State of Iowa
1954

THIRTIETH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1954

DAYTON COUNTRYMAN
Attorney General

Published by the
STATE OF IOWA
Des Moines

PERSONNEL

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FERN G. HULTEN	Secretary
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ATTORNEY GENERALS OF IOWA

1853-1955

NAME	HOME COUNTY	YEARS SERVED
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-

REPORT OF THE ATTORNEY GENERAL

HONORABLE LEO ELTHON

Governor of Iowa

Dear Governor:

In compliance with Section 17.6 of the 1954 Code of Iowa, I herewith submit the biennial report of the Attorney General covering the period beginning January 1, 1953, and ending December 31, 1954.

The opinions printed in the report represent only a minor part of the work of the office during the biennial period. In addition, many advisory opinions were issued in the form of letters to state and county officials.

The department has many duties of an advisory nature in connection with the operations of the State Highway Commission, the State Tax Commission, and the State Board of Social Welfare which, by their nature, cannot be included herein.

The duties of the department also require preparation and appearance in all appeals to the Supreme Court in the criminal cases.

The department investigated many claims against the state, made recommendations thereon to the State Appeal Board and arranged for their proper presentation to the General Assembly.

In submitting this report, I want to express my appreciation to all public officials of the state for their splendid cooperation with this department.

Respectfully submitted,

DAYTON COUNTRYMAN

Attorney General of Iowa

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Officers

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DAYTON COUNTRYMAN

Attorney General of Iowa

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THE

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

BIENNIAL PERIOD

1953-1954

January 8, 1953

SCHOOLS AND SCHOOL DISTRICTS: Office supplies for county superintendent and county board. The county board of education must furnish its own office supplies, but subject to the foregoing, the office space and equipment and items such as furniture, heat, lights and telephone must be furnished by the board of supervisors from the county general fund.

Mr. Earl C. Holloway, Supervisor of County Audits, Office of Auditor of State: We have yours in which you have submitted the following:

"There has been some confusion among the county superintendents [of schools] of the state in regard to what fund the postage, telephone, stationery, equipment, etc. should be paid.

Some of the superintendents contend that it should be paid from county general and others contend it should be paid from board of education fund and have included such items in their budget. They have come to the conclusion because they claim the board of education does certify the amount needed to the board of supervisors and consider their own budget and this separates the board of education from the board of supervisors who have no jurisdiction over the expenditures of the board of education.

Section 332.10 provides as follows:

'The board of supervisors shall also furnish each of said offices with fuel, lights, blank books, and stationery necessary and proper to enable them to discharge the duties of their respective offices, but nothing herein shall be construed to require said board to furnish any county attorney with law books or library.'

Section 273.11 provides as follows:

'The board of supervisors shall furnish at the county seat suitable space for the office of county superintendent and for the officers of the board of education, together with adequate storage space.'

Nothing is said in this section about any office supplies.

Section 273.13 (5) provides as follows:

'The board of education shall: Purchase and provide such general school supplies, school board supplies and other materials as are necessary to the conduct of its office.'

Section 273.13 (10) provides for the budget as submitted by the superintendent and certify same to the board of supervisors.

Section 273.18 (16) provides as follows:

'Powers of superintendent. Prepare and submit a detailed itemized budget for approval of the county board of education prior to the first day of July of each year.'

Nothing is provided in chapter 273.18 under powers and duties of superintendent for an itemized estimate to be filed with the board of supervisors for an appropriation for the office. It would be hard to determine just what supplies should be used for the office and what should be charged to board of education when the superintendent is charged with the duties of taking care of records, reports, documents, correspondence or other school property that may be placed in his charge by the board.

We would refer to rulings under date of December 31, 1947, and January 2, 1948, by your office on this subject.

The question is, what fund should bills for postage, telephone, stationery, equipment, etc. for office of county superintendent and board of education be paid.

Your opinion on the above would be appreciated in order that we may have a uniform accounting for office of county superintendents over the state."

In reply thereto we advise you as follows:

The office of county superintendent's powers and duties have been changed from time to time, including the changes made by the 52nd General Assembly, when, by what is now chapter 273, Code 1950, it established the county school system and created the county board of education, by which agency the county superintendent is now chosen and administers his office within the powers of that body. As far back as 1873 the statutes imposed upon the board of supervisors the duty of providing the county superintendent with offices at the county seat and also the duty of providing such officer with fuel, lights, blanks, books and stationery necessary and proper to discharge the duties of his office. See section 3844, Code 1873. This statute, in substantially that form, has had continuous existence and appears now as sections 332.9 and 332.10, Code 1950. It is noticeable by the enactment of the county school system by the 52nd General Assembly that this statute was not repealed and the obligation therein provided still remains. Insofar as the county board of education is concerned, it has had existence in different forms with differing powers from 1851 to the present time. During the period from 1851 to 1948 the county board, while having statutory status, had for the most part duties advisory to the county superintendent. It so remained until the 52nd General Assembly created the county school system, imposed and granted extensive duties and powers upon the county board of education, provided for the election of its members, and made the office of county superintendent an office under the county board. No provision was made in chapter 273 imposing upon the board of supervisors any duty with respect to providing the county board of education with supplies such as the board of supervisors was required to provide for the county superintendent under the provisions of section 332.10. Nor is the county board of education mentioned in sections 332.9 and 332.10 as an office or official entitled to the supplies detailed in section 332.10. A somewhat similar situation was presented to this department respecting the furnishing of supplies to the county board of social welfare, where, in respect thereto, it was said in an opinion appearing in the Report of Attorney General for 1944 at page 100, as follows:

"Although sections 5133 and 5134 fail to direct the board of supervisors to provide the county board of social welfare with an office, heat, lights, supplies, etc., yet, certainly, it would be an unusual anomoly if the legislature created a county office and did not intend that the board of supervisors should provide it with such necessities. These statutes also do not include the overseer of the poor and yet the board of supervisors furnishes him and his clerical force with an office, supplies, etc. Would anyone seriously contend that the board did not have the duty and right to do so? We think not.

Section 5130, Code of 1939, provides in part as follows:

'The board of supervisors at any regular meeting shall have power: * * * 6. To represent its county and have the care and management

of the property and business thereof in all cases where no other provision is made.'

In the case of Wilhelm vs. Cedar County, 50 Iowa 254, the Supreme Court had occasion to interpret this section. On page 255, the court said:

'No, because the statute does not expressly authorize the board of supervisors to employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty, *it does not follow that they may not have the implied power to do so.* They have the power 'to represent their respective counties, business of the county in all cases where no other provision is made.' Revision, sec. 312: Code, sec. 303. It is the business of the county to collect taxes, and to use all reasonable means to do it. We think, therefore, the board of supervisors had the power to employ the plaintiff to render the service in question.' (Italics supplied.)

It made similar pronouncement in Call vs. Hamilton County, 62 Iowa 448, and in Allen vs. Cerro Gordo County, 34 Iowa 54. In the latter case, the court said:

'But if the power were not thus in direct terms conferred, it would seem that it must be necessarily implied from the power to hold the property.'

It is, therefore, our opinion that the county board of supervisors has implied power to furnish an office and the necessary heat, light, stationery, etc. for its county board of social welfare."

In our judgment the foregoing opinion would furnish the answer to the problem here submitted were it not for the provisions of section 273.13, subsection 5, Code 1950, directing the county board of education to purchase and provide such general school supplies, school board supplies, and other materials, as are necessary to the conduct of its office. This legislative direction would require the foregoing supplies, designated by section 273.13, subsection 5, to be the obligation of the county board of education, to be paid out of the county board of education fund. Such supplies include paper, ink, blanks, pencils, stamps, stationery, typewriters, envelopes, and such other supplies that are required to operate and conduct an office having the specific powers and duties of the county board of education. Subject to the foregoing, the providing of office space (section 273.11) and the furnishing of office equipment other than specified to be paid by the board of education, and items such as office furniture, heat, lights and telephone, are the obligation of the board of supervisors to be paid out of the county general fund.

January 9, 1953

BEER: Violation by employee—status of employer. Where an employee in a beer tavern is convicted of a statute violation which results in the cancellation of his employer's permit, such action does not necessarily result in barring the employer from engaging as an employee of another in the sale of beer.

Mr. R. John Swanson, County Attorney, Red Oak, Iowa: This will acknowledge receipt of your letter of December 9, 1952, in which you describe the following situation:

Prior to December, 1952, a Mr. X held a Class "B" beer permit. In December, 1952, one of X's employees entered a plea of guilty to the

charge of illegal sale of beer to a minor, under section 124.20, 1950 Code of Iowa. As a result thereof the city council revoked X's Class "B" beer permit. However, the city council has now granted X's wife a Class "B" beer permit for the same premises. You ask whether Mr. X will be violating the provisions of section 124.30, 1950 Code of Iowa, if he is employed by his wife to manage or work in the tavern for which she holds the Class "B" beer permit.

Section 124.20, 1950 Code of Iowa, reads in pertinent part:

"It shall be unlawful for any person to sell, give or make available to any minor, or to permit any minor to purchase or consume any beer on the premises of a Class "B" or Class "C" permit holder * * *. * * * A violation of the provisions of this paragraph by any holder of a Class "B" or Class "C" permit or any of his agents or employees in connection with the operation of a beer business under said Class "B" or Class "C" permit, shall be a mandatory ground for revocation of said permit, in addition to other mandatory grounds provided in this chapter."

Under section 124.20, when the employee of X pleaded guilty to the charge of illegal sale of beer to a minor, it was mandatory for the city council to revoke X's Class "B" beer permit. The same city council shortly thereafter granted a Class "B" beer permit to Mrs. X. We must assume that the city council made an investigation and determined that Mrs. X had taken legal and actual control of the premises in question, and that, therefore, Mrs. X was entitled to a Class "B" beer permit. The granting of the Class "B" permit to Mrs. X was properly within the discretion of the city council.

To determine whether Mr. X is eligible to work as an employee in his wife's tavern, we must turn to section 124.30 which reads as follows:

"If a permit holder under the provisions of this chapter, is convicted of a felony or is convicted of a sale of beer contrary to the provisions of this chapter, or is convicted of boot-legging, or who is guilty of the sale or dispensing of wines or spirits in violation of the law, or who shall allow the mixing or adding of alcohol to beer or any other beverage on the premises of Class "B" permittees or who shall be guilty of the violation of this chapter as amended, or of any ordinances enacted by any city or town as provided for in this chapter, his permit shall be revoked by the authorities issuing same, and he shall not again be allowed to secure a permit for the distribution or sale of beer nor shall he be an employee of any person engaged in the manufacture, distribution or sale of beer."

It is obvious that the only portion of section 124.30 which could possibly apply to Mr. X and thereby make him ineligible to work in a tavern is the language "who shall be guilty of the violation of this chapter."

Our courts have often said that the holding of a beer permit is not an inherent right, but rather a privilege granted by the government. Section 124.20, as we have previously seen, provides for the mandatory revocation of that privilege if a permittee's agent or employee sells beer to a minor. However, the Iowa Supreme Court in State vs. Schultz, 50 N.W.2d 9, ruled that while the violation of section 124.20 was ground for the mandatory revocation of the beer permit, the employer might not be guilty of a criminal offense if the violation was committed by said permit

holders' employee or agent. That is the situation which you describe. It should be noted that the Supreme Court in the Schultz case did not state that the permit holder could never be convicted of an illegal sale if the sale was made by an employee. Each individual case must stand on its own facts. The Supreme Court in ruling that the permittee in the Schultz case had committed no criminal offense even though his employee had been found guilty of selling beer to a minor, decided that since the permittee had not been found guilty of a criminal violation that the general penalty section in the chapter, 124.37, 1950 Code of Iowa, did not apply to said permit holder.

Section 124.37 states:

"Any person who violates any of the provisions of this chapter or who manufactures for sale, or sells beer without a permit as provided herein, or who makes a false statement concerning any material fact in submitting any application for a permit, or for the renewal of a permit, or in any hearing concerning the revocation thereof, shall be punished by a fine of not less than three hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail for not less than three months, nor more than one year, or by both such fine and imprisonment. * * *"

Not that the language contained in section 124.37 "Any person who violates any of the provisions of this chapter * * *" is very similar to the disputed language in 124.30 "who shall be guilty of the violation of this chapter." A further study of section 124.30 also reveals repeated use of the words "convicted" and "guilty of violation." Since the Supreme Court has ruled that the language in regard to violations in section 124.37 means criminal violations, it would seem clear that the use of almost exactly the same words in section 124.30 means convicted of certain express criminal offenses and guilty of certain criminal violations under chapter 124.

It would seem that section 124.30 is but a standard for mandatory revocation of a beer permit and for the elimination of the permit holder from the beer business, either as the operator of the business or as an employee of the business when said permittee has been convicted of a criminal violation of chapter 124.

Therefore, it is the opinion of this office that while the violation by Mr. X's employee caused a forfeiture of X's license privilege that this forfeiture was not a criminal violation as contemplated by section 124.30, and that, therefore, since Mr. X has not been convicted of a criminal offense he may be employed by a person or persons engaged in the manufacture, distribution or sale of beer under our present beer law.

City councils and boards of supervisors are cautioned that the aforesaid described situation is abnormal, and applies only in cases in which the employee or agent of the permittee has been found guilty of a criminal offense and in which the permit holder has not been convicted of any criminal violations as are enumerated in section 124.30, 1950 Code of Iowa. However, the conviction of a permit holder of any criminal violation as set out in section 124.30 automatically results not only in the revocation of his beer permit, but his elimination as an employee of any person engaged in the manufacture, distribution or sale of beer.

Furthermore, if in the opinion of the licensing body any blame attaches to the acts resulting in the loss of the permit holder's permit, the local licensing body could, by a proper use of its discretionary powers refuse to issue a permit to the wife, husband or other member of the family of the former permit holder. This is especially true if said former permit holder is to be hired as the manager or employee of the relative who seeks to obtain the permit. See Curtis vs. DeGood, et al., 238 Iowa 877, 29 N.W.2d 225.

January 12, 1953

SCHOOLS AND SCHOOL DISTRICTS: Rural school closed for lack of pupils—procedure. Where a rural independent school is closed for lack of pupils, the matters of transportation to another school, the designation thereof, and payment therefor are discussed.

Mr. William L. Meardon, County Attorney, Iowa City, Iowa: You have requested an opinion of this office as follows:

"One of the subdistricts of Newport township located in Johnson county, Iowa, had a sufficient number of resident pupils to reopen a rural school. This school has been closed in the past. However, one or two families refused to send their children to the rural school which resulted in a reduction in the actual number of pupils available to the extent that the school could not be reopened under the statute.

"The School District of Solon, Iowa, which lies to the north of said township, then decided to maintain a bus line by the residences of some of the families involved. The families now feel that the children must be sent to Solon's elementary school and that the township school board must provide the funds therefor. The school board, however, wishes to know whether or not they must necessarily pay for tuition to a particular school or whether they can designate another school in the district for the pupils to attend. Also, if this power exists, is the school board liable for tuition and transportation costs to Solon when another is available in the district in view of the fact that the Solon school provides bus service on roads running adjacent to the premises of certain families within the Newport district in question?

"Will you please give us your opinion as to the power of the board in this matter and whether or not it is necessary to pay tuition for the pupils attending the school outside the District under the circumstances?"

The question which you present is related to numerous questions which have been submitted to this office involving the statutes which are pertinent to your inquiry. It has also come to the attention of this office that some misunderstanding of prior opinions exist and that in some instances such misunderstanding has led to unwarranted extensions or erroneous application to certain fact situations. Therefore, this opinion will involve a general consideration of said pertinent statutes and certain opinions thereon.

In February of 1952, the following question was presented to this office:

"In the event the board of a rural independent school district, which has no transportation facilities, fails to designate a school for attendance by children of the district residing more than two miles from the school of the district and fails to provide for the transportation of such children

to a designated school are such children entitled to attend a school outside of the district which provides them with transportation, with the cost of transportation and tuition charged to the district of their residence."

In a letter dated February 7, 1952, it was held that under the provisions of subsection 4 of section 285.9, Code of Iowa 1950, the children were entitled to attend the school outside their district, with transportation and tuition paid, by their resident school districts. The said Code provision provides:

"When the local board fails to make designations and other necessary arrangements for transportation, as required by law, the county board shall, after due notice to the local board, make necessary arrangements in conformity with law and established requirements. * * * The arrangements shall be binding on the local board which shall pay the costs for service as arranged."

The opinion in part stated:

"* * * the parent is not required to furnish transportation when the local board fails to do what the law requires. * * * where there is an established bus service available and the local board fails to provide transportation, the parent could lawfully make use of the bus service * * * for his children subject to action by the county board of education."

It is to be noted that under the facts of the case presented the school board of the rural school had failed "to do what the law required." It was not the intent of the opinion that in all cases where a bus route passed by a farm residence, that the children residing on such farm were entitled to ride the bus and attend the school of its district even though the district of their residence was not in default of requirements placed upon it by law. Pertinent requirements are set forth in section 285.1, Code of Iowa 1950, which in part provides:

"285.1 **When entitled to state aid.** 1. The board of directors in every school district shall provide transportation or the costs thereof for all resident pupils attending public school, kindergarten through twelfth grade, who reside more than one mile from the school designated by the board for attendance, except as hereinafter provided. * * *

"c. Elementary pupils residing in a rural independent district, a rural township district, or a consolidated district not operating a central school, when the school in the district or subdistrict is in operation, must live more than two miles from the school in their own district or subdistrict to be entitled to transportation. * * *

"3. In any district where transportation by school bus is impracticable, or where school bus service is not available, the board may require the parents or guardian to transport their children to the school designated for attendance. The parent or guardian shall be reimbursed for such transportation service for elementary pupils by the board of resident district for the distance one way from the pupil's residence to the school designated for attendance at the rate of twenty-eight cents per mile per day irrespective of number of children transported. For high school pupils, the parent or guardian shall be reimbursed forty dollars per pupil per year for such service, provided, however, no family shall receive more than eighty dollars per year for transporting the members of the family who attend high school.

"6. When the school designated for attendance of pupils is engaged in the transportation of pupils, the sending or designating school shall use these facilities and pay the pro rata cost of transportation except that a

district sending pupils to another school may make other arrangements when it can be shown that such arrangements will be more efficient and economical than to use facilities of the receiving school, providing such arrangements are approved by the county board of education."

Subsection 1 of section 285.1 provides that every school district, in the alternative, shall provide transportation or the costs thereof, for all resident pupils residing more than one mile from the school designated by the board for attendance.

Paragraph "c" modifies the subsection in that pupils of the schools mentioned therein who reside within two miles from the school of their district are not entitled to transportation or to have the costs thereof paid.

Subsection 6 of the section provides that in the event the designated school provides transportation facilities such facilities must be used unless more efficient and economical arrangements can be made and are approved by the county board of education.

If school bus transportation to the resident school is unavailable or is impracticable, then under subsection 3 of the section the designating school may require the parent or guardian of any pupil involved to transport such pupil to the designated school. On making such requirement the district of the designating school must pay for such transportation at the per mile rate fixed by the statute.

Nowhere does the statute provide that the designated school must be a school other than the designating school nor is there any mandate that the designated school shall be a school providing bus transportation facilities. On the contrary, the power of discretion of the board of the designating district or subdistrict is clear and express provision is made for payment for transportation service other than school bus transportation.

In the event the resident school is not open, the provisions of section 285.4 apply:

"* * *When a board closes its elementary school facilities for lack of pupils or by action of the board, it shall, if there is a school bus service available in the area, designate for attendance the school operating the buses, provided the board of such school is willing to receive them and the facilities and curricular offerings are adequate. The board of the district where the pupils reside may with the approval of the county board of education, subject to legal limitations and established uniform standards, designate another rural school and provide their own transportation if the transportation costs will be less than to use the established bus service."

Under this section the local board, subject to the conditions set forth, must designate a school affording school bus transportation if such is available, except that, with the approval of the county board another rural school may be designated if transportation arrangements made by the local board to such rural school will cost less than the cost of transportation to the school affording transportation by school bus. Under these provisions the parents of the children living in an area where school bus facilities are offered by a school other than the resident school, may bring about a situation which would result in the closing of the resident school. Thereafter the quoted provisions of section 285.4 would apply. For

example, if the parents of children residing in such an area were to send their children to the school offering school bus facilities, paying the cost of tuition and the cost of transportation, the number of pupils in attendance at the resident school might be reduced to the point that the resident school would necessarily close. Thereafter the children of the district would be entitled to attend the school offering school bus transportation with tuition and transportation paid by the district of their residence.

The effect of the provisions herein considered may be summarized as follows:

1. A district or subdistrict under these sections, which does not provide bus service for children residing more than two miles from the school may designate a school to be attended by such children.

2. The school designated may be the school of the district, the subdistrict, or a school outside of the subdistrict or district.

3. If the designated school does not provide transportation by bus, the board may require the parents or guardians to transport their children to the school designated.

4. The board must reimburse a parent or guardian required to transport pupils at the rate fixed by statute.

5. In the event a school outside of the subdistrict or district is designated which is engaged in the transportation of pupils the designating district shall use these facilities and pay the pro rata costs of transportation unless arrangements are made for the transportation of its pupils to the designated school which arrangements are more efficient and economical than the school facilities and are approved by the county board of education.

6. If the board of the resident school fails to designate a school for attendance or to make arrangements for transportation, such action shall be taken by the county board under the statutes acting in lieu of the local board.

7. If the resident school is closed and school bus transportation is offered to the children of the district, the local board shall designate a school or schools for attendance by the children of the district which provide school bus transportation. However, with the approval of the county board, the local board may designate another rural school which does not provide school bus transportation if the costs to the resident school of transportation is less than the cost of transportation to the school offering school bus service.

The opinion hereinbefore mentioned related to a situation where the local board had neither provided transportation nor agreed to pay the costs thereof. The arrangements hereinbefore discussed which are required by statute had not been made. Had the local board designated the school of its district and required the parent to transport his children, agreeing to make payment therefor at the rate provided by statute, the obligation of the district would have been fulfilled. The district, therefore, would be under no obligation to pay the costs of transportation and tuition to the school of the district whose bus route passed by the residence of the pupils involved.

You are advised that it is the opinion of this office: (1) That the board of a rural independent district, a rural township district or a consolidated district not operating a central school must provide transpor-

tation or pay the cost thereof, for its pupils residing more than two miles from the district or subdistrict school; (2) that if school bus transportation is not provided for any such pupils (unavailable or impracticable) the board may designate a school for attendance; (3) that the designated school may be the school of the district or subdistrict or a school outside of the district or subdistrict; (4) that in the event school bus transportation is not furnished such pupils by the designated school the board may require the parent or guardian of any pupil involved to transport such pupil to the designated school and pay such parent or guardian at the rate fixed by statute; (5) that if bus service is available to the designated school such pupils are entitled to use such facilities unless other more efficient and more economical arrangements are made by the designating board and approved by the county board of education; (6) that the designating school must pay the district of the designated school, tuition and the cost of transportation by bus on a pro rata cost basis; (7) that if bus transportation is not used the cost of other transportation facilities arranged in lieu thereof must be paid by the designating school; (8) that if the board of the resident district does not take action as provided by law the county board shall act in their stead and bind such district by such action; (9) that in the event the resident school is closed the provisions of section 285.4 of the Code apply, under which provisions the local board is obliged, as provided therein, to designate a school affording school bus transportation, or, with the approval of the county board, may designate another rural school provided the cost of transportation to such rural school is less than the cost of transportation to a school affording school bus facilities.

January 12, 1953

SCHOOLS AND SCHOOL DISTRICTS: Appeal to county board—equal division—effect. When there is equal division of the joint county boards of education on appeal, the decision of the county superintendent stands affirmed.

Miss Jessie M. Parker, Superintendent of Public Instruction: An opinion of this office has been requested by your department as follows:

"This office has had several inquiries as to the effect of a tie vote by the members of the joint county boards of education on an appeal under section 276.9.
* * *

"Since it appears that this question will recur with increasing frequency because of the increasing number of consolidations being attempted under chapter 276, we would appreciate your * * * opinion on the matter."

It is a well recognized rule of appellate practice that where the members of the appellate body are equally divided in opinion, the decision appealed from stands affirmed. A majority of the appellate body is required to reverse. (Washington Bridge Co. vs. Stewart, 3 How. (U. S.) 413; The Antelope, 10 Wheat (U. S.) 66; Viele vs. Germania Ins. Co., 26 Iowa 9.)

You are advised that it is the opinion of this office that when there is an equal division of the joint county boards ruling on an appeal under the provisions of section 276.9 of the Code, the decision of the county superintendent is thereby affirmed by operation of law.

January 15, 1953

TAXATION: **Sale for special assessments—procedure where taxes have been suspended.** The county treasurer may advertise and sell real property for delinquent special assessments even though the ordinary taxes have been suspended. The bidder buys subject to the lien of the ordinary taxes. A deed issued upon a sale for general and ordinary taxes extinguishes the lien of special assessments. (Overruling 1940 A.G.O. 411.)

Mr. Max C. Turner, County Attorney, Clarinda, Iowa: This will acknowledge receipt of request for opinion made by your predecessor, Wm. C. Hemphill, in terms as follows:

"The following question has arisen in a controversy between our county treasurer and attorneys practicing within the county.

Where real property has suspended taxes upon it, can the county treasurer advertise and sell such property for a special assessment? If so, can he add the suspended taxes to the special assessment at the time of sale? What if the bidder bids only the special assessments and not the suspended taxes (see OAG 1940 page 502)? Can one get a tax title subject to specific assessments? In this case, how does the county treasurer proceed?"

In reply thereto we would advise you that the foregoing questions involving the rules to be applied in the sale of property for delinquent special assessments where suspended taxes are present, has been the subject of several opinions of this department. However, the only one of these that has considered the exact question here submitted is the opinion appearing in the Report of the Attorney General for 1940 at page 411. It is there stated, based upon the assertion and assumption that a sale for delinquent special assessments will result when deed is issued, in the cancellation of the taxes suspended under section 427.9, Code 1950, unless actual notice of the existence of such suspended taxes is given:

"* * * in the event of a tax sale for delinquent special taxes where the general taxes have been suspended, the tax sale notice should include the general taxes with a notation that the same have been suspended so that the purchaser at a tax sale will receive notice that if he purchases the property for the delinquent special taxes, his certificate will be subject to the lien of the suspended general taxes. If this is done, then the tax deed, which might later issue upon the tax certificate, will not wipe out the suspended general taxes. The situation is somewhat analogous to the case of a tax sale for personal taxes where the property is subject to a prior mortgage and where the tax sale is always subject to the lien of this prior mortgage.

The attorney general's opinion appearing in the 1934 Report of the Attorney General's office at page 398 is not quite applicable in that there the suspension was a voluntary suspension by the board of supervisors. The present statutes making such suspension compulsory when

the owner is the recipient of old-age assistance must not be interpreted to work an extinguishment of suspended taxes.

We feel that with such notice the purchaser at the tax sale for the delinquent special assessments will know that he is only receiving the certificates subject to the lien of the suspended general taxes."

We think the foregoing opinion is erroneous and assign the following reasons for that conclusion:

Sale of property against which delinquent special assessments exist is authorized under section 391.64, Code 1950, in terms as follows:

"**Tax sale.** Property against which a special assessment has been levied for street improvements or sewers may be sold for any sum of principal or interest due and delinquent at any regular or adjourned tax sale, in the same manner, with the same forefeitures, penalties, and right of redemption, and certificates and deeds on such sales shall be made in the same manner and with like effect, as in case of sales for the nonpayment of ordinary taxes."

According to Bennett v. Greenwalt, 226 Iowa 1113, 1135, the right of sale for delinquent special assessments is a right attaching to special assessment certificates. It was there stated:

"These certificates and bonds were contracts entered into by the city of Des Moines and those to whom they were issued. It is a well known rule of law that such stationary provisions become a part of contracts made in reliance upon them just as fully as if they were written into them. The contractors and the purchasers of those certificates and bonds took them in reliance upon the statutory provisions. The legislature knew of these provisions and it is not reasonable to assume that it intended to ignore or defeat them by making the amendment to section 7244 apply to them."

However, when confronted with a situation in which suspended taxes exist upon the property, which also bears a delinquent special assessment, a sale for such special assessment is had, the question of priority between the two liens is presented. As between the lien of a special assessment and a lien of an ordinary or general tax, the priority thereof is fixed by section 391.35, Code 1950, in terms as follows:

"**Lien generally.** Thereupon all special taxes for the cost thereof, or any part of said cost, which are to be assessed and levied against real property, or any railway or street railway, together with all interest and penalties on all of said assessments, shall become and remain a lien on such property from the date of the filing of said papers with the county auditor until paid, and such liens shall have precedence over all other liens except ordinary taxes, and shall not be divested by any judicial sale."

Clearly, the special assessment lien is prior to all other liens on the said property except the lien of ordinary taxes, and this priority, as fixed by the foregoing statute, is preserved when default occurs in the payment of the special assessments and a sale is had thereunder. By reason and authority, special assessment liens do not displace the superior lien of the general or ordinary taxes. The reason why that is so is stated in Iowa Sec. Co. v. Barrett, 210 Iowa 53, 60.

"In White v. Thomas, 91 Minn. 395 (98 N.W. 101), that court used the following language:

'It is further claimed by respondent that the lien of the state for general taxes, after it has become the subject of private ownership, is subordinate to the liens of the city for local assessments. If this means, as we understand that it does, that the purchaser of the lien of the state takes it subject to all then existing liens of the city for local assessments, the claim is clearly wrong. Such a rule would practically emasculate the law giving to the state a paramount lien; for the only way the state can realize on its lien is to sell, subject to redemption, the land upon which the lien rests, to private parties. Now, if the state could not, on such a sale, vest in the purchaser its priority of lien over then existing local assessments, it would be of little practical value to the state; for, in cases where the amount of the local assessment liens approximately equalled the value of the land on which they rested, no one would buy the state's claim. We hold, then, that a purchaser of the lien of the state takes it with its right of priority over all the then existing liens of the city for local assessments, without reference to the time when the state lien attached.'" And stated also by the Supreme Court of Nebraska in the case of Polenz v. City of Ravenna, 18 N.W.2d, 510, 512:

"In the very nature of things a sale under a foreclosure of a first lien cannot be made subject to any other lien, for to do so would be to make the junior lien a senior lien. It would destroy the very purpose of the legislative provisions making general taxes a first lien. They are made a first lien in order that the funds which support the general functions of government may be secured. The lien for general taxes can only be realized by the sale of the property. If the special assessments remain a lien against the land, after sale to satisfy the paramount lien, then it is obvious that the sale value of the property is reduced by the amount of the junior lien. Such a result was not intended. If the special assessments remain a lien after title passes under the foreclosure proceedings, the result would be that the junior lien could then come forward and destroy the title based on the superior lien. Such a result would nullify the very purpose of the tax foreclosure laws.

To make the first lien of general taxes fully effective, the title must pass, as the legislature declares it shall pass, free and clear of all other liens. Anything short of that would nullify the purposes of the law and the foreclosure proceedings."

General or ordinary taxes are suspended under the provisions of sections 427.8 and 427.9, Code 1950. Such taxes are not delinquent taxes upon which a sale can be based. "Suspended taxes are not delinquent for the collection of which property can be sold pursuant to Code section 7244," Thompson v. Chambers, 229 Iowa 1265, 1271. And while it is to be observed that where there is a sale for ordinary taxes, the lien of which is superior to special assessment liens, a tax deed executed and delivered pursuant to such sale destroys the lien of the special assessments, it is also true that a tax sale may be made subject to paramount liens. Such is the rule announced in Flanders v. Inter-Ocean Co., 228 Iowa 926, 930, where it is said:

"We have heretofore recognized that a tax sale may be subject to paramount liens. In the case of Bibbins v. Clark & Co., 90 Iowa 230, 57 N.W. 884, 59 N.W. 290, 29 L. R. A. 278, the tax sale had been had to enforce the lien for personal taxes. We held that such lien was inferior to a mortgage lien which attached before the lien for personal taxes. To the same effect, see Bibbins v. Polk County, 100 Iowa 493, 69 N.W. 1007. In the case of Bittle v. Cain, supra, which involved the same tax sale that is now before us, we held that, since the lien for the taxes had been lost, the sale for such taxes was subject to the lien of a mortgage and refused to permit the holder of the tax title to quiet title against the lien of such mortgage. Accordingly, it is clear that the tax sale was

subject to and did not cut off the lien which is evidenced by appellant's special assessment certificate."

Nor is there a necessity of giving actual notice to a purchaser at a sale for delinquent special assessment of the existence of the lien for prior suspended taxes in order to preserve such priority.

The doctrine of caveat emptor applies to a purchaser at a tax sale, (Hart v. Delphey, 157 Iowa 316, 335), citing the case of Games v. Dunn, 39 U. S. Reports, page 327, where it is stated:

"And the purchaser at such sales is held bound to see that the requirements of the law, which subjected the land to sale for taxes, had been strictly observed. These principles have been repeatedly sanctioned by this court."

In view of the foregoing the opinion appearing in the Report of the Attorney General for 1940 at page 411 is withdrawn. We are of the opinion:

1. That the county treasurer may advertise and sell property for a delinquent special assessment even though there are suspended ordinary taxes levied upon the same property.

2. Sale had upon delinquent special assessments is subject to the lien of the suspended ordinary taxes.

3. The amount of the suspended ordinary taxes not being delinquent may not be added to the special assessment at the time of sale.

4. The bidder at the sale will be able to bid only upon the delinquent special assessments, and will take the property if his bid is accepted, subject to the prior lien of the suspended ordinary taxes.

5. If the ordinary taxes on the property of an old-age recipient are suspended and a sale is had for delinquent special assessments, then under the provisions of section 447.9, Code 1950, a notice of the expiration of the right of redemption is required to be made upon the board of social welfare. In any event, if redemption is not made and a deed issues, the suspended ordinary taxes lose such status, are restored to the tax list, and are due and payable.

In answer to your final question, as is stated in the foregoing opinion, deed issued upon a sale for general and ordinary taxes extinguishes the lien of the special assessment installments and interest then due.

January 15, 1953

SCHOOLS AND SCHOOL DISTRICTS: Hiring adults to direct traffic. The directors of an independent school have authority to hire adults for the purpose of directing traffic on and near the school building and grounds.

Miss Jessie M. Parker, Superintendent of Public Instruction: An opinion of this office has been requested by your department as follows:

"Does the board of an independent school district have authority to hire adults for the purpose of directing traffic in and near the school buildng to provide for safety of the pupils? These services would be for approximately one-half hour before the opening of school in the

morning; during the noon hour and for half or three-quarters of an hour when school closes in the afternoon."

The government of a school is subject to such limitations and prohibitions as may be defined by legislative enactment. Nevertheless the board of directors of a school district being responsible for the management of the affairs of the school necessarily has implied power to make decisions relating to the details of the school. It would be impossible for the legislature to foresee all of the minute problems which might confront a district and to spell out powers with relation thereto. For example, no statutory authority is expressly granted for the employment of janitors and custodians. Such power is found in the general powers of such management groups.

Responsibility for the welfare and safety of pupils is charged to the board. It is their duty to take such reasonable steps as are indicated to discharge this obligation. If a board finds that a hazard to the welfare and safety of the pupils in connection with their school attendance exists, it is within their power to adopt appropriate means to correct or minimize such hazard. A board may find that a traffic hazard exists, and that the logical solution is the employment of responsible individuals to secure the safety of the pupils.

You are therefore advised that it is the opinion of this office that a board of directors of an independent school district has the authority to hire adults for the purpose of directing traffic on and near the school building and grounds to protect the safety of pupils.

January 22, 1953

CORONER: Secrecy at inquest. A coroner's inquest is a public hearing. Secrecy at such hearing is permissible only where decency or public morality demands it.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: Reference is herein made to your request of January 5, in terms as follows:

"The coroner of Polk county, acting under and by virtue of the opinion of the Attorney General expressed in 1927 and published on page 62 of the 1928 Report of the Attorney General, has called an inquest, said inquest to be secret and the public and press excluded therefrom.

The local press has given considerable publicity to the law of other jurisdictions which specifically ban secret inquests, and by means of editorials has presented argument in favor of open inquests.

In view of the passage of time since the opinion referred to above was published and in order that the coroner be adequately protected in exercising his discretion, may I respectfully request your office to render an opinion either affirming or withdrawing the previous Attorney General's opinion which grants the coroner the discretion to hold secret or open inquests?"

In reply thereto we advise you as follows:

Neither the Constitution, nor statute, in specific terms makes a coroner's inquest either a public or a secret proceeding. It is true that

by section 605.16, Code of Iowa, 1950, "All judicial proceedings must be public, unless otherwise specifically provided by statute or agreed upon by the parties." While a coroner's inquest is not a judicial proceeding within the terms of the foregoing statute, and not entitled to be included within the express terms of the foregoing statute, a constitutional provision of South Carolina to the effect that "all courts shall be public" was held by the Supreme Court of that state to include within the spirit of that term a coroner's inquest. In State v. Griffin, 82 S.E. 254, the court was requested to rule on the question whether a coroner is authorized by law to refuse the public the right or privilege of attending an inquest and to hold it in secret if he be so advised, and to that request the court stated:

"Section 15, article 1, of the Constitution, provides that 'all courts shall be public'; and a coroner's inquest comes within the spirit of that provision."

The public character of a coroner's inquest has been stated by Starkie's evidence, 10th Ed., page 402, to be,

"Such inquests are of a public nature, and, taken under competent authority, to ascertain a matter of public interest, are, upon principles already announced, admissible in evidence against all the world. They are very analogous to adjudications in rem. Being made on behalf of the public, no one is properly a stranger to them; and all who can be affected by them usually have the power of contesting them."

Insofar as the state of Iowa is concerned, there appears to be no pronouncement by our Supreme Court, nor by this department respecting the public or private nature of a coroner's inquest, except the Attorney General's opinion to which you refer, appearing in the Report for 1928 at page 62. This opinion states as follows:

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

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

We are of the opinion that the coroner has a right to conduct an inquest the same as any other court. has a right to conduct its affairs and such inquests may be secret if the coroner so elects."

However, it has been held in the case of Kelly v. Shaffer, 213 Iowa 792, that a coroner's inquest is "a quasi judicial proceeding or investigation." According to the statute, chapter 339, Code 1950, its quasi judicial character is evidenced by the following powers bestowed upon the coroner in convening and holding an inquest:

1. He is directed to issue subpoenas for witnesses having knowledge touching the matter of death of the person whose inquest is being held.

2. Such witnesses are required to be sworn in and their evidence reduced to writing under the direction of the coroner subscribed by them.

3. The coroner may enforce the attendance of witnesses and jurors and punish them for contempt in disobeying process and like matter as the justice of the peace may do in criminal proceedings before him.

4. The coroner may, for the purpose of preserving the testimony of witnesses and his acts and doings and that of the jury, appoint a shorthand reporter who, before entering upon his duties as such reporter, is required to take an oath, administered by the coroner, that he will faithfully take down in shorthand the evidence given by witnesses, and that he will correctly extend the same into longhand.

5. The jurors are required to return the verdict in writing, which verdict may be kept secret and not made public until after the arrest of a person whom the jury believe has committed the crime.

The foregoing powers and duties attaching to a coroner's inquest are comparable to the powers and duties bestowed upon the court, and bear a reasonable inference that there was legislative intent that the coroner's proceedings in an inquest are of a public nature. This is quite consistent with the common law view of a coroner's inquest. In McMahon's Practical Guide to the Coroner, Para. 460, quoting from Boys at page 111, states:

"In olden days the impanelling of the coroner's inquest was commonly in the street, or an open place, and in corona populi." But, according to this same authority, this method has long been abandoned by reason of the inconveniences arising from rain, snow, or excessive heat, which made it difficult to proceed, to write and to sit at ease.

The common law characteristics of a coroner's inquest was described in Boehme v. Sovereign Camp Woodmen of the World, 84 S.W. 422, as follows:

"Clearly, therefore, the inquest, under our law, is not necessarily a public proceeding to which any one save the state and the accused is a party. Again, under our statute, there is no mode provided for traversing the finding of the justice who holds an inquest, nor is any method whatever secured for the correction of an erroneous finding. Consequently a post-mortem inquest under our law is lacking in three attributes of such an inquest at common law: (1) It may not be public; (2) no one save the counsel for the state and the accused and his counsel have the right to examine the witnesses; and (3) there is no means by which the finding upon the inquest may be reversed and set aside. Evidently the proceeding is not one in rem, nor does it bear any analogy to such a proceeding. Therefore we are of the opinion that, in providing for a post-mortem inquest under the restrictions above mentioned, it was not the purpose of our lawmakers to give it all the attributes and to attach to it all the consequences of a similar inquest at common law."

The public character of the coroner's inquest is confirmed by 18 C. J. S., page 298, title "Coroners", where it is stated:

"The inquest should be public, and every citizen permitted freely to attend."

The rule is stated likewise in 13 Am. Jur., Paragraph 9, title "Coroners", as follows:

"Right to counsel and to public hearing.—An accused or suspected person has no right to appear by counsel at a coroner's inquest or to cross-examine witnesses, unless such right is conferred by statute. It has been held that an inquest comes within the spirit of a constitutional provision that 'all courts shall be public' and that a coroner is not authorized to refuse the public the right of attending. Under some stat-

utes, however, the coroner, if he deems proper, may hold the inquest in private." Citing in support the text of the Boehme and Griffin cases cited in this opinion. It bears the support of a text writer. Smith's Judicial Decisions and Forms, page 627, states the following:

"Dissection of body.—Whenever a coroner is authorized by law to hold an inquest upon a body, the right to dissect the body exists, so far as such coroner authorizes dissection for the purposes of the inquest, and no further. A post-mortem examination, conducted by surgeons employed by a coroner holding an inquest, is not a part of the inquest in such a sense as that every citizen has a right freely to attend it; no person has a right to be present at such examination, upon the ground that he is suspected of having caused the death. But the inquest proper is a judicial proceeding, and is within the policy of the statute which declares that the sittings of any court within this state shall be public, and every citizen may freely attend the same."

In Crisfield vs. Perine, 15 Hun (New York), page 202, it appeared the plaintiff was excluded by the coroner from the room in which a post-mortem examination was about to be conducted. The court, in consideration of the plaintiff's asserted claim of assault against the coroner, implied plainly the public character of the coroner's hearing by stating:

"The real question in the case, therefore, is whether a post-mortem examination, conducted by surgeons employed by a coroner holding an inquest, is a part of the inquest, in such a sense as that every citizen has a right freely to attend it. We are of the opinion that it is not."

While the foregoing proves the general rule that a coroner's inquest is public, there is, at common law and as we have seen by statute and the case of Boehme v. Sovereign Camp Woodmen, supra, occasions when secrecy is permissible and authorized. At common law, where decency or public morals demand a closed hearing, it would be within the power of the coroner to hold such hearing or such portion thereof in secret. (See McMahon's Practical Guide to the Coroner, Paragraph 479). The field of secrecy does not seem to be enlarged even in common law, except as stated in a note to 13 Am. Jur., Paragraph 9, referring to Bird v. Keep (1918) 2 K. B. (Eng.) 692, 9 B. R. C. 691—C. A:

"It has been held in England that the coroner's inquest in some cases ought, for the purposes of justice, to be conducted in secrecy—that is, there may be cases in which privacy may be necessary for the sake of decency * * *."

We therefore advise you that a coroner's inquest is a public hearing which the public is entitled to attend. Secrecy at such hearing is permissible only where decency or public morality demands it, and even then should be confined to the portion involving decency. This opinion modifies the opinion issued March 7, 1927, appearing in the Report of Attorney General for 1928 at page 62.

January 22, 1953

HIGHWAYS: Jurisdiction over roads adjacent to parks or institutions.

1. The state highway commission and the board or commission in control of any state park or institution have concurrent jurisdiction as to primary highways upon or adjacent to land at the park or institution.

2. As to other highways the jurisdiction conferred on the board or commission in control of such park or institution is exclusive and the board of supervisors has no control over such roads.

Mr. E. F. Koch, Chief Engineer, Iowa State Highway Commission: You have invited attention to the provisions of secs. 3 and 4, chapter 103, Acts of the 54th General Assembly [ch. 306 of the Code], the first of which defines "primary roads," or "primary road system," "state park and institutional roads," and "secondary roads," or "secondary road system." Section 3 confers jurisdiction and control over these three types of roads to the state highway commission, the board or commission in control of any state park or institution, and the county board of supervisors, respectively. Copies of each of these sections are attached hereto for ready reference.

You have invited attention to the fact that both primary roads and secondary roads cross or are adjacent to state parks and state institutions and inquire whether the jurisdiction and control conferred by the statute on the board or commission in control of such institution or state park is exclusive.

The statutory language employed prior to the enactment of the concept expressed by sections 3 and 4, above referred to, did not give rise to this problem. Unusual complications may arise if it be found that the jurisdiction conferred is exclusive, rather than concurrent. For example, section 313.4 of the Code, outlines the specific purposes for which the primary road fund may be expended and these do not include the establishment, construction, or maintenance of state park or institutional roads. It is conceivable that specific appropriations might have to be made by the legislature to provide for either construction or maintenance. This would result in a decided alteration of existing policy and practice. State parks and state institutions are numerous. It is difficult to think of an instance (outside of cities and towns) where such parks and institutions are not contiguous to or crossed by primary roads, not to mention secondary roads.

Chapter 103, *Acts of the 54th General Assembly.*
(See chapter 306, Code 1954)

Sec. 3. **Definition of road systems.** The following words and phrases when used in this chapter or in any chapter of the code relating to highways shall respectively have the following meaning:

1. *Primary roads.* The term "primary roads" or "primary road system" shall include those main market roads and highway traffic arteries, outside of cities and towns, which have been designated as primary roads under section three hundred thirteen point two (313.2), Code 1950, or which may hereafter be so designated as the law may provide.

2. *State park and institutional roads.* The term "state park and institutional roads" shall include those highways, either inside or outside of cities and towns, upon or adjacent to land belonging to the state at any state park or state institution.

3. *Secondary roads.* The term "secondary roads" or "secondary road system" shall include all public highways, outside of cities and towns, except primary roads and state park and institutional roads.

4. *Farm to market roads.* The term "farm to market roads" or "farm to market system" shall include those main secondary roads which have been designated as farm to market roads under section three hundred ten point ten (310.10), Code 1950, or which may hereinafter be so designated as the law may provide.

5. *Local secondary roads.* The term "local secondary roads" or "local secondary road system" shall include all those secondary roads which are not now, or may not hereinafter be, included in the farm to market road system.

Sec. 4. **Jurisdiction—Control.** Jurisdiction and control over the highways of the state are hereby vested in and imposed on (a) the state highway commission as to primary roads; (b) the county board of supervisors as to secondary roads within their respective counties; and (c) the board or commission in control of any state park or institution as to any state park or institutional road at such state park or state institution.

With this brief reference to the serious implications of the problem, we turn to a consideration of the statutory language from which the intent of the legislature must be derived, but before doing so, invite attention to a well recognized rule of statutory construction which requires that, if possible, force and effect be given to all statutory enactments relating to the subject under consideration, in this instance, highways. We shall first consider the problem with respect to primary roads and set forth the provisions of subsection 1, of section 3, as follows:

"*Primary roads.* The term 'primary roads' or 'primary road system' shall include those main market roads and highway traffic arteries, outside of cities and towns, which have been designated as primary roads under section three hundred thirteen point two (313.2), Code 1950, or which may hereafter be so designated as the law may provide."

Turning to section 313.2, which is found in the chapter of the Code relating to primary roads, we find the pertinent part of that section to be the following:

"* * * The primary road system shall embrace those main market roads (not including roads within cities and towns) which connect all county seat towns and cities and main market centers, and which have already been designated as primary roads under chapter 241, Code of 1924; provided, that the said designation of roads shall be, with the consent of the federal authorities, subject to revision by the state highway commission. Any portion of said primary system so eliminated by any changes shall revert to and become a part of the secondary road system provided however that the state highway commission shall first allocate sufficient funds to put the road in good repair or assume responsibility for all necessary repairs. The state highway commission may, for the purpose of affording access to cities, towns, or state parks, or for the purpose of shortening the direct line of travel on important routes or to effect connections with interstate roads at the state line, add such road or roads to the primary road system * * *."

The language of chapter 241, Code of 1924, does not differ materially from the language of section 313.2 above quoted, except that it refers to roads "which have already been designated under section 2 of chapter 249 of the Laws of the Thirty-seventh General Assembly, accepting the provisions of the act of Congress approved July 11, 1916, known as the federal aid road act * * *."

Section 2 of chapter 249 was enacted in 1917, and it provided:

"The state highway commission is hereby authorized and directed to designate and select * * * a sufficient number of miles (of road) to at least require the full appropriation provided for by the federal act during the life of said statute * * *."

It may be stated factually that such a selection was made and that it included many highways abutting upon or crossing state parks and institutions. These roads have been constructed and developed as primary highways with primary road funds and the reference found in the definition of primary roads, given in section 3, to a designation of highways can be traced back, by corresponding reference, to a selection and designation made in 1917 which included highways of state park or institutional character. This seems to make it clear that there was no intention in this recently enacted statute to divest the highway commission of

jurisdiction and control over what had previously been clearly primary highways.

In an opinion of this office dated March 6, 1952, directed to E. W. Adams, county attorney of Marshall county, reference was made to the definition and classification referred to in sections 3 and 4 of chapter 103, Acts of the 54th G.A., without deciding the problem with which we are presently confronted, but the following language was employed:

"Regardless of the board or commission exercising jurisdiction and control over a specific highway it should be readily apparent that the highways of the state are all part of an interlocking network of communication and transportation and from the standpoint of a member of the general public who is seeking to travel from point "A" to point "B" he is not concerned about which of several agencies of the state exercises jurisdiction and control over the road on which he travels, but he is concerned that his travel shall not be interrupted or prolonged by excessive detours or roundabout routes prolonging his journey to his destination, particularly when such diversions might have been caused by the closing of highways, or parts of highways, due to lack of cooperation between the responsible governmental agencies. This statement may seem to somewhat labor the point but it is necessary to understand the necessity for integration, and such necessity highlights the intent of the legislature * * *."

The same thought is somewhat persuasive toward the view that with respect to primary roads impinging upon state parks or institutions the jurisdiction of the highway commission and that of the board or commission in control of the institution are at least concurrent. This thought is strengthened by the language found in chapter 308, Code of 1950, which deals with park and institutional roads. In section 308.4 thereof, with respect to the maintenance and improvement of such roads the following language appears:

"* * * this section shall not be construed as preventing the paving or hard surfacing of any such roads under any other proceeding authorized by law."

No attempt is made at this time to anticipate the result of a possible conflict of authority, for instance, between the state board of education, armed with one plan for the development of Highway 30 past Iowa State College in Ames, and equipped by legislative grant with the necessary funds for such improvement, and a future state highway commission, armed with a different plan and similarly equipped. Such a conflict is highly improbable, but if it should arise you, as chief engineer of the highway commission and ex officio chief engineer of the institutional road district involved, might be able to reconcile such divergent views and avoid the necessity of presenting such a fiasco to this office or to the courts for decision.

