Poor Law" respecting the service of notice to depart upon a pauper. It contains no requirement that the authorities of the serving county must, in addition to serving the pauper, serve or notify the county auditor or any authorities of a county wherein legal settlement is claimed. Furthermore, reading the statute as a whole, no such requirement is to be found. Rather said section deals exclusively with the case wherein a county undertakes to furnish relief to a poor person residing therein but whom the county claims has a legal settlement elsewhere. In such instance, and as a condition precedent to the recovery of money thus expended, the auditor of such county must notify the auditor of the county of legal settlement of the fact that relief has been granted. The county auditor so notified may or may not dispute the claimed legal settlement in his county. If he does dispute it, then that becomes an issuable fact in the trial specified in Section 5318, supra. If he does not dispute the question of legal settlement, then the poor person, if able, may be removed to said county, or at the request of the auditor or board of supervisors of the county of legal settlement he may be maintained in the first county and where he is residing at the expense of the county of legal settlement without in any manner effecting his legal settlement.

It is accordingly the opinion of this department that there is nothing contained in the law which requires the authorities of a county who serve a poor person with a notice to depart to notify the authorities of the county wherein legal settlement is claimed of the fact of service of such notice; that under the described facts the legal settlement of "A" family is in Lucas County and

not in either Wayne or Scott counties. As to whether or not Scott County could recover relief expenditures made in behalf of "A" family while it resided in Scott County is a question upon which we express no opinion.

Attention should be called to the fact that in August, 1932, the then attorney general, in an opinion reported at page 254 of the 1932 Report, held that the statute governing poor relief does not require the service of a notice upon the county of the pauper's legal settlement. We quote the conclusion expressed in that opinion as follows:

"Section 5315, Code of Iowa, 1931, provides for the service of notice to depart on persons who are public charges or likely to become public charges. There is no provision requiring the service of such notice on the county of such person's legal settlement.

"We are, therefore, of the opinion that it is not necessary to serve notice to depart on the county of a pauper's legal settlement. It is only necessary to serve upon the pauper himself."

PAUPERS: LEGAL SETTLEMENT: DISPUTE OF BETWEEN COUNTIES: RECOVERY OF RELIEF FURNISHED: SUPPORT BY COUNTY OF NO LEGAL SETTLEMENT: COUNTIES: Statutory procedure must be followed strictly to permit recovery; there must be a finding by township trustees of fact of need for poor relief. County of no legal settlement may furnish aid to poor of another county.

November 19, 1938. *Mr. Waldo E. Don Carlos, County Attorney, Greenfield, Iowa, Mr. George E. Allen County Attorney, Onawa, Iowa:* We acknowledge receipt of your requests for the opinion of this department on the following propositions:

1.

One "B" died in "X" County after having received medical assistance from said county. "X" County made claim that "B's" legal settlement was in Adair County, and that it should be reimbursed for the cost of such medical assistance. The procedure contemplated by Section 5317, et seq., Code of Iowa, 1935, was followed in no respects.

The question is whether or not the various notices required in said sections are a condition precedent to the institution of the action contemplated by Section 5318, Code of Iowa, 1935, and, if so, whether or not "X" County could at this time recover expenditures made in "B's" behalf. (Submitted by County Attorney Waldo E. Don Carlos.)

Section 5317, Code of Iowa, 1935, provides as follows:

"5317. *Contest between counties.* When relief is granted to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days after receipt of such notice, such auditor shall inform the auditor of the county granting relief if the claim of settlement is disputed. If it is not, the poor person, if able, may be removed to the county of his settlement, or, at the request of the auditor or board of supervisors of the county of his settlement, he may be maintained where he then is at the expense of such county, and without affecting his legal settlement."

Under this section the requirement is that when relief is granted to a poor person having a settlement in another county, the auditor *shall at once,* by mail, notify the county auditor of the county of legal settlement of such fact, and *within fifteen days thereafter* the latter county auditor is required to inform the former if the claim of settlement is disputed. If the settlement is disputed, then by reason of the provisions of Section 5318, Code of Iowa, 1935, the county auditor of the county which furnishes relief must *within thirty days after receipt of notice disputing settlement,* file copies of the notices sent

and received in the office of the clerk of the district court of the county against which claim is made. This required filing serves as the docketing of a case to determine the question of legal settlement. In each of said sections of the statute, wherever a duty is imposed, the legislature has employed the word "shall." With this in mind, and the additional fact that the legislature has specifically provided the time within which notice must be served and the cause docketed, if legal settlement is disputed, we are led irresistibly to the conclusion that "X" County by reason of laches is now estopped to claim recovery from Adair County for the expense of medical assistance rendered "B." This conclusion is predicated upon the following well established rules of statutory construction. The expression of one thing is frequently the exclusion of another, and if by law a thing is to be done in a particular manner or form, such a law includes a negative, namely, that it shall not be done otherwise. *The District Township of the City of Dubuque*, 7 Iowa 262. When a statute gives a right and creates a liability which did not exist at common law, and at the same time points out a specific method by which the right can be asserted and the liability ascertained, that method must be strictly pursued. *Jefferson County Farm Bureau vs. Sherman*, 208 Iowa 614, 226 N. W. 182; *Conrad & Ewinger, et al. vs. Starr, et al.*, 50 Iowa 470; *Cole, et al. vs. The City of Muscatine*, 14 Iowa 296. The liability of any county to support its poor is, of course, purely statutory. *Wood vs. Boone County*, 153 Iowa 92, 133 N. W. 377; *Cerro Gordo County vs. Boone County*, 152 Iowa 692, 133 N. W. 132; *Cerro Gordo County vs. Wright County*, 50 Iowa 439; *Cooledge vs. Mahaska County*, 24 Iowa 211. In the last cited case the supreme court of Iowa, at page 213 of 24 Iowa, took occasion to state:

"We admit the proposition that the obligation or duty of the county to support the poor is statutory, and that, to render it liable, the case must fall within, and the liability be created pursuant to, and in the manner prescribed by, the statute." (Cases cited.)

And in *Wood vs. Boone County*, supra, the court, at page 93 of 133 Iowa, stated:

"There being no legal obligation at common law upon a county or any of the instrumentalities of government to furnish relief to the poor, plaintiff's action, if he has any, must be bottomed upon some statute entitling him to relief."

And with respect to the usual construction placed upon the word "shall" as used in a statute, the supreme court of Iowa, in *Jefferson County Farm Bureau vs. Sherman*, 208 Iowa 614, 226 N. W. 182, stated, quoting from page 618 of 208 Iowa:

"* * * It is provided by paragraph 2 of Section 63 of the Code that, in the construction of statutes, words and phrases shall be construed according to the context and the approved usage of the language. * * * The word 'shall,' appearing in statutes, is generally construed to be mandatory. If any right to anyone depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. *Vail vs. Messenger*, 184 Iowa 553."

In the case of *The City of Newton vs. The Board of Supervisors of Jasper County, et al.*, 135 Iowa 27, 112 N. W. 167, it was stated by the court (id., page 30 of 135 Iowa):

"* * * Sometimes courts are justified in interpreting the word 'shall' as 'may,' but, *when used in a statute directing that a public body do certain acts, it is manifest that the word is to be construed as mandatory and not permissive.* *Grant vs. City*, 28 N. J. Law, 491; *Madderom vs. City*, 194 Ill. 572 (62 N. E. 846). The uniform rule seems to be that the word 'shall,' when addressed to public

officials, is mandatory and excludes the idea of discretion. *People vs. Board*, 39 N. Y. 81; *French vs. Edwards*, 80 U. S. 506 (20 L. Ed. 702). * * *"

When the provisions of Section 5317 and 5318, supra, are examined, it is to be seen that the legislature has prescribed a given method to determine the question of disputed legal settlement between counties. It has also provided a method for the relief of poor having a legal settlement in another county by the county wherein such poor reside, and at the expense of the county of legal settlement, when legal settlement is recognized and not disputed. The language of these sections is couched in mandatory not permissive form. A specific method by which a right can be asserted and liability ascertained is pointed out. That method, we believe, must be strictly pursued, and, in the instant case, "X" county having failed in all particulars to follow the requirements of the cited sections, it is the opinion of this department that the procedure specified is a condition precedent to the institution of the judicial proceedings contemplated by Section 5318, supra, and that "X" county is now barred by laches from asserting any claim or establishing any liability as against Adair County for medical assistance rendered "B."

2.

"A" family resides in Crawford County but has a recognized legal settlement in Monona County. "B" family resides in Monona County but has a recognized legal settlement in Crawford County. Notices to depart have been served upon each of said families by the respective counties. Each family desires to continue residing at their present place of residence. Both families are relief subjects and neither is in a position to file the affidavit specified in Section 5311, Code of Iowa, 1935. The board of supervisors of the two counties are in agreement that, if legally possible, the two families should be maintained from public funds in their present place of residence.

The foregoing case is, in the opinion of this department, governed by the provisions of Section 5317, supra. In other words, under said section, one county may grant relief to a poor person having a settlement in another county, and may hold the county of legal settlement responsible therefor if the auditor or board of supervisors of the county of settlement request that such poor person be maintained where he then is at their county's expense. Thus, "A" family, which resides in Crawford County but has legal settlement in Monona County, may be maintained in Crawford County at the expense of Monona County if the Monona County auditor or board of supervisors so request. The same would be true of "B" family, except that the position of the counties would be reversed.

In this connection, however, attention is directed to the case of *Cherokee County vs. Woodbury County*, 212 Iowa 682, 237 N. W. 454. It was held in that case that a county furnishing relief to a poor person who has a settlement in another county cannot recover of such other county the value of such relief unless it is shown that the relief was initiated by an application to the township trustees of the township in which the poor person resided, pursuant to the provisions of Sections 5320, 5328, 5329, 5330 and 5333. While the court did not, in the body of its opinion, give studied consideration to the provisions of Section 5317, supra, yet it took occasion to state (id., page 687 of 212 Iowa):

"While the Board of Supervisors are not bound by a finding of the trustees of the township, yet it would seem that in this case where one county is seeking to recover from another, a finding by the township trustees that the person is legally a 'poor person' should be determined by the township trustees, as provided in Section 5328.

"So far as we have been able to ascertain, this question has not been definitely determined by this court, but in *Wright County vs. Hagan*, 210 Iowa 795, a case in which Wright County sought to recover of a mother for the support of her daughter in the Hospital for the Insane at Cherokee, this court said:

" 'An application, although informal, by the poor person, or by someone for the poor person, to the trustees of the township where the poor person has a residence or may be, and action thereon, are the requisite initial steps which must be taken before there can be any liability on the part of the mother, father, and other designated relatives for money expended by the county for the support of the poor person. See Section 5298 of the Code, 1927; *Hamilton County vs. Hollis*, 141 Iowa 477; *Bremer County vs. Schroeder*, 200 Iowa 1285; *Mansfield vs. Sac County*, 60 Iowa 11; *County of Clay vs. County of Palo Alto*, 82 Iowa 626; *Monroe County vs. Teller*, 51 Iowa 670; *Boone County vs. Ruhl*, 9 Iowa 276.'

"In *Armstrong vs. Tama County*, 34 Iowa 309, this court had under consideration what was then Sections 1387, 1388, 1389 of the Revision, containing the following language:

" 'The poor must make application for relief to the trustees of the township where they may be, and if the trustees are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may, for the time being, afford such relief as the necessities of the person may require, and shall report the case forthwith to the judge (board of supervisors), who is authorized to deny further relief to such person if he find cause.'

This court said:

" 'The determination, in the first instance, of the question whether the necessities of a poor person are such as to require aid at the public expense, as well as the nature of the relief he requires, must be made by the township trustees.'

"Under the circumstances, we think that in a case where one county seeks to recover, as in this case, an application, however, informal, to the township trustees for relief, is a prerequisite to recovery."

Under this decision, it would appear that as a prerequisite to the granting of relief to poor persons having a settlement in another county, for which recovery may be had, it is necessary that such poor persons make application for relief to the township trustees of the township wherein they reside. Therefore, while it is our opinion that Section 5317, supra, is authority for Monona and Crawford Counties to maintain poor persons having legal settlements in one or the other of said counties, yet, and employing the posited cases as examples, it would be essential in the first instance that "A" family, which resides in Crawford County but has a legal settlement in Monona County, make application for relief to the trustees of the township wherein they reside. Thereafter, if relief is granted as prescribed in Sections 5320 to 5323, inclusive, and 5327 to 5330, inclusive, Code of Iowa, 1935, the auditor of Crawford County should at once notify the auditor of Monona County of the fact that such relief has been granted, and, since we may assume that the question of legal settlement will not be disputed, the Monona County auditor or board of supervisors should request Crawford County to maintain "A" family in Crawford County at the expense of Monona County.

Even though Monona and Crawford Counties are in agreement as to the legal settlement of the families involved, it is nevertheless recommended that the procedure, outlined by the supreme court in the Cherokee County case, supra, and the requirements of the legislature, as embodied in Section 5317, supra, be followed literally. This recommendation follows from the alternative provisions of Section 5317, supra, for the reason that said section of the statute contemplates first a situation where legal settlement is not disputed, and, secondly, the circumstances of disputed legal settlement, and where legal settle-

ment is disputed, the notice requirements of Sections 5317 and 5318, supra, are a condition precedent both to the institution of an action to determine legal settlement, and for eventual recovery of relief furnished by the county of residence. And it would appear from the decision in the Cherokee County case, supra, that in any case, whether or not legal settlement is disputed, as a condition precedent to recovery of relief granted by the county of residence, an application for relief must first have been made to the township trustees of the township wherein the "poor" family resides.

PAUPERS: POOR RELIEF: COUNTIES: COSTS OF: BOARDS OF SUPERVISORS: Payments of relief costs where same are offset by manual labor on roads and highways are payable from "poor fund" of county.

November 25, 1938. *Honorable C. W. Storms, Auditor of State:* We acknowledge receipt of your request for the opinion of this department on the following matter. You state:

"Can the board of supervisors, under Section 5322 of the 1935 Code, requires persons receiving relief to labor on the streets or highways of the county at the prevailing local rate per hour in payment for and as a condition of granting relief, and pay such relief costs from the poor fund, providing that such costs do not exceed the statutory allowance of $2.00 per week for each person for whom relief is furnished exclusive of medical attendance?"

Relief is purely statutory. The Supreme Court of Iowa has held that it is the statutory duty of counties to maintain their poor. *Cass County vs. Audubon County,* 221 Iowa 1037, 266 N. W. 293. While the duty to extend relief is expressed in general terms, yet the occasion, method and extent of relief is left to the judgment and discretion of the local relief authorities. Chapter 267, Code of Iowa, 1935, as amended; *Cerro Gordo County vs. Boone County,* 152 Iowa 692, 698, 133 N. W. 132. Hence, in order to arrive at a proper determination of the question presented, statutes of Iowa relating to the support of the poor must be examined, and, if there be authority, it must be found in the provisions of the statutes.

Section 5322, Code of Iowa, 1935, provides as follows:

"*Form of relief—condition.* The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance. They may require any able-bodied person to labor faithfully on the streets or highways at the prevailing local rate per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways."

