State of Iowa
1964

THIRTY-FIFTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1964

EVAN HULTMAN
Attorney General

Published by the
STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

1853-1964

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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
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Dayton Countryman	Story	1954-1956
Norman A. Erbe	Boone	1956-1960
Evan Hultman	Black Hawk	1960-1964

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SECRETARIAL STAFF

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COLLEEN SHEARER ..... Secretary
BARBARA LEHMAN ..... Secretary
MADGE HILL ..... Secretary
VERNICE WESSELS ..... Secretary
RUBY WALTON ..... Secretary
PEGGY RUSSELL ..... Secretary

*As of December 31, 1964

REPORT OF THE ATTORNEY GENERAL

Honorable Harold E. Hughes
Governor of the State of Iowa
Statehouse

Dear Governor Hughes:

In compliance with section 17.6 of the 1962 Code of Iowa, I hereby submit the biennial report of the Attorney General covering the period beginning January 1, 1963 and ending December 31, 1964.

Apportionment litigation during the biennium again occupied a large portion of the time of the staff of the Attorney General. The case of *Davis v. Synhorst*, 217 F. Supp. 492, which had been filed at the writing of the last biennial report, was decided by the Federal Court on May 3, 1963. It was held that the statutory system for apportioning legislative representation was invidiously discriminatory and unconstitutional within the meaning of the 14th Amendment to the Federal Constitution. The Court deferred judgment, however, on the constitutionality of the Iowa Constitution since there was pending at that time a constitutional amendment to revise the system of apportionment. Subsequent to the defeat of the constitutional amendment in a special election in 1963, the reapportionment litigation was again opened in the Federal Court at which time the Iowa Constitution was declared invidiously discriminatory under the 14th Amendment to the Federal Constitution.

A special session of the Iowa General Assembly was called in 1964 to enact temporary reapportionment legislation and to commence revising the Iowa Constitution pursuant to the Court Order. Legislation was enacted and the first step in the constitutional amendment process was taken, all of which was approved by the Federal Court in 1964 as interim measures. Related filings were made to the main case by various parties during the balance of the year, and at the writing of this report on December 31, 1964, the case is still considered pending before the Federal District Court for the Southern District of Iowa.

The Department of Justice has participated in and disposed of 125 criminal appeals to the Supreme Court of Iowa from the district and municipal courts of the State. Of these appeals, 91 convictions were affirmed, 8 were reversed, and 26 were dismissed. In addition to criminal appeals, the Department participated in 96 habeas corpus proceedings brought by inmates of Iowa penal institutions. Of these cases, 32 were appeals to the Supreme Court of Iowa, 43 were cases initiated in the United States District Court, 5 were appeals to the United States Court of Appeals and 16 were appeals to the Supreme Court of the United States. In the notable case of *State v. Stump*, 254 Iowa 1181, 119 N.W. 2d 210, the Supreme Court of Iowa sustained the State's position and

adhered to the Iowa rule which requires the defendant to carry the burden of proving his defense of alibi by a preponderance of the evidence.

An opportunity to develop outdoor recreation areas to meet the steadily increasing public demand arose by virtue of taming the Missouri River by the Corps of Engineers. A project to develop 25 areas along the river was begun by the State Conservation Commission. These areas, most of which were already owned by the State of Iowa, offered a unique chance to develop recreation areas without the necessity of incurring the expenses of obtaining land from private owners. Some of these potential sites were and are being claimed by Iowa and Nebraska riparian owners which necessitated the initiating of quiet title actions to establish clear ownership in the State of Iowa. Successful litigation on the part of the State of Iowa has been achieved in eleven of these potential sites.

The Department of Public Instruction was represented in this office in the litigation pertaining to the distribution of state aid to school districts. In *Lewis Consolidated School District of Cass Co. v. Johnston,* 127 N.W. 2d 118 (1964), the Iowa Supreme Court held that section 257.18(13) of the Iowa Code is unconstitutional. Under the authority of this section, standards for participation in state aid had been promulgated by the department. Following this decision legislation was passed by the Extraordinary Session of the 60th General Assembly which approved all schools for state aid.

The State Board of Social Welfare was represented by this office in actions involving statutory liens and claims connected with the property of deceased recipients of public assistance benefits. These actions included 12 foreclosure action, 36 partition actions, 10 quiet title actions, 48 objections to final report of fiduciary, 13 actions involving priority of liens and claims, 12 hearings on claims in deceased recipients' estates, and several miscellaneous actions pertaining to estate matters. Formal answers to 792 applications to sell real estate of deceased recipients of public assistance benefits were filed during the biennium. In addition, this office has participated in 6 appeals from the decision of the State Board of Social Welfare to the District Courts and in 4 appeals to the Supreme Court of Iowa, 2 of which have been decided and 2 of which are pending before the Supreme Court. In cooperation with all of the County Attorneys throughout the State of Iowa assistance has been given in cases involving Uniform Reciprocal Enforcement of Support.

During the biennium the Iowa Reciprocity Board was involved in litigation against three interstate trucking firms seeking payment to the state of $832,460 in license fees. The cases of *Midwest Emery Freight System, Inc. v. Pesch* and *General Expressways Inc. v. Nicholas* are ready for trial. The case of *Consolidated Freightways Corp of Delaware v. Nicholas* has been decided by the District Court which held that the Reciprocity Board had incorrectly construed the statute on the determination of license fees and had

illegally collected excessive fees. The Court ordered the Reciprocity Board to refund $27,027 to the trucking firm paid to the state in 1961 and 1962 for licensing vehicles. This district court decision has been appealed to the Supreme Court. Also, a mandamus case, *Midwest Emery Freight System Inc. v. Pesch,* was also determined during this period. This case was litigated before five tribunals; the state District Court, Iowa Supreme Court, United States District Court, United States Circuit Court and Justice Byram White of the United States Supreme Court. On each occasion the court denied the relief sought against the Reciprocity Board and refused to order the Board to permit the prorating of license fees by the carrier.

In the area of Public Safety, the Attorney General's office represented the Department of Public Safety in 157 cases involving the suspension or revocation of drivers' licenses. In addition, the Department of Justice cooperated in the conference of traffic magistrates called by the Chief Justice.

The Department of Health was represented in 13 hearings involving pollution of waters of the state. Injunctions were sought in 7 District Court cases against nursing or custodial homes operating without a license. The protection of the public was furthered by this Department through the institution of seven cases seeking an injunction from practicing dentistry without a license. Several District Court cases were prosecuted involving the revocation or denial of medical, optometry, dental, and pharmacy licenses.

The Gas Tax Division of the State Treasurer's office was represented in 30 hearings regarding revocation of motor fuel licenses, involving gas taxes or penalties. Claims collected, either directly or on bonds of dealers and distributors totaled, for the years 1963 and 1964, the sum of $58,429.92. In addition, this office represented the Gas Tax Division in 10 District Court actions involving motor fuel taxes. In the case of *Severs d/b/a Macmillan Oil Co. v. Abrahamson, Treasurer of State,* 124 N.W. 2d, 150, it was held that a postage meter stamp is a "postmark" within the terms of Section 324.60, Code of Iowa, 1962. As a result of the decision in the *Severs* case, the sum of $8,217.52 in penalties was refunded, which funds had been paid under protest. In the case of *State of Iowa v. Galinsky Bros. Co.,* 121 N.W. 2d 664, it was held that an assessment or lien is barred, under the statute of limitations, Section 324.66(4), Code of Iowa, 1962, unless action to enforce the same is brought within one year from time of assessment.

The Iowa Development Commission was given opinions and approvals on 6 contracts involving federal funds for assistance to cities, towns and counties in the State of Iowa. In addition, 63 opinions on abstracts of title have been given to the State Conservation Commission.

The Department of Justice represented the State Tax Commission in litigation concerning the personal and corporation income

taxes, the sales and use taxes, the inheritance and estate taxes, cigarette tax, beer tax, the chain store tax, and the equipment car tax. The most significant litigation involved the assessment of railroad real property by the State Tax Commission which was challenged by one of the operating railroads. The case, *Chicago and North Western Railroad v. Iowa State Tax Commission,* resulted in an opinion adverse to the Commission filed by the Trial Court in August of 1963, which has been appealed to the Supreme Court of Iowa. This Department also has worked with and assisted several county attorneys in litigation concerning the collections of the monies and credit taxes in various counties throughout the State.

In the past two years, 386 general claims and 55 highway claims have been processed by the Attorney General's office and submitted to the State Appeal Board and the 60th General Assembly. This represents an increase of 13 claims over the previous session. In addition, 300 general and highway claims have been processed for submission to the State Appeal Board and the 61st General Assembly.

The Department of Agriculture was represented in several revisions of their departmental rules and on the suspension of veterinarian licenses for fraudulent and unprofessional actions and conduct.

The Board of Control was represented in several matters of which the most important was the purchase of a farm for use by the Fort Madison Penitentiary and on the sale of three separate parcels, two of which were properties located at the Anna Wittenmeyer Home at Davenport, Iowa.

Numerous workmen's compensation cases were tried before the Iowa Industrial Commissioner and the courts of Iowa by this office. The State was also represented in federal condemnation actions, bankruptcies, title actions, and miscellaneous proceedings.

On January 1, 1963, there were 87 highway condemnation appeal cases pending in the district courts of Iowa. During the biennium, 649 parcels were processed for condemnation under the supervision of the special assistant attorney general assigned to the Highway Commission. From these, 150 were appealed to the district courts of Iowa, making a total of 237 appeals during the biennium. Of these, 175 were disposed of: 68 by trial, 83 by settlement, and 24 by dismissal, leaving 62 road condemnation appeal cases pending as of December 15, 1964. In addition, 107 other highway litigation cases were pending during the biennium with dispositions made on 58, thereby leaving pending 49 such cases as of December 15, 1964. During the same period, 30 cases were on appeal to the Supreme Court of Iowa with dispositions made of 27, leaving 3 cases still pending in that Court as of December 15, 1964.

EMINENT DOMAIN IN IOWA, a book published by the Attorney General's office in March of 1960, revised and republished

in September of 1962, was expanded with a cumulative supplement updating the work to January 1, 1964.

In the following pages of this report, the staff opinions by this office which were deemed of sufficient general interest are published in full. In addition, the headnotes for letter opinions of this office have been printed following the staff opinions of the subject matter to which they pertain.

Respectfully submitted,

EVAN HULTMAN

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*As of December 31, 1964

THE

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

BIENNIAL PERIOD

1963-1964

CONTENTS

CHAPTER 1

AGRICULTURE

STAFF OPINIONS

LETTER OPINIONS

1.1

AGRICULTURE: Licensing, authority to establish rules—§159.5(10), 1962 Code; Ch. 139, §5, Acts 60th G.A. Secretary of Agriculture is authorized to establish rules for enforcement of Pesticide law and to require proof of financial responsibility.

November 20, 1963

Senator A. V. Doran
Chairman, Departmental Rules Committee
Boone, Iowa

Dear Sir:

You have requested our opinion on the following questions submitted in behalf of the Departmental Rules Committee:

(1) What is the meaning of the word "responsibility" as used in Section 5 of Chapter 139, Acts of 60th G. A. and what is the secretary of agriculture's authority to promulgate rules for establishing or proving "financial responsibility", and

(2) Does the word "foreman", as used in line 9 of Section 5 of Chapter 139 relate to both public foreman and foreman of a commercial applicator?

In answer to your first question, Section 5, Subsection 1 provides:

"All commercial applicators of pesticides shall be required to secure a license * * * The secretary shall require proof of *competence* and *responsibility* before issuing a license."

It is necessary to start with definitions of the word "responsibility" in order to arrive at the intention of the legislature. Webster's International Dictionary defines responsibility as the quality or state of being responsible". "Responsible" is defined as "able to respond or answer for one's conduct and obligations". In Black's Law Dictionary, "responsibility" is defined as:

"The obligation to answer for an act done and to repair any injury it may have caused", and the word "responsible" is defined as "able to pay a sum for which he is or may become liable or to discharge an obligation which he may be under. *People vs. Kent,* 160 111. 655, 43 N. E. Rep 760."

From these definitions, it appears that financial capacity or ability to pay is an essential part or ingredient of the meaning of the word "responsibility".

In *Ex Parte Hawley,* 22 S. Dak. 23, 115 N.W. 93, the statute gave similar authority to its board of agriculture in the following words:

"The board of agriculture shall require such references and evi-

dences * * § as may seem to be necessary to establish the *"responsibility"* of the applicant."

The Supreme Court said in its decision:

"If the word responsibility as used in Section 1 was intended to signify anything and we are bound to assume it was, it means 'ability to answer in payment'. (Webster's International Dictionary) 'ability to respond in damages for actionable injuries' ".

Also the case of *Paccioni vs. Board of Education of City of N.Y.*, 195 N.Y.S. 2nd 593 (N.Y. Sup. Ct., 1959), is pertinent and defines the word "responsible". In this case, the statute required the Board of Education to let all contracts to the lowest responsible bidder. The court held that word "responsible" is not limited to financial or pecuniary responsibility, but is broad enough to include the bidder's ability to perform the contract. Many other cases are cited in the above decision to the same effect.

It is our opinion that the word "responsibility, is broad enough to include ability to pay, or financial responsibility, as one of its elements. Ability to pay or respond in damages has always been a customary and common meaning of the word "responsibility" in all editions of the dictionary and in litigated actions in the law courts for many years.

Rule 26 provides that an applicant shall submit proof of financial responsibility, and it also says that such proof may consist of:

(a) Proof of unincumbered financial net worth, if the applicant is a resident of the State, in an amount not less than $5,000, or

(b) A surety bond in favor of any person in the amount of $5,000, or

(c) The filing of an insurance policy in the amount of $5,000.

The filing of any one of these forms of proof is optional with the applicant. He may file one of these or any other forms of proof which will satisfy the secretary that he is competent and responsible.

The rule is within the authority of the secretary provided in §6(4) of the Act and is not inconsistent with any law. The rule is also authorized by the provisions of §159.5(10), 1962 Code which provides as follows:

"The secretary of agriculture shall be the head of the department of agriculture which shall * * * establish and enforce rules not inconsistent with law * * * for the enforcement of the various laws, the administration and supervision of which are imposed upon the department."

Second, does the word "foreman" as used in Section 5 of the Chapter 139 relate to both a public foreman and foreman of a commercial applicator?

Line 9 of §5 of Ch. 139 reads as follows:

"Every public officer or foreman who applies pesticides on public property or supervises such application by another shall also secure such license."

The word "foreman" is defined in Black's Law Dictionary as a "person designated by master to direct work of employees, a superintendent". The word foreman is limited only by the modifying words, "who applies pesticides on public property or supervises such application by another". He may be either a public foreman or a private foreman employed by private applicators; but, if applying pesticides on public property, he must be licensed. The fact that "public officials" are also included in the sentence and are required to be

licensed does not limit or restrict the meaning of the word "foreman", who must also be licensed. The statute is written to require a license of any foreman, engaged in work of this character, on public property. Proof of competence and a permit is required in each case, inasmuch, as the public agencies or authorities who own public lands and contract for public work are not subject to suit.

1.2

AGRICULTURE: Marketing Division's powers—§§159.20, 159.21, 159.26, 1962 Code, as amended by Ch. 1, §62, Acts 60th G.A. Marketing Division has power but not duty to prepare lists of Iowa producers of feeder pigs and distribute same. Tax money may be used to improve service although competitive. Service to Iowa producers is constitutional.

July 10, 1964

Honorable A. V. Doran
State Senator
Boone and Story Counties
Boone, Iowa

Dear Senator Doran:

This will acknowledge your letter in which you ask certain questions dealing with the program of listing Iowa producers of feeder pigs. Your questions are as follows:

"1. Since the last Legislature removed all duties of the Agricultural Marketing Board under Section 159.26 of the Code of Iowa, except the duty to elect officers and to keep books and records, can the Marketing Board legally engage in such a program?

"2. Do Sections 159.20 and 159.21 give the Director of the Division, under the supervision and direction of the Secretary of Agriculture, the power to engage in such a program?

"3. If these sections are interpreted to grant to the Department the power to enter a field traditionally belonging to private enterprises, are the statutes Constitutional?

"4. Can the Deparment of Agriculture use tax money, derived from approved livestock auction markets and legitimate feeder pig dealers among other tax payers, to finance a listing service for buyers and sellers of feeder pigs in direct competition with these taxpayers?

"5. If the Department of Agriculture can do so, must they also offer this service to all other producers of agricultural products in this state who are in direct competition with the pig producers, under the equal protection clause of the Constitution?"

1. In answer to your first question it is my opinion that the Marketing Division may legally engage in this program. In Section 62 of Chapter 1, headed Appropriations, 60th G.A., the Legislature amended Section 159.26, Code 1962 by striking out all of subsections 2, 3 and 4. The Legislature thereby removed certain duties previously imposed upon the Marketing Board, but did not thereby reduce or curtail its powers. These powers are granted specifically in another section of the statute and may be exercised at their option. Section 159.20 states the general purpose of the Act and authorizes the Division, among other things, to do the following:

"* * * (1) To investigate the subject of marketing farm products;

(2) to promote their sales, distribution and merchandising; (3) to furnish information and assistance concerning the same to the public; * * *"

The statute imposes no limitations. It confers upon the Marketing Division absolute discretion or authority to carry on this program. However, the Marketing Division is not required to continue the listing in perpetuity and may abandon the program upon a review and re-examination of the benefits received and receivable by Iowa farmers. Since approximately one million pigs are imported annually into this state, from the seven states adjacent to our borders, pig selling is competitive. The listing of feeder pigs is intended to advertise and publicize the Iowa products, as contrasted with out-of-state imports from other producers. This listing is a benefit to local farmers who may save trucking and transportation charges, promotes Iowa sales and is a valid reason among others for the state action.

2. Section 159.21, 1962 Code gives the Director of the Division authority and direction to engage in this program under the general supervision and direction of the Secretary of Agriculture. The Director is authorized and empowered among other thing:

> " * * *(4) to ascertain sources of supply of Iowa farm and food products, and prepare and publish from time to time lists of names and addresses of producers and consignors thereof and furnish the same to persons applying therefore; * * * "

These powers are to be exercised by and delegated to any employee of the Marketing Division under the supervision of the Secretary for the benefits and advantages which accrue to Iowa producers and farmers, as opposed to out-of-state imports of feeder pigs. The Legislature intended to have the Director ascertain the sources of supply and to furnish the lists of Iowa producers to all applicants.

3. This listing of Iowa producers is not a new practice. Over the past years the Marketing Division has ascertained, listed and mailed the names and addresses of individuals and corporations who could now supply good Iowa graded eggs, meats, meat products, dairy products, binder twine and rope and many other Iowa produced or manufactured products. These lists have been supplied to any person asking for market information. If there is any discrimination it is plainly in favor of Iowa farmers as against imported products and is reasonable. For instance, a statutory discrimination in favor of resident as against "itinerant" physicians is valid. *Kirk vs. State,* Sup Ct. Tenn. 150 S.W. Rep. 83.

The citizens of a state may be preferred in employment. 1915 U.S. Sup. Ct. *Heim vs. McCall,* 239 U.S. 175. A state may grant to its own citizens privileges without extending the same privileges to citizens of other states. *Vostich vs. Sand and Gravel Corp.,* (U.S. Dist. Ct. Md.) 154 Fed. Supp. 744. A recent decision is published in *Iowa Hotel Association Vs. State Board of Regents,* Sup. Ct. 1962) 253 Iowa 870. The court there decided that the state agency, Board of Regents, had the right to build the Iowa Memorial Union to provide additional guest rooms and more efficient service of food, for public use. The court said:

> "The fact that additional or improved facilities may reduce the demand for others is obvious but the extent to which private business might be impaired is pure speculation. * * * Incidental competition is not a basis for an injunction against a state agency engaged in the performance of a constitutional and statutory function."

Aside from these observations, the constitutionality of a statute is presumed until held otherwise by a court of law.

4. The Department of Agriculture can use tax money derived from all taxpayers including livestock auction markets to finance a listing service for buyers and sellers of domestic feeder pigs, although it may compete with the auction markets. The above decision in *Iowa Hotel Assoc. vs. State Board of Regents* is decisive on this question, as the service of listing is specifically

authorized and directed as a statutory function of the Marketing Division. It is clearly a service to Iowa farmers who benefit thereby in selling to their neighbors and other Iowa residents with a minimum of trouble and expense.

5. The fifth questions should be answered in the negative. The Marketing Division is not compelled to offer this service to all farm producers for its duties were deleted and diminished by the statute designated as Chapter 1. 60th G.A. Its right and authority to furnish such service to any Iowa producer of farm products remains. These powers are further itemized in the provisions of §159.21. These powers are also subject to the supervision and direction of the Secretary of Agriculture and may be extended or restricted as he may decide in the exercise of his discretion for the benefit and advantage of Iowa producers and farmers.

1.3

AGRICULTURE: Pesticides—Ch. 139, §2(12), Acts 60th G.A. Discussion of definition of "commercial applicator."

May 28, 1964

Mr. Carrol G. Henneberg
Lyon County Attorney
Rock Rapids, Iowa

Dear Mr. Henneberg:

You have requested an opinion concerning the application of the Pesticide Act to private golf clubs, churches, non-profit community hospitals and farmers employing a hired man, and the issuance of a license when required.

This involves an interpretation of the Iowa Pesticide Law, which provides as follows, at Section 2, Par. 12, Chapter 139, Laws of the 60th General Assembly:

> "The term 'commercial applicator' shall mean any person or corporation who enters into a contract or an agreement for the sake of monetary payment and agrees to perform a service by applying any pesticide or servicing any device, but shall not include a farmer trading work with another";

and of our Rule 26, which provides, in subsections 1, 2 and 3:

> "9.26(1) All licensed commercial applicators shall establish and maintain a program of continued training of personnel who apply or disperse pesticides.
>
> "9.26(2) The secretary shall administer a testing program designed to test an applicator's knowledge of the usage, the rates of application and precautions to be taken in use of any or all products which he will be applying.
>
> "9.26(3) All commercial applicators of pesticides shall be required to have a license. The secretary shall require proof of competence and responsibility before issuing a license, and for this purpose may require the commercial applicator and his or its foreman who supervise the application of any pesticide in this State, to pass a written examination before issuing license."

A golf club is clearly not a commercial applicator. But a grounds keeper or greens keeper could come within the definition, if he agrees to perform a service of applying any pesticide to club grounds and makes an agreement to do so for a fee or payment from the club. The facts would not be the same in all cases. If substantial acreage is involved, and a contract is made with the greens keeper for a monetary payment to apply the pesticides, the

keeper should be licensed, after an examination by the Secretary of Agriculture.

The custodian or employee of a church or hospital would not usually be required to be licensed. The principal duties of a custodian are those of caring for and maintaining the building and grounds. Such incidental spraying as may be done, without specific contractual obligation for a fee to apply the pesticide, is not required to be licensed. If, however, the hospital hires a person for a fee to apply the pesticide to a specific area, the person so hired should be licensed.