With regard to the conflict in jurisdiction as between "secondary roads" and "state park and institutional roads," in the attached copy of section 4, chapter 103, Acts of the 54th G.A. it will be observed that "state park and institutional roads" appears next after the definition of "primary roads," and following in subsection 3, is found the definition of "secondary roads," which are referred to in terms of the first two; that is to say, "all public highways outside of cities and towns, except

(the first two)." Having in this fashion limited the secondary road system to everything except the other two, it becomes apparent that the legislature has specifically excluded "state park and institutional roads" from the "secondary road system."

The jurisdiction and control conferred by section 4, chapter 103, Acts of the 54th G.A., on county boards of supervisors relates only to "secondary roads within their respective counties." From this it must be concluded that irrespective of the situation that may have obtained prior to the enactment of chapter 103, Acts of the 54th General Assembly, sections 3 and 4 thereof divest the board of supervisors of any concurrent supervision over "state park and institutional roads."

Conclusions

1. The Iowa state highway commission and the board or commission in control of any state park or institution have concurrent jurisdiction as to those highways which are extensions of primary highways outside of cities and towns, upon, or adjacent to land belonging to the state at a state park or state institution.

2. As to highways outside of cities and towns, upon or adjacent to land belonging to the state at any state park or state institution, the jurisdiction conferred on the board or commission in control of such park or institution is exclusive, and the board of supervisors has no control over such roads.

February 3, 1953

BANKS AND BANKING: Investment in municipal securities—limited to Iowa securities. The "municipal securities" in which savings banks are permitted to invest funds, capital and deposits is limited to such securities issued by any city, town, county, school district or drainage district in the state of Iowa.

Mr. Newton P. Black, Superintendent, Department of Banking: With reference to your recent request for an opinion as to whether subsection 4, section 526.25, Code 1950, limits the investment of funds of savings banks to securities, bonds and warrants issued by municipalities and governmental subdivisions within the state of Iowa, you are advised:

The pertinent parts of section 526.25, Code 1950, follow:

"526.25 **Investment of funds.** Each savings bank shall invest its funds or capital, all moneys deposited therein, and all its gains and profits, only as follows:

* * * * *

"4. *Municipal securities.* In bonds or warrants of any city, town, county, school district, or drainage district of this state, issued pursuant to the authority of law; but not exceeding twenty-five percent of the assets of the bank shall consist of such bonds or warrants."

Where the statute is written in clear and explicit terms, it is the policy of the courts to regard the statute as meaning what it says and to avoid giving it any other construction than that which the words demand. That is the case here.

It is a cardinal rule of statutory construction that the intent of the legislature must govern.

The legislative intent is made manifest from an examination of the legislative history of Code section 526.25 and subsection 4 thereof which appeared as section 1850 in the Code of 1897, as follows:

"Sec. 1850 **Investment of funds.** Each savings bank shall invest its funds or capital, all moneys deposited therein and all its gains and profits, only as follows:

* * * * *

"3. In bonds or warrants of any city, town, county or school district of this state, issued pursuant to the authority of law; but not exceeding twenty-five per cent of the assets of the bank shall consist of such bonds or warrants; * * *"

Section 1850 of the Code of 1897 was amended by Chapter 78, Laws of the 31st General Assembly, as follows:

"Section 1. **Drainage district bonds.** That section eighteen hundred and fifty (1850) of the code be and the same is hereby amended by striking out after the word "county" the word "or" in the first line of subdivision three (3) of said section, and by inserting after the word "district" in the first line of subdivision three (3) in said section, the words "or drainage district."

It will be noted that the comma between the word "district" and the word "or" in line two of subsection 4 of Code section 526.25 did not appear in the amendment quoted above and must have been inserted by the code editor.

It is manifest that the legislature clearly intended to impose certain geographical limitations. It must follow, then, that the words "city, town, county, school district" as well as "drainage district" are limited by the words "of this state".

It is therefore our opinion, that the words "of this state" limit the investment of funds, capital and money deposited in savings banks to municipal securities issued by any city, town, county, school district or drainage district in Iowa.

February 6, 1953

TAXATION: Homestead credit—attorney in fact acting for owner. An application for homestead credit may be signed under a properly executed power of attorney if the same is attached thereto, but the affidavit required must be executed by the person claiming the credit.

Mr. Ray E. Johnson, Vice-Chairman, State Tax Commission: This will acknowledge your letter in which you submitted the following:

"In making an application for homestead tax credit the applicant is required to make a *verified statement* and designation of homestead as claimed by him all as provided by section 425.2, Code 1950, as amended by chapter 166, Acts 54th General assembly.

We have been informed that for the sake of expediency one assessor has permitted the application for homestead tax credit to be signed by a person designated by the applicant as 'Attorney in Fact'.

The procedure followed is to submit an authorization of a certain person to act as Attorney in Fact and signed by each person so designating that person to act in that capacity. The person so designated then calls at the office of the assessor and signs the individual application for homestead tax receipt for each of the persons so signing the authorization to act as Attorney in Fact.

In view of these facts we respectfully ask for an official opinion as to whether or not application for homestead tax credit may be signed by anyone other than the person entitled to such credit, disregarding the provisions of law relating to members of the armed forces or persons receiving old-age assistance."

The pertinent statutes are section 425.2, which provides:

"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 indorsed thereon; provided, that if the said *verified statement* and designation of homestead is not delivered to the assessor, the person may, on or before July 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 case the owner of the homestead is in active service in the military, naval, or air force or nurse corps of this state or of the United States, such statement and designation may be delivered or filed by any member of the owner's family. The county old-age assistance investigator shall make application for the benefits of this chapter as the agent for and on behalf of persons receiving assistance under chapter 249." And section 425.11 which sets forth certain information which must be contained in the verified statement as is required under the following quoted paragraph (a) of said section:

"The homestead must embrace the dwelling house in which the owner is living at the time of filing the application and *said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed,* * * * *"

A reading of the foregoing statutes directs attention to the fact that a verified statement containing certain information is required to be filed, and that of necessity poses the question as to what is meant by "verified statement".

Section 622.85 of the Code defines an affidavit as "a written declaration made under oath, without notice to the adverse party, before any person authorized to administer oaths within or without the state".

A similar statute requiring a verified statement is section 572.8, Code of Iowa 1950, which relates to mechanic's lien. Our court, in interpreting that statute and the word "verified statement", in the case of Francesconi v. Independent School District, 204 Iowa 307, stated, "A verified claim is one support by oath. Such is the universally accepted meaning of the term." See also Independent School District v. Hall, 159 Iowa 607; McGillivray Bros. v. District Township, 96 Iowa 629; Dalbey Bros. v. Crispin, 234 Iowa 151; Canfield Lumber Company v. Heinbaugh, 184 Iowa 149.

In 39 Am. Jur., Oath and Affirmation, section 13, it is stated:

"While a large liberty is given to the form of the oath, some form remains essential. Something must be present to distinguish between the oath and the bare assertion. An act must be done and clothed in such form as to characterize and evidence it. This is so for the double reason that only by some unequivocal form could the sworn be distinguished from the unsworn averment, and the sanctions of religion add their solemn and binding force to the act. Hence, to make a valid oath, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath."

Also in Crenshaw v. Taylor, 70 Iowa 386, our court held:

"The statute does not require the affidavit to be signed; but it is defined to be a written declaration under oath. This, it seems to us, clearly implies that it should be signed by the affiant. Webster defines an affidavit to be a written statement or declaration under oath, signed by the affiant; and that this is the statutory meaning there can be no doubt. * * *". See also Magney v. Roberts, 129 Iowa 218.

Where a statute requires an affidavit to be made by a particular person his agent or attorney cannot make it. 2 C.J.S., Affidavits, sec. 6. Where a statute requires an affidavit to be made concerning matters peculiarly within the knowledge of a certain person it was held he must make the affidavit himself and one made by an agent would not be sufficient. U. S. v. Bartlett, 24 Fed. Cases 1021.

Under the authorities set out in this opinion, we believe that the affidavit and verified statement must be made by the person claiming the credit. An application might be signed under a proper power of attorney if such authority was attached to the application, but the affidavit of an intention to occupy said dwelling house in good faith as a home for six months or more in the year for which credit is claimed must be executed by the person claiming the homestead tax credit.

We do not believe some person can appear in the assessor's office with a list authorizing him to sign the application and by signing the name of the claimant to such application make a valid claim for homestead tax credit.

Similar statutes are Code section 53.5, relating to application for an absent voter's ballot, and section 324.50, Code 1950, relating to refunds of gasoline tax, and we do not believe anyone would seriously argue that in those instances the legislature intended for anyone other than the voter or claimant to execute the affidavit. The information required under all of these statutes relates to facts concerning which only the person making the affidavit could have the correct knowledge.

We are of the opinion the application must be made in the manner required by the statute in order to constitute a proper claim for homestead tax credit.

The legislature has provided for someone other than the owner making the application and verified statement in only two instances, (1) a person in the military service or (2) an old-age recipient. These are the only exceptions, and this is an indication the legislature did not intend any other. We are of the opinion the application might be signed under a properly executed power of attorney if the same was attached thereto, but the affidavit required by paragraph (a) of section 425.11 of the Code must be executed by the person claiming the credit.

February 17, 1953

STATE EMPLOYEES: Leave of absence for sickness—construction of statute. The word "days" occurring in the statute providing leave of absence of "thirty days" for sickness of state employees is to be construed to mean calendar days and not work days.

Mr. David A. Dancer, Secretary, State Board of Education: You have requested an opinion of this office as follows:

"A question has come up in our office about the interpretation of section 79.1 of the Code in connection with the provision for leaves of absence on account of sickness.

The last sentence of section 79.1 reads 'leave of absence of thirty days per year with pay may be granted in the discretion of the head of any department to employees of such department when necessary by reason of sickness of injury." In your opinion is the word 'days' to be interpreted to mean calendar days or work days?"

Section 79.1, Code of Iowa 1950, provides:

"Salaries—payment—vacations—sick leave. Salaries specifically provided for in an appropriation act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such act, and all salaries shall be paid in equal monthly or semimonthly installments and shall be in full compensation of all services, except as otherwise expressly provided. All employees of the state including highway maintenance employees of the state highway commission are granted one week vacation after one year employment and two weeks vacation per year after two or more years employment, with pay. Leave of absence of thirty days per year with pay may be granted in the discretion of the head of any department to employees of such department when necessary by reason of sickness or injury; unused portions of such leave for any one year may be accumulative for three consecutive years."

Your attention is respectfully invited to the provision in the above quoted Code section "leave of absence of thirty days per year with pay may be granted in the discretion of the head of any department to employees of such department when necessary by reason of sickness or injury."

It is the consensus of judicial authorities that the word "days" means calendar days unless the contrary appears. In Gibson vs. Michael's Bay Lumber Company (Limited) 7 Ont. 746, the High Court of Justice for Ontario said:

"Upon the general question, whether the Sunday is to be reckoned as one of the days to be allowed for, the rule appears to be that 'days and running days mean the same thing, viz.: consecutive days, unless there be some particular custom to the contrary. If the parties wish to exclude any days from the computation, they must be expressed.' "

In Booker et al. vs. Chief Engineer of Fire Department of Woburn, 85 N. E. 2nd. 766, the Supreme Judicial Court of Massachusetts stated:

'It has generally been held that the word "day" when not qualified means a calendar day.' "

In Okanogan Indians, et al., vs. United States, 279 U. S. 655, known as the Pocket Veto Case, the question before the United States Supreme Court was whether under the second clause in section 7 of Article I of the Constitution of the United States, a bill which is passed by both houses of Congress during the first regular session of a particular congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President

nor returned by him to the House in which it originated, becomes a law in like manner as if he had signed it. The Congressional provision reads in pertinent part:

'If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a law.'

Counsel for the petitioners contended that the 'ten days' allowed for the return of the bill may be construed as meaning 'legislative days,' * * * that is, days on which the Congress is in legislative session, * * * and not calendar days. In ruling upon this proposition it was said by the United States Supreme Court:

"There is plainly no warrant for adopting the suggestion of counsel for the petitioners * * * that the phrase 'within ten days (Sundays excepted),' may be construed as meaning, not calendar days, but 'legislative days', that is, days during which Congress is in legislative session — thereby excluding all calendar days which are not also legislative days from the computation of the period allowed the President for returning a bill. The words used in the Constitution are to be taken in their natural and obvious sense (citing cases), and are to be given the meaning they have in common use unless there are very strong reasons to the contrary. (Citing cases.) The word 'days', when not qualified, means in ordinary and common usage calendar days. This is obviously the meaning in which it is used in the Constitutional provision * * *. There is nothing whatever to justify changing this meaning by inserting the word 'legislative' as a qualifying adjective."

Nothing appears in section 79.1, Code of Iowa 1950, to indicate that the legislature intended that the word "days" should be given any meaning other than the meaning it has in common usage. Adopting the language of the Supreme Court of the United States is may be said with reference to section 79.1 of the Code that there is nothing whatever to justify changing this meaning by inserting the word "working" as a qualifying adjective.

You are therefore advised that it is the opinion of this office that the word "days" occuring in the language "Leave of absence of thirty days per year" in the said section 79.1 is to be construed to mean calendar days.

February 23, 1953

SCHOOLS AND SCHOOL DISTRICTS: Transportation by bus—pupils leaving bus to walk. There is no law which prohibits a child departing from a school bus and walking part of the way to school. The claim of the district for transportation refund is not affected by such practice.

Mr. Gifford Morrison, County Attorney, Washington, Iowa: By letter dated February 19, 1953, you have requested an opinion of this office as follows:

"(1) Is it lawful for a child to ride a school bus part way, then at a given corner depart from the bus and walk the remaining distance to school?

(2) What responsibility would rest upon the transporting district in case of mishap to the child during the distance the child walks?

(3) What claim could the district make for transportation refund

as indicated in section 285.2, since there was not complete transportation to and from school each day?

In the case at hand the school board is entering into a written agreement and waiver signed by the parents of two boys who apparently desired to walk about one mile instead of taking such a long additional ride on the bus."

School bus operation is controlled by statute and by rules adopted by the district board. There is no statute which prohibits a pupil passenger from leaving the bus before it has arrived at the school house terminal. However, it is properly within the purview of a school board to adopt rules and regulations with relation to pupil passengers on school buses, and such boards have the power to adopt a rule that pupils transported to school in a school bus may not leave the bus until it has arrived at the school terminal.

A complete answer to your question 2 would involve anticipating all factual possibilities which could arise. This opinion can go no further than to treat with propositions of law which bear upon the question. Such a waiver as is mentioned in your letter would be a contractual waiver. It is the rule under the modern doctrine relating to contracts of infants that contracts made by infants are voidable. The infant is permitted, when he has become of age, to determine what contracts are and what are not for his interest, and on that basis to ratify or avoid them. The infant's lack of power to contract is not affected by the fact that the contract was made with the approval of the infant's parent or that the contract was made by the infant and his parents. (Bombardier vs. Goodrich, Vt. 110 A. 11; Cain vs. Garner (Ky.), 185 SW 122).

An infant is not bound, as a general rule, by a contract made for him or in his name by another person purporting to act for him, unless such person has been duly appointed his guardian or next friend and authorized by the court to act and bind him. (Cain vs. Garner, supra.) It follows that a waiver executed by the parents of an infant can only be effective to bind the parents and cannot bind the infant. Therefore, any liability which might be incurred in the absence of a waiver, would continue to exist as to the infant notwithstanding the waiver.

A school district is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools. Having such status, it is the generally accepted rule that such a district, or its directing board, as such, or a municipality in charge of local schools, is not liable for torts. The functions of the school district are principally governmental although it has been held that a school district may engage in functions of a proprietary nature, and when so engaged it may be liable for its torts. It is the majority rule that a school district is immune from liability for injury arising from the operation of its motor vehicles (Hibbs vs. Independent School District of Green Mountain, 218 Iowa 841, 251 N.W. 606), and from liability for injuries to pupil passengers being transported to and from school in buses. However, some authorities hold that a school district engaged in the transportation of pupils from outside of the district performs a proprietory function, if the district is paid for such transpor-

tation. Other authorities regard such act as a governmental function, in view of the concept that a district is an instrumentality of the state performing a function of state government.

Regardless of whether school districts are liable for torts committed in the operation of motor vehicles or in the transportation of pupils generally, drivers and operators of school buses, whether acting as employees of the district or as independent contractors, are, as a rule, held liable for injuries resulting from their negligence in the course of transportation of pupils. (78 C.J.S. p. 1337, Montonick vs. McMillin, 225 Iowa 442.) In Cartwright vs. Graves, 184 S.W.2d 373, it was held that the relationship between a school bus driver and the children entrusted to him demands a special care proportionate to the age of the child and its ability or inability to care for itself; and in determining the driver's liability, the child's age and consequent ability or inability to look after his own safety after alighting from a bus are the dominant factors. In Rankin vs. School District No. 9, 23 Pac. 2d, 132, the Oregon Supreme Court held that a school district is not liable for injuries caused by negligent operation of a school bus, if acting in a governmental capacity, but must respond in damages if functioning in a proprietory capacity. It can only be concluded that where the question is open a school district may be found to be operating in a proprietory capacity while transporting pupils from outside of the district and that if so found, tort liability may result.

With relation to your question (3) attention is invited to the pertinent provisions of section 285.2 of the Code:

"Reimbursement shall be for the school year preceding that in which it is made on the basis of thirty dollars per pupil per annum in a district (1) transporting an average of one hundred twenty-five pupils per day, (2) its vehicles traveling 160 miles per pupil per year, and (3) having a road condition index of 1.40. To determine the amount of reimbursement to which a district shall be entitled and shall receive, adjustments from the foregoing standard shall be made and the amount determined in the following manner, to-wit:

1. * * *

2. Adjustments for mileage:

a. An increase of a base of eighteen dollars by three cents per year for each mile of vehicular travel in excess of 160 miles per pupil per year.

b. A decrease of a base of thirty dollars by three cents per year for each mile of vehicular travel less than 160 miles per pupil per year."

The claim of the district for transportation refund under the foregoing code provisions would not be affected by the fact that a pupil or pupils may walk a part of the distance to the school terminal. The computation to be made under section 285.2 of the Code, is on the basis of the mileage from the point where the pupil is to be taken aboard on the trip to school to the school terminal and return from the terminal to such point, times the number of such trips. The fact that a pupil may not use the school bus transportation at times such as periods of illness, or may leave the school bus before their trip is completed, is not a factor to be considered.

You are advised that it is the opinion of this office:

1. That a waiver signed by the parents of children is not effective to preclude an infant from maintaining a cause of action which would have existed had there been no waiver.

2. The question of legal liability of a school district for injuries sustained by pupils being transported by buses of the district has never been ruled upon by the Supreme Court of Iowa in any of its aspects. Therefore, this opinion must be confined in view of the conflict of authorities and the many possible factual situations which might alter a general rule, to the conclusion that a school district may be liable for injuries to pupils arising from the transportation of pupils on their way to school and on their return home.

3. There is no law which prohibits a child from departing from a school bus and walking a part of the way to school. A school board may adopt a regulation prohibiting such practice.

4. The claim of the district for transportation refund under the provisions of section 285.2 of the Code, is not affected by the fact that some pupils may not take full advantage of the facilities available.

February 26, 1953

SCHOOLS AND SCHOOL DISTRICTS: Formation of independent district of less than 200 persons. A village having a population of less than 200 persons, which constitutes a part of a consolidated school district, cannot form an independent school district.

Mr. R. A. Griffin, Department of Public Instruction: By recent letter an opinion has been requested of this office upon a statement of facts and question which may be summarized as follows:

A consolidation of several independent school districts was recently completed under the provisions of chapter 276 of the Code. One of the independent districts included a village having a population of 130 persons. May this village now establish an independent district under the provisions of section 274.23 of the Code?

The Code section referred to in your inquiry (274.23, Code 1950) provides:

"Upon the written petition of any ten voters of a city, town, or village of over 100 residents, to the board of the school corporation in which the portion of the city or town having the largest number of voters is situated, such board shall establish the boundaries of a proposed independent district, including therein all of the city, town, or village, and also such contiguous territory as is authorized by a written petition of a majority of the resident electors of the contiguous territory proposed to be included in said district, in subdivisions not smaller than the smallest tract as made by the government survey in the same or any adjoining school corporations, as may best subserve the convenience of the people for school purposes, and shall give the same notices of an election as required in other cases."

The question then is whether the provisions of the said section 274.23 are appropriate to the formation of an independent school district by a village having a population of 130 persons, when such village constitutes a part of a duly organized consolidated school district. An examination

of this question must involve a consideration of section 274.2 of the Code, which provides:

"When provisions of law relative to common schools shall apply alike to all districts, except when otherwise clearly stated, and the powers given to one form of corporation, or to a board in one kind of corporation, shall be exercised by the other in the same manner, as nearly as practicable. But school boards shall not incur original indebtedness by the issuance of bonds until authorized by the voters of the school corporation."

It should be noted that in Chambers vs. Housel, 211 Iowa 314, 233 N.W. 502, the Supreme Court in part stated:

"By the enactment of section 4190 (274.2 Code 1950), the legislature has made all of the provisions of law relative to common schools applicable to consolidated school districts. No exception is recognized." (Parenthetical reference supplied).

This categorical proposition does not appear warranted in view of other pronouncements of the court. In State vs. Board of Directors, 148 Iowa 487, an action of mandamus had been brought to compel the certification of taxes by the officers of three independent school districts which were named as defendants. The defendants answered and filed cross-bills. The real controversy in the case was between the defendants. It involved the conflicting school districts over disputed territory. Proceedings had been held under section 2794a of the Code to organize the consolidated independent district of Herdland, Iowa. The district so formed included 7½ sections of the territory of the pre-existing district of Webb, Iowa. The result was the reduction of the territory of the district of Webb to 12½ sections. The district of Webb contended in the case that such action was illegal in that under existing statutory law the district of Webb was guaranteed a continuing territory of not less than 16 sections. The Herdland district contended that it was entitled to take territory from the district of Webb if it did not reduce the area of the Webb district to less than four sections. The proceedings under which the Herdland Consolidated District has been effected were by virtue of section 2794a of the Code. This section provided in pertinent part:

"When a written description describing the boundaries of contiguous territory containing not less than 16 government sections within one or more counties is signed by one-third of the electors residing on such territory and approved by the county superintendent, if one county, and by the superintendents of each, if more than one county, and by the State superintendent if the county superintendents do not agree, and filed with the board of the school corporation in which the portion of the proposed district having the largest number of voters is situated, requesting the establishment of a consolidated independent district, it shall be the duty of said board within ten days to call an election in the proposed consolidated independent district * * * at which meeting all voters residing in the proposed independent district shall be allowed to vote by ballot for or against said separate organization * * * but no school corporation from which territory is taken shall, after the change, contain less than four Government sections, which territory shall be contiguous and so situated as to form a suitable corporation."

The Webb district had been organized in the year 1907 under this same section of the Code. The Herdland district was organized one year later. The question in the instant case arises under different Code

sections than those which presented the issues in the cited case. However, analogy is found in the two cases in that each case involves the question whether the area of an established consolidated school district may be violated by the formation of a new school district including a part thereof. In the cited case the district court held that the District of Webb was entitled to maintain all of its territory and that the District of Herdland was therefore illegally organized. The holding of the lower court was affirmed by the Supreme Court of Iowa by operation of law as a result of equal division on the proposition. The Supreme Court did not enter contrary opinions supporting each division thereof, but entered an opinion summarizing the reasons in support of each view of the case. The Supreme Court said in part:

"* * * it is to be considered that the statute in question was enacted to meet the demand for authority to consolidate small county districts into a single large one. This manifest purpose naturally calls for such reasonable construction of the statute as will effectuate it. This gives much force to the argument that the provisions of the statute which permit the change of boundaries so as to reduce the area of an organized district to a minimum of four sections is applicable only to the other forms or kinds of districts, and is not intended to permit encroachment to such extent upon a consolidated district duly created."

It is pertinent to observe that since the ruling in the foregoing case the legislature has acted to place the provisions governing the organization and dissolution of consolidated districts in a separate chapter of the code. By act of the 40th Extra General Assembly a separate chapter treating with consolidated school districts was created. This fact was considered significant by the Supreme Court of Iowa in Cook, et al., vs. Consolidated School District of Truro in Madison and Warren counties, 240 Iowa 744, 38 N.W. 2d, 265. In an opinion of the Attorney General dated August 17, 1927, Report of the Attorney General, 1928, it was held that the provisions of section 4133, Code of 1924, were not applicable to consolidated school districts, and that therefore a consolidated school district could not be dissolved by changing the boundaries under the provision of the said section. The Attorney General said:

"In the statute relating to consolidated independent school districts as set out in chapter 209, Code of Iowa, 1924, section 4818, provision is made for the manner of dissolution of consolidated independent school districts. We refer to sections 4188-9 which we shall not quote herein."

"We are, therefore, of the opinion that the boundary lines of a consolidated independent school district cannot be changed under the provisions of section 4133 in such manner as to dissolve the district and that the only manner such district can be dissolved is under the statutory regulations hereinbefore cited."

In adding territory by following the same procedure as was followed in the establishment of a consolidated school district all of the electors of the consolidated district have an opportunity to vote. In the formation of an independent school district under the provisions of section 274.23 of the Code, only the electors residing in the proposed independent district have an opportunity to vote upon the proposition affecting the entire consolidated district.

In determining the intent of the legislature, in addition to the signifi-

cance of the creation of a separate chapter relating to consolidated school districts it is pertinent to examine the provisions of the Code relating to the formation of such districts with particular reference to voting thereon. Most pertinent to the question here presented is section 276.13, Code of Iowa, 1950:

"When it is proposed to include in such district a school corporation containing a city, town, or village with a population of 200 or more inhabitants, the voters residing upon the territory outside the limits of such school corporation shall vote separately upon the proposition to create such new corporation."

Under section 276.13 urban entities of less than 200 population are not given the right to vote separateely on the question of consolidation. The courts have recognized that it has long been the policy of the legislature to improve the educational opportunities of children residing in small school districts where it was economically impossible to afford the benefits available in financially strong districts. This policy undoubtedly explains why the legislature did not give urban entities of less than 200 population the right to vote separately in the first instance. The policy is emphasized in the statement set forth in section 275.1, Code of Iowa, 1950:

"It is hereby declared to be the policy of the state to encourage by the granting of state aid the reorganization of school districts into such units as are necessary, economical and efficient and which will insure an equal opportunity to all the children of the state. In comformity to the county administration act passed by the Fifty-second General Assembly, the county board of education in each county of the state shall initiate detailed studies and surveys of the school districts within the county and territory adjacent thereto for the purpose of promoting such reorganization of districts by unions, mergers, reorganizations or centralization as will effect more economical operation and the attainment of higher standards of education in the schools."

To permit the secession of a village of 130 persons from a consolidated school district would be in direct conflict with the expressed policy of the legislature and would, therefore, give effect in the application of statutes which was contrary to the legislative intent.

In Cook vs. Consolidated School District, supra, 240 Iowa 744, 38 N.W. 2d 265, the Supreme Court of Iowa in holding that when a school district being enlarged is a consolidated independent school district, the applicable provisions of chapter 276, dealing with consolidated school districts, should be followed, stated:

"The movement back of the establishment of consolidated schools was promoted by definite reasons and purposes. It is essentially a rural school, in its territorial aspect, and is intended and is maintained to give better school quarters and educational facilities to the children in rural territory. The city, town, and village independent schools were not ordinarily situated to furnish these advantages. They could be more effectively obtained by a consolidation of the numerous subdistricts, into a single, compact, larger district, affording one taxing unit and a larger tax return. Its needs differed in particulars from those of the urban school, especially in the transportation of pupils. It may include urban territory or it may be entirely rural.

* * * * *

"In the case before us the defendants attempted to enlarge an existing consolidated district, as impliedly authorized by section 274.27, Code

1946, by following the provisions of sections 274.23 and 274.24 of said Code which apply to independent city, town, and village districts. The plaintiffs contended that under the decisions of this court, and under the implied authorization of said section 274.27 the enlargement of the defendant district, which is a consolidated district, should be effected by compliance with the provisions of chapter 276, applicable to consolidated districts, rather than by following the provisions of sections 274.23 and 274.24 of chapter 274, affecting independent districts in cities, towns, and villages. * * *

"* * * Statutes having to do with consolidated districts from their inception in 1906 have progressed and improved over many years through the legislative labor of many General Assemblies and the efforts of many workers interested in rural schools, until they comprise the provisions of chapter 276. * * *

"It is not probable that the various legislatures participating in the enacting of consolidated school legislation intended that it should be bypassed in the manner contended for by defendants, and that owners and occupants of land involved be deprived of these legislative provisions."

In the Cook case the lower court had held that the legislature intended that the statutory provisions for the initial forming of consolidated school districts set forth in chapter 276 should be used in the enlargement of such districts and that the provisions of chapter 274 relating to the enlargement of the area of school districts were not applicable. The Supreme Court sustained the lower court.

As to the ruling in Chambers vs. Housel, supra, the Supreme Court said:

* * * "the ruling to the first division of the opinion relied upon by the defendants (Chambers vs. Housel) is unsound."

You are advised that it is the opinion of this office, upon the reasons herein set forth, that a village having a population of less than 200 persons which constitutes a part of a legally established consolidated school district, cannot form an independent school district under the provisions of section 274.23, Code of Iowa, 1950.

March 3, 1953

CREDIT UNIONS: Amendments to bylaws—approval—directors' powers and limitations. The superintendent of banking may withhold approval of amendments to the bylaws of a credit union, even though couched in the words of the statutes. The board of directors has no authority over the credit committee, except to set a maximum on a loan to any applicant and all actions of the board must be within the limits of the bylaws and statutes.

Mr. Newton P. Black, Superintendent, Department of Banking: This is in reply to your recent letter as follows:

"Some complaints have been made by certain credit unions that the opinion of your office of August 27 with reference to certain suggested amendments to credit union bylaws is uncertain as to the authority of the board of directors granted by subsection 6 of section 533.9, Code of 1950.

"An opinion is requested supplementing your opinion of August 27 with reference to the power of the board of directors to set maximum loans with and without security and whether or not this department

may withhold approval of certain proposed amendments to credit union bylaws, or is this department required to give its approval to such proposed amendments when the proposed amendment is in the language of subsection 6 of section 533.9 of the Code?

"Your opinion is further requested as to whether or not the limitations placed on the directors by the bylaws are controlling in case there is a conflict between the action of the board of directors and the bylaws of the union."

The question here involved is the supervisory power of the superintendent of banking. Supervision of credit unions is required by section 533.1, Code 1950, which makes the superintendent of banking responsible for the execution of laws of this state relating to such unions and provides that he shall approve the bylaws or amendments thereto before they become effective. The need of supervision is recognized by Bridewell on Credit Unions at page 58 et seq. Bridewell states that a supervisory committee should be elected by the membership of a credit union and be responsible to no one but the membership. That is not the case in Iowa, as Code section 533.9 makes the appointment of the auditing committee a duty of the board of directors. Hence the independent and impartial supervision of the directors, officers, and committees, to effect the safeguarding of assets and interest of the many members of such unions, must be exercised by the office of the superintendent of banking. Code section 533.6 so provides.

The functions and duties of the directors and officers of the credit unions are designated in Code section 533.9, which section requires that the directors elect a credit committee and an auditing committee. Section 533.10 defines the duty of the credit committee and section 533.11 enumerates the powers of the auditing committee. There is little authority on the law relating to credit unions but what comments are available clearly spell out the division of duties between the board of directors, officers and committees. See Hardy on Consumer Credit and Its Uses at page 41.

The statutes and comment of the text writers indicate that the duties of the credit committee and the board of directors are distinct; that the credit committee is supreme in its field and cannot be interfered with by the board of directors, except insofar as the bylaws and subsection 6 of section 533.9 permit the directors to set the maximum individual loan which may be made with or without security. The provisions of that section mean that the board of directors may set the maximum amount, within the limits circumscribed by the bylaws and statutes, which any member may borrow. It does not authorize the board to designate who may borrow or the amount which may be loaned to a certain individual borrower. The credit committee has direct control and supervision of all loans to members. Such supervision is not within the province of the directors.

We said in our opinion of August 27, 1952, "It is not necessary for us to comment on the suggested amendments, as the question of approving the proposed changes are questions of the policy which are within the sole province of the superintendent of banking." You ask, may the banking department withhold approval of certain proposed amendments

to credit union bylaws where the proposed amendments are in the language of subsection 6 of section 533.9, Code 1950. It is evident that the wisdom of incorporating subsection 6 of section 533.9 in the bylaws is a matter within the discretion of the superintendent. For the reasons stated in our opinion of August 27th, the superintendent may, with propriety, withhold approval of bylaws which merely quote the law.

The bylaws required by subsection 7 of section 533.1 of the Code, 1950, are essential in the organization and operation of a credit union and have a definite function; they limit the powers of the union and its officers within the scope of the law. The statutes provide the legal framework within which the details of operation must be formulated. It is these details that are to be incorporated into bylaws. A mere statement of the statutory framework would leave, in each instance of supplying the details, the question whether such detail was in fact within the statute. The maximum authority which the law allows may be and often is curtailed by the bylaws.

The answer to the question with reference to the limitations placed on the directors by the bylaws is so patent as to need no comment. The bylaws are controlling. They are a desideratum which may be neither dispensed with nor ignored.

For the reasons herein stated, it is our opinion that the superintendent of banking may withhold approval of proposed amendments to the bylaws of a credit union, even though those amendments may be couched in the words of the statutes; that the board of directors have no authority or control over the credit committee, except to set a maximum amount which the credit committee may loan to any applicant, within the limits permitted under the bylaws or section 533.16, Code 1950, and that all actions of the boards of directors must be within the limits prescribed by the bylaws and statutes.

March 12, 1953

SCHOOLS AND SCHOOL DISTRICTS: Abandoned sites — reversion. Matters relating to the reversion of abandoned schoolhouse sites discussed. (Modifying 1912 A.G.O. 729).

Mr. William L. Meardon, County Attorney, Iowa City, Iowa: By recent letter you have requested an opinion of this office relating to "reversion" of schoolhouse sites. We submit an opinion on the following questions:

1. Does section 297.15, Code 1950, create a reversionary interest in land.

2. Are the provisions of section 297.15 of the Code and the provisions of subsection 2 of section 278.1 in conflict?

3. Are the provisions of section 297.15 applicable regardless of whether the site was purchased or condemned?

4. To whom does the word "owner" in the phrase "shall revert to the then owner of the tract from which the same was taken," contained in section 297.15, refer?

5. In the event the original tract from which the schoolhouse site was taken is subsequently divided in ownership in such a manner that two or

more persons are owners of individual tracts abutting on the schoolhouse site, what are the rights of such parties in the "reversion" of the schoolhouse site?

6. What is the effect of a covenant of reversion in a deed in which a school district is the grantee of land to be used as a schoolhouse site?

Attention is invited to the provisions of section 297.15, Code of Iowa 1950:

"Any real estate owned by a school corporation situated wholly outside a city or town, and not adjacent thereto, and heretofore used as a schoolhouse site, and which, for a period of two years continuously has not been used for any school purpose, shall revert to the then owner of the tract from which the same was taken, provided that said owner of the tract last aforesaid shall, within the time hereinafter prescribed, pay the value thereof to such school corporation."

The provisions of the foregoing Code section are not to be construed as casting title upon the owner of the tract from which the schoolhouse site was taken, as a matter of law. These provisions amount simply to an option to purchase upon fulfilment of the specified conditions. Waddell vs. Board of Directors, 190 Iowa 400, 175 N.W. 65. The section creates a statutory right of repurchase. Maxwell vs. Custer, 238 Iowa 1306, 30 N.W. 2d, 177. No vested interest results. Independent District of Des Moines vs. Smith, 190 Iowa 929, 181 N.W. 1.

Section 278.1, Code of 1950, provides in pertinent part to the questions here examined:

"278.1. The voters at the regular election shall have power to:
1. * * *.
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 provisions of subsection 2 of section 278.1 are not in conflict with the provisions of section 297.15 of the Code. In an opinion of the Attorney General dated July 6, 1912, Report of Attorney General, 1911-12, p. 729, it was held that the school district would have the right to sell the land and buildings subject to the right of the owner of the tract from which the land was taken to exercise his option after the expiration of a two year period of nonuser for school purposes. This opinion must be modified in view of a subsequent opinion of the Supreme Court of Iowa. In Maxwell vs. Custer, supra, it was held that section 297.15 and section 278.1 are not in conflict and that each statute has its appropriate field of operation. In that case the Supreme Court ruled that where a school had been permanently closed it was not necessary to await the expiration of a nonuser period of two years, but that the right of repurchase "by the owner" accrued at the time that the school was permanently closed and that the school site could be sold under the provisions of 278.1, reserving, however, the statutory right of the owner to exercise his repurchase option upon performance of the conditions specified in the statute at the time the property was offered for sale.

The provisions of section 297.15 of the Code are applicable regardless of whether the schoolhouse site was acquired by purchase or by condemnation. Waddell vs. Board of Directors, supra.

The language "shall revert to the then owner of the tract" which is contained in section 297.15 of the Code, refers to the person who is the owner of the tract when the abandonment becomes complete. Waddell vs. Board of Directors, supra.

In the event the tract from which the schoolhouse site is taken is thereafter divided in such manner that different individuals become the owners in fee of separate parcels each of which abuts upon the schoolhouse site, each will take that part of the schoolhouse site which abuts upon and is parallel to his tract. In other words, the portion of the schoolhouse site which each such owner would have an option to repurchase is that portion which would be enclosed by projecting the boundary lines of his tract which are perpendicular to the boundary line which abuts the schoolhouse site. The statutory conditions to be performed are those conditions appropriate to the part taken by each "owner". Each owner will pay the appraised value of his portion of the site under the provisions of section 297.18 of the Code. The "owner" whose portion includes improvements must comply with the statutory provisions relating to the improvements. In the event buildings overlap the individual portions neither such owner could exercise his option unless the value thereof were paid to the school corporation. It is obvious, as a practical matter, that such adjoining owners must necessarily arrive at an agreement relating to payment for overlapping improvements. The statutes in effect at the time of abandonment are controlling, rather than the statutes in effect at the time the schoolhouse site was acquired. Independent School District vs. Smith, supra.

The provisions of section 297.15 exist at the suffrance of the legislature. Independent School District vs. Smith, supra. They grant the privilege of an option which would not otherwise exist. Considering these propositions of law it is apparent that it was the intent of the legislature to make provision for repurchase when the site was acquired by condemnation or by deed which reserved no reversion. Although an opinion of the Attorney General dated June 7, 1905, Report of the Attorney General, 1906, p. 288, held that the provisions relating to reversion upon abandonment were a restriction upon the powers of a school district and would nullify any reversion provisions of a deed, that opinion is superseded by subsequent announcements of the Supreme Court which are in direct contradiction thereof. In Dvorak vs. School District Township of Dodge, 237 Iowa 442, 22 N.W. 2d 238, the Supreme Court of Iowa said with reference to the validity of a reversion provision, "The deed was one which the parties had a right to make." The court further held that the provision was a convenant running with the land. In that case the lower court held at the trial that the provision for reversion in the deed was valid and binding. The court further ruled that the improvements belonged to the school district and that such district had the right to make arrangements for removal and to exercise such right within a reasonable time. The judge who entered the decree died while a motion to set aside the ruling and decree and to grant a new trial was pending. Another judge of the district ruled upon the motion. The motion was overruled but the decree was amended by changing that portion thereof relating to the removal within a reasonable time of improvements, to

provide that with relation to the improvements the statutory provisions would apply. There was no issue on appeal on that part of the decree relating to improvements. The Supreme Court of Iowa, however, took notice of the original provision and the change made, and approved both procedures. The court granted the district an election to follow either course. It then appears that provisions in a deed for reversion will be given effect so far as the land is concerned in accordance with the terms expressed, and that as to improvements, arrangements may be made for their removal, sale to the reversioner directly, or by following the statutory provisions, if so elected. The law of real property will apply in determining reversionary rights reserved in a deed, and reserved in subsequent conveyances of the tract from which the site was taken.

You are advised that it is the opinion of this office:

1. That the provisions of section 297.15 give rise to an option to purchase with conditions precedent, which exists by statutory grace.

2. That there is no conflict between section 297.15 and subsection 2 of section 278.1, Code of 1950, the result being that the accrual of the purchase option is accelerated when a schoolhouse site is to be sold under the provisions of section 278.1.

3. That no vested interest in a reversion is created by section 297.15 of the Code.

4. That the provisions of section 297.15 apply regardless of whether a schoolhouse site is acquired by condemnation or by deed when the deed makes no provision for a reversion.

5. That the person entitled to exercise the purchase option under the provisions of section 297.15 is the owner of the tract from which the site was taken at the time the right to exercise the option accrues.

6. That a covenant of reverter contained in a deed by which a school district acquired a schoolhouse site, is valid.

March 19, 1953

COUNTIES: Construction of detention home—payment of architect's fees—surplus from levy. Where the voters have approved the construction and equipment of a public building at a maximum amount set out in the ballot, and a tax levied on such authority, all costs of construction except interest, but including architect's fees, must be held within this maximum. Any excess in taxes collected from the levy must be paid to the general fund.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: This will acknowledge receipt of yours of the 11th inst. in which you submitted the following:

"We have some puzzling questions regarding the construction of a proposed addition to the Polk county Juvenile Home. The writer has discussed these questions with Mr. Denmar Miller, our county budget director, and he is collaborating with me in submitting these questions to you.

"At the general election held in this county November 5, 1946, the following question was submitted to the voters of the county:

'Shall Polk County, Iowa, construct and equip an addition to the Polk county, Iowa Detention Home and School for dependent, neglected

and delinquent children at a cost not to exceed the sum of $150,000.00, and levy a tax upon the taxable property of Polk county, Iowa, in the year 1947, an amount to pay for the same, said tax levy not to exceed one mill?"

"This question carried at the election. The tax levied, pursuant to the vote, raised a sum in excess of $150,000.00 and the amount now in the fund, after payment of the cost of a preliminary survey, is $151,323.83.

"Yesterday our board of supervisors opened the bids for the work. The total of the lowest bids for the general construction work, the plumbing and heating and the electrical work, less certain alternates approved by the architect, is $146,420.00. When we add the architect's fees of $8,785.20, the total cost of construction is $155,205.20. This exceeds the amount in the fund above referred to by the sum of $3,881.37. If we do not accept the proposed alternates the deficit will be approximately $3,700.00 more.

"There is another fund under the control of the Polk county board of social welfare in the amount of approximately $6,000.00. We understand that this fund is derived chiefly from the sale of some automobiles owned by our local community chest. In the past, payments have been made out of this fund by the county board of social welfare for various benefits, such as artificial limbs and false teeth, not provided by the normal provisions of our state law for relief to the poor. Two of our supervisors are members of this board of social welfare, consisting of five members, and one of our supervisors has suggested that the county board of social welfare might be willing to contribute from this fund to the cost of the proposed addition to our children's home.

"The architect advises us that it has been customary in a number of school districts in the state to pay the architect's fees from the general funds of the school district, where the proceeds of a bond issue or schoolhouse levy is sufficient to pay the other construction costs but not to pay the architect's fees also. We have not been able to find any specific legal authority for this practice, especially in a case like this one where the people voted for a specific limitation of cost, but we realize we may have overlooked some statute or decision in our hasty search.

"We beg to submit the following questions:

1. Does the county have authority to pay any sum in excess of the funds received from this special levy, for the architect's fees or for any other part of the cost of building the proposed addition?

2. If you answer the previous question in the affirmative, may the county use part of its general fund, part of its emergency fund or part of the proceeds of the levy for the maintenance of the detention home and school, pursuant to Code sections 232.35 and 232.36, for this purpose, or is there any other county fund which may be used to pay the architect's fees or any other part of the cost of the building of this addition?

3. May the board of supervisors accept a gift from the county board of social welfare or from any other source to pay the architect's fees or any other part of the cost of building the proposed addition, over and above the balance remaining on hand as the proceeds of the special tax levied for this purpose?

"Under the provisions for the submission of bids, we are required to accept or reject bids within fifteen days from the date of opening of the bids, that is, on or before March 25, 1953. In view of this fact we will sincerely appreciate a prompt answer to the above questions."

In reply thereto, we would advise you as follows:

1. Note is taken of the fact that the proposition submitted to the electors of Polk county provides as follows:

"Shall Polk county, Iowa, construct and equip an addition to the Polk county, Iowa Detention Home and School for dependent, neglected, and delinquent children at a cost not to exceed the sum of $150,000? "

We are of the opinion that the foregoing direction from the electors fixes a mandatory maximum limitation upon the amount that can be expended to construct and equip the proposed detention home and school. The foregoing rule has the support of the case of Pennington vs. The Town of Sumner, 222 Iowa 1005, 1017, where it appeared that the electors authorized an expenditure for a utility plant in the maximum amount of $115,000.00, but it was the claim made there that the interest on deferred payments would increase the total of the payment to be made in excess of the stated amount of $115,000.00. In holding that the amount stated in the ballot imposed a maximum limitation of expenditure, the court stated:

"The amount stated in the ballot, it is true, imposes limitation upon the municipality in making the contract," holding, however, that the payment of interest is not to be included in the $115,000.00 maximum expenditure authorized. See also Brutsche vs. the Incorporated Town of Coon Rapids, 218 Iowa 1073, 1079; Zerwekh vs. Thornburg, 123 Iowa 254.

And in the annotation appearing in 117 A.L.R., page 895, it is stated:

"The cost of a proposed public improvement, as stated in ballots used in a special election in reference thereto, is a limitation upon subsequent official acts based upon a favorable vote."

2. The maximum cost of $150,000.00 for the construction and equipment of the home includes therein the amount of the architect's fees. This likewise has the support of authority. In Burns & McDonnell Engineering Company vs. Iowa City, 225 Iowa 1241, 1244, where suit was brought to recover for engineering services performed in connection with a proposed municipal light and power plant, it was stated:

"Defendants urge and plaintiff admits in its pleadings and testimony that these engineering services, that were performed by plaintiff and Schwob under the written contract, were a necessary part of the constructing of the plant, and that compensation for such services was necessarily included in and a part of the cost of the establishment and erection of the plant. We agree that such was the case."

This department has previously considered and determined the relationship between the architect's plans and specifications to the construction or erection of a courthouse in the opinion appearing in the Report of the Attorney General of 1922, page 374. It was stated:

"The first question relates to the validity of the action of the board of supervisors in entering into the contract with the architect for the approving and furnishing of plans and specifications for the erection of a courthouse.

"In considering this question it is necessary to determine what relation the plans and specifications bear to the construction or erection of a courthouse. Plans and specifications are a very important part of any major building enterprise. No one would attempt to build a courthouse without plans and specifications. The contract with the architect to draw plans and specifications for the erection of a courthouse is just as much a part of the building project as the contract with the contractor to build and erect a courthouse from those plans. Both contracts are in

the same category. They are inseparable as being integral parts of the building operation."

In view of the foregoing, we are of the opinion that the amount of the architect's fees is a part of the construction cost and payable from the building fund. The use of the general fund for such payment appears not to be authorized, except where preliminary plans and specifications have been made and not used. In such situations, recovery could be had for the reasonable value of the architect's time and labor bestowed upon the making of plans. See Driscoll vs. the Independent School District of Council Bluffs, 61 Iowa 426.

3. The amount of tax dollars, over and above the $150,000.00 secured by the tax levy, is not available for the payment of the architect's fees. This excess is payable into the general county fund. Section 345.15, Code of 1950, provides as follows:

"Surplus of tax. In case the amount produced by the rate of tax proposed and levied exceeds the amount required for the specific object, it shall not for that reason be held invalid, but the excess shall go into the general county fund."

In an opinion of this department appearing in the Report of the Attorney General for 1919-20, at page 657, interpreting the statute as it then existed, it was held to the foregoing view. The statute under consideration there provided as follows:

"In case the amount produced by the rate of tax proposed and levied exceeds the amount sought for the specific object it shall not therefore be held invalid, but the excess shall go into the ordinary county funds."

In quoting the foregoing statute, and section 456, as follows:

"In any county of this state where any special levy has been made to pay any claim, bond or other indebtedness, and the same shall have remained in the treasury of the county, uncalled for, for a period of three years, the board of supervisors of such county may authorize such unclaimed fund to be transferred to the general county fund."

Where the levy for paying for land for a poor farm produced an excess amount over the purchase price, it was said:

"These sections clearly state that the surplus shall be transferred into the general fund. I have been unable to find any statute which would warrant any other disposition than that provided for in the preceding section."

The difference in the language used in the statute quoted in the 1922 opinion and section 345.15 does not, in our opinion, change the legislative intent. The use of excess secured from the tax levy to increase the maximum limitation of $150,000.00 would be a frustration of the plain intent of the legislature evidenced by section 345.15 that the maximum expenditure authorized by the electors is a mandatory limitation upon the board.

4. In view of the foregoing, we deem it unnecessary to answer your question No. 3.

April 7, 1953

COUNTIES: **Change of title certificate—auditor's fee exclusive.** When the clerk of the district court issues a certificate of change of real estate title to the county auditor, he should not charge a clerk's fee for his own service in addition to the auditor's fee.

Mr. C. B. Akers, Auditor of State: Attention Mr. Earl C. Holloway, State Superintendent of County Audits: We have yours of the 23rd inst., in which you submit the following:

"Mr. Leonard Mogren, one of our county examiners who is making an audit of Boone county, finds they have been collecting fees for change of title, to be paid to the county in the same amount as the fees paid to the county auditor.

"We would like to have an opinion on the following question:

'When the clerk of the district court issues a certificate of change of real estate title to the county auditor, as provided in section 558.66, Code 1950, should the clerk charge a fee for his own service, in addition to the fee taxed, collected and paid over to the county auditor?'

"An early reply will be appreciated."

In reply thereto we would advise you that the certificate made by the clerk to the auditor as directed to be made by section 606.14, Code 1950, is in terms as follows:

"Change in title—certification. Where the title of any real estate is finally established in any person or persons by judgment or decree of said court or of the supreme court, or where title to real estate is changed by judgement, decree, will, proceeding, or order in probate, the clerk of the district court shall certify the same, under the seal of said court, to the county auditor of the county in which said land is located."

The duty of the auditor, upon receipt of this certificate, is set forth in section 558.66, Code 1950, as follows:

"Title decree—entry on transfer books. Upon receipt of a certificate from the clerk of the district or supreme court, that the title to real estate has been finally established in any named person by judgment or decree of said court, or by will, the auditor shall enter the same upon the transfer books, upon payment of a fee of twenty-five cents, which fee shall be taxed as costs in the case, collected by the clerk, and paid to the auditor at the time of filing such certificate."

It will be noted that in the latter section the fee for the entry by the auditor of the transfer certified to him is fixed at twenty-five cents which, by amendment provided in chapter 137, section 9, Acts of the 54th General Assembly, has been increased to fifty cents. A specific charge for the service of the clerk in making the certificate is not provided by these statutes.

It appears to be the legislative intent, therefor, that in fixing a specific fee for the auditor for the services to be performed by him and failing to provide a fee for the clerk for his specific duty, the performance of the duty by the clerk should be without cost. It is true that by the provisions of section 606.15, subsection 13, as amended, the clerk is directed to charge a fee of one dollar for the issuing of a certificate and seal, but we are of the opinion that this general statute providing for fees to be charged by the clerk would not control the legislative intent as disclosed

by the statutes herein exhibited, and that the certificate provided therein is not within the class for which a charge can be made. Compare the opinion of the attorney general appearing in the Report of the Attorney General for 1925-26, at page 153.