Section 5326, Code of Iowa, 1935, provides as follows:

"*County expense.* All moneys expended as contemplated in Sections 5320 to 5325, inclusive, shall be paid out of the county treasury, after the proper account rendered thereof shall have been approved by the boards of the respective counties, and in all cases the necessary appropriations therefor shall be made by the respective counties. But the board may limit the amount thus to be furnished."

Section 5337, Code of Iowa, 1935, provides as follows:

"*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."

From these provisions of the statute, it is to be noted that the expense of supporting the poor is payable out of the county treasury with authority vested in the county boards of supervisors to levy a poor tax if the ordinary revenue of the county proves insufficient for the purpose of supporting the county's poor. Further, it is to be noted that as a condition to granting relief in the form of food, rent or clothing, fuel and lights, medical attendance, or money, the board of supervisors may in its discretion require any able bodied person to labor on the streets or highways at the prevailing local rate per hour in payment for any relief granted. The language of the sections of the statute quoted supra is clear and unambiguous, and in view of the express wording of Section 5322, supra, it is the opinion of this department that a board of supervisors may require any able bodied person seeking poor relief to labor on the streets or highways of the county at the prevailing local rate per hour in payment for and as a condition precedent to the procuring of such relief. It is the further opinion of this department that, irrespective of the prevailing hourly wage, a board of supervisors would be limited in the payment of relief to the sum of $2.00 per week for each person for whom relief is thus furnished, exclusive of the cost of medical attendance which may be furnished as a form of relief.

As to the particular fund from which such relief is payable, attention is called to the fact that Sections 5326 and 5337, supra, contemplate that the expense of supporting the poor shall be paid out of the county treasury. Almost uniformly county boards of supervisors have appropriated poor support funds to a separate fund or account designated the "poor fund." This action makes of the fund no less revenue in the county treasury, and it is accordingly our opinion that the payment of relief costs, where the same are offset by manual labor on the roads and highways, are payable from the so-called "poor fund" of the county.

PAUPERS: LEGAL SETTLEMENT: NOTICE TO DEPART: STATUTE CONSTRUED: "LEGAL RESIDENCE" DISTINGUISHED: AID TO WIDOW IN CARE OF CHILD: COUNTIES: (1) Statute requires service of but one notice to depart except in instances of affidavit filed; (2) legal residence for widow's aid not synonymous with legal settlement; (3) where person is receiving public aid settlement cannot be acquired.

November 29, 1938. *Honorable John H. Mitchell, Attorney General of Iowa:* Several county attorneys have requested the opinion of this department as to the legal settlement of certain families,—the particular circumstances in each case being hereinafter set out in the form of supposititious cases.

1.

"A" family moved to Dallas County from an adjoining county. Dallas County officials immediately served a notice to depart upon "A" family. Thirty days later "A" family removed to the county from whence they had come and remained there for approximately six months. "A" family then moved back to Dallas County, where they have resided for about two years. No further or additional notice was served by the Dallas County officials. Relief has been refused by Dallas County on the theory that the legal settlement of "A" family is not in Dallas County. (Submitted by County Attorney Charles I. Joy.)

Section 5311, Code of Iowa, 1935, provides in part as follows:

"5311. *Settlement—how acquired.* 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 clear from a reading of this statutory provision that a legal settlement can be acquired after the service of notice to depart only by continuous residence in a county for the period of one year computed from the time the "person" served with such notice files an affidavit with the board of supervisors stating that he is no longer a pauper and intends to acquire a settlement.

In this connection it should be stated that contention has been made that irrespective of the filing of an affidavit it is incumbent that an additional notice be served prior to the expiration of each year that the "person" resides in the county. Such contention is based upon the provisions of Section 5315, Code of Iowa, 1935, which are as follows:

"5315. *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.*" (Italics ours.)

It is the opinion of this department, however, that such contention is not well founded. It is a familiar rule of statutory construction that statutes *in pari materia* shall be construed together and that the rule applies with peculiar force to statutes appearing in the same chapter. *Dikel vs. Mathers*, 213 Iowa 76, 238 N. W. 615; *Iowa Motor Vehicle Association vs. Board of Railroad Commissioners*, 207 Iowa 461, 221 N. W. 364. Furthermore, a statute must be construed to give effect to all of its provisions, and the different provisions of a statute are to be reconciled so as to make them consistent and harmonious, thus resulting in a sensible and intelligent effect of each. *Quinn vs. First National Bank*, 200 Iowa 1384, 206 N. W. 271; *Elks vs. Conn*, 186 Iowa 48, 172 N. W. 173; *Des Moines City Railway Company vs. City of Des Moines*, 152 Iowa 18, 131 N. W. 43; *Coggeshall vs. City of Des Moines*, 138 Iowa 730, 117 N. W. 309; *State vs. Coupe*, 91 Nebr. 463, 136 N. W. 41; *Rohde vs. Murfin*, 168 Mich. 683, 135 N. W. 457. Again where sections in the Code are each contained in a chapter devoted entirely to one subject they should be so construed, if possible, as to render neither nugatory. *State vs. State Savings Bank*, 139 Iowa 338, 115 N. W. 937.

Section 5315, supra, has appeared on the statute books in identical form since an early date. Section 2226, Code, 1897. Subsection 1 of Section 5311, supra, on the other hand was written into the statute by amendment. Chapter 99, Section 1, laws of the 45th General Assembly. Both provisions appear in the same chapter of the Code, to-wit: Chaper 267, supra. They relate to the same subject matter; they are *in pari materia,* and under the rules announced in the foregoing cases they must be construed in such manner as will make each consistent and harmonious with the other, and in such manner as will render neither nugatory. This in our opinion can be done without doing violence to either or to the intention of the legislature as expressed in those sections. It is at once apparent that if the language contained in Section 5315, supra,

reading—"After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning."—is construed to mean that a county must serve a notice prior to the expiration of each year that a person resides in the county if it (the county) would prevent the acquiring of a legal settlement, when such person has not filed the required affidavit, would result in the complete emasculation of that provision of Section 5311, supra, which requires the filing of an affidavit of status and intention. The net result of such a construction would be that no person would file an affidavit for the reason that by so doing the county would be put on guard as to such person,—would be apprised that the acquiring of a legal settlement is intended, and would accordingly take steps to protect itself. Section 5311, subsection 1, supra, as amended by the 45th General Assembly, was undoubtedly designed to protect counties and not to place them at the mercy of the pauper class.

The language of Section 5311, subsection 1, supra, in the opinion of this department can be reconciled with that of Section 5315, supra, so as to reach a consistency between the two and give effect to both. In the first instance the latter section is the statutory authority for the service of a notice to depart. Without it the chapter would be incomplete unless the authority were reasonably to be implied. To that extent there is not the remotest conflict between the sections. And as to the language of this latter section, quoted above, we are of the opinion that the legislative intent is preserved by construing the words "requisite residence" to mean a residence commencing from the date of the filing of the affidavit of status and intention. In other words, it is the filing of the affidavit that tolls the operation of the notice to depart which was originally served and not further continued residence for the period of one year. (See opinion of this department to County Attorney Frank Lounsberry, Nevada, Iowa, under date of November 17, 1938.)

It has also been contended that if a family, such as in the hypothetical case, removes from the county (in which notice to depart has been served upon it) with the bona fide intention of establishing a residence in another county, and subsequently interrupts such residence to return to the first county, then the family's residence in such county must be regarded as a new and independent one, and further warning to depart is necessary. This contention is not persuasive with us for the reason that we believe that the legislature did not intend to place a burden upon a county to determine whether or not a family upon whom notice has been served left the county with the good faith intention of establishing a residence elsewhere and to determine further whether or not in the interim the family has removed itself from the pauper class to a self-sustaining position.

Thus, if a person who has been served with such notice continues thereafter to reside "in the serving" county for one, two or ten years, but without filing the required affidavit, he could not acquire a legal settlement in such county. Under such circumstances it might be said that the person has a residence in such county for such purposes as exercising his elective franchise (*State vs. Mohr*, 198 Iowa 89, 197 N. W. 278), as a taxation situs, or for the probation of an estate, etc., but he would not have a legal settlement within the meaning of Chapter 267, Code of Iowa, 1935, entitled "Support of the Poor." Residence and legal settlement are not synonymous terms. *State ex rel. vs. Story County*, 207 Iowa 117, 224 N. W. 232. The terms should not be confused.

In the hypothetical case "A" family did not continue to reside in Dallas County after the service of the notice to depart. They presumably moved to the county wherein they had a legal settlement, remained there for six months and then once again moved to Dallas County where they have since resided for a period of over two years without again being served with a notice to depart. Under the facts posited, is the legal settlement of "A" family in Dallas County or in the county from which they moved?

It was stated by the supreme court of Iowa in *Cass County vs. Audubon County*, 221 Iowa 1037, 1041, 266 N. W. 293, that two things would concur in the acquiring of a settlement in a given county by a poor person. These were:

"First, personal presence in a fixed and permanent abode, or permanency of occupation as distinct from lodging, boarding or temporary occupation, and, second, an intention to there remain without any present intention of removing therefrom."

While facts relating to "A" family's living conditions, employment, etc. are not set out, yet by reason of the two years or more residence in Dallas County it would appear that both of the elements set out by the Iowa court have concurred, and that "A" family has acquired a legal settlement in Dallas County unless the notice to depart originally served upon them was effective to prevent their acquiring such settlement. In view of the clear wording of Section 5311, supra, to the effect

"* * * but if such person has been warned to depart * * * *then such settlement can only be acquired* after such person has resided in any one county without being warned to depart * * * 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." (Italics ours.)

it is the opinion of this department that the notice to depart served upon "A" family by Dallas County was effective to prevent its acquiring a legal settlement therein, notwithstanding that said family on the occasion of its second sojourn in Dallas County has resided there for two years or more. To hold otherwise, the intention of the legislature in enacting the affidavit provision would be defeated. (See footnote 1.)

2.

"B" family lived in Clay County for a number of years, and then moved to Buena Vista County in February, 1934. On July 6, 1934, the Buena Vista County officials served a notice to depart on "B" family. "B" family continued to reside in Buena Vista County, and in September, 1936, applied for relief from that county. "B" family was refused relief on the ground that their legal settlement was in Clay County. No relief was sought from Clay County, however. In January, 1938, "B" family, still residing in Buena Vista County, sought relief from Clay County and was granted temporary relief under protest, the claim of Clay County being that "B" family had lost its legal settlement in Clay County. Buena Vista County contends that the notice served on July 6, 1934, was sufficient to prevent "B" family acquiring a legal settlement in Buena Vista County. (Submitted by County Attorney Z. Z. White.)

What has been said with respect to the first hypothetical case set out above

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1. The result expressed is inescapable even though the desirability thereof may be questioned, for, in many instances, the result expressed places a premium on relief. In view of the coming session of the Iowa legislature, it is suggested that the legislature give studied consideration to needed revision in the existing "pauper" laws.

applies with equal force to this case. The legal settlement of "B" family under the facts posited is Clay County and not Buena Vista County.

3.

"C" family lived in Poweshiek County on January 28, 1936, at which time a notice to depart was served. In March, 1936, Poweshiek County transported "C" family to Adair County. On or about May 1, 1936, the head of "C" family was offered a job in Poweshiek County so once again "C" family removed to Poweshiek County. "C" family remained there until about November 1, 1936. In October, 1936, the mother went to Iowa County where she remained indefinitely with her parents. In November, 1936, the father went to Iowa County and remained there for approximately three months where he obtained employment. During this period of time the household goods of "C" family remained in the family home in Poweshiek County. In the spring of 1937 the family returned from Iowa County to Poweshiek County and continued to live and work there until the latter part of June, 1937. The family was served with a second notice to depart on January 28, 1938. (Submitted by County Attorney Waldo E. Don Carlos.)

In this hypothetical case, facts have not been furnished as to the legal settlement of "C" family prior to its residence in Poweshiek County at the time of the service of the first notice to depart, to-wit: January 28, 1936. If we are to assume that "C" family had a legal settlement in Adair County at such time, and the assumption is not without justification for the reason that Poweshiek County transported "C" family to Adair County, then it is the opinion of this department that Adair County and not Poweshiek County is the county of legal settlement of "C" family in view of our discussion with reference to the first hypothetical case set out in this opinion.

4.

"D" family moved to Dallas County from Boone County and has continued to reside in Dallas County for over a period of eighteen months. Dallas County served notice to depart on "D" family immediately upon their taking up residence in that county. No additional notice was served by the Dallas County authorities. (Submitted by County Attorney Charles I. Joy and County Attorney M. C. Williams.)

The conclusions heretofore expressed determine the legal settlement involved in this case as being Boone County and not Dallas County.

5.

"E" family, which had a legal settlement in Dallas County, moved to Madison County in September, 1933. On February 28, 1934, and again on August 15, 1934, a notice to depart was served on "E" family by the Madison County authorities. On August 28, 1934, Dallas County acknowledged its liability for "E" family and authorized their return to Dallas County.

In June, 1935, "E" family again removed to Madison County where the head of the family worked until December, 1935, at which time he was certified for WPA work as a resident of Dallas County. His WPA job continued until March, 1936, at which time he again procured private employment in which he was engaged until July, 1936, all the while residing in Madison County. In July, 1936, the Dallas County relief worker cancelled his WPA certificate on the theory that he was no longer a resident of Dallas County. (Submitted by County Attorneys Charles I. Joy and Charles D. Van Werden.)

It is the opinion of this department, in view of the foregoing discussion, that the legal settlement of "E" family in the fifth hypothetical case is in Dallas and not Madison County. The facts concerning WPA certificates have no bearing whatsoever on the question of legal settlement. The certification of persons for WPA is based upon need only and not upon legal settlement or residence. We are informed, however, that counties have been requested by the Iowa emergency relief administration to determine the legal settlement,

residence or non-residence, as the case may be, of persons who are to be certified for WPA work.

6.

"F," who had a settlement in Fayette County, moved to Buchanan County on March 1, 1936, where he has since resided. On March 19, 1936, a notice to depart was served upon "F" by Buchanan County. "F" was furnished relief by Fayette County, and in May, 1937, was given work by Fayette County on its roads and was paid from county funds by Fayette County. On January 22, 1938, "F" was discharged from such labor and thereafter Fayette County refused to furnish further support. (Submitted by County Attorneys R. J. Kremer and Hillis W. Noon.)

The case of "F," a poor person, is controlled by the answer heretofore given to the first hypothetical case. In other words, it is opinion of this department that the legal settlement of "F" is Fayette County and not Buchanan County.

7.

"G," who had a settlement in Fayette County, and who was receiving direct relief from that county moved to Buchanan County. She was served with a notice to depart prior to the expiration of one year by the Buchanan County authorities. A subsequent notice to depart was served upon her in February, 1936. She continued to reside in Buchanan County.