And finally, you cite the case of the farmer's helper working on a monthly basis to do the regular farm work. The definition clearly excludes the farmer working for himself or trading work with another. The word "farmer" is defined in Webster's International Dictionary as, "A man who cultivates land or crops." The hired man also farms by selling his time for a monthly wage, in the usual manner; and as a farmer, he is not required to obtain a license while working on his employer's farm or trading work.

If, however, either he or his employer contracts to apply the pesticide to a specific area in return for a fee or monetary payment for this service, he becomes subject to the Pesticides Act, whether he does it once or a hundred times, and should be licensed. The definition of "commercial applicator" could apply if the facts come within the definition, stated in Section 2 of the Act.

And, of course, under Section 3, subsection 2, it is always unlawful:

> "To apply or cause to be applied any pesticide in such a way as to damage seriously the health, welfare or property of any person, or cause pollution of public waters."

This statute applies to all of the above employers or employees, without any exceptions, whether licensed or not.

1.4

AGRICULTURE: Restaurant inspectors—§§170.1, 170.6, 170.7, 1962 Code. Cost of inspecting hotels, motels, rooming houses and cabins is not chargeable against "restaurant fund" inasmuch as same are expressly excluded from term "restaurant."

July 25, 1963

Mr. L. B. Liddy
Secretary of Agriculture
L O C A L

Dear Mr. Liddy:

Your letter has been received, asking for an opinion as to use of the "restaurant fund." The precise question is:

> "Would our restaurant inspectors be permitted to inspect hotels, motels, rooming houses, cabins and receive their compensation from this fund?"

Sections 170.6, 170.7 and 170.1 are to be construed to answer this question. Section 170.6 states:

> "Each restaurant hereafter opened and each restaurant hereafter changing ownership shall, before it opens for business or before the new owner assumes the management and control of same, pay to the department an inspection fee of fifteen dollars."

Section 170.7 provides in part:

"All inspection fees required by section 170.6 shall upon receipt thereof by the department be paid to and receipted for by the treasurer of state and shall be kept by him in a separate fund to be known as the 'restaurant fund.' Such restaurant fund shall be continued from year to year and the treasurer shall keep a separate account thereof showing receipts and disbursements as authorized by law. No part of such fund shall be used for any other purpose than the administration and enforcement of the laws relating to restaurants. * * *"

By referring to definitions in §170.1(1), the word "hotel" is defined as follows:

"1. 'Hotel' shall mean any building or structure, equipped, used, advertised as, or held out to the public to be an inn, hotel, or public lodging house or place where sleeping accommodations are furnished transient guests for hire, whether with or without meals."

Section 170.1(4) has defined the word "restaurant" to mean:

"4. 'Restaurant' shall mean any building or structure equipped, used, advertised as, or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, lunch wagon, or other like place where food is served for pay, except hotels, and such places as are used by churches, fraternal societies, and civic organizations which do not regularly engage in the serving of food as a business."

It is our opinion that hotels are thereby expressly excluded from the term restaurant, are separately defined as above stated, and represent a separate category.

The accommodations mentioned in your letter would be classified as "hotels" and not as "restaurants." Therefore, your restaurant inspectors cannot receive their compensation from the "restaurant fund" for the purpose of inspecting hotels, motels, rooming houses and cabins.

1.5

AGRICULTURE: Vaccination and sale of calves, Brucellosis—Ch. 131, Acts 60th G.A. Female calves of 9 months of age, if sold, or commingled for dairy or feeding purposes must be officially vaccinated. Only exception may be permitted by department in a hardship case. Beef-type calves transferred for feeding purposes must be quarantined, if not vaccinated.

August 11, 1964

M. E. Pomeroy, D.V.M., Chief
Division of Animal Industry
Department of Agriculture
LOCAL

Dear Mr. Pomeroy:

Reference is made to your letter in which you request our opinion relative to the bovine brucellosis law which is found in Chapter 131, 60th General Assembly. Your questions are as follows:

"1. After a beef-type female calf reaches the age of nine months and has not been officially vaccinated for brucellosis, can the owner of said animals sell to another party and transfer ownership?

"2. If the answer is yes, can the new owner purchase the cattle under a feeder quarantine in Section 13, Par. 6?

"3. If the answer is yes to this question, can the new purchaser who has purchased these animals under a 12 month feeder quarantine have such calves tested for brucellosis to release the feeder quarantine the same as imported feeder cattle?

"4. Referring again to Sec. 3, dairy calves, after they have reached the age of nine months and have not been officially vaccinated for brucellosis, can the owner sell said calves other than direct to slaughter?

"5. If so, under what section of the law could they be sold?

"6. Further, can a dairy calf that has not been officially vaccinated before reaching the age of nine months be tested for brucellosis under Section 13 before transferring the ownership."

The conditions under which the sale or transfer of any bovine animal (including calves) is prohibited are clearly stated in Section 13 of this law; it is there stated to be unlawful for any owner to sell or transfer any animal or commingle dairy or breeding cattle with grazing animals unless they are accompanied by a negative brucellosis test report issued within thirty days.

This is the principal method provided by statute for the sale of bovine animals—the sale must be accompanied by a negative test report.

But the provisions of this section requiring a negative brucellosis test report do not apply to the following cases:

1. Calves under eight months, spayed heifers or steers.

2. Official vaccinates under thirty months of age.

3. Animals consigned to slaughter.

4. Animals moved for exhibition purposes, if:

(a) Official vaccinates under thirty months of age, or

(b) If accompanied by a negative brucellosis test conducted within 75 days.

5. Animals from herds certified to be free of brucellosis or animals sold from a herd not under quarantine located in a modified certified brucellosis area.

6. Native female cattle of recognized beef-type under 21 months of age *not under quarantine* which may be sold for feeding purposes only. Section 3 of Ch. 131 also provides as follows:

"All female cattle born after July 1, 1963, sold or otherwise disposed of, or moved to commingle with cattle of another owner for dairy or breeding purposes, after reaching the age of nine months must have been officially vaccinated for brucellosis according to the method approved by the United States Department of Agriculture. In a hardship case the department my issue a permit for the movement of such animals providing it is warranted."

On applying these rules answers to your questions are as follows:

1. A beef-type female calf of nine months or over not officially vaccinated, may be sold as provided above, under class 6 for feeding purposes only.

2. The new owner may purchase these animals, under a feeder quarantine as provided in Section 13, paragraph 6.

3. The new owner who has purchased these calves for feeding purposes cannot release them from quarantine unless they have been officially vac-

cinated as required by Section 3. This means that the calf must have been vaccinated between the age of four months and eight months, before sale or release.

4. Dairy calves after they have reached the age of nine months not officially vaccinated, cannot be sold except by a permit from the department in a hardship case and then only upon taking a brucellosis test showing that they are free of the disease, if the calf has been born subsequent to July 1, 1963.

5. The calves if sold should be sold only by written permit by the department in a hardship case if not vaccinated, or sold to slaughter.

6. A dairy calf that has not been officially vaccinated before reaching the age of nine months may be tested for brucellosis under Section 13. But if born after July 1, 1963, such female dairy calf cannot be transferred except in a hardship case, by special permit of the department.

1.6

AGRICULTURE: Warehouse receipts, grain purchase—§543.17, 1962 Code. Where bulk grain is deposited with warehouseman for purpose of sale to warehouseman, bookkeeping entry crediting purchase price to farmer is not payment thereof.

February 12, 1964

Mr. Charles F. Balloun
Tama County Representative
Toledo, Iowa

My dear Mr. Balloun:

Reference is herein made to yours in which you ask for an opinion of this Department in the following situation:

"A farmer delivers grain to a warehouseman under the Iowa Warehouse Law. The warehouseman purchases said grain at the current market price. The purchase price is credited to the farmer on the books of the warehouseman. A farmer can then, or at any future time, demand payment of said purchase price or any part thereof. Under the foregoing facts, has the warehouseman made 'payment' for the grain at the time of entry of said purchase price on the books, within the meaning of Section 543.17, Code of Iowa?"

Section 543.17, Code of 1962, to which you refer, provides in pertinent and applicable part as follows:

"Acceptance of bulk grain for purposes other than storage. Any warehouseman, whether or not licensed under the provisions of this chapter, may accept a deposit of bulk grain for the purpose of sale to the warehouseman * * * Any grain, which has been received at any bonded warehouse and for which the actual sale price is not fixed and payment made therefor within ten days after the receipt of said grain, is construed to be grain held in storage within the meaning of the Iowa bonded warehouse law and warehouse receipts shall be issued therefor to the depositor not later than the tenth day after receipt thereof."

Thus, it appears from the foregoing that any warehouseman, licensed or unlicensed, may accept a deposit of bulk grain for sale to the warehouseman. However, according to the foregoing statute, actual sale of such grain and the passing of title thereto is conditioned upon the following:

1. The fixing of an actual purchase price thereof,

2. Payment to be made therefor—both within ten days after the receipt of such grain.

In other words, if within the foregoing described ten days of the deposit of the grain for sale, the purchase price is fixed and payment made, a warehouse receipt is not authorized.

On the other hand, if the price is not fixed within that period and payment made, a warehouse receipt shall issue not later than the tenth day after the deposit. If both conditions are met within the ten days, title passes from the depositor to the warehouseman and the bailment ceases to exist. There is then a completed purchase and sale, provided payment is made. Warehouse receipts in that period and under those circumstances may not issue.

The term "payment" has been defined by C.J.S. in Volume 70, *Payment*, §1, as follows:

> "In its legal sense, 'payment' may be defined as the discharge in money or its equivalent of a debt or obligation; it involves the actual or constructive delivery by a debtor to his creditor of money or its equivalent, with the intent thereby to extinguish the debt, and the acceptance thereof by the creditor with the same intent."

The Iowa Supreme Court has likewise defined the term in *Clay County State Bank vs. McMorrow*, 209 Iowa 165, 225 N.W. 859 (1929) in which the following was iterated:

> "Payment involves intent, express or implied, to make payment on the one side and to receive or accept it on the other."

Thus, "payment" implies the existence of a debt, of a party to whom it is owed, and of the satisfaction of the debt to that party. *McHale vs. Industrial Commission of Ohio*, 63 Ohio App. 479, 27 N.E. 2d 180 (1940). "Payment of a debt is not a contract; instead, it is the performance of the obligation arising out of the promise to pay. *Porter vs. Title Guaranty & Surety Co.*, 17 Idaho 364, 106 P. 299 (1910).

The answer to the question posed then would seem to depend on whether the debt owed has been satisfied by an acknowledgment of the debt on the warehouse books. It would appear that this would not be sufficient since it would in no way satisfy the debt. Instead it would only amount to a promise to pay in the future. In consideration of the scope of the term "payment" it was stated in *Sokoloff vs. National City Bank*, 250 N.Y. 69, 164 N.E. 745 (1928) as follows:

> "There may be many instances where an entry upon the books of a bank evidence a completed transaction or transfer, and constitute payment. There can be no rule of law that the mere bookkeeping entry in itself constitutes payment. We must always look through the form of the transactions and business communications to get the exact facts."

By reason of the foregoing and of the facts stated by you, I am of the opinion that the warehouseman has not made payment for the grain by entry of the purchase price on his books within the terms of §543.17, Code of 1962, even if a sale to him has been made.

1.7

Veterinary, expenses—§163.4, 1962 Code. Cost of overalls used by district veterinarians, in posting animals, dead from disease, is properly payable by State, out of appropriation for eradication of disease. (Zeller to Pomeroy, State Veterinary, 11/25/64) #64-11-1

1.8

Veterinary, license renewal fee—Art. 111, §26, Iowa Const., §§3.7, 169.6, 169.11(3), 1962 Code; Ch. 133, Acts 60th G.A. Effective date of Ch. 133 being July 4, 1963, veterinary license renewal applications received prior to July 4th are subject to present renewal fee of $1.00. (Oakley to Liddy, Sec. of Agric., 5/22/63) #63-5-2

CHAPTER 2

CITIES AND TOWNS

STAFF OPINIONS

LETTER OPINIONS

2.1

CITIES AND TOWNS: Auditor's plats and proprietors' plats—§§409.1, 409.27, 1962 Code. (1) "Original proprietor" is original owner who subdivides his own land into three or more parcels for purpose of laying out town or city, or part, or addition, or suburb thereto. (2) Mandatory for auditor to comply with §409.27 if original proprietor fails to execute and file plat as required by said section.

July 24, 1964

Mr. Walter L. Saur
Fayette County Attorney
22 East Charles
Oelwein, Iowa

Dear Mr. Saur:

This is in reply to your recent request for an opinion wherein you state: "One of the cities of this county with a population of less than 12,000 a few months ago issued an ultimatum that it would no longer grant a building permit to anyone unless their land be platted. Thus, those persons who originally purchased their land by metes and bounds are now faced with the predicament of either platting their property or being unable to build or add to an existing building on this property. The situation is further complicated in that Section 409.1 apparently does not lend itself to an owner platting but one lot. Thus, the city has gone to the County Auditor and requested that she cause a plat to be made under Section 409.27. In accordance therewith, the questions have arisen as follows:

"1. As set forth in Section 409.27, who is an original proprietor?

"2. Is it the duty of the Auditor to cause a plat to be made, 'whenever the original proprietor * * * has sold or conveyed any part thereof' as set forth in Section 409.27? * * *"

Section 409.1, in part, provides:

"Every original proprietor of any tract or parcel of land, who has subdivided, or shall hereafter subdivide the same into three or more parts for the purpose of laying out a town or city, or addition thereto, or part thereof, or suburban lots, shall cause * * * a plat of such subdivision * * * to be made * * *"

Section 409.27, in part, provides:

"Whenever the original proprietor of any subdivision of land located in a city having a population * * * of less than twelve thousand has sold or conveyed any part thereof * * * and has failed and neglected to execute and file for record a plat as provided in this chapter, the county auditor *shall* * * * notify some or all of such owners, and demand its execution. If such owners * * * fail and neglect to * * * execute and file said plat for record, the county auditor *shall* cause one to be made * * *"

Since the several sections of any one statute must be construed together, the words "the original proprietor," as used in §409.27, must necessarily refer to the "original proprietor" as used in §409.1.

In 1962 *O.A.G.* at page 14, it was stated with regard to the provisions of §409.1:

"It is clear from this section that the only original owners required to file plats are those who subdivide any parcel or tract of land they may own into three or more parts and then only if they do so for the purpose of laying out a town or city or a part or addition of a town or city or suburban lots. For example, if A owns a parcel of land and conveys a part of it to B, then conveys the remaining part to C, who conveys a portion of the part he receives to D, there is no requirement that a plat be filed because no one proprietor has subdivided into three or more parts, although the parcel as originally owned by A is now three separate tracts * * *

"In summary, an original owner required to file a plat is one who subdivides his own land into three or more parcels for the purpose of laying out a town or city or a plat or addition thereto or a suburb thereof * * *"

This would also be applicable to the words "the original proprietor" as used in §409.27.

The answer to your second question is in the affirmative, since the word "shall" as used in §409.27 must be construed to be mandatory.

2.2

CITIES AND TOWNS: Conference Board, composition—§§441.2, 363.3, 363.7, 363A.2(6), 363.1, 1962 Code; Ch. 234, 235, Acts 60th G.A.. Mayor of cities in Iowa that have city assessor is ex-officio chairman of city conference board, and any vote that mayor may have in relation to conference board matters is limited to voting with city council when it acts as voting unit of conference board.

July 23, 1964

Mr. Ballard B. Tipton
Director of Property Tax
Iowa State Tax Commission
L O C A L

Dear Mr. Tipton:

Reference is made to your recent request for an opinion on the following:

"The question has been presented to the Property Tax Division as to the membership of a city conference board under provisions of Section 441.2, Code of Iowa, 1962, and inasmuch as it is a question that can arise with respect to a majority of the 21 city conference boards in the

state, said Property Tax Division desires an official opinion on the question which is as follows:

"Section 441.2, Code 1962, provides that in cities having an assessor the conference board shall consist of the members of the city council, school board and county board of supervisors. It is further provided that in cities having an assessor the mayor of the city council shall act as chairman of the conference board and the members of the city council shall constitute one voting unit, each unit having a single vote and no action shall be valid except by the vote of not less than two out of the three units, and the majority vote of the members present of each unit shall determine the vote of the unit. Some cities in the state operate under a mayor-council form of government while others are under the commission or city manager form. The question is as to whether the mayor of each of the 21 cities in Iowa that have a city assessor is ex-officio chairman of the city conference board, and if so, is the mayor of each of the said 21 cities to be regarded as a member of the city council with the right and authority to cast a vote on any matter that is before the city conference board and on which the city council votes as a voting unit of such conference?"

The mayor is ex-officio chairman of the conference. Section 441.2 provides that the mayor of the city council, in cities having an assessor, shall act as chairman of the conference board. This provision is in keeping with the general provision made in Section 363.3 of Chapter 363.

Section 441.2, as above noted, provides that the city conference board shall be composed of the members of the city council, school board and county board of supervisors, and the mayor of the city council acting as Chairman. The voting units for any conference board action are the city council, school board, and the county board of supervisors, each having one vote, which is controlled by the majority of each respective group, making a total of three possible votes.

Any vote that the mayor may have in relation to conference board matters, therefore, is limited to voting with the city council when it acts as a voting unit of the conference board. In this respect, the mayor has the same rights and authority to vote as he does on any other matter coming before the city council.

Chapter 235, 60 G.A.:

"* * * No section of the Code which grants a specific power to cities and towns, or any reasonable class thereof, shall be construed as narrowing or restricting the general grant of powers hereinabove conferred unless such restriction is expressly set forth in such statute or unless the terms of such statute are so comprehensive as to have entirely occupied the field of its subject * * *"

No such specific restrictions or comprehensiveness is found in Section 441.2. Thus, the general provisions relating to municipal corporation controls.

Section 368A.2(6) of Chapter 368A, General Powers and Duties of Municipal Officers, provides that the mayor shall be the presiding officer of the city council with the right to vote only in case of a tie. This power of the mayor to vote in case of a tie cannot be exercised insofar as a tie exists in a vote on ordinances and resolutions of the municipality except as otherwise specifically provided by law. Op. Atty. Gen., July 21, 1958. Specific provision has been made in Chapter 234, 60 G.A., wherein the mayor under the mayor-council form of government, where the council is composed of only four members, has the right to vote on all matters where the vote of the council is evenly divided, and specific provision has been made in Section 363.7 and Section 363C.1 for the mayor under Commission and Council-Manager forms of municipal government allowing him to vote as a member of the Council.

2.3

CITIES AND TOWNS: Contracts, real estate installment—§§13.2, 368.2, 370.11, 370.12, 394.1, 407.1, 407.3, 407.12, 1962 Code; Ch. 235, Acts 60th G.A. By virtue of self-determination powers conferred upon cities and towns by 60th G.A., real estate for use as golf course may be purchased on installment contract.

June 10, 1963

Honorable David O. Shaff
State Senator
406 South 2nd Street
Clinton, Iowa

Dear Senator Shaff:

This is in response to your recent letter in which you set forth the following:

"I have received an inquiry which affects the Clinton Park Board and the City of Clinton dealing with the authority of either the City Council or the Park Board to acquire property under an installment contract.

"An opportunity is now present to make such a purchase under very advantageous conditions, and it is expected that this property will eventually be improved for the purpose of a municipal golf course. Of course, if any improvement is undertaken, at that time the contract would be paid off in full and title acquired."

This office has consistently refused to answer questions pertaining solely to matters affecting a city because of the limitations on the opinion-rendering power of the Attorney General in §13.2, Iowa Code of 1962. However, because of the importance of the question in connection with H.F. 380 and because of the wide significance of "home-rule powers" in connection with all cities and towns, this answer is provided for the purpose of establishing guide-lines.

House File 380, Acts of the 60th G.A., amends §368.2 by adding a new section, in pertinent part as follows:

"Section 1. Section three hundred sixty-eight point two (368.2), Code 1962, is amended by adding at the end thereof the following:

" 'It is hereby declared to be the policy of the State of Iowa that the provisions of the Code relating to the powers, privileges, and immunities of cities and towns are intended to confer broad powers of self-determination as to strictly local and internal affairs upon such municipal corporations and should be liberally construed in favor of such corporations. The rules that cities and towns have only those powers expressly conferred by statute has no application to this Code. Its provisions shall be construed to confer upon such corporations broad and implied power over all local and internal affairs which may exist within constitutional limits. No section of the Code which grants a specific power to cities and towns, or any reasonable class thereof, shall be construed as narrowing or restricting the general grant of powers hereinabove conferred unless such restriction is expressly set forth in such statute or unless the terms of such statute are so comprehensive as to have entirely occupied the field of its subject. However, statutes which provide a manner or procedure for carrying out their provisions or exercising a given power shall be interpreted as providing the exclusive manner of procedure and shall be given substantial compliance, but legislative failure to provide an express manner of procedure for exercising a conferred power shall not prevent its exercise. Nowithstanding any of the provisions of this section, cities

and towns shall not have power to levy any tax, assessment, excise, fee, charge or other exaction except as expressly authorized by statute.'"

Initially, it is observed that park boards are given the authority to purchase real estate for park purposes. (§370.11). However, a limitation set forth in §370.12 provides that no indebtedness shall be incurred in excess of the amount of taxes already levied and available, except for bonded indebtedness as authorized in Chapter 370. Consequently, the total cost of the real estate must be paid from (1) taxes already levied and available or (2) general obligation bonds. The park board would not be authorized to purchase real estate on an installment basis for the reason that "* * * a manner or procedure for carrying out * * *" the provisions of the statutory authorization to purchase real estate is provided and is to be deemed "* * * the exclusive manner of procedure * * *" within the meaning of H.F. 380, *supra*.

These same limitations do not appear as an obstacle in the way of a purchase of real estate by the City of Clinton on an installment basis. Limitations on the total indebtedness that may be incurred are set forth in the Iowa Constitution, Art. XI, §3 and §§407.1 and 407.2 of the Code. However, §407.3, providing for the acquisition of land, would also seem to carry with it the requirement that for any authorized indebtedness "* * * the council shall issue bonds and make provision for the payment thereof * * *" (§407.12).

Section 394.1 provides in pertinent part:

"* * * Cities and towns * * * are hereby authorized and empowered to own, acquire, construct, equip, extend and improve, operate and maintain * * * *golf courses*, and shall have authority to acquire by gift, grant, purchase, or condemnation or otherwise, all necessary lands * * * and to issue revenue bonds to *pay all or any part of the costs* of such improvement." (Emphasis added)

This section provides to cities and towns direct statutory authorization for the acquisition and improvement of real estate as a golf course and it is apparent that no specific procedure is outlined for the exercise of the power. It is contemplated that the venture can be a self-liquidating improvement that can be financed through revenue bonds but this is available for "all or any part of the costs."