April 9, 1953

HIGHWAYS: Secondary road districts—basis of percentage of owners—withdrawal. In the establishment of a secondary road assessment district, it is the area involved, and not the lineal frontage which must be considered in determining the percentage. A landowner who has subscribed to such petition may not withdraw after it has been filed even though the board may not have acted thereon.

Mr. Walter J. McCarthy, County Attorney, Maquoketa, Iowa: You recently made reference to an opinion of this office found in 1950 Opinions of the Attorney General, 131, dated January 28, 1950, and requested answers to the following specific questions:

"1. How is the 75% of the owners of adjacent or abutting lands determined? Is the determination linear feet running parallel to the road or number of acres in adjoining land running back a certain distance from the road?

"2. May a landowner who has subscribed a petition under section 311.7 withdraw from the petition after the necessary 50% of the estimated cost has been deposited with the county treasurer before December 1, but before the board of supervisors has acted upon the petition?"

With regard to question number 1, it should be borne in mind that section 311.2 deals with the width of the district and provides as follows:

"311.2 **Width of district.** Any such secondary road assessment district shall be not more than one-half mile wide on each side of the road or roads to be improved by said district. (C24, 27, 31, 35, 39, sec. 4746; C46, sec. 311.3; 53GA, ch 129, Secs. 2, 4)"

This office had occasion to discuss the basis upon which the assessment should be spread in an opinion found in 1950 Opinions of the Attorney General, 85, dated July 29, 1949, and set at page 86.

"It is possible to conceive a situation where land not actually abutting or adjoining the highway might be properly included in the district (if within one-half mile of the road) on the theory that the owner by easement had access to the improvement and sustained some benefits therefrom. That this may be the rule in Iowa is indicated by the case of Frymek vs. Washington County, 229 Iowa 1249, 296 N.W. 467, where in an action for the recovery of damages sustained by the reason of a vacation of the highway, it was considered that the owner of property which did not actually abut thereon but who had an easement across the land of a third party to the land in question might still recover."

Following this line of thought and applying it to the specific problem with which you are concerned it is the conclusion of this office that the area owned rather than the lineal frontage on the highway should be the method employed in determining the percentage of owners whose signatures are required.

Your second question was answered in an opinion of this office dated April 6, 1950, not published as an official opinion. The principles involved

are no different from those enunciated by the Iowa Supreme Court in the case of Zilske vs. Albers, 238 Iowa 1050, 29 N.W.2d, 189, where in an opinion by Mr. Justice Garfield handed down in 1947 the Iowa Court held as follows:

a. Signers of petition for establishment of a consolidated school district may withdraw therefrom at any time before the petition is filed with the officer to whom it is addressed.

b. Signers of a petition for a consolidated school district may not withdraw therefrom after final action is taken.

c. The signing and filing of the petition in proper form is sufficient to confer jurisdiction on the appropriate statutory agency.

d. The withdrawal of the names on a petition for the establishment of a consolidated school district after the publishing of notice of the hearing do not deprive the superintendent and county board of education of jurisdiction to establish the district but should be considered by the superintendent in passing on the merits of the petition.

There is no apparent ground for distinguishing the situation presented by the filing of a petition for the establishment of a secondary road assessment district under the provisions of chapter 311, Code of Iowa 1950, and the situation presented by the filing of a petition for the establishment of a school district as in the Zilske case. The principles announced in the Zilske case must be considered as controlling.

In the Zilske case the court uses the following language:

"It is not necessary to determine whether jurisdiction attaches with the filing of the original petition or upon the giving of notice. In either event, jurisdiction was acquired here before the withdrawal of the 52 signers. And such withdrawal did not deprive defendants of jurisdiction to proceed further."

In the same opinion, however, the court said at page 191 of the Northwestern Reporter:

"Some decisions, including several of our own, hold that jurisdiction is acquired when a petition is filed in proper form. Annotation, 126 A.L.R. 1031, 1057; State vs. Rowe, 187 Iowa 1116, 1121, 1128, 175 N.W. 32; Smith vs. Blairsburg Independent School District, 179 Iowa 500, 508, 159 N.W. 1027; Seivert vs. Lovell, supra, 92 Iowa 507, 61 N.W. 197."

Reference to the annotation in volume 126 A.L.R. is quite persuasive that withdrawal from the petition after filing cannot be made as a matter of right. The case of State vs. Rowe, supra, an opinion by Mr. Justice Weaver handed down in 1919, holds that the filing of the petition confers the jurisdiction. It is difficult to understand how jurisdiction may be lost once it has attached, particularly where as in the present instance certain priorities accrue to the petitioners at the time and by reason of the filing of the petition.

On the strength of this authority the answer to question number 2 would be that the landowner ought not to be permitted to withdraw his name from the petition. Viewing the matter from the standpoint of the law of contracts it should be borne in mind that under section 311.7 Code of Iowa 1950, as amended, where 50% of the money is subscribed and deposited a special assessment district is not established. The subscriptions are accepted in lieu of an assessment but the statute provides that the

board shall otherwise proceed to the improvement of the roads as provided in that section and the priorities are retained. The petition can therefore be treated as a contract between the signers of the petition the consideration for which is provided by the mutual promises of the signers. The law on that subject is well established generally as well as in Iowa. Reference is made to annotations found in 38 A.L.R. 868, 906; 95 A.L.R. 1305, 1312; 115 A.L.R. 589, 592; 151 A.L.R. 1238, 1241. As supporting the rule announced in these annotations appear the following Iowa cases: Burlington University vs. Barrett, 22 Iowa 60, 92 American Decisions 376; Brokaw vs. McElroy, 162 Iowa 288, 50 LRA (NS) 835, 143 N.W. 1087; in re Leigh, 186 Iowa 931, 173 N.W. 143; Y.M.C.A. vs. Caward, 213 Iowa 408, 239 N.W. 41.

It is the view of this office that the landowner who has subscribed a petition under section 311.7, Code of Iowa 1950, as amended, may not withdraw from the petition after it has been filed even though the board of supervisors may not have acted thereon.

April 14, 1953

AIRPORTS: Abolition of airport commission. The failure of the legislature to provide a method of abolition of the office of airport commission, by either the electorate or by the city council, leads to the conclusion that the abolition of such office or discontinuance of its operations is a matter for legislative action.

Mr. Chet B. Akers, Auditor of State; Attention Mr. C. W. Ward, Supervisor: This will acknowledge receipt of yours of the 25th ult. in which you submitted the following:

"In a city where an airport commission was established by an election and the appointment of said commission has been made by the mayor and approved by the council and also has been functioning for a period of years, what is the proper procedure or does the statute provide for a specific method of dispensing with or discontinuing said commission? Should this be done by an official act of the municipal airport commission, or by ordinance, or resolution of the council, or is it necessary that a special election be held?"

In reply thereto, we advise you as follows:

An airport commission is created under the provisions of section 330.17, Code of 1950, which provides as follows:

"**Airport commission—election.** The council of any city or town which owns or otherwise acquires an airport or airports may, and upon petition of ten percent of the number of qualified electors who voted at the last city election shall, at any city election if one is to be held within sixty days from the filing of said petition, or special election called for that purpose, submit to the voters the question as to whether the management and control of such airport, or airports, shall be placed in an airport commission."

Section 330.18 is a provision for notice of the projected election.

Section 330.19 exhibits the form of question to be submitted to the voters, as follows:

"**Form of question.** The question to be submitted shall be in the following form:

'Shall the City (or Town) of ..... place the management and control of its airport (or airports) in an airport commission?' "

Section 330.20 provides for the appointment of the personnel of the commission, if the proposition carries at the election, the term of their respective offices, and other matters in connection with the occupancy of the office. The statute makes no provision for the abolition of the office of airport commission, or for dispensing with or discontinuing the operations of the commission.

The fact the statute is silent with respect to the abolition of the office of airport commission or the discontinuance of the operations of such commission, presents the question, what, if any, method exists to accomplish this result.

There being no specific provision for the abolition of the office of airport commission, or for the discontinuance of its duties, and there being no policy established by constitution or statutes of general application providing for the abolition of an office created by the electorate, by either the electorate which established the office or by city council of a municipality in which the office is created, resort is had to the legislative intent in failing and omitting to legislate in that respect. The applicable rule of interpretation is stated in 50 Am. Jur. entitled "Statutes", paragraph 234, as follows:

"It is a general rule that the courts may not by construction insert words or phrases in a statute, or supply a casus omissus by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said, and which, to all appearances, was not in the minds of the legislature at the time of the enactment of the law however just and desirable it may be to supply the ommitted provision. Under such circumstances, new provisions or ideas may not be interpolated in a statute, or ingrafted thereon. In this respect, it has been declared that it is not the office of the court to insert in a statute that which has been omitted, and that what the legislature omits the courts cannot supply."

Cited in support of the foregoing rule, among other numerous cases, are the following: Eysink vs Jasper County, 229 Iowa 1240, 296 N.W. 376; State vs. Claiborne, 185 Iowa 170, 170 N.W. 417, 3 A.L.R. 392.

The foregoing rule was applied by our Supreme Court in the case of Isbell vs. Board of Supervisors, 54 N.W. 2d 508, where the town of Correctionville had, by vote of the electorate, become part of the county library system. The claim was made that having thereafter established a town library, such fact constituted a withdrawal of the town of Correctionville from the county library system. To that claim the Supreme Court stated:

"When this county library was established Correctionville had no free public library—it was established later. It is not questioned that Correctionville was included within the county library district at the outset. Nothing has happened that constitutes a withdrawal of the town from that district unless the establishment of the town library has that effect. We find no statute which so provides. If formation of a town library is

to constitute a withdrawal of the town from an existing county library district the legislature must so provide. Until it does there is no basis for such holding. Plaintiff's remedy at this point rests with the legislature, not the courts. See Kistner vs. Board, 225 Iowa 404, 414, 280 N.W. 587; In re Estate of Hagan, 232 Iowa 525, 529, 5 N.W. 2d 856, 859; 50 Am. Jur., Statutes, section 234; 59 C.J., Statutes, section 576."

The failure of the legislature, therefore, to provide a method of abolition of the office of airport commission by either the electorate or by city council leads to the conclusion that abolition of such office or the discontinuance of its operations is a matter for action by the legislature and not to be implied from the power to establish the airport commission by the electorate.

April 16, 1953

BRIDGES: County levy for secondary roads—cities controlling bridge levy excluded. County levies for secondary road construction do not include the taxable property in cities and towns since all cities and towns now control their own bridge levies.

Mr. Robert H. Shepard, County Attorney, Mason City, Iowa: This will acknowledge receipt of yours of the 8th inst. in which you submitted the following:

"I request a formal opinion be furnished to me for use by the Cerro Gordo county board of supervisors in connection with the present application of the two foregoing Code sections.

"Section 309.6 provides that the board of supervisors may levy a tax for secondary road construction of not to exceed one-half mill on all taxable property in the county, *except on property within cities which control their own bridge levies.*

"Section 309.11 provides that the board of supervisors may levy their optional tax of not to exceed two mills for secondary road maintenance on all taxable property in the county, *except property within cities and towns which control their own bridge levies.*

"For a number of years, the board of supervisors of this county has been levying taxes in accordance with the two foregoing Code sections. A levy of .487 mills was made on all taxable property, except Mason City corporation, under section 309.6 and a levy of 1.948 mills was made on all taxable property under subsection 1 of section 309.11 of the Code for the 1952 real estate taxes, due in 1953.

"Mason City, Iowa, for a number of years has qualified under section 381.2 as a city making its own bridge levy, and, therefore, the two foregoing taxes for road purposes had never been levied by the county on taxable property within Mason City, Iowa.

"The 54th General Assembly repealed section 381.2 of the Code, effective December 31, 1951, which was the Code section authorizing certain cities, including Mason City, Iowa, to control their own bridge levy.

"I believe in the municipal bills of 1951, enacted by the 54th General Assembly, a separate provision was made for including bridge purposes in the general levy made by a municipal corporation, this provision being in lieu of section 381.2 that was repealed.

"In view of the repeal of section 381.2 providing for cities controlling their own bridge levy. I wish to be advised if property lying within the corporate limits of Mason City, Iowa, must be included in the levy made

for the 1953 taxes, due in 1954, under section 309.6 and subsection 1 of section 309.11 of the Code of Iowa.

"It would appear to me that since Mason City, Iowa, no longer controls its own bridge levy, section 381.2 having been repealed, that they must now levy a tax for secondary roads under the two foregoing Code sections."

In reply thereto we advise you that, in our opinion, the levy for secondary road construction as provided by section 309.6 and the optional levy for secondary road maintenance as provided by section 309.11, both to be made by the board of supervisors, does not include in such levies the taxable property within the city of Mason City. Reasoning to that conclusion follows:

Section 381.2 of the Code of 1950 authorized certain cities described therein to have full control of the city bridge fund levied and collected therein, such statute in terms being as follows:

"Cities controlling bridge fund. Cities of the second class having a population of two thousand or over, which border on or are traversed by a stream two hundred feet or more in width from shore line to shore line, and cities which have a population of forty-five hundred and not exceeding six thousand, and which are traversed by a river and in which there are, within the corporate limits, at least twelve bridges used for general traffic, and cities of the first class shall have full control of the city bridge fund levied and collected therein, and shall use the same for the construction and repair of bridges, culverts, and approaches thereto, and payment of bridge bonds, and interest thereon, issued by such city, and shall be liable for the defective construction thereof and for failure to maintain the same in safe condition. They may use the bridge fund for the construction, reconstruction, maintenance, or repair of viaducts, underpasses or grade crossing separations, and approaches thereto, except those constructed and wholly maintained by any railroad company under the provisions of chapter 387."

The foregoing section was repealed by chapter 159, section 54, Acts of the 54th General Assembly. The bridge levy referred to in section 381.2 was authorized under section 404.3, Code of 1950, which section was amended by the 54th General Assembly by chapter 145, section 98, but which section as amended, together with the whole chapter, was repealed by the 54th General Assembly by chapter 159 and a substitute enacted therefor. The substituted statute, insofar as the money for the construction, maintenance, etc., of bridges is concerned, is section 7 of chapter 159, 54th General Assembly, designated as the "street fund", and provided:

"Municipal corporations shall have power to annually cause to be levied for a fund to be known as the street fund a tax not to exceed seven (7) mills on the dollar on all taxable property within the corporate limits and allocate the proceeds thereof to be spent for the following purposes:" one of which purposes is designated by subsection 8 thereof, "For all bridge purposes;".

It should be observed that the county levy made by the board of supervisors under the provisions of section 309.6 and 309.11 excludes from the levy, property within cities "which control their own bridge levies". The power of the city to control its own bridge fund is a different power from the power of levying and collecting the bridge fund. The repeal of section 381.2 was the repeal of the power of control of the city bridge

fund. It was not a repeal of the power to levy. The power to levy was contained in chapter 404 which has been repealed by the enactment of the substitute contained in chapter 159 of the 54th General Assembly.

The difference between the power to levy and the power to control the fund is illustrated in the case of Murphy vs. Berry, 200 Iowa 974, where action was brought to recover a money judgment against Johnson county and its treasurer by reason of the imposition of an alleged illegal tax. This arose out of the following statutes: Section 758 of the Supplemental Supplement of 1915, provides as follows:

"Cities of the first class and also cities of the second class having a population of 5,000 or over and which are traversed by a stream 200 feet or more in width from shore line to shore line, shall have full control of the bridge fund levied and collected as provided by law, and shall have the right to use the same for the construction of bridges, culverts, and approaches thereto, repairing the same, and paying bridge bonds and interest thereon issued by such city, and shall be liable for defective construction thereof and failure to maintain the same in safe condition as counties now are with reference to county bridges; and no county shall be liable for any such bridge or injuries caused thereby."

Section 1303, Supplemental Supplement, 1915, as amended by chapter 355, Acts of the Thirty-eighth General Assembly, provides:

"The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county: * * *

"4. For making and repairing bridges, not more than five mills on a dollar; but such tax shall not be levied upon any property assessable within the limits of any *city of the first class*, and none of such bridge tax shall be used in the construction or repair of bridges within the limits of such city; provided that in counties having a bonded indebtedness of ten thousand dollars or over the county board of supervisors may levy not to exceed seven mills."

Section 888, Code of 1897, provided:

"*Cities of the first class may annually levy* a tax not exceeding three mills on the dollar, to be known as a city bridge fund."

These statutes were analyzed in the following manner:

"From a perusal of the foregoing it will be seen that a duty rests upon the board of supervisors to make all bridge fund levies, except that *cities of the first class* may levy their own bridge fund. (This is likewise true of cities under special charter, not material here.) Section 758 conferred upon Iowa City, as a city of the second class traversed by a stream, power to *control* its own bridge fund. The power of levying and collecting such bridge fund was left undisturbed in the county authorities, as provided by Section 1303."

The city council of Iowa City did make a levy upon the taxable property of Iowa City for its bridge fund. At about the same time the board of supervisors of Johnson county made a county levy which the county auditor extended to all the taxable property of the county, including that of Iowa City, with the result, as the court states:

"That the taxpayers of Iowa City paid a ten-mill levy for a bridge fund, instead of a five-mill levy to which they were legally subject. The five-mill levy ordered by the board of supervisors was collected from all taxpayers, and no part of it was paid over to the authorities of Iowa City

for expenditure therein. * * * The fact remains that an excess tax for the bridge fund was collected from the taxpayers of Iowa City, to the extent of five mills."

The existing statute situation, then, is this: Sections 309.6 and 309.11, Code of 1950, provide for secondary road levies for construction and maintenance upon all the taxable property in the county, except on property within cities which control their own bridge levies. Chapter 159, section 7, Acts of the 54th General Assembly, provides municipal corporations with power to levy "for a fund to be known as the street fund a tax not to exceed seven (7) mills on the dollar on all taxable property within the corporate limits and allocate the proceeds thereof to be spent for the following purposes", among which is "All bridge purposes". The foregoing statute is not only a levy but its use, among others, for all bridge purposes constitutes control by all cities of the bridge fund, including the city of Mason City.

From the foregoing, therefore, we are of the opinion that all cities and towns now under the provisions of section 7, chapter 159, control their own bridge levies and are therefore within the exception contained in sections 309.6 and 309.11.

May 5, 1953

AUCTIONS: **Licensed and bond—"value" defined.** The statutes requiring a license to auction new merchandise and for a bond, provide that the value is determined by the cost as displayed in the inventory. A new bond is required for each sale.

Mr. Max Milo Mills, County Attorney, Marshalltown, Iowa: We have yours of the 13th inst. in which you submitted the following:

"I am writing this letter requesting an opinion from your office interpreting the below cited sections of House File 27 [Ch 239, Acts 55 G.A.; Ch 546A, Code 1954], at the request of the Marshall county board of supervisors. Your attention is directed to section 3 of this legislation. This section requires the applicant for [auction] license to file bond with the board of supervisors in an amount twice the "value" of the merchandise proposed to be offered for sale as shown by the inventory.

"*Question:* How is 'value' to be determined? Is it cost? It is estimated sale price? Or is it cost plus reasonable percentage mark-up?

"The board of supervisors further propounds the following question:

"Does that sale require a separate bond, or may merchandise auctioneers file an annual, continuous bond? Such a continuous bond would be of greater convenience both through the board of supervisors and to the applicant for permit.

"Your attention is further directed to section 9 of the instant legislation where the term 'value' again appears and requires interpretation. A written opinion interpreting this legislation especially as it applies to the above questions is deemed necessary before the Marshall county board of supervisors can issue the license required by House File 27."

In answer to the foregoing, we would advise you as follows:

1. Section 2 of House File 27, Fifty-fifth General Assembly, provides for the filing of an application in writing by a person, firm or corporation

proposing to sell, dispose of or offer for sale new merchandise at public auctions. Subsection 3 thereof provides as follows:

"A detailed inventory and description of all such new merchandise to be offered for sale at such auction which inventory shall set forth the cost to the applicant of the several items contained in such inventory."

Accompanying such application, a bond with sureties to be approved by the board of supervisors is required to be filed with the board of supervisors. Section 3 of House File 27, in respect to such bond provides as follows:

"At the time of filing said application, and as a part thereof, the applicant shall file and deposit with the board of supervisors a bond, with sureties to be approved by the board of supervisors, in the penal sum of two (2) times the value of the merchandise proposed to be offered for sale at such auction as shown by the inventory filed, running to the state of Iowa, and for the use and benefit of any purchaser of any merchandise at such auction who might have a cause of action of any nature arising from or out of such auction sale against the auctioneer or applicant; the bond to be further conditioned on the payment by the applicant of all taxes that may be payable by, or due from, the applicant to the state of Iowa or any department or subdivision thereof, the payment of any fines that may be assessed by any court against the applicant or auctioneer for violation of the provisions of this Act, and the satisfaction of all causes of actions commenced within one (1) year from date of such auction sale and arising therefrom, provided, however, that the aggregate liability of the surety for all said taxes, fines and causes of action shall in no event exceed the sum of such bond.

In such bond the applicant and the surety shall appoint the chairman of the board of supervisors of the county in which such bond is filed, the agent of the applicant and the surety for the service of process. In the event of such service, the agent on whom such service is made shall, within five (5) days after the service, mail by ordinary mail a true copy of the process served upon him to each party for whom he is served, addressed to the last known address of such party. Failure to so mail said copy shall not, however, affect the court's jurisdiction.

Such bond shall contain the consent of the applicant and surety that the district court of the county wherein the application and bond is filed shall have jurisdiction of all actions arising against the applicant or surety, or both, arising out of said sale.

The state of Iowa or any subdivision thereof, or any person having a cause of action against the applicant arising out of the sale of such new merchandise may join the applicant and the surety on such bond in the same action, or may in such action sue either such applicant or the surety alone."

We are of the opinion that what is value measuring the amount of the bond is determined from the foregoing quoted portions of House File 27. It will be noted that under the foregoing subsection 3 of section 2 the inventory made part of the application is required to set forth the cost to the applicant of the several items contained in the inventory. According to section 3 the penal sum of the bond shall be two (2) times the value of the merchandise proposed to be offered for sale as shown by the inventory filed. It seems quite clear that in the foregoing enactment the legislature used the term "cost" and "value" of the merchandise proposed to be offered for sale interchangeable, and that in using the term value of the merchandise in section 3 "as shown by the inventory"

filed, it could only have meant the cost of the merchandise as shown by the inventory made part of the application provided to be made by the applicant under section 2 of the Act. Confirmation of this view is found in section 9 of House File 27 where the penalty for failure to procure the license is provided by the statement that any person offering merchandise for sale without first securing a license or offering for sale merchandise in excess of the amount and value of the inventories filed with the application for license shall be guilty of a misdemeanor. The only value shown in the inventory is the cost value.

2. In answer to question number two we are of the opinion that an annual continuous bond is not permissible or authorized under the Act. Each sale requires a separate bond. This appears to be the legislative intent. Referring to section 2 of this Act, provisions are there made that:

"Any person, firm or corporation desiring such license shall, at least ten (10) days prior to such proposed auction sale, file with the board of supervisors * * * an application," and the provisions of section 3: "At the time of filing said application, and as a part thereof, the applicant shall file and deposit with the board of supervisors a bond * * * for the use and benefit of any purchaser of any merchandise at such auction."

The clear intent of the legislature as disclosed by the foregoing is that each application shall be accompanied by a bond. A bond for each auction sale is, from the terms of the Act, a prerequisite to each sale. To hold that an annual continuous bond is either permissible or authorized under the Act would require drawing inferences for which no basis in the law is found.

May 21, 1953

FISH AND GAME: Taking rough fish by bow and arrow—deer hunting on one's own land. The conservation commission has authority to permit the taking of "rough fish" by any means found beneficial in promoting conservation, providing such term, "rough fish" has been properly defined. Owners and tenants of land are not required to have a special deer hunting license on their own land.

Mr. Bruce F. Stiles, Conservation Director, State Conservation Commission: This is in reply to your recent letter in which you called our attention to Senate File 18 [Ch 77, Acts 55 G.A., section 109.38, Code 1954], which was enacted by the 55th General Assembly and approved by the governor.

You asked the following questions:

1. Can the commission by its own action permit the spearing of such species as dogfish, gar, quillback and gizzard shad under authority of subsection 1, section 1?

2. Can the commission by its own motion permit the taking of rough fish as mentioned above, and including carp and buffalo, with the use of bow and arrow?

3. Are owners or tenants of land required by Senate File 18 to have a special deer hunting license while hunting on their own land?

The answer to question number 1 depends on whether or not dogfish, gar, quillback and gizzard shad are rough fish. In your letter you stated

that rough fish in Iowa are generally classified as those undesirable or injurious to the management of sport fishery resources. The conservation commission has authority to adopt rules and regulations to effectuate the law. We have examined the 1952 Departmental Rules and find no rule defining rough fish. We believe that it is within the authority of the state conservation commission to make such a rule, not as an order, but as a permanent rule and regulation. It is our opinion that the commission must first define rough fish and name the species which are included therein before we can correctly reach a conclusion as to whether the spearing of dogfish, gar, quillback and gizzard shad would be permissible within the meaning of Senate File 18.

With reference to question number 2, subsection 1, section 1 of Senate File 18 is as follows:

"1. The commission may upon its own motion and after an investigation, altar, limit, or restrict the methods or means employed and the instruments or equipment used in taking deer, raccoon or rough fish, if the investigation reveals that such action would be desirable or beneficial in promoting the interests of conservation, or the commission may, after an investigation when it is found there is imminent danger of loss of fish through natural causes, authorize the taking of fish by such means as they may deem advisable to salvage such imperiled fish populations."

There must a finding of facts by the state conservation commission. If after an investigation the commission, as a matter of fact, determines that the fish named herein are rough fish or unless the commission has adopted a rule defining rough fish, and further finds the taking of such fish by means of bow and arrow would be desirable and beneficial in promoting the interests of conservation, it would then be within the authority of the state conservation commission to authorize the taking of rough fish by bow and arrow.

We now refer to question number 3. Section 110.17, Code 1950, is in part as follows:

"110.17. **License not required.** Owners or tenants of land, and their children, may hunt, fish or trap upon such lands and may shoot ground squirrels, gophers or woodchucks upon adjacent roads without securing a license so to do. * * *"

We find nothing in Senate File 18 which, in any way, alters or affects section 110.17. It must follow, then, that owners or tenants of land are not required by Senate File 18 to have a special deer hunting license while hunting on land owned or leased by the hunter; for subsection 2, section 1, Senate File 18, Acts of the 55th General Assembly expressly permits owners or tenants of land to hunt deer on lands owned or leased by them and, moreover, provides that such permission shall be subject to all other laws and regulations, one of which is section 110.17.

May 22, 1953

THEATERS: Drive-in license by township—amount of fee. The fee of a township license for a drive-in theater should be in such reasonable amount as the trustees should fix, with due regard to the limita-

tion that the fee should not be such an amount as to be regarded as for revenue purposes.

Mr. Ben C. Birdsall, County Attorney, Clarion Iowa: We are in receipt of yours of the 15th inst. in which you submitted the following:

"Please give me an answer to the following question:

On April 24, 1953, you stated in an opinion to me that the only license necessary for the operation of a drive-in theater is that required by chapter 361, Code 1950. Said chapter also provides that, 'in case a license is revoked the licensee should be repaid a pro rata part of the license fee. All license fees to be paid to the township clerk who shall in turn pay the same to the county treasurer * * *. Said fees to be credited to the secondary road maintenance fund.'

Please advise me as to the amount of the license fees which should be paid under this chapter, for drive-in theaters."

In reply thereto we advise you as follows: Chapter 361, Code 1950, treats of township license, including license thereon to any person, firm or corporation, to operate a theater for profit, moving picture shows, which would include a drive-in theater. The chapter, while providing for the necessity of a license, to be issued by the township trustees, for the operation of a drive-in theater, in defining the powers of the trustees in the issuance thereof and prescribing the limitations attached to the license when issued, nowhere vests express power in the trustees to impose a fee for the license applied for and issued. From the language of section 361.5 to-wit:

"In case a license is revoked the licensee should be repaid a pro rata part of the license fee. All license fees to be paid to the township clerk who shall in turn pay the same to the county treasurer who shall issue duplicate receipts therefor, one of which shall be filed with the county auditor. Said fees to be credited to the secondary road maintenance fund." There is an implication that power and authority to require a fee for such license exists. This implication is confirmed by the rule stated in 53 C.J.S., Title Licenses, paragraph 4, to-wit:

"The power to license has been held to include the power to exact a reasonable license tax or fee to defray the expense of regulation."

Cited in support of the foregoing cases from Kentucky, Nebraska, Oregon, Texas, Idaho, Indiana and Montana. Application of this rule to the situation here under consideration vests in the township trustees, who have the power to license drive-in theaters, power to exact and fix a tax or fee for its issuance. The fee should be in such reasonable amount as the trustees in their sound discretion should fix, with due regard to the limitation that the fee should not be such an amount as to be regarded as the issuance of a license for revenue purposes. As indicating the amount thereof attention is directed to the opinion of this department appearing in the 1932 Report of Attorney General, page 130, where it was observed:

"As to the amount of license fees the trustees can charge, we see no reason why they cannot place a license fee of $10.00 on each place."

The amusement there, for which license was applied for, was a miniature golf course.

May 26, 1953

TAXATION: Real estate assessment date—later improvements. Real estate should be assessed as of January 1st, of the year in which it is subject to assessment, and any change in value after that date must be reassessed the following year. (Overruling 1918 A.G.O. 106)

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: This will acknowledge your letter forwarding an inquiry from Mr. Hugh I. Harter, Polk county assessor, relative to the date of taxation of real estate. The question as posed by you is, "Did the Polk county assessor have the right to protest a value as it was assessed as of January 1st and did the board of review have the right to raise the value to bring it equal to adjoining and like properties as of the middle of May when the assessed property had been improved since the January 1st assessment?"

It is to be noted from your letter that the property when valued on January 1st consisted of tracts of land which, subsequent to January 1st and on or about March 1st, were platted into lots and blocks and which platting, in your opinion, effected a change in value of the property.

The pertinent statute is section 428.4, which provides in part:

"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 assessments and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, * * *."

Our search has disclosed two Attorney General opinions on this subject. The 1918 AGO at page 106 holds that there is no definite date fixed and that it is permissible to value and assess real estate as and of any date between the time when the assessment shall begin and be completed; namely, between the day following the second Monday of January and the first day of April. The question was again submitted to the Attorney General in 1940, and, in an opinion appearing in the 1940 AGO, page 517, it was held that, "real estate shall, in real estate assessing years, be assessed as of its value as of the first day of January". We have made a search for authority and have found none other than the case of Churchill v. Millersburg Savings Bank, 211 Iowa 1168, in which case it was contended that under the provisions of Section 428.4, real estate is listed, assessed and taxed year by year for *the period of a year* as of the first of January of each year; that there was no taxation for six months or any fraction of a year. This position was adopted and approved by the Supreme Court in the above cited case.

An examination of section 428.4 discloses that the statute provides *property* (which includes both real and personal 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. The first day of January relates to the name of the owner and not to the taxation of the personal property as of that date. Taxes are assessed

for one year at a time and if an assessor were to assess any time after January 1st such assessment would be for a period of eleven months, ten months or nine months and not for a year which is clearly contrary to the statute.

An examination of some of the taxing statutes; namely, sections 423.10, relating to ice and coal dealers, 428.17 relating to stocks of merchandise, 431.2 relating to corporation stock, 431.7 relating to building, savings and loan associations, and foreign loan companies, 432.1 relating to insurance premiums, 433.1, relating to telegraph and telephone companies, 434.1 relating to railway companies, 436.3 relating to express companies, 438.3 relating to pipeline companies, all provide for taxation as of December 31st of the preceding year or January 1st of the current year, which dates are of course in legal effect the same.

An examination of the taxing statutes provide January 1st as the universal date for the valuation of property and the taxes in every instance are assessed for a period of one year. Attention is further called to the fact that under the express provisions of section 442.2, "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 board of review to meet at the time provided under the terms of section 442.1, 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, * * *." The legislature contemplated that any changes taking place after January 1st, so far as real estate is concerned, which tended to effect a change in value, should be corrected at the time of making the assessment in the following year. In Wagner v. Board of Review, 232 Iowa 58, the assessor in January of 1941 assessed a lot and a building under construction, which building was then 55 per cent completed. An objection was made that such assessment was incorrect and the building was not taxable. The court held that the property and the building so far as completed should be taxed by the assessor as of January 1941.

We are convinced that the 1918 opinion was incorrect and should be and is hereby withdrawn and that the opinion of 1940 was correct and should be approved. We do not believe it was ever the intent of the legislature that the value of property for taxation should depend upon the date when the assessor sees fit to view the property for assessment purposes. We think the rule of January 1st assessment valuation has been universally followed in the state of Iowa for both real and personal property.

The reference to sections relating to taxation set forth in this opinion substantiates our conclusion that January 1st has been accepted as the official date for the assessment of all property. No hardship would result from this rule, for the person who has improved his property after January 1st has presumably been subjected to the moneys and credits tax on the money he had on hand to pay for the improvement on January 1st. To hold otherwise might subject the money used for the improvement and the improvement itself to tax in the same year. In the case of two similar properties, both unimproved on January 1st, and one of which was assessed as of that date and the other two months

later and at a time when it had been improved, would result in an inequitable and unfair tax on the one property for that year. Taxes are assessed for *one year* and unless January 1st is adhered to as a date the assessment would relate to a period less than twelve months rather than to a year as is contemplated under all the statutes referred to in this opinion.

We are of the opinion that real estate should be assessed as of January 1st of the year in which real estate is subject to assessment under the statute, and any change in value after that date must be assessed as provided in section 442.2, Code of Iowa, 1950.

June 11, 1953

COUNTIES: Soldiers relief fund—procedure when fund exhausted. In the event of exhaustion of soldiers relief funds two methods are available to provide additional money: (1) warrants may be stamped "payable from anticipated revenue" or "not paid for want of funds" or (2) money may be transferred from any other available county fund.

Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board: We have yours in which you have submitted the following:

"I am desirous of an official opinion as to the procedure a county soldiers relief commission may take if a sufficient levy has not been made and the available funds are exhausted before the end of the current year for which the levy was made.

I refer you to section 250.12 of the 1950 Code which provides that it is unlawful for the board of supervisors of any county or the soldiers relief commission of any county to place the administration of the duties of the soldiers relief commission under any other relief agency of any county."

In reply to the foregoing we would advise you that in the event of exhaustion of soldiers relief funds two methods are available to provide additional money. The first method, according to opinion of this department, appearing in the Report of Attorney General for 1934 at page 242, the soldiers relief fund constitutes an exception to the Tuck Law, now designated as section 343.11, Code 1950, and where funds are exhausted, warrants may be stamped "payable from anticipated revenue" or "not paid for want of funds". It is there said:

"It is the opinion of this office that the soldiers' relief fund is exempted from the operation of the Tuck Law, for the reason that section 5259-4 does not use the term, 'poor relief,' but specifically provides that it shall not apply to expenditures for the benefit of any person entitled to receive help from public funds.

Your question does not take into consideration the budget law, as contained in chapter 24 of the Code of 1931, and especially section 380. Were it not for an act of the recent legislature, this budget law might prevent the issuance of such warrants against the soldiers' relief fund. However, House File 114 amends section 380 by striking out the words and figures at the end of said section, 'in section 373 and 381,' and substituting therefor, the following, 'in sections 373, 381 and paragraph 4 of section 5259'.

In view of this amendment, we are of the opinion that neither the Tuck Law nor the budget Law prevents the issuance of warrants, pro-

vided that said warrants are issued by the county auditor in disbursing said funds. However, there is no provision which would authorize the relief commission, after receiving a payment from the county auditor, to issue checks in disbursing the funds to an aggregate amount in excess of the anticipated revenue."

Section 380 referred to in the foregoing opinion is now section 24.14, Code of 1950, and sections 373 and 381 are now designated as sections 24.6 and 24.15, Code of 1950. Paragraph 4 of section 5259 is now designated as section 343.11, Code of 1950.

The second available method is provided by section 24.22, Code 1950, which provides as follows:

"Transfer of active funds—poor fund. Upon the approval of the state board, it shall be lawful to make temporary or permanent transfers of money from one fund of the municipality to another fund thereof; but in no event shall there be transferred for any purpose any of the funds collected and received for the construction and maintenance of secondary roads. The certifying board or levying board, as the case may be, shall provide that money temporarily transferred shall be returned to the fund from which it was transferred within such time and upon such conditions as the state board shall determine, provided that it shall not be necessary to return to the emergency fund, or to any other fund no longer required, any money transferred therefrom to any other fund. No transfer shall be made to a poor fund unless there is a shortage in said fund after the maximum permissible levy has been made for said fund."

The soldiers' relief fund, being a county fund, transfer to it can be made from other county funds in accordance with the provisions of the foregoing statute.

June 12, 1953

COURTS: Expense allowance—interpretation. Reimbursement to supreme court judges for governmental expenses is not additional compensation.

Mr. Glenn D. Sarsfield, State Comptroller: This will acknowledge receipt of yours of the 3rd inst. in which you have submitted the following:

"Under provisions of House File 514 [Ch 1, sec 43, Acts 55 G.A.], Section 43, Acts of the 55th General Assembly, members of the Supreme Court have been authorized their expenses in accordance with the provisions of section 605.2, Code of Iowa 1950.

I respectfully request an official opinion as to whether or not this authorization for expenses is payable to the judges during the term they have been elected and are now serving (Article V, section 9 of the Constitution)."

In reply thereto we advise you as follows: House File 514, section 43, Acts of the 55th General Assembly, provides the following:

"Section 605.2, Code 1950, is amended by inserting before the word 'court' in line two (2) thereof the words 'or supreme'."

Section 605.2, Code 1950, as thus amended appears as follows:

"**Expenses.** Where a judge of the district or supreme court is required, in the discharge of his official duties, to leave the county of his

residence or leave the city or town of his residence to perform such duties, he shall be paid such actual and necessary hotel and living expenses not to exceed the sum of six dollars per day and transportation expenses as shall be incurred."

In our opinion the foregoing statute as amended by House File 514 heretofore quoted is not in contravention of the constitutional provisions referred to by you to-wit: Article V, section 9, which provides as follows:

"The salary of each Judge of the Supreme Court shall be two thousand dollars per annum; and that of each district judge, one thousand six hundred dollars per annum, until the year Eighteen hundred and Sixty; after which time, they shall severally receive such compensation as the General Assembly may, by law, prescribe; which compensation shall not be increased or diminished during the term for which they shall have been elected."

Whether provision for allowance of expenses, as herein exhibited, constitutes increased compensation, and therefore, violative of the foregoing constitutional provisions, is determined according to the case of Gallarno v. Long, 214 Iowa 805, 811, by a marked distinction between governmental expenses and mere personal expenses. The former are deemed constitutional and lawful allowances while the latter are deemed unconstitutional and unallowable. Insofar as the expenses authorized by section 605.2, Code of 1950, as amended, the court there said:

"* * * An illustration of such governmental expenses may be found in the case of a district judge who maintains his residence in one county and is required to go to another county in his district to hold court. While traveling to and from, and obtaining board and lodging in, the last-named county, such official is incurring governmental, as distinguished from a personal, expense. * * *"

Comparably, pursuant to the provisions of section 684.5, Code 1950, the Supreme Court shall be held at the seat of government. Judges of the Supreme Court in order to discharge their respective duties as members of that court, and having a residence in a county, city or town other than the seat of government, are required to be at the seat of government to attend sessions of the court. Clearly such judges are constitutionally entitled to be paid their actual and necessary hotel and living expenses, not to exceed the sum of six dollars ($6.00) per day and transportation expenses as shall be incurred, in attendance of court at the seat of government, as authorized by section 605.2, Code of 1950, as amended by House File 514, section 43, Acts of the 55th General Assembly.

June 16, 1953

CIGARETTES: Issuance of permits to nonresidents. Cigarette licenses and permits can be issued by the state tax commission only to distributors, wholesalers, and retailers who have a place of business within the state.

Mr. Ray E. Johnson, Vice-Chairman, State Tax Commission: We have your letter of June 16th in which you submit the following:

"I have examined the cigarette law and note that chapter 98 relates to permits issued by this commission to a distributor, wholesaler and retailer.

"An application has been presented to the commission to issue a wholesaler's permit to a person who is a nonresident and whose place of business is located within the borders of another state. Is there any provision in chapter 98 relating to the sale of cigarettes which would permit the issuance of a permit to a wholesaler who is not a resident of the state of Iowa?"

In reply to your inquiry we set out the following sections:

Section 98.1. "The following words, terms and phrases, when used in this chapter, shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

"13. 'Wholesaler' shall mean and include every person other than a distributor or distributing agent who engages in the business of selling or distributing cigarettes within the state, for the purpose of resale.

"17. 'State permit' shall mean and include permits issued by the commission to distributors, wholesalers, and retailers *within the state.*" (Italics supplied.)

Section 98.13. "1. *Permits required.* Every distributor, wholesaler, and retailer *in this state* now engaged or who desires to become engaged in the sale or use of cigarettes, upon which a tax is required to be paid, shall obtain a state and/or retail cigarette permit as a distributor, wholesaler or retailer, as the case may be.

"5. Said permits shall be issued only upon applications accompanied by the fee indicated above, and by an adequate bond as provided in section 98.14, and upon forms furnished by the commission upon written request. * * * *. Said forms shall set forth:

"b. The principal office, residence, and *place of business in Iowa,* for which the permit is to apply." (Italics supplied.)

A reading of the foregoing sections indicates that permits were to be issued only to Iowa residents, and we find no provisions in the law which would authorize the issuance of a wholesaler's permit to a nonresident of the state of Iowa.

The legislature is its own lexicographer, and under the express provisions of section 98.1, subsection 17, they define a state permit as meaning and including "permits issued by the commission to distributors, wholesalers, and retailers within the state". We find no other definition of a state permit, and a reading of the statute set forth in this opinion will disclose that the legislature contemplated that permits should be issued only to Iowa residents. The state, of course, cannot go beyond its borders and enforce laws enacted by the legislature and, hence, it seems logical that the legislature would confine the issuance of a license to persons located within the state of Iowa, so that they would have some control over the parties to whom such licenses were issued.

We are of the opinion that cigarette licenses can be issued by the state tax commission only to distributors, wholesalers, and retailers who have a place of business within the state of Iowa.

June 26, 1953

TAXATION: Refund of sales and use taxes to governmental bodies. Tax certifying or tax levying bodies of the state, or governmental subdivisions thereof, are entitled to refunds of sales and use taxes on all taxable purchases in connection with the performance of written public contracts for materials which become an integral part of the project where used.

Mr. Martin Lauterbach, Chairman, State Tax Commission: In response to your letter of May 27 making certain inquiries as to House File 44 [Ch 206, Acts 55 G.A.], enacted by the 55th General Assembly, we reply as follows:

First. "Does House File 44 exempt from sales tax, 'the gross receipts from the sales, furnishing or service of gas, electricity, water, heat and communication service' when sold to any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof and used for public purposes?"

The Attorney General's office in an opinion under date of September 24, 1947, appearing in the 1948 AGO at page 85, ruled in detail upon this identical question in construing provisions of House File 229, Acts of the 52nd General Assembly, now appearing as subsections four (4) to seven (7) inclusive, of section 422.7, Code of Iowa, 1950. These provisions were repealed by House File 44, Acts of the 55th G.A., but the opinion rendered upon the prior law would apply with equal strength to the provisions of House File 44, inasmuch as the terminology found in House File 44 is identical with that used in the prior law. It is not necessary to cite in detail here the reasoning upon which the opinion of September 24, 1947 was based nor to repeat the legal citations there presented. We quote, however, the final paragraph of this opinion as follows:

"We, therefore, hold that the words 'goods, wares and merchandise' as used in the sales and use tax refund Act are to be interpreted as having such a broad and general meaning as to cover sales of water, gas, heat and telephone services when such items are purchased by any tax certifying or tax levying body of Iowa or any governmental subdivision thereof and used for public purposes."

Second. "(a) In view of the provisions of subsection 10 of section 422.42, Code of Iowa, 1950, and in view of the provisions of sections 6 and 6A of House File 44, Acts of the 55th General Assembly, is a tax certifying or tax levying body of Iowa or political subdivision thereof entitled to a refund of sales tax or use tax paid by a construction contractor or construction subcontractor, with whom the tax body is dealing concerning material which becomes an integral part of the project where the construction contractor does not have a written contract with the tax body?"

In regard to question (a), House File 44 provides that there shall be no refunds of tax paid by any contractor unless he has entered into a written contract with a tax levying body involved for the performance of a project. Any work done by a subcontractor would necessarily have to be based upon the original written contract with a tax certifying or tax levying body. It would not be material if the subcontractor presented the certification of the amount of refund to which the taxing body would be entitled. Were it presented by the general contractor

the amount of refund would be identically the same. The taxing district would be entitled to this refund on the basis of the original contract regardless of any complications which might result from later subcontracts.

"(b) Where the general construction contractor contracts (Class A) to complete the entire project for a tax body and has his agreement in writing, but sublets a part of the contract to a construction subcontractor who under the subcontract is to furnish all material and erect same for a lump sum amount, is the tax body entitled to a refund of sales tax or use tax paid by such construction subcontractor on the materials he uses even though the subcontractor is not dealing directly with the tax body and even though the agreement between the subcontractor and the general contractor is oral?"

In answer to question (b), the dealings between the general contractor and his subcontractor, whether they were by written contract or oral, would be immaterial in a case of this character. The general contractor would be required to submit, under oath, a statement of all sales or use taxes paid for materials which become an integral part of the project. He would assume the responsibility for the accuracy of all purchases made by himself or by his subcontractor in the performance of the project and, under the provisions of House File 44, would be subject to severe penalties in the event of fraud.

Citing again our opinion of September 24, 1947, we quote:

"Our legislature in the passage of chapter 229, Acts of the 52nd General Assembly, must be presumed to be familiar with the language of the various statutes and likewise informed as to the interpretations placed on said acts by the court. It was undoubtedly the intention of the legislature to grant a refund on all taxable purchases under the provisions of the sales tax and use tax acts when such items were used for public purposes as provided in said law."

The same reasoning as presented above applies to the construction of House File 44. It was clearly the intention of the General Assembly to provide for a refund to a tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof of all taxable purchases made in connection with the performance of a public contract of materials which become an integral part of the project.

"(c) If a written contract is required as a condition precedent for refund, must the agreement be reduced to writing in advance of performance of the contract by the contractor, or may the agreement be reduced to writing at any time before final settlement?"

In regard to question (c), it was clearly the intent of the legislature to safeguard the granting of refunds to taxing bodies of materials used in public contracts by insuring that there should be no laxity in the granting of such refunds. House File 44 was the subject of very serious study of the legislature for several years before it was adopted. This bill was originally recommended to the General Assembly in 1951 by special study committee which recommended a sweeping revision of the laws of Iowa regarding the government of municipalities.

The prior law made no requirement as to written contracts; neither did it make any specific provisions as to refunds to public taxing bodies

of this state of sales tax or use tax paid upon materials used in public contracts referred to in this Act. There can be no question that the provisions of House File 44 as to written contracts were adopted advisedly and intended to be strictly construed.

We are, therefore, of the opinion that in every case where a claim is made by a tax levying body or a tax certifying body of Iowa for a refund under the provisions of House File 44, a definite written contract must have been entered into prior to the performance of any part of the contract. This ruling does not prevent the granting of refunds upon materials purchased prior to the date of the contract by the contractor which were later used in the performance of the contract. To grant refunds upon a contract entered into at the time the job was completed or after it had been partially completed would certainly be contrary to the plain intent of the law.

Third. "What is the final date for certification of claims for such refunds?"

House File 44 provides:

" * * * * all claims for such refunds which are not certified to the state tax commission within thirty (30) days after the last day of the quarter ending next subsequent to the effective date of this Act shall be forfeited and forever barred."

The Act becomes effective July 4th and the last day of the quarter ending next subsequent to the effective date would be the quarter of July, August and September, which would end September 30, 1953. Thirty days after the last day of that quarter would be October 30, 1953, which is the final date on which the claims for such refunds may be certified to the state tax commission, and those not certified on or before that date will be forfeited and forever barred under the above quoted section of House File 44.

July 15, 1953

CHILDREN: Aid does not bar parents from acquiring settlement. Any adult person receiving aid to dependent children, a portion of which necessarily inures to the benefit of such adult, is not, by receiving such aid, barrred from acquiring a legal settlement.

Mr. M. C. Herrick, County Attorney, Indianola, Iowa: In Re: Carrel (Golden) (Sarah); Your letter of recent date has been received by this department, the question asked in said letter being whether a family receiving aid to dependent children, a portion of which inures to the benefit of the adult members of said family, places them in a category of receiving public funds within a contemplation of section 252.16, subsection 3.

The program of aid to dependent children is one of several in which the federal government participates with the state. In order for participation of the federal government, it is necessary that the plan adopted by the states shall be in conformity with the requirements of the federal

statutes. A portion of these requirements is found in the Social Security Act, as amended. Title IV, subsection b, of section 402 is directly in point with the question raised. It states as follows:

"The administrator shall approve any plan which fulfills the conditions specified in subsection (a) except that he shall not approve any plan which imposes as a condition of eligibility for aid to dependent children, a residence requirement which denies aid with respect to any child residing in the state (1) who has resided in the state for one year immediately preceding the application for such aid, or (2) who was born within the state within one year immediately preceding the application, if its mother has resided in the state for one year immediately preceding the birth."

In the case of Warren County v. Decatur County, 232 Iowa, 613 5 N.W. 2nd, 47, the court stated:

"But we hold that while old-age assistance is additional help provided by the poor laws, the statutes affording this assistance are not to be construed in the light of the laws with reference to the poor which have been in force for many years. The statute with reference to old-age assistance makes no reference to 'legal settlement' nor the methods by which that status may be attained. This assistance is available to every person who has attained the age of 65 years, who has a 'residence or domicile' in the state of Iowa, and is not otherwise disqualified."

The above question with reference to old-age assistance is comparable to aid to dependent children as no requirement in any particular county is a prerequisite to receive aid. The only condition with reference to the payment of the county is found in section 239.8:

"**Removal from county.** When any child for whose benefit a grant of assistance has been made removes or is removed from the county, giving assistance, it shall be the duty of the recipient to immediately notify the county board of the county giving assistance of the fact of such removal and of the city or town (or nearest city or town) and of the county to which the child has removed. If the removal is into another county in the state, the county which has been giving assistance shall continue the assistance for a period of six months after the date of removal, but if the removal is out of the state, assistance shall immediately cease. Thereafter, any assistance can be granted only in the manner provided for herein as to obtaining assistance, and can be only in and from the county in which the child is then living."

It is the philosophy of the grant called aid to dependent children, that the same is for the benefit and protection of children needing aid, and that if incidentally, the grant is given either to the parent or to the legally appointed guardian who has control and custody of said child, such grant or assistance is not for the benefit of said parent or other person having the care and custody of said child as enumerated by the statute, but is for the benefit of the children. Further, the word "person" in section 252.16 applies only to adults. 1942 A.G.O., page 204.