In February, 1937, "G" being destitute, applied for relief. An arrangement was entered into between Buchanan and Fayette counties whereby Buchanan County allowed her a widow's pension and Fayette County agreed to advance such direct relief as might be necessary. In November, 1937, when "G" applied for direct relief in addition to the widow's pension she was refused such relief by Fayette County. (Submitted by County Attorney R. J. Kremer.)

It is the opinion of this department that "G" in the posited case, for the purpose of support under the provisions of Chapter 267, has a legal settlement in Fayette County and not in Buchanan County for the reason that her legal settlement in the former county was at no time lost, Buchanan County having served upon her the requisite notice to depart within the first year of her residence in that county. The statute is clear in this respect. The pertinent section thereof (5312) specifies that a legal settlement once acquired continues until a new one is acquired in some other county of the state or is lost by removal from the state for a period of one year,—and in the first of such instances, cannot be acquired in another county where warning to depart has been given (as was done by Buchanan County in this case). Section 5311, supra.

The mutual agreement entered into between the counties, in our opinion, has no effect whatever on the question of "G's" legal settlement. True, questions of acquiescence, laches or estoppel might arise by virtue of such agreements, but in the instant case Buchanan County protected itself by the service of notice to depart thus preventing "G" from acquiring a settlement therein.

Attention, however, is directed to the statement of facts wherein it is related that Buchanan County undertook to provide "G" a widow's pension pursuant to Section 3641, Code of Iowa, 1935. This section of the statute provides in part as follows:

"3641. *Aid to widow in care of child.* If the juvenile court finds of record that the mother of a neglected or dependent child *is and has been a resident of the county for one year preceding the filing of the application,* * * * it may * * * by proper order determine the amount of money * * * necessary to enable said mother to properly care for said child. The board of supervisors shall cause said amount to be paid from the county treasury

* * *. *No payment shall be made after* * * * *she* (the mother) *has acquired a legal residence in another county* * * *.

"*No person on whom the notice to depart provided for in Chapter* 267 *shall have been served within one year prior to the time of making the application, shall be considered a resident so as to be allowed the aid provided for in this section.*" (Italics ours.)

The italicized language points out the limitations the legislature has placed on this form of aid. The inhibition contained in the concluding paragraph of the section was amended into the existing law in 1927 (Chapter 72, Laws of the 42nd General Assembly—effective July 4, 1937). Prior to that date there was no provision enabling a county to protect itself against one establishing a legal residence within its boundaries and after one year applying for widow's aid. And it is material to note that prior to this amendment the supreme court of Iowa had occasion to pass upon the question as to whether or not the words "resident" and "legal residence" as used in Section 3641, supra, meant one or the same thing as "legal settlement" under the "Support of Poor" law (Chapter 267). In the case of *Adams County vs. Maxwell, Judge,* 202 Iowa 1327, 212 N. W. 152, it was held that the jurisdiction of the juvenile court to adjudicate and order the payment of a pension to a widow depends, *inter alia, not* on a finding of *legal settlement* within the meaning of Section 5311 of the Code, *but* on a finding of *residence* in the county for one year. Said the court (id., page 1329 of 202 Iowa):

"That there is an essential difference between residence and a legal settlement, within the meaning of the statutes relating to the support of paupers, is apparent from a consideration of those statutes themselves. By Section 5311 it is provided that an adult may acquire a settlement in the county of his residence by residing there one year, without warning to depart. Under Section 5315, a person cannot, after such warning, acquire a settlement, except by the requisite residence of one year without further warning. It would seem that one might be a resident of a county for years, and yet, by reason of successive and timely warnings to depart, never acquire a legal settlement there. (See footnote 2.)

"The legislature has seen fit to make residence for one year on the part of the widow, and not legal settlement under the Pauper Acts, requisite to an allowance of public aid in the support of her children, under Section 3641."

Since this opinion was handed down February 8, 1927, a date prior to the amendment alluded to, the question arises as to whether or not the amendment providing for the service of notice to depart in widows' aid cases under Section 3641, supra, indicates an intention on the part of the legislature to thereafter regard "legal settlement" and "legal residence" as synonymous terms, and thus make applicable to widows' aid cases the entire law governing paupers. As against any such result it may be contended that the legislature by the use of unmistakable language could have so specified but did not for the reason that it merely provided that one shall not be eligible for widow's aid in the county wherein she resides if a notice to depart "provided for in Chapter 267 shall have been served within one year prior to the time of making the application." If that be done then, said the legislature, such person shall not "be considered a *resident* so as to be allowed the aid provided for in this section (3641)." In this amendment the legislature again employed the word "resident," whereas, it might clearly have stated that no such person shall be con-

2. For comment on this language under present statute see opinion to Frank Lounsberry, County Attorney, dated November 17, 1938, page ..., this report.

sidered to have a legal settlement in such county so as to be allowed the aid provided for. Hence we are led to the conclusion that the legislature did not intend to change the settled meaning of Section 3641, supra, but rather intended only to provide machinery whereby a person could be prevented from establishing a "legal residence" within a county for the purpose of procuring widow's aid. It follows then that a county must necessarily, in such cases, serve the required notice prior to the expiration of each year's residence and the affidavit provision of Chapter 267, viz., Section 5311, subsection 1, supra, has no application to Section 3641, supra. Therefore, in the posited case of "G," Buchanan County having failed to serve notice to depart upon "G" prior to the expiration of each year's residence therein (we assume no such notice was served after February, 1936), she would have a *legal residence* in Buchanan County for the purpose of widow's aid, and at the same time would have a *legal settlement* in Fayette County for the purpose of relief under Chapter 267. (See footnote 3.)

Irrespective of the foregoing discussions, in the case of "G," there necessarily was an adjudication by the juvenile court that she had a legal residence in Buchanan County for the purpose of widow's aid,—hence the question is *res adjudicata* in this particular case.

Further contention is made, particularly with reference to the succeeding posited cases, that the provisions of Section 5311, subsection 3, Code of Iowa, 1935, would prevent the acquiring of such residence so long as the county from which the person removed continued to pay a widow's pension. Said subsection provides:

"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."

In view of this language, if the situation were reversed, the contention might be well taken. In other words, a continuous residence in a county cannot ripen into legal settlement while the person is being supported by public funds,—receipt of a widow's pension comes within this category. 1936 *Report of the Attorney General*, page 347. But there is no similar provision contained in Section 3641, supra, and since the legislature limited the application of the provisions of Chapter 267, in the case of widow's aid, to the sole provision of a service of notice to depart, it is the opinion of this department that the subsection quoted above has no application to the establishment of a legal residence for the purpose of widow's aid. In this same connection attention is called to the language of Section 3641, supra, reading:

"No payment shall be made * * * after she (the widow) has acquired a legal residence in another county * * *."

This language clearly inhibits a county of former residence from paying a widow's pension to one who has acquired a legal residence in another county, but the county to which she has removed is likewise prohibited from paying such aid until there has been a year's residence preceding the filing of the application. During the interval, it is our opinion, that the county of former residence is authorized to pay such relief, and while a *legal settlement* could not be gained during this period and assuming that widow's aid is paid by the

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3. Id., footnote 2.

county of former residence, yet a *legal residence* for the purpose of widow's aid could be acquired, assuming further that the county to which the person has removed does not serve the requisite notice to depart as specified in Section 3641, supra.

8.

"H," a resident of Buchanan County, who is receiving a widow's pension from said county, moved to Chickasaw County in the early part of 1937. She resided in Chickasaw County for one year without being served with a notice to depart. On March 1, 1938, Buchanan County discontinued paying a widow's pension to "H." She then applied for a widow's pension in Chickasaw County but was denied such relief. (Submitted—id.)

In view of the discussion *supra* under the preceding supposititious case, Chickasaw County would be the county of legal residence of "H" for the purpose of widow's aid, and Buchanan County legally and properly discontinued paying a widow's pension to her.

9.

"I," a resident of Tama County who was receiving a widow's pension from said county, moved to Buchanan County. She continued to receive a widow's pension from Tama County for a period of time after moving to Buchanan County. She has now resided in Buchanan County for more than a year without being warned to depart. Tama County has discontinued paying her a widow's pension, and she now makes application for such aid from Buchanan County. (Submitted—id.)

Under the stated facts "I" has a legal residence in Buchanan County and not in Tama County for the purpose of procuring widow's aid. See discussion *supra*.

10.

"J" family resided in Fayette County and received relief from that county. On June 8, 1936, "J" family moved to Bremer County where it has since resided. In the months of February and March, 1937, "J" family received relief from Fayette County but while residing in Bremer County. In addition, in the month of February, 1937, the family received relief from the Red Cross. On January 11, 1938, Bremer County served a notice to depart on "J" family. (Submitted by County Attorneys Oliver J. Reeve and Hillis W. Noon.)

The question raised by this case is whether or not the notice to depart, served by Bremer County, was timely so as to prevent "J" family from acquiring a residence therein. Section 5312, Code of Iowa, 1935, provides as follows:

"5312. *Settlement continues.* 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."

And the pertinent portion of Section 5311, quoted supra, is as follows:

"5311. * * *

"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, * * *."

In addition the last cited section at subsection 3 provides:

"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."

This quoted portion of the statute apparently was an exception grafted into the law by the 45th General Assembly (Chapter 99, Section 2), to the statutory rule prescribed in subsection 1 of Section 5311, supra, that "any person continuously residing in any one county of this state for a period of one year

without being warned to depart * * * acquires a settlement in that county, * * *." While "J" family, under the facts stated, has resided in Bremer County for more than one year, viz., from June, 1936, to the present, yet in February and March, prior to the expiration of one year's residence in Bremer County, Fayette County, the county of legal settlement of "J" family, furnished relief to said family. Thereafter, and prior to the expiration of one year from the date of granting such relief, i. e., on January 11, 1938, the Bremer County authorities served "J" family with a notice to depart.

For the purpose of discussion, we assume "J" family, aside from the months of February and March, 1937, was self-subsisting. The real question then is whether or not the assistance furnished by Fayette County during the months of February and March, 1937, tolled, so to speak, the continuous residence of "J" family in Bremer County, so that the period of continuous residence must be computed from the time assistance was last given, viz., March, 1937, rather than from the date the family moved to Bremer County, to-wit: June, 1936. The obligation to furnish relief is predicated upon legal settlement. The supreme court of Iowa has said that it is the statutory duty of counties to aid their poor. *Cass County vs. Audubon County,* supra. Therefore, had Fayette County furnished aid to "J" family from the time it removed from Fayette County in June, 1936, until June, 1937, or until the expiration of one year's absence from Fayette County, no one would contend that thereafter "J" family's legal settlement was other than Fayette County for the reason that Section 5311, subsection 3, clearly states that "any person who is being supported by public funds shall not acquire a settlement in said county," meaning, of course, the county to which the family has removed. See 1934 *Report of the Attorney General,* pages 631 and 694.

Is the rule otherwise where the county of legal settlement, during the course of one year's absence from that county, furnishes relief but intermittently? We think not. In the *first* instance the residence must be continuous. Section 5311, subsection 1. In the *second* place a legal settlement continues until a new one has been acquired. Section 5312, supra. *Lastly,* a legal settlement cannot be acquired by any person "who is being supported by public funds." Section 5311, subsection 3, supra. Clearly if relief were furnished for nine months of the year's absence from the county, the year's continuous residence could only be computed from the tenth month forward, in view of the legislative language quoted supra. If under the law a person can only acquire a legal settlement by one year's continuous residence, but in no event can acquire such settlement while being supported by public funds, it logically follows that where such support is given there is an interruption in the year's continuous residence. Nor do we believe that the continuous residence contemplated by the statute takes up where it left off, or as in the instant case that one "leg" was completed from June, 1936, to February, 1937, and the last "leg" from April, 1937, to August, 1937, for this would reduce each case to a mathematical equation, and we believe the legislature intended no such result but rather intended that where a county affirmatively recognized its statutory obligation and furnished "poor" support to one having a legal settlement therein but residing outside the county, that the year's continuous residence was interrupted. Applying this reasoning to the case at hand, during the months of February and March, 1937, "J" family was being supported by public funds

(funds from the treasury of Fayette County), this action on the part of Fayette County, in the opinion of this department, tolled the running of the year's continuous residence in Bremer County.

It may be contended that such a rule will encourage counties to refuse relief during the transitory period. County officials who take that attitude are, of course, amenable to the law for maladministration, but irrespective of that fact the legislature has prescribed in the following quoted section the manner and method of caring for such unfortunates as "J" family, and thereafter holding the county of legal settlement strictly responsible for such expenditures on the part of the county wherein the family resides but has no legal settlement. This is Section 5317, Code of Iowa, 1935, which provides as follows:

"5317. *Contest between counties.* When relief is granted to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days after receipt of such notice, such auditor shall inform the auditor of the county granting relief if the claim of settlement is disputed. If it is not, the poor person if able, may be removed to the county of his settlement, or, at the request of the auditor or board of supervisors of the county of his settlement, he may be maintained where he then is at the expense of such county, and without affecting his legal settlement."

When the foregoing section of the statute is read in connection with the provisions of the statute which set up the procedure for preventing the gaining of legal settlement, it is clear that ample protection is afforded the counties to which indigent families have removed.

It is our conclusion that the legal settlement of "J" family is in Fayette County, and not Bremer County.

11.

"K," who has a legal settlement in Crawford County, and being a relief client of that county, moves to Harrison County. While residing in Harrison County he continues to receive relief from Crawford County. Harrison County does not serve a notice to depart prior to the expiration of one year's residence on the part of "K" in Harrison County. (Submitted by County Attorney Carl K. Burbridge.)

What has been said with respect to the preceding hypothetical case is here applicable. In other words, "K's" legal settlement is in Crawford County, assuming, of course, that a year's continuous residence in Harrison County, during which period no relief has been furnished from public funds by Crawford County or otherwise, has not transpired.

12.

"L," while a resident of Union County makes application for and receives old age assistance. Subsequently, "L" moves to Clarke County where she resides for more than one year without being served with a notice to depart. "L" now desires medical assistance and Clarke County refuses to grant the same on the ground that "L" has not gained a legal settlement in Clarke County. (Submitted by County Attorney O. E. Anderson.)

This department has previously ruled that when a person, while receiving old age assistance, moves from one county to another and continuously resides therein, during which period of time he receives old age assistance, he does not acquire a legal settlement in the second county even though he resides therein for more than a year and is not served with a notice to depart. See 1936 Report of the Attorney General, page 670. This opinion was predicated upon the provision of Section 5311, subsection 3, quoted supra. The old age assistance act, enacted by the 45th General Assembly, extraordinary session

(Chapter 19), according to its title, was an act to provide for the protection, welfare and assistance of aged persons in need. There can be little question but what a recipient of old age assistance comes within the purview of the language of Section 5311, subsection 3, supra, reading "any such person * * * supported by * * * 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 * * *"

It is accordingly the opinion of this department that "L" has a legal settlement in Union County and not in Clarke County, and in this respect we adopt and approve the conclusion expressed in the opinion appearing at page 670 of the 1936 Report of the Attorney General. In passing, it is well to call attention to the provisions of Section 5296-f27, as amended by Chapter 137, Section 23, laws of the 47th General Assembly, prescribing the type of other assistance that an old age assistance recipient may receive while being paid old age assistance.