It is the opinion of this office that under the broad powers of self-determination conferred upon cities and towns by the 60th General Assembly in H.F. 380, effective July 4, 1963, it will be possible for a city to purchase real estate on an installment contract for use as a golf course pursuant to Chapter 394, 1962 Code of Iowa.

As a caveat, it should be noted that only a court of law can ultimately pronounce whether a given power is within the scope of authority of a municipal corporation and whether it has been properly exercised. These powers and their exercise are subject to challenge at the behest of any interested party at any time. For these reasons, (plus the fact that legal exercises of this nature are without the scope of statutory authority of this office), no further interpretations of city and town powers will be made, except insofar as they are concerned in some vital way with the operation of state government.

2.4

CITIES AND TOWNS: Incompatibility, City Attorney, Justice of Peace—§§368A.1(7&10), 367.6, 1962 Code. Offices of Justice of Peace and Assistant City Attorney are incompatible.

February 25, 1964

Mr. Martin D. Leir
Scott County Attorney
County Court House
Davenport, Iowa

Dear Sir:

This will acknowledge receipt of your letter in which you submitted the following:

"The opinion of your office is respectfully requested as to the following problem.

"An Examiner for the State Auditor's office has brought to my attention that one Jack D. Gordon is acting as Justice of the Peace for Bettendorf Township, this county, and has also been appointed to the office of Assistant City Attorney for the City of Bettendorf, likewise this county.

"I would like the opinion of your office with respect to whether or not the holding of the two above named offices by one individual constitutes incompatibility."

In reply thereto, I would advise that while it does not appear that the office of City Attorney is a statutory office, undoubtedly a city may, by ordinance, establish the office and prescribe the duties thereof. §368A.1(7) and (10).

I am of the opinion that the occupant thereof cannot at the same time occupy the office of Justice of the Peace. These offices are incompatible.

According to §367.6, a Justice of the Peace, in the absence or inability to act of the mayor or judge of the superior, municipal, or police court, the nearest Justice shall have jurisdiction and hold court in criminal cases. As Assistant City Attorney, this duty, among others, would be appearance in court as prosecutor over which, as a Justice of the Peace, he would preside.

It is provided by §367.9, Code of 1962, that fines and penalties to the city may be recovered in a Justice of the Peace Court by municipalities. Normally, the appearance for the city in such action would be by the City Attorney or his assistant.

These offices are incompatible.

2.5

CITIES AND TOWNS: Jurisdiction—§413.1 as re-enacted by Ch. 254, Acts 60th G.A. Any dwelling erected in an unincorporated area adjacent to and within one mile of city of 15,000 or more population, irrespective of whether it is located in same county as city, falls within provisions of housing law; with exception of areas located outside state boundary lines.

November 1, 1963

Mr. P. J. Houser, Director
Department of Public Health Engineering
State Department of Health
LOCAL

Dear Mr. Houser:

Reference is made to your letter with regard to the application of §413.1, as re-enacted by House File 122, Acts of the 60th General Assembly, to unincorporated areas in one county that may be adjacent to an incorporated city

or town in another county; e.g., Sioux City in Woodbury County is adjacent to Plymouth County, and Des Moines in Polk County is adjacent to Warren County.

Section 413.1 of the Code now reads as follows:

"This chapter shall be known as the housing law and shall apply to every city which, by the last federal census, had a population of fifteen thousand or more, and shall apply *to any dwelling in any area adjacent to and within one mile of such municipalities, except estates of real property of ten acres or more in said adjacent area,* and to every city as its population shall reach fifteen thousand thereafter by a federal census."

A county, while a body corporate, is a subdivision of the state, created for administrative and other public purposes, and is subject at all times to legislative control and change. (*McSurely v. McGrew,* 118 N.W. 415, 140 Iowa 163), and (*Scott County v. Johnson,* 209 Iowa 213, 222 N.W. 378).

Municipal corporations are created by the legislature and derive their powers from the source of their creation. (*Rogers v. City of Burlington,* 70 U.S. 654, 3 Wall. 654, 18 L. Ed. 79).

Since all municipal corporations, whether counties, cities or towns, are subject to legislative control, it is within the power of the legislature to define the limits or boundaries within which such administrative bodies may act within the powers granted, irrespective of corporate boundary lines or county boundary lines.

Therefore, in answer to your question, any dwelling erected in an unincorporated area adjacent to and within one mile of a city of 15,000 or more population, irrespective of whether it is located in the same county as the city, falls within the provisions of the housing law, House File 122, Acts of the 60th General Assembly (being §413.1 of the Code as re-enacted). There is one obvious exception, however, i.e., the statute would not be applicable to areas located outside the state boundary lines.

2.6

CITIES AND TOWNS: Library maintenance fund, unexpended balance—§§358B.13, 24.9, 1962 Code. 1. Unexpended balance in Library Maintenance Fund may not be disposed of under §358B.13. 2. Such balance may be made available by amending current budget under provisions of §24.9.

February 20, 1964

Mr. Martin D. Leir
County Attorney
Scott County
Davenport, Iowa

Attention: Norman M. Peterson
Assistant County Attorney

Dear Sir:

This will acknowledge receipt of your letter in which you submitted the following:

"The Board of Supervisors of Scott County have requested that I obtain an opinion from the Attorney General's Office relative to the construction of the last sentence of Section 358B.13 of the 1962 Code of Iowa. This provides: 'Any unexpended balance in the Library Main-

tenance Funds at the end of the fiscal year shall remain in said fund and be available without re-appropriation.'

"This office gave the Board of Supervisors an opinion to the effect that it was not intended by this section to permit the County Library board to accumulate an unlimited balance in their funds at the end of various fiscal periods but that such balance should merely be taken into account by determining the millage rate and that the word 're-appropriation' had nothing to do with cash balances. That the word 're-appropriation' as used meant that the budget should not be reduced merely because they had a balance on hand.

"The Auditor in computing the tax levy at the end of 1962 credited the Library Board with a balance of approximately $8,000 on hand. The Auditor therefore subtracted the $8,000 from the proposed budget of $58,550 in setting the millage, thus raising only an additional $50,550. The Library Board complains that this is incorrect and that the millage should have been set to raise $58,550 and permit them to keep unexpended balances in their account not reduced by the tax levy to make up the difference in the budget for the coming year.

"The real difficulty in this situation arises because we fell approximately $6500 short on the millage levy due to the fact that the small cities and towns in Scott County on a maximum two mill basis will not raise their proportionate share based upon population as required by the statute. The Library Board is therefore going to be about $7,100 short on their budget for the coming year due to these two factors.

"Would you kindly advise as to your interpretation of the last sentence in Section 358B.13 as to whether or not it means, first, that the Library Board may merely retain their balance of funds for current expenditures until new money is raised by taxation, but that the unexpended balance shall be considered in setting the levy to make up the proposed budget collections or, secondly, that it means the Board may collect the full amount of their annual budget by tax millage and be allowed to retain unexpended balances at the end of each fiscal year and collect, in addition thereto, the full amount necessary to meet their budget for the coming year."

In reply thereto, I advise the following. Section 358B.13, so far as applicable, is as follows:

"Any unexpended balance in the Library Maintenance Funds at the end of the fiscal year shall remain in said fund and be available without re-appropriation."

Under the plain terms of this statute this balance of $8,000 in the Library Maintenance Fund remains in said fund available for spending without reappropriation. This statute was enacted as part of Chapter 193, 52nd General Assembly, effective July 4, 1947. It would still be effective by its terms to control this situation were it not for the provisions of Section 24.9, Code of 1962, providing for the amendment of the county budget under the following situation, to-wit:

"* * * Budget estimates adopted and certified in accordance with this chapter may be amended and increased as the need arises to permit appropriation and expenditure during the fiscal year covered by such budget of unexpended cash balances on hand at the close of the preceding fiscal year and which cash balances had not been estimated and appropiated for expenditure during the fiscal year of the budget sought to be amended, and also to permit appropriation and expenditure during the fiscal year covered by such budget of amounts of cash anticipated to be available during such year from sources other than taxation and

which had not been estimated and appropriated for expenditure during the fiscal year of the budget sought to be amended * * * *"

This statute was enacted by the 55th General Assembly by Chapter 53, effective April of that year. The disposition of this $8,000 balance cannot be effectuated under both of these statutes, to-wit: 358B.13 and 24.9, because they provide different dispositions of this balance. Conflict between them results. Disposition thereof may be made under the implied repeal of one or the other. The pertinent rule is stated:

"The doctrine of repeal by implication rests on the ground that the last expression of the legislative will ought to control, and that the legislature intended to give effect to its enactments." 50 *Am. Jur.*, paragraph 534, *Statutes.*

See *DeBerg v. the County Board of Education,* 258 Ia. 1039, 1051, (approving the application of this rule.)

The quoted portion of Section 358B.13 is impliedly repealed and the balance of $8,000 may not be disposed of under it. However, such balance may be made available by amending the current budget under the provisions of Section 24.9, quoted heretofore. The form for pursuing that method is herewith enclosed.

2.7

CITIES AND TOWNS: Park Board Commissioners, bonding requirements– §370.3, 1962 Code. Park board commissioners in cities with population of less than fifteen thousand not required to give bond under provisions of §370.3.

March 20, 1964

Honorable R. O. Burrows, Sr.
State Senator
State Capitol Building
Des Moines, Iowa

Dear Senator Burrows:

This is in response to your opinion request in which you raise the following question:

"Our problem of filling vacancies on the Park Board arises in connection with Section 370.3 of the Code of Iowa, wherein it provides that all park board commissioners shall qualify by taking oath and giving bond in the sum of $1,000, except that no such bond shall be required from park commissioners in cities of the second class. Since the statutory definition of 'cities of the second class' appearing in §363.1, Iowa Code, 1950, has been repealed by Chapter 145, Acts 54th G.A., does the exemption from the bonding requirement of §370.3 continue to apply?"

Section 363.1, Iowa Code, 1950 defined cities of the second class as follows:

"Every municipal corporation now organized as a city of the second class, or having a population of two thousand, but not exceeding fifteen thousand of the second class."

Section 363.4, Iowa Code, 1962, now defines a "city" as follows:

"Any municipal corporation which had a population of two thousand or more is a city."

The Legislature is repealing the definition of "cities of the second class" by Chapter 145, Acts 54th G.A., provided in §111 of that Chapter:

"Wherever in the statutes, other than in this Act, reference is made to *cities of the second class,* the code editor is authorized to strike such reference and to insert in lieu thereof reference to *cities* having a population of *less than fifteen thousand.*" (emphasis added.)

Thus, it can be seen that the Legislature intended to effectuate no change in statutes which at that time referred to "cities of the second class." Any discrepancy which now exists in §370.3 is due to an oversight in the assembling of the Code.

It is, therefore, my opinion that park board commissioners in cities having a population of less than fifteen thousand are not required to give a bond under the provisions of §370.3.

2.8

CITIES AND TOWNS: Planning commissions, powers—§§28.10, 368.2, 373.1, 373.9, 373.14, 373.15, 373.17, 373.21, 1962 Code. City planning commissions do not have exclusive power to contract for planning assistance with the Iowa Development Commission under §373.21, but such contracts must be executed or ratified and confirmed by the Mayor with approval of the city council of the municipality concerned.

January 18, 1963

Mr. Walter P. Williams
Acting Director
Iowa Development Commission
200 Jewett Building
Des Moines, Iowa

Attention: Ronald J. Gear
Planning Director

Dear Mr. Williams:

Reference is made to your recent favor in which you state:

"The Planning Department of the Iowa Development Commission wishes to request an opinion relative to the ability of a local City Council to enter into contracts for comprehensive community planning services where a local City Planning Commission has been established in accordance with Chapter 373 of the Iowa Code.

"Attention is called to the provision set forth in Sections 373.9 and 373.21 of the Code. The point in question is whether the City Council of an Iowa city or town relinquishes its right to enter into contracts for planning services on behalf of the municipality. Does the city provide the city planning commission with exclusive power to contract for planning or does the City Council still maintain this ability when a local ordinance establishing a planning commission has been adopted in accordance with Chapter 373 of the Iowa Code?

"The Iowa Development Commission has been negotiating contracts for planning services with the local planning commissions but the final contracts have been adopted or executed by the Mayor with the approval of the City Council."

The Iowa Development Commission was granted certain specific powers in this field, as follows:

"28.10 Planning Assistance. To insure the economic and orderly development of the state through the encouragement of sound community planning, the Iowa development commission is authorized to (a) provide planning assistance to cities, towns, counties, groups of adjacent communities, incorporated or unincorporated, other cities, towns and counties which have suffered substantial damage as a result of a catastrophe, areas where rapid urbanization has resulted or is expected to result from the establishment or rapid and substantial expansion of a federal installation, and metropolitan and regional areas: (b) apply for, receive, contract for, and expend federal funds under section 701 of the federal Housing Act of 1954, as amended, or under any other federal Act for local and regional planning and administer the funds in accordance with any such federal law."

Cities and towns which have established city plan commissions also have certain planning powers, as provided in the following provisions of the Code, to wit:

"373.9 Powers. Such city plan commission shall have full power and authority to make or cause to be made such surveys, studies, maps, plans, or charts of the whole or any portion of such municipality and of any land outside thereof which in the opinion of such commission bears relation to a comprehensive plan, and shall bring to the attention of the council and may publish its studies and recommendations."

"373.21 Professional consultants. The plan commission, zoning commission, or plan and zoning commission of any city, town, county, regional or metropolitan area, may contract with professional consultants, the Iowa development commission and the federal government, or with any one or more of them, for local planning assistance, and may agree with each or all of them as to the amount, if any, to be paid for such planning assistance."

The members of a city plan commission are appointed by the Mayor, after establishment by ordinance, subject to the approval of the council. The commission may also be abolished by ordinance duly enacted. (§373.1) The commission has no debt contracting powers beyond the amount of its income for the current year, which consists of funds annually appropriated by the city council for the expenses of such commission. (§§ 373.14, 373.15 and 373.17).

As such, it is an agency of the municipality, and any contracts which the commission may negotiate under the provisions of §373.21, which provides inter alia – "may contract with * * *, the Iowa development commission * * * for local planning assistance, and may agree with each or all of them as to the amount, if any, to be paid for such planning assistance." – must be ratified and confirmed by the Mayor and city council under the general powers conferred upon such municipal corporations by Chapter 368, and particularly §368.2 of the Code.

Therefore, in answer to your question, it is the opinion of this office that a city plan commission does not have exclusive power to contract for planning assistance with the Iowa Development Commission, and any such contracts that may be negotiated by such city plan commissions must be executed by or ratified and confirmed by the Mayor, with the approval of the city council of the muncipality concerned therewith.

2.9

CITIES AND TOWNS: Platting of rural lands—§§409.11, 409.13, 1962 Code. (1) §§409.11 and 409.13 are inapplicable to plats of rural lands. (2) Filing of plat of rural areas dedicates streets to general public, if facts show acceptance of dedication.

May 26, 1964

Mr. Douglas J. Burris
Jackson County Attorney
Maquoketa, Iowa

Dear Mr. Burris:

This will acknowledge your letter of recent date, requesting opinion as follows:

"Chapter 409.13 provides acknowledgement and recording shall be equivalent to a deed in fee simple of such portion of the premises platted as is set apart for the streets or other public uses, or as is dedicated to charitable, religious, or educational purposes. This is the only section in the Code of Iowa referring to the plats of record. Section 409 deals with cities and towns and plats thereof.

"Will you kindly give us an opinion as to whether Section 409.13 covers a plat filed in a rural area outside of a city or town, the nearest city or town being approximately 12 miles.

"Does the filing of the plat in such an area, in fact, make the streets, parks, and other areas for general use public? Also, when a person filing a plat and developing an area in the county, are they required to purchase a performance bond, as required in 409.11?"

In Iowa, two types of "dedication" are recognized, statutory and common law. The statutory dedication provisions contained in sections 409.11 and 409.13, 1962 Code, are applicable only to cities and towns.

In *Town of Kenwood Park vs. Leonard,* 177 Iowa 337, 158 N.W. 655 (1916), it was stated:

"The filing of a plat dedicating a highway in a village unincorporated, does not convey to the village, or to the public, the fee title. By such dedication, the general public acquires only an easement in the highway —a right to use it for public purposes. The fee remains in the original owner, and when vacated, it reverts to the original owner, the same as in all other public highways outside of incorporated cities and towns.

"Chapter 13, Title V, (now Chapter 409) of the Code deals with cities and towns, and not with villages, and does not cover town sites platted and unincorporated.

"Section 917 of Chapter 13, Title V, of the Code of 1897, (now §409.13) in so far as it provides that the recording of plats, such as we are dealing with, is equivalent to a deed in fee simple of such portion of the premises platted as is set apart for streets or other public uses, evidently relates to streets in cities and towns, and not to streets in unincorporated villages * * *"

"To an incorporated city or town, the tender is in fee, and, when accepted, vests in the municipality a fee title to the land set apart as streets in the plat. See Section 917 of the Code of 1897. When tendered to an unincorporated village, it is the tender of an easement in the land set apart, and, when accepted by the public, the right to the easement becomes complete. . ."

In *Iowa L. & T. vs. Bd. of Supervisors,* 187 Iowa 160, 174 N.W. 97, (1919), it was stated:

"It is suggested by appellant that statutes providing for platting and the effect thereof have application to a city or incorporated town only, and therefore have no application to the plat in consideration. . . .

"Now, while the *Leonard* case does make a distinction between incorporated and unincorporated towns, that distinction is that while, as to incorporated towns, the platting gives the fee simple title in the streets to the municipality, the filing of the plat, where the lands are in an unincorporated town, has merely the effect of giving 'the public at large the privilege of passing over the using the land so set apart as a public highway for public travel. The public acquired a right to an easement in the land so set apart, for the purpose for which it was set apart.' . . .

"We conclude that, notwithstanding that this plat did not deal with an incorporated town, it worked a common-law dedication.

"To work an exemption from taxation, acceptance of the dedication is essential, and we now turn to the question whether the evidence sustains the finding below that there was sufficient acceptance. * * *"

Of course, whether or not there has been acceptance of a common law dedication is a question of fact. In *32 Iowa Law Review,* 746, 750, there appears an excellent discussion of what constitutes acceptance, citing the various Iowa cases on the subject.

In conclusion, to specifically answer your questions, -- (1) the provisions of sections 409.11 and 409.13 have no application to plats of rural areas outside of cities and towns; and (2) the filing of a plat for such an area dedicates streets to the general public if the facts show there has been an acceptance of the dedication.

2.10

CITIES AND TOWNS: Policemen's pension fund, termination--Ch. 410, 1962 Code. Established policemen's pension fund may not be terminated except by express legislative action.

November 30, 1964

Mr. Ira Skinner, Jr.
Buena Vista County Attorney
Fritcher Building
Storm Lake, Iowa

Dear Mr. Skinner:

This is in reply to your recent request for an opinion in which you state:

"I have been requested to secure an opinion concerning the proper and legal procedure to follow in terminating a pension fund established under the provisions of Chapter 410 of the 1962 Code of Iowa.

"More specifically, on May 1, 1958, a policeman's pension fund was created covering the police officers of the Storm Lake, Iowa, Police Department pursuant to Chapter 410 of the 1962 Code of Iowa. The members of the fund have expressed their desire to terminate the fund, however, I can find nothing in Chapter 410 which provides the manner or way in which such a termination can be made and of disposing of the funds now in the retirement plan."

Section 410.1 provides in part:

"Any city or town having an organized fire department may, and all cities having an organized police department or a paid fire department *shall,* levy annually a tax . . . for the purpose of creating firemen's and policemen's pension funds."

In *Lage v. City of Marshalltown,* 212 Iowa 53, 235 N.W. 761 (1931), the court in considering this statute stated:

"Section 6310 (now 410.1) of the Code is mandatory, in so far as it imposes the duty upon certain cities to levy annually a tax for the purpose of creating a firemen's and policemen's pension fund. . . It is settled in this and in all other jurisdictions. . . that, upon the happening of the event which entitles a police officer or fireman to a pension, his right thereto then becomes immediately vested, and may not be taken away. . . Clearly, the duty resting upon appellant to provide a fund sufficient to make the monthly payments to its pensioners is mandatory. . ."

In the case of *Mathewson v. Board,* 226 Iowa 61, 283 N.W. 256 (1939), it was held that a fireman was entitled to a pension based upon years of actual service even though the pension fund had not been in existence for the whole period of his service. The court stated:

"There is nothing. . . which requires that the service. . . be after the city elected to go under the provisions of the act."

Subsequently this fireman brought a mandamus action to compel payment of his pension. In *Mathewson v. City of Shenandoah,* 233 Iowa 1368, 11 N.W. 571 (1943), the Supreme Court stated:

"Appellant is entitled to receive payment of his pension and there is a duty resting upon the city to provide a fund sufficient to make the payments accruing thereon."

The court held that the fund could not be used to pay liabilities incurred in the preservation of the trust fund. Referring to the present Section 410.3, the court stated:

"This unequivocal legislative mandate makes it necessary for municipalities to provide for the expense of preserving and operating such pension funds from some source other than the pension tax."

The most recent case concerning the pension fund is that of *Rockenfield v. Kuhl,* 242 Iowa 213, 46 N.W. 2d 17, (1951). There the court stated:

"There is no affirmative provision for terminating a disabled fireman-pensioner's right to his pension, once established, except by a finding. . . that his disability has terminated. . . We have held that while a pension is not a matter of contract or vested right so far as concerns the right of the law making power to change it by modifying or repealing the law, nevertheless, *when the right once has accrued it becomes vested 'so far as relates to the obligations of the custodians of the fund to pay'.* Gaffney v. Young, 200 Iowa 1030, 1033; 205 N.W. 865, 867."

Based on the above authorities, it is our opinion that a policeman's fund established under the provisions of Chapter 410 may not be terminated except by legislative action.

2.11

Cemetery lots—§§566.20, 566.21, 566.22, 566.23, 566.24, 566.25, 566.26 and 566.27, 1962 Code. All funds received from sale of abandoned portions of cemetery lots must be placed in fund to be used solely for perpetual care and upkeep of lots. (Price to Carroll, Union Co. Atty., 5/19/64) #64-5-1

2.12

Civil Defense Fund, withdrawal of monies appropriated — Ch. 72, Acts 60th G.A. Municipality not authorized to withdraw appropriated funds which have been expended for civil defense purposes and subsequently reimbursed

by federal matching funds. (Byers to Samore, Woodbury Co. Atty., 6/10/64) #64-6-1

2.13

Council proceedings Publication.—§368A.3, 1962 Code. Where there is newspaper published in a town, the proceedings of town council of that town are required to be published therein. (Strauss to VanGinkel, Cass Co. Atty., 3/13/63) #63-3-1

CHAPTER 3

CONSERVATION

STAFF OPINIONS

LETTER OPINIONS

3.1

CONSERVATION: Annexation, existing laterals—Ch. 455, 462, 1962 Code. Existing drainage district has no authority to appropriate existing lateral of different drainage district.