Therefore, it is the opinion of this department that any person receiving aid to dependent children does not, by receiving such aid, fall within the category of section 252.16, subsection 3.

July 16, 1953

COUNTIES: Change of title certificate—separate parcels in one instrument—fees. There is to be taxed as costs the sum of fifty cents for each parcel of real estate described in a certificate of change of title, subject, however, to a maximum of two and one-half dollars where several parcels are described in any one such instrument and the parcels are contiguous.

Mr. J. Leo Martin, County Attorney, Sigourney, Iowa: This will acknowledge receipt of yours of the 8th inst. in which you submitted the following:

"I would appreciate your opinion upon the following question:

Under the provisions of section 333.15 of the 1950 Code of Iowa, as amended, which provides that the county auditor may charge fifty cents for 'or transfer of title certified by clerks of the district courts', is the clerk of the district court entitled to charge fifty cents for each separate parcel of real estate as provided in the section referred to above, which amount shall be taxed as costs and transferred to the auditor's office, or is he only entitled to make one charge of fifty cents for the entire transfer of title which he certifies to the auditor's office?"

In reply thereto we would advise you as follows: Section 333.15, Code of 1950, and section 558.66, Code of 1950, are exhibited as follows:

"333.15. **Fees to be collected.** The county auditor shall be entitled to charge and receive the following fees:

1. For transfers made in the transfer books, twenty-five cents for each separate parcel of real estate described in any deed, or transfer of title certified by clerks of district courts, provided, however, if several parcels are described in any one such instrument and the parcels are contiguous or separated only by public streets or highways, the fee shall not exceed two and one-half dollars. A parcel of real estate outside of the limits of cities and towns shall be all the unplatted land described in any deed or transfer of title lying within one numbered section of land.

2. For issuing certificate of redemption of land sold for taxes, twenty-five cents.

3. For each certificate issued by the treasurer for lands sold for non-payment of taxes, fifteen cents."

"558.66. **Title decree—entry on transfer books.** Upon receipt of a certificate from the clerk of the district or supreme court, that the title to real estate has been finally established in any named person by judgment or decree of said court, or by will, the auditor shall enter the same upon the transfer books, upon payment of a fee of twenty-five cents which fee shall be taxed as costs in the cause, collected by the clerk, and paid to the auditor at the time of filing such certificate."

It is to be noted that the foregoing two sections impose upon the county auditor the duty of charging a fee for entering upon the transfer books transfer of title to real estate certified to the auditor by the clerk of the district court. The fee for entering the transfer upon the books by the auditor is fixed under the provisions of section 558.66 at twenty-five cents (now by amendment of the 54th General Assembly increased to fifty cents), and for the same service under the provisions of section 333.15 the fee is fixed at twenty-five cents (increased by Acts of the 54th General Assembly to fifty cents).

Differences but not ambiguities exist between these statutes. One such difference is that under the provisions of section 558.66 the fee is ordered collected by the clerk of the district court, while collection of the fee prescribed to be paid in section 333.15 is the obligation of the auditor. Difference also is noted in the provisions of section 333.15 that if several parcels of real estate are described in the certification by the clerk and the parcels are contiguous and separated only by public streets or highways the fee shall not exceed two and one-half dollars.

In our opinion these statutes are in pari materia. They pertain to the same subject matter and relate to the same person or thing and have the same purpose or object. Statutes in pari materia, although in apparent conflict, are so far as reasonably possible taken together as if they were one law, Sutherland Statutory Construction, 3rd Edition, sections 5201 and 5202. The rule of in pari materia is stated in Fitzgerald v. State, 220 Iowa 547, 553 as follows:

"Sutherland, Statutory Construction, Volume 2 (1903 Ed.) at page 698, speaking of acts in pari materia, says:

'All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day. They are all to be compared, harmonized if possible, and, if not susceptible of a construction which will make all of their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment.' * * * * *

This is the rule laid down in 59 C.J. section 1819, p. 1041 et seq., and other works dealing with the subject."

Resultantly there is to be taxed as costs the sum of fifty cents for each parcel of real estate described in the certification, subject, however, to a maximum charge of two and one-half dollars where several parcels are described in any one such instrument and the parcels are contiguous and separated only by public streets or highways. This department has previously defined the term "parcel" as used in section 333.15. See opinion of the Attorney General appearing in the 1946 report, page 47.

July 16, 1953

COUNTIES: Hospital care for indigents—payment by county mandatory. In any county having a population of less than 135,000 it is mandatory upon the county hospital trustees to submit, to the board of supervisors, claims for cost and care of indigent persons who have legal settlement, in cases other than tuberculous, and the board of supervisors is obligated to pay such claims.

Mr. Glenn D. Sarsfield, State Comptroller: This will acknowledge receipt of yours of the 1st inst. in which you have submitted the following:

"Section 347.16, Code of Iowa, 1950, as amended by Chapter 156, Acts of the 55th G. A., reads as follows:

347.16 **Hospital benefits—terms.** Any resident of the county who is sick or injured shall be entitled to the benefits of such hospital and

shall pay to the board of hospital trustees reasonable compensation for care and treatment according to the rules and regulations established by the board.

Free care and treatment in such county public hospital in counties with a population of more than one hundred and thirty-five thousand to any indigent or tuberculous person shall be furnished to such residents of the county as have established legal settlement in the county as defined in section 252.16 and have been found by the board of hospital trustees to be indigent and entitled to said care, or be entitled to free care as provided in chapter 254. Provided, however, such county public hospital may provide hospital benefits to indigent persons having a legal settlement outside the county and the county of such persons' legal settlement shall pay to such county public hospital for the fair and reasonable cost of such care, treatment, and hospitalization.

Free care and treatment in such county public hospital in all other counties to any tuberculous person may be furnished to such residents of the county as have established legal settlement in the county as defined in section 252.16 and are entitled to free care under the provisions of section 254.8, Code 1950. In cases other than tuberculosis, care and treatment in such county public hospital to any indigent persons shall likewise be furnished to such residents of the county as have established legal settlement in the county as defined in section 252.16, Code 1950, and have been found by the board of hospital trustees to be indigent and entitled to said care. In integrated counties where the board of hospital trustees have no social service department, then under the supervision of the board of hospital trustees, the overseer of the poor or the director of social welfare shall determine whether or not said persons are indigent and entitled to said care. Cost of said care shall be the liability of the county, and upon claim made therefor paid under the authority and in the manner specified by section 252.35, Code 1950. Provided, however, such county public hospital may provide hospital benefits to indigent persons having a legal settlement outside the county and the county of such persons legal settlement shall pay to such county public hospital for the fair and reasonable cost of such care, treatment and hospitalization.

A county public hospital shall not be required to provide facilities for treatment of tuberculous persons. When such facilities for treatment of tuberculous persons are not available in the county public hospital, care and treatment shall be provided under the provisions of section 254.1, Code 1950.

To be entitled to hospital benefits, patients shall at all times observe the rules of conduct prescribed by the board of hospital trustees.'

I respectfully request an opinion as to whether it is optional or compulsory, on and after July 4, 1953, that the trustees of a county hospital in counties with a population of less than 135,000, submit claims to the county board of supervisors, for the cost of care for indigent persons who are residents of the county, and who have been found by the board of hospital trustees to be indigent and entitled to said care, and when said claim is submitted to the county board of supervisors, is it optional or compulsory that the claim be paid under the authority and in the manner specified by section 252.35, Code of Iowa, 1950?"

We are of the opinion that in any county having a population of 135,000 or less, it is mandatory upon the county hospital trustees to submit to the board of supervisors claims for the cost of care and treatment of indigent persons who have legal settlement in the county, in cases other than tuberculous, and the board of supervisors is obligated to pay such claims in accordance with the provisions of section 252.35,

Code of 1950. That this is the intent of the legislature is evidenced by the explanation attached to House File 293, 55th General Assembly, which House File, as amended, creates the situation that requires the clarification involved in your request. This explanation follows:

"The foregoing bill changes the availability of a county public hospital to those tuberculous patients who are residents of the county, to accord with the provisions of chapter 254, Code 1950, instead of making it available to those who have a legal settlement in the county, as is now provided, and instead of providing free care and treatment to indigent residents as the statute now provides, the reasonable cost of such care and treatment is made an obligation of the county to be paid from the county poor fund."

The legislative intent so expressed was not changed or modified by the course of this bill through the two houses of the legislature. In fact, amendatory action confirmed the intention and purpose stated in the explanation heretofore exhibited. It will be noted that the legislature recognizes the mandatory or optional powers of the hospital trustees and the board of supervisors in their respective fields in the administration of this Act, by the meaning that it attached to the words "shall" and "may." Section 347.16, Code of 1950, in line 10 thereof provided:

"Free care and treatment in such county public hospital to any indigent or tuberculous persons **shall** be furnished, and etc."

By the enactment of chapter 156 the 55th General Assembly has limited the provisions of the foregoing paragraph to counties having population over 135,000. However, the legislature added a paragraph to section 347.16, Code of 1950, and stated in such addition the following:

"Free care and treatment in such county public hospital in all other counties to any tuberculous person **may** be furnished. * * *"

While it is true that the words "may" and "shall" do not always when used in statutes import discretion on the one hand and compulsion on the other by the legislative use of the words "may" and "shall," it seems clear to us that by the foregoing the legislature has disclosed an intent that the "may" and "shall" as used in chapter 156, 55th General Assembly and section 347.16, shall be interpreted to mean discretion where may is used and compulsion where shall is used. In that view, insofar as care and treatment of indigent persons in cases other than tuberculosis is concerned care and treatment shall be furnished to such residents as have established legal settlement in the county and been found by the hospital board of trustees to be indigent and entitled to such care. This obligation of care and treatment is mandatory and liability for the cost for such care and treatment of such person is the mandatory liability of the county and payment of the claim made by the hospital trustees is the obligation of the board of supervisors acting under the provisions of section 252.35.

July 16, 1953

HIGHWAYS: Gasoline tax increase—purpose of levy. The legislative direction that the temporary one-cent increase in motor vehicle fuel taxes shall be used in roads "presently surfaced with gravel or crushed rock" does not limit expenditures on such roads to funds derived from such one-cent levy. The permanent two-cent increase in tax on fuel oil is not limited to such roads.

Mr. K. L. Hart, Auditor, Iowa State Highway Commission: Section 324.2, Code of Iowa 1950, imposes a license tax of four cents per gallon on all motor fuel sold in Iowa. Section 1 of House File 10, Acts of the 55th General Assembly adds to that section the following:

"The license fee of four cents per gallon or fraction of a gallon provided for in this section shall be increased to five cents per gallon for the biennium beginning July 1, 1953, and ending June 30, 1955."

Section 324.63, Code of Iowa 1950, contemplates that the four cents per gallon shall be credited to the road use tax fund while section 2 of House File 10, Acts of the 55th General Assembly adds the following language to section 324.63:

"The net proceeds of one cent per gallon of the license fees collected under the provisions of this chapter shall, for the biennium beginning July 1, 1953, and ending June 30, 1955, be credited by the treasurer of the state as follows:

"1. To the primary road fund, to be used for construction of such primary roads as are **presently surfaced with gravel or crushed rock only**, on the basis of need as determined by the state highway commission."

You ask whether it is necessary to begin to collect money under the additional one-cent levy and credit the same to a special fund before expenditures "for construction of such primary roads as are presently surfaced with gravel or crushed rock" can be made and charged to the fund? The answer is negative.

Under section 308A.2, Code of Iowa 1950, only 42 per cent of the road use tax fund is credited to the primary road fund and this is required under section 313.4, Code of Iowa 1950, to be expended on the primary road system. As a practical proposition the highway commission has almost invariably used a portion of this money for the construction and improvement of roads of the precise classification made in subsection 1 of section 2, House File 10, Acts of the 55th General Assembly. Nothing in the language of this section, the legislative discussion surrounding its enactment or any rule of statutory construction leads to a possible inference that expenditures for the improvement of this type of highway must be limited to the proceeds of the temporary one cent tax increase. Primary highway funds always were and continue to be available for the development of roads "presently surfaced with gravel or crushed rock". Such expenditures when made from this time on may be set up in a special account on the highway commission books and the proceeds of the one-cent tax credited to the account when received so that the highway commission may be in a position to demonstrate its compliance with the legislative mandate in this respect. It is of more than passing interest to note that the highway commission has

already manifested an intent to expend substantially more than the proceeds of the one-cent tax on this type of highway.

It has also been suggested that the expenditure of the proceeds of the additional two-cent tax on fuel oil is limited to the same classification of highways. The one-cent tax is a temporary increase. The two-cent tax on fuel oil is permanent in character. The legislative draftsman very carefully treats of each in separate sections of House File 10. The proceeds of the two-cent increase in fuel oil tax are to be credited to the road use tax fund and apportioned as there provided. The expenditure of this money is not limited to the classification of primary highways made in subsection 1 of section 2, House File 10.

Some confusion has arisen as to the significance of the word "presently" in subsection 1 of section 2 of House File 10, that is as to the time to which it relates. The act contains a publication clause and the records in the office of the secretary of state indicate that it became effective by publication on June 6. This then would be the date to which the word "presently" refers.

August 18, 1953

SCHOOLS AND SCHOOL DISTRICTS: Religious instruction off premises during school time. The board of directors of an Iowa school district may make provision to excuse pupils for one hour per week on the written request of their parents, so that such pupils may attend religious instruction given by nonschool personnel at places not a part of the school premises.

Mr. Robert L. Oeth, County Attorney, Dubuque, Iowa: By recent letter you request an opinion of this office on the following question:

"It is lawful under the laws of the state of Iowa and constitutional under the Constitutions of the United States and the state of Iowa, for the Independent School District of Dubuque, Iowa, to excuse pupils in the elementary grades for one hour per week on the written request of their parents so that said pupils may attend religious instruction imparted by nonschool personnel at designated off-school premises during regularly scheduled school time?"

The implication intended by the use of the word "designated" occurring in the phrase "designated off-school premises" not having been explained, must be treated without significant bearing on the question.

The First Amendment of the Constitution of the United States prohibits enactment of a law by the Congress respecting the establishing of religion or prohibiting the free exercise thereof. This provision is not binding upon the state legislatures. By reason of the Fourteenth Amendment the provisions of the First Amendment are given vitality with relation to the states under the due process clause. The due process provisions of the federal Constitution and the Constitution of the state of Iowa are considered to be of like effect.

The question which you present does not involve an enactment of a law by a legislative body. Therefore the question is raised whether

the due process provisions of the federal and state Constitutions which involve the First Amendment to the federal Constitution are applicable.

In Illinois ex rel McCollum vs. Board of Education, 333 U. S. 203, the local board of education had agreed to the giving of religious instruction to the schools under a "released time" arrangement whereby pupils whose parents signed "request cards" were permitted to attend religious instruction classes conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths subject to the approval and supervision of the superintendent of schools.

On the proposition that the case did not draw in question the validity of a statute, the Supreme Court of the United States held that the validity of the program having been sustained by the state Supreme Court was "sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of 28 USCA § 344 (a)."

On the main question it was held by the Supreme Court of the United States that the arrangement was in violation of the Constitutional principle of separation of church and state, as comprised in the First Amendment and made applicable to the states by the Fourteenth Amendment, and accordingly that the state court had acted erroneously in upholding the validity of the action of the local board.

After the McCollum case there was presented to the Supreme Court of the United States a case arising from the State of New York distinguishable from the McCollum case in certain details of the arrangement whereby religious instruction was afforded. The latter case, Zorach vs. Clauson is reported in 343 U. S. at page 306. The Zorach case arose as a result of a program of the public schools of New York City under which, upon written request of the parents, students were released during a school day to attend religious courses operated outside the school building, by, and at the expense of, a duly constituted religious body. All students not attending such courses were required to remain in the classrooms. The Supreme Court of the United States distinguished the case from the McCollum case on the ground that in the McCollum case the classrooms of public schools were turned over to religious instructors. The court emphasized that there was a lack of evidence that the system involved the use of coercion to get students into religious courses. The opinion of the court said:

"It takes obtuse reasoning to enjoin any church of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. He is left to his own desires as to the manner or time of his religious devotions, if any.

There is a suggestion that the system involves the use of coercion to get students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard, and do no more than release students whose parents so request.

* * * The First Amendment * * * does not say that in every and all respects there shall be a separation of church and state. Rather, it studiously defines the manner, the specifications in which there shall

be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly * * *. The policeman who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the chief executive; the proclamation to make Thanksgiving a day of holiday; the 'So Help Me, God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies, would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the court opens each session: 'God save the United States and this Honorable Court.'

We would have to place the concept of the separation of church and state to these extremes to condemn the present law on Constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requests parental consent in writing. In each case, the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi or the minister. The teacher, in other words, co-operates in a religious program to the extent of making it possible for her student to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students, does not alter the character of the act."

The legislature of the state of Iowa has deemed it proper and advisable to encourage the attendance of children at religious services and to attend places where they will receive religious instruction. Section 299.2, Code of Iowa, 1950, contains the school attendance requirements of children. One who violates these requirements is a truant. By the provisions of section 299.2 of the Code there is excepted from the truancy provisions by virtue of subsection 4 thereof, any child "while attending religious services or receiving religious instructions."

As observed by the Supreme Court of the United States, we are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom of worship as one chooses. We make room for as wide a diversity of beliefs and creeds as the spiritual needs of man may deem necessary. We sponsor a duty on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents.

Encouragement of religious instruction by the state and its co-operation with religious authorities in the adjustment of the schedule of public events to sectarian needs, follows the best of our traditions. A contrary view must find in the Constitution a requirement that the government show callous indifference to religious groups. Such a finding would favor those who believed in no religion over those who do believe.

There is no law of the state of Iowa which forbids such arrangement as is involved in your question administered upon an impartial basis. Nor is such an arrangement offensive to the Constitution of the United States or the state of Iowa.

You are, therefore, advised that it is the opinion of this office that

the board of directors of an Iowa school district may make provision to excuse pupils for one hour per week on the written request of their parents, so that such pupils may attend religious instruction given by nonschool personnel at places which are not part of the school premises.

August 20, 1953

FISH AND GAME: Commercial fishermen selling own catch. A licensed commercial fisherman is not required to have a wholesale fish market or peddlers license to sell his catch in his place of business, or to serve his catch in a restaurant owned and operated by the licensee.

Mr. Walter J. McCarthy, County Attorney, Maquoketa, Iowa: This is in reply to the following letter:

"I am asking that an opinion issue as to provisions of section 109.115 of the 1950 Code of Iowa.

"We have a situation wherein commercial fishermen along the Mississippi river catch their own fish and sell them at retail in fish markets owned by the fishermen and at least one situation where the fisherman sells the fish in a cafe, which he owns and operates.

"Do these fishermen need a wholesale fish market for fish peddlers license?"

Section 109.115 reads:

"**Sale of fish.** 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."

You refer to commercial fishermen. We are therefore assuming you mean commercial fishermen who have procured net licenses as required by sections 109.07 and 110.1, Code 1950. Pertinent matters have been considered by this department on several occasions heretofore.

The 1925-26 A.G.O., page 497, discussed the distinction between fish usually found in Iowa and other fish not naturally propagated in Iowa waters.

The 1930 A.G.O., page 343, discusses the requirements for license of persons owning a private fish pond.

The 1932 A.G.O. at page 144, has to do with the necessity for one who peddles fish to procure a license from the state fish and game department (now the state conservation commission).

There are two opinions in the 1938 A.G.O. The one at page 256 holds that fish peddlers and wholesale fish market operators are required to obtain state licenses and the opinion at page 343 states that the holder of a seining license may sell fish caught by him at his place on the bank of the river.

The last-mentioned opinion refers to a statute which is substantially in the same form as section 109.115, Code of 1950. It is therefore

lawful for the owner of a seining license to sell fish at a market at or near the river which have been lawfully taken.

With reference to the second part of your request, you are advised that a fisherman, who sells fish in a cafe which he owns and operates, has the same rights as any other person who lawfully acquires fish. If the seining licensee may lawfully sell fish at the river he may also lawfully use such fish in any way which does not involve a sale of fish. The sale of a meal in a restaurant, which includes fish, is not the sale of fish as such. It is a sale of both food and service.

It is therefore our opinion that the holder of a seining license is not required to have a wholesale fish market or peddlers license to sell his own catch of fish at his place of business on the bank of the river, and it is our further opinion that one who lawfully takes fish is not required to have a license to serve such fish as part of a meal in a restaurant owned and operated by the licensee.

August 20, 1953

PUBLIC PROPERTY: Lease to private corporation. It is lawful for the conservation commission, with the approval of the executive council, to lease for a period not to exceed five years, the two dredges owned by the commission.

Mr. Bruce Stiles, Director, Conservation Commission: This is in reply to your recent request for an opinion as to the authority of the state conservation commission to rent certain dredges to the North American Steel Company of Clinton, Iowa.

You are advised that section 111.25 of the 1950 Code of Iowa reads:

"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."

This section was considered by this department in an opinion dated September 23, 1936 A.G.O., page 615. In that opinion this office held that section 1819, Code of 1935, authorized the leasing of personal, as well as real, property. We quote from that opinion, at page 618:

"It is our opinion that the legislature has not authorized the commission to go into private business without limitation. Section 1703-g26 of the 1935 Code of Iowa does specifically authorize your commission to sell or otherwise dispose of products from such lands and to make such rules and regulations as may be necessary to carry out the purposes of this chapter. We find no other provisions in the law authorizing your commission to sell any personal property except the products from such lands which come under your jurisdiction. However, you are authorized to lease in accordance with section 1819 of the Code."

Section 1819, Code of 1935, reads the same as section 111.25, Code of 1950. It is therefore the opinion of this department that it is lawful for the state conservation commission, with approval of the executive council, to lease for a period not to exceed five years the two dredges owned by the commission, if it is the opinion of the commission that such a lease may seem advisable.

August 20, 1953

PENSIONS: Retirement allowance of policemen and firemen. A proviso, by way of limitation, attached to a statute must prevail over foregoing provisions of the statute, altered by legislative amendment, where the legislature made no change in the proviso.

Hon. Paul L. Parker, Des Moines, Iowa: This will acknowledge receipt of yours of the 6th inst. in which you submitted the following:

"I should appreciate your official opinion as to certain provisions of Code chapter 411 as amended by the Fifty-fifth General Assembly.

Section 411.6 (4) (b) was amended by striking from line six (6) the words 'one-fourth' and substituting therefor the words 'one-half' and by striking from line ten (10) thereof the word 'fourth' and substituting therefor the word 'half'.

The above amendment would appear to be inconsistent with the wording of the proviso which concludes this subsection, and I should like to have your opinion as to whether said proviso should be given full force and effect in view of the above mentioned inconsistency."

In addition to the contents of your letter, we are advised that computation of the pension together with the annuity, aggregating the retirement allowance of a policeman or fireman, in many cases will result in a retirement allowance in excess of the amount of the allowance computed on the basis of the proviso contained in section 411.6, subsection 4 (b). This statute as amended by the Fifty-fifth General Assembly is as follows:

"b. A pension which together with his annuity shall make a total retirement allowance equal to ninety percent of 1/70 of his average final compensation multiplied by the number of years of membership service, if such retirement allowance exceed one-half of his average final compensation, otherwise a pension which together with his annuity shall provide a total retirement allowance equal to one-half of his average final compensation; provided, however, that no such allowance shall exceed ninety percent of 1/70 of his average final compensation multiplied by the number of years which would be creditable to him were his service to continue until the attainment of age sixty."

The foregoing situation provides the conflict and presents the question as to whether full force and effect will be given to the proviso, in view of the fact if so given full force and effect, the retirement allowance will be a reduced amount from the computed under other provisions of this section. Answer to the foregoing is found in the rules of statutory construction concerning the status of a proviso or exception in a statute in its relation to the preceding general provisions, and its bearing upon the legislative intent. This has had the consideration of our Supreme Court. In the case of Campbell vs. Jackman Bros., 140 Iowa 475, page 480, the rule is thus stated:

"The effect of any sweeping, general statutory provision which is followed by or coupled with an express exception naturally and necessarily depends upon the nature and extent of the exception, and, if this be of such character as to emasculate the principal clause or render any of its terms meaningless, the courts are nevertheless required to give effect to such exception, whatever they may think of the candor or want of candor which controlled the phraseology of the law. * * * "

In the case of In Re Guardianship of Wiley, 239 Iowa 1225, page 1223, it is stated:

"There can be no question as to the principal rule of statutory construction relied upon by the guardian ad litem. If fairly possible a statute will not be construed so part of it is rendered superfluous. Effect should ordinarily be given to every provision. Moulton v. Iowa Employment Sec. Comm., 239 Iowa 1161, 1172, 34 N.W.2d 211, 216, and citations; Independent Sch. Dist. v. Iowa Employment Sec. Comm., 237 Iowa 1301, 1309, 25 N.W.2d 491, 496, and citations.

We think the guardian ad litem is asking us either to read out of the statute the clause we have italicized or to add a provision which greatly limits its meaning and that the construction for which he contends conflicts therewith. Of course we have no power to read the italicized language out of the statute nor to add thereto. Moulton v. Iowa Employment Sec. Comm., supra, and citations; 50 Am. Jur., Statutes, section 231, 234.

The italicized clause is plainly an exception or proviso which limits the application of the statute. See as having some bearing 43 Words and Phrases, Perm. Ed., 315, 316. The fundamental rule for which the guardian ad litem contends that effect should be given all parts of a statute requires that effect be given a proviso when it can be done in accordance with recognized rules of construction. 50 Am. Jur., Statutes, section 440; 59 C. J., Statutes, section 639. See also Campbell v. Jackman Bros., 140 Iowa 475, 480, 481, 118 N.W. 755, 27 L.R.A., N.S., 288; State ex rel. Bedell v. Best, 225 Iowa 338, 280 N.W. 551."

In the case of Mote v. Incorporated Town of Carlisle, 211 Iowa 392, page 396, it is stated:

"When, however, pending litigation is made a proviso limiting the effect of the legislation, or an exception from the result of the act, a conclusion different from that announced in the foregoing cases must be reached. Campbell v. Jackman Bros., 140 Iowa 475 (Local citation 480, 481). In that case we said, on page 480:

'The effect of any sweeping, general statutory provision which is followed by or coupled with an express exception naturally and necessarily depends upon the nature and extent of the exception; and, if this be of such character as to emasculate the principal clause or render any of its terms meaningless, the courts are, nevertheless, required to give effect to such exception, whatever they may think of the candor or want of candor which controlled the phraseology of the law.'

Earlier, we declared, in Rice v. City of Keokuk, 15 Iowa 579, on page 583:

'This view (the one previously expressed in the opinion) also harmonizes with the acknowledged rule of construction that a proviso will generally be considered not to enlarge, but rather to restrain, qualify, or explain the cause to which it refers.'

Likewise, the Supreme Court of New Jersey, in State v. Inhabitants of Township of Kearny, 55 N. J. Law 50 (25 Atl. 327, 328), on page 53, suggested:

'Mr. Sedgwick, in his work on Statutory Construction (page 49), says: 'A curious rule of a very arbitrary nature prevails with regard to provisos. It is that, when the proviso of an act of Parliament is directly repugnant to the main body of it, the proviso shall stand, and be held a repeal of the purview, as it speaks the last intention of the makers.' Chancellor Kent, in Volume 1 of Commentaries (page 463), says: 'It is difficult to see why the act should be destroyed by the one and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected.' * * * in Townsend v. Brown, 4 Zab. 80, 86, Chief Justice Green declared 'that the rule had long been established that, if a proviso in a statute be directly contrary to the purview of the statute, the proviso is good, and not

the purview, because it speaks the later intention of the legislature.' In the disposition of the case in hand, that must be conceded to be the law.'

During its discussion in United States v. Jackson, 75 C.C.A. 41 (143 Fed. 783, 787), the United States District Court said, on page 45:

'This is a congressional act, and must be interpreted according to the intention of Congress, apparent upon its face. * * * Another well-settled rule of construction applicable to these cases is that, where there is an irreconcilable conflict between different parts of the same act, the last in the order of arrangement will control.'

While considering this subject-matter, courts have seen fit to distinguish between exceptions and saving clauses. See State v. Inhabitants of the Township of Kearny, 55 N. J. Law 50 (25 Atl. 327), supra. Yet regardless of such technical discussions, the present so-called exception is in the nature of a proviso, the provision being that the act is contingently defeated. Without entering into technical discussions concerning definitions, it is enough to say that the plain intention of the legislature was that the so-called curative act should not apply to pending litigation. Lawyers generally understand that the proviso, or exception, under consideration defeats the act, so far as the pending litigation is concerned. As said in Campbell v. Jackman Bros. (140 Iowa 475), supra, if the exception 'be of such character as to emasculate the principle clause or render any of its terms meaningless, the courts are, nevertheless, required to give effect to such exception * * *.' Even if, as appellees assert, no meaning could be given to the curative act unless it does apply to pending litigation, the result must be the same. We do not here decide that the curative act does not have application. For instance, the act has effect against all attacks except those involved in the pending litigation."

By reason of the foregoing authority we are of the opinion that the terms of the proviso contained in section 411.6, subsection 4 (b), Code of 1950, will prevail over the preceding provisions of the section referred to as amended by chapter 197, paragraph 1, Acts of the 55th General Assembly.

September 3, 1953

EXECUTION: Storage charges on personalty. Where a sheriff wrongfully levies on personalty by attachment or execution and stores the property with a third person, the custody remains in the sheriff and said third person has no lien for storage nor is the sheriff entitled to be reimbursed for storage charges. Where the levy is by attachment the court may assess storage charges, but recovery therefor, must be asserted by the sheriff by suit or otherwise.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: We have yours of the 19th inst. in which you submitted the following:

"The Polk county sheriff's office has asked for an opinion interpreting Rule 260-A of the Iowa Rules of Civil Procedure with particular reference as to whom the sheriff should look to for storage costs in connection with levies on personalty. Specifically the problem involves a general execution with an order to levy attached in which the plaintiff directed the sheriff to levy an execution under Rule 260-A on an automobile and the order directed the sheriff to store the same at a certain welding shop. The owner of the welding shop signed a receipt for same as custodian. Subsequently a notice of ownership was filed with the sheriff of Polk county by a third person. The sheriff thereupon notified the plaintiff through his attorney that such notice of ownership had been given to him and that a reasonable time to post a bond as required by statute should be complied with. The execution claimant

failed to provide such bond and the sheriff gave a release to the party claiming ownership so that he could obtain possession of the auto levied upon. The custodian has refused to give possession unless the storage bill be paid in advance. The execution claimant refuses to pay the storage bill and so does the party claiming ownership.

Code section 639.58 provides that the sheriff shall be allowed necessary expenses for keeping attached property to be paid by the plaintiff and taxed in the costs. Specifically, where would the sheriff be authorized to take the money from to pay such charges and in what way would the sheriff be reimbursed? The statute provides that the plaintiff shall pay such costs and assuming that he refuses, would the sheriff then be required to file suit to recover the costs?

Another point of inquiry is must the sheriff, under Rule 260-A, retain the levy so long as the levying plaintiff desires or may the sheriff force the plaintiff to action to prevent the accumulation of months of storage charges?

I have also been requested to inquire as to whether or not the sheriff is authorized to lease storage space in which to store personalty levied upon."

In reply thereto we advise you as follows:

1. In the situation described by you we are of the opinion that the custodian of the automobile levied upon by the sheriff in execution does not have a lien for his storage charges. Lewis v. Best-by-Test Garage, 200 Iowa, 1051.

2. Where the sheriff takes possession of personal property under attachment or execution and places the keeping of personal property levied upon with a third person, the sheriff still retains possession and custody of the personal property and the third person acts only as an agent of the sheriff. Rowley v. Painter, 69 Iowa 432.

3. The duty of care of the sheriff in the possession of property levied upon is the same whether the levy be under writ of attachment or execution. Cresswell v. Burt, 6 Iowa 592.

4. Section 639.58, Code of 1950, providing as follows: **Expenses for keeping.** The sheriff shall be allowed by the court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the costs"—is limited by its terms to levy by attachment. There appears to be no like statute authorizing the expenses for storing property levied upon by execution to be taxed and recoverable as costs. However, it is to be observed that where property levied upon is delivered by the sheriff to a receiptor designated by the judgment creditor or by his attorney, the sheriff is relieved of liability for safekeeping of the property. Citizens National Bank v. Loomis, 100 Iowa 274. The sheriff, it would appear, is entitled to the protection of this rule whether the storing of the property is under a levy by attachment or a levy by execution.

5. As a result of the foregoing we are of the opinion, first that where the sheriff stores personal property upon which he has wrongfully levied by attachment or execution the third person has no lien upon the property for the amount of his storage charges. Second, where property is levied upon under a writ of attachment or execution and custody obtained by the sheriff, such custody remains in the sheriff, notwithstand-

ing the fact that he has stored the property with the third person. Third, the sheriff is not entitled to be reimbursed for any charges for storage of personal property levied upon. Fourth, where the levy is by attachment, the sheriff is entitled to have the court assess for storage charges as costs in the case but recovery, therefore, must be asserted by him, by suit or otherwise. Fifth, there is no statutory method whereby the sheriff may compel the plaintiff to the action to expedite the action to prevent the accumulation of storage charges. Sixth, there is no statutory or other authority for the sheriff to lease storage space in which to store personal property levied upon. The leasing of such property by the sheriff is a matter of his own discretion.

September 14, 1953

TAXATION: County assessor—one name only on eligible list. Where only one name appears on the eligible list for county assessor, certified by the state tax commission, the conference board is required by law to appoint such person as assessor.

Mr. R. K. Brannon, County Attorney, Denison, Iowa: This will acknowledge your letter of recent date relative to section 441.3, Code of 1950, relating to the examination of candidates and the appointment by the conference board of a county assessor. Your specific inquiry is, "When only one eligible candidate appears on the certified list may the conference board ask the state tax commission to conduct a new examination?"

Section 441.3 of the Code provides for the selection of a county assessor in the case of a vacancy, and such statute provides for a notice to be given by the state tax commission of an examination to be held for purpose of selecting eligible candidates for the position of county assessor. The examination is open to all residents of the county for at least one year who desire to present themselves and who have notified the commission as provided by statute and who are qualified voters and residents of the county. The commission prescribes the rules and regulations covering the examination, and the statute specifically provides:

"The examination shall cover the general field of laws pertaining to the assessment of property taxation in Iowa; laws pertaining to tax exemption; the principles of valuation of real estate; laws pertaining to the assessment of personal property and the duties and powers in general of assessors. There shall be taken into consideration in the grading of candidates the executive ability, physical condition, experience and general reputation of the candidate."

In the instant case notice was given and four (4) applicants filed notice of intention to take the examination, and on the date set two (2) applicants appeared and took the examination conducted by the state tax commission. Under the rules one of the applicants passed the examination and became eligible and the other failed to qualify.

The statute provides:

"The state tax commission shall certify as rapidly as possible to the appointive conference of the county concerned, the names of eligibles

for appointment as county assessor. This list of names shall include all persons who have passed examinations at a grade of not less than seventy percent."

The statute further provides:

"In the event that *no* person taking an examination is found to be qualified by the state tax commission, a new examination shall be called in the same manner as the original examination and in the event that no applicant is found eligible in the second examination, the conference as provided by the provisions of section 442.1 shall appoint the county assessor * * *". (Italics supplied)

The foregoing section is plain and the only provision therein for a second examination is when *no* person is found to be qualified. In your case a person was found to be qualified and, hence, this provision for a second examination does not apply. The statute further provides:

"Upon receipt of such certification the county auditor shall call a conference as provided by the provisions of section 442.1, which conference shall select from the eligible list the county assessor * * *."

From the foregoing it is clear the legislature limited the right of the conference board to the selection of a candidate from the certified list of eligibles and made no provision for any other examination of candidates to determine eligibility. The board is vested under the statute with only an appointive power and that power is limited to the eligible list when such list exists. This is the clear expression of the legislature and is binding on both the state tax commission and the conference board.

In your letter you refer to some opinion you relied on, given by some party connected with the state office other than that of the Attorney General. The legislature has provided that all official opinions are to be given by the county attorney or, upon his request, by the Attorney General upon all matters in connection with county officers and county business. Wisdom dictates that only the official opinions of a qualified authority should be sought and followed, and such a practice will preserve uniformity throughout the state and many times avoid embarrassment.

You are advised it is the opinion of this office that the list containing one name certified to you by the state tax commission of Iowa is a lawful list compiled pursuant to statute, and the conference board is required under the law to appoint such certified eligible as the county assessor of Crawford county, Iowa.

September 16, 1953

SIGNATURES: Affixing by stamp or otherwise. Where an administrative officer is required by law to affix his signature to various documents, his method of signing is left entirely to himself. It may be by stamp, copperplate, or otherwise. The question of what evidence is required as to the identity of the person who actually affixes the signature is an administrative matter.

Mr. K. L. Hart, Auditor, Iowa State Highway Commission: Attention has been directed to an opinion of the Attorney General dated January 21, 1946, and found at page 133 of the opinions for that year. It holds that signatures signifying claims may be affixed by stamp or

other mechanical means. Attention has likewise been invited to an unofficial opinion of the Attorney General dated September 8, 1947, directed to Ray E. Johnson as state comptroller. The latter opinion reaffirms the first but indicates that when such mechanical means is employed "the person, who applies the stamp, musts attach his signature *in full* below the stamped signature". In practice, too much emphasis has been placed on the italicized words "in full" and not enough on that part of the opinion of January 21, 1946, which quotes from an opinion with respect to the secretary of the treasury as follows:

"The law requires signing merely as an indication and proof of the parties' assent. It places the treasury of the United States under guardianship of the secretary. It requires that no moneys shall be drawn from the treasury without authority. The evidence which it demands of his authority is, that the warrants shall be signed by him; but as to the method of signing, that is left entirely to himself. He may write his name in full, or he may write his initials; or he may print his initials with pen; that pen may be made of a goose quill, or of metal; and I see no legal objection to its being made in the form of a stamp or copperplate. It is still his act; it flows from his assent and is the evidence of that assent. It is merely directory to the officers who are to act after him * * * to the comptroller, who is to countersign; the register who is to record; and the treasurer, who is to pay. Being recognized by the secretary himself, and known to the officers who are to act after him, the treasury has all the guards placed over it which the law has provided."

The question of what evidence should be required as to the identity of the person who actually affixes the signature to the document is an administrative matter and not a question of law. The responsible official might require his agent to add his own signature in full to the official stamp, or to add his initials, or even to add a number which might identify him. The purpose of such administrative requirement is to enable the responsible official to identify for his own purposes the individual performing the act. The stamped signature independent of the initials is sufficient evidence of approval. The degree or quality of control exercised over subordinates in connection with the affixing of the signature must after all be left to the discretion of the responsible public official.

September 24, 1953

HIGHWAYS: Condemnation of extra land to secure dirt for grading. The board of supervisors may not condemn a parcel of land to secure dirt for grading a secondary road under the guise of "right of way." To secure said tract they must proceed under the chapters of the Code relating to eminent domain.

Mr. Carroll E. Engelkes, County Attorney, Grundy Center, Iowa: This acknowledges receipt of your letter of September 4, in which you say:

"The Grundy county board of supervisors has included in its 1953 program the grading of a certain secondary road, and in order to do so is in need of additional dirt. Failing to secure enough by agreement with the adjoining landowners, proceedings have been instituted in accordance with the provisions of section 306.51 et seq., of the 1950 Code of Iowa for the condemnation of a one-acre tract 225 feet by 194 feet adjoining the road. I have enclosed a copy of the Grundy county

engineer's recommendation together with his plat and the action taken by the board to commence this proceeding.

It appears that section 14 of Chapter 103, 54th G.A. as amended by section 1 of chapter 122, 55th G.A., classifies the board's right to condemn into two separate situations, namely:

(a) For acquisition of necessary *"right of way"*; and

(b) For land necessary for highway drainage, for weighing stations, or land containing gravel or other suitable material for the improvement or maintenance of highways, together with necessary road access thereto.

Those sections require that chapter 471 and 472 of the Code of Iowa be followed; except that in the condemnation of *right of way* for secondary roads, the board of supervisors may proceed as provided in sections 306.51 et seq.

The question which arises from this set of facts is:

'Can the board legally proceed with condemnation of the tract as provided in sections 306.51 et seq. by denominating this a condemnation of *right of way?* Or must it proceed to condemn such a tract only in accordance with chapters 471 and 472?' "

The plat which accompanied the county engineer's recommendation for condemnation shows the tract in question to be a rectangular shaped tract of land 194 feet wide by 225 feet long containing approximately an acre of land adjacent to a county highway. There is no pretense that the land is necessary for any other purpose incident to the highway than the acquisition of additional dirt for its construction. Section 14, chapter 103, Acts of the 54th General Assembly as amended by section 1, chapter 122, Acts of the 55th General Assembly reads as follows:

"In the maintenance, relocation, establishment, or improvement of any road, including the extension of such road within cities and towns, the commission or board having jurisdiction and control of such road shall have authority to purchase or to institute and maintain proceedings for the condemnation of the necessary right of way therefor. Such board or commission shall likewise have power to purchase or institute and maintain proceedings for the condemnation of land necessary for highway drainage, for weighing stations, or land containing gravel or other suitable material for the improvement or maintenance of highways, together with the necessary road access thereto.

Proceedings for the condemnation of land for any highway shall be under the provisions of chapter 471 and chapter 472, Code 1950, or as said chapters may be amended.

Provided that, in the condemnation of right of way for secondary roads, the board of supervisors may proceed as provided in sections 306.51 to 306.59, both inclusive, and 306.61, Code 1950."

Denominating land required to secure suitable material for the improvement of a highway "right of way" does not make it highway right of way. The fact that the language of the statute as amended in one sentence refers to the acquisition by condemnation of "right of way" and in another sentence enumerates the things in addition to right of way that may be acquired by condemnation necessarily excludes the idea that the phrase "right of way" includes anything in addition thereto.

The last two paragraphs of the section were enacted two years previous to the first paragraph and it must be assumed that the legislature at the time of the enactment of the first paragraph of the section

had in mind the phraseology of the last two paragraphs. The only power that was extended to proceed under section 306.51 et seq. was the power to acquire "right of way for secondary roads."

In the opinion of this office denominating this tract of land "right of way" does not permit the board of supervisors to proceed under section 306.51 et seq. To condemn this tract of land which is to provide suitable material for the improvement of the highway, the board must proceed under chapters 471 and 472 of the Code of Iowa 1950, relating to eminent domain.

October 5, 1953

INSURANCE: Automobile liability insurance on public employees. Boards, commissions and other public agencies are permitted to buy automobile liability insurance on their employees and pay for same from their funds. However the executive council may not secure this insurance for other departments and employees who secure insurance on their own cars used in public business are not entitled to be reimbursed.

Mr. W. Grant Cunningham, Secretary, Executive Council: In re Senate File 79 [Ch 230, Acts 55 G.A.; Ch 517A, Code 1954], Liability insurance on state-owned vehicles. We acknowledge receipt of yours of the 24th inst. in which you have submitted the following:

"Kindly give us an opinion on the following questions that have come up with regard to the above subject matter:

1. Is the council or the car dispatcher authorized under the Act to purchase this insurance for cars and drivers under their jurisdiction?

2. Should those employees who are covered by insurance riders on their personal cars, while car is being used for state business, be required to get additional insurance while using the state car?

3. Should all employees who use personal cars even occasionally on state business be required to get rider on their policy?

4. Can the state reimburse the employee for same?

5. From what fund are premiums for this insurance to be paid?

6. Should the one authorized to purchase this insurance under the Act get approval from the state commissioner of insurance?"

In reply thereto we advise as follows. Senate File 79 being chapter 230, Laws of the 55th General Assembly, provides as follows:

"All state commissions, departments, boards and agencies and all commissions, departments, boards and agencies of all political subdivisions of the state of Iowa, not otherwise authorized, are hereby authorized and empowered to purchase and pay the premiums on liability and property damage insurance covering and insuring all officers and employees of such commissions, departments, boards and agencies while in the performance of their duties and operating an automobile, truck, tractor, machinery or other vehicles owned or used by said commissions, boards, departments and agencies, which insurance shall insure, cover and protect against individual personal legal liability that said officers or employees may incur. The amount of insurance that said commissions, departments, boards and agencies may purchase shall not exceed five thousand dollars for property damage or ten thousand dollars for personal injury or death of one person, or twenty thousand

dollars for personal injury or death of more than one person, arising out of a single accident."

It is to be noted that providing this insurance coverage is not a *duty* imposed upon the several state departments, commissions, etc. By the terms of the Act such departments, commissions, etc. are *authorized* to purchase the coverage therein prescribed and to pay the premiums thereon. This difference between the duty imposed and authority conferred explains the intention of the legislature in the enactment of this Act. Coverage for which the authority is granted is limited to the individual personal liability that state officials and employees may incur in the operation of state-owned or controlled automobiles in the performance of an official duty. Under this power an agency of the state is authorized to purchase a policy of insurance that will cover the personal liability of each of its employees when using state cars in the performance of their official duties. Whether such purchase of coverage shall be made and paid for is a matter within the discretion of the commission, agency, etc., which employs the individual who performs the official duty.

Insofar as the questions you propound are concerned we advise as follows:

1. The answer to your question number 1 is in the negative. Employees authorized to be insured are employees of the commission, agency, etc., for which the duty is performed. This would exclude the executive council or the car dispatcher from purchasing insurance for cars under the jurisdiction of the council and the car dispatcher, but used in the performance of official duties by other commissions, agencies, etc.

2. The answer to your question number 2 is no, for no authority to pay for riders on individual policies exist.

3. The answer to your question number 3 is in the negative likewise, for reasons set forth in number 2.

4. The answer to question number 4 is in the negative.

5. Payment for premiums should be made from the respective appropriations of the department that purchases the insurance.

6. The answer to your question number 6 is in the negative.

October 6, 1953

AUCTIONS: Personal property assessable only as of January first. Personal property is assessable only as of January first. Any attempt to have the property assessed when the same is not assessable under the law would in no way aid the owner to escape the provisions of the auction sales law.

Mr. Robert H. Shepard, County Attorney, Mason City, Iowa: This will acknowledge your inquiry of September 26th relative to chapter 239, Acts of the 55th General Assembly of Iowa [Ch 546A, Code 1954],

and specifically as to section 8 thereof. You inquire as to whether or not the language in section 8, and we quote:

"The provisions of this Act shall not extend * * * to auction sales by individuals of new merchandise, which was assessed personal property tax or is replacement stock of merchandise inventory which was assessed personal property tax in the county in which the sale is to be had, * * *." is applicable to merchandise which was not in the state of Iowa and subject to assessment under the taxation laws on January 1, 1953.

Code section 428.4 provides:

"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. * * *."

The Supreme Court of Iowa, in Wangler v. Black Hawk County, 56 Iowa at page 384, interpreted this statute as follows:

"Under the statute, as we construe it, personal property must be assessed and taxed in the name of the person owning it on the first day of January each year. If assessed to any other person than such owner, the assessor exceeds his jurisdiction, the assessment is illegal and so are the taxes levied. * * *.

Personal property not in this state on the first day of January is not taxable for that year, * * *."

The Court, in Churchill v. Millersburg Savings Bank, 211 Iowa 1168, held:

"Taxes are assessed for periods of one year at a time as of the first day of January of each year."

In Langhout v. First National Bank, 191 Iowa 957 at page 960, the Court stated:

"The powers, duties, and jurisdiction of taxing officials are prescribed, and they may not take cognizance of matters not within the contemplation of the statute defining their authority and jurisdiction."

It follows from the foregoing that an assessor could not properly assess personal property which was not in the state of Iowa on January 1 of any year. Such an assessment would be invalid and of no force and effect. This being true, the owner of merchandise brought into the state after January 1 could not have the same assessed and then claim by virtue of such assessment that they were within the provisions of section 8 of chapter 239 of the Acts of the 55th General Assembly. The legislature is presumed to have written this act in light of existing law, and they are charged with knowledge of the fact that personal property must be in the state on January 1 to be subject to assessment for taxation purposes.

It is our opinion that any attempt to have the property assessed when the same was not assessable under the law would in no way aid the owner to escape the provisions of chapter 239, Acts of the 55th General Assembly.

October 7, 1953

MOTOR VEHICLES: Maximum weight per axle permitted. Ambiguity in the phrase "nearest foot or fraction thereof" contained in the amended law on maximum weight permitted on each axle of a motor vehicle is discussed and construed.

Mr. E. F. Koch, Chief Engineer, Iowa State Highway Commission: In re section 321.463, Code of Iowa 1950, as amended by chapters 128 and 129, Acts of the 54th General Assembly, and chapter 140, Acts of the 55th General Assembly. This department has been asked to re-examine a memorandum opinion given under date of July 24, with respect to the above entitled Code section. The section as revised in pertinent part reads as follows:

"321.463 **Axle—maximum gross weight.** An axle may be divided into two or more parts, provided, however, that all parts in the same vertical transverse plane shall be considered as one axle.

The gross weight on any one axle of a vehicle, or of a combination of vehicles, operated on the highways of this state, shall not exceed eighteen thousand pounds on an axle equipped with pneumatic tires, and shall not exceed fourteen thousand pounds on an axle equipped with solid rubber tires.

No vehicle or combination of vehicles shall be operated with a total gross weight in pounds in excess of the amount given in the following table corresponding to the distance in feet between the extreme axles of the said vehicle or combination of vehicles measured longitudinally to the nearest foot **or fraction thereof.**

No group of axles or any vehicle, or any combination of vehicles, shall carry a load in pounds in excess of the value given in the following table corresponding to the distance in feet between the extreme axles of the group measured longitudinally to the nearest foot **or fraction thereof:**

Distance in feet between the extremes of any group of axles or the extreme axles of the vehicle or combination.	Maximum load in pounds carried on any group of axles or of the vehicle or combination.
4	32,000
5	32,000
6	32,000
7	32,000
8	32,610
9	33,580

* * *

The added phrase "or fraction thereof" which was added by the 55th General Assembly adds little to the context and there is some ambiguity.

The legislative history is that the chapter as originally introduced was House File 316, Senate File 388 and when introduced it did not contain the disputed language. For that reason the explanation attached to House File 316 affords no help. The amendment containing the language "or fraction thereof" was filed in the House. It appears at page 1179 of the House Journal and was adopted by the House on April 14, according to House Journal 1216 and 1217. The bill as amended was adopted by the House on the same day, House Journal 1220, and

was concurred in by the Senate on April 20, Senate Journal 1094. The original passage of the bill by the Senate before the amendment having taken place on April 2, Senate Journal 828. There is no committee report nor any debate that throws any light on the reason for the proposed amendment.

Prior to the adoption of the amendment this section had been construed by the department of safety and traffic and by such courts as had been asked to apply it to mean that the number of pounds of load which might be carried for each foot of wheel base as shown by the table applied to the half foot just under the figure opposite the respective weights up to but not including the half foot just above that figure. In other words if the distance between the extremes of any group of wheels was exactly on the dividing line, for instance 10½ feet, the more generous maximum load would apply. The breaking point in the application of the maximum load was the half foot measurement. It might not be considered that the language added would have any particular significance if it had been a part of the statute as originally enacted but it cannot be considered that the adoption of the language by an amendatory act of the legislature was without any meaning at all.