13.

"M" family moved to Boone County from Dallas County wherein it had a legal settlement and received aid. The family removed to Boone County on April 11, 1937, and the head thereof was employed by a farmer residing in Boone County,—living in a tenant house until on or about March 1, 1938, when the employment contract was terminated. The family left Boone County, temporarily residing in both Des Moines and the State of Illinois. On or about April 20, 1938, "M" family again moved to Boone County, has been served with notice to depart, but Boone County has furnished the family emergency relief because Dallas County has refused to accept the family as its liability. The family has not been in Boone County continuously for a period of one year. (Submitted by County Attorney M. C. Williams.)

As has heretofore been pointed out under Section 5311, supra, "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 * * *" Furthermore, Section 5312, supra, provides that 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. In other words, a legal settlement once acquired can be lost only upon the happening of one of two contingencies, viz., (1) removal from the state of Iowa for more than a year, and (2) continuous residence in another county for the period of one year without being warned to depart.

While the posited facts are not all enlightening, yet it would appear that "M" family, which had a legal settlement in Dallas County, resided in Boone County from April 11, 1937, to on or about March 1, 1938,—a period less than a year. Hence, under the law, this period of sojourn in Boone County did not result in the acquirement of a legal settlement in Boone County. Nor was legal settlement in Dallas County lost by reason of "M" family's removal from the state under the facts for the reason that, and this we must assume, its removal from the state of Iowa was for a period of less than a year. Now then, the statute clearly requires continuous residence in another county for a period of one year without notice to depart, or removal from the state for a period of one year. Neither of these contingencies happening, it is the opinion of this department that "M" family has a legal settlement in Dallas County and not in Boone County. In view of this conclusion it should be

stated that any emergency relief afforded by Boone County is an immaterial factor for the reason that the clear wording of the statutes at Sections 5317 et seq., supra, contemplates that relief may be furnished by the county wherein the family has no legal settlement but resides, and that such county may thereafter hold accountable the county of legal settlement. Section 5317, supra, specifically states that the poor person may be maintained where he then is at the expense of such (legal settlement) county, and without affecting his legal settlement, if the auditor or board of supervisors of the county of legal settlement so request.

14.

"N's" wife who owned a residence in Appanoose County, and who had been living with "N" in Decatur County for some seven years, removed to Appanoose County in May, 1937. She was never served with a notice to depart. "N" continued to reside in Decatur County until May, 1938, when he moved to his wife's home in Appanoose County. Appanoose County denies "N's" wife's legal settlement in that county. (Submitted by County Attorney Edward P. Powers.)

Section 5311, subsection 4, Code of Iowa, 1935, provides:

"4. A married woman has the settlement of her husband, if he has one in this state; if not, or *if she lives apart from* or is abandoned by *him, she may acquire a settlement as if she were unmarried.* Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state." (Italics ours.)

the foregoing language is clear. A married woman, if she lives apart from her husband, may acquire a settlement as if she were unmarried. An unmarried woman may acquire a settlement anywhere in the state if her continuous residence is not tolled by a notice to depart or is otherwise interrupted. Such a notice could have been served upon "N's" wife in the hypothetical case by the Appanoose County authorities. This they did not do, and "N's" wife has now resided in Appanoose County for longer than the time specified in the law. Has "N's" wife thereby acquired a legal settlement in Appanoose County, notwithstanding that at this date "N" may be prevented from acquiring a legal settlement there?

The quoted subsection of Section 5311, down to the time of the 1924 Code revision, 40th General Assembly, extraordinary session, House File 140, Section 6, read as follows:

"2. A married woman follows and has the settlement of her husband, if he have any within the state, and if she had a settlement at the time of marriage, it is not lost by the marriage."

"3. A married woman abandoned by her husband may acquire a settlement as if she were unmarried."

In *Washington County vs. Polk County*, 137 Iowa 333, 113 N. W. 833, the supreme court of Iowa, in passing upon these sections, stated (id., page 335 of 137 Iowa):

"* * * 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. * * *"

Again in *Polk County vs. Clarke County*, 171 Iowa 558, 560, 151 N. W. 489, the court stated:

"* * * The theory of the statute, Code Section 2224 (5311 (4)), making the settlement of the wife that of the husband, has its origin in the general and accepted theory of the family relation. Ordinarily speaking, a family

consists of husband, wife and dependent children, if any, and the husband is its head. On him rests the duty of providing the home and the support of the household, and with him rests the authority to select the place of residence. When, for business or other reasons, he removes from one county to another, wife and children go with him,—the unity of the family remains unbroken. Wherever he establishes a home, there he is entitled to, and ordinarily has, the society, comfort, and service of those who, with him, constitute the family circle. The statutory recognition of this fact operates as a protection both to the county from which he removes and the one to which he goes. He cannot shift his responsibility by crossing the boundary line of his county; and wherever he settles, the local authorities have jurisdiction to compel his observance of the duties which the law has imposed upon him. There is, then, a large measure of justice and reason in the establishment of a rule by which, so long as the legal unity of the family remains unbroken and the reciprocal obligations of support and service are unimpaired, and the law looks alone to the settlement of the family head as determinative of the settlement of those who belong to his household. * * *"

The court went on to hold, however, that the theory of the statute did not obtain in the case of a wife who had been adjudicated insane and committed to one of the state hospitals for the reason that "the insane wife, while in name still a member of the husband's family, is no longer a member of his dependent family"; that the husband has no control over her and is powerless to direct the manner or place of her restraint. Said the court (id., page 562 of 171 Iowa):

"* * * The duty which would rest upon her as a sane wife not under restraint, to go where he goes and abide where he abides,—the duty which lies at the foundation of the rule making his settlement her settlement,—is wholly lacking; and in the absence of an express statutory provision that the settlement of a wife duly found insane in the proper county and thereafter restrained in the hospitals or asylums provided for that purpose shall follow the settlement of the husband as he may wander from county to county, we do not feel authorized to affirm such a rule or to establish such a precedent. In short, we hold that the legal settlement of an insane wife * * * remains unchanged by an act on the husband's part, so long as the restraint * * * continues. * * *"

This then is the rule laid down by the court in the case of an insane spouse. No such disability is involved in the case under consideration. From the limited facts posited, we must necessarily assume that the "general and accepted theory of the family relation" exists in the case of "N" and his wife; and further, we must assume that the "reciprocal obligations of support and service are unimpaired,"—that the legal unity of the family remains unbroken. Did the legislature then contemplate by inserting the language—"or if she lives apart from * * * him"—that a wife could establish a legal settlement separate and apart from her husband simply by reason of the overt act of residing apart from him, when, as a matter of fact, the legal unity of the family remained unbroken?

It is to be noted from the language of subsection 4 of Section 5311, quoted supra, that the legislature used the terms "lives apart from, or is abandoned," in which case a woman may acquire a settlement as if she were unmarried. And thereafter the legislature preserved to a woman her legal settlement at the time of her marriage in event her husband died or she were divorced from or abandoned by him. The legislature having specifically included abandonment in the statute, the language "lives apart" must necessarily mean something other than abandonment, unless the language "lives apart from or is abandoned by" be in the disjunctive. We do not believe that the legislature

used the quoted language in the disjunctive, for obviously a woman may live apart from her husband without being abandoned by him in the legal sense.

Ordinarily in the construction of statutes words must be given their plain and ordinary meaning. *Jefferson County Farm Bureau vs. Sherman*, 208 Iowa 614, 226 N. W. 182; *Drazich vs. Hollowell*, 207 Iowa 427, 223 N. W. 253; *Des Moines City Railway Company vs. City of Des Moines*, 205 Iowa 495, 216 N. W. 284; *First National Bank vs. Burke*, 201 Iowa 994, 196 N. W. 287, 275 U. S. 502, 48 S. Ct. 155, 72 L. Ed. 395. The word "apart" in its ordinary connotation means: "so as to be separate from companionship, sympathy, or the like; separate; aside; by itself." Funk and Wagnall New Standard Dictionary.

In the instant case "N" clearly has a legal settlement in Decatur County. Under ordinary circumstances, in virtue of the language of the statute that a married woman has the settlement of her husband, "N's" wife likewise would have legal settlement in Decatur County. However, from May, 1937, to May, 1938, "N's" wife has lived apart from him in Appanoose County, and we are inclined toward the view that this living apart from "N" brings "N's" wife within the purview of subsection 4 of Section 5311, supra. Now then if "N's" wife has lived apart from him and in Appanoose County for the period of one year without being warned to depart by the Appanoose County authorities (and this we cannot determine from the facts presented), she would be in a position to elect whether or not she would take the legal settlement of her husband in Decatur County or her independent legal settlement acquired by her living apart from her husband in Appanoose County for the reason that subsection 4 of Section 5311, supra, specifies that "a married woman * * * if she lives apart from (her husband) * * * *may acquire* a settlement as if she were unmarried." And, of course, an unmarried woman could acquire a legal settlement in the same manner as a married or unmarried man, viz., by continuously residing in any county in this state for the period of one year without being warned to depart. If, on the other hand, "N's" wife has not lived apart from him and in Appanoose County for the requisite period of one year, she could not acquire an independent legal settlement in Appanoose County. In the case under consideration this may well be the fact for the reason that we are not informed whether or not her continuous residence in Appanoose County apart from her husband from May, 1937, was interrupted prior to the expiration of one year by her act of again living with him.

In considering subsection 4 of Section 5311, supra, it should be borne in mind, in addition to what has been previously stated, that the legal settlement of a married woman had at the time of marriage may be resumed upon the death or divorce of or abandonment by her husband, if both had settlements in this state without regard to the statutory requirements of one year's continuous residence.

Any previous opinions of this department in conflict herewith are hereby overruled.

PRISONERS: BOARD OF CONTROL: SENTENCE: COMMUTATION: Section 14018, Code 1935, providing for deduction of time served has no application in case of life sentence even where there is a subsequent commutation. Under Indeterminate Sentence Law warden would have authority to give credit for time served.

December 5, 1938. *Board of Control:* We acknowledge receipt of your re-

quest for the opinion of this department on the matter hereinafter set out. The following facts are posited:

One Jesse Adams was convicted of first degree murder and sentenced to the state penitentiary for life. He was received at the penitentiary on May 4, 1922. He appealed from the judgment of conviction to the supreme court of Iowa, and on April 2, 1924, he was released from the penitentiary upon an order of court to stand trial a second time. At this point he had served on his life sentence one year, ten months and twenty-eight days. He was convicted on the second trial and again sentenced for life,—being received at the penitentiary on April 23, 1925. His absence from the penitentiary was approximately one year and twenty-one days. On May 4, 1938, the governor commuted his sentence from life to thirty years.

The questions, as raised by Warden Haynes under the foregoing facts, may be stated as follows:

(1) Whether or not the commutation dates from the time of this prisoner's incarceration in the penitentiary under the second sentence;

(2) Whether or not said prisoner is entitled to credit for the time served in the penitentiary on the first life sentence, viz.: one year, ten months and twenty-eight days; and

(3) Whether or not said prisoner is entitled to a credit of approximately one year and twenty-one days for time presumably spent in jail pending the completion of his second trial.

One pertinent section of the 1935 Code of Iowa is the following:

"3773. *Time to be served.* No convict shall be discharged from the penitentiary or the men's reformatory until he has served the full term for which he was sentenced, less good time earned and not forfeited, unless he be pardoned or otherwise legally released. *He shall be deemed to be serving his sentence from the day on which he is received into the institution, but not while in solitary confinement for violation of the rules of the institution.*" (Italics ours.)

Treating the warden's questions in the order in which they are enumerated, supra, it should first be stated that the Iowa supreme court has never had occasion to pass upon the question as to whether or not the commutation of a life sentence dates from the time the defendant is delivered into the custody of the warden, or from and after the date of such commutation. On this question our research discloses authority both ways. In *State ex rel. Murphy vs. Wolfer*, (Minn.), 148 N. W. 896, the supreme court of Minnesota held that after commutation, the sentence has the same legal effect, and the status of the prisoner is the same, as though the sentence had originally been for the commuted term,—citing as authority therefore: *Johnson vs. State*, (Ala.), 63 So. 163; *In Re Hall*, 34 Nebr. 206, 209; 51 N. W. 750; 5 *Op. of Attorneys General*, (U. S.) 370; *Lee vs. Murphy*, 22 Grat. (Va.) 789, 799, 12 Am. Rep. 563. On the other hand, the supreme court of North Carolina, in the case of *In re McMahon*, 125 N. C. 38, 34 S. E. 193, held that a prisoner for life, whose term has been commuted by the governor to a term of years, is entitled to the statutory commutation from and after the date of such commutation. The North Carolina decision appears, however, to have been based upon the peculiar wording of that state's statutes,—and so thought the Minnesota court. See also: 50 *Corpus Juris*, page 350, paragraph 50. On the part of this department, we think the rule announced by the Minnesota court to be the better one, since it is well settled that a commutation of a sentence is a substitution of a less for a greater punishment, and, after commutation the commuted sentence is the only one in existence, and the only one to be considered. It is accordingly the opinion of this department that the commutation of the life sentence of Jesse Adams

to a term of thirty years dates from the time Jesse Adams was delivered into the custody of the warden of the State Penitentiary under a mittimus which issued in the second prosecution. Consequently, Jesse Adams would be entitled to the statutory credit specified in Section 3774, Code of Iowa, 1935, from the date of his delivery into the custody of the warden under the second sentence pronounced against him. While we do not pass upon the question as to whether or not he likewise would be entitled to "honor" time, yet attention is called to the fact that on March 2, 1934 (not officially reported), this department ruled that a life prisoner, whose sentence to life imprisonment is subsequently commuted, would not be entitled to any credit for "honor" time in contradistinction to statutory time.

The second question presented involves the following provision of the 1935 Code of Iowa:

"14018. *Time of imprisonment deducted.* If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction."

While our supreme court has had occasion to construe this statutory provision (*State vs. Hopkins*, 67 Iowa 285, 25 N. W. 244; *Travis vs. Hunter*, 109 Iowa 602, 80 N. W. 680; *State vs. Hunter*, 124 Iowa 569, 100 N. W. 510; *State vs. Barr*, 133 Iowa 132, 110 N. W. 280; *State vs. Butler*, 155 Iowa 204, 135 N. W. 628), and has held that the term of imprisonment under conviction on a former trial which was reversed should be deducted from the period of imprisonment under a second conviction, yet, the court has never had occasion to consider Section 14018, supra, in the light of the particular facts submitted in this request for our opinion. Each of the cited cases dealt with a situation where the judgment of conviction carried a sentence for a term of years.

The penal offense, first degree murder, carries as its punishment either death or imprisonment for life at hard labor in the penitentiary, as determined by the jury or by the court, if the accused pleads guilty. In view of the penalty prescribed for first degree murder, it is at once apparent that the district court having jurisdiction of the accused would be without authority to deduct on the last verdict of conviction the period of time that Jesse Adams served on the first sentence. The life term was the "least" sentence the court could pronounce. In other words, it is the opinion of this department that the provisions of Section 14018, supra, have no application to a case such as the instant one where the penalty prescribed by the legislature is greater than imprisonment for a term of years.