July 9, 1964

Mr. Harley Stipp
County Attorney
Winnebago County
Forest City, Iowa

Dear Mr. Stipp:

This is to acknowledge your recent inquiry wherein you set forth the following:

> "Drainage District 3-11 is an inter-county drainage district, located in Winnebago and Kossuth Counties. Lateral 8 of this drainage district is located entirely in Winnebago County.
>
> "Winnebago County Drainage Districts No. 29 and No. 1, both outlet into Lateral 8 above. The people in Lateral 8 wish to be separated from the inter-county drain 3-11, and go into a trusteeship with Winnebago County Districts No. 29 and 1 above.
>
> "Our Board of Supervisors is willing to do this, but the question has arisen as to whether or not a lateral alone can be put in a trusteeship, and this is the question which the Board would like to know."

In reply thereto, we advise as follows. Examination of Chapter 455 and Chapter 462 reveals an absence of statutory provisions covering the particular problem set forth above. It is a well settled principle of law that boards of supervisors have only such powers as are conferred upon it by statute. In *Board of Supervisors v. District Court,* 209 Iowa 1030, 229 N.W. 711, the Iowa court stated:

> "The powers of such board, however, are limited and defined by statute — They (the Board of Supervisors) act wholly in an official or representative capacity, under the express provisions of the drainage statutes."

The appropriation of ground for drainage district purposes already within a drainage organization was fully discussed in *Farley Drainage District v. Big Four Joint Drainage District,* 207 Iowa 970. In that opinion, the Iowa court indicated that such an appropriation was only permissible in that

instance through the enabling clauses of establishing an inter-county drainage district.

It is therefore our opinion that the lateral existing and presently a part of an inter-county drainage district has no authority to incorporate by trusteeship within the confines of a separate and distinct existing drainage district or districts.

3.2

CONSERVATION: Conservation Commission, administrative authority – §107.14, 1962 Code. Conservation Commission has authority to make administrative determination to restore former conservation officer who has successfully taken competitive examination under §107.14, to his former conservation officer status without further examination.

May 20, 1963

Mr. Glen Powers, Director
State Conservation Commission
L O C A L

Dear Mr. Powers:

This is to acknowledge your letter wherein you request an opinion upon the following:

"From time to time the Conservation Commission promotes one or more Conservation Officers to supervisory capacity, or some other position, within the Commission; however, in several cases, the officer has asked that he be permitted to return to his officer's status, if, after a period of time, he finds it desirable to do so. That part of the Code governing Conservation officers does not clearly define the Commission's authority in this area and we have, on an occasion or two, questioned our authority to reinstate the Conservation officer in his original role as an officer after having served in some other capacity with the Commission.

"We would appreciate an opinion as to whether or not a former Conservation officer, having continuous service with the Commission but working in a different capacity, can return to his former Conservation officer status without retaking the competitive examination initially required for Conservation officers as set forth in §107.14."

In reply thereto, you are advised that §107.14, Code of Iowa, 1962, provides:

"No person shall be appointed as a conservation officer until he has satisfactorily passed a competitive examination, held under such rules as the commission may adopt, and other qualifications being equal only those of highest rank in examinations shall be appointed."

This provision of law came before this Department for this first time in 1936 *O.A.G.* 154, for a determination of whether or not examinations given by the commission prior to the enactment of §107.14 would satisfy the requirements of that statute. In answer thereto, this Department held:

"It would be the opinion of this department that sections to which you refer relative to competitive examinations would be a part of the administrative duties of the new Conservation Commission, and that the commission could determine with reference to the nature of an examination which they desired to give applicants for these positions, and if, in the opinion of the commission the examinations previously given made a situation as the commission desires to have it, those now em-

ployed who have previously taken examinations and are doing satisfactory work, could be continued if the commission so desired.

"In other words, it is our opinion that this is an administrative matter for the commission to determine and under the law creating the commission, it would be empowered to determine as to the nature of the examination, and those previously taken could be used by the commission in picking its personnel."

We are, therefore, disposed to the belief that the Conservation Commission has the authority to make an administrative determination to return a former conservation officer who has successfully taken the competitive examination required by §107.14, to his former conservation officer status without further examination.

3.3

CONSERVATION: County Conservation Boards, museums—Ch. 111A, 1962 Code. County conservation boards have authority to acquire in name of county, by gift, purchase, lease, agreement or otherwise, building to house museum of historic objects, and to maintain same.

February 7, 1964

Mr. William H. Miles
Wayne County Attorney
Corydon, Iowa

Dear Mr. Miles:

This is in reply to your recent letter wherein you submit the following:

"Does the County Conservation Board, as established under paragraph 111A of the Code of Iowa, have authority under this Section to use any portion of the tax money levied by it to maintain and operate a building to house a museum of Wayne County historical objects, said building to be erected and owned by the Wayne County Historical Society?"

In reply thereto we advise that the purposes of County Conservation Board are set forth in §111A.1, Code of Iowa, 1962, which provides as follows:

"The purposes of this chapter are to create a county conservation board and to authorize counties *to acquire, develop, maintain, and make available to the inhabitants of the county, public parks, preserves,* parkways, playgrounds, *recreational centers,* county forests, wildlife and other conservation areas, and to promote and preserve the health and general welfare of the people, to encourage the orderly development and conservation of natural resources, and to cultivate good citizenship by providing adequate programs of public recreation." (Emphasis supplied) Section 111A.4, Code of Iowa, 1962, provides in pertinent part:

"The county conservation board shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for public parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes and is authorized and empowered:

"(2) *To acquire in the name of the county by gift, purchase, lease, agreement or otherwise,* in fee or with conditions, suitable real estate within or without the territorial limits of the county areas of land and water for *public parks,* preserves, parkways, playgrounds, *recreation centers,* forests, wildlife and other conservation purposes. . . . in acquir-

ing or accepting land, due consideration shall be given to its scenic, *historic, archaeologic, recreational or other special features,* and no land shall be acquired or accepted which in the opinion of the board and the state conservation commission is of low value from the standpoint of its proposed use." (Emphasis supplied)

Your attention is invited to an opinion issued by this department in 1960 *O.A.G.* 38, wherein this department held that the above statutory language confers implied authority for a County Conservation Board to employ a professional assistant for the excavation and recovery of archaeological relics. Since the County Conservation Board has the authority to excavate archaeological relics, it would appear inconceivable that they should be stripped of the authority to preserve the same, especially in view of the statutory language which requires the County Conservation Board to give due consideration to the historic, archaeological, recreational and other special features when acquiring or accepting land.

The Iowa Court in *Golf View Realty Co. v. Sioux City,* 222 Iowa 433, construed a statute which authorized a municipal corporation to purchase land for city parks, and in that construction, held, a "golf course" fell within the meaning of the word "park". Although the legislature had subsequently amended the statute and expressly included the authorization to purchase land for "golf courses", before the Supreme Court's decision, the court held that the legislature merely clarified the power already held under the previous statute. While this decision does not directly affect a museum, it is illustrative of the attitude of the Iowa Court as to what the term "park" may embrace.

In *Bostick v. Purdy,* Ala., 5 Stew. & P. 105, we find the following judicial definition of "museum":

"The word 'museum' is a comprehensive term, and may embrace within it a menagerie, as well as many other things. By tracing the Greek word from which 'museum' is derived to its root, it is found to signify 'amusement' or 'to amuse,' and thus the term 'museum' would appear to express, not only collections of curiosity for the entertainment of the sight, but also such as would interest, amuse, and instruct the mind."

In re Central Parkway, City of Schenectady, 140 Misc. 727, the New York Court held in defining the word "park":

"Although primarily involving the idea of open air and space, the sentiment for artistic adornment of public places is such that the occupation in part by monuments, statues of heroes, art, museums, gallerys of paintings and sculpture, free public libraries, and other agencies contributing to the aesthetic enjoyment of eye and ear is not a perversion of the lands from park purposes."

In *Stoolman v. Camden Council Boy Scouts,* 185 Atl. 2d 436, the New Jersey Court held:

"The term 'educational' and 'recreation' are not mutually exclusive, but rather are overlapping."

We are, therefore, disposed to the belief that the County Conservation Board has the authority to acquire in the name of the county, by gift, purchase, lease, agreement or otherwise, a building to house a museum of historic objects, and to maintain the same.

3.4

CONSERVATION: Disputes between Conservation Commission, Natural Resources Council—§§111.4, 111.18, 455A, 679.19, 1962 Code. All disputes be-

tween state agencies, whether of fact or law, must be submitted to arbitration.

November 5, 1963

Mr. H. Garland Hershey, Chairman
Iowa Natural Resources Council
L O C A L

Dear Mr. Hershey:

This is in reply to your inquiry wherein you submitted the following:

"Reference is made to your letters dated May 10, 1963 and May 22, 1963, regarding an alleged dispute within the meaning of Section 679.19, Iowa Code, 1962, between this department and the State Conservation Commission.

"Various members and representatives of the Iowa State Conservation Commission attended a series of public hearings on flood control along the Upper Mississippi River conducted by the Corps of Engineers during November 1944, and April and May of 1945. Improvement of the levees at the mouth of the Skunk River was one of 17 projects proposed by the Corps of Engineers, U.S. Army, in an interim report for flood control, Mississippi River from Guttenburg, Iowa, to Hamburg Bay, Illinois, dated April 11, 1952. The Iowa Natural Resources Council conducted a hearing on said report at Davenport, Iowa on November 6, 1952. W. L. Frank and C. R. Adamson, representatives of the Conservation Commission, offered no comment or statement at the November hearing.

"By letter dated November 27, 1952, the Iowa Natural Resources Council commented favorably on behalf of the State of Iowa on the report as it related to the Skunk River project. This project was one of 17 recommended in House Document #281 and authorized by the Flood Control Act of 1954. Construction has been initiated or completed on several of these projects since authorization in 1954. Design of the improvement of the levees at the mouth of the Skunk River has been completed and funds have been appropriated by Congress to initiate construction during 1963.

"The proposed Skunk River channel changes were developed by the Corps of Engineers during the design period to provide protection to the levee system. The existing sharp bends in the affected reach of the Skunk River results in ice jams and in high velocity flood waters flowing directly against the levees with consequent erosion damages. One copy of the Corps of Engineers' design memorandum, including the Skunk River channel changes was submitted to the Resources Council by the Corps of Engineers on December 5, 1962. This copy of the design memorandum was loaned to the State Conservation Commission from December 13, 1962 to December 21, 1962 for study and comment by the Commission.

"A public hearing was held at Fort Madison, Iowa, on February 27, 1963, by the Iowa Natural Resources Council on the application of Green Bay Levee and Drainage District No. 2 for approval of construction of improvements in accordance with said design memorandum. While representatives of the Conservation Commission did attend said hearing and object generally to channel straightening projects, no specific information was offered regarding damages caused to fish and wildlife by the proposed plan nor was an alternative plan proposed.

"The order complained of, Iowa Natural Resources Council Order No. 63-49, was issued on March 15, 1963, to Green Bay Levee and Drainage District No. 2, in compliance with the specific duties and responsibilities

assigned to the Resources Council under the provisions of Section 455A.33 and 455A.36, Iowa Code, 1962. A copy of this order was forwarded to Mr. Glen G. Powers, Director, State Conservation Commission, E. 7th and Court, Des Moines, Iowa, by letter dated March 15, 1963. Said order and all other orders issued by the Resources Council approving the construction, operation and maintenance of a project in or on the floodway of a river or stream deal only with the effect of such project on the efficiency and capacity of the floodway and on flood control in the state.

"Said order was issued in accordance with the cited provisions of law on the basis of the following finding:

> * * * that the construction, operation, and maintenance of Stage I, consisting of strengthening and raising levees and realignment of the Skunk River, in accordance with the application, plans and specifications submitted by the Green Bay Levee and Drainage District No. 2, will not adversely affect the efficiency of or unduly restrict the capacity of the floodway and will be in aid of and acceptable as part of flood control in the state.

"This finding relates only to matters within the exclusive jurisdiction of the Resources Council; to wit, the effect of the construction, operation, or maintenance of such project on the efficiency or capacity of the floodway and on flood control in the state.

"In recognition of the extent of and limitations on its duties, authority and jurisdiction under the cited provisions of law, the Resources Council does not make any determination as to the ownership of any of the lands affected by any project for which its approval is requested. Neither does the Resources Council determine or rule upon the legal sufficiency of any easements, rights of way or other documents relating to ownership, dominion and control over lands affected by a proposed project.

"In seeking Resources Council approval of said project in or on the floodway of the Skunk River and in thereafter constructing such project, said district is responsible for determining ownership of affected lands and obtaining any consent required from the owners of such lands in accordance with Condition (6) of Order No. 63-49, set out below:

> (6) The applicant shall secure, prior to construction, such easement and rights-of-way as are required for the construction, operation, and maintenance of the approved works.

"Although the Iowa Natural Resources Council has an official interest in the effect of any project on fish and wildlife and feels that the project approved in the order complained or represents a net benefit to the people of the State of Iowa, said order makes no determination regarding the effect of such project on fish and wildlife and, as previously pointed out, provides no authority to the applicant to construct said project on lands not under its dominion and control.

"Inasmuch as the order complained of deals solely with matters which would seem to be within the exclusive jurisdiction of the Iowa Natural Resources Council and makes no determination of matters under the jurisdiction of the State Conservation Commission, an official opinion of the Attorney General is requested as to whether a 'dispute' within the meaning of Code Section 679.19, can exist between two state departments where there is no concurrent jurisdiction over the subject matter in 'dispute'.

"If it is determined that dispute does exist, the opinion of the Attorney General is requested as to the following:

"Whether arbitration under Code Section 679.19 is the proper method of resolving such dispute inasmuch as the real party in interest, Green Bay Levee and Drainage District No. 2, has no part in the arbitration proceedings and, under the terms of said section, has no recourse to the courts from the award of the arbitration board.

"Whether the request for arbitration represents an official action of the State Conservation Commission supported by appropriate entries in the official minutes of the Commission and that a timely request for arbitration was made pursuant to such official action.

"The areas in which concurrent jurisdiction exists and are therefore considered to be appropriate areas for arbitration between the Iowa Natural Resources Council and the State Conservation Commission."

Flood control is within the jurisdiction of the Iowa Natural Resources Council by virtue of §455A.18, Code of Iowa, 1962, which provides:

"The council shall have jurisdiction over the public and private waters in the state and the lands adjacent thereto necessary for the purposes of carrying out the provisions of this chapter. The council shall make a comprehensive study and investigation of all pertinent conditions of the areas in the state affected by floods; determine the best method and manner of establishing flood control; adopt and establish a comprehensive plan for flood control for all the areas of the state subject to floods; and determine the best and most practical method and manner of establishing and constructing the necessary flood control works. The council may construct flood control works or any part thereof. The council is authorized to perform such duties in co-operation with other states or any agency thereof or with the United States or any agency of the United States, or with any person as defined in this chapter.

"The council shall procure and obtain flood control works from and through or by co-operation with the United States, or any agency of the United States, by co-operation with and action of the cities, towns and other subdivisions of the state, under the laws of the state relating to flood control and water use, and by co-operation with and action of landowners in areas affected thereby.

"The council shall make surveys, and investigations of the water resources of the state and of the problems of agriculture, industry, conservation, health, stream pollution and allied matters as they relate to flood control and water resources, and shall make and formulate plans and recommendations for the further development, protection, utilization, and preservation of the water resources of the state.

"Upon application by any person for permission to divert, pump, or otherwise take waters from any watercourse, underground basin or watercourse, drainage ditch or settling basin within the state of Iowa for any purpose other than a nonregulated use, the council shall cause to be made an investigation of the effect of such use upon the natural flow of such watercourse and also the effect of any such use upon the owners of any land which might be affected by such use and shall hold a hearing thereon."

However, jurisdiction over meandered streams and meandered lakes is conferred upon the Conservation Commission by virtue of §111.18, Code of Iowa, 1962, which provides:

"Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other body for state purposes, is conferred upon the commission. The exercise of this jurisdiction shall be subject to the approval of the Iowa natural resources council in matters relating to or in any manner affecting flood

control. The commission, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

The exercise of this jurisdiction, however, is subject to the approval of the Iowa Natural Resources Council in matters relating to or affecting flood control.

In establishing the Iowa Natural Resources Council, it appears from §455A.2, Code of Iowa, 1962 and the explanation of House File 2, 53rd G.A., that it was the legislature's intention to make the Iowa Natural Resources Council the dominant authority over all other agencies, state and local, whose activities relate in any way to the conservation of water resources and flood control. However, §111.4, Code of Iowa, 1962, prohibits any person. . . from erecting or building any pier, wharf, sluice, piling, wall, fence, obstruction, building or erection of any kind upon or over any stateowned land or water under the jurisdiction of the commission, without first obtaining from such commission a written permit.

The Conservation Commission is prohibited from issuing any permit if the same would affect flood control, without the approval of the Iowa Natural Resources Council. However, by virtue of this statute, the Conservation Commission must, in the first instance, issue the permit which apparently it has not done in the instant case. Thus it appears from the language employed in §111.4, 1962 Code of Iowa, the Iowa Conservation Commission and the Iowa Natural Resources Council have concurrent jurisdiction in the matter of issuing a permit for the construction of the above enumerated matters, when the same involves a meandered stream as well as affects flood control.

It also appears that the legislature, by virtue of this statutory language, has set up a balancing of the powers of the separate agencies to control the possibilities of a difference in the primary policies of the two agencies. It is obvious that both agencies have a definite and worthwhile interest in the matter at bar, and it appears from the legislative enactments hereinbefore discussed, that the legislature recognized these interests by conferring authority to both.

Section 679.19, 1962 Code of Iowa, provides:

"Disputes between governmental agencies. Any litigation between administrative departments, commissions or boards of the state government is prohibited. All disputes between said governmental agencies shall be submitted to a board of arbitration of three members to be composed of two members to be appointed by the departments involved in the dispute and a third member to be appointed by the governor. The decision of the board shall be final."

Examination of the explanation of House File 495, 58th G.A., which subsequently became the above quoted statute reveals:

"This bill would prevent litigation between state departments over disputes of questions of law or fact. Such litigation is expensive, time-consuming and wasteful of public funds. Legal counsel is employed on both sides and in many cases such litigation continues for years. This bill would submit such internecine disputes to arbitration."

The meaning of the phrase "all disputes" is clarified by the explanation above, wherein it provides that the bill is designed to prevent litigation between state departments over disputes of questions of law or fact.

Your attention is invited to *In Re Robinette,* 211 Minn. 223, 300 N.W. 798

(1941), wherein that Court held in discussing the meaning of dispute, the following:

"We need only consider the claimed error that the court erred in denying the motion to dismiss for want of a dispute. . . .There is no 'dispute' except where there is a matter of either law or fact asserted on one side and denied on the other."

The legislature's choice to employ the word "all" in §679.19 cannot go unobserved. The Iowa Supreme Court in *Cedar Rapids Community School District v. City*, 252 Iowa 205, 106 N. W. 2d 655, held that the word "all" does not admit to exceptions which are not specified. Thus the legislature's failure to provide exceptions in §679.19 includes all disputes between governmental agencies whether they be of fact or of law.

Thus, it is our belief that a dispute has arisen within the meaning of §679.19 between the Conservation Commission and the Iowa Natural Resources Council which should be submitted to arbitration under the statute as therein provided.

The interest of the Green Bay Levee and Drainage District must rise or fall on the authority of the state agencies, for without the authority of the Iowa Natural Resources Council to proceed in this matter, the Green Bay Levee and Drainage District has no authority to proceed in the matter at hand. While this drainage district has an interest in the same, it is our belief that the primary interest is in the State of Iowa and its populace whether or not the matter concerned its flood control or conservation.

Your third inquiry pertains to an administrative matter outside the scope of the Department of Justice and probably one to be submitted to arbitration inasmuch as a dispute does, in fact, exist.

Your fourth inquiry pertains to questions which may arise in the future and, as such, exceeds the function of this department inasmuch as the same would involve conjecture, speculation and prediction.

3.5

CONSERVATION: Federal Aid, State Conservation Commission legal sponsors—§107.24, 1962. Code. State Conservation Commission may qualify as legal sponsor under Public Law 566 within purview of applicable chapters of Iowa Code, 1962.

May 2, 1963

Mr. W. H. Greiner, Director
State Soil Conservation Committee
L O C A L

Dear Mr. Greiner:

This is to acknowledge your letter of March 1, 1963, wherein you request an opinion upon the following:

"The State Soil Conservation Committee acts as the Governor's official agency for approving or disapproving Public Law 566 watershed applications. The Public Law 566 watershed program is a program whereby federal funds are used to do engineering and construction work in approved watershed projects throughout the state.

"When an application is submitted to the State Soil Conservation Committee from a local group. it is necessary that an official body act as a legal sponsor of the application. All applications received thus far by

the Committee have a local soil conservation district as legal sponsor and several of them have county boards of supervisors and, still others, cities and towns, and drainage districts. The Attorney General's office, in past opinions, has ruled all of these agencies can act as a legal sponsor of a Public Law 566 watershed.

"It has been a policy of the State Soil Conservation Committee to ask for a ruling from the Attorney General's office regarding official sponsors of watershed projects when the need arises. Until recently there have not been any projects where the State Conservation Commission could cooperate and act as a sponsor. However, there are several projects in the state being studied at the present time where soil conservation districts and the Conservation Commission could cooperate with a mutual advantage for both groups, as well as the public, in providing recreational areas. For this reason, the State Soil Conservation Committee feels that the State Conservation Commission should be a legal sponsor.

"If agreements were entered into by the Conservation Commission and soil conservation districts, they would be in accordance with the rules and regulations as set forth in the Federal Act governing Public Law 566 projects and also the rules and regulations governed by the statutes of Iowa. Needless to say, there are many opportunities where the Conservation Commission and districts could cooperate through the watershed program and provide the general public with some very useful recreational areas."

Public Law 566 as amended provides in pertinent part:

"Be it enacted. . . that erosion, floodwater and sediment damages in the watershed. . . cause loss of life and damage to property, constitute a menace. . . that the Federal Government should cooperate with the states. . . and other local public agencies for the purpose of preventing such damages and of furthering the conservation, development, utilization. . ."

Section 2 of this Act provides in part:

"Works of improvement . . ." "any undertaking for" . . .

"(1) Flood prevention

"(2) The conservation, development, utilization, and disposal of water. . .

"Local organization—is in part defined as 'or any other agency having authority under state law to carry out, maintain and operate the work of improvement'."

Section 4 of this Act requires as a condition precedent to federal cooperation that the local organization have the authority to *acquire lands by condemnation or otherwise,* and further provides therein in connection with "works of improvement", that the Federal Government will bear one-half the cost if any "local organization" agrees to *operate and maintain any reservoir or other area included in a plan for public fishing* or *wild life* and *recreational development.*

Section 107.24, Code of Iowa, 1962, provides in part:

"The commission is hereby authorized and empowered to:

"(1) . . .