Under the heading "Statutes" in 50 American Jurisprudence 261, Chapter 275, the following rule with reference to change of language by amendment is announced:

"In making material changes in the language of a statute, the legislature cannot be assumed to have regarded such changes as without significance, but must be assumed to have had a reasonable motive. Where a statute is amended, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. To the contrary, the presumption is that every amendment of a statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change of phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change, particularly where the wording of the statute is radically different. . . ."

The foregoing rule does not seem to have been applied thus far by the Supreme Court of Iowa but it clearly represents the great weight of authority and apparently was most recently applied in 1951 in the case of Hopson v. North American Ins. Co., 71 Idaho 461, 233 P.2d 799, 25 A.L.R.2d 1040.

Unless it was intended to effect some change in the application of the rule as announced above the adoption of the amendment was an idle gesture. No other purpose has been suggested and the added language admits of the suggestion that the maximum weight announced for each foot of length is limited to the length opposite which it is put and that the next higher maximum announced begins to be applied the moment that length is exceeded.

It is the opinion of this department, therefore, that for a distance of seven feet between the extremes of any group of axles or the extreme axles of vehicle or combination the maximum load carried could be only

32,000 pounds, but that if the distance referred to exceeded seven feet but was eight feet or less the maximum load carried should be 32,610 pounds and so on, through the balance of the table.

October 9, 1953

JUSTICE OF PEACE: **Fees in mayor's court or police court.** Where a justice of the peace holds court on criminal cases in a mayor's court or police court he is still acting as justice, and while he is entitled to receive the fees, they are to be deemed part of his statutory salary.

Mr. Charles G. Rehling, County Attorney, Scott County, Iowa: I have yours of the 6th inst. in which you have submitted the following:

"The question has been raised in Scott county, Iowa, regarding the responsibility of a justice of peace in accounting for costs received.

The problem is briefly stated as follows:

The particular party was elected as justice of peace and acted as such. Subsequently, he was called upon to act as the magistrate in a mayor's court. In fact, the justice continued to perform all of the functions normally performed by the mayor in the police court. In the course of so acting, the justice of the peace received the costs for such cases. While acting in mayor's court, the justice also held his own justice of peace court. The justice received the full statutory amount of costs in his regular justice of peace work and the specific question is whether the additional costs which he received from his work in mayor's court can be retained by him, or whether the total of the fees, that is from both the justice of peace and mayor's court, are governed by the statutory limitations.

In submitting this problem, we are well aware of the general rules applicable to this situation. However a question has been raised by reason of the opinion at page 233, of the Opinions of the Attorney General, 1923-1924. The language of this opinion seems to indicate that the justice of peace is entitled to retain the costs received from mayor's court. It also appears to the writer that the statement of facts as contained in the aforementioned opinion at page 233 seems to state that the problem which is raised in our request for an opinion in this case. However the opinion is subject to various interpretations and for that reason we ask your clarifying the opinion in this instance."

In reply thereto I would advise you as follows. I agree with you that while the language of this opinion appears to indicate that the justice of peace is entitled to retain the fees received from performing services in the mayor's court, it is not as clear in this conclusion as could be desired and not sufficiently certain to constitute a precedent. A contrary conclusion was reached by opinion of this department appearing in the Report for 1944 at page 183, and on the authority of that opinion several letter opinions have been issued. There is authority for the latter conclusion in this matter in the case of Jones County v. Arnold, 134 Iowa 580. There suit was brought to recover an overpayment of compensation to the sheriff arising out of the fact that he had not accounted for fees received by him for the discharge of his duties as constable in mayor's court. In holding that fees so received from performing such services should have been taken into consideration in fixing his salary the court said:

"In Code Supp. 1902, section 511, it is provided that each sheriff is entitled to charge and receive certain fees, and it is further provided therein that: 'when sheriffs perform official duties in justices' courts, their fees shall be the same as allowed constables.' In Code, section 4591, it is provided that 'the constable is the proper executive officer in a justice's court, but the sheriff may perform any of the duties required of him.' We think it is clear that in thus performing the duties of constable the sheriff acts as sheriff, and not as constable, and therefore that the fees received by him for such services are fees for performing the duties of sheriff which are to be taken into account in fixing his salary."

The foregoing situation and statute insofar as the justice of peace holding mayor's court is evidenced by section 367.6, Code of 1950, in the terms as follows:

"Jurisdiction of justice of peace. If the mayor or judge of the superior, municipal, or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold court in criminal cases, and receive the statutory fees, to be paid by the city or county as the case may be."

It was seen therefore from the foregoing that where the justice holds court on criminal cases in a mayor's court or police court he is still acting as justice, and while he is entitled to receive the fees they are to be deemed part of his statutory salary.

October 14, 1953

ELECTIONS: Municipal office candidates—verifications of petitions. The oath of qualification and service if elected, required by a candidate for municipal office, is mandatory and if the required verification by an elector is omitted it disqualifies the candidate. Likewise, if the candidate verifies his own oath. Where all prospective candidates are so disqualified, a place on the ballot for a write-in vote is required.

Mr. Buell M. Lindgren, Attorney at Law, Des Moines, Iowa: We have yours of the 13th inst. in which you submitted the following:

"As attorney for the town of Windsor Heights, Iowa, I am requesting an opinion as to the application of the election laws and the qualifications of candidates for the coming November election. The town has a mayor and five (5) councilmen and a treasurer who are elected by popular vote. The facts are as follows:

"1. On the last day for filing petitions for nomination six (6) candidates filed affidavits as set forth in chapter 145 of the 54th G.A. stating that they would qualify and serve if elected, but failed to have an elector sign the affidavit in reference to the names of the signers of the petition. (The clerk has canvassed the names and finds that they are all qualified electors.)

"2. The remaining candidates filed the oath as to service if elected and verified their own petitions as to the signatures on their petitions. These petitions also contain the names of qualified electors.

"My questions are these:

"1. Are the first group named so qualified that their names might appear on the ballot?

"2. Are the second group qualified that their names can be qualified and certified on the ballot?

"3. If all are disqualified should there be an election called and write-ins permitted, or will the old officers continue to hold over?"

In reply thereto we would advise you:

1. In answer to your question No. 1, we would advise you that in our opinion the candidates whose petitions bear a sufficient number of qualified electors but do not bear the statutory affidavit are not entitled to have their names appear on the election ballot. The reason for this conclusion is found in the rule that there must be substantial compliance with statutory requirements in order to justify the placing upon an official ballot of the name of a candidate nominated by petition. 18 Am. Jur., Title "Elections", Paragraph 120.

The legal effect of failure to abide by the foregoing rule is stated in 29 C.J.S., Title "Elections", Paragraph 81, as follows:

"Irregularities and defects in carrying out constitutional and statutory requirements for the holding of an election will not be ignored prior to the election, but after the election they will not as a rule invalidate it unless they affect the merits thereof.

"Constitutional and legislative provisions designed to secure the freedom of the voters, the security and purity of the ballot, and the certainty of the result should not be entirely ignored. Statutes providing that laws as to elections shall be construed so as to give effect to the will of the electors, notwithstanding informality or failure to comply with some of their provisions, afford no excuse for the nonperformance of prescribed official duty, and apply only after the holding of the election and the will of the electors has been manifested. In general if there is substantial compliance with the statutes regulating elections the election is valid. An irregularity which affects the merits of the election and defeats the intended legal results will invalidate an election, but minor irregularities and defects in the procedure whereby a special election is brought about are insufficient to avoid the result."

To the same thought it is stated in the case of State of Indiana ex rel. Harry vs. Ice, 191 N.E. 155, 92 A.L.R. 1508, 1512, as follows:

"It is well settled that provisions of the election law viewed as mandatory, if enforcement is sought before election in a direct proceeding, will be held directory only in a proceeding after the election, unless an essential element of the election is affected, or there is an express declaration in the statute that the act is essential to a valid election, or that its omission will render the election void. The purpose of the law and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disfranchisement. In the absence of fraud, actual or suggested, statutes will be liberally construed to accomplish this purpose. Jones v. State ex rel. Wilson, supra; Blue v. Allee (1916) 184 Ind. 302, 111 N.E. 185."

Based upon the foregoing, we are of the view that the failure to attach to the petitions the affidavit required by section 17, chapter 145, Laws of the 54th General Assembly, is a failure of substantial compliance with the requirements of that statute and the candidates are not entitled to have their names appear upon the official ballot.

2. In answer to your question No. 2 respecting the candidates who verified their own petition as to the signatures on the petition, we would advise you that while the candidate who makes an affidavit as to qualification and address of each signature of the petition as provided by section 17, chapter 145, Acts of the 54th General Assembly, may be an elector of the corporation, the candidate himself is not an elector with-

in the spirit of the foregoing provisions, this for the reason that the design of this election law, as is that of election laws generally, is to secure a fair election, including a guard against fraudulent election procedure. The provisions so designed are mandatory and not directory. We are therefore of the opinion that the petitions bearing the affidavit of the candidate as an elector are not valid petitions and the signatures on such petitions may not be counted. This position has support in a related situation where the candidate has not made the certification but has acted as notary to the certifying signature. To such situation the Wyoming Supreme Court in State ex rel. Sammon vs. Chatterton, Secretary of State, 70 P. 466, 11 Wyoming 1, said:

"We think it unnecessary to decide whether or not the fact that the oath was administered by the person nominated renders the certificates invalid, if timely objection be made. *It is said to be a general rule, referring to notaries public, that if the officer is substantially interested in the transaction, or is a party to it, he is incapable of acting in that particular case.* 21 Am. & Eng. Enc. Law (2d Ed) p. 568. And in Illinois the court said: 'The propriety of the rule that oaths and affidavits should be taken before officers who are disinterested and unbiased is too manifest to require discussion.' "

And on the affect of acknowledgments certified by notaries having a beneficial interest in the subject matter of the instrument, see Farmers' & Merchants' Bank vs. Stockdale, 121 Iowa 748; Wilson vs. Traer, 20 Iowa 231; Empire Real Estate and Mortgage Company vs. Beechley, 137 Iowa 7, 66 C.J.S. 617. The question of the validity of the election if the signatures on such a petition were counted and the name of the candidate placed upon the ballot is not present. What is here submitted is whether the election officials can disregard the plain intent of the statute. Compare Munsell vs. Hennegan, 31 A. 2d 640, 146 A.L.R. 660, 667.

3. In answer to your question No. 3, we would advise you that according to the case of Barr vs. Cardell, 173 Iowa 18, 27, in holding that the right to vote is constitutional, it is stated:

"If the constitutional right to vote at all elections may be whittled away by denying the privilege to the elector of voting for persons to fill all the elective offices, or denying him the right to vote for anyone other than those whose names are on the ballot, then such right is worth no more than the legislature cares to make of it and nothing is acquired under the fundamental law through the provisions relating to the right of suffrage. Those qualified are given the right to vote at all elections, by the section quoted, not for persons the legislature directly or indirectly specifies, but according to their own free and unrestricted choice. Only by the free and untrammelled choice can the electors be said to exercise all that political power which is declared by the Constitution to be inherent in the people. We reach the conclusion that any limitation of the right of the elector to vote for whomsoever he chooses would be inconsistent with Sec. 1 of Article 2 of the Constitution. The point having been fully argued, its decision is appropriate and persuasive in construing the act under consideration. See Hunter v. Colfax Consolidated Coal Co., decided at the present session (Nov. 24, 1915. Petition for rehearing overruled Apr. 6, 1916).

"If, then, these statutes are open to the construction that the electors are not limited thereby, in voting the nonpartisan judicial ticket, to names printed on the ballot, they should be so construed. Nowhere is the elector expressly restricted from the right to vote for whomsoever he pleases. True, he is to use the form of ballot printed as prescribed,

but nothing contained in the chapter relates to the manner of marking or depositing the ballot, except that part of sec. 1087-b4 saying that 'the method . . . of preparation of the ballot, of canvassing the vote . . . shall, so far as applicable, be the same as now provided for the regular primary and general election laws of Iowa.' "

The rule of that case has been applied in city elections by two opinions of this department appearing in the Report of 1916, pages 162 and 163, both of which are set out as follows:

"Elections—city nominations—use of stickers. Blank ballot stickers may be used separately for each office without square thereon, and marked by voter after going into booth, where no nominations made.

March 21, 1916.

Henry H. Jebens, County Attorney, Davenport, Iowa.

1st. What form of ballot should be provided by the election officials where no nominations have been made?

2nd. May stickers be made use of by the voters in the marking of their ballots?

3rd. Must the stickers be used separately for each person voted for, or may the names of candidates for different offices be included upon the same paster?

4th. May the squares be printed upon the paster or only upon the ballot?

5th. If printed upon the paster may the same be marked by the voter before going into the booth?

Replying to your first question will say a blank ballot should be provided.

Replying to your second question will say that section 1119, Supplement to the Code, 1913, provides among other things, "The voter may also insert *in writing* in the proper place the name of any person for whom he desires to vote, making a cross opposite thereto." Subdivision 18 of section 48 of our Code provides: "The words 'written' and 'in writing' may include any mode of representing words and letters in general use, except that signatures * * * must be made by the writing or mark of the person." Under a statute in Minnesota which provides that the voter may write other names in the blank spaces and under a similar statute defining the scope of the words "write" and "written" it was held that the voter "may provide himself before going into the booth with, and use, the printed or typewritten name of his choice on adhesive paper; that is with the so-called paster or sticker." Snortum vs. Hoome, 119 N.W. 59. See also De Walt vs. Bartley, 15 L.R.A., 771; Ray vs. Hogan, 108 N.E. 105.

Replying to your third question: The stickers, if used, should bear the name of but one person and be used separately.

Answering your fourth question will say the squares should be printed upon the ballot and not upon the paster, and should only be marked by the voter in the booth.

Even if one ticket has been nominated, blank lines should also be added for the reception of the paster or the written name of the person for whom the voter desires to vote for each office to be filled.

C. A. Robbins, Ass't. Att'y. Gen'l.

Election—city nomination. Blank line for each office must be provided even though one ticket is properly nominated.

March 21, 1916.

Mr. E. E. Coakley, Ryan, Iowa.

Dear Sir: Replying to yours of the 20th instant will say that even though one ticket has been properly nominated a blank line and square

for each office to be filled should also appear upon the same ticket and in the same column immediately following the names printed on the ballot in order that the voter may write in or paste in by means of a sticker the name of the person for whom he desires to vote for each office to be filled.

C. A. Robbins, Ass't. Att'y. Gen'l.

Therefore, in answer to No. 3, we would advise you that if all are disqualified, a place on the ballot for a write-in vote is required, and in the event, as appears in the situation presented, the candidates whose names are written in may be the only successful candidates, the number of votes they receive will entitle them to be considered elected. See Barr vs. Cardell, supra.

October 16, 1953

ZONING LAW: County zoning law—"farm land" construed. The statutory exemption in the county zoning law, afforded to farm land, is determined by the facts as to whether the land is used for agricultural purposes as a primary means of livelihood and not by the area of land with certain boundaries designated as a farm.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa; Attention James V. Sarcone, Assistant County Attorney: We have yours of the 28th ult. in which you have submitted the following:

"The Polk county zoning commission has requested this office to seek an opinion interpreting section 358A.2 of the 1950 Code of Iowa. The zoning commission specifically wishes to know whether or not a certain number of acres of land shall constitute a farm within the meaning of the Code section above referred to or whether the provision in that Code section which states 'for use for agricultural purposes as a primary means of livelihood, while so used' shall govern what is intended as a farm under the provsions of said Code section 358A.2."

In reply thereto we advise you as follows. The statute from which the question arises is section 358A.2, Code of 1950, in terms as follows:

"**Farms exempt.** No regulation or ordinance adopted under the provisions of this chapter shall be construed to apply to land, farm houses, farm barns, farm outbuildings or other buildings, structures, or erections which are adapted, by reason of nature and area, for use for agricultural purposes as a primary means of livelihood, while so used."

The case presented is not whether the land adapted to farming is subject to zoning, but whether such land, buildings, etc., may be exempted from zoning ordinance and regulation. In either aspect the test is the same, that is, what constitutes a farm or land used for agricultural purposes as a primary means of livelihood. As so stated, we clearly infer that the terms of the statute described land *for use* for agricultural purposes together with farm buildings and other attributes thereof, for deprivation of the use of land as opposed to the land itself is essential to subjecting the land to zoning regulation. Bank of America Nat. Trust & Savings Ass'n. v. Town of Atherton, 140 P. 2d 678, 681, 60 Cal. App. 2d 268; N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge, 69 A. 2d 767, 771, 6 N. J. Super. 495; Devaney v. Board of Zoning Appeals of City of New Haven, 45 A. 2d 828, 829, 132 Conn. 537; State

ex rel. Spiros v. Payne, 41 A. 2d 908, 911, 131 Conn. 647. In reaching a conclusion herein certain principles are to be noted. It is stated in In Re W. P. Rose Builders' Supply Co. et al., 163 S.E. 462, that:

"Zoning ordinances are in derogation of the right of private property, and, where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner. * * *"

From the case of Granger v. Board of Adjustment, 241 Iowa 1356, 1363, the following:

"Zoning is an 'exercise of the police power, in the interest of public peace, order, morals, health, safety, comfort, convenience, and the general welfare.' Boardman v. Davis, 231 Iowa 1227, 1229, 3 N.W. 2d 608. Under the guise of zoning, arbitrary and unreasonable restrictions upon the use and enjoyment of property, prohibition of use which does not interfere with the equally rightful use and enjoyment by others of their property, or deprivation of property without due process of law may not be made. Anderson v. Jester, 206 Iowa 452, 221 N.W. 354. Zoning being an exercise of police power by the municipality, which is a power delegated from the State, such delegated power must be strictly construed. Downey v. City of Sioux City, 208 Iowa 1273, 227 N.W. 125."

Bearing in mind these principles and the conclusion herein that the legislative intent was to exempt from the operation of the county zoning law farm land, it is our opinion that whether such land is entitled to be exempted depends upon its use primarily as a means of livelihood and not on the area of land that might constitute a farm.

Adjudication of what constitutes farming or using land for agricultural purposes within the terms of an exemption was determined in Chudnov v. Board of Appeals, 154 A. 161, in terms as follows:

"The first question presented is whether, as the appellant claims, the use which he contemplates making of his land constitutes farming, and therefore is permissible in a residence zone under subsection (8) of section II. It is apparent upon examination of the available definitions of 'farming,' that the dominant and distinguishing characteristic of this occupation, in both the popular and the legal sense of the term, is the cultivation of the soil for the production of crops therefrom. Corpus Juris (volume 25, p. 674) defines it as 'the business of cultivating land, or employing it for the purposes of husbandry; the cultivation and fertilization of the soil as well as caring for and harvesting the crops.' Most of the judicial definitions have been evolved by the federal courts in the course of determination of the scope, and application to varying sets of facts, of the exemption, under the bankruptcy acts, from adjudication as an involuntary bankrupt, of 'a person engaged chiefly in farming or the tillage of the soil.' Bankr. Act sec. 4b (11 USCA sec. 22(b)). Both in this and other connections a farm has been held to denote a considerable tract of land devoted, at least in part, to cultivation of crops and produce, with suitable buildings. Kendall v. Miller, 47 How. Prac. (N. Y.) 446, 448; In re Drake (D. C.) 114 F. 229, 231; 2 Bouvier (3d Rev.) 1190; 3 Words and Phrases, First Series, page 2697. 'A farm is, both by the standards and in common acceptation, defined to be a body of land, * * * devoted to agriculture, either to the raising of crops or pasturage or both.' People ex rel. Rogers v. Caldwell, 142 Ill. 434, 436, 32 N.E. 691, 693."

See also Winship v. Inspector of Buildings, 174 N.E. 476, where it is stated:

"A farm may consist of land devoted to agriculture and may lie in one township or in more than one. The word farm has a well defined

meaning and is a tract of land devoted to agriculture, stock raising or some allied industry. Williams v. Chicago & Northwestern Railway, 228 Ill. 593, 81 N.E. 1133; Gordon v. Buster, 113 Tex. 382, 257 S.W. 220. A tract of land of eighteen acres devoted to agriculture and the raising of crops and domestic animals is as properly designated and held to be a farm as a much larger tract carried on for the same purposes. It could not be successfully contended that a tract of land where cows were kept and nothing was there produced except milk for sale was not a dairy farm within the ordinary meaning of that designation."

And see Annotation 146 A.L.R. 1201 treating the terms "farm" and "farming" in zoning regulations.

By reason of the foregoing we advise you that the exemption provided by section 358A.2, Code of 1950, is determined by the facts as to whether the land is used for agricultural purposes as a primary means of livelihood and not by the area of land with certain boundaries designated as a farm.

November 19, 1953

COUNTIES: Courthouse improvement—payment of architects where election fails. The board of supervisors has power to employ architects, to prepare tentative plans for improvement of county buildings, in order to secure competent data to submit to the voters for approval and authorization to proceed. If the voters fail to authorize the improvement the cost of preparation may be paid from the county general fund.

Mr. Robert H. Shepard, County Attorney, Mason City, Iowa: I have yours of the 21st ult. in which you have submitted the following:

"I request a formal Attorney General's opinion concerning the effect of chapter 345 of the 1950 Code of Iowa in the following factual situation:

The Cerro Gordo county, Iowa, courthouse is more than 50 years old. It has no fireproof vault storage space. The county jail is a separate building and for a number of years has not been approved by the federal bureau of prisons. For many years, the grand juries of Cerro Gordo county, Iowa, have written critical reports to the board of supervisors, after their annual inspection of county property, pointing out the lack of fireproof vault space for storage of records and also the rather unsatisfactory structural condition of the Cerro Gordo county, Iowa, jail.

Acting in response to these grand jury criticisms, the board of supervisors engaged a Minneapolis firm of architects with a view to determining whether the present courthouse and jail should be razed and an entire new structure built or whether it would be more economical to build an addition on to the present courthouse, razing the present jail and having the offices housed in the new addition which require fireproof vault storage space for records, together with the county jail facilities. Accordingly, a Minneapolis firm of architects, experienced in this line of endeavor, was engaged with a view to collecting data necessary for the submission of the question to the voters and the issuance of bonds. In order to ascertain what type of structure would satisfy the requirements of the county as pointed out by the grand jury reports, and in order to intelligently know how much money would be required from a bond issue, the Minneapolis firm of architects performed the following services, to-wit:

(a) Inspected the condition of the present old courthouse and present old jail.

(b) Conferred with the county recorder, auditor, clerk and treasurer with a view to learning the functions of their offices and requirements for fireproof vault storage space, including the anticipated requirements of the respective offices for the next 25 years.

(c) Prepared rough preliminary plans and a rough drawing showing the proposed addition to the courthouse as being a three story fireproof structure plus a basement. The proposed new county jail was located on the top floor of the addition. The entire proposed building included 25 per cent of its floor area in either actual or potential fireproof vault space.

(d) Gathered information concerning the proposed cost of such an addition, which included the desired fireproof vault storage space and a new jail.

(e) Conferred with affected officers to ascertain if the proposed plan would meet the requirements of the respective offices.

The proposed bond issue was defeated by a vote of the citizens of Cerro Gordo county, Iowa, on August 24, 1953. The architects are now desirous of being paid for the foregoing work which they have performed, all of it being of a preliminary nature. The bill of the architects included nothing for final plans of the building, drawing final specifications for various subcontractors, drawing blueprints of various subcontracting phases of the proposed construction, actual supervision of construction, such as normally is done by reputable architect, or any other work that would normally go into the final construction of a building.

I am familiar with the limitation of authority of the board of supervisors to spend money as set forth in the 1922 Opinion of the Attorney General at page 374. This opinion does not in terms deal with mere preliminary drawings and estimates as are necessary to permit an intelligent choice by the voters at the bond issue election. I think it is necessary to make a distinction between such preliminary tentative work on the one hand and the final drawings and specifications on the other. It seems unreasonable to expect a group of laymen on the board of supervisors to competently estimate for presentation to the voters at a bond issue the amount of money necessary to pay for a highly specialized structure containing cellblocks and a vast amount of fireproof storage space, unless they first obtain at least a minimum of preliminary and tentative estimates by a competent architect. Only in this way can the necessary factual information be presented to the voters so that they may vote intelligently on the bond issue. I am satisfied that the 1922 Attorney General's Opinion was never intended to prevent the county authorities and the voters from obtaining the necessary preliminary data on which to make an intelligent choice.

However, I certainly feel the opinion is correct in that final plans and specifications for an addition to a courthouse should be paid for out of the bond issue proceeds and not from the general fund of the county.

In view of the foregoing, I wish to be advised if the board of supervisors may properly pay the Minneapolis firm of architects from the general fund for their work of a preliminary nature in connection with the unsuccessful proposed bond issue of August 24, 1953, for an addition to the Cerro Gordo county, Iowa, courthouse."

In reply to the foregoing we advise you as follows: The following several statutes support the view that the legislature imposed a duty upon the county to provide and maintain a courthouse. Section 332.3, subsection 4, confers power to make expedient orders concerning corporate county property, and subsection 6 of that section, empowers the board to have the care and management of the county property where no other provision is made. Subsection 12 provides power to purchase

for the use of the county, real estate necessary for county purposes. Section 332.9 imposes the duty upon the board of supervisors to furnish the several county officials with offices at the county seat. Section 604.9 provides that courts must be held at the places provided by law. Section 604.10 provides that where there is no courthouse at the place where court should be held that the session shall be at such suitable place as the board of supervisors provides. These and related statutes are those that the court has reference to in the case of Kincaid v. Hardin County, 53 Iowa 430, concluding that:

"The statutes of this state contemplate that every county shall be provided with the necessary county buildings, and to that end, by section 303 of the Code, the board of supervisors are empowered to build and keep in repair the necessary buildings for the use of the county and the courts. Section 773 provides that 'when a county is not provided with a regular courthouse, at the place where the courts are to be held, they shall be held at such place as the board of supervisors provide.' It will be seen that all counties are required, without their assent and exclusively for public purposes, to provide a room or place for holding the courts. The counties have no option concerning this duty. It is an involuntary duty imposed upon them by the state, and imposed upon all alike. The obligation to build bridges is different. The statute leaves it to the respective counties to determine what bridges shall be built. It is provided that the board of supervisors shall have power 'to provide for the erection of all bridges which may be necessary, and which the public convenience may require within their respective counties, and to keep the same in repair.' Code, sec. 303, sub. 18.

The respective counties are not absolutely required by this provision of the statute to build any particular bridge, or to build any bridge whatever. It is a question to be determined by the board of supervisors, taking into account the wants and convenience of the public. * * *"

Like other general duties conferred upon public administrative bodies the duty here conferred upon the board of supervisors vests them with power to determine in their sound discretion the manner in which the duties shall be fulfilled. Within this area of discretion it cannot be doubted that to inform itself of the requirements of the several public offices it is bound to house, including space for holding court, the economic use of tax money in the type, extent and cost of the court building and the public convenience involved in the use of the building, that the board of supervisors could employ qualified architects to prepare and present informative data for use by the supervisors in correctly presenting the facts to the public and compensate them out of the county general fund. Therefore, in the situation outlined in your letter the board was within its powers in employing architects to prepare and present informative data from which to determine the type of courthouse necessary to meet the needs of the county and estimate the probable cost to the taxpayer. If the compensation to such architects for service to be rendered was not fixed the board is empowered to pay the reasonable value of the services of the employed architects. In this view the fact that the voters under the authority vested in them by chapter 345 did not authorize the construction of a new courthouse and impliedly denied power in the board to proceed further with plans therefor, does not deprive or divest the board of the powers it exercised in the formulation

of the project nor deny to them the power to pay for the services of architects in the exercise of such powers.

November 19, 1953

FUNERAL EXPENSE PLANS: Deposit of trust funds. The statute providing for prearranged funeral plans authorizes any bank or trust company, including foreign trust companies doing business in Iowa, to accept such trust funds for deposit.

Mr. Newton P. Black, Superintendent of Banking: This is in reply to your oral request for an opinion as to whether chapter 231, Laws of the 55th General Assembly (H.F. 378), [Ch. 523A, Code 1954], applies only to banking institutions or whether it refers to any corporation having trust powers and authorized to do business in Iowa.

The pertinent part of Chapter 231, Laws of the 55th General Assembly, reads as follows:

"Whenever an agreement is made by any person, firm or corporation for the final disposition of a dead human body wherein delivery of personal property to be used under a prearranged funeral plan or the furnishing of professional services of a funeral director or embalmer in connection therewith, is not immediately required, eighty per cent of all payments made under the agreement, including interest thereon, shall be and remain trust funds until occurrence of the death of the person for whose benefit the funds were paid, unless said funds are sooner released to the person making such payment by mutual consent of the parties.

All such trust funds shall be deposited in a bank or trust company authorized to transact business in this state within thirty days after the receipt thereof and shall be held in a separate account or in one common trust fund under a trust agreement in the name of the depositor in trust for the designated beneficiary until said trust fund is released under either of the conditions provided in section 1.

Any bank or trust company doing business in this state and receiving such trust deposits shall make report thereof annually to the superintendent of banking, indicating the name and address of each depositor and beneficiary, the amount so deposited and the interest paid on such account. Such annual report shall be made on or before February first of the year following the year of deposit.

Any person, firm or corporation, or any agent or representative thereof, who shall violate any of the provisions of sections 1 and 2 of this Act, or who shall aid and abet in such violation, shall be deemed guilty of a misdemeanor."

Section 2 of the Act as introduced into the House and passed by that body reads, in part, as follows:

"All such trust funds shall be deposited in a bank or trust company licensed under the banking laws of this state."

On April 17th and 20th three amendments were filed. On April 23rd two of the amendments were withdrawn, (S.J. Page 1150). On the same day the amendment by Watson of Pottawattamie was adopted, (S.J. page 1151), so that part of section 2 quoted above was made to read as follows:

"All such trust funds shall be deposited in a bank or trust company authorized to transact business in this state."

The Bill as amended passed the Senate, (S.J. page 1151), and on April 24th the House concurred in the Senate amendment (H.J. page 1149).

The legislative history of H.F. 378 clearly indicates that the legislature did not intend to limit the depository of trust funds for funeral expenses to banks or trust companies licensed under the laws of the state of Iowa. Moreover, the wording of section 3 is important in arriving at the legislative intent, for section 3 provides, any bank or trust company authorized to do business in this state and receiving such trust deposits shall make report thereof annually to the superintendent of banking.

It is our opinion that H.F. 378 as amended authorizes any bank or trust company, including foreign trust companies authorized to do business in Iowa, having trust powers and qualified to do business in Iowa, to accept trust funds provided for by H.F. 378 for deposit. A bank or a trust company, either domestic or foreign, is required to make an annual report to the superintendent of banking with reference to the trust funds created under H.F. 378.

December 10, 1953

GAMBLING: "Bank night" without element of consideration paid. A theater "bank night", conducted in such a manner that there is no element of consideration paid by the participants, is not a lottery and not violative of the gambling laws.

Senator R. R. Bateson, Eldora, Iowa, and Mr. Wendell B. Gibson, Attorney at Law, Des Moines, Iowa: You have requested an opinion as to whether an enterprise conducted in accordance with the facts hereinafter set forth contravenes the gambling laws of this state. The facts are:

"Members of the public will sign a registration book which will be in the possession of a theater business. A number is set forth opposite each registration.

Numbers corresponding to the number appearing opposite each registration will be placed in a container. Once each week a number will be withdrawn from the container.

Cards will be available each week which persons who have signed the registration book may obtain free and deposit in a container provided by the theater business. No charge will be made for the opportunity to deposit the card nor will persons attending the theater obtain any advantage in receiving a card or opportunity to deposit the same.

The drawing will take place at a time when the theater is not open, or in the event the theater is open all persons present for the drawing will be admitted to the theater without charge and will be entitled to view the entertainment, scheduled by the theater, without charge. Any person who has signed the permanent registration book is entitled to participate in the drawing if present at the drawing. Also registrants who are not present at the drawing but have signed weekly cards hereinbefore mentioned, are entitled to participate. The word 'free' herein-

before used, means not only that no direct charge is made, but such word includes the meaning that there is no tie-in sale, nor is any consideration paid indirectly.

The number drawn will be checked by the person drawing the number, against the registration book. In the event the person whose number is drawn is present or has signed a participation card for that particular week, that person shall be given an award or prize. In the event the person whose number is drawn is not present and has not signed a participation card for the particular week, no prize or award will be given for that week, but the prize or award scheduled to be given that week will be carried over to the week following and will be added to the prize or award scheduled to be given in the week following.

The decision of the theater manager shall be final regarding the eligibility of a contestant to win the scheduled prize or award."

We note that all members of the public have an equal opportunity to register in the permanent book *with no advantage whatsoever being gained by persons who patronize the theater*, and in connection with the drawing that weekly registration is in no way connected with patronage of the theater and *that all members of the public have an equal opportunity to obtain and deposit weekly eligibility cards without paying for the same, directly or indirectly.* As to registrants attending the drawing we note that the drawing will be held at a time and place when the theater is not open for business, or in the event the theater is open, tickets of admission will not be sold for the scheduled theater entertainment for the program immediately preceding and immediately following the drawing.

The Supreme Court of Iowa has repeatedly ruled that a lottery consists of three elements: (1) A consideration, (2) for a chance (3) to win a prize. In the absence of any one of the three elements a lottery does not exist. The definition presupposes that there must be some means of determining the participants. In other words, in order to have a "chance to win a prize" those participating must be identified in some manner. It must necessarily follow that merely becoming identified as a participant does not constitute the giving of a consideration. Otherwise, a lottery would be simply defined "as a drawing among persons for a prize".

An enterprise conducted in strict conformance, both in letter and in spirit, to the facts you have outlined, is nothing more than "a drawing among persons for a prize". The essential elements of "consideration" is therefore lacking.

You are advised that it is the opinion of this department that such an enterprise as you have described *conducted as set forth herein* is not in violation of the gambling laws of this state. However, we caution you that should any person or corporation deviate from the plan as described whereby the element of consideration is present, then the same is definitely a lottery, and is in violation of our laws.

December 18, 1953

COUNTIES: County attorney's expenses at national convention. The attendance of a county attorney at a national convention of county attorneys, at which matters relating to the official duties of that office are discussed, is the performance of an official duty and his actual expenses may be paid from county funds.

Mr. C. B. Akers, Auditor of State; Attention Earl C. Holloway: This will acknowledge receipt of yours in which you have submitted the following:

"We have received a letter from Mr. E. F. Griffith, state examiner, who is making an audit of Plymouth county. He stated that a claim was found filed and paid by the county for expenses of the county attorney while attending a national convention of county attorneys in Minneapolis. * * *

The question is, can the county attorney be allowed expenses to a national convention?"

In reply thereto we would advise you that in our opinion attendance of the county attorney at a national convention of county attorneys at which matters relating to the official duties of that office are discussed, is the performance of an official duty of the county attorney and whose actual expenses in attendance thereat may be properly paid out of county funds. Attendance of such meetings is not a mere convenience, but appears to us to be a matter of responsibility and in effect is the use of public funds for a public purpose We embody the following excerpt from an article addressed to this problem appearing in the magazine "Western City" for April, 1953, to-wit:

"As the cited cases indicate, the use of public funds to defray the expense of attendance at conventions has been sustained by the courts where the particular trip was one which could reasonably be expected to result in more efficient and better informed local government. It is clear that not all convention trips can be sustained under these principles. Mere 'junkets' which are primarily for the purpose of social entertainment, rather than for serious discussion of problems of public administration, manifestly will not be approved by the courts at the expense of the taxpayers. As in other fields of law pertaining to the expenditure of public money, complete good faith and reasonable expectations of public benefit appear to be an essential prerequisite. The initial determination of whether or not the particular convention is one which meets this test, however, is one which is the responsibility of the governing body of the local entity which has the duty of approving the expenditure of public funds. As a number of cases have pointed out, this initial determination will not be disturbed by the courts except upon a showing that it is arbitrary, fraudulent or an abuse of discretion. (Reeves v. Talbott (1941) Ky. 581; Kelso v. Teale (1895) 106 Cal. 477.)"

as representing our view. In the aspect of the foregoing, section 343.12, Code of 1950, providing:

"**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."

is not violated.

However, payment of such expenses should be conditioned upon the prior authorization by the board of supervisors of the county attorney's

attendance at such meeting. Such prior authorization being present, the county attorney would be entiled to his actual expenses incurred in attending such meeting.

The authority of this opinion is limited to the subject matter to which address is made.

December 23, 1953

SANATORIUM: Lien for care—limitation of actions—accounts kept. There is no lien in favor of the county when assistance is given to a person receiving care at the state sanatorium.

The statute of limitations applicable to open running accounts governs in case of a person liable for such assistance.

The county auditor has implied authority to maintain a separate claim book in such cases but he is not required to do so.

Mr. James M. Demro, County Attorney, Nashua, Iowa: In your letter dated December 9, 1953, you request an opinion on the following questions:

"1. Is there a lien in favor of the county when assistance is given to a person receiving care at the state sanatorium at Oakdale?

"2. Does the statute of limitations on an open running account govern in the case of an individual personally liable for assistance for care at the state sanatorium at Oakdale?

"3. Should the county auditor keep two separate county account records, one specifically to record claims arising in cases where an institutional lien is created by law, and another specifically to keep a record of accounts against persons who receive care in institutions where no lien is created by law?"

In answer to your first question, we would call your attention to an official opinion issued under date February 17, 1941, appearing in 1942 A.G.O., page 27. In that opinion attention was called to that part of section 3604.1, Code 1939 (Section 230.25, Code 1950), which provides:

"Any assistance furnished under this chapter * * *." (Chapter 179, Code 1935, now chapter 230, Code 1950).

It was therein noted that in the chapter relating to the state sanatorium references as to liability and procedures for the collection of amounts due for assistance were made to the provisions of the chapter dealing with the support of the insane. These were recognized as being merely for convenience only and not as having any effect on the existence of a statutory lien. The opinion cited numerous authorities to the effect that statutes creating liens must be strictly construed and reached the conclusion that assistance furnished tubercular patients at the Oakdale sanatorium, not being furnished under the chapter entitled "Support of the Insane" (now chapter 230, Code 1950), did not constitute a lien under the provisions of the latter chapter. We have examined all the statutes considered in that opinion and find no changes since the issuance thereof. It is our conclusion, therefore, that the provisions of section 230.25, Code 1950, do not create a lien in favor of the county when assistance has been furnished to a tubercular patient receiving care at

the state sanatorium at Oakdale or in any other hospital or institution, nor does such a lien exist by virtue of any other statute.

In answer to your second question we note that long prior to the enactment of sections 230.25 and 230.26, Code 1950, in 1939, by the provisions of section 4, chapter 98, Laws of the 48th General Assembly, it had been held that assistance furnished to an insane person under chapter 230 of the Code which was a liability of the patient as well as persons liable for his support, was such an account as to be a continuous, open and current account within the meaning of the statute of limitations. See 1923 A.G.O., page 336; Cedar County v. Sager, 90 Iowa 11; Buena Vista County v. Woodbury County, 163 Iowa 626; Scott County v. Townsley, 174 Iowa 192. Later, and in an opinion under date February 2, 1943, appearing in 1944 A.G.O., page 15, it was held that the above named cases were controlling and that the same principle would apply to all similar institutional accounts owned by a county.

It is our conclusion that the statute of limitations applicable to an open running account governs in the case where a county attempts to collect by action for the patient's support in the state sanatorium at Oakdale. In this connection it should be noted, however, that the statute of limitations is an affirmative defense and the facts constituting the bar of the statute must be pleaded. See Murphy vs. Hahn, 208 Iowa 698, 223 N.W. 756.

In answer to your third inquiry, we would advise you that there is no statutory requirement that the county auditor keep an account of the cost of maintenance of each patient having legal settlement in his county which is at the Oakdale sanatorium. The provisions of section 230.26, Code 1950, are limited to assistance furnished patients under the provisions of chapter 230 of the Code. Prior to the enactment of section 230.26, there was no specific requirement that he keep a separate account for each of such patients, yet in the cases heretofore cited, the charges against the patient or those legally liable for his support were recognized as constituting an open account. In the case of Cedar County v. Sager, supra, in order to prove the amount of assistance it had furnished, Cedar county introduced in evidence certificates of the superintendent of the hospital and notices of the auditor of state to the county auditor of the charges made for the patient Sager. Such method of proving the account was objected to and the Supreme Court held that the objections were not good. They stated that the certificates and notices were provided for by law and were presumptive evidence of the correctness of the sums appearing therein. Such a method of establishing the amount of the account would be equally available now regarding assistance to a tubercular patient at the sanatorium except that under the provisions of sections 271.14 and 230.20, Code 1950, the duplicate certificate of the superintendent to the state comptroller which is required to be sent to the county auditor would be available for establishing the amounts which had been expended by the county on behalf of the patient in question.

We are of the opinion that the county auditor would have implied authority to maintain a separate claim book in which he carried a ledger account for each patient other than the insane, but there is no statute

requiring him to do so. In view of the limited provisions of section 230.26, Code 1950, we would add that in our opinion the county auditor would be acting improperly if he should enter any institutional account in the record of accounts required to be kept and maintained by that section other than those which are within the scope of its provisions.

December 29, 1953

INSANE PERSONS: Instituting legal proceeding to collect for care. When the board of supervisors directs the county attorney to proceed to collect for the care of an insane person at a state institution, it must supply information as to guardianship, existence of a spouse, ownership of real estate, financial status of persons declared liable and other matters bearing on the instituting of legal proceedings.

Mr. Charles G. Rehling, County Attorney, Davenport, Iowa: This is in reply to your recent request for an opinion relative to the provisions of section 230.27, Code 1950. You ask whose responsibility it is to make necessary investigations regarding such matters as to whether the patient is living, if so, whether under guardianship, if not, whether an estate has been opened, the existence of a spouse, whether either the patient or spouse owns real estate, whether any of the persons declared legally liable for the assistance furnished the patient exist, and what their financial status might be, all of which have a bearing on the matter of instituting legal proceedings for the purpose of collecting claims existing under the provisions of chapter 230, Code 1950.

Section 230.27, Code 1950, provides as follows:

"It shall be the duty of the board of supervisors to collect said claims and *direct the county attorney to proceed with the collection of said claims as a part of the duties of his office.*" (Italics supplied.)

In an official opinion dated May 26, 1939, appearing 1940 A.G.O., page 251, the foregoing section was considered insofar as it relates to the duty of the county attorney to proceed with the collection of such claims if directed to do so by the board of supervisors. The matters you inquire about were not considered therein.

There can be no doubt but that the legislature placed the primary duty or responsibility of collecting these claims on the board of supervisors. From the italicized portion of the above quotation of the section the county attorney is not required to act until directed to do so by the board of supervisors and even then the extent of his duty is to *proceed* with the collection of said claims as a part of the duties of his office. The word "proceed" has a recognized meaning in law. It means "to begin and carry on a legal proceeding; to conduct legal proceedings." See Webster's New International Dictionary, Second Edition; Volume 34, Words and Phrases, page 79; and Graham v. Michigan Motor Freight Lines, Mich., 7 N.W. 2d 246, 250, 304 Mich. 136.

With the foregoing definition in mind, it is our opinion the legislative intent expressed in section 230.27, Code 1950, is that the board of supervisors, with the assistance of the county auditor and his staff, in the performance of the duties imposed by section 230.26 and chapter 333,

Code 1950, should not only receive monies voluntarily paid on such accounts but also utilize and exhaust the usual collection techniques on all other such accounts. This would necessitate the securing and using of the information on the matters you mentioned in your inquiry. In order to "proceed with the collection" of such a claim, the county attorney is entitled to have such information and it is the duty of the board of supervisors to make necessary arrangements for supplying him with it.

December 29, 1953

HIGHWAYS: County road survey by private engineers—payment. The county supervisors may engage the services of a private engineering firm to study the county road system with a view to integrating it with an over-all plan of road improvement and pay the costs from the county general fund, the secondary road construction fund or the secondary road maintenance fund, or from any or all of said funds.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: In your letter of December 10, you inquire on behalf of the board of supervisors of Polk county whether that board would have the power to contract for the services of a private engineering firm. The purpose of the employment is to have that firm make a study of the county road system of Polk county with a view to integrating it with the over-all road plan of the city of Des Moines. If this question is answered in the affirmative you inquire from what funds such a firm may be paid.

In the planning of a modern highway program, it is just as necessary to make a survey of traffic to accumulate data as it is to make a survey of the terrain on which it is proposed to construct the highway. It is just as essential to determine the volume, weight and trends of traffic as it is to estimate requirements of highway drainage or to take the levels upon which cross-sections and alignments can be computed. These are factors which affect not only the location and grade of the highway, but the kind and character of highway surface and the amount of reinforcing required to resist the impact of traffic. These are problems which affect the engineering and design of every highway project. They are relatively simple in a rural county with few market centers, but become increasingly complex with the number and size of the urban communities within the county boundaries or adjacent thereto.

Chapters 306 to 320 inclusive, Code of Iowa 1950, as amended, classify the highway system, fix the responsibility and define the jurisdiction of the several boards and commissions with respect thereto. Section 309.9 pledges 35% of the yearly secondary road construction fund to the improvement of those local county roads "which the board (of supervisors) finds are of the greatest utility to the people of the various townships". How is such a determination to be made without some consideration of volume of traffic and traffic trends? The succeeding section 309.10 provides:

"The balance of said secondary road construction fund sl.all be used for any or all the following purposes at the option of the board of supervisors: * * * 8. The payment of * * * *all other expenses* incurred

in the construction, reconstruction or improvement of secondary or farm-to-market roads in said county."

That engineering is a necessary part of the construction, reconstruction, or improvement of a road is hardly subject to debate. Hence this broad grant of power is sufficient to cover the payment of the cost of engineering unless it be limited by subsequent statutory provisions. No such limitation is apparent. Section 309.17 provides as follows:

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

Section 309.18 provides for the fixing of their compensation and the payment of the same "together with all engineering costs, from the general county fund, or from the secondary road construction fund, or from the secondary road maintenance fund, or from any or all of said funds." Section 309.22 provides for the adoption by the board of supervisors of a comprehensive program for a period of years subject to the approval of the Iowa state highway commission. Section 309.23 provides for the adoption of a tentative plan of improvement which contemplates recommendations by the township trustees to the board of supervisors, as to those roads which should be improved first and directs the board of supervisors to plan a program of construction based thereon. Section 309.24 requires such a program to be uniform and unified and 309.25 reads as follows:

"In planning and in adopting said program or project by the board of supervisors, said board and the county engineer shall give due and careful consideration, (1) to the location of primary roads, and of roads heretofore improved as county roads, (2) to the *market centers* and *main roads leading thereto*, and (3) to rural mail and school bus routes, it being the intent of this chapter that said program or project will, when finally executed, afford the highest possible systematic intracounty and intercounty connections of *all* roads of the county."

How is such a study to be made in the absence of a consideration of the very factors to which reference is made in your communication? Sections 309.26, 309.27, 309.28, 309.30, 309.32, 309.35 and 309.37 all confirm and strengthen this conclusion. Section 309.56 provides for a review of the thoroughness, feasibility and practicability of such plans by the Iowa state highway commission after they have been approved by the board of supervisors subject to the approval of the state highway commission to make proper connections between roads which cross county lines so as to afford continuous lines of travel. The succeeding section provides for the enforcement of this rule by the state highway commission. Section 309.73 provides for the integration of highways with city bridges and streets and for the enforcement of that program by the state highway commission.

From the foregoing it is apparent that the board of supervisors has the authority to take into consideration in the adoption of its highway program, the very factors sought to be determined by the engineering study about which you inquire. To require the hiring of an individual or individuals to conduct the study, draw the proper conclusions there-

from and make appropriate recommendations thereon, would seem to be clearly within the power of the board of supervisors but would be highly wasteful in view of the limited period the services of most of these specialized engineers would be required. Engineering organizations exist with staffs geared to study this specific problem. It would be highly legalistic and frustrating to conclude that the greater but more wasteful power did not include the lesser and more economical. It is the opinion of the department that the board of supervisors may by contract temporarily supplement the engineering services of the county engineer's office for the purpose indicated in your letter.

Your inquiry does not indicate any intention of using farm-to-market funds. For that reason no attempt is made to arrive at a conclusion concerning the possibility of applying that fund to such purpose. The funds out of which the work authorized by section 309.17 shall be paid are specifically indicated in the following language:

309.18 **Compensation.** "The board shall fix the compensation of said engineer or engineers, and pay the same, together with all engineering costs, from the general county fund, or from the secondary road construction fund or from the secondary road maintenance fund, or from any or all of said funds."

January 7, 1954

CITIES AND TOWNS: Officers—time of qualification. City officials elected to office in the November election shall qualify before noon of the second secular day in January following their election.

Senator Ted Clark, Mystc, Iowa: On December 31st you propounded the question:

"When shall members of the city council and the mayor who were elected in November, 1953, perfect their qualifications for office?"

In confirmation of our oral opinion of that date, we advise you that city officials shall qualify before noon of the second secular day in January, namely January 2nd, 1954. In 1951 the legislature enacted laws pertaining to municipal elections which changed not only the date of the election, but also the date that the elected officials would take office. See chapter 145, Laws of the 54th General Assembly. [Ch 363, Code 1954]

January 8, 1954

NOTARIES PUBLIC: Scope of authority. Notaries public have the following authority:

1. Within the county of appointment and any adjoining county where a certified copy of the certificate of appointment is filed with the county clerk; (a) to take acknowledgments of instruments, including those involving the conveyance and encumbrance of real estate, and (b) to administer oaths, and take affirmations and affidavits.

2. Within any other county of the state to take acknowledgments of instruments, except those involving the conveyance and encumbrance of

real estate provided the above mentioned copy of their appointment is so filed.

Hon. William S. Beardsley, Governor of Iowa: Attention *Mrs. Mabel Garns:* We have yours of the 27th ult. in which you submitted the following:

"I am in the process of having printed some new forms 'Powers and Authority of Notaries Public' which are to be enclosed with each notary public commission issued for the new period July 5, 1954 through July 4, 1957, and those issued in 1954 for the remainder of the period expiring July 4, 1954.

Reference is made on this form to the different sections of the 1954 Code of Iowa referring to notaries public. I call your attention to the apparent conflict of sections 77.7 and 77.8, 78.1, 558.20, all of which refer to notaries public acting in counties others than their county of residence.

I would like an official opinion from your office covering these apparent contradictions."

In reply thereto the several statutes mentioned are exhibited here as follows:

1. Section 77.7. **"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."

2. Section 77.8. **"Powers in any county.** Such notary public is also invested with the powers specified in section 77.7 in any county of the state, provided he has filed in such county, with the clerk of the district court, a certified copy of his certificate of appointment."

3. Section 78.1. **"General authority.** The following officers are empowered to administer oaths and to take affirmations:

1. Judges of the supreme, district, superior, municipal, and police courts.

2. Official court reporters of district, superior, and municipal courts in taking depositions under appointment or by agreement of counsel.

3. Clerks and deputy clerks of the supreme, district, superior, police, and municipal courts.

4. Justices of the peace within the county of their residence.

5. Notaries public within the county of their appointment, and within any adjoining county in which they have filed with the clerk of the district court of said adjoining county a certified copy of their certificate of appointment."