The question immediately arises, however, as to whether or not the deduction contemplated by said section of the statute obtains by operation of law where the governor commutes the life sentence to a term of years. From a reading of the language of Section 14018, supra, it appears that the deduction is to be made by the trial court which pronounces sentence in the second prosecution, and that it has no application whatsoever to the action of the chief executive in reference to his commutation powers. As a matter of fact, a somewhat similar question confronted the supreme court of Iowa in the case of *Travis vs. Hunter, supra,* wherein contention was made that said section contemplated as its purpose that the deduction should be made by the warden of the penitentiary if not made by the court. This contention was predicated upon the theory that the legislature intended that it should be deducted by the

warden of the penitentiary if not done by the trial court at the time of second sentence for the reason that the legislature had deleted from the language contained in the forerunner to Section 14018, supra, the following words: "shall be deducted by the district court." (See Section 4545, Code of Iowa, 1873, for the language of this section in its original form.) The supreme court, however, was of the opinion that the deduction under the then existing law was to be made from the period of imprisonment fixed on "the last verdict of conviction," and that it must necessarily be made by the court; that the legal effect of Section 14018 is the same as Section 4545 of the Code of 1873, wherein the words "shall be deducted by the district court" appeared. Therefore, while Section 14018, supra, in cases where applicable is conclusive on the court, yet, in our opinion, it has no legal effect either by operation of law or as binding upon the chief executive in cases where a life sentence has been commuted by the governor to a term of years. In this connection it must be presumed that the governor, in considering the commutation of Jesse Adams' sentence, was aware of his case history, and that he took into consideration the fact that more than a year had been served in the penitentiary by Jesse Adams under a prior conviction and sentence which was set aside by the supreme court. The absence of any language in the commutation indicating that Jesse Adams' life sentence was commuted to imprisonment for a term of any period less than thirty years fortifies this presumption. It is accordingly the opinion of this department that the period of one year, ten months and twenty-eight days served by Jesse Adams under the first sentence cannot be deducted from his present commuted thirty-year term in light of facts in this case.

The third question submitted for our determination is whether or not Jesse Adams is entitled to credit on his commuted thirty-year term for the period during which he presumably was incarcerated in jail pending and during his second trial for the offense of first degree murder, and which period we are informed was approximately one year and twenty-one days. In the first instance, we must assume that he was in fact held in custody in the county jail for the reason that this is not stated as a positive fact.

Alluding to Section 3773, quoted supra, we note, *inter alia*, that one accused and convicted of crime shall be deemed to be serving his sentence from the day on which he is received into the institution. Since this language appears in the chapter of the 1935 Code styled "Penitentiary and Men's Reformatory," we must necessarily assume that the legislature limited its application to prisoners received at one or the other of these institutions, and did not extend its operation to county jails, etc.

Now then, Jesse Adams did not commence to serve his commuted thirty-year term until on or about April 23, 1925,—the date of his delivery to the warden of the penitentiary under the sentence imposed in the second trial. His imprisonment in the county jail, if such be the fact, occurred prior to that time. Is he entitled to credit for such detention in the county jail?

It is stated in 16 *Corpus Juris*, page 1372, paragraph 3230:

"In the absence of a statute to the contrary, one who appeals from a sentence to a term in the penitentiary is not entitled to be credited on his term of imprisonment with the time he is confined in jail, or the time he is detained in the prison in which persons held for trial are confined, while awaiting the determination of his appeal, even though restrained for the length of time for which he was sentenced. * * *"

And it has been held that one who appeals from a sentence of imprisonment

to the penitentiary is not entitled to be sent to the penitentiary to serve on the term imposed on the sentence from which he has appealed, since there is no warrant to hold anyone in the penitentiary except under final judgment. *Clemons vs. State*, 92 Tenn. 282, 21 S. W. 525. Again, it has been held that where a defendant is confined in the penitentiary under a void or erroneous sentence, because of his failure to obtain a suspension of his sentence during the pendency of proceedings in error, it is in no sense a part execution of a legal sentence. *McCormick vs. State*, 71 Nebr. 505, 99 N. W. 237. While we are not called upon to pass upon the question as to whether or not the propositions of law announced by the Texas and Nebraska courts, respectively, obtain in this state, yet, we may point out that Section 14018 apparently contemplates imprisonment under the sentence pending appeal for which the convicted may procure credit on retrial on the last verdict of conviction. Hence, we are unwilling to accept as final in this state the broad statement of law quoted supra from the text of Corpus Juris.

However, in *Dimmick vs. Tompkins*, 193 U. S. 540, 24 S. Ct. 780, 48 L. Ed. 1110, the prisoner there concerned had been sentenced to the state prison for a period of two years from October 16, 1901. He was imprisoned under said judgment in the state prison from April 13, 1903, but prior to that time in a county jail. The prisoner had taken an appeal during the intervening period. On petition for writ of habeas corpus, the Supreme Court of the United States, at page 546 of the opinion reported in 194 U. S., stated:

"If the appellant had been at once transported to the state prison under the sentence imposed upon him after his conviction, it is of course plain that two years from the time of his sentence (if he remained there in the meantime) would be the extent of his legal detention. In fact, he was not taken to the state prison until April 13, 1903, but he avers that he had been previously and from October 16, 1901, the date of the judgment, to April 13, 1903, imprisoned under said judgment in the county jail of the county of Alameda, by the order of said District Court. The sentence upon the verdict of guilty is given in the record, which is made a part of the petition, and that record shows that the appellant was 'sentenced to be imprisoned at hard labor for the term of two years from October 16, 1901; and it is further ordered that said sentence of imprisonment be executed upon the said Walter N. Dimmick by imprisonment in the state prison of the State of California, at San Quentin, Marin County, California.'

"The imprisonment of the appellant in the county jail could not, therefore, have been under the judgment which prescribes imprisonment in the state prison. But such detention may have been owing to his efforts to obtain a review and reversal of the judgment and in the meantime a supersedeas thereon, so as to prevent his transportation to the state prison, and in that case such detention should not be counted as any part of the time of imprisonment in the state prison. In that event his imprisonment in the state prison, under the judgment, should be counted from the time it actually commenced, notwithstanding the statement of the sentence that it should be for two years from October 16, 1901. The time of commencement was postponed by his own action, and he cannot take advantage of it and thus shorten the term of his imprisonment at hard labor in the state prison."

See also: *United States ex rel. Steinberg vs. Cummings, Attorney General, et al.*, 14 Fed. Supp. 647, 648; *Mosheik vs. Bates, Director*, 87 Fed. (2d) 221, 223; *Aderhold, Warden, vs. Ellis*, 84 Fed. (2d) 543, 544; *Jordan vs. United States*, 60 F. (2d) 4, 6, *Armenta vs. United States*, 48 Fed. (2d) 568, 570; *Ex Parte Ducket*, 15 S. C. 210, 40 Am. Rep. 694.

Adams' confinement in the county jail, if such be the fact, pending retrial

of his case, was neither pursuant to the first sentence which the supreme court had set aside, nor the second which at the time was not entered for the reason that there had been no judgment of conviction. Under no circumstances then was Adams, during this period of time, in prison in execution of a sentence pronounced against him.

It is accordingly the opinion of this department that Jesse Adams is not entitled to credit on his commuted thirty-year term for the period during which he may have been confined in the county jail pending and during his second trial for the offense of first degree murder.

In reaching this latter conclusion, we desire to make it clear that we are not passing upon the question as to whether or not such jail confinement may be counted as a part of prison confinement in execution of a sentence where a prisoner, by order of court, is removed from the penitentiary to stand trial for a distinct and separate offense from that for which he is serving time.

A second question is presented in connection with this inquiry which may be restated as follows:

What is the authority, power and duty of the warden with respect to the granting of credit to prisoners for time served in those cases where the prisoner has been twice convicted and sentenced under the Indeterminate Sentence Law,—serving time under the first sentence, which was subsequently set aside by the supreme court, and upon a second conviction again sentenced under the Indeterminate Sentence Law, if the trial court fails to deduct from the sentence the time served under the first conviction?

The case of *Travis vs. Hunter, supra,* may, at first blush, lead to the conclusion that the warden has no authority or duty in such cases. It should be borne in mind, however, that the *Travis* case, supra, was decided long prior to the enactment of Section 13960, known as the Indeterminate Sentence Law, and, in our opinion, the language of the court in that case is not conclusive of the question here presented.

There can be no question but what in such cases it is the mandatory duty of the court to make the deduction contemplated by Section 14018, supra. On the other hand, Section 13960, supra, provides that the court shall not fix the limit or duration of a sentence, but that the term of imprisonment shall not exceed the maximum term provided by the law for the crime of which the prisoner is convicted. Notwithstanding this seeming conflict, we believe that the two sections of the Code can be reconciled, construed harmoniously, and effect given to each. In the first instance, we are inclined toward the view that it would be entirely proper and lawful for the district court, at the time of pronouncing sentence, to specify in its order that the accused is sentenced under the Indeterminate Sentence Law, but that there is to be deducted the time served by the accused under the prior sentence. If, however, the court fails to make such provision, we believe that the warden of the penitentiary is not only authorized, but that it is his duty to give credit to the prisoner the time served under the first sentence.

BOARD OF CONTROL: REWARD: PRISONERS—ESCAPED: WOMEN'S REFORMATORY: There is no authority in the existing law authorizing either the superintendent of the women's reformatory or the board of control to offer a reward for an escaped prisoner from the women's reformatory.

December 5, 1938. *Board of Control:* We acknowledge receipt of your request for the opinion of this department on the question as to whether or not

the superintendent of the Women's Reformatory or the Board of Control has the power to offer rewards for the apprehension and delivery of escaped prisoners from the Women's Reformatory.

Section 3770, Code of Iowa, 1935, provides that if a convict escapes from the penitentiary or the Men's Reformatory, the warden thereof, for the purpose of effecting such escaping prisoner's apprehension, may offer a reward, not exceeding fifty dollars, to be paid by the state. No similar provision appears in Chapter 186 of the 1935 Code pertaining to the "Women's Reformatory." The cited section has been on the statute books of Iowa since prior to the Code of 1851.

As a matter of historical reference, it should be pointed out that down to and including action taken by the 28th General Assembly (Chapter 102) women convicted of crime punishable by imprisonment in either the reformatory or penitentiary were committed to the women's departments of those institutions. Therefore, there is little question but what Section 3770, supra, during that period of time, applied alike to men and women prisoners.

Chapter 102, Laws of the 28th General Assembly, provided for the establishment of an Iowa industrial reformatory for females to be located at Anamosa, Iowa. This act took effect on publication, April 11, 1900. In the provisions of said act of the General Assembly no provision was made whereby either the board of control or the executive officer in charge was authorized to offer a reward for an escaped prisoner therefrom. This act was repealed by the 36th General Assembly at Chapter 216, and in lieu thereof there was enacted a new law establishing such reformatory, the location of which was to be selected by the board of control. This act of the General Assembly presently appears in the 1935 Code as Chapter 186. No provision was contained in Chapter 216, supra, repealing existing provisions of the Code inconsistent or in conflict therewith,—the only repeal reference being that made to Chapter 102, Laws of the 28th General Assembly.

Among the sections contained in Chapter 186, supra, are the following:

"3738. *Escape.* Any inmate of said reformatory who shall escape therefrom may be arrested and returned to said reformatory, by an officer or employee thereof without any other authority than this chapter, and by any peace officer or other person on the request in writing of the superintendent or board of control."

"3739. *Costs of returning inmate.* The costs attending the return of escaped or paroled inmates shall be paid from the funds of the institution."

Section 3738, supra, provides in like manner to Section 3770, supra, for the apprehension of escaped prisoners, but in the former no reference is made to the offering of a reward.

Further, in the provisions of Chapter 167, Code of Iowa, 1935, styled "Government of Institutions," and which chapter sets out in detail the power, authority and duties of the board of control of state institutions, no direct authority is to be found authorizing said board to offer a reward for the apprehension of an escaped prisoner from the reformatory. True, said chapter at Section 3290 endows the board with power to prescribe such rules, not inconsistent with law, as may be deemed necessary for the discharge of its duties, the management of each institution under its control, the admission of inmates, and the treatment, care, custody, education and discharge of inmates,—but this, in our opinion, is not broad enough to predicate authority for offering a reward

in the case under consideration. Nor is there any authority vested in the chief executive of this state, by virtue of Section 83, Code of Iowa, 1935, to offer a reward in such case.

Therefore, while there is no sound reason to be advanced why it is less important to offer a reward for the apprehension of an escaped prisoner from the women's reformatory than from either the men's reformatory or the penitentiary, yet, the legislature having failed to so provide, and it being a general rule of law that the powers and authority of public officers are fixed and determined by law (46 Corpus Juris 1031, paragraph 287), it is the opinion of this department that there is no authority in the existing law authorizing either the superintendent of the women's reformatory or the board of control to offer a reward for an escaped prisoner from the women's reformatory.

TAXATION: TAX SALE: HOLIDAYS: LEGALITY OF TAX SALE: There are no provisions in the Iowa tax sales statutes prohibiting tax sales on the first Monday in January when the same falls on the day after New Years. A tax sale held on January 2nd would be a legal and valid sale and to comply with the statute, the sale should be held on that date.

December 5, 1938. *Honorable C. W. Storms, Auditor of State:* This is to acknowledge receipt of your letter of December 5, 1938, wherein you request the advice of this department as to the legality of a tax sale to be held on January 2nd.

As you pointed out in your letter, Section 7262 of the 1935 Code specifically provides that in the event the tax sale is not held on the first Monday of December, then the treasurer shall hold the sale on the first Monday of the next succeeding month in which the required notice can be given. The first Monday of the next succeeding month is January 2nd and your concern is whether or not the sale can legally be held on January 2nd because of the fact that New Year's day falls on Sunday, January 1st and the usual custom is to observe a Sunday holiday on the following Monday.

In 29 *Corpus Juris*, Title "Holidays" at Section 3 we find the following rule:

"A legal holiday other than Sunday has effect as a holiday only as to those acts and transactions which are designated in the statute establishing the day. Accordingly it is held that with the exception of matters concerning which the statute provides that the day shall be treated as Sunday, any act done on that day is as effective as if done on any other day."

In 29 *Corpus Juris*, Title "Holidays," Section 11 the rule is further elaborated in regard to official acts and it is there provided that:

"As in the case of other transactions the validity vel non of official acts performed on a legal holiday depends on the terms of the statute. The mere designation of a day as a holiday does not invalidate a sheriff's sale, or a sale for taxes. * * *"

In *Young vs. Wagner, County Auditor*, 99 Pac. 552, the California Courts had occasion to pass upon the validity of a tax sale held upon a holiday. In that case the statute prescribed the method of sales by the state of lands and authorized the sale whenever directed by the comptroller and noticed by the tax collector. The sale was held upon a day designated as a legal holiday and the owner of the land contended that for that reason the sale was void. The court held that:

"Plaintiff's had no right to demand that it (the land) be sold or not sold on some particular day."