(2) *Acquire by purchase, condemnation, lease, agreement, . . . lands or water* suitable for the purpose hereinafter enumerated, and rights of way thereto, and *to maintain the same for the following purposes to wit:*

"(a) Public hunting, fishing . . . *grounds and waters.* . . to provide areas in which any person may hunt, fish. . ."

"(3) Extend and consolidate lands or water suitable for the above purposes by exchange for other lands or waters *and to purchase, erect and maintain buildings* necessary to the work of the commission."

Subsection (9) thereunder states that the commission is authorized to "provide for the protection against fire and other destructive agencies on state or privately owned. . . areas, *and to cooperate with federal and other state agencies in protection programs approved by the conservation commission. . . .*"

Since the commission is specifically empowered to acquire lands, maintain the same, erect and maintain buildings, and to cooperate with the federal agency in protection programs, it becomes clear that the State Conservation Commission is a local organization within the meaning of Public Law 566 and is vested with the authority to become a legal sponsor within the meaning of that Act.

3.6

CONSERVATION: Petition for formation of soil conservation subdistrict—§§467A.7(4), 467A.14, 467A.15, 1962 Code. 1. Petition for such formation of subdistrict must accurately describe included land so that its boundaries are ascertainable. Petition not required to list names of all interested persons, but must be signed by 65% of landowners in proposed subdistrict. Expenses incident to formation of subdistrict may, in its discretion, be paid by district under §467A.7(4), or must otherwise be borne by petitioners. 2. In order to give adequate legal notice under §467A.15, including "interested parties" not of record, complete and accurate description of included land must be given in such notice. Posting of bond to cover costs of publication of notice is question for negotiation with publisher, but costs of such bond would be justifiable expense payable by district.

January 14, 1963

Mr. William H. Greiner
Director
State Soil Conservation Committee
L O C A L

Dear Mr. Greiner:

We have your letter requesting the opinion of this office in regard to the following:

"Several questions have arisen in connection with the formation of a subdistrict under the Soil Conservation District law as set out in Chapter 467 A of the 1958 Code. There are several persons in our county who are proposing to form a subdistrict as set out in Sections 467A.13 and the following sections. The following questions have arisen concerning the procedure thereunder:

"1. Does the petition need to set out an accurate description of the land involved in the subdistrict by legal subdivision, and also by setting out the portion of a farm which would be affected by said district? If such an accurate description is necessary, setting forth the description of the land, the owners and lienholders of same, would the expense of preparing such information be borne by the petitioners? By expense, I would refer to such items as abstracting, determination of legal boundaries, descriptions, etc.

"2. With reference to Section 467A.15 concerning notice to be published in the paper,—does the notice as described in this section require a complete and accurate description by legal subdivision of all the land in the proposed district, and also require that the names of all owners and lienholders, and all others interested in the land be set out in a detailed

and rather expensive nature, who is to bear the original cost of same? Would it be proper to require the petitioners to file a bond, or other form of security of payment, to guarantee the cost of this publication and other expenses entailed by notice and hearing on the petition, or should the petitioners be free of such expense, and same be borne by the Soil Conservation District itself, in the event the district is not formed and no tax is then levied for the purpose of paying the expenses incurred?"

1. Iowa Code §467A.14 requires that the petition contain "an intelligible description by congressional subdivision, or otherwise, of the land suggested for inclusion in the subdistrict." In our opinion, this language requires that the included land be described with such sufficient accuracy and detail that its boundaries are ascertainable by reference to the description. In many cases, facts would possibly require that a portion of a farm be described. While the land must be accurately described, we find no requirement in Chapter 467A that the petition list the names of persons with interests therein, other than the requirement that the petition be signed by sixty-five percent of the landowners in the proposed subdistrict.

Iowa Code §467A.7(4) empowers soil conservation districts to:

"* * * co-operate, or enter into agreements with, and within the limits of appropriations duly made available to it by law, to furnish financial or other aid to any agency, governmental or otherwise, or any owner or occupier of lands within the district, in the carrying on of erosion-control and watershed protection and flood prevention operations within the district, subject to such conditions as the commissioners may deem necessary to advance the purposes of this chapter."

Thus, expenses incident to the formation of a subdistrict may, in our opinion, be paid by the district, subject to the discretion of the district commissioners. If expenses are not paid by the district, they must, of course, be paid by petitioners.

2. If the notice referred to in §§467A.15 and 467A.16 did not contain a complete and accurate description of all land sought to be included in the subdistrict, legal notice would not, in our opinion, be accorded to those "interested parties" referred to in §467A.15 whose interests are not of record in the offices of the county auditor and recorder. This section grants a hearing to all interested parties, not those with recorded interests. Therefore, the land must be completely and accurately described in said notice. Again, the notice must, by the terms of §467A.15, be given to all owners, lienholders and encumbrancers of record. Since notice is by publication only (§467A.16), such notice should contain the names of those to which it is directed. Here again, the costs may be borne by the soil conservation district under §467A.7(4). Whether a bond should be posted to cover the costs of publication of notice is not a legal matter, but a question for negotiation with the publisher. The cost of such a bond, however, is, in our opinion, a justifiable expense which could be paid by the district.

3.7

CONSERVATION: Watersheds, contracting officer – §§467A.6, 467A.7, 467A.20, 1962 Code. Contracting officer entitled to actual expenses incurred performing required duties.

May 5, 1964

Mr. William H. Greiner, Director
State Soil Conservation Committee
L O C A L

Dear Mr. Greiner:

This is in reply to your recent inquiry wherein you submit the following:

"Under Public Law 566 concerning Watershed Projects, a contracting officer is appointed by the soil conservation district or subdistrict involved. He is usually a citizen who generally lives within the watershed and is sometimes a commissioner of the soil conservation district.

"The contracting officer's job is to administer the contracts let by the Federal government in watershed projects, and to supervise some of the proceedings.

"Is it a lawful expenditure to pay this contracting officer's actual expenses and mileage out of subdistrict funds obtained under Sec. 467A.20, Code of Iowa, 1962?"

In reply thereto, we advise as follows: Sec. 467A.6, Code of Iowa, 1962, provides in pertinent part:

"A commissioner shall receive no compensation for his services, but he may be paid expenses, including traveling expenses, necessarily incurred in the discharge of his duties, if funds are available for that purpose. * * * *The commissioners may delegate to their chairman, to one or more commissioners, or to one or more agents, or employees, such powers and duties as they may deem proper.*"

Sec. 467A.7, Code of Iowa, 1962, subsection (7), in enumerating the powers of soil conservation districts and the commissioners thereof, provides in part:

"To construct, improve, and maintain such structures as may be necessary or convenient for the performance of any of the operations authorized in this chapter."

We have previously held that a soil conservation district has the authority to cooperate with the Federal government as a sponsor under Public Law 566 in the construction of watershed projects. Forrest to Greiner, January 28, 1957. It is, therefore, clear that by virtue of the above statutory language that a commissioner serving in the capacity of a contracting officer necessarily, in the discharge of his duties, incurs expenses and is entitled to be paid his actual expenses, including travel expenses, if the funds are available for that purpose. It is clear that the construction of a watershed project constitutes a work of improvement within the boundaries of a soil conservation district. Forrest to Greiner, January 28, 1957.

Sec. 467A.20, Code of Iowa, 1962, provides in pertinent part:

"* * * A sub-district shall have the authority to impose a special annual tax, the proceeds of which shall be used for the repayment of actual and necessary expenses incurred to organize the sub-district, to acquire land or rights or interests therein by purchase or condemnation, repair, alteration, maintenance and operation of the present and future works of improvement within its boundaries."

We are, therefore, disposed to the belief that a commissioner serving in the capacity of a contracting officer can be paid his actual expenses, including mileage, under §467A.20.

Your attention is again invited to §467A.6 and the pertinent language:

"The commissioners may delegate to their chairman, to one or more commissioners, or to one or more agents, or employees, such powers and duties as they may deem proper."

The right of an individual to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the Code, conferring it either directly or by necessary implication. *Good v. Tyler,* 186 Southern 129; *Madden v. Riley,* 128 Pacific 2d, 602. However, where a

public duty is required of an individual without express provision for any compensation, the expense should be borne by the public for whose benefit it is done. *Hulsizer v. Northampton County,* 19 Pa. Co. 385.

In *Schanke v. Minden,* 250 Ia. at Page 310, we find the Iowa court stating:

"It is well settled that a municipality may reimburse an officer for expenses actually incurred which are reasonably required in carrying out the duties of his office. In the absence of constitutional restriction, an officer *may be allowed repayment of the expenses actually incurred by him in the performance of* his official duties. When a duty is required of an officer, and no provision is made for expenses, they are properly charged to the public body for whose benefit it is done, but he is allowed only the actual expense; any excess over the actual cost is an increase in compensation * * * ".

The commissioner having authority to perform the duties in question and having the authority to delegate such powers and duties as they may deem proper, it is our belief that a contracting officer appointed by the commissioners of a soil conservation district is entitled to be paid his actual expenses, including traveling expenses, which are incurred in the discharge of his duties.

3.8

CONSERVATION: Water sheds, co-sponsorship – §§111A.7, 397.26, 1962 Code. County conservation board and board of trustees of waterworks have authority to be co-sponsors under Federal law to operate and maintain a reservoir or similar area.

April 8, 1964

Mr. Clinton Ryan
County Attorney of Poweshiek County
Brooklyn, Iowa

Dear Mr. Ryan:

"The Town of Montezuma, Iowa, is the owner of Diamond Lake located adjacent to the town, covering a water area of something over one hundred acres. This lake is the water supply for the Town of Montezuma, Iowa, and is under the control of a Board of Trustees, duly appointed under the provisions of Chapter 397 of the Code of Iowa. This lake is open to the public for fishing and recreational purposes.

"Due to the fact that a great deal of the land lying above the lake is farmed, a serious silting problem has developed, which in some years to come, will ruin the lake unless conservation measures are taken.

"Surrounding this lake, to a great extent, is land owned by Poweshiek County, Iowa, which is under the supervision and control of the Poweshiek County Conservation Board. This land is being developed as a park and recreational area for use by the general public.

"The Federal Soil Conservation Service has adopted a water shed area on the farm land adjoining the Conservation park area and proposes to construct nine retaining dams for the purpose of conserving the farm land, and also to prevent further silting of Diamond Lake. The Soil Conservation Service requires that this project be sponsored by a public body, the sponsorship involving only the maintenance of the said dams. All construction costs would be paid by the Federal Conservation Service. The maintenance cost of like projects totals approximately $210.00 per year as an average.

"The questions upon which an Attorney General's opinion is requested are as follows:

"1. Does the Board of Trustees of the Montezuma Water Works Board have authority to sponsor this project and assume the obligation of maintenance of the dams for the protection of its water works supply?

"2. Does the Poweshiek County Conservation Commission Board have authority to join and be a co-sponsor of the project set out in one above?"

In reply thereto, we advise as follows: Public Law 566, as amended, provides in pertinent part:

"Be it enacted . . . that erosion, floodwater and sediment damages in the watershed . . . cause loss of life and damage to property, constitute a menace . . . that the Federal Government should cooperate with the states . . . *and other local public agencies for the purpose of preventing such damages and of furthering the conservation, development, utilization. . .*"

Section 2 of this act provides in part:

"Works of improvement . . ." "any undertaking for" . . .

(1) Flood prevention

(2) The conservation, development, utilization, and disposal of water. . .

"Local organization—is in part defined as 'or any other agency having authority under state law to carry out, maintain and operate the work of improvement'."

Section 4 of this act requires as a condition precedent to federal cooperation that the local organizations have the authority to *acquire lands by condemnation or otherwise,* and further provides therein in connection with "works of improvement," that the Federal Government will bear one-half of the cost if any "local organization" agrees to *operate and maintain any reservoir or other area included in a plan for public fishing* or *wild life* and *recreational development.*

Section 111A.7, Code of Iowa, 1962, provides in pertinent part:

"111A.7 Joint operations. *Any county conservation board may cooperate with the federal government* or the state government or any department or agency thereof to carry out the purposes and provisions of this chapter. Any county conservation board may join with any other county board or county boards to carry out the provisions of this chapter, and to that end may enter into agreement with each other and may do any and all things necessary or convenient to aid and to cooperate in carrying out the provisions of the chapter. *Any city, town, village or school district may aid and cooperate with any county conservation board or any combination thereof in equipping, operating and maintaining any parks, preserves, parkways, playgrounds, recreation centers, and conservation areas,* and for providing, conducting and supervising programs of activities, and may appropriate money for such purposes. The state conservation commission, county engineer, county agricultural agent, and other county officials shall render such assistance as shall not interfere with their regular employment. The board of supervisors is authorized to make available to the use of the county conservation board, county-owned equipment and operators and any county-owned materials it deems advisable." (Emphasis supplied)

It, therefore, becomes clear that a County Conservation Board may cooperate with the federal government for the purposes enumerated in Public Law 566 by virtue of the above statutory provision. It is equally clear by virtue of the above statutory provision that "any city, town, village, or school district may aid and cooperate with the County Conservation Board

or any combination thereof in equipping, operating and maintaining . . ." the areas enumerated in Public Law 566.

Your attention is further invited to §397.26, which confers jurisdiction upon cities for the purpose of maintaining and protecting the type of works that are set forth in Public Law 566. Chapter 397 of the Code of Iowa expressly provides a delegation of this authority held by the City to a Board of Trustees. It is, therefore, my opinion that the above legislative provisions render the Board of Trustees a local organization within the meaning of Public Law 566, and, accordingly, is vested with the authority to become a legal sponsor within the meaning of this Act.

It is also my belief that by virtue of the foregoing statutes, a County Conservation Board has clear authority to act as a co-sponsor with a water works Board of Trustees in equipping, operating and maintaining the enumerated areas set forth in Public Law 566.

3.9

Bait dealers—§§109.38, 109.63, 109.112, 110.1, 1962 Code. All persons selling bait in Iowa must have bait dealer's license. Bait dealer's license may be issued to non-residents if their state sells similar license to Iowa resident. (Yost to Speaker, Conservation Comm., 8/7/64) #64-8-1

3.10

Spear Fishing—§109.76, 1962 Code. Person spearing fish below surface of body of water is enclosed, and, as such, is in violation of §109.76. If at the time he is materially hidden from view, which is a factual question. (Yost to Speaker, Director State Conservation Comm., 2/26/64) #64-26-2

CHAPTER 4

CONSTITUTIONAL LAW

STAFF OPINIONS

4.1

CONSTITUTIONAL LAW: Appropriations, Budget and Financial Control Committee—S.F. 460, Ch. 55, Acts 60th G.A. Since S.F. 460 has now been enacted into law, its constitutionality is presumed and must by law be defended by the Attorney General; Committee must carry out duties imposed thereby; members of Committee exercising said duties are immune from civil liability.

August 1, 1963

Honorable Clifford M. Vance
Senator
Mount Pleasant, Iowa

Dear Senator Vance:

Reference is herein made to the following questions recently submitted by you in behalf of the Budget and Financial Control Committee and to confirm an oral opinion given at that time:

> "1. Should the Budget and Financial Control Committee carry out its duties under S.F. 460, which bill the Attorney General had previously indicated would be unconstitutional before it was signed by the Governor, and
>
> "2 Do the members of the Budget and Financial Control Committee subject themselves to civil liability for carrying out their duties under S.F. 460?"

1. It is to be observed that at the time the opinion of the Attorney General was given, S.F. 460 was only a proposed bill and had not been enacted into law. Since this bill has been enacted, it is now the duty of the Attorney General to defend its constitutionality. This is in accord with the position previously taken repeatedly by this office. See e.g.i. 1936 *O.A.G.* 336. This described duty is based upon the presumption of the constitutionality of duly enacted statutes until *judicially* determined otherwise. Its bearing upon public officers was accordingly described in the case of *State v. Fairmont Creamery Co.*, 153 Iowa at page 706:

> "To speak accurately, the constitutionality of an act is not dependent upon an affirmative holding to that effect by the court. It is the province of the court only to determine whether a legislative act in question is or is not 'clearly, plainly, and palpably' unconstitutional. The legislative and executive departments of government are under the same responsibility to observe and protect the Constitution as is the judicial department. This responsibility is always present in the enactment by the Legislature, and approval by the executive, of all legislation. The constitutionality of all proposed legislation must be determined in the first

instance by such co-ordinate branches of the government. Within the zone of doubt and fair debate such determination is necessarily conclusive. For the court to enter that zone would of itself be an offense. . ." . "

2. The authorities are in accord that as a general rule the members of legislative bodies cannot be held personally responsible in civil actions based upon their vote cast in the exercise of their discretion vested in them by virtue of their office. *Tenny v. Brandhove,* 341 U.S. 367 (1951); *Kilbourn v. Thompson,* 103 U.S. 168 (1881); *Lough v. Estherville,* 122 Iowa 479, 98 N.W. 308 (1904); *McHenry v. Sneer,* 56 Iowa 649, 10 N.W. 234 (1881). The scope of the immunity has been held to attach to acts or speeches of legislators in legislative committees. *Tenny v. Brandhove, supra.*

This immunity has been placed around legislators while engaged in the discharge of their legislative duties, not for their private indulgence, but instead for the public good. 49 *Am. Jur.,* States, Territories and Dependencies, §45.

Nor has the Iowa Supreme Court seen fit to rule otherwise even though the legislation was known to be in violation of the constitutional provisions. Thus, in *Lough v. Estherville,* supra, it was held that the city councilmen cannot be held personally liable for so voting as to create a municipal indebtedness for a lawful purpose in excess of the constitutional limit, even though they knowingly did so. In addition, the Court stated as follows:

"It has always been the law that a public officer who acts either in a judicial or legislative capacity cannot be held to respond in damages on account of any act done by him in his official capacity. His act may be void as in excess of jurisdiction, or otherwise without authority of law, and he may be subject to impeachment and removal from office for corrupt practice, but he cannot be mulcted in damages."

In conclusion, since S. F. 460 has now been enacted into law, its constitutionality is presumed and must by law be defended by the Attorney General. The Budget and Financial Control Committee must carry out the duties imposed on it by S. F. 460. A legislator occupying a position on the Budget and Financial Control Committee and exercising those duties as a member of that committee is immune from civil liability.

4.2

CONSTITUTIONAL LAW: Appropriations, delegation of power--S.F. 460, 60th G.A., Art. III, §21, Iowa Const. S.F. 460 appropriation of two million dollars to the Budget and Financial Control Committee, to be expended by Committee pursuant to terms of such Act, held unconstitutional as constituting delegation of legislative power as well as exercise of executive powers.

June 14, 1963

Honorable Harold E. Hughes
Governor
State of Iowa
L O C A L

My dear Governor:

This is in response to your letter of recent date in which you submitted the following:

"I have in my possession Senate File 460 of the Sixtieth General Assembly, an act creating the general contingent fund of the state for the biennium beginning July 1, 1963, and appropriating thereto the sum of

two million dollars ($2,000,000.00) from the general fund of the state, specifying the purposes for which the appropriation is made of the fund.

"Your opinion of May 13, 1963, to Representative Halling concerning the powers of the Budget and Financial Control Committee indicated that Senate Files 465 and 466 of the Sixtieth General Assembly apparently entail unconstitutional delegation of power to members of the legislative branch of the Iowa Government.

"In view of your citation of People v. Tremaine, 252 N.Y. 27, 168 N.E. 817 (1929) in the aforementioned opinion, is the provision of Senate File 460 stating that 'said contingent fund shall be administered by the Budget and Financial Control Committee' equally unconstitutional under the Iowa Constitution, Article III, section 1? Does this provision violate the well-known tenet of constitutional law stating that, '. . . where under the constitution the legislative power appropriates funds and, except as to legislative and judicial appropriations, the administrative or executive power expends the money so appropriated, members of the legislature cannot be appointed to expend moneys so appropriated. . . .' 16 C.J.S., Constitutional Law, sec. 130?

"In this connection, your attention is called to In Re Opinion of the Justices, 19 N.E. 2d 807 (Mass. 1939).

"Since I view these questions as having considerable bearing on the conduct of our state government, I would appreciate your giving this matter you most prompt attention."

The action of the legislature in appropriating two million dollars to the Budget and Financial Control Committee under the provisions of Senate File 460 constitutes an absolute act of the legislature, unmodified and unqualified or diluted in any respect by or through the acts of others or other laws. It is my opinion that this is the major premise of the solution to the problem that you submitted. Thus, as to the appropriation of two million dollars to the Budget and Financial Control Committee, if it is not an absolute appropriation, its constitutionality is in question.

That it is not absolute is determined by the power bestowed on the Committee by the foregoing numbered Act. These powers, as defined there, are that it is required that said fund shall be administered and allocations made therefrom only for contingencies arising during the biennium which are legally payable from the funds of the State; that allocations may be made for compensation of the expenses of members of the Budget and Financial Control Committee, and that the only limitation on its power of allocation is that no money shall be allocated for any purpose or project which was presented to the General Assembly by way of a bill and these bills failed to become laws.

It seems clear, therefore, that the appropriation so made is not constitutional. Thus, the Committee may amplify prior commitments made to the executive branch by the legislature and may spend money to meet contingencies. Either or both powers are vested in the Committee over the money appropriated to it by the legislature.

The Committee, in performing its duties under the foregoing Act and exercising the powers there given, is either acting in an executive capacity or is using delegated legislative powers. In either situation, they are acting unconstitutionally. This situation does not have exact precedent in Iowa. However, see 1958 *O.A.G.* 62, where it is said:

"The legislature cannot delegate legislative power, but it can grant fact-finding and administrative authority to boards and commissions, and make the operation of statutes conditional upon the findings of these bodies. If the appropriations made by the legislature are not absolute,

the power of redistribution given to the council and budget director is akin to the power of appropriation itself; but if the appropriation of the legislature is absolute subject to be used only upon the council's and budget director's determination of the existence of a necessity, then it may be said that only ministerial power has been delegated and the power placed in the Executive Council and budget director is entirely proper. As it is obvious that a deficiency cannot be foreseen and that when it arises legislative action is likely to be impossible, it seems entirely proper that some agency should be provided to remedy the situation. One of the primary functions of the Executive Council being the conduct of the affairs during the adjournment of the legislature, the delegation of the power to it seems entirely appropriate unless other constitutional restrictions intervene."