4. Section 558.20. **"Acknowledgments within state.** The acknowledgment of any deed, conveyance, or other instrument in writing by which real estate in this state is conveyed or encumbered, if made within this state, must be before some court having a seal, or some judge or clerk thereof, or some county auditor, or justice of the peoce within the county, or notary public within the county of his appointment or in an adjoining county in which he has filed with the clerk of the district court a certified copy of his certificate of appiontment. Each of the officers above named is authorized to take and certify acknowledgments of all written instruments, authorized or required by law to be acknowledged."

Insofar as the powers conferred by these several statutes are concerned we advise as follows:

1. As to section 77.7 the power of a notary under the law merchant

was limited to the taking of acknowledgments and does not include administration of oaths.

2. The power to administer oaths is a creature of statute.

3. The power to acknowledge signatures to conveyances of real estate is not included within the power conferred by the acknowledgment authorized under the law merchant.

4. In Proffatt on Notaries, chapter V, paragraph 50, the rule is stated as follows:

"The authority to take affidavits is given to notaries by statute in all our states; but it should be remembered this authority is one purely derived from statute law, and did not appertain to the office originally; and therefore courts cannot take judicial notice of the fact that notaries are authorized to take affidavits, outside of the jurisdiction of those courts. So the courts say in Keefer v. Mason: 'The power to administer oaths is not one of the incidents of the office of notary public under the general law merchant, nor was it, as far as we can ascertain, under the Roman law, from which the office is derived. Where that power is annexed to the office, it is so by virtue of positive enactment, and we cannot presume its existence in the absence of all proof or ground for presumption.' It is not usual for notaries to have this power in other countries; they do not exercise it in Canada, for there are 'commissioners of affidavits' appointed for that purpose." And see John's American Notaries, Fifth Edition, paragraph 19:

(a) Legislative history of the powers of notaries in Iowa is confirmation of the foregoing rule. Section 77.7, Code of 1950, appeared originally in its exact terms in the Code of 1851, chapter 10, section 79, in the Code of 1860, chapter 16, section 196, and Code of 1897, section 377, and it has so appeared in the several subsequent Codes including the Code of 1950.

(b) The statute provides with respect to the administration of oath appears in the Code of 1851, chapter 63, section 979, as follows:

"**By whom taken.** The following officers are authorized to administer oaths and take and certify the acknowledgment of instruments in writing; each judge of the supreme court, each judge of the district court, each judge of a county court and the prosecuting attorney when acting in his stead, each clerk of the supreme court, each clerk of the district court both as clerk of the district court and as clerk of the county court, each justice of the peace within his county, and each notary public within his county." And in chapter 78, section 1843, Code of 1860, the power to administer oath was provided as follows:

"The following officers are authorized to administer oaths and take and certify the acknowledgment of instruments in writing; each judge of the supreme court, each judge of the district court, each judge of a county court and the prosecuting attorney when acting in his stead, each clerk of the supreme court, district court and as clerk of the county court, each justice of the peace within his county, and each notary public within his county." And insofar as the administration of oath is concerned, Code of 1897, chapter 15, section 393, provided:

"**Who may administer.** Judges of the supreme, district, superior and police courts; clerks of said courts and their deputies; county auditors and their deputies; justices of the peace and notaries public within the county of their residence; * * * Notaries public may perform such services in any adjoining county in which they have filed with the clerk of the dis-

trict court a certified copy of the certificate of their appointment." Subsequent Codes contained similar enactments including the Code of 1950.

Insofar as acknowledgments to conveyances and encumbrances of real estate is concerned the Code of 1851, section 1217, provided as follows:

"**Before whom.** If acknowledged within the state, it must be before some court having a seal or some judge, justice, or clerk thereof, or some justice of the peace, or notary public."

The Code of 1860 with respect to instruments of like character, section 2226, provided as follows:

"If acknowledged within the state, it must be before some court having a seal or some judge, justice or clerk thereof, or some justice of the peace, or notary public."

Code of 1897, section 2942, made the following provisions:

"**Acknowledgment of conveyances or incumbrances.** The acknowledgment of any deed, conveyance or other instrument in writing by which real estate in this state shall be conveyed or incumbered, if made within this state, must be before some court having a seal, or some judge or clerk thereof, or some county auditor or his deputy, or justice of the peace within the county, or notary public within the county of his appointment or in an adjoining county in which he has filed with the clerk of the district court a certified copy of his certificate of appointment." And subsequent Codes, including the Code of 1950, contained similar statutes.

By reason of the foregoing we would advise you that a notary public has authority:

a. To take acknowledgments of instruments, including instruments involved in the conveyance or encumbrance of real estate, within the county of his appointment and in any adjoining county provided he has filed a certified copy of his certificate of appointment with the clerk of the district court of that county. (Section 558.20.)

b. To take acknowledgments of instruments within the county of his appointment and (with the exception of acknowledgments involved in the conveyance or encumbrance of real estate) within any other county of the state provided a certified copy of the certificate of appointment is filed with the clerk of the district court of that county. (Sections 77.7, 77.8, Attorney General's Opinion dated January 8, 1954.)

c. To administer oaths, take affirmations and affidavits within the county of his appointment and in any adjoining county in which he has filed with the clerk of the district court of that county a certified copy of his certificate of appointment. (Sections 78.1, 622.85.)

January 21, 1954

PUBLIC INSTRUCTION DEPARTMENT: Salaries of employees—exempt from personnel law. The personnel director has no jurisdiction over the salaries of employees of the board of public instruction or the department thereunder.

Mr. Glenn D. Sarsfield, State Comptroller: We acknowledge receipt of yours of the 14th inst. in which you have submitted the following:

"Chapter 114, Acts of the 55th General Assembly [ch 257, C. '54], es-

tablishes a state board of public instruction for the state of Iowa, and also provides various other duties.

Section 10 of this Act reads in part as follows:

'Sec. 10. It shall be the responsibility of the state board to exercise the following specific powers and perform the following duties:

1. Employ adequate clerical help to keep such records as are necessary to set forth clearly all actions and proceedings of the state board. * * *'

Section 21 of this Act reads as follows:

'Sec. 21. The state superintendent shall appoint all employees, with due regard to their qualifications for the duties to be performed, designate their titles and prescribe their duties. If deemed advisable, the state superintendent may for cause effect the removal of any employee in the state department of public instruction. The total amount of compensation for employees shall be subject to the limitation of the appropriation and other funds available for the maintenance of the department.

The appointment, promotion, demotion, change in salary status or removal for cause of any employee shall be subject to the approval of the state board.'

Chapter 45, Section 3, Acts of the 54th General Assembly, reads in part as follows:

'Sec. 3. * * *

Division of personnel. There shall be a personnel division in the office of the state comptroller which shall be organized as follows:

1. **Director.** The division shall be in the charge of an administrative officer appointed by the comptroller with the approval of the Governor, and shall be known as the director of personnel.

2. Through the personnel director, the executive council shall adopt and establish a plan of classification and compensation for each position and type of employment in state government, except for positions for which the salaries or compensation is fixed by statute, and shall prescribe therein the necessary salary schedules, fixing a minimum and maximum for each class of employees doing the same general type of work. With the approval of the executive council, the personnel director shall make such regulations and adopt such methods of qualifying employees for positions as will make the plan effective, and shall prescribe rules to provide for personnel administration which shall include rules governing appointments, promotions, demotions, transfers, separations, vacations and sick leave as provided by law, and hours of employment.

The plan adopted for personnel administration shall be based on merit system principles and standards.

3. The employees under the attorney general, employees of the supreme court, employees of the clerk and reporter of the supreme court, and those employees under the state banking board and the employees of institutions under the state board of education shall not come under the division of personnel.

* * *'

I request an opinion as to whether the salaries of the employees of the newly created state board of public instruction are to be determined in accordance with the provisions of chapter 114, Acts of the 55th General Assembly, or in accordance with chapter 45, Acts of the 54th General Assembly, with the exception of the salary of the superintendent, for which other provisions are made."

In reply thereto we advise as follows. The area of power of employment of personnel of the department of instruction described in section

21 of chapter 114, Acts of the 55th General Assembly, overlaps the same area of power vested in the personnel director described in section 3, subsection 2 of chapter 45, Acts of the 54th General Assembly. Such overlapping creates conflicts in the respective authority conferred upon each of the foregoing officials. Illustrative of this appears: The state superintendent is directed to appoint employees with due regard to their qualifications of their duties to be performed; the state superintendent is endowed with power to effect for cause the removal of any employee; the superintendent of public instruction likewise with the approval of the state board has the power of appointment, promotion, demotion, change in salary status or removal of employees of the department. On the other hand, the personnel director with the approval of the executive council is directed to make regulations and adopt such methods of qualifying employees as will make the established plan of classifications and compensation for each position and type of employment in state government effective; the personnel director also has the power to prescribe rules governing appointments, promotions, demotions, transfers, separations, vacations and sick leave of state employees. These provisions between the authority of the personnel director and the superintendent of public instruction administering the same area of employment, being plainly in conflict and repugnant, chapter 114, Acts of the 55th General Assembly, being later in time than the enactment of chapter 45, Acts of the 54th General Assembly, is an implied repeal of the provisions of chapter 45, insofar as the power of the personnel director is concerned with the employment of all employees in the department of public instruction.

We therefore advise you that the salaries of the employees of the newly created state board of instruction and the department of public instruction are to be determined in accordance with the provisions of chapter 114, Acts of the 55th General Assembly, and not in accordance with the provisions of chapter 45, Acts of the 54th General Assembly.

January 21, 1954

COUNTIES: **Hospital treatment for tuberculosis—persons entitled.** Insofar as treatment and care to persons entitled to free treatment for tuberculosis is concerned in county public hospitals, such treatment is available only to persons not only having a residence in the county, but also a legal settlement therein.

Mr. Edwin H. Curtis, Executive Secretary, State Bonus Board: We have yours in which you have submitted the following:

"I am desirous of an official opinion regarding the position of county soldiers' relief commissions and the treatment of tuberculosis. In an official opinion rendered March 3, 1948 it was held that treatment of tuberculosis was a public health measure and not a relief measure. The 55th General Assembly enacted chapter 156 of the Acts of the 55th General Assembly and I wonder if this alters the opinion of March 3, 1948. Here are my questions:

A veteran's wife residing in Marion county was committed to the Oakdale Sanatorium by Marion county for treatment of tuberculosis. She was discharged from Oakdale Sanatorium on November 20, 1953, im-

proved but not completely arrested. She will need additional treatment at Broadlawns Hospital in Des Moines, Iowa.

On November 21, 1953 the veteran and his wife moved to Jasper county and applied for continued treatment from Jasper county which was referred to the Jasper county soldiers' relief commission.

By gaining 'residence' in Jasper county does the responsibility of her treatment become an obligation of Jasper county or must Marion county complete their job?

Is this treatment a responsibility of the county soldiers' relief commission or the department of public health?"

In reply thereto we advise you that on the authority of the opinion referred to, now appearing in the Report of the Attorney General for 1948 at page 164, soldiers, indigent or otherwise, suffering from tuberculosis are entitled to care and treatment for that disease, under chapter 254, Code of 1950. Such care according to section 254.8 is supplied to any legal resident of Iowa. It appearing that the residence of the veteran's wife now being in Jasper county, upon certification of the proper authorities of Jasper county, as specified in 254.8, she is entitled to treatment and care for tuberculosis. The responsibility for such treatment and care is not on the county soldiers' relief commission.

While section 254.8, Code of 1950, provides the method of determining who among residents may be entitled to free care, providing facilities for the treatment and care of those entitled to it is the obligation of the board of supervisors. Section 254.1, Code of 1950, provides as follows:

"Care and treatment. The board of supervisors of each county shall provide suitable care and treatment for 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."

Such facilities may include a county public hospital where available, if the board exercises its power to contract with the hospital trustees, but the use of such county public hospital, in the absence of an agreement under the provisions of section 254.1 with the trustees, for tuberculous persons is, according to the provisions of chapter 156, Acts of the 55th General Assembly, limited not only by their residence, but also by their legal settlement. Chapter 156, amended chapter 347, Code of 1950, and specifically section 347.16, and insofar as pertinent here, the foregoing section as codified by the amendment of chapter 156, provides as follows:

"Free care and treatment in such county public hospital in counties with a population of more than one hundred and thirty-five thousand (135,000) to any indigent or tuberculous persons shall be furnished to such residents of the county as have established legal settlement in the county as defined in section 252.16 and have been found by the board of hospital trustees to be indigent and entitled to said care, or be entitled to free care as provided in chapter 254."

Insofar as counties having a population of less than 135,000, chapter 156 of the 55th General Assembly has added the following to section 347.16:

Free care and treatment in such county public hospital in all other counties to any tuberculous persons may be furnished to such residents of the county as have established legal settlement in the county as de-

fined in section 252.16 and are entitled to free care under the provisions of section 254.8, Code 1950."

Insofar as treatment and care to persons entitled to free treatment and care for tuberculosis is concerned in county public hospitals, such treatment there is available only to persons not only having a residence in the county, but also a legal settlement therein. We advise that having a residence but not legal settlement in Jasper county, a county public hospital is not available to the veteran's wife for treatment, except as hereinbefore indidcated.

January 28, 1954

NEWSPAPERS: Publication of official proceedings—qualification. To be designated an official newspaper, said paper must have qualified under the two-year paid circulation requirement of the statute.

Mr. Lawrence R. Kayser, County Attorney, Webster City, Iowa: We have yours of the 20th inst. in which you have submitted the following:

"Pursuant to chapter 349 of the Code, the board of supervisors proceeded to select the newspapers in which the official proceedings are to be published for the ensuing year. A contest developed, and I would appreciate an informal opinion concerning an interpretation of section 618.3. Evidence presented to the board indicates that one of the newspapers, the one with the second largest subscription list, has been in business for approximately three years. That it was first published and distributed free to the public by carrier and by third class mail. They changed their policy in November, 1952 and sold subscriptions and now have a regular paid subscription list and a separate list of people who receive the paper free, or have been given subscriptions free of charge by the advertisers. They obtained their second class postal permit on February 12, 1953, and according to the evidence presented, this was the first time that they were able to take advantage of the second class newspaper rate.

In view of the wording of section 618.3, as follows:

'Newspapers of general circulation that have been established, published regularly, and mailed through the post office of current entry for more than two years and which have a bona fide paid circulation recognized by the postal laws of the United States.'

Should it be concluded that the newspaper does not qualify in that they did not obtain their second class permit more than two years ago?

It is the contention of the objector that the post office of current entry necessitates a second class permit being issued to the newspaper in order to qualify and that said permit shall have had to be in force for a period of at least two years. The contention of the paper in question, of course, is that the post office of current entry refers to the place where the paper has been mailed for more than two years, irregardless of the type of permit. A copy of a letter from their attorney is attached hereto for your information, which discloses their position.

The January meeting of the board was adjourned until January 29th and the board of supervisors has requested that I obtain an opinion from you prior to that date to assist them in their designation of the official papers."

In view of the provisions of the Code section hereinbefore set forth, it must be concluded that the newspaper does not qualify at this time. The phrase "which have a bona fide paid circulation, recognized by the

postal laws of the United States", qualifies the type of circulation, etc., first set forth in said section. If it be assumed that the language is not to be construed to the effect that the bona fide paid circulation of the newspaper must have been recognized by the postal laws for at least two years, but rather is construed to the effect that such bona fide paid circulation when recognized has been in effect for two years, the newspaper would qualify in November of 1954. Whether the date of qualification will be in November of 1954 or February 12, of 1955, it is not necessary now to decide as the question to be answered is whether such newspaper is qualified at this time. That question must be answered in the negative.

You are, therefore, advised that it is the opinion of this department that under the facts as presented in your letter the newspaper is not presently qualified to be designated an official newspaper.

January 28, 1954

PUBLIC INSTRUCTION DEPARTMENT: Salaries controlled by biennial salary act. The salaries of the superintendent of public instruction and his assistants are controlled until July 1, 1955 by the biennial departmental appropriation act.

Mr. Glenn D. Sarsfield, State Comptroller: We have yours of the 14th inst. in which you have submitted the following:

"Chapter 114, Acts of the 55th General Assembly [Ch. 257, Code '54], establishes a state board of public instruction for the state of Iowa, and also provides various other duties.

Section 11 of this Act reads as follows:

'Sec. 11. The state board shall appoint, effective January 1, 1955, and each four years thereafter, with the approval of two-thirds of the members of the senate in executive session, a superintendent of public instruction.

The superintendent of public instruction, elected to office in 1950, shall continue in said office until the effective date herein, with all the rights, powers, and duties conferred by law on the office of superintendent of public instruction. Should any vacancy in the office of state superintendent of public instruction occur prior to April 1, 1955, and after the state board is first selected and qualified, said vacancy shall be filled by the state board.'

Section 22 of this Act reads in part as follows:

'Sec. 22. The state superintendent may appoint not more than two assistant superintendents subject to the approval of the state board, whose duties shall be directed by the superintendent of public instruction. * * * *'

Section 24 of this Act reads in part as follows:

'Sec. 24. The salary of the superintendent of public instruction shall be fixed by the state board, but not to exceed ten thousand dollars ($10,000.00) per year. The salaries of the assistant or assistants provided for in section 22 hereof shall be fixed by the state board but not to exceed three-fourths (¾) of the salary of the superintendent. * * * *'

Chapter 1, section 37, Acts of the 55th General Assembly, appropriates the amount of $7,000.00 annually for the salary of the Superintendent of Public Instruction.

Effective on January 2, 1954, two assistant superintendents of public

instruction were appointed. These two individuals prior to that date have been drawing an annual salary of $5,520.00.

I request an opinion as to the following:

1. Is the salary of the superintendent of public instruction to be $7,000.00 throughout the biennium ending June 30, 1955, or may the state board of public instruction, after it is organized, fix the salary of the superintendent, as provided in chapter 114, section 24, Acts of the 55th General Assembly?

2. Are the salaries of the two assistant superintendents to be three-fourths of the salary of the superintendent ($7,000.00), as provided by chapter 1, section 37, Acts of the 55th General Assembly, or three-fourths of the salary of the superintendent, as provided in chapter 114, section 24, Acts of the 55th General Assembly, or may the annual salary remain at the amount fixed in accordance with the provisions of chapter 45, section 3, Acts of the 54th General Assembly, which, at this date happens to be $5,520.00?"

In reply thereto we advise you as follows. Section 24 of Article III of the Constitution provides:

"No money shall be drawn from the treasury but in consequence of appropriations made by law."

Expenditure of moneys in excess of an appropriation is prohibited by section 8.38, Code of 1950, which provides as follows:

"No state department, institution, or agency, or any board member, commissioner, director, manager, or other person connected with any such department, institution, or agency, shall expend funds or approve claims in excess of the appropriations made thereto, nor expend funds for any purposes other than that for which the money was appropriated, except as otherwise provided by law. A violation of the foregoing provision shall make any person violating same, or consenting to the violation of same liable to the state for such sum so expended, together with interest and costs, which shall be recoverable in an action to be instituted by the attorney general for the use of the state, which action may be brought in any county of the state."

Bearing the foregoing in mind, section 37, chapter 1, Acts of the 55th General Assembly, appropriated:

"For salary of superintendent of public instruction—$7,000.00"

The foregoing appropriation in the terms stated, fixed the amount of the salary of the superintendent of public instruction for each year of the biennium beginning July 1, 1953, and binds the comptroller to that limit in the issuance of a warrant in the payment of the salary of the superintendent. This is the ruling of O'Connor v. Murtagh, 225 Iowa 782, where it appeared the 45th General Assembly, chapter 188, appropriated money:

"For salary of the attorney general, $5,000.00."

The statutory salary of that official at that time was the sum of $6,000.00 per annum. The foregoing chapter 188 provided also with respect to salaries the following:

"All salaries provided for by this act are in lieu of all existing statutory salaries, for the positions provided herein, * * * and shall be in full compensation for all services except as otherwise provided. In all cases the amount of the salary * * * which has been fixed by the various ap-

propriations shall be considered the maximum amount available for the respective position * * *." Section 70 of the same chapter provides: "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."

The court observed with respect to this situation where the attorney general was claiming the difference between the $5,000.00 salary fixed by the appropriation act and the statutory salary of $6,000.00 such difference amounting to $2,166.84, the following:

"On their face these statutes fixed the amount of the salary of the attorney general, during this biennium, at $5,000 per year, and limited to $5,000 per year the appropriation of public funds, for the payment of this salary, and also, on its face, the express limitation found in this act, to the effect that said amount shall be considered the maximum amount available for that purpose, left no room for the issuance by the comptroller to plaintiff of any warrants in excess of $5,000 per year. The comptroller was bound to observe the constitutional provision that no money shall be drawn from the treasury but in consequence of appropriations made by law. Article III, section 24."

It would appear therefore:

1. That the General Assembly by the foregoing appropriation fixed the salary of the superintendent of public instruction at the sum of $7,000.00 for each year of the biennium beginning July 1, 1953.

2. That the power vested in the state board of public instruction by chapter 114, Acts of the 55th General Assembly, section 24, providing as follows:

"The salary of the superintendent of public instruction shall be fixed by the state board, but not to exceed ten thousand dollars ($10,000.00) per year. The salaries of the assistant or assistants provided for in section 22 hereof shall be fixed by the state board but not to exceed three-fourths (¾) of the salary of the superintendent. * * *" is a power that could not be legally effective until July 1, 1955.

3. The state board of public instruction having no power until July 1, 1955, to fix the salary of the superintendent of public instruction, its power to fix the salary of assistant superintendents likewise could not be exercised prior to that date.

4. That the salary of such assistants remains and is determined by the provisions of chapter 45, section 3, Acts of the 54th General Assembly.

February 11, 1954

AUCTIONS: **License requirements.** Companies, partnerships and corporations are excluded from the exemption section of the auction sales license law. The term "replacement stock of merchandise inventory which was assessed" relates to one sale only. Merchandise assessed in one county cannot be sold in another county without a license.

Hon. Robert K. Beck, State Representative, Centerville, Iowa: Your inquiry relating to chapter 239, Acts of the 55th General Assembly [Ch 546A, Code '54], is at hand and you have presented three questions:

1. Do the exemptions contained in section 8 relate to farm sales and individuals or are companies, partnerships or corporations included therein?

2. Does the reference "Replacement stock of merchandise inventory which was assessed" relate to one sale or a series of sales by a replacement each time with new merchandise?

3. Can merchandise assessed in one county be sold in another county without obtaining a license?

Chapter 239, Acts of the 55th General Assembly, in the Title to the Act, provides, "An Act to require a license for the sale by auction of new merchandise, * * *." The explanatory note which is printed on all house files and which was on the original House File 27 states:

"This is an Act relating to transient auction sales of new merchandise."

In construing a statute it is always the rule that one must consider the legislative intent and, with the foregoing background, we will proceed to answer your questions.

1. Do the exemptions contained in section 8 relate to farm sales and individuals or are companies, partnerships or corporations included therein? Section 8 of this Act is what is known as an exemption section and under recognized rules of statutory construction is to be construed strictly against anyone claiming to come within its terms. All auction sales of new merchandise are subject to license under the terms of the Act except in the following enumerated instances:

(1) The sale at public auction of livestock, farm machinery or farm produce or other items commonly sold at farm sales.

(2) Auction sales by *individuals* of new merchandise which was assessed personal property tax or is replacement stock of merchandise inventory which was assessed personal property tax in the county in which the sale is to be had.

(3) Sales required by law or under the direction of the court.

In addition to the foregoing, section 1 of the Act excludes from its provisions a sale in a city or town under an ordinance enacted pursuant to the provisions of section 368.8 of the Code. The second exemption above enumerated relates to sales by *individuals* of new merchandise, and no mention is made of companies, partnerships or corporations. An examination of the entire Act discloses that in section 1 the legislature specifically refers to "person, firm or corporation", and again in section 2 the same terms are employed so it follows that in enacting this chapter the legislature must have had in mind, persons, firms or corporations. The term, "individual", was apparently intended by the legislature to restrict those who were entitled to be exempt, and in granting exemptions under section 8 they were attempting to limit the exemptions to a narrow field.

We are of the opinion that the term, "individual", was not intended by the legislature to include companies, partnerships or corporations, and does not include them; hence, parties other than an individual, in order to hold an auction sale of new merchandise, must obtain a license as provided in the Act.

2. Does the reference, "Replacement stock of merchandise inventory which was assessed", relate to one sale or a series of sales by a replace-

ment each time with new merchandise? The statute requires a license for all sales unless the sale falls within the exemption provided for in section 8. A study of the Act and explanation attached to House File 27 convinces us that the legislature intended that the Act should not apply to a sale of new merchandise which had been assessed personal property tax in the county in which the sale is to be had. It is to be presumed that the legislature recognized the fact that personal property is assessed as of January 1st of each year on the average inventory of the preceding year and that they knew established merchants replenish their stocks from time to time in the regular course of their business to meet their needs and requirements.

The statute was designed to require a license of the transient merchant and permit the individual regularly engaged in business, and who had been assessed personal property tax, to sell without the necessity of a license such assessed merchandise and any replacement stock of such merchandise up to the time of the auction sale. Once a sale of assessed stock and replacement thereof has taken place there would be no further right to conduct any other sale consisting of replacement stock of merchandise without obtaining a license.

3. Can merchandise assessed in one county be sold in another county without obtaining a license? The answer to question three (3) is "No". Section 8 of the Act clearly provides that merchandise assessed in one county cannot be sold in another county without a license.

February 19, 1954

HOSPITALS: X-Ray or pathology department—professional conduct. A corporation which operates a hospital with a diagnostic radiology or a clinical pathology department and contracts with a licensed physician to diagnose the ailments of persons examined in said department is practicing medicine without a license. If the physician agrees to such a contract on a salary or percentage basis or divides fees collected by him with the hospital he is guilty of "unprofessional conduct."

Board of Medical Examiners, Division of Licensure, State Department of Health: We have your recent request for an opinion in which you set forth facts and questions as follows:

"(a) A physician who specializes in diagnostic radiology, which consists of the diagnosis of disease and injury by the use of x-ray films, has entered into a contract with an Iowa non-profit corporation engaged in operating a general hospital. The corporation maintains a department with the necessary x-ray equipment for the taking and developing of x-ray films at the hospital and employs the necessary technicians to operate the same. The physician under the contract agrees to supervise the operation of the equipment by the technicians and in some cases operates the equipment himself. He also agrees to give his opinion as to the condition of the patient based upon the x-ray films taken of each patient's body. The patient may be an in-patient whose attending physician has requested consultation with the radiologist by requesting x-ray examinations, or a patient who comes to the hospital with or without the advice of another physician for the sole purpose of securing an x-ray diagnosis. The hospital holds itself out as maintaining a radiology department with the physician in charge thereof being available for

conference and to assist in determining proper treatment for the condition found to exist.

"(b) A physician who specializes in clinical pathology, which consists of the diagnosis of disease and injury by the use of clinical laboratory methods, such as the examination of tissue, blood, urine, or other body fluids and secretions, has entered into a contract with an Iowa nonprofit corporation operating a general hospital. The corporation maintains a clinical pathology laboratory with the necessary equipment and employs the necessary technicians to operate the same. The physician under the contract agrees to supervise the operation of the equipment by the technicians, and in some cases operates the equipment himself. He agrees to give an opinion on the condition of the patient based upon the results of the laboratory procedures when requested to do so. The patient may be an in-patient whose attending physician has requested consultation with the pathologist in charge by requesting laboratory procedures, or a patient who comes to the hospital with or without advice of another physician for the sole purpose of securing clinical pathology diagnosis involving blood, tissue, urine, or other clinical laboratory procedures. The hospital corporation holds itself out as maintaining the clinical pathology laboratory with the physician in charge thereof being available for a conference and to assist in determining the proper treatment for the condition found to exist.

"In each of the foregoing situations, and in accordance with the terms of the contract the hospital, in its own name, bills and collects a fee from the patient for all services rendered and for the use of its equipment and personnel in connection therewith. In accordance with the terms of the contract, the hospital, with no knowledge on the part of the patient, pays to the physician for his services a fixed percentage of the gross or net income of the radiology department or clinical pathology laboratory as the case may be. A hospital service association provides as benefits to its subscribers x-ray services and clinical laboratory services. In case of such patients, the hospital bills are paid by the association and under the terms of the contract they are treated as part of the gross or net income in arriving at the compensation to be paid the physician in charge.

"(c) In other hospitals radiologists and pathologists are employed on straight salary contracts with the hospital collecting all of the fees direct from the patient or from the hospital service association.

"Inasmuch as we are charged with the responsibility of aiding in the administration and enforcement of the provisions of law relating to those licensed to practice medicine and surgery in Iowa, your opinion is requested on the following questions:

"1. Is the corporation which operates the hospital in each of the foregoing situations practicing medicine and surgery in violation of the law?

"2. Is the physician in charge of the radiology department or pathology laboratory guilty of unprofessional conduct as that term is defined by the provisions of subsection 4 of Section 147.56, Code 1950."

Prior to answering either of your specific questions it is necessary to first determine whether or not the physicians in the situations you inquire about are themselves "engaged in the practice" of medicine and surgery. In this connection we must consider the provisions of section 148.1, Code 1950, which are as follows:

"For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of medicine and surgery:

"1. Persons who publicly profess to be physicians or surgeons or who publicly profess to assume the duties incident to the practice of medicine or surgery.

"2. Persons who prescribe, or prescribe and furnish medicine for human ailments or treat the same by surgery.

"3. Persons who act as representatives of any person in doing any of the things mentioned in this section.

In your statement of facts you say that the physician in charge of the radiology department agrees in his contract with the hospital to give his opinion as to the condition of the patient based upon the x-ray film taken of each patient's body, and that the physician in charge of the clinical pathology laboratory in his contract with the hospital agrees to give an opinion on the condition of the patient based upon the results of the laboratory procedures when requested to do so. You further state, in both situations the hospital holds itself out as maintaining either a radiology department or pathology laboratory with the physician in charge thereof being available for conference and to assist in determining proper treatment for the condition found to exist.

In the case of State v. Hughey, 208 Iowa 842, 226 N.W. 371, the defendant was prosecuted under the charge of practicing medicine without a license. His argument was that inasmuch as he gave no medicine, he could not be guilty of practicing medicine. At page 846 of the Iowa Reports the Supreme Court stated:

"The term 'practice of medicine' is defined by section 2538. It is not confined to the administering of drugs. Under this statute, one who publicly professes to be a physician and induces others to seek his aid as such is practicing medicine. Nor is it requisite that he shall profess in terms to be a *physician.* It is enough, under the statute, if he publicly professes to assume the duties incident to the practice of medicine. What are 'duties incident to the practice of medicine?' Manifestly, the first duty of a physician to his patient is to diagnose his ailment. Manifestly, also, a duty follows to prescribe the proper treatment therefor. If, therefore, one publicly profess to be able to diagnose human ailments, and to prescribe proper treatment therefor, then he is engaged in the practice of medicine, within the definition of section 2538."

It is our conclusion that when the physicians in charge of the respective departments inquired about do give their opinion as to the condition of the patient based upon x-ray or laboratory procedures, they are "diagnosing human ailments", and when they make themselves available for conference or assist in determining proper treatment for the condition found to exist, they are "engaged" in the practice of medicine and surgery. For additional authority, see 41 Am. Jur., "Physicians and Surgeons", page 151, Section 24; State v. Howard, 216 Iowa 545, 245 N.W. 871; and State ex rel. Bierring v. Robinson, 236 Iowa 752, 19 N.W. 2d 214.

We now come to your first question which is whether the corporation which operates the hospital in each of the foregoing situations is practicing medicine and surgery in violation of the law. Section 147.2, Code 1950, provides:

"No person shall engage in the practice of medicine and surgery, chiropody, osteopathy, osteopathy and surgery, chiropractic, nursing, dentistry, dental hygiene, optometry, pharmacy, cosmetology, barbering, or embalming as defined in the following chapters of this title, unless he

shall have obtained from the state department of health a license for that purpose," and section 147.93, Code 1950, further provides:

"The opening of an office or place of business for the practice of any profession for which a license is required by this title, the announcing to the public in any way the intention to practice any such profession, the use of any professional degree or designation, or of any sign, card, circular, device, or advertisement, as a practitioner of any such profession, or as a person skilled in the same, shall be prima facie evidence of engaging in the practice of such profession."

Immediately the question is presented whether a corporation would fall within the term "person" as used in the foregoing section 147.2. The rule as stated in 13 Am. Jur., "Corporations", page 838, section 837, is as follows:

"While a corporation is in some sense a person and for many purposes is so considered, yet, as regards the learned professions which can only be practiced by persons who have received a license to do so after an examination as to their knowledge of the subject, it is recognized that a corporation cannot be licensed to practice such a profession. For example, there is no judicial dissent from the proposition that a corporation cannot lawfully engage in the practice of law.

"A corporation cannot be licensed to carry on the practice of medicine. Nor, as a general rule, can it engage in the practice of medicine, surgery, or dentistry through licensed employees. It is generally held that in the absence of express statutory authority, a corporation may not engage in the practice of optometry either directly or indirectly through the employment of duly registered optometrists."

That the Iowa court is in accord with the foregoing rule is evidenced by the decision in the case of State v. Bailey Dental Company, 211 Iowa 781, 234 N.W. 260, which was an action in equity to enjoin the defendant corporation from practicing dentistry. Defendant's first contention was that it was not practicing dentistry. At page 784 of the Iowa Reports, our court stated:

"Defendant's first contention is that it is not practicing dentistry. Immediately upon its incorporation, it did open an office in the city of Des Moines, and equipped the same for the purpose of practicing dentistry. Pursuant to the same purpose, it employed licensed dentists for its work. This course of procedure has been followed ever since. It has advertised the practice of dentistry under its corporate name, and not otherwise. It has obeyed the statute in posting the names of its employee-dentists. No officer of the corporation is a licensed dentist. The ownership and control of the entire equipment is in the corporation and its officers, and not in the employees. Its unlicensed officials necessarily determine all its policies, whether they be deemed professional or commercial. If such officials were to carry on this business as individuals, without the formality of a corporate organization and without a license, would they be amenable to the statutes above quoted, as violators thereof? The affirmative on this question seems too plain to tolerate argument. If these officials could not, as individuals, conduct this business without a license, we can conceive of no reason why they should be permitted to do so, under the statute, under a corporate organization and name. If a business thus conducted by an individual be unlawful, it is likewise unlawful if conducted by a corporation. Code section 8339. We hold, therefore, that the defendant-corporation was practicing dentistry, and was doing so, therefore, in violation of the statute."

Following the decision in the Bailey Dental case this department was

asked to issue an opinion as to whether medical clinics incorporated and practicing medicine as an organization would be in conflict with that decision of the Supreme Court. In that opinion appearing 1932 A.G.O., page 248, we stated:

"In view of the fact that the employees of an incorporated clinic would be under the supervision and direction of the officers of the corporation, they would not be free agents and the public would be left unprotected if unlicensed persons and corporations were permitted to practice through and under the cloak of the licensed individual, and this would open the road for quacks, charlatans and others whose greed would be masked under the practice of one of the healing arts, and who, through liberal promises and compensation, would and could employ licensed practitioners who would be obliged to submerge their own ideas and teachings at the request of the unlicensed quacks and corporations by whom they were employed. There would soon spring up throughout the country corporations which would be controlled by laymen who would go out and secure the professional services of unethical licensed men in the different professions, and who would, through cut rates, extravagant advertisements, and the use of cappers and steerers, soon develop a large following, not only to the disadvantage of the different professions but to the danger of the public.

"When a licensed practitioner of any of the professions attempts to contract his professional services to an individual, or a group of individuals, he is in reality attempting to serve two masters, his employer and his patient. The law has repeatedly, not only in this state but in other states, stepped in and laid down the rule that this practice was against public policy, for the reason that the law takes into consideration human frailities and also recognizes the fact that in many instances, at least, the employee will serve that master from whom he receives the highest remuneration, and that as a result the patients and the public would suffer if any conflict existed between them and the employer. For that reason and the impossibility on the part of clinics and corporations to meet the required standards laid down by the legislature of this state, corporations and clinics would be violating the law if, and when, they employed medical men in their professional capacity to treat the public and held themselves out for that purpose."

An official of this department in 1934 A.G.O., page 64, held that the Amana Society of Amana, Iowa, could not legally operate physicians and dentists offices as a part of their corporate business. Later and as evidenced by an official opinion, 1946 A.G.O., page 159, it was held that the practice of cosmetology by a corporation would not be a legal business and therefore the secretary of state was advised not to accept such articles of incorporation for filing. For additional authority that a corporation cannot legally engage in the practice of one of the healing art professions, see State v. Baker, 212 Iowa 571, 235 N.W. 313, State v. Kindy Optical Company, 216 Iowa 1157, 248 N.W. 332.

In view of the above expressions of the law, we are bound to conclude that a corporation, whether or not organized or operated for profit, may not practice medicine and surgery in this state directly because of its inability as a legal entity to obtain a license, nor can it practice indirectly by hiring licensed members of that profession to do the actual professional work involved. It is immaterial whether the compensation to the licensed person so hired be on a straight salary basis or in the form of a contractual percentage arrangement as you mention in your statement of facts.

We do not intend to say that the mere ownership and operation of a radiology department or pathology laboratory by a corporation in and of itself means that they are engaged in the practice of medicine. Consideration must be given to the hospital for the use of its equipment and facilities, but in our opinion this can only be done through a lease arrangement with a licensed member of the medical profession resulting in a true landlord-tenant relationship with freedom of complete independent judgment and operation as the licensed member deems best. Such an arrangement would permit the physician in charge of the department to be directly responsible to the patient and make possible the paying of the fee for professional services direct to that physician. Under such an arrangement the hospital could not legally hold itself out to the public as a corporation offering the professional services. This, of course, is very important in view of the provisions of section 147.93 quoted above with respect to what constitutes prima facie evidence of engaging in the practice of the medical profession. Clearly the type of arrangement just discussed is not apparent under the provisions of the contracts mentioned in your statement of facts.

Your second question makes reference to Code sections 147.55 and 147.56, Code 1950, and inquires as to the possibility of the provisions of such a percentage contract or salary arrangement constituting "unprofessional conduct" within the meaning of subsection 4 of section 147.56, Code 1950, which refers to division of fees in the following language:

"Division of fees or agreeing to split or divide the fees received for professional services with any person for bringing or referring a patient or assisting in the care or treatment or a patient without the consent of said patient or his legal representative."

There can be no doubt that in the case where a corporation hires the licensed member of the profession on a straight salary contract and they in return receive any amount as compensation for professional services rendered, the one receiving the salary would be guilty of "unprofessional conduct" within the purview of the foregoing subsection. It would be equally clear that under the type of contract where the compensation is determined by a percentage of either the gross or net earnings of the department there would likewise be guilt on the part of the licensed member of the profession of dividing fees with the corporation if any amount was received by them as compensation for professional services rendered. See opinion 1934 A.G.O., page 732, wherein this department held that a division of money received from the sale of prescriptions by a licensed pharmacist with a licensed physician constitutes "unprofessional conduct" within the meaning of the foregoing statute.

March 4, 1954

TAXATION: State income tax special limitations on powers of tax commission. The audit of the facts and figures on a state income tax return must be made within two years. The determination of how much tax an individual should have paid must be made within five years.

Mr. Ray E. Johnson, Chairman, State Tax Commission: This will acknowledge your letter relative to the provisions of section 422.25, Code of 1950, and especially subsections 1 and 2 thereof, relating to the effect of the two (2) year and five (5) year limitations contained therein. The pertinent question is, may the commission go beyond the two (2) and five (5) year limitation set forth in the statute in connection with the collection of income tax? The pertinent parts of the statute are as follows:

Subsection 1 provides:

"As soon as practicable and in any event within *two* (2) *years* after the return is filed the commission *shall examine it,* and *determine* the correct amount of tax and the amount so determined by the commission shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the excess, together with interest and penalty as hereinafter provided shall be paid by the taxpayer within ten days after the commission shall have given notice thereof to the taxpayer by registered mail."

The provisions of the foregoing subsection are quite clear and it specifically provides that the commission shall examine the return and determine the correct amount of the tax from what is shown by that return. The legislature evidently contemplated an audit of the facts and figures disclosed by the return within the two (2) years after the return was filed. We are of the opinion that *after two* (2) *years* the commission could not determine the correct amount of the tax based upon the facts, figures and information disclosed by the return and if it were not so determined within such period of time, the authority of the commission to determine the correct tax would be barred.

Subscection 2 provides:

"*If the commission discovers from the examination of the return or otherwise* that the income of the taxpayer, or any portion thereof, *has not been listed in the return, or that no return was filed when one was due,* it may at any time within five (5) years after the time when such return was due, *determine the correct amount of the tax* together with interest and penalty as hereinafter provided. The amount thereof shall be paid within ten (10) days after the commission shall have given notice thereof to the taxpayer by *registered mail.*"

The above quoted subsection clearly provides that if the commission discovers (1) from an examination of the return, (2) or otherwise, that *the income* of the taxpayer *or any portion thereof* has not been listed in the return or (3) that no return was filed when one was due, it may *at anytime within five (5) years* after the time when such return was due, determine the correct amount of the tax. This subsection provides for an examination within five (5) years (a) where income or any portion thereof has not been reported, (b) or a return has not been filed, and this must be done within five (5) years after the time when such return was due.

We believe this statute bars the right of the commission to determine the correct amount of tax under the foregoing circumstances after (5) years from the time when such return was due. We view this statute as a limitation on the right of the commission to determine the tax. The foregoing limitations of two (2) and five (5) years are more than the ordinary statutes of limitations and are not statutes that bar the remedy of the state in connection with the collection of the tax, but are in fact a limitation upon the power of the commission to determine the amount of tax after the lapse of two (2) years or five (5) years from the time when the return was due.

In view of the foregoing we are of the opinion that after two (2) years and five (5) years, under the conditions as set out above, the commission is without any statutory authority to determine the correct amount of the tax or bill the taxpayer for additional tax.

March 16, 1954

TAXATION: Special mobile equipment not subject to property tax. A cement mixer permanently mounted on a registered motor vehicle is not subject to personal property tax. (Overruling 1950 A.G.O. 25 and 1952 A.G.O. 34)

Mr. Richard Ackley, County Attorney, Ottumwa, Iowa: This will acknowledge your inquiry relative to the assessment for personal property taxation of cement mixers which are permanently attached to registered trucks.

We have restated your question as follows: Is a cement mixer which is permanently mounted on a registered truck where registration fee is based upon the combined weight of such truck, cement mixer and load, subject to assessment for personal property tax?

It would appear that the equipment referred to in your letter is a cement mixer of a large size, permanently fastened to the truck and due to its size and weight cannot be readily removed therefrom. Such unit must, therefore, be looked upon as constituting an integral whole. In addition to the permanency of the attachment, the registration fee is based upon the combined weight of the truck, mixer and its load capacity. The pertinent statute is section 321.130, Code 1950, which provides in part:

"If a motor vehicle shall have been registered at any time under this chapter, it shall not thereafter be subject to a personal property tax * * *."

In State vs. Griswold, 225 Iowa 237, at page 239, the Supreme Court in discussing similar special equipment made the following observation:

"Where a vehicle is specially equipped in such manner and with such permanency that the vehicle and equipment is in reason to be looked upon as constituting an integral whole, then it is to be considered as one whole apparatus * * *."

It is our opinion, in view of the foregoing facts and the announcement of the court, that the truck and cement mixer above referred to

comes within the provisions of section 321.130, Code 1950, and is not subject to assessment as taxable personal property.

The opinions found in 1950 A.G.O. at page 25, and 1952 A.G.O. at page 34, are overruled so far as inconsistent with this opinion.

March 16, 1954

TAXATION: Home of school janitor furnished in lieu of salary. A home, owned by a school district, in which the school janitor is permitted to live rent-free, is not subject to taxation. In case levy has been made thereon and it is sold at tax sale, both the levy and the sale are void.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: This will acknowledge your letter of recent date in which you pose the following two questions:

"1. The Alleman School District in Polk county, Iowa, is the owner of a home in which the janitor of the school district is permitted to live in lieu of part of his salary. In view of the fact that these living quarters are considered in lieu of part of the janitor's salary, is the property subject to taxation?

"2. The above mentioned property was put on taxation and subsequently sold at tax sale in 1951. The school district claims it had no knowledge that the property was being taxed and, at this time, has requested the county assessor to cancel the tax. In view of the school district's failure to file a protest, have they lost their right under the law to have such tax canceled, if your answer to question number (1) is in the negative?"

In response to your first question, you are advised we are of the opinion that under the express provisions of Code section 427.1 (2) the property used by the Alleman School District as a home for the janitor is not subject to taxation. The statute provides:

"The property of a county, township, city, town, *school district* or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit, is exempt from taxation." (Italics supplied.)

In response to question number two you are advised that the treasurer was without authority to sell the property at tax sale and the sale should be canceled and the money returned to the party who bid it in at tax sale. Where a property is exempt from taxation, the owner thereof is not required to protest inasmuch as the statute provides that the board of supervisors shall levy a tax only against the taxable property of the county. The levy was void and the sale is void.

March 18, 1954

LIENS: Veteran's honorable discharge. A war veteran's honorable discharge is an official document and is not property subject to the statutory hotelkeepers lien.

Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board: This will acknowledge receipt of yours of the 10th inst. in which you have submitted the following:

"I am requesting an official opinion as to the status of a veteran's discharge from the armed services. These discharges are given by the

War Department for identification as to his record of service, his separation from the armed services and for contact with the veteran agencies. The following shows the occasion which has brought about this request:

A veteran living in a hotel was evicted because of his failure to pay an eight dollar ($8.00) room bill. His baggage was held for the room bill. In his baggage was his honorable discharge and when he went to the hotel to obtain the discharge, so he could apply for county soldiers' relief aid, he was refused possession of it. This discharge is a necessary identification for the administration of county soldiers' relief aid, admission to the Iowa Soldiers' Home, the Veterans Administration and the Veterans Hospital.

The question is: Is this discharge personal property or is it an official document owned jointly by the United States Government and the individual veteran? Can this document be held as collateral?

In reply to the foregoing we advise you as follows.

Sections 583.1 and 583.2, Code of 1950, are exhibited as follows:

583.1 "1. 'Hotel' shall include inn, rooming house, and eating house, or any structure where rooms or board are furnished, whether to permanent or transient occupants.

2. 'Hotelkeeper' shall mean a person who owns or operates a hotel.

3. 'Guest' shall include boarder and patron, or any legal occupant of any hotel as herein defined.

4. 'Baggage' shall include all property which is in any hotel belonging to or under the control of any guest."

583.2 **"Nature of hotelkeeper's lien.** A hotelkeeper shall have a lien upon the baggage of any guest, which may be in his hotel, for:

1. The accommodations and keep of said guest.
2. The money paid for or advanced to said guest.
3. The extras and other things furnished said guest."

According to the foregoing the hotelkeeper has a lien upon the *baggage* of any guest which may be in his hotel. Baggage is defined as including all *property* which is in any hotel belonging to or under the control of any guest. The honorable discharge referred to herein is the evidence of a record of the soldier's service. Such evidence in the form of the honorable discharge is not property subject to the foregoing statutory lien.

We are of the opinion, therefore, that the hotelkeeper is in unlawful possession of the honorable discharge.

March 18, 1954

INSANE PERSONS: Federal facilities for war veterans—screening center provisions and transfers. The screening center observation provisions are not applicable to proceedings to commit an insane war veteran to federal facilities, and such order to commit should be made permanent in the original instance. The provisions to transfer patients from state institutions to the federal facilities apply only to persons previously committed.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: This is in answer to your recent request for an official opinion on the two following questions:

1. Are the provisions of section 1 of chapter 86, Laws of the 54th General Assembly, relating to screening center observation, applicable when a county commission of insanity is proceeding under the authority vested in it by subsection 1 of section 229.20, Code of 1950, against an alleged insane person eligible and acceptable for care and treatment in facilities of the Veterans Administration or other agencies of the United States government?

2. Do the provisions of section 1 of chapter 86, Laws of the 54th General Assembly in any way affect the power of transfer to the facilities of the Veterans Administration or other agency of the United States government which were created by subsection 3 of section 229.20, Code 1950:

In expressing an opinion on your first inquiry, we do not deem it necessary to set out the lengthy provisions of subsection 1 of section 229.20, Code of 1950, but do think it advisable to direct your attention to an official opinion under date July 24, 1947 (1948 A.G.O. 57). That opinion held that, in spite of the use of the term "the court," the legislative intent apparent in chapter 130, Laws of the 52nd General Assembly, was to vest the powers and duties therein prescribed in the agency provided by law as the regular committing body, which in this state is the county commission of insanity. (See section 228.8, Code 1950).

In an official opinion under date January 31, 1952, (1952 A.G.O. 89) this department reached the conclusion that the provisions of section 1 of chapter 86, Laws of the 54th General Assembly, requiring observation at a screening center prior to a final order of commitment, were not applicable to proceedings under section 229.27, Code 1950, providing for restraint, protection and care of alleged insane persons outside the *state mental health institutes* and after setting forth the provisions of section 229.9, Code of 1950, as amended by section 1 of chapter 86, Laws of the 54th General Assembly, stated as follows:

"As amended, the foregoing statute specifies the two conditions precedent to an order providing for observation or treatment at a screening center. These remain the same as were previously required prior to a final order of commitment to a state hospital for the insane. They are (1) a finding from the evidence that the person is insane, and (2) that said person is a fit subject for custody and treatment in a state hospital. In view of the requirement as to a specific finding on the second of these conditions, and the fact that section 229.27, Code 1950, was not mentioned in the amendment, we reach the conclusion that the legislative intent in the enactment of section 1 of chapter 86, Laws of the 54th General Assembly, was to provide an additional method to alleviate or prevent an overcrowded patient population in the various mental health institutes in the form of a screening of the persons prior to their final commitment as patients therein. We find no evidence of any intent to set up the personnel of the screening centers, established under the provisions of section 218.46, Code 1950, with power to pass upon *all* actions of a county commission of insanity with regard to an order for the restraint, protection and care of an insane person. Rather, we find the authority of such personnel to be limited to those cases where the person has been found by the county commission of insanity to be a 'fit subject for custody and treatment in the state hospital.'"

The foregoing reasoning leads to the same conclusion as to proceedings

by the commission under section 229.20, Code of 1950. It is therefore our conclusion that the screening center observation provisions are not applicable thereto and the order of commitment direct to such federal facilities is to be made permanent in the original instance.

In answer to your second inquiry, it is first to be noted that the portion of subsection 3 of section 229.20, Code 1950, pertinent here is as follows:

"Upon receipt of a certificate of the veterans administration or such other agency of the United States that facilities are available for the care or treatment of *any person heretofore committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted* and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the veterans administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency . . ." and subsection 4 of said section provides:

"Any person transferred as provided in this section shall be deemed to be committed to the veterans administration or other agency of the United States pursuant to the original commitment."