At page 553 of the reported opinion the court further said:

"We find no statute prohibiting such a sale on a holiday. * * * We think the rule applicable here is that, in the absence of a statutory prohibition, a ministerial act of the kind in question is not void because performed upon a legal holiday."

In *Federal Land Bank of St. Paul vs. Steele, et al.*, 231 N. W. 892, the court held:

"Statutes establishing legal holidays and commanding the suspension of official business thereon are construed to prohibit only such acts as are in express terms or by clear implication within the purview of the act, and what it thus expresses or fairly implies is prohibited; what it fails to prohibit remains lawful to be done."

In *Hadley vs. Mussleman*, 3 N. E. 122, the Indiana Supreme Court held that a sale of property for taxes on Christmas day is not invalid. At page 124 of the reported opinion the court said:

"The third question is this: Is a sale for taxes made on Christmas day valid? Our statute makes Christmas a holiday in one respect, and in one only, and that is in regard to commercial paper, and we can find no rule of our common law making it a legal holiday as to any other matter. * * * If Sunday cannot be considered as a holiday in the absence of a statute so declaring, it is quite clear that Christmas cannot be. That it has not been so regarded is evident from the fact that it was found necessary to enact a statute making it a holiday in regard to commercial paper. As there is neither a statute nor a rule of common law prohibiting the sale of property for taxes on Christmas day, we cannot hold that a sale made on that day is void, however much we may doubt the wisdom and propriety of making sales on that day."

The only provision in the Iowa law which would make the Monday following the first day of January where the same falls on Sunday a holiday is Section 9545 of the Iowa Code. This provision is a portion of the negotiable instruments law and relates specifically to that law. January the second is not a legal holiday for any other purpose, but assuming *pro arguendo* that it is a legal holiday, still the foregoing authorities would be controlling for the reason that there are no provisions in the Iowa tax sale statutes prohibiting tax sales on the first Monday in January when the same falls on the day after New Years.

In view of the foregoing authorities, it is apparent that a tax sale held on January 2nd would be a legal and valid sale and that to comply with the provisions of the statute, the sale should be held on that date.

CLAIMS: LEGAL SERVICES: COMPENSATION: LEGISLATURE: EXECUTIVE COUNCIL: Through the legislature the state may recognize the justice of a claim, either in whole or in part and make just restitution. In this event, the state comptroller may make payment.

December 8, 1938. *Honorable C. B. Murtagh, Comptroller of State:* We acknowledge receipt of your request for the opinion of this department as set forth in your letter of December 3, 1938, wherein you state:

"I am enclosing a claim of Leonard J. Wegman in the sum of $2,842.61 for legal services. The claim is self-explanatory.

"Will you please give this department your official opinion as to whether or not this claim should be paid in accordance with the order of the Executive Council under date of November 20, 1938, from the funds allocated for court costs as indicated on the voucher form attached to the claim."

In the first instance, and as explanatory, it should be stated that on November 4, 1937, a contract was entered into by and between Robert E. O'Brian, Secretary of State, and Leonard J. Wegman, a practicing attorney, which contract was

approved on November 8, 1937, by the Executive Council of the State of Iowa wherein the last named party was to receive a contingent fee in consideration for the performance of the stipulations contained in said contract. Without question the agreement related solely to compensation based upon the successful recovery of what might be termed "penalties" or "forfeitures" under the provisions of Chapter 386, Code of Iowa, 1935, styled "Permits to Foreign Corporations," and not for the value of service rendered.

On June 13, 1938, the Executive Council of the State of Iowa undertook the following action, as shown by the official records of the council. We quote as follows from Volume 18, page 608, of the council's records.

"Moved by O'Brian and seconded by Wegman that the resignation of Leonard Wegman, Special Assistant Attorney General, be accepted and that the contract with Mr. Wegman be cancelled as of May 25, 1938."

The claim of Mr. Wegman filed with and approved for payment by the Executive Council is a statement for legal services based upon a per diem allowance from November 9, 1937, down to and including April 30, 1938, and in addition actual expenses incurred by Mr. Wegman for materials, stenographic expenses and certain miscellaneous items.

In view of the action taken by the Executive Council at its meeting held June 13, 1938, it is unnecessary for us to give consideration to the legality of the contract in its inception (for authority see Section 152, Code of Iowa, 1935). The contract having been cancelled, and the voluntary resignation of Mr. Wegman as special counsel accepted, it is alone necessary that we consider the authority of the Executive Council to approve for payment the claim referred to above.

In passing we state that we are fully aware of the general rules pertaining to the law of contracts where the state is one of the contracting parties, viz., that the state, in general, has the same power to contract as a private corporation or individual,—limited only by constitutional and statutory restrictions; that the contracts of the state with individuals are ordinarily to be construed in the same manner and have the same binding effect on the parties thereto as the contracts of private parties, and that while the state generally is bound to observe the same rule of conduct in the performance of its contractual relations with its citizens as it requires them to observe, and like an individual is liable for its breach of contracts, yet in the absence of a statute authorizing suits against the state, the contractor cannot enforce performance for recovery of damages,—his remedy being an appeal to the legislature for relief. 59 *Corpus Juris* 170, p. 284-183, p. 320-187, p. 324; *State vs. Feigel*, (Ind.), 178 N. E. 435; *People vs. Sohmer*, (N. Y.), 101 N. E. 164; *Regents of University System of Georgia vs. Blanton*, (Ga. App.), 176 S. E. 673; *Hollingshead Company vs. Board of Control*, 196 Iowa 841, 195 N. W. 577; *Wilson vs. The Louisiana Purchase Exposition Commission, et al.*, 133 Iowa 586, 110 N. W. 1045; Note to Reported Case of *Hampton, et al. vs. State Board of Education of Florida, et al.*, (Fla.), 42 A. L. R. 1456, 1464. None of these rules, however, are applicable to the instant case in view of Mr. Wegman's voluntary resignation as special counsel, and the cancellation of the contract of employment between him and the state of Iowa. Hence, we may state summarily that Mr. Wegman has no "legal claim" against the state in virtue of the contract entered into by and between him and the state.

In this connection it should be pointed out that a "legal claim" is one recog-

nized or authorized by the law of the state, or which might be enforced at law if the state were a private corporation. 59 *Corpus Juris* 282, p. 429. No one would seriously contend that if Mr. Wegman had contracted with an individual or private corporation, and subsequently the parties mutually agreed to a cancellation of their contract, and Mr. Wegman resigned his employment thereunder, he could thereafter recover all or any part of the contingent compensation specified in such contract. That precisely is his position here in so far as the express contract between the parties is concerned. See cases *infra.*

The question arises, however, as to whether or not Mr. Wegman has a "legal claim" against the state of Iowa of the nature of the one which he has filed, based upon the theory of *quantum meruit. Quantum meruit,* in common-law pleading, is known as the common count in an action of assumpsit for work and labor, founded on an implied assumpsit or promise on the part of defendant to pay plaintiff as much as he reasonably deserved to have for his labor. 51 *Corpus Juris* 116. Now the express contract between Mr. Wegman and the state was abrogated by mutual consent. It was no longer in existence. As stated hereinbefore, in our opinion, there could be no recovery under its terms. On the other hand, the existence of an implied contract, whereby the state would reimburse Mr. Wegman, for legal services upon a per diem and actual expense basis (the character of the claim filed), is negatived by the fact that the parties had at one time agreed upon his compensation on a contingent fee basis for recoveries made under the provisions of Chapter 386, Code of Iowa, 1935. The record discloses no different agreement or understanding. Hence, there is nothing from the circumstances or acts of the parties from which the law may imply a contract upon which Mr. Wegman could recover for his legal services on a per diem and actual expense basis. Any such implication would be contrary to all of the circumstances or the acts of the parties in the instant case. It is accordingly the opinion of this department that there is no "legal claim" against the state of Iowa in favor of Mr. Wegman upon an implied contract for compensation on a per diem and actual expense basis.

The next question which arises is whether or not Mr. Wegman has a "legal claim" against the state of Iowa for compensation in *quantum meruit* upon an implied contract for the reasonable value of his legal services.

It has been held that when complete performance by an attorney of his contract of employment becomes impossible without fault on the part of either party, the attorney may recover in *quantum meruit* the value of the services actually rendered by him. This rule was applied by the District Court of Appeals of California in the case of *Boardman vs. Christin,* 65 Cal. App. 413, 224 Pac. 97,—and we quote as follows from the opinion as reported at page 99 of 224 Pac.:

"Though we are of the opinion that respondent's contract with Mrs. Christin was an entire contract, and that it required full performance on respondent's part as a condition precedent to his right to recover the stipulated compensation in an action on the contract, we do not think he is entirely remediless. True, there is nothing in the record before us necessitating the conclusion that Mrs. Christin prevented performance before respondent had entirely fulfilled the obligation of his contract. But it is equally true that there is nothing to indicate that respondent's failure to fully perform his contract was due to any fault on his part. * * * Under these circumstances, while he (the attorney) cannot recover the stipulated compensation in an action on his contract with Mrs. Christin, respondent is entitled to recover in quantum meruit the reasonable value of such services as he actually did perform under his contract.

The rule is that when complete performance by an attorney of his contract of employment becomes impossible without fault on the part of any party, the attorney may recover in quantum meruit the value of the services actually rendered by him. *Moore vs. Robinson*, 92 Ill. 491; *Baird vs. Ratcliff*, 10 Tex. 81; *Corson vs. Lewis*, 77 Nebr. 449, 114 N. W. 281; Thornton on Attorneys, section 452; 6 Corpus Juris, p. 726, par. 297."

In reviewing this case, we note *inter alia* that the contract involved was not a contingent fee contract.

There are, of course, many decisions to the effect that where an attorney is discharged by his client, there is not an actionable breach of contract between them, but even so the attorney is entitled to the reasonable value of the services which he has rendered in *quantum meruit*, and not the compensation agreed upon in the contract. While this is not the situation before us, yet we set forth a number of the authorities announcing the last stated rule. *Ritz vs. Carpenter*, 43 S. D. 236, 178 N. W. 877, 19 A. L. R. 840; *Andrewes vs. Haas*, 214 N. Y. 255, 108 N. E. 423; 3 A. L. R. 458, (Contingent fee); *Clark vs. Nichols*, 127 App. Div. 219, 111 N. Y. Supp. 66, (Contingent fee); *Thole vs. Martino*, 56 Pa. Super. Cts. 371, (Contingent fee); *Lawler vs. Dunn*, 145 Minn. 281, 176 N. W. 989; *McPhail vs. Spore*, 62 Colo. 307, 162 Pac. 151, (Contingent fee); *Simon vs. Chi., M. & St. P. RR. Co.*, 45 N. D. 251, 177 N. W. 107, (Contingent fee). Generally on this proposition see note to reported case 3 A. L. R. 468, 489, and note to reported case 40 A. L. R. 1525, 1538. In keeping with the rule as announced, the supreme court of Nebraska in *Shevalier vs. Doyle*, 88 Nebr. 560, 130 N. W. 417, held that a client may discharge his attorney at any time, but, where he does so without just cause, the law gives the attorney an action for damages therefor, and, where the attorney accepts his discharge, the express contract of employment, if there be one, may be declared to be abrogated, in which case an implied contract arises to which the attorney may resort for the recovery of the reasonable value of his services. See also 6 *Corpus Juris* 745, p. 321.

Clearly the rule announced in *Boardman vs. Christin*, supra, is unapplicable to the instant case for the reason that here there occurred an abrogation of the express contract by mutual consent, whereas unforeseen contingencies transpired in the Boardman case, supra, and the contract became impossible of performance through the fault of neither of the contracting parties. Nor is the rule announced by the courts in such cases as *Ritz vs. Carpenter* and *Andrewes vs. Haas*, supra, applicable. Mr. Wegman was not discharged by his client. On the contrary he voluntarily resigned his employment as special counsel for the state. It is accordingly the opinion of this department that no "legal claim" against the state of Iowa exists in favor of Mr. Wegman in *quantum meruit* upon an implied contract for the reasonable value of his legal services.

Notwithstanding that, in our opinion, no legal claim exists against the state of Iowa in this case, we desire to call attention to the fact that Mr. Wegman's research of the law in connection with his employment as special counsel has resulted, as we are informed, in the preparation of an extensive brief, the collation of numerous authorities, a comprehensive card index as to the status of foreign corporations presumably doing business in Iowa,—all of which may prove of material benefit to the state of Iowa and as an aid to its attorney general in the continued and further investigation of foreign corporations who are in fact doing business within this state but have failed to qualify as contem-

plated by law. Furthermore, indirectly traceable to the efforts of Mr. Wegman is a result reflected by the records of the office of the Secretary of State. Numerous foreign corporations, previously delinquent in qualifying, have now qualified and paid into the treasury of the state the statutory fees. Hence, it is not without justification to assume that the state of Iowa derived benefit from the services actually performed by Mr. Wegman.

Now then, it is stated negatively in 59 Corpus Juris 283, p. 433, that, under constitutional provisions prohibiting the granting by the state of gratuities, the legislature cannot direct or authorize the audit or allowance of a claim where there is no legal or moral obligation against the state; but it may authorize the hearing and determination, not only of claims constituting legal demands, but also all claims founded merely in right and justice, although they might not have been enforcible in the courts against individuals. The record of our legislative history is replete with instances where the legislature has authorized the allowance of a claim where there is but a moral obligation against the state. Its authority is embodied in the Constitution in Article III, Section 31, which reads as follows:

"*Extra compensation—payment of claims.* 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."

On this subject the Iowa supreme court has spoken. In *Grout vs. Kendall*, 195 Iowa 467, 477, 192 N. W. 529, Justice Evans, writing for the court, stated:

"* * * True it is that a promise of gratuity is not enforcible as between individuals, and that a mere moral obligation is not a valuable consideration. True it is, also, that the inherent power of taxation possessed by a sovereign state can be lawfully exercised only for a public purpose. The analogies of private law in respect to valuable consideration are not particularly helpful in defining the legislative power to appropriate moneys for specified purposes. The legal obligations of a state are few, as compared with the legislative appropriations which it makes. Legislative appropriations are not ordinarily made under legal compulsion. The great body of the obligations of a state are moral, rather than legal. Legislative appropriations are made voluntarily, either in response to moral obligation or to public expediency. In either event, they may be made for a public purpose. They are gratuitous in the sense that they are not compulsory. Whether a particular purpose is a public purpose and whether it has the sanction of a moral obligation of the state are questions which have never been definitely answered or defined. It has been quite uniformly held by the courts that the determination of such questions inheres largely in the legislative power. Within the zone of doubt, that is a moral obligation of the state and that is a public purpose which the legislature deems to be such. * * *"

In that case the court was of the opinion that to hold judicially that the Soldiers' Bonus Act enacted by the 39th General Assembly serves no public purpose and responds to no moral obligation would not only be to belie the state's legislative history, but would be a judicial interference with the prerogative of the legislature.