Your attention is directed to the case of *People v. Tremaine,* 252 N.Y. 27, 168 N.E. 817, referred to in opinion submitted to Representative Halling, where an appropriation act of the legislature provided that no part of the appropriation should be expended except upon the approval of the Governor and the chairman of the Senate Financial Committee and the chairman of the Ways and Means Committee. With respect to that situation, and pertinent to the situation considered, it was said in 91 *A.L.R.* 1512, the following:

"The principal question raised in People v. Tremain (N.Y.) supra, was whether the legislature could constitutionally attach to the appropriations the condition requiring approval of the two chairmen, the governor having insisted upon the unconstitutionality of such a condition; and it was decided that the designation of such chairman to approve the segregations amounted to the making of civil appointments by the legislature, in violation of a constitutional provision that no member of that body should receive any civil appointment. In reply to the contention that the duties so attempted to be conferred on these chairmen were reasonably incidental to the performance of their duties as members of the legislature, the court said that the new duties were administrative and that the legislature attempted to make two of its members ex officio its executive agents to carry out the law. And the court further pointed out that, if the appointments should be regarded as legislative in character rather than administrative, they were void as unauthorized delegations of legislative power over appropriations. A specially concurring judge who disagreed with the holding that the constitutional provision against appointment to a civil office was violated expressed the view that the requirement of approval by the two chairmen was equally illegal as an attempt to clothe members of the legislature with administrative functions after the appropriation had been made."

The case of *In re Opinions of the Justices,* 302 Mas. 605 (1939) 19 N.E. 2d 807, referred to by you, is not authority otherwise. Under a statute of the State of Massachusetts, appropriation was made to a special recess commission with powers to expand the monies in accordance with this appropriation. However, the point labored here is discussed in these terms:

"* * * If the power conferred by the bill on this recess body were to be regarded as legislative in nature, it would be a legislative power of appropriation which cannot be delegated. But we are of opinion that the power so conferred upon the Governor, is executive or administrative in nature and may be conferred upon an executive or administrative board, that such a board may be established by law outside the State departments as 'officers serving directly under the governor' in accordance with the provisions of art. 66 of the Amendments, and that the bill and the proposed amendments thereto providing for a special recess commission or committee purport to establish such a board."

Thus, while holding that the power conferred upon the recess committee is administrative or executive in nature, the members of the legislature acting upon such committee are deemed to hold a civil office within the meaning of the Massachusetts Constitution, performing administrative or executive duties, and therefore, violative of the Massachusetts Constitution. If the powers of the Budget and Financial Committee composed of legislators are determined to be administrative or executive, then, like the facts in Massachusetts case, these legislators are met with Art. III, §21, of the Constitution of Iowa, which provides as follows:

> "Members not appointed to office. Sec. 21 No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people."

It is my opinion, therefore, that the powers conferred upon the Budget and Financial Control Committee by Senate File 460 are legislative in character and may not be exercised constitutionally, as either an exercise of legislative power or an exercise of executive powers contrary to the Constitution.

4.3

CONSTITUTIONAL LAW: **Appropriations, self-sufficiency**—Ch. 2, Ch. 3, Acts 60th G.A., §24, Art. III, Iowa Const. The self-sufficiency of legislative appropriation act may not be affected by any act of law that modifies, qualifies or conditions this self-sufficiency.

May 13, 1963

Honorable Eugene Halling
State Representative
L O C A L

My dear Mr. Halling:

This is in answer to your request concerning the constitutionality of portions of S.F. 465 and S.F. 466. Senate File 466, §2, provides as follows:

> "Sec. 2. Before any of the funds herein appropriated shall be expended, it shall be determined by the board of control, with the approval of the budget and financial control committee, that the expenditure shall be for the best interests of the state."

Senate File 465, §17, provides in part:

> "* * * "the Board of Control) . . . shall receive the approval of both the budget and financial control committee and comptroller."

This Act also requires approval of the budget and financial control committee, and of the governor and comptroller, prior to the transfer of funds from one institution to another by the Board of Control.

Section 24, Art. 111, of the Constitution of Iowa, provides:

> "Appropriations. Sec. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law."

This is a self-sufficient provision, unmodified and unqualified and unconditioned by any act or law affecting in any way its self-sufficiency. In *Geebrick v. State of Iowa,* 5 Iowa 494, it was said with respect to this principle the following:

"This decision is in conformity with that of Rice v. Foster, 4 Harrington, 492, in which it is said:

" 'The legislature is invested with no power to pass an act which is not a law in itself, when passed, and has no authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other persons or body, by whose will, also, existing laws are to be repealed or altered and supplied.' "

By opinion of this Department dated May 20, 1957 and appearing in 1958 *O.A.G.* 58, it was held that power conferred on the Governor to reduce appropriations made by the General Assembly violated Art. 111, §24, of the Constitution of Iowa.

These authorities conform with the general rule that statutory provisions subjecting the expenditure or payment of appropriated money to the approval of the governor and other officials who are otherwise without authority to approve or disapprove expenditures are without authority. See 42 Am. Jur., Public Funds, para. 50; 91 ALR 1511. Insofar as this amounts to a delegation of power of appropriation to members of the legislative branch, see *People v. Tremaine,* 168 N.E. 827.

In view of the foregoing I am of the opinion that the cited provisions of S.F. 465 and S.F. 466 are unconstitutional.

4.4

CONSTITUTIONAL LAW: Eminent domain, delegation of power—Ch. 106, Acts 60th G.A. Constitutionality of grant of power of eminent domain to private corporations subject to approval of State Conservation Commission, contained in §15 of S.F. 19 is dependent upon purpose for which property sought to be acquired by this power is to be used, since said power may not be used to acquire private property for private purpose; and in order to determine whether such purpose is private or public, it remains to examine each individual act of proposed exercise of power.

March 21, 1963

The Honorable A. V. Doran
State Senator
L O C A L

Dear Senator Doran:

Reference is herein made to your oral request for opinion as to the constitutionality of §15 of Senate File 19, which is set out below:

"Sec. 15. Eminent Domain. Any municipality or corporation having secured a permit for the establishment of a water recreational area as in this chapter provided, shall thereupon be vested with the right of eminent domain to such extent as may be necessary and as prescribed and approved by said state conservation commission in order to appropriate for its use for water recreational area purposes and facilities normally associated therewith for the use of the public any land which the commission shall have found to be suitable and in the public interest for said purposes and in connection therewith may appropriate such other interests in property as may be required to establish, maintain and operate said water recreational area and facilities normally associated therewith."

The answer to such question is governed by the following legal premises:

"Private property shall not be taken for public use without just compensation first being made. . . ." (Art. I, §18, Iowa Cons.).

The exercise of the power of eminent domain is limited to the taking of private property for a public use, and it cannot constitutionally be exercised to take private property for private use. *Stewart v. Board of Supervisors of Polk County,* 30 Iowa 9; *Wertz v. City of Ottumwa,* 201 Iowa 947, 209 N.W. 511; *Ferguson v. Illinois Central Railroad Co.,* 202 Iowa 508, 210 N.W. 604; *Carroll v. City of Cedar Falls,* 221 Iowa 277, 261 N.W. 652; *City of Emmetsburg v. Central Iowa Telephone Co.,* 250 Iowa 768, 94 N.W. 2d 445.

The exercise of the power of eminent domain may be delegated to a private corporation or individual to authorize the taking of private property for a public purpose. *Stewart v. Board of Supervisors of Polk County,* 30 Iowa 9; *Sisson v. Board of Supervisors of Buena Vista County,* 128 Iowa 442, 104 N.W. 454; *Mid-America Pipeline Co. v. Iowa State Commerce Commission,* 114 N.W. 2d 622.

The taking of private property for the construction of a public park or recreation area such as a lake is a public purpose, to which the power of eminent domain may be applied. *Herman v. Board of Park Commissioners of City of Boone,* 200 Iowa 1116, 206 N.W. 35; *Mathiasen v. State Conservation Commission,* 246 Iowa 905, 70 N.W. 2d 158.

The initial determination of what constitutes a public use is ordinarily for the legislature, and the courts will not interfere with its determination unless it is clear, plain and palpable that the contemplated uses are private in character. *Sisson v. Board of Supervisors of Buena Vista County,* 128 Iowa 442, 104 N.W. 454; *Reter v. Davenport, R.I. and N.W. Ry. Co.,* 243 Iowa 1112, 54 N.W. 2d 863; *Ermels v. Webster City,* 246 Iowa 1305, 71 N.W. 2d 911; *Abolt v. City of Fort Madison,* 252 Iowa 626, 108 N.W. 2d 263.

In interpreting a statute involving the power of eminent domain, as in interpreting any statute, the construction which makes statute constitutional must be adopted. *Hunter v. Colfax Cons. Coal Co.,* 175 Iowa 245, 157 N.W. 146; *Mid-America Pipeline Co. v. Iowa State Commerce Commission,* 114 N.W. 2d 622. See also cases cited in opinion of the Attorney General to Representative Harold O. Fischer, dated February 20, 1963, and statement therein that it is the duty of the Attorney General to uphold the constitutionality of all legislation.

In order to avail itself of the power of eminent domain as set forth in §15 of H.F. 19, a private corporation, in accordance with the other sections of the bill, must apply to the State Conservation Commission for a permit to establish a water recreational area, must include in such application a legal description of the lands to be included with such area, the area to be inundated by the waters in such area, and the proposed plan of operation and regulations for the use of said facilities by the public; and must make and keep available for public access and use not less than 25% of the water frontage of said recreational area.

In §15 of the bill, the legislature has delegated to the State Conservation Commission the power to approve the necessity of the exercise of the power of eminent domain by a private corporation. The power so to delegate is unquestioned. *Jager v. Dey,* 80 Iowa 23, 45 N.W. 391; *Reter v. Davenport, R.I. & N.W. Ry. Co.,* 243 Iowa 1112, 54 N.W. 2d 863. This section further provides the Commission can only approve an exercise of this power ". . . for the use of the public . . ." (Line 8, §15 and) ". . . in thepublic interest. . ." (line 10, §15). Thus, the statute must be construed as allowing the power of eminent domain to be exercised only to acquire property for a public purpose. This interpretation is clearly supported by *Mid-America Pipeline Co. v. Iowa State Commerce Comm.,* 114 N.W. 2d 622, where, at page 624, the Supreme Court of Iowa states: 253 Iowa 1143 (1962).

> "We must agree that the grant of the power of eminent domain for a strictly private purpose and use, as Chapter 490 seems to authorize, is

beyond legislative authority and when the commission attempts to follow the statute in granting such right, it is acting illegally and beyond its jurisdiction. It has no right to put into effect unconstitutional provisions of a statute", and in *City of Emmetsburg v. Central Iowa Tel. Co.*, 250 Iowa 768, 96 N.W. 2d 445, where the Court states at page 778 of the Iowa report:

"If the statutes last above referred to should be construed as permitting the taking of private property for the construction of lines intended only for private use, they would be unconstitutional, and we adopt the construction which makes a statute constitutional in case of ambiguity."

The State Conservation Commission could not, therefore, constitutionally authorize the exercise of the power of eminent domain for a private purpose, and in determining whether or not a proposed use is for a public or private purpose, said Commission would do well to follow the guides set forth in *Sisson v. Board of Supervisors of Buena Vista County, supra,* at page 453 of 128 Iowa, and set out again in *Ferguson v. Illinois Central Railroad Co., supra,* at page 513 of 202 Iowa:

"It must be confessed that there is no standard by which to determine in all cases what is a public use, or what can fairly be regarded as a public benefit, and, therefore, conducive to the public health, welfare, etc. The Constitution contains no words of definition, and it seems to remain for each act which is brought forward aided, of course, by the disclosed purpose and object thereof, and by the conditions, stated or well known, upon which it is to operate, to furnish an answer to the test."

and the guides set forth below:

"It is essential to constitute a public use that the general public have the right to a definite and fixed use of the property appropriated, not as a mere matter of favor or by permission of the owner, but as a matter of right, and if the special benefit to be derived from the lands sought to be appropriated is wholly for private persons, the use is a private one, and is not made a public use by the fact that the public has a theoretical right to use it." 20 *C.J.S.* 555, Eminent Domain, §39.

In view of the legal doctrines and provisions of the proposed bill set out above, it is my opinion that the constitutionality of the grant of the power of eminent domain to private corporations, subject to the approval of the State Conservation Commission as contained in §15 of S.F. 19, is dependent upon the purpose for which the property sought to be acquired by this power is to be used. In order to determine whether such purpose is private or public, it remains for an examination of each individual act of proposed exercise of the power to furnish an answer for such determination.

It is apparent that three basic situations will arise under the act concerning the proposed use of the property sought to be acquired. They are:

1. Property which will be subdivided by the private corporation and sold to private individuals or held by it for use for corporate purposes.

2. Property which will be inundated by the waters to be impounded for the proposed water recreational area.

3. Property which will be included within the 25% or more of the water frontage which will be made and kept available for public access and use.

Applying the doctrines and standards set forth above to these three basic factual situations in the order set forth above, it is our opinion that:

1. It would be clearly unconstitutional for the State Conservation Com-

mission to approve the exercise of the power of eminent domain contained in said bill to allow the taking of private property for the purpose of use exclusively by the corporation or reselling to private individuals.

2. The State Conservation Commission must examine "the proposed plan of operation and regulations for the use of said facilities by the public," and if it finds that the public's use of said facilities is not essentially the same as the use the public has of public-controlled recreational areas, it would be unconstitutional for said Commission to approve the exercise of the power of eminent domain to acquire the property to be inundated by the waters impounded.

3. The State Conservation Commission must examine the proposed public use of the water frontage made available for public access and use, and if it finds that the public's use of that area will not be essentially the same as the use the public has of public-controlled recreational areas, it could not constitutionally authorize the exercise of the power of eminent domain for acquiring property to be used in this area.

4.5

CONSTITUTIONAL LAW: Equal protection—Ch. 286, Acts 60th G.A. Art. 1, §6, Iowa Const. Article 1, §6 of the Iowa Constitution is not violated by exempting from the operation of S.F. 11 rural electric cooperatives.

February 20, 1963

Honorable Harold O. Fischer
State Representative
L O C A L

Dear Mr. Fischer:

This is in reply to your recent request in which you raise the question of constitutionality of Chapter 286, Acts 60th G.A., as follows:

> "It is my belief that if this bill would become a law that it would be in violation of Article One, Section 6 of the Constitution of the State of Iowa. It is my further belief that this bill does have a general application to the majority of the utility consumers of the state and that the exemptions in this bill would indicate a district class exemption in the case of a rural electrical cooperative serving an area which is annexed by a city. The people within the city who would possibly be served by a public utility under control of a utility commission would have the protection of the rate making authority of the commission but those citizens served by the rural electrical cooperative would not enjoy that same protection."

Article 1, §6, of the Iowa Constitution, provides:

> "Laws uniform. Sec. 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

The uniformity of operation required by Article 1, §6, does not mean that the law must operate alike upon every citizen of the State of Iowa. A law is generally held to be uniform if it operates alike upon all within a reasonable classification. The classification, to meet the constitutional standard, must be based upon something substantial, distinguishing one class from another in such a way as to suggest the reasonable necessity for legislation based upon the classification. Under the equality clause, the only inquiry that courts will make is whether the law is uniform or arbitrary. These general principles are

well established in Iowa. See *Diamond Auto Sales v. Erbe,* 251 Iowa 1330, 105 N.W. 2d 650 (1960); *Sperry & Hutchinson v. Hoegh,* 246 Iowa 9, 65 N.W. 2d 410 (1954); *Welsh v. Darling,* 216 Iowa 553, 246 N.W. 390 (1933).

The Iowa Supreme Court has held that if there is any reasonable ground for the classification and if the law operates equally upon all of those within the same class, there is uniformity to the extent required by the Constitution. The passing of the statute itself is a legislative finding that there are sufficient differences to justify the classification. *Dickenson v. Porter,* 240 Iowa 393, 35 N.W. 2d 66, appeal dismissed 338 U.S. 843 (1949). The Iowa Court has also held statutes valid drawing distinctions between different forms of business organizations and between cooperative associations and corporations for profit. *Clear Lake Coop. Ass'n v. Weir,* 200 Iowa 1293, 206 N.W. 297 (1925); *Brady v. Mattern,* 125 Iowa 158, 100 N.W. 358 (1904). In the case of *State ex rel. Dairy v. Iowa Coop. Assn.,* 250 Iowa 839, 95 N.W. 2d 441 (1959), the Supreme Court stated at page 846:

> "If there is any rational basis for applying different benefits and immunities to co-operatives under chapter 499, the legislative discretion in extending the same is not to be lightly set aside. . . ."

In view of the above cited decisions of the Iowa Supreme Court, and considering the strong presumption in favor of the constitutionality of a statute and the burden of showing that it clearly, plainly, and palpably violates a particular constitutional provision, it is my opinion that Chapter 286, Acts 60th G.A., is not in conflict with Article 1, §6, of the Iowa Constitution.

4.6

CONSTITUTIONAL LAW: Legislature, rules of procedure—§9, Art. III, Iowa Const. Each house of General Assembly may adopt its own rules of procedure, such rules including constitutionality thereof, are not subject to review by Courts.

March 5, 1964

Honorable Eugene M. Hill
State Senator
Newton, Iowa

My dear Senator:

This will acknowledge receipt of your letter in which you submit the following:

> "Rules have been adopted by the Iowa Senate that are intended to prevent the filing of bills or joint resolutions by individual members of the Senate.
>
> "It is my contention that such action is unconstitutional and that such action makes it impossible for a duly elected Senator to represent his constituents in the General Assembly.
>
> "The rules, as adopted, are to be found on page 17 of the Senate Journal, February 24, 1964. An Opinion is requested as to the constitutionality of these rules."

In reply thereto, I would advise the following: §9 of Article III of the Constitution of Iowa provides with respect to the authority of the houses of the Legislature:

> "Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rules of proceedings, punish members for disorderly behavior, and, with the consent of two

thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the General Assembly of a free and independent State."

You will note that this section confers the powers on each house of the Legislature to "determine its rules of proceedings". This power is not limited or restricted in any respect by any other constitutional provision.

The question you present does not appear to have been considered or adjudicated by our Supreme Court. However, the extent of this power has been considered in 49 *Am. Jur.* at page 248, States, Territories, and Dependencies, that:

"Observance of the rules of a legislative body which regulate the passage of statutes is a matter entirely within the legislative control and discretion, not subject to review by the courts."

Support for this statement is found in the cited case of *St. Louis & S.F. Ry. Co. v. Gill,* 54 Ark. 101; 15 S.W. 18, and affirmed in the Supreme Court of the United States in Volume 156 at page 649, 39 L. Ed. 567.

Addressing itself to this rule, it was said in the Arkansas case, supra, the following:

"In the second paragraph it was alleged that the act of April 4, 1887, entitled 'An act to regulate the rates to be charged by railroads for the carriage of passengers,' was not passed by the several houses of the general assembly in accordance with their joint rules, and that the bill as passed did not contain any provision limiting the rates that could be charged for the transportation of passengers. The joint rules of the general assembly were creatures of its own, to be maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts. That the act as passed contained a clause limiting passenger rates was settled by this court in Dow v. Beidelman, 49 Ark. 325, 5 S.W. Rep. 297."

The Supreme Court of Arkansas reaffirmed the rule in *Bradley Lumber Company v. J. Orville Cheney,* Commissioner of Revenues, 295 S.W. 2d, 765, where it was said:

"* * * Subject to the restrictions imposed by the constitution each branch of the legislature is free to adopt any rules it thinks desirable. It follows, both as a matter of logic and as a matter of law, that each house is equally free to determine the extent to which it will adhere to its self-imposed regulations. For this reason it was held in Railway Co. v. Gill, 54 Ark. 101, 15 S.W. 18, 19, 11 L.R.A. 452, that the validity of an act is not affected by the legislature's disregard of its own rules, the court saying: 'The joint rules of the general assembly were creatures of its own, to be maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts.' "

In view of the foregoing, the constitutionality of the Senate rules referred to is not subject to review by the Court.

4.7

CONSTITUTIONAL LAW: Outdoor advertising signs, proposed legislation— H.F. 51, 60th G.A. H.F. 51, if enacted, would be held constitutional regarding outdoor advertising signs to be erected at future time, but opinion is reserved regarding the constitutionality of its application to existing signs.

February 20, 1963

Honorable Harold O. Fischer
House of Representatives
State House
Des Moines, Iowa

Dear Mr. Fischer:

This is to acknowledge you letter of February 4, 1963 in which you request an opinion as follows:

"Please furnish me with an opinion of the constitutionality of this proposed legislation. (House File 51)

"It is my observation that if passed this particular bill would deprive certain owners of the free use of their property without due process of law. In certain other instances because of the exemptions and the administrative latitude extended to the State Highway Commission, it is my further belief that this particular bill would not grant uniform provisions to all property owners concerned, because of the fact that it does not set forth a uniform application."

Specifically, your questions appear to be two, which are paraphrased as follows:

1. Whether or not House File 51 "would deprive certain property owners of the free use of their property without due process of law?"

2. Whether or not "because of the exemptions and the administrative latitude extended to the State Highway Commission", House File No. 51 would be in violation of Iowa Constitutional provisions including Art. 1, §6?

Certain legal principles govern any determination as to whether a law enacted by the legislature is constitutional. Our Supreme Court has stated that:

"all persumptions are in favor of . . . constitutionality. . ."

"We have pointed out repeatedly the General Assembly has power to enact any legislation it sees fit provided it is not clearly and plainly prohibited by some constitutional provision. Within the zone of doubt and fair debate legislation is conclusive upon us. It is plaintiff's burden to negative every conceivable basis which may support (the) act. It is not our province to pass upon the policy, wisdom, advisability or justice of a statute . . ." *Steinberg-Baum v. Countryman,* 247 Iowa 923, 77 N.W. 2d 15; *Diamond Auto Sales, Inc. V. Erbe,* 251 Iowa 1330, 105 N.W. 2d 650.

And, as stated in the case of *State v. Di Paglia,* 247 Iowa 79, 71 N.W. 2d 601:

"One challenging a statute has a burden to overcome the presumption it is constitutional and to negative every reasonable basis upon which it may be sustained."

And the case of *Knorr v. Beardsly,* 240 Iowa 828, 38 N.W. 2d 236, advises that:

"* * * the power to declare legislation unconstitutional is one which courts exercise with great caution, and only when such conclusion is unavoidable. . . It is one of the fundamentals of the law, uniformly announced that courts can declare an act void only when it violates the constitution, clearly, palpably, plainly, and beyond any reasonable doubt. . ."

These tenets are basic to any constitutional inquiry, and ordinarily preface Supreme Court decisions upon constitutionality.

Because it is the duty of the Attorney General to uphold the constitutionality of all legislation enacted by the General Assembly, he can only submit an opinion of unconstitutionality in those instances where an Act "violates the constitution clearly, palpably, plainly, and beyond any reasonable doubt. . .". Furthermore, it is improper for this office to invade the province of the legislature "to pass upon the policy, wisdom, advisability or justice" of proposed legislation.

House File 51 can readily be divided into two general categories of application. The first is as it affects existing signs; and the second relates to what new signs may be erected. The reply to question No. 1 has, therefore, been divided into two parts.

As to certain existing signs, House File 51 provides that these shall be declared non-conforming uses and public nuisances, which, if not removed after specified notice, are to be abated by legal action.