From the italicized portion of subsection 3 above, it is apparent that the power of transfer exists only as to those patients previously "committed" to any hospital for the insane or other institution. A patient at one of the state mental health institutes who has merely been temporarily ordered to the screening center for observation in accordance with the provisions of section 1 of chapter 86, Laws of the 54th General Assembly, has not been "committed" to the mental health institute. It is our opinion, therefore, that the provisions of subsection 3 of section 229.20, Code 1950, are affected by the provisions of section 1 of chapter 86, Laws of the 54th General Assembly, to the extent that the power or authority to transfer from one of the state mental health institutes to the Veterans Administration facilities or other agency of the United States government is limited to those patients on which there has been a final or permanent order of commitment made by the county commission of insanity.

March 25, 1954

COUNTIES: **Assistant county attorney and zoning law administrator—incompatibility.** The office of assistant county attorney and administrative officer of the zoning commission may not be occupied by the same person and such occupancy is barred by the rule of incompatibility.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: We have yours of the 5th inst. in which you have submitted the following:

"A member of my staff has been appointed by resolution of the board of supervisors administrative officer of the Polk county zoning ordinance. The board has agreed to pay this assistant $2,000 per annum additional compensation to his assistant's salary of $4,420 per annum.

A certain member of the board objected to and voted against this appointment and has publicly stated he will seek an opinion of your office as to the legality of this appointment.

I have heretofore advised the board that they could legally appoint an assistant county attorney administrative officer of the Polk county zoning ordinance pursuant to the provisions of section 358A.9 of the 1950 Code, which reads as follows:

'The board of supervisors shall appoint an administrative officer authorized to enforce the resolutions or ordinances so adopted by the board of supervisors. Such administrative officer may be a person holding other public office in the county, or in a city or other governmental subdivision within the county, and the board of supervisors is authorized to pay to such officer out of the general fund such compensation as it shall deem fit.'

In view of the foregoing, I am therefore, at this time, requesting an opinion of your office in answer to the following questions:

1. May the board of supervisors legally appoint an assistant county attorney administrative officer to enforce the Polk county zoning ordinance heretofore adopted?

2. If your answer to question No. 1 is in the affirmative, may the board fix compensation for such administrative officer in excess of the maximum salary allowed to an assistant county attorney?

3. Does the law contemplate and require that the duties of the administrative officer, when he is a person holding another county office, specifically that of an assistant county attorney, be performed outside of the normal working hours of such county employee or may the duties be performed during the working day of such assistant county attorney or other public official so appointed?"

In reply to the foregoing we advise as follows. While the statute, section 358A.9, Code of 1950, quoted by you permits a county officer to be appointed to the office of administrative officer to carry out the enforcement of resolutions and ordinances of the board, this permission does not supersede the common law bar of incompatibility between two offices, if it exist. Such is the rule. In 67 C.J.S. page 133, title, "Officers", it is stated:

"* * * A public officer is, however, prohibited from holding two incompatible offices at the same time, the rule being founded on principles of public policy; and, even though specific constitutional and statutory provisions furnish no bar to the holding of particular offices or positions at the same time, the common law must be considered in determining whether there is any incompatability therein unless the legislature has, by clear and unequivocal language, manifested its intention to abrogate the common-law principle to the extent of permitting one to hold incompatible offices. * * *"

What is meant by incompatible is set forth in Bryan v. Cattell, 15 Iowa 538, as follows:

"Does it cover every case where the incumbent places himself in such a position that he cannot, for the time being discharge the duties of the first office? Or does it embrace those cases where the nature of the duties of the two offices is such as to render it improper, from considerations of public policy, for him to retain both? . . . Looking to the common law, we are of the opinion that the incompatibility must be such as arises from the nature of the offices, or their relation to each other. Or, as Mr. Bouvier has it: "They are such as are subordinate to, or interfering with, each other; for example, a man cannot be at once judge and clerk of the same court.' Bailey J., in Rex v. Tizzard (1829) 9 Barn. & C. 418, 109 Eng. Reprint, 155, 4 Man. & R. 400, 7 L. J. K. B. N. S. 275 (infra, footnote 8), says: 'The two offices are incompatible where the holder cannot in every instance discharge the duties of each.'

And that incompatibility, as here used, must be such as arises from the nature of the duties, in view of the relation of the two offices to each other, seems to have its foundation in reason."

Justification of the occupancy of the office of administrative officer of the zoning commission by an assistant county attorney must rest upon the assumption that the office of assistant county attorney is in law the office of county attorney and correlative to the foregoing that an assistant county attorney holds no independent office as between him and the county attorney and is not an independent officer. Such is the rule. In an opinion issued by this department appearing in the Report for 1923-24 at page 263 it is said:

"It is quite clear that the legislature did not make the assistant county attorney an independent officer and clothe him with the power to act in his own name. At best he is a mere agent of the county attorney, and as such must perform official acts in the name of his principal."

In that aspect and applying the principles of incompatibility to the respective powers of the assistant county attorney and administrative officer of the zoning commission we find that according to section 358A.13 that:

"**Appeals to board.** Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the county affected by any decision of the administrative officer. * * *" And according to section 358A.18:

"**Petition to court.** Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment under the provisions of this chapter, or any taxpayer, or any officer, department, board or bureau of the county, may present to a court of record * * *"

That the assistant county attorney is a county officer embraced within the terms of the foregoing cited sections, and would be in the position of appealing one of his own orders made as administrative officer is quite clear. And the performance of an official duty as prescribed by section 336.2, subsection 6, to:

"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."

would require the assistant county attorney to defend as an assistant county attorney any other county officer affected by an order of the administrative officer. The conflict existent in such person occupying such two offices with such conflicting duties is quite clear.

In addition to the foregoing we find among other powers the following. Section 66.3, Code of 1950, provides with respect to removal the following:

"**Who may file petition.** The petition for removal may be filed:

1. By the attorney general in all cases.

2. As to state officers, by not fewer than twenty-five electors of the state.

3. As to any other officer, by five qualified electors of the district, county, or municipality where the duties of the office are to be performed.

4. As to district officers, by the county attorney of any county in the district.

5. As to all county and municipal officers, by the county attorney of the county where the duties of the office are to be performed."

That this power vested in one person occupying both these offices constitutes incompatibility is held in Attorney General ex rel. Moreland v. Detroit, 112 Mich. 145, 70 N.W. 450. There was involved the question of incompatibility of the offices of mayor and governor. The court there stated:

"* * * in every case the question must be determined from an ascertainment of the duties imposed by law upon the two officers. If one has supervision over the other, or if one has the removal of the other, the incongruity of one person holding both offices is apparent, and the incompatibility must be held to exist so that the acceptance of the latter vacates the former. * * *

The remoteness of the necessity for the removal of a mayor by the governor is urged by counsel for the respondent as a reason why a legal incompatibility does not exist at the common law. The question, however, is one of the existence of the power, and not the remoteness of its exercise. This position is well answered in State v. Goff, where it was urged that the respondent would not probably undertake to act in both offices at the same time: 'The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. The question of incompatibility is to be determined from the nature of the duties of the two offices, and not from a possibility, or even a probability, that the defendant might duly perform the duties of both.' State v. Brown, 5 R. I. 1. The power of removal is ever present, ready for use when its exercise is required. The argument that the contingency for its use is very remote is without force. We have been unable to find a decision which holds that one person may hold two offices, in one of which he is clothed with power to remove the person holding the other. It follows that the offices of mayor and governor are incompatible."

By reason of the foregoing we are of the opinion that the office of assistant county attorney and administrative officer to the zoning commission may not be occupied by the same person and such occupancy is barred by the rule of incompatibility.

April 2, 1954

HOSPITALS: Osteopaths not excluded from county hospitals. The trustees of a county hospital have rule making powers with regard to control and supervision over the physicians practicing in the hospital, but the specific provisions in section 347.18 of the Code prevent them from excluding licensed osteopaths provided they meet the other requirements.

Mr. Gifford Morrison, County Attorney, Washington, Iowa: This is in reply to your recent request for an opinion which was in the following form:

"A question has arisen in this county as to the proper interpretation to place on section 347.18 of the 1950 Code of Iowa. Bearing in mind section 347.13, subsection 5, of the 1950 Code of Iowa, the specific question which has arisen here is as follows:

"Do the trustees of the Washington county hospital have any authority to prevent an osteopath who is a resident of Washington county, Iowa, from taking a patient, or patients who are also residents of Washington county, Iowa, to the county hospital of Washington county, Iowa, for treatment by him in the course of his professional practice?

"I am familiar with three attorney general's opinions on this subject, and have told the board that in my opinion they had no authority to discriminate against the osteopath. However, there are some board members who feel that they have such authority, and, therefore, the chairman of the board of Washington county hospital has asked me to write to your office for an up to date opinion on this subject."

The statutory provisions in the 1950 Code of Iowa which you refer to provide as follows:

"347.13 **Powers and duties.** Said board of hospital trustees shall:

"5. Have control and supervision over the physicians, nurses, attendants, and patients in the hospital."

"347.18 **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." (Italics supplied).

As you mention, there are three previous opinions from this department touching upon the subject which appear to contain some conflicting conclusions. The first of these, under date January 14, 1930 (1930 A.G.O. 250), on the identical question you submit, concluded as follows:

"We do not believe that the legislature, when they incorporated section 5364 [Sec. 347.18, Code, 1950] in the chapter pertaining to county public hospitals, intended to discriminate against any recognized branch of medical service, and that the hospital should, therefore, permit osteopaths and chiropractors to have the same recognition in county public hospitals as is given to doctors practicing a regular course of medicine." (Our insert)

The second, under date June 24, 1937 (1938 A. G. O. 321), was in response to the specific question:

"Can chiropractors care for patients in hospitals supported in whole or in part by taxation?"

That opinion first pointed out that chiropractors are not from any school of medicine but of the school of chiropractic, that under the practice act they could not prescribe "any drug or medicine included in materia medica," but were limited in their treatment merely to the "adjustment by hand of the articulations of the spine or by other incidental adjustment." After citing what now appears as subsection 5, section 347.13, Code 1950, that opinion concluded that it was a discretionary matter with the trustees in that they had authority to make rules and regulations excluding or including chiropractors.

The third and final of these previous opinions under date May 10, 1939 (1940 A.G.O. 219), was in reply to an inquiry as to what was meant by the term "school of medicine" used in section 380.6, Code 1950, which

is the comparable antidiscriminatory section appearing in the chapter relative to municipal hospitals. In that opinion this question appeared along with others and was identified as question 6. The conclusion in answer to this question was as follows:

"Answering question 6, it will be observed that the Iowa law recognizes at present three schools of healing art, namely, medicine and surgery, osteopathy and surgery, and chiropractic. That part of section 5871 prohibiting discrimination against practitioners of any school of medicine by the laws of Iowa was passed by the 31st General Assembly in 1906 and first appeared in the revision of 1913. The 29th General Assembly provided the laws relative to osteopathy and surgery and the 39th General Assembly those of chiropractic. It will be noted that osteopathy was recognized by the Code at the time section 5871 became law but that chiropractic had not as yet become a part of the Iowa statutes. Since the enactment the laws relative to both such practices have, with various amendments, come down to and are included in the present Code.

"Inasmuch as the present law includes the three methods of healing and inasmuch as the statute in question seeks to prevent discrimination against any recognized school of medicine, it seems that a practitioner of any of the schools must be allowed to practice in the hospital. Osteopathy was recognized at the time the statute was passed and at the time the legislature passed the act recognizing chiropractic, it had the power to prohibit chiropractic from practice in municipal hospitals, but it did not see fit to do so. In addition to the above, both schools are allowed methods of practice which frequently demand hospitalization, and this being true, in the absence of statute to the contrary, neither school should be denied the use of a municipal hospital. In answer to question 6, therefore, it is our opinion that medicine and surgery, osteopathy and surgery, and chiropractic constitute schools of medicine for the purpose of practicing in a municipal hospital.

"Attached hereto is a memorandum brief upon which we predicate our conclusion."

Section 5871, Code 1935, therein referred to now appears as section 380.6, Code 1950.

A similar historical analysis of section 347.18 now in question reveals that it first appeared as section 14 of chapter 26, Laws of the 33rd General Assembly, enacted in 1909, and first appeared in the revision of 1913. The wording of the statute at that time was as follows:

"Sec. 14. No discrimination against legal practitioners of medicine. In the management of such public hospital no discrimination shall be made *against practitioners of any school of medicine recognized by the laws of Iowa*, and all such legal practitioners shall have equal privileges in treating patients in said hospital. The patient shall have the absolute right to employ at his or her own expense his or her own physician and when acting for any patient in such hospital the physician employed by such patient shall have exclusive charge of the care and treatment of such patient, and nurses therein shall as to such patient be subject to the directions of such physician; subject always to such general rules and regulations as shall be established by the board of trustees under the provisions of this act." (Italics supplied)

It is interesting to note that the phrase, "recognized school of medicine," as it now appears in the Code was then stated in identical words to those appearing in section 380.6, namely, "any school of medicine recognized by the laws of Iowa". This fact would clearly lead to the

conclusion that what this opinion held regarding the antidiscriminatory provision in the section relative to municipal hospitals would likewise apply to the same provision in the statutes governing county hospitals.

From the foregoing analysis of these previous opinions it would seem that the only conflict appears in the conclusion of the opinion appearing 1938 A. G. O. page 321. When we consider, however, that that opinion dealt specifically with the practice of chiropractic and the reasoning on which it was based so strongly emphasized their lack of authority to prescribe "any drug or medicine included in materia medica", it is apparent that its reasoning and basis would not be applicable as against osteopathic physicians or osteopathic surgeons holding Iowa licenses under the provisions of chapter 150, Code 1950. As evidence of an osteopath's scope of practice, see official opinion dated July 2, 1948 (1948 A. G. O. page 216). In any event the conclusion reached in the foregoing opinion was impliedly overruled by the May 10, 1939, offiicial opinion.

The sole remaining question for our consideration is whether we are now in agreement with the conclusion reached in the opinion issued under date May 10, 1939 (1940 A. G. O. page 219). We have examined with care the memorandum brief with regard to the definition of "schools of medicine" attached to and published along with said official opinion. In searching for more recent authority and decisions touching upon the question we find numerous cases dealing generally with the power of public hospital trustees to restrict its facilities provided their rules and regulations are reasonable and not arbitrary. In fact, such rules have in some instances been upheld if they barred osteopaths. See Hayman v. City of Galveston, 273 U. S. 414, and Newton v. Board of Commissioners of Weld County, 282 P. 1068 (Colo.). An examination of those cases, however, reveals that the state laws there involved had no specific statute prohibiting discrimination such as we have in Iowa and the cases therefore have no bearing on your qustion. In fact, a complete search of the Century and Decennial Digests revals one single case dealing with the definition of the term "any school of medicine recognized by the laws of * * *", and that is the case of Stribling, et al., vs. Jolley, et al., (Mo.) 253 S. W. 2nd. 519. We quote from that opinion as follows:

"What did the legislature mean when it said that no discrimination shall be made against practitioners of any school of medicine and then went on to say that the patient shall have the absolute right to employ his or her own physician? The trustees and medical defendants maintain that the rule excluding osteopaths is not in violation of this section because the trustees are allowed to adopt rules not inconsistent with the general law, and that osteopathy is not a school of medicine within the meaning of the statute.

"We are cited to Hayman v. City of Galveston, 273 U. S. 414, wherein the Supreme Court of the United States disagreed with the contention of an osteopathic physician in Texas, who was asserting a constitutional right to practice in the municipal hospital. No statute such as the one we have under consideration was involved in that case. The same is true of the case of Newton v. Board of Commissioners of Weld County, Colo., 282 P. 1068, also cited. This case was decided upon the authority of Hayman v. City of Galveston, supra, and the court said, "in all

substantial particulars the case in hand is like the Hayman case". We are therefore without authority in support of the contention raised.

"One of the meanings of the word 'school' is: 'The standard, doctrines, or principles relating to a profession or occupation in a given locality; the standards or theories relating to the pathology, etiology, or treatment of human ailments.' C. J. S., 78, P. 590.

"Webster's New International Dictionary, Merriam's Second Edition, gives as a definition of medicine: 'a. The science and art dealing with the prevention, cure, or alleviation of disease. b. In a narrower sense, that part of the science and art of restoring and preserving health which is the province of the physician as distinguished from the surgeon and obstetrician.' The meaning therefore of the words 'school of medicine' does not, as contended, limit the practice in public hospitals to those who administer drugs, for if that were true, a practitioner of any school who confined his practice to surgery could not use the institutions." And again it was stated in that opinion:

"From this it seems obvious that the legislature, in prohibiting the boards of county hospitals from discriminating against any school of medicine, used language that included osteopathic physicians.

"The matter need not, however, rest upon that alone, for it will be noted that there is a further provision in th second paragraph of the statute providing that the patient in the hospital has the absolute right to the 'physician' of his choice. There is no qualification as to the school of medicine to which the physician may belong and the legislature has considered and called doctors of osteopathy 'physicians' in the act regulating their practice. Mo. R. S. 1949, Sections 337.020, 337.040, and 337.070."

Like the Missouri statutes, section 347.18 makes references to the right of a patient to employ any physician of his choice, and also subsection 5 of section 135.1, Code of Iowa, 1950, in defining the term "physician" includes persons licensed to practice osteopathy and osteopathy and surgery.

The attorney general of the state of Michigan in an opinion issued February 24, 1950, had for consideration a rule promulgated by trustees of a county hospital in that state which required an applicant for membership on the medical staff to be a graduate of an approved medical school legally licensed to practice in medicine "qualified for membership and a member in good standing in his local medical society or a member in good standing in the Tri-County Medical Society of Wisconsin and practicing within a reasonable distance of the hospital". In arriving at the conclusion that said rule was void, one of the reasons stated was "because it violates those provisions found in s 13 of the statute granting equal privileges to the legal practitioners of any school of medicine recognized by the laws of Michigan and granting patients the absolute right to employ their own physicians at their own expense." Then after passing upon numerous other rules submitted, that opinion states:

"In the preparation of this opinion I have not overlooked cases such as Newton v. Board of Commissioners, 86 Colo. 446, 282 P 1068; Selden v. City of Sterling, 316 Ill. App. 455, 45 N. E. 2d 329; Richardson v. City of Miami, 144 Fla. 294, 198 S. 51; Hamilton County Hospital v. Andrews, (Ind.), 81 N. E. 2d 699, susperseded by 84 N. E. 2d 469, 85 N.E. 2d 365, certiorari denied 70 S. Ct. 73; Bryant v. City of Lakeland, (Fla), 28 S 2d, 106; and CL 1948, s 331.511."

In our analysis of your question, we too are not unmindful that prior to the enactment of Senate File 156, Laws of the 54th General Assembly, the provisions of section 147.17, a statute of long standing, in stating the qualifications for the board of medical examiners of the state of Iowa had provided that "not more than two of such examiners shall belong to the same school of medical practice". It has been urged that these words indicated a meaning of the terminology appearing in section 347.18 and section 380.6, Code 1950. In fact such seems to have been the thinking of the writer of the official opinion hereinbefore referred to as appearing 1938 A. G. O. 321. With this conclusion we cannot agree. We believe that the additional words "recognized by the laws of the state" currently appearing in section 380.6 and the words "recognized by the laws of Iowa" as originally appearing in section 14 of chapter 26, Laws of the 33rd General Assembly, the forerunner of section 347.18, clearly show a legislative intent consistent with the conclusion reached by this department in the official opinion appearing 1940 A. G. O. 219, and other authorities cited herein.

In conclusion, and in answer to your specific question, it is the opinion of this department that trustees of a county hospital existing under the provisions of chapter 347, Code 1950, do, under the provisions of subsection 5 of section 347.13, have rule making powers with regard to the control and supervision over the physicians practicing in the hospital, but that the specific provisions contained in section 347.18, Code 1950, prevent them from excluding licensed osteopathic physicians or osteopathic surgeons provided they meet the other requirements of the rules and regulations.

April 16, 1954

SCHOOL AND SCHOOL DISTRICTS: Tuition for children residing on state owned land. It is within the legislative province to require the payment of tuition to local school districts, by the state board of education, for the education of students residing on land owned by the state under control of the state board.

Mr. Carl Gernetzky, Chairman Finance Committee, State Board of Education: You have requested an opinion of this office as follows:

"Chapter 6, section 14 Laws of the 55th General Assembly reads as follows:

Sec. 14, chapter two hundred sixty-two (262), Code 1950, is hereby amended by adding therto the following: 'The state board of education shall pay to the local school boards the tuition payments for elementary or high school education of students residing on land owned by the state and under the control of the state board of education. Such payments shall be made from funds of the respective institutions other than appropriations.'

While the intent of this law is clear there is considerable question in our minds as to the legality of the payment of tuition to a school district for the education of students living within said district. There seems to be some support for our question in the following:

From the School Laws of Iowa compiled from the Code of 1950 we find reference to a decision as follows: Chapter 282.6 **Tuition.** Children

residing with their parents, who have moved into a school district, acquire a residence for purposes of tuition free school attendance. (Carbon District v. Adams Co. 211-1047; 267 NW 690)

From an opinion of the Attorney General, 1909—page 66—Tuition may not be charged actual residents of the district of school age.

There seems to be a provision in the Code for a school district to determine a tuition charge and to make such a charge for students living outside the district but we are unable to find any provision, method or technique whereby a school district may legally determine a tuition charge or make such a charge for the education of school children living within said district.

It appears that the intent of the school laws in the state of Iowa pertaining to education for elementary and high school pupils is that all children residing in a district are entitled to an education free of tuition.

In view of the apparent conflict between the law passed by the 55th General Assembly and the school laws already in force, we respectfully request your opinion on the following questions:

1. 'Is it legally possible for school districts to charge tuition for the education of children living within said district?

2. 'Is it legally possible for school districts to charge the state board of education tuition for the education of children living on state owned land located within said district?'

3. 'Is it legally possible for the state board of education to pay tuition for the education of children residing on state owned land to a district in which said children reside?' "

Section 282.6 of the Code to which you refer provides in pertinent part:

"Every school shall be free of tuition to all actual residents between the ages of 5 and 21 years, * * *"

It is to be noted that the provisions of section 14 of chapter 6, Laws of the 55th General Assembly, do not require the payment of tuition by residents of the district. These provisions provide that tuition shall be paid for residents by the state board of education. If, however, the provisions of section 14 aforesaid are deemed to be repugnant to the provisions of section 282.6 of the Code, such fact would not render the provisions of the said section 14 invalid. When a statute is enacted by the legislature which is inconsistent or incompatible with other statutes the statute last enacted is to be construed as implied repeal to the extent of such inconsistency or incompatibility.

However, it is our opinion that in this instance there is no repugnancy, but rather the legislature has enacted an exception to the general provisions.

You are advised that it is the opinion of this office that it was within the legislative province to require the payment of tuition to local school districts by the state board of education for the education of students residing on land owned by the state under the control of the state board of education.

April 22, 1954

LOAN OFFICES: Multiple licenses—limitation on loans. A licensee under the small loan law, holding more than one such license for separate places of business, may not induce or permit any one borrower, or any husband and wife, individually or together to be indebted to him under more than one contract of loan at the same time at any one or more of his offices.

Mr. N. P. Black, Superintendent, Department of Banking: We are in receipt of your request for an opinion on the following question:

"If a 'person' licensed under the Iowa small loan law applies for and is issued more than one license under the provisions of section 536.7, Code 1950, is it illegal for him to induce or permit any one borrower or any husband and wife, individually or together, to be indebted to him under more than one contract of loan at the same time at any one or more of his licensed offices?"

Section 536.1, Code 1950, defines the word "person" as including individuals, copartnerships, associations and corporations. Section 536.5 sets forth in detail the information required to appear on a license to engage in the business of making small loans. It requires that if the applicant be an individual, the license must state fully the name of the individual. If the applicant be a copartnership or association, it must state the names of the members thereof, and if a corporation, the date and place of its incorporation.

Section 536.7 which you mention in your question is in part as follows:

"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." (Italics supplied).

The restrictions as to the limitation of principal to $300 or less, as well as the provisions specified in subsection 6 of section 536.13, do not lend themselves to statutory interpretation if only one place of business is operated by one licensed under the provisions of chapter 536. It is only by virtue of the authority vested in you to issue more than one license to the same licensee which gives rise to the question you present. You will note that in the foregoing quote of section 536.7, we have italized the words "same licensee". This same section was before this department in connection with an official opinion issued under date July 29, 1937, 1938 A. G. O., page 406. The question there was whether investigation and license fees should be based on the liquid assets of the person, partnership or corporation applying for an additional license or on those liquid assets set over to the branch office to carry on the business of that branch. In that opinion it was pointed out that the issuance of another license to the same licensee was in effect the authorization of a branch office operation, which operation remained a part of the individual, corporation, partnership or whatever the concern might be. In other words, it was recognized as one concern spread out over the state by way of branch offices. It was held that the applicant was the individual, partnership, association or corporation itself and

that in fact, the additional license was to be issued to that applicant rather than to the branch office, and therefore the liquid assets of the applicant would determine the amount of the investigation and license fee regardless of the amount which had been set over to operate the branch office. The theory of their being only one "licensee" with the additional licenses merely authorizing the doing of business at a named place stated therein is borne out by the concluding paragraph of section 536.6., which provides as follows:

"Every licensee shall have available at all times for each licensed place of business at least five thousand dollars in assets, either in liquid form or actually in use in the conduct of such business."

In connection with the matter of making loans with the same individual at different offices, we would direct your attention to that portion of subsection 6, section 536.13, which provides as follows:

". . . No *licensee* shall induce or permit any borrower or borrowers to split up or divide any loan or loans for the purpose of evading any provision of this chapter nor shall any licensee knowingly permit any borrower, nor any husband and wife individually or together, to be indebted to him under more than one contract of loan at the same time. . ." (Italics supplied).

We would also direct your attention to the provisions of section 536.15, Code 1950, which provides:

"No licensee shall *directly or indirectly* charge, contract for, or receive any interest or consideration greater than the lender would be permitted by law to charge if he were not a licensee hereunder upon the loan, use, or forbearance of money, goods, or things in action, or upon the loan, use, or sale of credit, of the amount or value of more than three hundred dollars. The foregoing prohibition shall also apply to any licensee who permits any person, as borrower or as indorser, guarantor, or surety for any borrower, or otherwise, to owe directly or contingently or both to the licensee at any time the sum of more than three hundred dollars for principal." (Italics supplied.)

Based on the foregoing analysis of the statutory provisions appearing in chapter 536, Code 1950, it is the opinion of this department that it would be illegal for an individual, copartnership, association or corporation holding more than one license under the provisions of section 536.7, Code 1950, to induce or permit any one borrower or any husband and wife, individually or together, to be indebted to him under more than one contract of loan at the same time at any one or more of his licensed offices.

April 30, 1954

OLEOMARGARINE: Public eating places—when in "form ready for serving." Colored oleomargarine possessed in a public eating place is in a "form ready for serving" when each separate serving is labeled identifying it as oleo, or each separate serving is triangular in shape.

Hon. Clyde Spry, Secretary, Department of Agriculture: This is in reply to your recent request for an opinion interpreting the latter part of section 191.3, Code 1950, as amended by a part of the provisions of

section 4, chapter 97, Laws of the 55th General Assembly. More specifically your question is:

"Under what conditions should this department consider colored oleo, oleomargarine or margarine, possessed in a public eating place to be 'in a form ready for serving'?"

That part of the foregoing statute pertinent to your question provides:

"No person shall possess in a form ready for serving colored oleo, oleomargarine or margarine at a public eating place unless a notice that oleo, oleomargarine or margarine is served is displayed prominently and conspicuously in such place and in such manner as to render it likely to be read and understood by the ordinary individual being served in such eating place or is printed or is otherwise set forth on the menu in type or lettering not smaller than that normally used to designate the serving of other food items. *No person shall serve colored oleo, oleomargarine or margarine at a public eating place, whether or not any charge is made therefor, unless* each separate serving bears or is accompanied by labeling identifying it as oleo, oleomargarine or margarine, or each separate serving thereof is triangular in shape." (Italics supplied).

From the italics above you will note that the legislature created two separate and distinct prohibitions regarding acts of those operating public eating places with detailed conditions under which they can lawfully operate. The one provides that the actual serving of colored oleo, oleomargarine or margarine at a public eating place, whether or not a charge is made therefor, is prohibited *unless* each separate serving thereof bears or is accompanied by proper label *or* is triangular in shape. The other provides that it shall be illegal to possess such colored products "in a form ready for serving" at a public eating place *unless* the required notice is displayed *or* such information is set forth on the menu as prescribed in the statute.

The phrase "in a form ready for serving" is what you ask us to interpret. It is apparent that the word "form" as used in the phrase means something other than color because the object of the sentence in which it appears is 'colored oleo, oleamargarine or margarine". Ordinarily in this type of statutory regulation the legislature expressly defines such phrases in order to aid in the administration. The absence thereof in the Iowa statute compels us to arrive at the legislative intent of its meaning by the application of established rules of statutory construction.

One of the most basic rules of statutory construction is that each part or portion of an Act must be considered in light of all its other provisions. In the concluding sentence of that part of section 191.3 as amended and set forth above, the legislature definitely prescribed the form in which colored oleo, oleomargarine or margarine can legally be served, namely, by each separate serving thereof bearing or being accompanied by labeling identifying it as such *or* each separate serving being triangular in shape. Possessing such prepared servings is, in our opinion, what the legislature intended by the phrase "in a form ready for serving".

The foregoing interpretation means that if an operator, in anticipating the actual serving of separate portions of colored oleo, oleomargarine

or margarine, prepares them and has them in his possession ready to serve in accordance with the requirements of the last sentence of the statute, he is required to display prominently and conspicuously the notice *or* print or otherwise set forth on the menu in the required sized lettering the information that colored oleo, oleomargarine or margarine is served in his place of business. If he does neither, then he is subject to being charged with illegal possession.

The enforcement of the statute in question providing restrictions on colored oleo, oleomargarine, or margarine in public eating places is not dependent alone on your department's ability to prosecute the operators for illegally possessing such products "in a form ready for serving". You may always invoke the provision prohibiting the actual serving thereof even though the operator took the portion from any quantity which he might legally possess under the conclusion reached in this opinion.

We call your attention to the fact that the penalty for conviction of the offense of actually serving the product without it being properly identified by label or shape carries the same penalty as does that for possessing it "in a form ready for serving" without having the required notice posted or the menu information in the manner as required by statute. This is evidenced by the penalty clause appearing as section 10 of Senate File 2, Acts of the 55th General Assembly, which is as follows:

"**Penalty.** Any person violating any provision of section one hundred ninety-one point three (191.3) of the Code shall upon conviction or plea of guilty be punished, for the first offense by a fine of one hundred (100) dollars; for the second offense by a fine of three hundred (300) dollars; for the third offense by a fine of five hundred (500) dollars and the suspension for one year of all licenses issued by the state of Iowa for the public eating place in which said violation occurred."

May 5, 1954

HOSPITALS: County hospitals—collection of delinquent accounts. A credit syndicate employed by the county hospital trustees to collect delinquent accounts is through when the time is reached when litigation is required. The trustees may then employ attorneys to institute proceedings and pursue same to conclusion and pay the costs from the hospital maintenance fund.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: We have yours of the 23rd ult., in which you have submitted the following:

"My office has been presented with several problems from time to time in connection with the adoption of chapter 157 of the 55th General Assembly [sec. 347.17, Code '54], which provides that the trustees of a county hospital are authorized to employ any person for the purpose of collecting delinquent hospital accounts and also employ legal counsel for that purpose. Specifically, I would like your interpretation of the following questions:

1. May a credit syndicate employed by the trustees to collect delinquent accounts in turn employ counsel to collect those accounts which must be sued upon, or must the attorney be employed directly by the

trustees thereby by-passing the credit syndicate which has initially attempted to collect the account?

2. Are the trustees, in behalf of the hospital, required to pay court costs, and if so, from what fund or funds would these costs be advanced from?

An early reply will be appreciated as I am to meet with the board of trustees of Broadlawns Polk County Hospital on May 10, 1954."

In reply thereto, we advise you as follows:

1. In answer to your question Number 1, we advise you that the statute to which reference is made provides as follows:

"It shall be the duty of the trustees either by themselves or through the superintendent to make collections of all accounts for hospital services rendered for others than indigent patients or patients entitled to free care as provided in chapter 254. Such account shall be payable on presentation to the person liable therefor of an itemized statement and if not paid or secured within sixty days after such presentation the said trustees shall proceed to enforce collections by such means as are necessary and are authorized to employ any person for that purpose, and if legal proceedings are required they may employ counsel, the employment in either event to be on such arrangement for compensation as the trustees deem appropriate provided, however, that should the county attorney act as attorney for the board in any such legal proceedings he shall serve without additional compensation." (Section 347.17, 1950 Code of Iowa, as amended by chapter 157, Acts of the 55th General Assembly.)

By the plain terms of the foregoing statute the county hospital trustees may within the power bestowed upon them employ a collecting agency or a credit syndicate to collect the delinquent hospital accounts. Their power in such collection will extend to the time when litigation is required in order to effect recovery. When that stage is reached the board of hospital trustees are empowered to employ attorneys to institute the proceeding and pursue the litigation to conclusion. The collecting agency or credit syndicate may not legally contract to furnish legal services in the collection of the delinquent accounts. Such contract constitutes the illegal practice of law. See, Bump v. Barnett, 235 Iowa 308, 16 N. W. 2d 579. Such collecting agency or credit syndicate is also unauthorized to employ counsel to represent the county hospital trustees in litigation involved in the collection of such delinquent county hospital accounts.

2. Insofar as your question Number 2 is concerned as to whether the county hospital trustees are required to pay advance court costs involved in litigation authorized by chapter 157, Acts of the 55th General Assembly, we are of the opinion that such court costs are required to be paid and the maintenance fund of the county hospital is the proper fund from which these costs should be advanced. The reason for this conclusion is found in the following: The county hospital operates from funds resulting from taxation over which the hospital trustees have sole control. The clerk of the court operates from funds appropriated out of the county general fund or the county court expense fund. As between the county hospital fund on the one hand and the county general and court expense fund on the other, these funds are separate, distinct and self-supporting. They are not reciprocally subject

to transfer, lending or borrowing. See, opinion of the attorney general appearing in the Report for 1948 at page 223. Use of the services of the clerk or sheriff in litigation instituted by the county hospital trustees without payment therefor would constitute a disregard of the several and separate character of these funds.

May 6, 1954

DRUGS AND DRUGGISTS: Prescription forms furnished to physicians. Where a licensed pharmacist furnishes prescription forms, to physicians, with the name of his pharmacy printed thereon, with or without an instruction to the patient to take the prescription to his pharmacy, he is subject to a charge of unprofessional conduct.

Mr. J. F. Rabe, Secretary, Iowa Pharmacy Examiners: Some time ago you made inquiry of this department as to the legality of the following practices:

1. A pharmacist supplies various physicians with slips of paper bearing name and street address of his pharmacy and a map identifying various buildings on the street with an arrow pointing to his place of business. The physician in issuing written prescriptions accompanies the same with one of the slips when it is handed to the patient, the prescription blank itself bearing no reference to any pharmacy but merely shows the physician's name and address at the top thereof.

2. A pharmacist supplies various physicians with pads of prescription blanks having at the top thereof the name, street address and telephone number of his pharmacy and either on the front or back of the blank the printed words,

"Take this to
———————— Drug Store
Prescription Druggist
———————— Street,
————————, Iowa."

The physician writes his prescription on the face of the prescription blank and delivers it to the patient.

3. A pharmacist supplies various physicians with pads of prescription blanks in the identical form as designated in No. 2 above except the words "Take this to" do not appear thereon. The physician uses these prescription blanks in the same manner.

More specifically your inquiry is whether the foregoing practices by licensed pharmacists would be "unprofessional conduct" within the meaning of that term as defined in subsection 1 of section 147.56, Code of Iowa, 1950. That subsection defines "unprofessional conduct" as

"Solicitation of professional patronage by agents or persons popularly known as 'cappers' or 'steerers', or profiting by the acts of those representing themselves to be agents of the licensee."

The terms "cappers" and "steerers" appearing in the foregoing statute are not defined, but as pointed out in the opinion of the Supreme Court of Illinois in the case of People v. Dubin, 367 Ill. 229, 10 N.E. 2d 809, the words have a commonly accepted meaning so that their use in a statute of the kind in question indicates a legislative intent to forbid the obtaining of professional patronage by the use of a solicitor or

solicitors regardless of whether they are actually compensated for their services of solicitation.

If at the time a physician handed a patient a written prescription he should orally state to the patient that he was to take it to the "———————— Prescription Druggist" to have it filled, there would be little doubt but that he was soliciting business or patronage for that pharmacist. The written instruction, "Take this to ———————— Drug Store" as appears on the prescription blank set out in your second situation is equally such a solicitation. The use of the slip bearing the information set out in your first statement of practice or that type of prescription blank identified in your third statement, when delivered to the ordinary patient by his physician, would, in our opinion, bear the permissible inference on the part of that patient that the physician has a preference that that particular prescription druggist be asked to fill the prescription. In that aspect the physician would in fact also be soliciting business for that druggist.

In an official opinion dated November 22, 1934 (1934 A.G.O. 732), this department held that a division of money received through the sale of a prescription by a licensed pharmacist with a licensed physician constitutes unprofessional conduct within the definition of that term appearing in subsection 4 of section 147.56, Code 1950, and constitutes a ground for revocation of the pharmacist's license. We therein pointed out, however, that evidence of any unprofessional conduct should be clear, satisfying and convincing in order to justify proceedings to revoke any professional license. That admonition is equally applicable here and each individual case should be analyzed on the basis of its own facts.

It is our conclusion that if a licensed pharmacist makes arrangements for the use of any of the forms of prescription blanks or illustrative maps referred to in the three situations you present and investigation reveals that those with whom he makes such arrangements, namely, the physician or physicians, acts in accordance therewith and uses or delivers them to his patients, then the pharmacist would be subject to a charge of unprofessional conduct under the provisions of the statute appearing as subsection 1 of section 147.56, Code of Iowa, 1950.

May 10, 1954

BUILDING AND LOAN ASSOCIATIONS: Title insurance as evidence of first lien. Title insurance cannot be accepted by examiners representing the auditor of state in lieu of an attorney's opinion based on the abstract, and reciting that the building and loan association's mortgage constitutes a first and prior lien.

Mr. C. B. Akers, Auditor of State; Attention George T. Carson: We have yours of the 29th inst., in which you submitted the following:

"We hand you herewith a copy of a letter from Ralph B. Smith, Attorney at Law, Keokuk, Iowa, dated April 1st, with the enclosures referred to in the letter. Also, a copy of our reply in which we advised that title insurance could not be accepted by examiner's from this de-

partment in lieu of an attorney's opinion, and cited section 515.48 of the Code of 1950 to substantiate our ruling.

We have received a reply from attorney Smith in which he questions our decision and requests that we receive an attorney general's opinion 'as to whether or not the state auditor's office would be justified in refusing to allow credit to a loan and building association for a loan in which the title to the security was evidenced by title insurance rather than by abstract.'

In compliance with Mr. Smith's request we are asking your consideration in the question involved and would greatly appreciate receiving your opinion at your very earliest convenience."

Accompanying your letter are copies of letters between interested parties, which letters disclose that as far as the Federal Home Loan Bank is concerned title insurance is acceptable in determining evidence of title, and that it has no objection to the adoption of title insurance by the Keokuk Building and Loan Association, if it is the policy in the community to accept title policies, and if such insurance policies clearly recite that the association has a first lien on real estate securing its loan. Others of the letters disclose the attitude of the auditor of state with reference to the acceptance of such title insurance in the administration of the building and loan chapter.

In the view that we take of this situation, we are confirming the advice given to Mr. Smith by your letter of April 19, inst., "Title insurance cannot be accepted by examiners representing the auditor of state in lieu of an attorney's opinion based on the abstract, and reciting that the association's mortgage constitutes a first and prior lien." Reason for this conclusion follows:

No specific statute appears to have been enacted authorizing insurance of titles to real estate but by interpretation of section 1709, Supplement to the Code of 1913, which appears as subsection 2 of section 5627 of the compiled code, such statute being in terms as follows:

"Insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed, except bonds required in criminal causes. None but stock companies shall engage in fidelity and surety business."

it was declared by this department that the business of guaranteeing titles to real estate and entering into contracts of that character were within the power bestowed by the foregoing statute. See opinion of attorney general appearing in the Report for 1919-1920, page 146, and the Report for 1923-24, at page 220. Such remained the state of the legislation on the subject until the 52nd General Assembly, while retaining the foregoing statute as section 515.48, subsection 2, also added chapter 258, section 5, which is now designated section 515.48 of subsection 10, Code 1950, and provided:

"Any company organized under this chapter or authorized to do business in this state may:

* * *

10. Insure any additional risk not specifically included within any of the foregoing classes, which is a proper subject for insurance, is not

prohibited by law or contrary to sound public policy, and which, after public notice and hearing, is specifically approved by the commissioner of insurance, except title insurance or insurance against loss or damage by reason of defective title encumbrances or otherwise. When such additional kind of insurance is approved by the commissioner, he shall designate within which classification of risks provided for in section 515.49 it shall fall."

Such action by the 52nd General Assembly specifically excepting power in insurance companies to engage in the business of title insurance or insurance against loss or damage by reason of defective title encumbrances or otherwise, evidenced two things:

(1) That it did not regard the statute now designated as section 515.48, subsection 2 as authorizing the insurance of real estate titled.

(2) That it did not intend to authorize insurance companies to engage in the business of insuring real estate titles or insure against loss or damage by reason or defective title, etc.

It is to be noted that "where the law-making power speaks on a particular subject for which it has constitutional power to legislate, public policy in such case is what the statute enacts." 12 Am. Jur. Par. 179, Title Contracts.

Such declared public policy would deny to the auditor of state in the fulfilling of constitutional and statutory duties and powers, the power to approve the activities of a foreign corporation doing business in Iowa in contravention of its statutes. Or, stated otherwise, the legislature having denied domestic and foreign corporations the right to engage in the business of insuring title to real estate, the auditor of state could not in the exercise of functions bestowed, approve the doing of such interdicted business by a foreign corporation. It is the obvious duty of the auditor of state in his examinations to see that the public policy of the state is not violated and therefore he would exceed his power in approving an act by a building and loan association that violates such policy. Therefore, rightly, the auditor of state may refuse to credit loans of building and loan associations certified as to liens by a company doing business of insuring titles to real estate.

May 12, 1954

BUILDING AND LOAN ASSOCIATIONS: Loans from Federal Home Loan Bank—requirement. Building and loan associations, in order to avail themselves of powers to receive advances from the Federal Home Loan Bank, are required to claim such powers in their articles of incorporation.

Mr. C. B. Akers, Auditor of State; Attention George T. Carson: We have yours of the 16th inst., together with a copy of opinion of Robert H. Bush rendered to Robert J. Richardson, president of the Federal Home Loan Bank of Des Moines, concerning an opinion rendered to you by Assistant Attorney General Strauss, dated March 9, 1954, relating to the power to borrow money by Iowa chartered savings and loan associations. To clarify the situation to which address was made in the letter

of March 9, 1954, we attach herewith copy of the request made by you and copy of answer thereto.

We have received the letter opinion of Mr. Bush and the authorities therein cited and as a result thereof we are confirming letter issued March 9, 1954. In support thereof we would cite to you the following. In the case of Bathe v. The Decatur County Agricultural Society, 73 Iowa 11, 12, we find the following statement:

"The powers of a corporation are such as are expressly provided in the articles of incorporation, and such others as are reasonably incident to the exercise of such powers. * * *"

In the case of Williams v. Dean, 134 Iowa 216, 220, it is stated:

"The general rule as to all corporations is that they have such powers 'as are expressly provided in the articles of incorporation and such others as are reasonably incident to the exercise of such powers. * * *'

In the case of Traer v. Prospecting Co., 124 Iowa 107, 113, it is stated:

"It is said by the appellees that because section 1609, paragraph 6, of the general incorporation law of the state, gives a corporation the power 'to make contracts, acquire and transfer property, possessing the same power in such respects as natural persons,' it has 'implied power to dispose of any or all of its property whenever this is deemed expedient in carrying out the purposes for which it was organized.' A part of this proposition may be conceded, so far as a private trading or manufacturing corporation is concerned, because of the very nature of its business. But it is evident that this statute only designates the powers which a corporation may provide for in its articles of incorporation, and exercise them only when it has so provided; otherwise articles of incorporation, no matter how limited the business they might provide for, would be no check upon the power of the corporation."

We have no quarrel with the case of Bohn v. Boone Building and Loan Association, 135 Iowa 140, quoted by Mr. Bush. The statement there made is a restatement of the words of the court set forth in the citation from the case of Traer v. Prospecting Co., supra. The power to borrow generally to meet a contract demand like the power to contract in that case, is implied from the nature of the business which it was carrying on. The borrowing in the Bohn case was made to meet the demand of a holder of matured shares. That is a wholly different borrowing from that authorized by our statute that a building and loan association may receive advances from the Federal Home Loan Bank. Receiving such advances is not an implied power arising out of the nature of the business of a building and loan association. As a matter of fact the power to borrow to pay maturities is now expressly authorized by section 534.19, subsection 7, Code of 1950. Such section states:

"To borrow money for the purpose of making loans to its members, paying withdrawals, paying maturities, paying debts, and for any other purposes within the scope and objects of its articles of incorporation, and to execute written obligations evidencing such indebtedness."

And insofar as the repayment of either such borrowing or receiving advances from the Federal Home Loan Bank is concerned, section 534.19, subsection 8, Code of 1950, provides expressly as follows:

"To pledge its notes and mortgages and other assets as security for the repayment of borrowed money, and for the repayment of advances received from a federal home loan bank, and to authorize such pledged security to be repledged by such bank."

That the building and loan associations are not excepted from the rule is evidenced by the following: They are organized under the general corporation laws and upon compliance with the provisions of chapter 534, they may become a building and loan association. Section 534.4, Code of 1950. Among the provisions of that chapter is section 534.19, which provides:

"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 bylaws:

* * *

6. To subscribe for, purchase, and hold shares of stock of the federal home loan bank of the district in which Iowa is situated, organized under the act of Congress known and cited as the federal home loan bank act, approved July 22, 1932 (12 USC; § 1421 et seq.), and do all acts necessary to become and be members of the federal home loan bank system, established under the said act and amendments thereto, and to receive advances from such bank and make deposits with such bank and invest in the bonds and other obligations of the federal home loan banks and to assume the obligations and participate in the benefits of such memberships.

* * *

8. To pledge its notes and mortgages and other assets as security for the repayment of borrowed money, and for the repayment of advances received from a federal home loan bank, and to authorize such pledged security to be repledged by such bank."

These powers according to the foregoing section "are subject to the terms and conditions contained in their articles of incorporation and bylaws." The phrase "subject to" means subservient and subordinate. See Kelly v. Smythe, 157 P. 2d 289, Flower v. Town of Billerica, 87 N.E. 2d 189, Homan v. Employers Reinsurance Corporation, 136 S.W. 2d 289. Therefore, the foregoing powers bestowed upon building and loan associations by the statute are subservient and subordinate to the terms and conditions contained in the articles of incorporation and bylaws. Proof of this being the legislative intent lies in the anomalous result of the articles containing a bare general power to borrow or accept advances from the federal bank. If a general power justified such implied power the respective depositors and creditors of such association would stake their deposits and their evidences of debt at the will of the association subject to no limitations on the exercise of the power to accept such advances and to secure them by the pledge of the building and loan associations assets and securities. It is to be borne in mind "such associations so widely differ from other corporation in their purpose and nature that they are generally recognized as a proper subject of independent legislation. In view of their quasi public character, the state may, under its police power, subject them to a degree of supervision and regulation which would be unnecessary and unreasonable in the case of purely private corporations." 9 Am. Jur.,

section 8, title, "Building and Loan Associations." And see Brady v. Mattern, 126 Iowa 158.

By reason of the foregoing we adhere to the view expressed in my letter of March 9, 1954, and specifically as to the necessity of building and loan associations, in order to avail themselves of the powers to receive advances from the Federal Home Loan Bank, being required to claim such powers in their articles of incorporation.

June 17, 1954

SCHOOLS AND SCHOOL DISTRICTS: Military leave of absence to teacher—sick leave accumulative. A school teacher on leave of absence in the military forces of the United States continues to accumulate sick leave during such leave of absence.

Mr. R. A. Griffin, Legal Advisor, Department of Public Instruction: This opinion is written in answer to your letter to which you attached a letter from Armstrong Consolidated School embodying the following question relative to section 279.40, Code of 1950, sick leave of school teachers:

"Kenneth Lemke was employed in our school for the school year 1950-51. At the end of the first six weeks he was drafted into the army.

In October 1952 he returned to work in our school and has been employed since that time. He is of the opinion that he should be allowed accumulated sick leave for the time that he was in the army.

Will you please give us an opinion as to legal requirements regarding this case?"

In our opinion the statute governing this matter is set out in chapter 54, section 28, page 96, Laws of the 55th G.A. [section 29.28 Code 1954] as follows:

"All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment *for the period of such active state or federal service, without loss of status or efficiency* rating, and without loss of pay during the first thirty (30) days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence."

If no credit is given the teacher for the period spent in military service it would clearly be a loss of status. This might be more clearly illustrated by the example of a teacher who had six consecutive years of employment is called into the army for a year then returns to his employment. Failing to allow credit for his military service would give him the status of a new teacher with no accumulated sick leave.

An attorney general's opinion (1952 A.G.O. 92 construing 279.40) held that a state employee who is on statutory leave of absence continues to accumulate sick leave during such leave of absence.

Section 28 you will note specifically gives all officers and employees of the state or a subdivision thereof a *leave of absence* from such civil employment and for this reason in our opinion the teacher who is called into service and thereafter returns to the employ of his previous school retains his status for his prior service and for the time spent in military service. See also Gibbons v. Sioux City, 242 Iowa 160, 45 N.W. 2d 842.

June 17, 1954

GARNISHMENT: Bank account—claim of exemption—bond. Where the bank account of a judgment debtor has been garnished a question of exemption of the garnished funds is determined by the court. In proceedings in garnishment, possession in the sheriff is not present and bond like that required under execution is not required.

Mr. Robert M. Underhill, County Attorney, Onawa, Iowa: We have yours of the 1st inst. in which you submitted the following:

"The Monona county sheriff has garnished a bank account of a judgment debtor, and has received notice of exemption and demand for release thereof from him, and in turn the sheriff demanded an indemnifying bond from the plaintiff under section 626.54 of the Code. The plaintiff's attorney refuses to post such indemnifying bond, contending that the procedure where a garnishment has been made is governed by section 642.15, which leaves the question of exemption of garnished funds up to the court, and the plaintiff's attorney has threatened to hold the sheriff liable for any damages if he would release the garnished money by reason of failure to post such indemnifying bond.

I would be pleased to have you give me vour opinion as to whether section 642.15 or section 626.54 controls the procedure in such case."

In reply thereto we would advise you that in our opinion the foregoing situation is controlled by section 642.15 under which the question of exemption of garnished funds is determined by the court. This conclusion is based upon the distinction between levying and garnishing. This is described in Brenton Bros. v. Dorr, 213 Iowa 725, 736, as follows:

"The difference between levying and garnishing, roughly stated is, that in a levy the sheriff takes actual or constructive possession of the property; whereas in garnishment, the property is left in the possession of the garnishee. That there is a difference between levy and garnishment is recognized in our statutes, as will be seen by reading sections 11676, 11677, 12099, 12100 and 12101."