Whether or not a moral obligation exists on the part of the state to compensate Mr. Wegman is a question upon which we express no opinion for the determination of any such question rests solely with the legislature.

Even so, the existence of a moral obligation is of little importance in con-

sidering the authority of the state comptroller to pay the claim that has been filed by Mr. Wegman and allowed by the Executive Council. In the opinion of this department, there is no authority in the law of Iowa for the Executive Council to allow and approve for payment said claim, the nature of which has been described, or for that matter any claim arising out of the relations of Mr. Wegman and the state of Iowa. With respect to the employment of special counsel, the sole authority of the Executive Council is that provided in Section 152, Code of Iowa, 1935. It goes without saying that that statutory provision is without application in this case if for no other reason than that the contract of employment was cancelled by mutual consent.

As has been stated hereinbefore, whether or not Mr. Wegman will be allowed any compensation on the theory that a moral obligation exists is for the legislature to determine. As was stated by the Iowa supreme court in *Hollingshead Company vs. Board of Control of State Institutions, et al.*, supra, through the legislature, "the state may recognize the justice of the plaintiff's (his) claim, either in whole or in part, and not only may make, but presumably *will* make, just restitution." If and when such action ensues, the state comptroller may make payment thereof in like manner to any other claim allowed by the legislature.

ELECTIONS: SECULAR DAY: SUNDAY: COUNTY OFFICERS: OFFICE: It is the opinion of this department that January 3, 1939, is the second secular day of January, 1939. 29 Corpus Juris, page 762, par. 3.

December 12, 1938. *Mr. John L. Duffy, County Attorney, Dubuque, Iowa:* We acknowledge receipt of your request for the opinion of this department on the following matter:

You point out that January 1, 1939, which is popularly referred to as New Year's Day, falls on a Sunday; that Section 511, Code of Iowa, 1935, specifies that the term of office of all officers chosen at a general election for a full term, shall commence on the second secular day of January next thereafter; and that you are in a quandary as to whether or not county officers elected at the November 8, 1938, election take office on January 2, 3 or 4, 1939.

Your question actually arises by reason of the fact that when a so-called holiday falls on Sunday, it is customary to observe such day on the following Monday. This custom, in our opinion, however, makes Monday, January 2, 1939, no less a secular day within the meaning of Section 511, supra. Monday, January 2, 1939, is in no sense a legal holiday,—a legal holiday ordinarily being regarded as the opposite of a "secular" or "business" day. See *State vs. Duncan*, 118 Louisiana 702, 43 Southern 283, 10 L. R. A. (NS) 791. In this very connection, this department recently ruled, in an opinion dated December 5, 1938, to State Auditor Charles W. Storms, that January 2, 1939, is not a legal holiday for any other purpose than that mentioned in Section 9545, Code of Iowa, 1935, being a section contained in the negotiable instruments law. In the course of that opinion we took occasion to point out that a legal holiday, other than Sunday, has effect as a holiday only as to those acts and transactions which are designated in the statute establishing the day, citing 29 *Corpus Juris*, page **762**, paragraph 3. Hence our conclusion that Section 9545, supra, must be strictly confined to the inhibited acts therein specified. Therefore, if January 2, 1939, be not a legal holiday except as where provided by law, it must necessarily be a "secular" or "business" day.

In view of the foregoing discussion, and by reason of the fact that January 1, 1939, falls on Sunday, it is the opinion of this department that January 3, 1939, is the second secular day of January next following the general election held November 8, 1938, and that the term of office of all officers chosen at said general election commences on January 3, 1939.

It should be stated that obviously January 2, 1939, is not the second secular day of January in the year 1939 for the reason that Sunday, January 1, 1939, cannot be regarded as a secular day, not for the reason that Sunday is a holiday, but rather for the reason that by law the citizens of this state are inhibited from engaging in secular business on the Sabbath. See Section 13227, Code of Iowa, 1935. In this regard, it has been held that the term "secular business" as used in Sunday laws, includes all activities in the business forms of life, the professions, or a trade or employment, and commercial proceedings, such as the making of promissory notes, lending money, and the like.

Lovejoy vs. Whipple, 18 Vt. 383, 46 Am. Dec. 157;
Finn vs. Donahue, 35 Conn. 217;
Allen vs. Deming, 14 N. H. 139, 40 Am. Dec. 179;
Smith vs. Foster, 41 N. H. 221.

Again, as stated by the supreme court of Louisiana, in *State vs. Duncan*, supra, "holiday," in its present conventional meaning, is scarcely applicable to Sunday; that Sunday owes its exceptional position to a general sense of its sacred character; and that to no other day has a like distinction been accorded. Hence, when the first day of January of any year, within the meaning of Section 511, supra, falls on Sunday, the second secular day of that month must necessarily be the third day. If, on the other hand, the first day of January in any year, within the meaning of Section 511, supra, falls on any day other than Sunday, it is our opinion that the second secular day would be the second day of that month for the reason that the only provision in the law of Iowa, establishing January 1st as a holiday, is that contained in the negotiable instruments law, and its application must be strictly confined thereto.

REAL ESTATE: CONSERVATION COMMISSION: EXECUTIVE COUNCIL: STATE LANDS: Lands under jurisdiction of state may be transferred upon recommendation of conservation commission and approval of executive council. See Sections 1824 and 1825.

December 16, 1938. *Executive Council of Iowa:* Receipt is acknowledged of your letter dated December 15, 1938, in which you set out certain statements with reference to certain riparian lands in Woodbury County adjacent to the city of Sioux City, and in which you inquire whether or not the executive council has the power to issue a deed or patent to the land in question under the provisions of Section 1824 of the Code. The second paragraph of your letter reads as follows:

"The application discloses that the property in question is accretion land and therefore under the control of the state conservation commission. The state conservation commission subsequently recommended that this land be deeded to the city of Sioux City for the sum of $1.00. Such action was taken under the provisions of Section 1824 of the Code."

The statute provides that jurisdiction over state lands bordering on meandered streams and lakes of this state not used by some other state body for state purposes is vested in the state conservation commission, Section 1812, 1935 Code, providing as follows:

"Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission. The commission, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

Section 1824, 1935 Code, provides, with certain exceptions, for the sale of public lands under the jurisdiction of the commission as in its judgment may be undesirable for conservation purposes. The language of this statute is as follows:

"The executive council may, upon a majority recommendation of the commission, sell or exchange such parts of public lands under the jurisdiction of the commission 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 commission 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."

The exception set out in the above statute apparently would not include the land under consideration. It will be observed that the statute provides that the state conservation commission, by a majority of its members, recommend to the executive council such sale, including the terms, conditions and considerations thereof. The authority to consummate such transaction then is vested in the executive council, which should be expressed by a resolution of the council approving all the recommendations of the state conservation commission.

Under the provisions of Section 1825, 1935 Code, the conveyance of such land issues in the name of the state of Iowa, signed by the governor and the secretary of state, with the great seal of the state attached.

This office has had no opportunity to make investigation of the character of this real estate which has been recommended for sale. The state of Iowa owns the beds of navigable streams lying within the boundaries of the state. The bed of a navigable stream extends to the ordinary high water mark, and the line constituting this ordinary high water mark forms a dividing line as between private ownership and public ownership of real estate abutting navigable streams.

It is stated in your letter that the real estate in question is accretion land. The rule in this state is that the owner of the shore land is also the owner of land which has accreted to his shore property. Accretion may be said to be gradual and imperceptible addition of soil to shore land, which said addition in the process of building up, rises higher than the ordinary high water mark.

If this particular real estate is in fact accretion land, i. e., if it has been built up and has arisen to a point above the ordinary high water mark, then it is owned by the owner to whose land such accretion has attached. On the other hand, if the same is actually still a part of the bed of the river and lies below the ordinary high water mark, then the state of Iowa owns the same and could dispose of the same in the manner contemplated. See the Iowa case of *Park Commissioners vs. Taylor*.

You have requested that the opinion of this department issue immediately upon this matter, and for this reason time has not been taken to substantiate the foregoing statements with citations from the cases, but the opinion expressed above can be substantiated as being the settled law of this state.

If the lands, therefore, are of such character that the state, in virtue of its sovereign ownership, of the bed of the Missouri river, owns and controls the same, it is our opinion that upon recommendation of the conservation commission, and upon approval by the executive council, that such lands can be transferred to the city of Sioux City as contemplated in Sections 1824 and 1825.

The actual character of such real estate frequently can be determined only by a consideration of all the facts and physical circumstances. Where questions have arisen as to whether or not certain riparian real estate is in fact state owned or privately owned, we have relied to a large extent upon the findings of Mr. Charles E. Sayre, engineer for the state conservation commission. Mr. Sayre is a recognized authority on questions of this character, and it would be our opinion that if Mr. Sayre has found that the real estate in question is owned by the state, that the council would be warranted in proceeding upon his recommendations.

We assume that the conservation commission has determined that the real estate in question is subject to their jurisdiction, and if this is the situation, then if the council sees fit it may proceed to approve the conveyance and consummate the same.

MINORS: JUVENILE COURT: JURISDICTION: Jurisdiction of the court once invoked, a child thereafter is in the protective custody of the juvenile court until, by reason of statute, it is legally adopted or is committed to a state institution, or until it has reached its majority. Chapter 180, Code 1935.

December 19, 1938. *Mr. Raymond H. Wright, County Attorney, Burlington, Iowa:* We acknowledge receipt of your request for the opinion of this department on the following matter:

"Where a petition has been filed under the provisions of Chapter 180, Code of Iowa, 1935, charging a child then under 18 years of age with being either dependent, neglected, or delinquent, within the meaning of this chapter, and the court having proper jurisdiction upon her, instead of committing the child to a State Institution, as it might have under the provisions of said chapter, finds it to be for the best interests of said child to continue the proceedings and commit said child to the care and custody of a probation officer, or other discreet person, and enters an order accordingly, does the court, after said minor reaches 18 years, have jurisdiction to enter any further orders in said cause, either committing the minor to a State Institution if the circumstances warrant, or changing the custody, or does the jurisdiction of the court in said proceedings completely cease when the minor arrives at 18 years of age?"

The jurisdiction of the juvenile court, under the provisions of Chapter 180, Code of Iowa, 1935, is invoked by the filing of a sworn petition on information and belief, as prescribed in Section 3621 thereof. The procedure to be followed thereafter is set forth in Sections 3622 to 3636, inclusive, Code of Iowa, 1935. The jurisdiction of the juvenile court once having been invoked, and the proceedings having come on for hearing, the court is empowered to commit the child, subject of the proceedings, in any of the alternative ways specified in Section 3637, Code of Iowa, 1935, or pursuant to the mandatory commitments specified in Section 3646, Code of Iowa, 1935. The former of said sections provides as follows:

"3637. *Alternative commitments.* The juvenile court, in the case of any neglected, dependent, or delinquent child, may:

"1. Continue the proceedings from time to time and commit said child to the care and custody of a probation officer or other discreet person.

"2. Commit said child to some suitable family home or allow it to remain in its own home.

"3. Commit said child to any institution in the state, incorporated and maintained for the purpose of caring for such children.

"4. Cause the child to be placed in a public or state hospital for treatment or special care, or in a private hospital which will receive it for such purpose, when such course seems necessary for the welfare of the child."

In cases where the court commits a child under the alternative commitments provided in Section 3637, supra, then the following statutory provisions are applicable:

"3638. *Guardianship and adoption.* In case the court commits said child to the custody of some proper person or institution, such person or institution shall, by virtue of such custody, be the legal guardian of the person of such child and may be made a party to any proceeding for the legal adoption of such child, but any such adoption shall be approved by the court."

"3639. *Conditions attending commitment.* In any case contemplated by Section 3637, the court may, from time to time, incorporate in its order such conditions and restrictions as it may deem advisable for the welfare of the child, and the jurisdiction of the court over said proceedings and said child shall continue until the child is legally adopted, or until the child is committed to a state institution."

The only limitation expressed in Chapter 180 on the jurisdiction of the juvenile court is that embodied in Section 3617, Code of Iowa, 1935, which provides:

"3617. *Applicable to certain children.* This chapter shall not apply to any child who is accused of an offense which is punishable by life imprisonment or death, but shall otherwise apply to all children who are not feeble-minded and who are under eighteen years of age and who are not inmates of any state institution or of any institution incorporated under the laws of this state."

However, as is to be noted from the provisions of quoted Section 3639, supra, in event the juvenile court commits a child after hearing upon a sworn petition in any one of the alternative ways specified in Section 3637, then said court retains jurisdiction of the child in the proceedings either until the child is legally adopted or is committed to a state institution. Section 3639, supra.

By virtue of Section 3649, Code of Iowa, 1935, and being a section contained in Chapter 180, any child committed under the provisions of the chapter to one of the state institutions, must be so committed until it reaches the age of twenty-one years,—a discretion being vested solely in the Board of Control of State Institutions as to whether or not the child thus committed shall sooner be released or discharged provided it has reached the age of eighteen years.

Nothing is contained in Chapter 180, supra, however, specifying the age limit to which children may be committed in any one of the alternative ways prescribed in Section 3637, supra, unless Section 3649, supra, be regarded as all inclusive,—which we do not believe to be the case.

It is true that the juvenile court would have no original jurisdiction to commit a child under Chapter 180, supra, who has arrived at the age of eighteen years. But is this fact material in considering the court's jurisdiction when its original jurisdiction is without question? In light of the manifest purpose of Chapter 180, supra, and the generally accepted doctrine that the state, as *parens patriae*, may assume for a child parental authority and duty, we are

inclined toward the view that the jurisdiction of the court once having been invoked, and properly so with respect to the child's classification, and the court upon hearing undertakes to and does determine that the child, subject of the proceedings, is in fact neglected, dependent or delinquent, and in its discretion determines that the commitment of such child shall be in one or another of the alternative ways specified in Section 3637, supra,—such child is, thereafter, in the protective custody, so to speak, of the juvenile court. Until when? Until, by reason of the statute, it is legally adopted or is committed to a state institution, and, we add, or until it has reached its majority. In this latter regard it is stated in 31 Corpus Juris 1111, par. 243:

"* * * The period of commitment or detention is often regulated by statute, and, in such case, it must comply with that designated. *It ordinarily lasts until the child has obtained his majority, and this is so even though the power of the court to commit was limited to children under certain age and the child in question has passed that age.* * * *" (Italics ours.) Citing: *Ex parte Willis*, 30 Cal. A. 188, 157 P. 819; *State vs. Ragan*, 125 La. 121, 51 So. 89; *Ex parte Toman*, (Nebr.), 187 N. W. 120; *People vs. House of Good Shepherd*, 62 Miss. 24, 115 N. Y. Supp. 887, 23 N. Y. Cr. 184; *Commonwealth vs. Murray*, 26 Pa. Dist. 489.

At common law the age at which an infant reaches full majority is fixed at twenty-one years, whether male or female. 31 Corpus Juris 986, par. 3. Originally, this rule of the common law was abrogated by statute in the state of Iowa. See Section 3188, Code of 1897, and previous codes. (Footnote 1.)