In Iowa's leading and principal case on billboard advertising, *Stoner McCray System v. City of Des Moines,* 247 Iowa 1313, 78 N.W. 2d 843 (1956), our Supreme Court held that an advertising company which had obtained all necessary permits from a city before certain signs were erected and which had invested about $600 in each sign in reliance upon the permits, established vested rights prior to the enactment of an ordinance requiring removal of non-conforming signs in certain zones within a two-year period. The Court found that the operation of the city ordinance as to such existing signs and vested rights was unconstitutional as it deprived the advertising company of its property without due process of law. The Court did point out that no contention was made by the city that any structures or billboards maintained by the advertising company were "nuisances". The Court said that "we find almost all of the authorities in agreement that a city cannot prevent the use of a sign previously erected on real property unless it is a nuisance per se."

The *Stoner McCray System* case leaves undecided in Iowa the question whether existing billboards declared a nuisance by the legislature may be required to be removed under the exercise of the police power of the State without compensation to their owners. An examination of cases regarding this question in various other states indicate that the courts have inquired as to whether or not the existing signs are or not a "nuisance". These cases have been decided both ways, with the apparent weight of authority in favor of constitutionality. *Cusack v. City of Chicago* (*supra*); *General Outdoor Advertising Co. v. Dept of Public Works,* 289 Mass. 149, 193 N.E. 799 (1935); *Opinion of the Justices,* 103 N.H. 268, 169 A. 2d 761 (1961); *New York Thruway Authority v. Ashley Motor Court Inc.,* 10 N.Y. 2d 151, 176 N.E. 2d 566, 218 N.Y.S. 2d 640 (1961); contra: *Ghaster Properties v. Preston* (Ohio, 1962) 184 N.E. 2d 552.

In the event that House File 51 were enacted into law, it would be the duty of this office to defend its constitutionality. Any litigation on this aspect of a bill would require a marshalling by both sides of evidence pro and con respectively as to the nuisance characteristics of such existing signs. A determination of the constitutionality of the abatement of affected existing signs as nuisances would involve not only matters of law but factual questions. The latter could only be weighed and finally determined upon the submitted evidence by the courts of Iowa. For this reason no legal opinion thereon is now submitted.

The case of *Stoner McCray System v. City of Des Moines, supra,* does strongly imply that the prohibition of the future erection of billboards in certain areas is constitutional. The Court there states that:

"Billboards properly may be put in a class by themselves. It may, in the future, be prohibited 'in residence districts of a city in the interests of the safety, morality, health and decency of the community'. Thomas Cusack Co. v. Chicago, 242 U.S. 526, 530, 37 S. Ct. 190, 191. . . A reasonable control or regulation of the construction and maintenance of advertising billboards by the municipalities is proper. Under liberal construction of the general welfare purposes of the state and federal constitution we note a trend to foster under police power the aesthetic and cultural side of municipal development — to prevent a thing that offends a sense of sight in the same manner as a thing that offends the senses of hearing and smelling. . . This trend, of course, must be kept within reasonable limitations and it is often been held a City may not prohibit billboards merely because such boards are unsightly. . .Aesthetic consideration can be said to enter into the matter as an auxiliary consideration where the zoning regulation has a real or reasonable relation to the safety, health, morals or general welfare of the community. . ."

These remarks apply as readily to the powers of the legislature as they do to those of a city council.

In view of the language of the *Stoner McCray System* case, the presumptions surrounding constitutionality, the burdens of one attacking the same in this state, and the weight of authority of cases from other jurisdictions, it is our opinion that the application of House File 51 in prohibiting the erection of new signs in the affected classifications would be found constitutional. To be found unconstitutional it would have to be shown conclusively that such prohibition had no relationship to the safety or the general welfare. The language of *Steinberg-Baum Co. v. Countryman, supra,* appears applicable: "Within the zone of doubt and fair debate, legislation is conclusive upon us".

In response to question No. 2, it is our opinion, assuming House File 51 would be held constitutional on all other grounds, that the exemptions as to certain advertising signs provided for by House File 51 would not be held in violation of Art. 1, §6, of the Iowa Constitution.

You have made specific inquiry as to part 3 of §3 of House File 51 which exempts "advertising devices which advertise activities being conducted at a location within twelve (12) miles of the point at which signs are located". Such provision encompasses signs erected by either the property owner or lessee, or the lease of space on such land, to advertise activities conducted upon the property or within 12 miles of the point of sign erection.

Any attack on an exemption classification established by the legislature has to overcome the strong presumption and burdens relating to constitutional challenges. If there is any reasonable grounds for the classification determined by the legislature, and if it operates equally upon all within the same class, there is uniformity in the constitutional sense and no violation of any constitutional provision; and it is not sufficient that a court may regard reasons for classification as weak or poor, or that the difference on which it is based is not great or conspicuous. *Diamond Auto Sales, Inc. v. Erbe, supra.* The courts recognize a wide discretion in the legislature to determine classes to which their acts apply. *Steinberg-Baum Co. v. Countryman, supra.* They state that in order for there to be unconstitutional discrimination in an Act, the classification therein must be so unreasonable and arbitrary that no statement of facts can be assumed which will sustain it. *Vilas v. Iowa State Board,* 223 Iowa 604, 273 N.W. 338, 346.

Cases from other jurisdictions have generally held that there is a basis to recognize a valid distinction between signs which advertise businesses conducted on the premises, including the offering for sale of property on which the signs are located, and those in the nature of general outdoor advertising. *Opinion of the Justices, supra; General Outdoor Advertising Co. v. Depart-*

ment of Public Works, supra; Cusack Co. v. City of Chicago, supra; Landau Advertising Co. v. Zoning Board of Adjustment, 387 Pa. 552, 128 A. 2d 559 (1957). It is our opinion that based upon the reasoning of these cases, our court would not find that the House File No. 51 classifications set forth in part 3 of section 3 thereof "so unreasonable and arbitrary that no plain state of facts could be assumed which sustain it".

Justice Brennan, now of the U.S. Supreme Court, speaking for the New Jersey Court in the case of *United Advertising Corp. v. Borough of Raritan* (New Jersey), 93 A. 2d 362, 365, states:

"It has long been settled that the unique nature of outdoor advertising and the nuisances sponsored by billboards and similar outdoor structures located by persons in the business of outdoor advertising, justify the separate classification of such structures for the purposes of governmental regulation and restriction. Thomas Cusack v. City of Chicago, 242 U.S. 526, 37 Sup. Ct. 190, 61 L.Ed. 472 (1917); St. Louis Poster Advertising Company v. City of St. Louis, 249 U.S. 269, 39 Sup. Ct. 274, 63 L.Ed. 599 (1917). . . And such separate classification offends no constitutional provision. There also exists no invidious discrimination in the provisions of the ordinance, barring plaintiff's signs in the business industrial zones while allowing various manufacturing plants, junk yards, coal and coke yards, and other uses suggested by plaintiff, as also having undesirable characteristics. It is enough that outdoor advertising has characteristic features which have long been deemed particularly applicable to it."

As to business or on-premises signs, Justice Brennan is quoted as follows:

"A business sign is in actuality a part of the business itself, just as the structure housing the business is a part of it, and the authority to conduct the business in the district carries with it the right to maintain a business sign on the premises subject to reasonable regulations in that regard as in the case of this ordinance. Plaintiff's placement of its advertising signs, on the other hand, are made pursuant to the conduct of the business of outdoor advertising itself, and in effect, what the ordinance provides is that this business shall not to that extent be allowed in the borough."

In *Murphy v. Town of Westport,* 131 Conn. 292, 303, 40 A2d 177, 182 (1944) in upholding a similar classification as valid, that court states:

"* * * there is no illegal discrimination where there is between classes some natural and substantial difference germane to the subject and purposes of the legislation. . . Whether there is such a difference is primarily for the legislative branch of the government to determine, and the courts cannot interfere unless the classification is clearly unreasonable. . .We have sustained as not involving illegal discrimination. . .a state's statute which subjected the automobile junk dealers in general. . . we hold that the trial court could not properly conclude that the defendant town might not justifiably treat signs referring to business conducted upon the property upon which they stand as a class apart from signs not so related to such business. . . ."

The provision of part 3 of §3 of House File 51 exempting signs advertising activities within twelve miles of the sign location appear within the power of the legislature to determine degrees of an Act's application. As stated by Justice Oliver Wendell Holmes in the case of *Dominion Hotel v. Arizona,* 249 U.S. 265, 268 (1919):

"The power of the state 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced'. . . It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to a few concerned is thought less important than the harm to the public that would ensue if the rule laid

down were made mathematically exact. The only question is whether we can say on our own judicial knowledge that the legislature of Arizona could not have had any reasonable grounds for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. . ."

House File 51 does not appear vulnerable on the grounds of an unconstitutional delegation of power. The Act does set forth sufficient standards of direction from the legislature as to fulfill constitutional requirements. *Wall v. County Board of Education of Johnson County*, 249 Iowa 209, 86 N.W. 2d 231.

Our general conclusion is that House File 51, if enacted would be held constitutional as to those challenges here discussed; however, we reserve any opinion, for reasons expressed, as to its application to existing signs.

4.8

CONSTITUTIONAL LAW: Reapportionment, implementation—S.J.R. 1, 60th G.A., S.J.R., 16, 59th G.A. cit.—Status of the 60th G.A. with its existing apportionment is preserved until S.J.R. 1 is adopted by the people and implemented by appropriate legislation in compliance with provisions of that resolution.

February 5, 1963

Honorable David Stanley
State Representative
L O C A L

Dear Mr. Stanley:

In answer to your oral request of this date proposing the following question:

"Does S.J.R. 1 effectuate a 58 member senate and 99 member house beginning with the 62nd General Assembly which would be elected in the year 1966 and a continuation of the present apportionment through the 61st General Assembly?",

I submit the following:

The substance of this question was generally considered in part (2) of our opinion to Senator David O. Shaff dated January 29, 1963, to which reference is herewith made and answered in the affirmative.

The effect of the proposed amendment is to replace present §§6, 34, 35, 36 and 37 of the Iowa Constitution and the plan of apportionment contained therein with a new plan of apportionment encompassed in proposed §§6, 34, 35, 36 and 37. It is a basic rule of constitutional law that all the words and language in a constitution or provision thereof should be construed together and its meaning and intent ascertained from a consideration of the instrument as a whole. Accordingly, if a literal interpretation of the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent of the instrument as deduced from a consideration of all its parts, such intent must prevail over the literal meaning. 16 C.J.S., §23. Mitchell v Lowden, 288 Ill. 327, 123 N.E. 566.

Further, it is a general rule that the most radical change in form does not destroy an existing government until after ratification and after the means are furnished of giving full effect to the new government superseding it under new or altered constitutional provisions. 11 *Am. Jur.*, §38. Cucullu v. Louisiana Ins. Co., 5 Mart. N.S. 464, 16 Am. Dec. 199.

I am of the opinion, therefore, that the present status of the General Assembly is preserved until the necessary legislative implementation is enacted in compliance with all the provisions of the proposed amendment.

4.9

CONSTITUTIONAL LAW: Reapportionment, submission to electorate—Art. X, Iowa Const. No authority under Article X, §1, for submitting to electorate proposed amendment by separate bill. S.J.R. 16 is, by its terms, inseverable, and is operative in that form upon enactment of appropriate legislation. If said amendment is adopted, present status of General Assembly is preserved until implementary legislation is enacted.

January 29, 1963

Honorable David O. Shaff
State Senator
L O C A L

Dear Senator:

Referring to your recent letter in which you submitted the following:

"Some additional inquiries have been raised in regard to S.J.R. 1. It would be appreciated if we could receive an early opinion of your office since the resolution is scheduled as a special order on Tuesday, January 29th. The inquiries are as follows:

"1. Is there any reason why the date for submitting the proposal cannot be handled in a separate bill? As you know, Representative Goode objects to its inclusion in the main resolution and it appears that a large number of legislators would prefer a separate bill too.

"2. Are there any practical problems involved which might arise because of the date of submission? The resolution provides there shall be a house of 99 and a senate of 58. Would this take effect earlier and cause problems if the election were prior to the 1964 primary?

"3. Also, the resolution does not in so many words, preserve the present status of the General Assembly until the new senatorial redistricting is established. Would we nonetheless continue to have a 50 member senate and 108 member house until the 61st General Assembly redistricts or would it mean that the sizes of the two houses would be changed?

"4. Would submission of the question at the 1964 general election eliminate the foregoing problems because the General Assembly would have been nominated and elected pursuant to the then existing constitution provision? In other words, may it be assumed that the adoption of the amendment would not affect the majority elected under the old provisions until the next general election?"

(1) In answer to your question 1, there is no authority in Article X, §1 of the Constitution providing for submission to the electorate of proposed amendment by separate bill.

(2) Insofar as your questions 2, 3 and 4 of your letter, the proposed constitutional amendment is not severable. By its plain terms, its provisions are operative at the same time. Section 2 thereof provides:

"Sec. 2. The foregoing proposed amendment to the Constitution of the State of Iowa is hereby referred to the legislature to be chosen at the next general election, and the secretary of state is directed to cause the same to be published as provided by law for three (3) months previous to the time of making such choice."

To add any words to the provisions thereof would make severable a proposed amendment that the legislature intended to be inseverable. In respect to this power of amending, 16 C.J.S., Constitutional Law, page 48, states the following:

"Generally, under the constitutions of various states, constitutional amendments may be initiated by the legislature, and, in proposing a constitutional amendment, the legislature is not exercising its ordinary legislative power, but is acting as a special organ of government for the purpose of constitutional amendment. . . ."

This is confirmed by the fact that, while the amendment becomes a part of the Constitution after approval by the electorate and canvass of the vote thereof, its operation is postponed until appropriate legislation is enacted to implement the terms of the amendment. The fact that such implementation may concern only part of the amendment does not affect the inseverability of the amendment. According to the Constitution, Article 111, §1, the legislative authority of this state shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives. There is no indication that the General Assembly, by the enactment of Joint Resolution 16, intended to violate this constitutional provision by making severable the provisions thereof.

I am of the opinion, therefore, that the present status of the General Assembly is preserved until legislative implementation is enacted.

4.10

CONSTITUTIONAL LAW: Reapportionment, use of word "proposed"—S.J.R. 16, 59th G.A., S.J.R. 1, 60th G.A. Art. X, Iowa Const., §49.43, 1962 Code. Article X of the Constitution of Iowa is sole authority for amending Constitution, and it is a requirement that Legislature shall propose to electors such amendment as the only constitutional method of such submission. Use of word "propose" in legislative submission of S.J.R. 16, 59th G.A., complies with constitutional requirement.

January 25, 1963

Honorable David O. Shaff
State Senator
L O C A L

Dear Senator:

Reference is made to your recent letter in which you request an explanation of the changes suggested in our opinion to you of January 26, 1961 concerning Senate Joint Resolution 16, 59th G.A., commonly referred to as the "Shaff Plan", and submitted as Senate Joint Resolution 1 to the 60th G.A.

Article X, §1 of the Constitution of Iowa provides:

"How proposed—submission. Section 1. Any amendment or amendments to this Constitution may be proposed in either House of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two Houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to, by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner, and at such time as the General Assembly shall provide; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting

thereon, such amendment or amendments shall become a part of the Constitution of this State."

Article X has remained unchanged through the years as it is referred to in this opinion. It provides a self-executing amendment procedure, requiring no law to supplement its terms in order to make it operative. This is the view of the Iowa Supreme Court, announced in the case of *Koehler & Lange v. Hill,* 60 Iowa 543, where at page 554, in addressing itself to this Amendment, the Court stated:

"The question before us is as to the validity of a constitutional amendment, and we think there is a material distinction between the rules which must obtain in such case, and when a statute is assailed as not having been constitutionally enacted. The Constitution provides for its own amendment, and the manner in which this may be done is prescribed with particularity, and yet the provisions are simply and readily understood. An amendment may be 'proposed in either house of the General Assembly, and if the same shall be agreed to by a majority of the members elected to each of the two houses, the proposed amendment shall be entered on the journals, with the yeas and nays taken thereon.' "

This position was confirmed indirectly in an attack upon this same constitutional amendment where the Iowa Court held the initiation of a proposed amendment is not the fulfillment of the Legislature's duty of apportionment, but was merely a constitutional change that might be made in the future. *Selzer v. Synhorst,* 253 Iowa 936 113 N.W. 2d 724 (Iowa, 1962).

Senate Joint Resolution 16, an action of the 59th General Assembly, is a proposal to amend the Constitution in accordance with the provisions of Article X. Therefore, we recommend the change from "adopt" to "propose" because this is the very language of Article X, which provides the procedure for amending the Constitution. On the other hand, we do not find the word "adopt" in such Article. This Article is the sole source of authority for the initiation of an amendment to the Constitution by the General Assembly.

The word "adopted" has been used at times in previous submissions of proposed amendments, as well as the word "proposed" and numerous others, but it is to be observed that form is not prescribed by Article X. In 1917-18 *O.A.G.* 41, where a number of proposed amendments to the Constitution were exhibited, most used the word "proposed" in the preamble to the amendment. In discussing a proposed amendment that used the word "adopted", it was said at 1917-18 *O.A.G.* at page 49:

"We have set out the foregoing for the purpose of showing that no fixed plan has been followed in the adoption of the amendment to the constitution, and indeed none is fixed by the constitution itself, except that (procedure outlined by Article X of the Constitution). . ."

However, in the constitutional amendment procedures, the use of the word "adopted" is not without significance. As shown above, if the word is used by the Legislature in submitting a proposed amendment it may not be the best form but it will probably he held fatal, if the other requirements of Article X are met. 1917-18 *O.A.G.* 41. The Legislature has also provided in §49.43:

"Constitutional amendment or other public measure. When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon a separate ballot, preceded by the words, 'Shall the following amendment to the constitution (or public measure) *be adopted?*" (emphasis supplied)

Consequently, the rationale of this procedure is that the Legislature "proposes" and the people "adopt" a constitutional amendment.

When the framers of the Constitution used the phrase:

". . . if the people shall *approve and ratify,* such amendment . . ." (Art. X. §1, *Iowa Const.*)

they intended that only the people should have the power to "adopt" an amendment to the Constitution. The Legislature, through the enactment of §49.43, further supports this theory.

In an effort to be technically correct and in compliance with the Constitution, it was suggested that the word "proposed" be substituted for the word "adopted" in conjunction with the constitutional amendment initiated through the 59th General Assembly. It is submitted that this is in proper form and has the sanction of the Constitution.

4.11

CONSTITUTIONAL LAW: State University of Iowa, change of name—Art. IX, §11., Art. XI, §8, Iowa Constitution, §262.7, Ch. 263, 264, §565.5, 1962 Code. Board of Regents have exceeded its powers in eliminating word "State" from "State University of Iowa." Power to change state constitution is generally exercised in manner provided by Constitution.

December 15, 1964

Honorable Elmer F. Lange
State Representative
Sac City, Iowa

Dear Mr. Lange:

I acknowledge receipt of yours of the 5th inst., in which you ask for a written opinion "as to whether or not President Bowen of SUI has the authority to change the name of University of Iowa instead of State University of Iowa".

I advise as follows. The Constitution of Iowa does not expressly define the name of the University in Iowa City as the State University of Iowa. However, it does by Article XI, Section 8, and Article IX, Section 11, recognize the State University at Iowa City as the State University. Section 8 of Article XI provides the following:

> "The seat of Government is hereby permanently established as now fixed by law at the City of Des Moines, in the County of Polk; and the State University, at Iowa City, in the County of Johnson."

and Section 11, Article IX provides:

> "The State University shall be established at one place without branches at any other place, and the University fund shall be applied to that Institution and no other."

The literature concerning the adoption of constitutions, the permanence and generalities of its provisions, the integrity and continued existence of constitutions is voluminous, but as applied to the situation you present, certain principles are pertinent. It is stated that the peculiar value of a written constitution is that it places in unchanging form limitations upon legislative action and thus gives a permanence and stability to popular government which otherwise would be lacking.

Under our constitution, sovereignty resides in or with the people and may be exercised in the manner they have provided by the constitution. The power to change a state constitution is generally exercised in either one of two methods, mainly by convention of delegates chosen by the people for the express purpose of revising the entire constitution, or by the adoption by the people of propositions of specific amendments that have been previously

submitted to it by the legislature. It can be neither revised nor amended except in the manner prescribed by itself, and the power which it has conferred upon the legislature in reference to proposing amendments as well as to calling a convention must be strictly pursued. However, every part of a state constitution may be amended including the provisions authorizing the making of amendments and new articles may be added. See 11 Amer. Juris., title, "Constitutional Law", Sections 4, 22 and 24. As pertinent to the article of the constitution heretofore referred to, it is stated:

> "The right of the people to establish and remove their seat of government at pleasure involves a governmental subject about which there can be no irrepealable law or organic provision."

Nor in our opinion may there be a change under our statute. The Board of Regents is an administrative body of express powers which do not include the power to change the name of the University at Iowa City. Statutes impliedly negate such power.

Section 262.7 provides the State Board of Regents shall govern the following institutions:

1. The State University of Iowa.

Chapter 263, Code of 1962, is devoted to the State University, its management and the several educational agencies included therein.

Chapter 264, Code of 1962, is devoted to the perpetuation of records of the State University of Iowa, and of the students in attendance there. (Note a change of name of Iowa College of Agriculture and Mechanic Arts and the State Teachers College were accomplished by legislation. See Chapter 74, 58th General Assembly, and Chapter 153, 59th General Assembly.)

Additionally, it is a fair inference that under the authority of the Regents to accept and administer trusts, both testamentary and living, for the benefit of the institutions under its control, including the University at Iowa City, by statutes named the state's university, the Regents have accepted such trusts for the State University, and the execution of such trusts is a continuing obligation in the name of the State University of Iowa. It is also a fair inference that previously gifts, devises or bequests of property, real or personal, has been made to the State University of Iowa, and which it had the power to accept under the provisions of Section 565.5, Code of 1962. Many of the instruments by which these gifts are conferred are public records, and such records may not be changed.

The foregoing requires of us the conclusion that the Board of Regents exceeded its powers in eliminating the word "State" from the "State University of Iowa".

CHAPTER 5

CORPORATIONS

STAFF OPINIONS

5.1

CORPORATIONS: License Fee—§§496A.2(11), 496A.126, 496A.127, 1962 Code. No statutory authority to impose annual corporation license fee upon domestic corporations organized under Chapter 496A, Code 1962, having no issued stock.