Garnishing is the mere impounding in the garnishee's hands "whatever he may then owe the debtor or may have in his hands or in his control for the debtor." Under an execution made by the sheriff where he takes possession of the property, bond may be required of the creditor or in the event it is not provided the property may be released from the levy. See section 626.54, Code of 1950. However, in the proceedings by garnishment, possession in the sheriff is not present and bond like that required under execution is not required. This distinction is recognized by this statute: Section 626.28, Code of 1950, which provides as follows:

"**Return of garnishment—action docketed.** Where parties have been garnished under it, the officer shall return to the next term thereafter a copy of the execution with all his doings thereon, so far as they

relate to the garnishments, and the clerk shall docket an action thereon without fee, and thereafter the proceedings shall conform to proceedings in garnishment under attachments as nearly as may be."

Proceedings in garnishment under execution is prescribed by section 642.15, Code of 1950, as follows:

"**Pleading by defendant—discharge of garnishee.** The defendant in the main action may, by a suitable pleading filed in the garnishment proceedings, set up facts showing that the debt or the property with which it is sought to charge the garnishee is exempt from execution, or for any other reason is not liable for plaintiff's claim, and if issued thereon be joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. If such debt or property, or any part thereof, is found to be thus exempt or not liable, the garnishee shall be discharged as to that part which is exempt or not liable."

See Eller v. Nat. Mot. Vehicle Co., 181 Iowa 679, 683, 684.

July 12, 1954

HIGHWAYS: Secondary road construction and maintenance—levies in cities and towns. So far as the secondary road construction levies are concerned, property, in cities controlling their bridge levy, is excluded therefrom. Insofar as maintenance levies for secondary roads are concerned, the property, in both cities and towns controlling their bridge levies, is excluded therefrom. (See opinion of April 6, 1953.)

Mr. Glenn D. Sarsfield, State Comptroller: Reference is herein made to opinion of the Attorney General issued April 16, 1953, and as a supplement thereto for the purpose of clarifying it and resolving misunderstandings with reference to it, I would make the following observations:

1. That the opinion was concerned with and limited both in argument and conclusion to county levies for secondary roads in the following aspects:

(a) Those authorized for construction of such roads under the provisions of section 309.6, Code of 1954, and

(b) Those authorized for the maintenance of such roads under the provisions of section 309.11, Code of 1954.

2. That the levy authorized for the construction of secondary roads under section 309.6, excludes from that levy property within cities which control their own bridge levies. *Towns* are not within the exclusion and remain subject to the secondary road construction levy authorized by section 309.6, Code of 1954.

3. Section 404.7, subsection 8, on the other hand applies to all cities and towns whether they have bridges or not. If a city or town does not have bridges then there is no necessity for maintaining them. In these latter instances it is within the discretion of the city council to allocate the entire street fund authorized under section 404.7, subsection 8, Code 1954, to the other purposes enumerated.

4. Section 309.3, Code of 1954, defines the secondary bridge system of a county as follows:

"**Secondary bridge system.** The secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the

county except on primary roads and on highways *within cities which control their own bridge levies,* except that culverts which are thirty-six inches or less in diameter shall be constructed and maintained by the city or town in which they are located." (Italics supplied)

It will be noted from the foregoing italicized portion that even though towns do control their own bridge levies they are not excluded from the system as are cities.

Under the provisions of section 309.10, subsection 8, Code of 1954, the secondary road construction fund can be used for the following:

"The payment of the cost in the establishment, construction, reconstruction, surfacing, resurfacing, grading, construction of bridges and culverts, the elimination, protection, or improvement of bridges and culverts, the elimination, protection, or improvement of railroad crossings, the acquiring of additional right of way and all other expenses incurred in the construction, reconstruction or improvement of secondary or farm-to-market roads in said county."

In this connection I call your attention to the power vested in the board of supervisors by section 309.14, which provides as follows:

"**Optional levy.** The board of supervisors may annually, at the September session of the board, levy not to exceed five-eighths mill on the dollar on all taxable property of the county, the same to be pledged either to the construction fund or the maintenance fund as the board may direct."

Therefore, so far as the secondary road construction levies are concerned property in cities having control of their bridge levy, is excluded therefrom. Section 309.6.

In so far as maintenance levies of secondary roads are concerned, the property of both cities and towns controlling their bridge levies is excluded in such levies. Section 309.11.

July 14, 1954

HIGHWAYS: Augmenting farm-to-market funds from future share of road use tax funds. Where a county has obligated all its share of farm-to-market road funds and a necessity arises to build an additional bridge costing more than $50,000, the board of supervisors may, by resolution under section 310.20 of the Code, make available to the farm-to-market fund enough money from its future share of road use tax funds to permit the construction without submitting the question to the electors.

Mr. K. L. Kober, County Attorney, Waterloo, Iowa: From the correspondence in connection with this matter, the following essential facts are gathered. The board of supervisors of Black Hawk County has programmed three bridges for construction as farm-to-market projects. Contracts for two of them have been let by the Highway Commission and the third will probably be let in August. The three projects will obligate Black Hawk County's allotment of the farm-to-market fund up to July 1, 1955.

A fourth bridge within the county is becoming unsafe for traffic and should be replaced in 1954. The estimated cost is $65,000.00 which ex-

ceeds the limitation imposed by sections 309.76 and 309.78, Code of Iowa 1954, and if the bridge is constructed as a secondary road project, as distinguished from a farm-to-market project, the approval of the electors of the county must be secured.

Under section 312.1 Code of Iowa 1954 (Section 308A.1 Code of Iowa 1950) the road use tax fund is created in the state treasury. It consists of motor vehicle fees; motor vehicle fuel tax or license fees; compensation tax on motor vehicle certificated carriers; revenue derived from the use tax; ten percent of the revenue of the sales tax; and any other funds which may by law be credited to the fund.

Under the following section of the statute, section 312.2 Code of Iowa 1954 (Section 308A.2 Code of Iowa 1950) the Treasurer of State is directed on the first day of each month to credit

"1— To the primary road fund, forty-two percent
2— To the secondary road construction fund of the counties, thirty-five percent
3— To the farm-to-market road fund, fifteen percent
4— To the street construction fund of the cities and incorporated towns of the state, eight percent."

Under the next following section of the statute, which is section 312.3 Code of Iowa 1954 (Section 308A.3 Code of Iowa 1950), the Treasurer of State on the first day of each month must apportion among the counties of the state in the ratio that the area of each county bears to the total area of the state, the thirty-five percent of the road use tax funds which he has credited to the secondary road construction fund under the last preceding section, and is required to remit the treasurer of each county the amount so apportioned.

Reference to section 309.8 Code of Iowa 1954 discloses that the secondary road construction fund of the county consists not only of the monies derived from the road use tax fund but also monies secured from a direct tax levy on all taxable property in the county (except cities and towns). See sections 309.6 and 309.7 Code of Iowa 1954. It thus appears that the secondary road construction fund of the county is made up both by direct levy on property and by taxes derived from general state sources.

It must also be borne in mind that under section 312.2 Code of Iowa 1954 (Section 308A.2 Code of Iowa 1950) subsection 2 with reference to the thirty-five percent and subsection 3 with reference to the fifteen percent, both relate to secondary roads and the separate classification of farm-to-market is made for the purpose of enabling the counties thru the agency of the Iowa State Highway Commission to secure additional federal aid in construction of this type of highway. With reference to all secondary roads of whatever classification, the board of supervisors will be found to have a specific duty. Section 306.3 Code of Iowa 1954, confers on the county board of supervisors jurisdiction and control over the secondary roads within their respective counties and from this jurisdiction and control derive certain duties with reference to such roads. Having these duties, the board of supervisors is justified in using whatever secondary road funds are at its disposal for the construction and

maintenance of all types of secondary roads. To implement this in practice, it will be observed that the boards of supervisors of the various counties of the state have from time to time supplemented the farm-to-market road fund out of the secondary road fund for the purpose of either paying for a portion of the project not eligible to be paid for from farm-to-market funds or constructing additional mileage on a farm-to-market road where the balance of money remaining in the farm-to-market fund might not be sufficient to construct the desired mileage. No question can rationally be raised with reference to this type of supplementation since the money is still being spent on secondary highways. It is not with that type of financial transfer that this opinion is concerned.

The code provisions which give rise to the problem which you propound are as follows:

Section 309.76—Intracounty Bridge. The board of supervisors may, without authorization from the voters, appropriate, for the substructure, superstructure, and approaches of any one bridge within the county, a sum not exceeding fifty thousand dollars.

Section 309.78.—Election Required. No appropriation for a bridge in excess of the authorization contained in sections 309.76 and 309.77 shall be made until the question of making such appropriation is first submitted to the electors. Such submission shall be made as provided in chapter 345.

The question of whether these two sections of the code had to be complied with in connection with the expenditure of farm-to-market funds was answered at page 123 of the Opinions of the Attorney General for 1944. That opinion held categorically that the farm-to-market road fund remained a state fund on which warrants were drawn by the Highway Commission rather than the board of supervisors and that the limitations provided by the above cited sections of the code have no application to expenditures for bridge construction from the farm-to-market road fund. That opinion has governed the operation of the Highway Commission with respect to the construction of bridges on farm-to-market roads and has not been challenged since the date of its issuance.

There is still another procedure by which the farm-to-market road fund has from time to time been augmented. This is by the adoption of a resolution by the board of supervisors and its certification to the State Treasurer in accordance with section 310.20 Code of Iowa 1954, which reads as follows:

"Any county may, in any year, by resolution of its board of supervisors, make available for the improvement or construction of farm-to-market roads within the county any portion of its allotment or road use tax funds. Upon certification of such a resolution, the state treasurer shall place in the county's allotment of the farm-to-market road fund the amount authorized by such resolution."

The augmenting of the farm-to-market fund under this section of the code has not taken place as frequently as under the method first referred to, but it has taken place and specific reference is made to the adoption of a resolution by the board of supervisors of Wright County on April 6, 1948 in which that board authorized the State Treasurer to

withhold $7,500.00 monthly from Wright County's share of the gasoline tax for a period of eight months to be credited to Wright County farm-to-market road funds. That resolution was duly certified to the State Treasurer on April 21, 1948 by the Chief Engineer of the Highway Commission in a letter which specifically called attention to the aggregate reimbursement desired, to wit: $60,000.00. There have been similar resolutions on which the State Treasurer has acted.

The peculiar problem which your situation presents and the only aspect of it which is new, poses the question of whether funds can be made available under section 310.20 from the thirty-five percent of road use tax funds to the farm-to-market fund freed from the requirement for an election imposed by sections 309.76 and 309.78 quoted above. It is interesting to note at this point that those two sections of the code were enacted many years prior to the conception of primary highways, farm-to-market highways, or federal aid of any kind. They have remained substantially unchanged for more than fifty years and the only change that has taken place is in the specified amount of the cost of the bridge which has been increased from $25,000.00 to $50,000.00.

Section 310.20 acts *in futuro*. It does not attempt to authorize a transfer or make available any portion of the road use tax fund after it has been distributed to the county and become comingled with funds that may have been derived from a direct property tax or other special sources. What it does attempt to do is to make available to the farm-to-market fund a portion of the county's allotment of road use tax fund before any distribution and before any comingling takes place. When the distribution is made, the specified amount becomes a part of the farm-to-market road fund. These is no legal reason why the legislature should not be permitted to authorize a subordinate governmental agency, such as the board of supervisors, to shift secondary road funds from one classification of secondary roads to another classification of secondary roads. The language of section 310.20 confers this specific power.

Having made available for the construction of farm-to-market roads a portion of its allotment of road use tax funds before the allotment became a part of other funds, it would seem that upon the completion of the necessary computations and the making of the necessary book entries that the money made available by the resolution would become a part of the farm-to-market road fund. Having become a part of the farm-to-market road fund prior to its distribution to the county, there seems to be no reason why the limitation of sections 309.76 and 309.78 should be any more effective than they have been held to be effective with respect to the farm-to-market fund generally.

It is the opinion of the department that if the board of supervisors sees fit under section 310.20 of the code to make available to the farm-to-market road fund enough money to permit the construction of the additional bridge, there is no occasion for submission to the electors of the question whether the appropriation shall be made.

July 19, 1954

ELECTIONS: Statement of expenditures—prosecution for violation. The law requires candidates for public office to file a statement of expenditures with the Secretary of State. In case of a violation of this statute the duty of prosecution reposes with the law enforcement officials of the place where the crime is committed.

Mr. Melvin D. Synhorst, Secretary of State: We have yours of the 13th inst., in which you submit the following:

"In connection with the requirements of chapter 56, Code of Iowa, 1954, that every candidate for state and federal office voted for at the primary election shall within thirty days after the holding of such election, file a true, detailed and sworn statement of campaign expenses with the Secretary of State, this office distributed on June 1, 1954, forms to all candidates for state and federal offices for making this report on the June 7, 1954, primary. On July 8, 1954, another set of forms was sent to all candidates who had not reported in accordance with the requirements of this chapter along with a letter pointing out their responsibility. As of this date many candidates for state and federal office have not filed the statement of expenses which is required under chapter 56.

What additional responsibility, if any, does the Secretary of State have in seeing to it that the provisions of this chapter are carried out?"

In reply thereto we advise you that chapter 56, Code 1954, involved herein, provides for the performance of these duties by you. Section 56.3 provides for the receipt and filing of the statements of expenses in terms as follows:

"**Filing.** Such statement shall be filed:

1. With the county auditor, in case of municipal or county offices.

2. With the secretary of state, in case of state or federal offices."

And you have the further duty of keeping the statements so filed open to the inspection of the public, and their preservation as a part of the permanent records of your office. Section 56.6 so provides. It states:

"**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."

In so far as the duty imposed upon you by section 56.3 is concerned it is to be said such duty is ministerial, and the duty imposed upon you by section 56.6 is custodial. While section 56.9 provides "the violation of any provision of this chapter shall constitute a misdemeanor" this duty is imposed upon the law enforcing officials of the place where the crime is committed.

July 19, 1954

MOTOR VEHICLES: Purchased by state directly from manufacturers. It is permissible for the state of Iowa to purchase automobiles directly from the manufacturer if he be the lowest responsible bidder and qualifies otherwise within the terms of the offering.

Mr. Melvin D. Synhorst, Secretary of State: We have yours of the 14th inst., in which you submit the following:

"During recent weeks the state Executive Council has been buying cars on bid directly from a manufacturer of automobiles. The standard

procedure heretofore has been to purchase passenger cars from licensed Iowa dealers. The Department of Public Safety has advised me that this corporation does not have a dealer's license as would appear to be required under chapter 322, Code of Iowa, 1954. Section 322.3, subsection 1 provides as follows:

'No person shall engage in this state in the business of selling at retail new motor vehicles of any make or represent or advertise that he is engaged or intends to engage in such business in this state unless he is authorized by a contract in writing between himself and the manufacturer or distributor of such make of new motor vehicles to so dispose thereof in this state and unless the department has licensed the person as a motor vehicle dealer in this state in motor vehicles of such make and has issued to the person a license in writing as in this chapter provided.'

I, therefore, respectfully request your formal opinion on the following question:

Is it permissible for the state of Iowa to purchase autombiles directly from a manufacturer that is not a licensed dealer in the state of Iowa?

As a member of the Executive Council I am directly interested in having all state purchases conform to the law."

The power of purchasing of motor vehicles for use by the state government is vested in the car dispatcher.

Section 21.2, subsection 4, provides in that respect the following:

"4. The state car dispatcher shall purchase all new motor vehicles for all branches of the state government. Before purchasing any motor vehicle he shall make request for public bids by advertisement and he shall purchase the vehicles from the lowest responsible bidder for the type and make of car designated. No passenger motor vehicle except ambulances, busses or trucks, shall be purchased for an amount in excess of the sum of two thousand dollars retail delivered price."

The question, therefore, presented is whether the duty imposed upon the car dispatcher to purchase automobiles for use of the state departments from the lowest responsible bidder is limited or restricted by the provisions of section 322.3, subsection 1, quoted by you in your letter. In reaching a conclusion as to that it may be said that the intent of the law conferring the duty on the car dispatcher obviously was that he should accept the bid that involved the least expenditure of public funds. In that aspect the question is presented whether the field of his duty extends to inquiry whether there has been compliance with the statute referred to. It is to be observed that when on a public offer, a bid is accepted and such acceptance communicated to the bidder, a contract is entered into. (See Pennington et al v. Town of Sumner, 222 Iowa 1005, 200 N.W. 629, 109 A.L.R. 355.) There appears to be no statute that bars a manufacturer from bidding at a public letting and likewise there appears to be no statute that bars public officials from accepting the bid of a manufacturer, or limits the power to accept bids to those engaged in the business of selling motor vehicles at retail. Whether the bidder can perform the contract by reason of failure to comply with the provisions of section 322.3, subsection 1 is not a question involved in the public bidding and in fulfillment of the duty of the car dispatcher in the selection of the lowest responsible bidder. The primary objective is to purchase state cars for the low dollar.

We are of the opinion, therefore, that it is permissible for the state of Iowa to purchase autombiles directly from the manufacturer if he be the lowest responsible bidder and qualifies otherwise within the terms of the offering.

August 27, 1954

COUNTIES: Legal residence of one in jail—aid to wife and children. One jailed in another county than his residence does not gain a legal residence there. It follows that if the wife and children need assistance it must be furnished by the county of legal residence of the husband and father regardless of where the wife and children live during his incarceration.

Mr. Edwin H. Curtis, Executive Secretary, Bonus Board: This will acknowledge receipt of yours of the 17th Inst., in which you submitted the following:

"I am desirous of an official opinion on the following question:

An honorably discharged war veteran residing in X county was jailed in Y county for a period less than a year. His wife and children were placed on A.D.C. in X county. The wife and children then moved their belongings to Y county and gained residence as a veteran however they continued to receive their assistance from an A.D.C. grant from X county because they must reside in Y county for six months before it can be transferred. While still receiving their assistance from X county the wife and one child were involved in an automobile accident which necessitated both medical and hospital care. A.D.C. makes no provisions for medical and hospital care. A.D.C. makes no provisions for medical and hospital expenditures so it becomes a responsibility of the county Soldier's Relief Commission. The veteran will soon be out of jail and the family has already made plans to return to X county. The county Soldiers' Relief Commission of Y county maintains they did not establish a residence of good intent for permanence but only moved to their county during the term of commitment.

The question is: Since the family is not receiving county Soldiers' Relief Assistance, do the medical and hospital bills become a responsibility of the county Soldiers' Relief Commission in the county issuing the assistance, which is County X, or does it become the responsibility of the county where they are now residing, which is County Y?

I requested this be made official because we will have similar cases in the future."

In reply thereto, we advise you as follows:

The specific statute under which medical and hospital care is granted to honorably discharged soldiers and their indigent wives, widows and minor children in section 250.1, Code of 1954, which in terms follow:

"Tax. A tax not exceeding one mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent men and women of the United States who served in the military or naval forces of the United States in any war, and their indigent wives, widows and minor children not over eighteen years of age, having a legal residence in the county."

It will be noted that the foregoing assistance is available to the named persons "having a legal residence in the county". Under the cir-

cumstances set forth in your letter, the legal residence of the honorably discharged soldier was not changed by his commitment to jail. The rule pertaining to that situation is set forth in 17 Am. Jur., Par. 77, Title, Domicil, in terms as follows:

§77. **Prisoners.**—A person committed to prison cannot gain a residence where the prison is situated. He retains his residence at his abode or home before his commitment. A residence can only be acquired by voluntary choice or by right. Under certain constitutional provisions it has been made impossible for anyone residing in the state to gain a domicil in any public prison, even voluntarily, as where a man intentionally has himself committed to prison and lives there under slight restraint for several years."

Insofar, as the residence of the wife is concerned, it is the established rule that a woman on her marriage loses her own domicil and by operation of law acquires that of her husband. See, 17 Am. Jur., Title, Domicil, Par. 38. And insofar as the minor children are concerned, it is the general rule that they do not acquire a domicil of their own volition. The domicil of the father is in legal contemplation the domicil of his minor children if legitimate. Under the Iowa law there is no difference between domicil and legal residence. Fitzgerald v. Arel, 63 Iowa 104, 16 N.W. 712. The fact that the wife and children have moved their belongings to Y County, the place where the veteran was imprisoned, does not deprive them of the legal residence which they acquired by and through the veteran. Our Supreme Court in the case of Ludlow v. Szold, 90 Iowa 175, 57 N.W. 676, recognized a distinction between legal and actual residence. A person may be a legal resident of one place and an actual resident of another, as when he goes from the place of his legal residence to reside temporarily at the other place intending to return. See also, Fitzgerald v. Arel, supra.

Applying the rules of law herein set forth, we are of the opinion that the wife of the imprisoned veteran and his minor children are legal residents of X County and that is the county that bears the responsibility for providing the assistance authorized by chapter 250, Code of 1954.

August 27, 1954

INEBRIATES: Commitment—screening center not applicable. Inebriates may be committed by the commissioners of insanity directly to a state mental health institute without observation in the screening center and the superintendent of such institute has no discretion to refuse an habitual offender. No authority exists to commit such persons to the county home.

Board of Control of State Institutions: This is in reply to your recent request for an opinion on the following questions:

"(1) Can the local commission commit an inebriate directly to their County Home?

"(2) Does the Superintendent of the Mental Health Institute have the right to refuse to admit habitual offenders, when committed by the local commission, if they have not benefited by treatment in the past?

"(3) Does an inebriate come under the screening center law?"

The answer to your first question appears in the provisions of section 224.1, Code 1954, which are as follows:

"Persons addicted to the excessive use of intoxicating liquors, morphine, cocaine, or other narcotic drugs may be committed by the commissioners of insanity of each county *to such institutions as the board of control may designate.*" (Italics supplied).

In addition to the foregoing statute section 224.4 requires the Board of Control to designate the institutions to which commitments are to be made and authorizes it to divide the state into districts. These statutes contemplate that the board limit its designations to those institutions under its jursidiction and control, which of course would exclude county homes as the management and control of county homes and farms is vested in the Board of Supervisors. See section 253.2, Code 1954.

The answer to your second question appears in the provisions of section 226.9, Code 1954, which are as follows:

"The superintendent, upon the receipt of a duly executed warrant of commitment of a patient into the hospital for the insane, accompanied by the physician's certificate provided by law, *shall take such patient into custody and restrain him as provided by law and the rules of the board of control,* without liability on the part of such superintendent and all other officers of the hospital to prosecution of any kind on account thereof, but no person shall be detained in the hospital who is found by the superintendent to be sane." (Italics supplied).

As the foregoing section appears in the chapter dealing with state mental health institutes which have heretofore been designated by the board pursuant to the provisions of section 224.4 mentioned above, it is the opinion of this department that the superintendent has no discretion if the warrant of commitment or order from the local commission of insanity has been duly executed and is in proper form.

In answering your third question, we are confronted with the limitation in section 224.2, Code 1954, which is as follows:

"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." (Italics supplied).

The question therefore is whether that part of the provisions of section 229.9, Code 1954, which was enacted as section 1, Chapter 86, Laws of the 54th General Assembly (commonly referred to as the "screening center law"), is applicable in the commitment of an inebriate or drug addict under the provisions of chapter 224, Code 1954.

The required finding in order to justify commitment under the provisions of section 224.1, Code 1954, is that the person be "addicted to the excessive use of intoxicating liquors, morphine, cocaine, or other narcotic drugs". This determination is to be made by the commission based on evidence of the person's action and conduct without regard to the extent that the addiction or excessive use may have affected the mind of the person under investigation. Substantiation of the foregoing analysis appears in the provisions of section 224.5, Code 1954, where we find a

prescribed procedure for the Board of Control to follow if a person committed because of his excessive use of intoxicating liquors or narcotic drugs thereafter becomes insane. Possibly this concept of addiction does not coincide with modern day thinking by medical authorities on the subject, but that is a matter for legislative consideration and not this department. As was pointed out in the official opinion of this department dated January 31, 1952, appearing 1952 Report of Attorney General, page 89, section 229.9, Code 1950, as amended by the provisions of Section 1, chapter 86, Laws of the 54th General Assembly, specifies the two conditions precedent to an order providing for observation or treatment at a screening center, namely, (1) a finding from the evidence that a person is insane, and (2) that said person is a fit subject for custody and treatment in a state hospital. As hereinbefore pointed out, such a finding as that required in the first of these two conditions is not a prerequisite to the commitment of one addicted to the excessive use of intoxicating liquors or drugs.

The foregoing analysis would lead to the conclusion that the screening center law would not be applicable to the commitment of a person under the provisions of chapter 224, Code 1954, unless legislative intent to the contrary is clearly found in some other provisions of the statutes. In the enactment of the provisions of section 1, chapter 86, Laws of the 54th General Assembly, we note reference merely to the screening center located at the hospital in the district nearest to the county in which the hearing is conducted. To determine what was meant by the words "screening center", it is necessary to examine the statutory basis for the establishing of such centers. This we find in the provisions of section 1 of chapter 94, Laws of the 53rd General Assembly, which currently appears as subsection 2 of section 218.46, Code 1954, as follows:

"The board of control is authorized to provide services and facilities for the scientific observation, rechecking and treatment of *mentally ill persons* within the state. Application by, or on behalf of, any person for such services and facilities shall be made to the board of control on forms furnished by the board. The time and place of admission of any person to out-patient or clinical services and facilities *for scientific observation, rechecking and treatment and the use of such services and facilities for the benefit of persons who have already been committed as insane* shall be in accordance with rules and regulations adopted by the board of control." (Italics supplied).

We find nothing in the foregoing statutory provision indicating any legislative intent that one found to be an addict shall first be ordered to a screening center for observation and treatment as provided in section 229.9, Code 1954, but rather from the italicized portions thereof, it is apparent that the legislative intent in authorizing the establishment of such centers was for the observation and treatment of "menally ill persons" or "persons who have already been committed as insane".

We fail to find any other statutory provision that would indicate any legislative intent regarding the matter under discussion and therefore must conclude that under the present statutory laws of this state the commissioners of insanity of each county in proceedings had on a person

addicted to the excessive use of intoxicating liquors or drugs are not required to order observation and treatment at a screening center preliminary to the issuance of the final order or warrant of commitment.

August 27, 1954

LIQUOR CONTROL: Warehouse equipment—roadway repairs. The liquor commission may purchase equipment it deems necessary to operate its warehouse and may also pay from liquor funds necessary amounts to repair the roadway so its trucks may reach said warehouse.

Iowa Liquor Control Commission: This will acknowledge receipt of your inquiries which are as follows:

1. Does the liquor control commission have the authority to purchase equipment such as:

Fork lift trucks
Tractor to pull four-wheeled trailers
Pallets
Electric lift trucks
Mechanical hand lift trucks
Steel dock boards
Lockers for warehousemen and truck drivers
Water cooler
Desks
One 20,000 gallon gas tank
One 30 ton scale

for use in the new warehouse?

2. Would the liquor commission have the right to pay $8,000 as a fair portion of the costs of repairing the paved road which extends from the new liquor warehouse to the state highway and lies wholly on state-owned grounds?

Section 123.16 of the Iowa Liquor Control Act provides:

"The commission shall have the following functions, duties and powers:

1. * * * *
2. * * * *
3. * * * *
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 or buy equipment it may consider necessary and useful in carrying into effect the objects and purposes of this chapter."

We are of the opinion that your question number one (1) should be answered in the affirmative. Section 123.16, paragraph four (4), provides the commission shall have the power and duty "to rent, lease, and/or equip any building or any land necessary to carry out the purposes of this chapter".

The foregoing provision grants authority to the commission to equip any building, if it is the judgment of the commission that the equipment referred to in this opinion is necessary to carry out the purposes of the

chapter then they would be authorized to purchase it in connection with their operation of the warehouse.

As to question number two (2), section 123.16, in paragraph five (5), as set out in this opinion provides that the commission has the power to buy or lease equipment it may consider necessary and useful in carrying into effect the objects and purposes of this chapter. The purpose of repairing the paved road is to place the same in condition so that the trucks of the Iowa Liquor Control Commission may use the same in going to the warehouse and returning to the highway from said warehouse. We recognize the economics resulting from transportation of heavy loads over paved roads. Varying weather conditions during the year make it imperative that a hard surfaced road be available in order to permit travel to and from the warehouse during inclement weather.

We are of the opinion that if it is the judgment of the commission that the expense for the repair of this road to and from the warehouse is necessary and useful in conducting the business of the Iowa Liquor Control Commission, and especially the transportation of heavy loads of liquor to and from the warehouse, they would be authorized under the statute to incur such expense and pay for it out of liquor funds.

August 27, 1954

CITIES AND TOWNS: **Audit requested by taxpayers—town council without further power.** Where the taxpayers of a town have exercised their statutory authority and filed a valid application with the state auditor for an audit of the town's records and accounts, the governing body of the town is without power to order its own audit.

Mr. Chet B. Akers, Auditor of State; Attention: C. W. Ward, Supervisor: We are in receipt of yours of the 12th inst., in which you submitted the following:

"I would appreciate an official opinion to clarify part of chapter 11, section 11.18, Code 1954.

A petition from a town was filed, with the required number of names, requesting an audit of their town records and accounts. After said petition was filed with the State Auditor, the council employed a certified public accountant to audit their said records and accounts.

Must the State Auditor reaudit said accounts with reference to said petition?"

In reply thereto, we advise as follows:

Section 11.18, Code of 1954, to which you refer, provides as follows:

"The financial condition and transactions of all cities and city offices, and all school offices, other than those in rural and village independent districts and school townships and all consolidated school districts and independent school districts in cities and towns of less than five thousand population, shall be examined at least once each year and such examination may be made by the auditor of state, or in lieu of the examination by state accountants the local governing body whose accounts are to be examined, in case it elects so to do, may contract with, or employ, certified or registered public accountants, certified and registered in the state of Iowa, and pay the same from the proper public funds. If the

city or school district elect to have the audit made by certified or registered public accountants, they must so notify the auditor of state within sixty days after the close of the fiscal year to be examined. If any city or school district does not file such notification with the auditor of state within the required period, the auditor of state is authorized to make the examination and cover any period which has not been previously examined.

Any township or municipal corporation not embraced within the foregoing provisions of this chapter and any school corporation in which an annual examination is not required may, on application to the auditor of state, secure an examination of its financial transactions and condition of its funds, or a like examination shall be had on application of one hundred or more taxpayers, or if there are fewer than five hundred taxpayers, then by five percent thereof. The examination in any such school district may be had upon the written request of the county superintendent of schools. In lieu of such examination by state accountants, the local governing body may contract with, or employ, certified or registered public accountants and pay the same from the proper public funds."

The situation described in your letter arises out of the provisions of the second paragraph of the foregoing section, which is concerned with an examination in towns, townships and school districts not required to be audited by the Auditor of State as part of his statutory duty. In our view of this second paragraph of the statute whether the auditor is required to reaudit under the situation described in your letter is dependent upon the intention of the legislature. It will be noted that such townships, towns and school districts may have an audit made of their financial condition by any one of three ways: First, an application of such townships, etc., to the Auditor of State; Second, by a like application made to the Auditor of State by the designated number of taxpayers, subject to the right of the county superintendent of schools to request an examination of any school district; and third, by contract with or employment of certified or registered public accountants. Insofar as the council acts it is to be observed it is the elected representative of the taxpayers and electors of a town and act for and on their behalf. In the instant case the council as representatives of the taxpayers had caused no audit to be made by the auditor, so the taxpayers on their own motion and under their statutory right petitioned for the audit. The taxpayers have exercised their equal right to provide an audit by their action nullified the right of their representative council to proceed to employ a private concern. The matter of an audit had been disposed of in a proper statutory manner and there was nothing for council to act upon.

It is to be observed that under subsection 1 of section 11.18, in the performance of his statutory duty of examination, priority as between such performance by the Auditor of State and employment of private public accountants by the local governing body, is fixed by the terms of the statute. This priority in the city or school district is exercised by notifying the Auditor of State within sixty days after the close of the fiscal year that it intends to have the audit made by a certified or registered public accountant. Absent this or any method of determining priority as between an examination by the Auditor of State and by a

certified or registered public accountant under the second paragraph of section 11.18, the legislative intent as disclosed by the language used in the statute will control. In that view, therefore, where a valid application has been filed with the Auditor of State, the governing body of the corporation with which the application is concerned is without further power. The Auditor of State should proceed to audit as requested by the taxpayers.

August 30, 1954

BEER: Subsidization of permit holder—credit extension. Extension of credit, by a beer manufacturer or wholesaler to a permit holder, beyond the usual and customary credit period would amount of subsidization of the permittee, and as such, is prohibited by statute.

Mr. Martin Lauterbach, Chairman, State Tax Commission: This will acknowledge your letter from the cigarette and beer revenue department which is accompanied by two letters, one from the Wholesale Beer Distributors Association, and one from the United States Brewers Foundation, Inc. These letters relate to the same subject matter and specifically sections 124.7 and 124.22.

Section 124.7 provides:

"It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of permit."

Section 124.22 provides:

"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 provision of this chapter."

An opinion has been given on these sections heretofore and you have been advised that the section 124.7 relates to being directly or indirectly interested in more than one class of permit. This, of course, provides that one cannot own an "A" permit and a "B" permit or an "A" permit and a "C" permit, and that it is unlawful for any person to be interested directly or indirectly in more than one permit.

The other question relates to the extension of credit beyond a thirty-day period or credit extended in excess of the credit period usual and customary to the industry, and the inquiry is, would such extension of credit be a subsidization, which subsidization would be a violation of the foregoing quoted sections.

Section 124.22 was designed to prevent manufacturers and wholesalers from directly or indirectly supplying, furnishing, giving or pay-

ing for any furnishings, fixtures or equipment used in the operation of the busines of a class "B" or class "C" permittee, and it also provides that they could not directly or indirectly pay for the permit nor be directly or indirectly interested in the ownership, conduct or operation of the business.

The primary purpose of the legislature was to prevent manufacturers and distributors from controlling or influencing the operation of retail establishments. It was not the intent of the legislature to merely prevent ownership. Rather the legislature prohibited any "interest" direct or indirect.

One who makes a direct loan is directly interested. Conditions under which the loan is made or threats following a default may place the borrower in a position where he is not a free agent but has become a servant of the lender. The legislature obviously meant something more than to preclude ownership or loans. The legislature chose the word "interest" and to indicate the comprehensive quality of their intent expressly stated that they meant more than a direct interest by using the word indirect.

While credit is not ordinarily thought of in the sense of loan, the extension of credit may serve the same purpose and may work the same result, or it may in fact be substantially a loan.

The beer business is subject to such conditions as the legislature deems it advisable to impose. The extension of credit obviously creates an indirect interest within the intent of the statute.

Further inquiry is made as to whether or not any permittee who would permit or assent to be a party in any way to any violations of the chapter would be deemed guilty of a violation of that chapter. The express provisions of section 124.22 state that any permittee who shall permit or assent to be a party in any way to any such violation shall be deemed guilty of a violation of the provisions of this chapter.

October 28, 1954

EXECUTION: Advertisement of sale of personal property—appraisal. Posting notice of sale of personal property, by the sheriff, under execution requires an appraisal before such action. The result of appraisement determines the sheriff's method of advertisement of the sale.

Mr. Robert Underhill, County Attorney, Onawa, Iowa: We have your letter of the 9th inst., in which you have submitted the following:

Our sheriff has raised the question as to whether it is necessary to publish notice of execution sale of personal property, in addition to posting notices, where the judgment is in excess of $200.00, notwithstanding the value of the property is probably less than $200.00. Section 626.75 of the Code provides that where personal property to the amount of $200.00 or upwards is to be sold, publication shall be made. If it should be difficult for the sheriff to determine whether the property is less or more than $200.00, then what procedure should the sheriff undertake?

In respect to the foregoing we advise as follows:

The duties of the sheriff rise out of two applicable statutes. These are section 626.75 and section 626.93.

Section 626.75 provides as follows:

"Posting and publication—compensation. Notice shall be given by posting up in at least three public places of the county, one of which shall be at the place where the last district court was held. In addition to which, in case of the sale of real estate, or where personal property of the amount of two hundred dollars or upwards is to be sold, there shall be two weekly publications of such notice in some newspaper printed in the county, to be selected by the party causing the notice to be given, and the compensation for such publication shall be the same as is provided by law for legal notices."

In one view of that section it could be interpreted to mean that where the amount required to be secured from a levy and sale is $200.00 or more, publication in a newspaper, as well as posting of the notice of sale, is required. Such interpretation distinguishes the method of notice as between a judgment of $200.00 and one of less than $200.00, and is inconsistent with and in conflict with the provisions of section 626.93, which requires all personal property levied upon and *advertised* to be appraised before sale.

If the word "advertised", as used in the foregoing statute, is limited in its meaning to newspaper publication, then a levy to satisfy an execution of less than $200.00 would not require appraisal, and there appears to be no other authority for fixing the value of property under such circumstances. The selling officer would have nothing to guide him in determining the value of the property to be sold where section 626.75 is applicable. However, the term "advertising", as used in section 626.93 has a broader meaning. It is defined in the case of People v. Montague, 274 N.W. 347 (Mich.), as "the word 'advertising' which originally means noticing or observing, gradually became extended until it now means making public intimation or announcement of anything, whether by publication in newspapers or by hand bill or by an oral proclamation."

According to Rust v. Missouri Board, 155 S.W. 2d, 80, "Advertising includes publication by hand bill, signs, billboards, sound truck and radio."

In view of the foregoing meaning attached to the term "advertise", the posting of notice of sale would automatically invoke the appraisement provisions of section 626.93, and thus enable the selling officer to meet the publication requirement of section 626.75, if necessary, all within the provisions of section 626.74 requiring notice of the sale of personal property to be given for three weeks. As so analyzed all pertinent sections can be operative.

November 3, 1954

SCHOOLS AND SCHOOL DISTRICTS: Children in county juvenile home —educational program. Neither the local school board nor the county board of education has the power or duty to provide an educational program for children in the county juvenile home in counties over forty thousand population. Such duty rests on the board of supervisors.

Mr. Edward R. Fitzgerald, First Assistant County Attorney, Des Moines, Iowa: This will acknowledge receipt of yours of the 19th, ult., in which you submitted the following:

"The board of supervisors of Polk County, Iowa, has requested my office to seek an opinion of you regarding the following questions:

1. Is the board of directors of the Independent School District of Des Moines or the Polk County board of education under any mandatory legal obligation to furnish, supervise and pay for the educational program of the children in the Polk County Juvenile Home?

2. If the foregoing question is answered in the negative, then may either or both of the above named boards legally furnish, supervise and pay for part of or all of said educational program voluntarily?"

In reply to the foregoing, we advise as follows: The County Juvenile Home is provided and maintained by the board of supervisors under direction of the following statutes:

Section 232.35 provides as follows:

"In counties having a population of more than forty thousand, the board of supervisors shall, and in counties of over thirty thousand, said board may 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."

Section 232.36 provides as follows:

"The board of supervisors may annually levy a tax of not to exceed one-fourth mill for the purpose of maintaining such home, and paying the salaries and expenses of all appointees authorized by this chapter, providing however that the board of supervisors in counties having a population of more than one hundred fifty thousand may annually levy a tax of not to exceed one-half mill for the above purposes."

The legislature in requiring of the boards of supervisors in counties having a population of more than 40,000, to provide and maintain a detention home for neglected, dependent and delinquent children, also required of the board the providing and operating of a school. School, according to the case of Livingston v. Davis, 50 Northwestern, 2d, page 592, 596, is defined by our Supreme Court as follows:

"There can be little doubt defendants' place is a school. An accepted definition of school is 'a place for instruction in any branch or branches of knowledge.' See Webster's New Intl. Dict., 2d Ed.; Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056, 52 A.L.R. 244, 246, 247 (holding stadiums for athletic games are included within the term 'schoolhouses'); Langbein v. Board of Zoning Appeals, supra, 135 Conn. 575, 67 A. 2d, 5, 8.

Another common definition of school is 'a place where instruction is imparted to the young.' People v. Levisen, 404 Ill. 574, 90 N.E. 2d., 213, 215, 14 A.L.R. 2d, 1364; Board of Education v. Ferguson, 68 Ohio App. 514, 39 N. E. 2d, 196, 198; 47 Am. Jur., Schools, Section 2. Our conclusion that defendants operate a school finds support especially in the Langbein

and Levisen cases, supra, and in People v. Collins, 191 Misc., 553, 83 N.Y.S. 2d, 124."

Comparably the case of Hansen v. the Board of Education, 116 Pac. 2d, 936, 101 Utah 15, public school is something more than a plot of ground, or a site for a building or both, and it is an operating institution for the welfare of the community it serves.

According to the statute, as herein defined, it is the board of supervisors which is directed to "furnish, supervise, and pay for the educational program of the children in the Polk County Juvenile Home." We find neither power nor duty vested in the local school district, express or implied, to provide and maintain an educational program for such children.

November 30, 1954

TAXATION: Sales tax on automobile taken in trade on car sold for delivery out of state. The gross receipts from the resale of a used car, acquired as part consideration in a sale in Iowa of a new automobile on which no sales or use tax is due or collected, is exempt from sales tax to the extent that the sale price is not in excess of the trade-in valuation.

Honorable Jay C. Colburn, Harlan, Iowa: This will acknowledge receipt of yours of the 4th inst., in which you have submitted the following:

"It has come to my attention that one of the questions which, in the past several months, has given rise to considerable controversy in the administration of the Iowa retail sales tax law is whether the provisions of section 422.45 (subsection 4) of that law exempt from sales tax the gross receipts from the retail sale of a used car acquired as part consideration in the sale in Iowa of a new automobile on which no sales or use tax is collected or paid.

Because of this controversy, legislation designed to clarify section 422.45 (subsection 4) will probably be introduced in the next session of the Iowa General Assembly. In order to assist me in giving proper consideration to such legislation, I hereby request an opinion from you in answer to the following question:

Does section 422.45 (subsection 4) of the 1954 Code of Iowa, exempt from the sales tax gross receipts from the retail sale of a used car acquired as part consideration in the sale in Iowa of a new automobile on which no sales or use tax is collected or paid?

I should also like an opinion from you in answer to this question:

In the event your opinion should construe the aforesaid statute in a manner which is in conflict with any existing administrative rule or regulation, which would prevail?"

In respect to your questions, we advise as follows:

(1) Sales tax is imposed upon the sale of personal property under the authority of section 422.43 which so far as pertinent is this:

"There is hereby imposed, beginning the first day of April, 1937, a tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as

otherwise provided in this division, sold at retail in the state to consumers or users."

However, exemption from the imposition of this tax is provided by the following statute, section 422.45 (subsection 4) which in so far as pertinent provides:

"That part of the gross receipts from sales of tangible personal property accepted as part consideration in the sale in Iowa of other property which is not in excess of the original trade-in valuation."

This is the statute which you question in your letter as providing exemption from the sales tax gross receipts from the retail sale of a used car acquired as part consideration in the sale in Iowa of a new automobile on which no sales or use tax is collected or paid.

However, this statute is plain, clear and unambiguous in its terms and therefore does not permit of its enlargement by conditions or other factors which would preclude its operation according to its terms. The statute is general in its terms and exempts the gross receipts from sale of all tangible personal property accepted as part consideration in the sale of other property which is not in excess of the original trade-in valuation. The statute does not exclude from its operation the gross receipts from the retail sale of a used car acquired as part consideration of a new auto upon which a sale or use tax has not been paid.

The rule of statutory construction which bars the extension, enlargement, or qualifications of a plain unambiguous statute is stated in numerous cases and is hornbook law. In the case of Eysink v. Board, 229 Iowa 1240, 1244 it said:

"We find nothing doubtful or ambiguous about the statute. It must be remembered that it is only where a statute is of doubtful or uncertain meaning that courts are at liberty to apply rules of construction. Where the language of a statute is plain and unambiguous and its meaning clear, courts are not permitted to search for its meaning beyond the expressed terms of the statute. This court has no power to write into the statute words which are not there. These rules are of course elementary, and do not require the citation of authorities. As especially applicable, however, see 25 R.C.L. 957, section 213; Palmer v. Board, 226 Iowa 92, 95, 283 N.W. 415, 416; Mathewson v. Board, 226 Iowa 61, 67, 283 N.W. 256, 260; HOLC v. District Court, 223 Iowa 269, 271, 272 N.W. 416, 417; Smith v. Sioux City Stockyards, 219 Iowa 1142, 1149, 260 N.W. 531, 534; Hahn v. Clayton County, 218 Iowa 543, 551, 255 N.W. 695, 699."

The question as asked in the terms stated assumes the existence of a state of facts arising out of two separate statutes, section 422.45 (subsection 4) and 423.4 (subsection 1). It is to be noted that according to the case of Iowa Elec. Co. v. Scott, 206 Iowa 1217, 1221:

"It is a rule of statutory construction that one statute may not be resorted to for matters dealt with in another. Drury v. City of Boston, 101 Mass. 439; Pittsburgh's Petition, 243 Pa. St. 392 (90 Atl. 329); Pacific Gas and Elec. Co. v. Chubb, 24 Cal. App. 265 (141 Pac. 36); Jones v. School Board, supra."

According to the case of Fitzgerald v. State, 220 Iowa 547, 551, it stated:

"Hamilton v. Rathbone, 175 U. S. 414, 20 S. Ct. 155, 157, 44 L. Ed.

219, on page 221 of the Law edition, has this to say as to the construction of statutes:

The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purposes intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.

Again it says on the same page, quoting from a previous opinion (U. S. v. Bowen 100 U. S. 508, 25 L. Ed. 631):

When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that provision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.

Again on the next page of the report, it says:

Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in a single observation that prior acts may be resorted to, to solve but not to create, an ambiguity."

And in so far as the application of the rule of pari materia is concerned in the same case, it is stated:

"Even then, if this act, attached as it was by amendment to section 7852, created an ambiguity as to just what it meant, that ambiguity is solved under the doctrine of *in pari materia*. But even such resort is not necessary for the act by its title was dealing with 'costs and attorney fees in condemnation proceedings.'

A New York case, People v. Utica Ins. Co., 15 Johns, page 357, star page 358, 8 Am. Dec. 243, decided in 1818, on this subject, had this to say:

'That is construing a statute, the intention of the legislature in a fit and proper subject of inquiry, is too well settled to admit of dispute. That intention, however, is to be collected from the act itself, and other acts *in pari materia*. * * * Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. And this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances, and whenever such intention can be discovered, it ought to be followed with reason and discretion, in the construction of the statute, although such construction seems contrary to the letter of statute. Where any words are obscure or doubtful, the intention of the legislature is to be resorted to, in order to find the meaning of the words. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute unless it be within the intention of the makers. And such construction ought to be put upon it as does not suffer it to be eluded.'

Hayes v. Hanson, 12 N.H. 284, says on page 290:

'It is a well settled rule, that in endeavoring to ascertain the meaning of a particular statute, or of a clause in a statute, all the laws on the same subject are to be construed together, and that the general legislation on the matter may be considered by the Court, * * * All acts "in pari materia" are to be taken together, as if they were one law, and they are to be compared in the construction of statutes, because they are construed as framed upon one system, and having one object in view.'"

Therefore, we are of the opinion in answer to question No. 1, that the provisions of subsection 4 of section 422.45 of the Code exempts from sales tax the gross receipts from the resale of a used car acquired as part consideration in a sale in Iowa of a new automobile on which no sales or use tax is collected or paid to the extent that the sale price of such used car is not in excess of the trade-in valuation.

(2) In answer to question No. 2, of the legal effect of an opinion of this department upon administrative agencies of the state, we advise under the opinion of this department issued September 16, 1930, appearing in the Report for 1930, page 345, it was stated:

"The rules as to the legal effect and force of an opinion of the Attorney General of the United States is set out in 'Thornton on Attorneys at Law,' volume 2, page 1140, section 728, as follows:

In giving this advice and opinion on questions of law, the attorney general's duties are quasi-judicial. His opinions are an official interpretation of the law, and in many cases his decision is conclusive, not only with respect to the action of public officers in administrative matters, but also as to many questions which involve private rights, inasmuch as parties having concerns with the government cannot. in many instances, bring a controverted matter before a court of law. Therefore, the opinions of successive attorneys general have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice, and administrative officers should regard them as law until they are withdrawn or over-ruled by the courts.

The duties of the Attorney General of the State of Iowa with reference to interpretation of statute, is the same as the duties of the Attorney General of the United States, and therefore, the foregoing citation would apply with equal force and effect to the opinion of the Attorney General of this state."

Therefore, we would answer your second question that opinions of the Attorney General construing statutes takes precedence over rules and regulations of other administrative departments and in the event of conflict, the opinions of the Attorney General will prevail.

December 29, 1954

BANKS AND BANKING: Interest on deposits by waterworks trustees. A bank may not contract to pay interest on a certificate of deposit of funds collected by a municipal board of waterworks trustees.

Mr. N. P. Black, Department of Banking: By recent letter you have requested an opinion of this department as follows:

"May a bank contract to pay interest on a certificate of deposit of a municipal waterworks?"

With relation to the question which you have submitted it is to be noted that municipal boards of waterworks trustees created under the provisions of chapters 397 and 398, Code of Iowa, have the same powers of management and control.

Section 397.34 of the Code provides:

"The board of trustees shall have all the power and authority in the management and control of the utilities mentioned in the question sub-

mitted to the voters at such election as is conferred upon waterworks trustees appointed as provided in chapter 398."

Section 398.9, Code of Iowa 1954, provides in pertinent part:

"The said board of trustees shall have the power * * * for the collection of water rentals, * * * All money collected by the board of waterworks trustees shall be deposited at least weekly by them, with the city treasurer; * * *

By virtue of the foregoing provisions moneys collected for water rentals are to be paid over to the treasurer of the municipality. Such funds are therefore within the provisions of section 453.1, Code of Iowa, 1954, which provides in pertinent part:

"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 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."

By virtue of the foregoing provisions of section 453.1 of the Code, the funds received by the municipal treasurer are subject to the provisions of the state sinking fund law set forth in chapter 454 of the Code.

It is provided by section 453.7, Code of Iowa, 1954:

"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."

It was held in an opinion of this department, p. 771, Report of the Attorney General, 1938, that the provisions of section 453.7 of the Code apply to public officers holding funds subject to the state sinking fund law, being those officers named in section 453.1, supra.

The cited opinion examined the history and background of the code section which appears as section 453.7 of the 1954 Code, and stated:

"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 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:

(Here are set forth the provisions of section 453.7 of the present code).

The opinion holds that the provisions are not applicable to the treasurer of Iowa State College for the reasons that such treasurer is not specified as within the provisions of the sinking fund law, stating:

"We conclude that the provisions of section 7420-d7, as enacted by

the 47th General Assembly (present section 453.7), 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 the said section do not apply as against an officer not subject to the operation of section 352-d1, 1935 Code, relating to public deposits." (Parenthetical notes added).

The quoted opinion in effect holds that all officers holding funds subject to the state sinking fund law are within the interest prohibition.

You are therefore advised, that it is the opinion of this department, that a bank may not contract to pay interest on a certificate of deposit of funds collected by a municipal board of waterworks trustees.

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