In *De Sonora vs. Casualty Co.*, 124 Iowa 576, loc. cit., 584, the Iowa Supreme Court commented: "The common law is modified by our statute to the extent of declaring a female an adult at eighteen years of age, and all persons such upon marriage."

However, the 40th General Assembly, at Chapter 198, repealed the existing law and enacted in lieu thereof the following provision which appears in the 1935 Code of Iowa as Section 10492, as follows:

"10492. *Period of minority.* The period of minority extends to the age of twenty-one years, but all minors attain their majority by marriage, and females, after reaching the age of eighteen years, may make valid contracts for marriage the same as adults."

Hence it may be said that minors in this state reach their majority only upon arriving at the age of twenty-one years, although, for some purposes, majority may sooner be reached, as in the case of marriage, and in the case of females, for the purpose of contracting marriage, it is sufficient that they reach the age of eighteen years. This statutory allowance, however, may not be construed as elevating them (females) to majority, or as abrogating the common law rule in any respect other than the right to consummate a valid contract of marriage.

In view of the foregoing discussion, it is the opinion of this department, that the juvenile court under the provisions of Chapter 180, Code of Iowa, 1935, retains jurisdiction of children committed pursuant to Section 3637, of said chapter, until such time as children thus committed are either (1) legally adopted; (2) committed to a state institution; or (3) reach their majority. It is our further opinion that the court would have jurisdiction to enter any further order in any proceedings where its jurisdiction still obtains, none of

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Footnote 1. Section 3188. (Code 1897) Majority. The period of minority extends in males to the age of twenty-one years, and in females to that of eighteen years; but all minors attain their majority by marriage.

the three enumerated contingencies having happened, irrespective of the fact that the children, subject of the proceedings, have passed the ages of sixteen to twenty, inclusive.

We recognize *inter alia* the question as to the court's jurisdiction in those cases where such children have, in the interim, married. The Supreme Court of Iowa passed upon a similar question in *McPherson vs. Day*, 162 Iowa 251, 144 N. W. 4, wherein it was held that under the statute authorizing the commitment of an incorrigible girl to the industrial school until she attains the age of twenty-one years, one may be detained in the school for the statutory period, although she attained her majority at eighteen and was then married. Under existing statutes this rule would no doubt still obtain in the case of commitments under Chapter 180, supra, to a state institution. Whether or not it would in cases such as we have under consideration is a matter of conjecture and upon which we express no opinion. In this connection, however, it is stated in 31 Corpus Juris 1103, par. 227:

"The authorities are not in full accord on the question whether the statutes, providing for the commitment of delinquent juveniles, apply to married infants, who otherwise fall within the classification provided by statute. This conflict may be somewhat explained by distinguishing the cases where marriage had taken place prior to the time when the juvenile court sought to obtain jurisdiction and the cases where the marriage had taken place thereafter. Most of the cases which have held that the statutes apply to female married infants have been cases where the marriage had taken place after the juvenile court had obtained jurisdiction; and such cases have held that the operation of the statute is not suspended by the subsequent marriage, and it does not render her commitment invalid, although appropriate steps may be taken for her release. * * *"

CLAIMS: COMPROMISE OF: TAXATION: EXECUTIVE COUNCIL: ATTORNEY GENERAL: Compromise of claims owing the state under the provisions of Chapter 338, Code of Iowa, 1935, discussed.

December 20, 1938. *The Executive Council:* On December 13, 1938, you requested the written opinion of this department in the following language taken from your letter:

"The Executive Council requests a written opinion on the legality of the statutes covering the assessment of tax on equipment cars owned by foreign corporations. Certain petitions have been presented to the council for statement of certain delinquent taxes, and the council is desirous of disposing of these matters, and request your written opinion forthwith with regard to their powers of compromise in the matter. The council is now in session and are awaiting your reply."

On December 13th I advised you that it would be impossible to provide a written opinion upon such short notice, but that I would make a report to you within a short time.

We are advised that certain applications have been filed with the Executive Council asking for the compromise of certain delinquent taxes on equipment cars which, under the laws of Iowa, are subject to taxation by virtue of the provisions of Chapter 338 of the 1935 Code. It is our understanding that your request to this department is based upon the provisions of Section 288 of the 1935 Code, which are as follows:

"288. *Compromise of claims.* The executive council, on a written report to it by the attorney general together with his opinion as to the legal effect of the facts, may determine by resolution to be duly entered in its official records, the terms on which claims of doubtful equity or collectibility, and in favor of the state, may be compromised and settled with all or any of the parties

thereto. Such terms may be withdrawn prior to acceptance, or in case the debtor fails to comply therewith within a reasonable time. The attorney general shall have full authority to execute all papers necessary to effect any such settlement."

and that in accordance with the provisions of said section, you desire a report from the attorney general upon these applications, and an opinion as to the legal effect of the facts in order that you may determine whether or not the claims presented in the applications should be compromised and settled, or whether the applications should be denied.

Applications for the compromise of these delinquent taxes have been pending before the council for some months, and we call your attention to your letter of April 22, 1938, in which you rejected the offer of a compromise settlement made by these same companies, and in which you instructed the attorney general to proceed to collect the full amount of the taxes due from said companies. Following your instructions, we made an investigation of the provisions of Chapter 338 of the Code under which the cars of these companies are taxed, and the validity of which chapter these companies questioned in their applications. It is contended by these concerns that the provisions of Chapter 338 are invalid, and that the taxes cannot be collected, and they question the right of the state to enforce the provisions of this chapter. After an investigation of the law with reference to their claims, we reached the conclusion that because of the provisions of Section 7 of Article VII of the Constitution of Iowa, Section 7076 of Chapter 338 might be questionable because this section and Chapter 338 do not provide the object to which the tax is to be applied.

We concluded, therefore, that rather than to start proceedings, after we had received your letter, that we would defer any action to collect these delinquent taxes, and suggest and recommend to the next session of the legislature (which meets in January, 1939), that Chapter 338 of the Code be rewritten, and that a proper provision be made for the application of these taxes in order that there might be no question in the future about the right of the state to collect these taxes. Moreover, we decided that insofar as the delinquent taxes were concerned, we would suggest and recommend to the legislature that they pass a curative act correcting any alleged defect in the existing statutes, and thereby place the state of Iowa in a sound position to enforce the collection of the present delinquencies. We have gone into this question sufficiently to convince this department that if such a curative act were passed the state would then be in a position to enforce collection without any risk of the court holding Chapter 338 invalid. The validity of such a curative act would undoubtedly be questioned, but we have reached the conclusion that there is authority for the belief that such action on the part of the legislature could be sustained in the courts. We believe that our position is sustained by the following authorities:

59 *Corpus Juris*, Title Statutes, secs. 713 through 716;
Boardman vs. Beckwith, et al., 18 Iowa 292;
State vs. Squires, 26 Iowa 340;
The Iowa Railroad Land Co. vs. Soper, 39 Iowa 112;
Richman vs. Supervisors of Muscatine County, 77 Iowa 513;
Chicago R. I. & P. R. Co., 211 Iowa 1334;
Iowa Electric Company vs. Grand Junction, 220 Iowa 441.

The record in the office of the state treasurer reveals that approximately one hundred twenty companies were charged with this tax in July of 1937, under the provisions of Chapter 338. Out of the approximate one hundred twenty

companies charged with the tax ninety have paid it in full. The balance of the companies are represented in the applications for the compromises, and the delinquent taxes cover the years 1933 to 1937, as shown by the list contained in the applications, and these delinquent taxes constitute a total sum of $23,708.90, and the sum of $5,927.43 is offered in compromise. The amount charged to and paid by other companies to the state treasurer for the year 1937 alone amounted to approximately $34,762.29, as shown by the record in the office of the state treasurer. (The foregoing figures have been taken from the records which we have found available, and in our opinion are approximately correct.)

The question for your determination must, therefore, be whether or not, in the light of the fact that a large number of companies have paid these taxes each year, a compromise should be made with the applicants. The figures contained in the applications indicate that the effect of the compromise would be to settle these delinquent taxes on a basis of twenty-five cents on the dollar. The effect of such a compromise would eliminate the necessity for the passage of a curative act because the delinquent taxes would be disposed of.

Were we to be in office at the time the legislature meets, we would ask them to pass the legislation heretofore referred to. Of course, we will not be here, and the question for you to decide is whether or not, in view of the situation as we have outlined it, you feel the compromise should be made. We think that, under the provisions of Section 288 of the 1935 Code, you do have the right to compromise, but the expediency of such action is one for you to decide.

In view of the foregoing statements, we feel that we have made the report requested in your letter, and as provided for in Section 288 of the 1935 Code. The writer is authorized to say that this opinion is concurred in by the entire staff of the attorney general's office.

OFFICERS: BOARD OF EDUCATION: FEDERAL CORN LOAN PROGRAM: LEGISLATION: Enabling legislation would be required to permit board of education to participate in federal corn loan program.

December 22, 1938. *Mr. M. R. Pierson, State Board of Education:* We acknowledge receipt of your request for our opinion as to whether or not the Iowa state board of education or the Iowa state college can participate in the federal corn loan program. You state that the board is interested by reason of the fact that certain corn is produced on farms owned by the state for the use and benefit of Iowa state college which, if possible, is desired to be made eligible to the federal program.

Powers of the state board of education, which under the statute is vested with the management and control of the personal property belonging to the state educational institutions, are limited to such as are expressed in the statutes, together with the incidental powers, the exercise of which is necessary to effectuate such expressed powers.

The statutes do not give to the board the power to borrow money or to incumber personal property held by it as security for loans.

We have examined the "corn producer's note" and the accompanying chattel mortgage which, under the corn sealing program are required to be executed as security for the making of the crop loan. After examining the provisions of these instruments, we conclude that the required transaction constitutes a loan of money secured by a chattel mortgage. This conclusion must be reached

notwithstanding the provisions of the agriculture act of 1938, as amended, which under certain circumstances permits the tendering of the security in full satisfaction of the debt.

We conclude, therefore, that enabling legislation will be required to permit the Iowa state board of education to participate in the corn loan program formulated under the authority of the act of Congress referred to above.

Attached hereto is a draft of proposed legislation which would enable the board to participate in the federal crop loan program as follows:

A BILL for an Act to authorize the Iowa state board of education to participate in federal crop loan programs and to this end to borrow money and to incumber crops produced on lands held by the said board.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. The Iowa state board of education is hereby authorized to participate in crop loan programs formulated under the provisions of acts of Congress insofar as such programs may include crops produced upon lands held by the Iowa state board of education for the use and benefit of any of the institutions under the jurisdiction of said board.

Sec. 2. To the extent necessary to permit such participation by the Iowa state board of education, the board shall have authority to borrow money and to mortgage or otherwise incumber said crops and to perform such other acts as may be necessary to effect such participation.

Sec. 3. This act being deemed of immediate importance shall be in full force and effect from and after its publication as provided by law in the ...., a newspaper published at......................, Iowa, and in the..................., a newspaper published at.............., Iowa.

STATE FUNDS: BOARD OF EDUCATION: TRANSFER: OFFICERS: Endowment funds, securities and records may be transferred from department of state treasurer to treasurer of Iowa state college at Ames.

December 27, 1938. *Mr. M. R. Pierson, State Board of Education:* We acknowledge receipt of your request for the opinion of this department upon the following statement of facts which you set out in your letter:

"Upon the suggestion from the staff of the state auditor, an agreement has been reached by the Iowa state college, the state treasurer and the finance committee of the Iowa state board of education for the transfer of the endowment funds, securities, and records from the department of the state treasurer to the treasurer of the Iowa state college at Ames. We would appreciate your opinion as to whether there is any legal obstacle in the way of effecting this proposed transfer."

Prior to the code revision of 1924 by the 40th General Assembly, extra session, the law provided that the proceeds of land grants made for the use and benefit of Iowa state college be paid to the treasurer of state, Section 2409, 1919 Supplement providing as follows:

"The principal of all money so collected must be paid to and held by the treasurer of state, and shall be drawn out only for the purpose of investment, upon the order of the state board of education. The interest or rental collected must be paid at the end of each month to the treasurer of the college, and the agent collecting the same must at the same time file with the secretary of the board an itemized report of the amount collected."

It was also then provided that loans of this fund, which is the permanent endowment fund of the state college, might be made under certain conditions

by the state board of education, paragraph (3), Section 2411, 1919 Supplement providing as follows:

"3. Principal and interest shall be payable to the order of the board at the office of the state treasurer, the notes and mortgages to provide for the payment by the borrower of all expenses, attorney fees and costs incurred in collecting the same."

Section 2412, 1919 Supplement provided as follows:

"Money collected from delinquents shall at once be paid into the state treasury, the principal of the fund to be there kept and drawn out for the purpose of investment as above provided, subject to such restrictions as may be imposed by the executive council. The state treasurer shall make monthly reports to the secretary of the state board of education, showing all payments of principal and interest made, and remit to the treasurer of the college. All interest in his hands, as shown by such report, shall be loaned as other funds, or used to defray the expenses of the college."

It is clear that the above quoted provisions of the old law contemplate that custody of the *principal* of the permanent endowment fund was to be in the treasurer of state. Also the treasurer of state, under such statutes, was required to perform certain duties with reference to the administration of the said fund.

It will be observed that the above provisions vesting custodianship in the treasurer of the college of the *income* from the permanent endowment fund were consistent with the then existing statutes, which provided that the *principal* of such fund should be held by the treasurer of state.

The provisions with reference to the control and management of the endowment funds of the institutions under the jurisdiction of the Iowa state board of education were materially changed by the revision of 1924. Under the present statute, Section 3935, 1935 Code, the authority of the treasurers of state educational institutions has been enlarged, the said section providing in part as follows:

"1. Receive all appropriations made by the general assembly for said institution, and all other funds from all other sources, belonging to said institution.

"2. Pay out said funds only on order of the board of education, or of the finance committee, on bills duly audited in accordance with the rules prescribed by said board."

In view of the foregoing, it is clear that there no longer exists any requirement that the treasurer of state serve as custodian of the permanent endowment fund of Iowa state college. Under the present statute, custodianship of such fund is placed in the treasurer of the institution entitled to the earnings therefrom. There is no existing provision of the statute requiring that the records pertaining to such fund now be held by the treasurer of state, and it is our conclusion, therefore, that such records properly can be transferred to the office of the treasurer of the institution which, under the statute, is entitled to assume custodianship of the permanent endowment fund.

Section 6, Article IX, paragraph (2) of the constitution of the state of Iowa provides as follows:

"The financial agents of the school funds shall be the same, that by law, receive and control the state and county revenue for other civil purposes, under such regulations as may be provided by law."

We have examined the above section, and we are of the opinion that the provisions thereof cannot reasonably be construed as a restriction on the power of the legislature to place the custodianship of the permanent endowment fund in the treasurer of the institution to which the benefits of such fund accrue.

In view of the foregoing, therefore, we conclude that there is no obstacle in the way of effecting the proposed transfer of funds, securities, and records mentioned in your letter from the office of the treasurer of state to the treasurer of the Iowa state college at Ames.

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