January 17, 1963

Honorable Melvin Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

This will acknowledge receipt of yours, in which you submitted the following:

> "Section 126 of the Act (§469A.126, Iowa Code) provides that an annual license fee shall be paid by domestic corporations on stated capital, stated capital being generally defined as the amount of money or property received by the corporation for stock issued and outstanding.
>
> "Certain corporations have received corporate charters who have not as of the filing date when annual reports are due issued any stock. These corporations, therefore, contend that there is no annual license fee due until such time as stock is issued.
>
> "It is the thought of this office that all corporations regardless of whether they have stated capital are required to pay a minimum fee of $5.00 for the filing of the annual report and if the filing is later than March 1st of any year the penalty of $5.00 would also attach."

You are advised that there appears to be no express statutory authority to impose an annual fee upon corporations having no issued capital stock, nor is there implication in such statute of the existence of such fee. Clearly under §496A.2(11) stated capital has reference only to issued stock and is defined there, (1) with respect to stocks having par value, as meaning the par value of all shares of the corporation having a par value that have been issued, and (2) with respect to shares without par value, it means the amount of the consideration received by the corporation for all shares of the corporation that have been issued, except such part of the consideration therefor that may have been allocated as surplus in the manner permitted by law, and (3) to such amounts not included in the foregoing as having been transferred to stated capital in the corporation, whether upon the issue of shares and share dividends, or otherwise, minus all reductions from such sum as have been affected in a manner permitted by law. Under this provision, stated capital plainly is issued capital. This plain legislative intent is confirmed by the provisions of §496A.127 of the Code in providing the base for the computation of annual license fees of foreign corporations.

As to such corporations, the statute offers a choice. (1) The base may be the sum total of the fair and reasonable value of all property employed and used in Iowa as of January 1 of the year in which the report is due, with a deduction of sums due and owing by the said corporation, which method is by statute "considered the stated capital in this state for the purpose of said annual license fee and the amount of the fee to be determined by apply-

ing the schedule of annual license fees as prescribed for domestic corporations in §496A.126, or (2) such foreign corporation may at its option pay its annual license fee upon the total stated capital. The fee so determined shall be paid according to the schedule of the annual license fees set forth in the foregoing number §496A.127". Obviously these are two different methods of computing the annual license fees of foreign corporations – one upon the value of its property employed and used in Iowa which by statute is deemed stated capital, or by the schedule of fees based upon stated capital as defined in §496A.2(11).

The only way by which this license fee can be computed obviously, as far as domestic corporations are concerned, is upon issued stock.

5.2

CORPORATIONS: Reports—§§496A.92, 496A.144, 1962 Code; Ch. 287, Acts 60th G.A. H.F. 354 provides an additional penalty for failure to file an annual report by October 1, 1963, and is applicable to corporations regulated by Ch. 496A.

July 25, 1963

Mr. Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

This is in reply to yours of July 9th in which you ask:

"Paragraph two (2) of Sec. 8 of House File 354, Acts of the 60th General Assembly of Iowa, provides that:

> 'The secretary of state may cancel the certificate of incorporation of any corporation that fails or refuses to file its annual report for any year prior to the first day of October of the year in which it is due by issuing a certificate of such cancellation at any time after the expiration of thirty days following the mailing to the corporation of notice of the certification to the attorney general of the failure of the corporation to file such annual report as required by section four hundred ninety-six A point ninety-two (496A.92) of the Code, provided the corporation has not filed such annual report prior to the issuance of the certificate of cancellation. Upon the issuance of the certificate of cancellation, the secretary of state shall send the certificate to the corporation at its registered office and shall retain a copy thereof in the permanent records of his office.'

> "Do the foregoing provisions of House File 354 apply to domestic corporations which were required under the provisions of Chapter 496A to file annual reports in the office of the Secretary of State between the first day of January, 1963 and the first day of March, 1963?

> "The question stated another way is: Will the Secretary of State have authority to cancel the certificate of incorporation of any corporation which was required to file a 1963 annual report and has failed to do so, provided that the procedure outlined in Sec. 496A.130, as amended, is followed by the Secretary of State in effecting the cancellation?"

The provision found in House File 354 is an additional penalty for failure to file the annual report. Such was a valid exercise of the General Assembly's power to amend as provided in §496A.144, Code 1962. That provision found in House File 354 is not a penalty for failure to file the annual report when due in March, but is instead a penalty for failure to file the report by October 1, 1963, the bill being effective July 4, 1963.

More specifically, the amendment is neither retroactive by its own terms nor by operation of law. The opportunity a corporation has to file its annual report between July 4, 1963 and October 1, 1963 and thus to preclude the operation of the newly enacted penalty negates the thought of retroactivity.

Thus it is the opinion of this office that paragraph two of §8 of House File 354, Acts 60th G.A., does apply to a corporation regulated by Chapter 496A, 1962 Code, which has failed to file a 1963 annual report before October 1, 1963.

CHAPTER 6

COUNTIES AND COUNTY OFFICERS

STAFF OPINIONS

LETTER OPINIONS

6.1

COUNTIES AND COUNTY OFFICERS: Assessors, deputy's salary—§441.16, 1962 Code. Salary of deputy assessor, for fiscal year, set solely by conference board and may not be changed during budget period.

February 28, 1964

Mr. James Van Ginkel
Cass County Attorney
Home Federal Savings & Loan Bldg.
Atlantic, Iowa

Dear Mr. Van Ginkel:

Your letter of recent data, with regard to the salary of a deputy county assessor, requests opinion as follows:

"Our deputy county assessor resigned as of the last day of 1963 and it is necessary to hire a replacement.

"I would appreciate an opinion from your office as to whether the county assessor of the county conference board sets the salary of a deputy county assessor who is hired after the conference board has approved the proposed budget for the following year."

Section 441.16, Code of Iowa 1962, in part provides:

"Not later than July 1 of each year the assessor. . .shall . . .prepare a proposed budget of all expenses for the ensuing year. . . Said budgets shall be combined by the assessor and copies thereof filed. . . with the chairmen of the conference board.

"Such combined budgets shall contain an itemized list of all proposed salaries of the assessor and each deputy. . . Each year the chairman of the conference board shall. . . call a meeting to consider such proposed budget and shall fix and adopt a consolidated budget for the ensuing year not later than July 15.

"At such meeting the conference board shall authorize:

"1. The number of deputies. . .

"2. The salaries and compensation of . . . the assessor, chief deputy, other deputies, . . . and determine the time and manner of payment.

"4. . . . The assessor shall not issue requisitions so as to increase the total expenditures budgeted for the operation of the assessor's office. However, . . . the assessor shall have authority to transfer funds budgeted . . . ; such transfer shall not be made so as to increase the total amount budgeted for the operation of the office of assessor, and no funds shall be used to increase the salary of the assessor or the salaries of permanent deputy assessors. . . "

A deputy assessor's salary as fixed in the adopted budget inures to the position, rather than to the individual, occupying that position.

"Insofar as the compensation of deputies and assistants are concerned, . . . the county conference fixes the compensation. . . The county assessor (has) the responsibility of putting into effect the salaries *as fixed.*" 1950 *O.A.G.*, 99, 102. (Emphasis supplied)

It has been held that compensation for an office fixed by a budget should not be altered. (*Kellogg v. Story County,* 219 Iowa 399, 257 N.W. 778 (1935)).

20 C.J.S., *Counties,* §235, states with regard to budgets, that a board, having acted upon a budget, cannot thereafter reconsider its findings and reduce the amount determined upon. Cited for this proposition is the case of *State v. County Court of Putnam County,* 93 W. Va. 316, 116 S.E. 704 (1923), wherein it was stated:

"These two amendments provide for what has been popularly termed a 'sort of budget' . . . It required the County Court, when it determines the amount of the budget, to enter of record its findings, for the very purpose, as we believe, to remove the matter beyond further controversy or temptation, so that thereafter there would be no further attempt either to increase or reduce the amount."

It has been specifically held that an assessor's salary, when fixed for the term, may not be changed or altered during the term.

This line of authorities would be equally applicable to the office of deputy assessor. 1962 *O.A.G.*, page 174 (§7.117. #61-6-13), and opinions cited therein.

It is therefore our opinion that the salary for the office of deputy assessor is set solely by the conference board, by its adoption of the budget for the ensuing year, and that during that year, that salary may not be modified even though a new deputy is hired to fill the position.

6.2

COUNTIES AND COUNTY OFFICERS: Auditor, Auditor's plat—§§409.27, 409.28, 409.29, 409.30, 409.31, 409.48, 1962 Code. Where an auditor's plat has been prepared because the proprietors of subdivided land failed to do so, §409.30 requires the total cost of the platting to be prorated over the several subdivisions. It is within the county auditor's discretion to determine some reasonable basis for the prorating.

August 1, 1963

Mr. David J. Butler
Cerro Gordo County Attorney
Mason City, Iowa

Dear Mr. Butler:

This is in reply to your recent letter in which you requested an opinion of this office as follows:

> "An Auditor's Plat has been prepared because the owners of the tracts of land involved failed to comply with the Auditor's request pursuant to Section 409.31 of the Code of Iowa, and the cost of making said plat has been assessed against the owners of the land involved in the plat. The Auditor has assessed the cost of preparing the plat according to the amount of time spent by the Engineer on each portion or tract of land involved in the entire plat. The smaller lots have been assessed $35.00 to $40.00 of the cost and the largest tract has been assessed for over $200.00 of the total cost. The largest landowner has now objected to the assessment and has taken the position the cost of the platting should be shared equally by each of the tracts or lots.
>
> ". . . Will you please give this matter your consideration and furnish us with an opinion setting out the correct procedure to be followed in prorating the costs of this platting to the tracts or lots involved."

Section 409.31 of the Code of Iowa, 1962, incorporates by reference the procedures of §409.27-30, inclusive. Section 409.27 requires the County Auditor to give notice to original proprietors of subdivided land that they are delinquent in filing a plat and then to proceed with platting the land if the delinquency is not corrected. Section 409.28 provides for filing the auditor's plat and §409.29 requires the auditor to present a statement of costs to the board of supervisors. Section 409.30 provides in pertinent part: "The auditor shall at the same time assess *the amount prorata upon the several subdivisions*. . . " (Emphasis added).

It is clear from §409.30 that it is the total cost which is to be assessed and that the assessment is to be laid upon the several subdivisions themselves, prorata. Such statutory guides would seem to preclude the use of an unrelated standard such as the amount of time spent on each particular subdivision by the surveying engineer.

Any contention that the words "prorate" mean equally among the owners of the various subdivisions is also without merit. Such a position was urged in reference to the words "prorate" contained in a contract in the case of *Chaplin v. Griffin,* 252 Pa. 271, 97 Atl. 409 (1916), but the Court rejected the argument, stating at 97 Atl. 411:

> "If it was the intention of the parties to it that the liability of each was to be the same, such liability could readily, and would naturally have been fixed by a simple declaration that each one of them was to share equally with the others in the distribution of the stock and be equally liable for the amount of the loan; but, instead of such a provision, there is the studied repetition of an intention that there should not be equal liability, which is never contemplated by the use of the words 'prorate' or 'prorata'. They contemplate a just proportion of liability upon an equitable basis."

In the case of *City of Des Moines v. Reiter,* 251 Iowa 1206, 102 N.W. 2d 363 (1960), the Iowa Supreme Court said at 251 Iowa 1212:

> "But. . . (the rule of strict construction) does not apply to the mode adopted by the municipality to carry into effect powers that are granted, where such mode is not prescribed by the legislature but is left to the discretion of the municipal authorities. Unless restrained by statute a municipality may in its discretion determine for itself the method of exercising powers conferred upon it."

This position is further supported by *Keokuk Waterworks Co. v. Keokuk,* 224 Iowa 718, 730, 227 N.W. 291 (1938), See also H.F. 380, Laws of the 60th General Assembly (1963).

It is apparent that Section 409.30 has granted the power of taxation and has restricted it to an assessment to be made prorata upon the several subdivisions, but beyond these limitations has not prescribed the particular measure of value in reference to the subdivisions which is to be used. Under such circumstances the Iowa Supreme Court, in the *Keokuk Waterworks case,* supra, quoting from 1 *Dillon on Municipal Corporations,* 5th Ed., page 453, at 224 Iowa 731, has stated the rule to be:

> "In such a case the usual test of the validity of the act of a municipal body is, whether it is reasonable, and there is no presumption against the municipal action in such cases. The general principles of law, stated in this and in the preceding sections, are indisputably settled."

Your opinion request specifically mentions the possibility of using either proportionate areas or measures of value as bases for the prorata assessment. Section 409.48, although not specifically applicable to the situation at hand, lends support to the reasonableness of the use of relative areas. Likewise, use of a prior assessment made under Chapter 441 or of a measure of present value would appear to be reasonable.

In summary, §409.30 requires the total cost of the platting to be prorated over the several subdivisions, using some reasonable basis pertaining to the subdivisions themselves, the basis being in the discretion of the county auditor.

6.3

COUNTIES AND COUNTY OFFICERS: County Board of Education, Insurance—§§85.2, 85.61, 332.3(20), 1962 Code; and Ch. 85, §2, Acts 60th G.A. (1) Employees of county board of education, not county employees. (2) County is neither obligated nor empowered to purchase workmen's compensation insurance for employees of the county board of education. (3) Em-

ployees of county boards of education are covered by Workmen's Compensation Act.

November 24, 1964

Mr. Paul D. Strand
Winneshiek County Attorney
Decorah, Iowa

Dear Mr. Strand:

This is in answer to your request for an opinion, in which you state:

"I have been asked by some of the County Special Education teachers as to whether or not they are covered by the Workmen's Compensation Act under Section 85.2 of the Iowa Code. These teachers are hired and employed by the County Board of Education and their duties are principally that of guidance and counseling and working with students in the public school system that have a particular and special need, such as speech therapy. These employees are all teachers and are qualified as such by the Department of Public Instruction. Because they are employed by the County Board of Education, it would seem to me that Section 85.2 is in effect; that is, they would be considered county employees and as such would qualify.

"Also, this special education department has requested an opinion as to whether or not the county is responsible to carry liability insurance for them and their department. The question would arise whether the county can carry such insurance and whether or not they would be obligated to carry such insurance.

"I imagine this liability insurance question revolves around the question as to whether or not they are county employees and if as such, the county can maintain a liability or type of malpractice insurance for their protection."

The question of mandatory workmen's compensation coverage under Section 85.2, by a county for county board of education employees, was considered in a former opinion of this office, (1952 *O.A.G.*, page 53), which stated:

"We conclude therefore as follows:

"1. That the County Board of Education is not an employer within the terms of the workmen's compensation act.

"2. The superintendent, or other employees of the County Board of Education, not being employees of the county, the county is not liable under workmen's compensation act."

Since the issuance of the 1952 Opinion, the Legislature has amended Section 85.61 so as to include county board of education within the definition of "employer" for workmen's compensation purposes. (Chapter 85, Section 2, Acts of the 60th General Assembly).

Therefore, paragraph one above, quoted from 1952 *O.A.G.*, page 53, is incorrect under the present law. Employees of county boards of education would now be covered by the Workmen's Compensation Act. Nevertheless, the legal import of paragraph two of 1952 *O.A.G.*, page 53, quoted above, has not been changed.

With respect to your question regarding liability insurance, the county is authorized by Section 332.3(20) to purchase liability insurance for "county employees". Since employees of the County Board of Education are not employees of the county, the county board of supervisors is neither obligated nor empowered to purchase such insurance.

6.4

COUNTIES AND COUNTY OFFICERS: Board of Education, publication of salaries—§273.13(13), 1962 Code. Gross salaries of employees must be published. Amounts withheld for income tax, retirement, or retirement contributions by county are not required by said statute to be published.

April 15, 1964

Mr. E. L. Carroll
Union County Attorney
Court House
Creston, Iowa

Dear Mr. Carroll:

We hereby acknowledge your request for an opinion contained in your recent letter in which you said:

"There seems to be some question as to just what is to be published in accordance with Section 273.13, subsection 13, of the Code of Iowa. . .

"(a) Are gross or net salaries of employees to be published?

"(b) Are payments to depositories and to the Collector of Internal Revenue for income tax withheld to be published in list?

"(c) Are total amounts paid to the Iowa Employment Security Commission and to the Iowa Public Employees Retirement System to be published, or just that part of these payments which is contributed from the County Board of Education Fund?"

Section 273.13(13) states:

"The county board of education shall:

"13. Cause to be published annually in the official newspaper of the county a list of the bills and claims allowed, with the name of each individual receiving such payment, the amount thereof, and the reason therefor."

The purpose of the above statute seems to be to inform the public how moneys are being spent by the county board of education. The published information must show the name of each individual receiving payment from the board and the amount thereof. The purpose of informing the general public as above indicated would seem to be served by showing the gross salary received by an employee. Said amount indicates the actual amount of public funds expensed for work performed by the employee. Amounts withheld from the gross salary for income tax purposes or for retirement purposes are included in the amounts shown as gross salaries. Publication of these amounts gives no additional information to the general public so far as the statute's purpose is concerned. Nor does the statute contemplate the publication of amounts that are contributed by the county board of education under the Iowa Public Employees Retirement System. Therefore, in answer to your questions, it is our view that the purpose of Section 273.13(13) is fulfilled so far as the publication of payments to individuals is concerned by publishing the gross salaries received. Questions (b) and (c) are thus answered in the negative.

6.5

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, ambulance service—§§332.3, 347.13, 347.14, 1962 Code. Board of supervisors, or board of trustees of county hospital have no authority to provide ambulance service.

April 6, 1964

Mr. Stanley R. Simpson
Boone County Attorney
Lippert Building
Boone, Iowa

Dear Mr. Simpson:

This will acknowledge your letter of recent date, requesting opinion in the following matter:

"The funeral homes in the cities of Boone and Madrid have notified local civil authorities, including the Boone County Board of Supervisors, that all ambulance services will terminate as of June 1, 1964 in Boone County. As you undoubtedly know, it has been traditional in the smaller communities for the funeral homes to provide ambulance services as a matter of public service and accommodation, rather than for profit making purposes.

"The legal question being raised is whether or not the county or the county hospital can go into the ambulance business.

"Secondly, if there is some authority allowing either the county or the county hospital to enter into the ambulance service, is there some authority to subsidize such ambulance services through taxation?"

With respect to your question as to whether or not a county may provide ambulance service, it was held in *Hilgers vs. Woodbury County,* 200 Iowa 1318, 206 N.W. 660 (1925), that the Board of Supervisors is limited to its statutory powers. The Court in that case, stated:

"Counties are recognized as quasi corporations, and it is universally held that the board of supervisors of a county has only such powers as are expressly conferred by statute or necessarily implied by the powers so conferred."

The powers and duties of the board of supervisors are contained in Section 332.3 of the Code. There is no power expressly or impliedly conferred upon the board of supervisors by this statute which would enable the county to provide ambulance service.

The same principle is applicable to county hospitals. The board of trustees of such hospitals have only such powers which are either expressly or impliedly delegated to them. (See *Merchants Motor Freight, Inc. vs. State Highway Commission,* 239 Iowa 888, 32 N.W. 2d 773 (1948); *State vs. F.W. Fitch Co.,* 236 Iowa 208, 17 N.W. 2d 380.

The powers and duties of the board of hospital trustees are contained in Sections 347.13 and 347.14 of the Code. Again, there is no power expressly or impliedly conferred upon the board of trustees which would enable the county hospital to provide ambulance service.

It is therefore our opinion that neither the county board of supervisors nor the board of trustees of the county hospital may provide ambulance services as a matter of public service and accommodation, whether for profit or otherwise.

Your first question having been thus answered, it is unnecessary to answer the second question.

6.6

COUNTIES AND COUNTY OFFICERS: Board of supervisors, approval of subdivision plats—§306.15, 1962 Code. (1) Board may approve plat and at

same time disapprove roads in plat; (2) Board may reject proposed plat where streets do not comply with reasonable requirements; (3) Board may reject plat containing "private road" not meeting reasonable requirements.

October 29, 1964

Mr. Harry Perkins
Polk County Attorney
Room 406, Courthouse
Des Moines, Iowa

Dear Mr. Perkins:

This is in reply to your recent request for an opinion in which you state:

"The Polk County Board of Supervisors have requested this Department to obtain an Attorney General's opinion as to the extent of authority of the Polk County Board of Supervisors under the provisions of Section 306.15 of the 1962 Code of Iowa, as amended by the 60th General Assembly.

"Section 306.15 of the 1962 Code of Iowa provided as follows:

" '306.15 Plat and field notes. All road plans, plats and field notes for rural subdivisions shall be filed with and recorded by the county auditor and approved by the board of supervisors and the county engineer before the subdivision is laid out and platted, and if any proposed rural subdivision is within one mile of the corporate limits of any city or town such road plans shall also be approved by the city engineer or council of the adjoining municipality. In the event such road plans are not approved as herein provided such roads shall not become the part of any road system as defined in chapter 306.'

"Article 5-D of the Subdivision Ordinance, Unincorporated Territory of Polk County, Iowa, among other things, provides as follows:

"1-a. All streets shall be paved with six (6) inch reinforced concrete with integral curb and gutter. The width of said paving to be as required by the County Engineer, but in no case less than twenty-five (25) feet back to back of curbs. In subdivisions where a majority of lots are not less than one hundred (100) feet in width for single family use, and where conditions are such as to discourage street parking, the Board (approved by the County Engineer) may waive the requirement for curb and gutter.

"2. For subdivisions being developed within the unincorporated area of Polk County, outside of the three (3) mile area specified in (1.) above, the following regulations shall apply.

"a. All streets shall be put to grade and standard cross section according to plans approved by the County Engineer. The type and strength of street surfacing shall be done to the satisfaction of the County Engineer and be commensurate with the volume, character, and general circulation requirements as determined by the Commission.

"Referring to Section 306.15 of the Code, your office issued an opinion on November 1, 1963, addressed to Mr. William C. Ball, Black Hawk County Attorney, to the effect that the Board of Supervisors has no authority under Section 306.15 to require subdividers to provide a bond assuring the compliance of the subdivider or platter to comply with requirements of the County for improvements, especially with regard to roads.

"Section 306.15 requires all plats in unincorporated territory to be approved by the Board of Supervisors and the County Engineer. This

same section also provides that 'in the event the road lines are not approved as herein provided, such roads shall not become the part of any road system as defined in Chapter 306.'

"This raises the following questions:

"1. Has the County Board of Supervisors authority to approve a plat and at the same time refuse to approve roads which are laid out within said plat?

"2. If the Board of Supervisors are not authorized to require or accept a bond as stated in the above mentioned Attorney General's Opinion, do they have authority to reject a proposed plat which is a proper plat with the exception that the roads or streets platted in such plat do not comply with the requirements of the Polk County subdivision requirements?

'3. Has the Board of Supervisors authority to reject a plat which appears proper in every respect but contains what the platter terms a private road or street which does not meet county requirements?"
In 1962 *O.A.G.*, 146, it was stated:

". . . I am of the opinion that the recorder has the power and duty of refusing to accept a plat of a rural subdivision with its road plans, plats and field notes unless such plat *and* its road plans, plats and field notes bear the approval of the board of supervisors. . ." (Emphasis supplied.)

This opinion indicates that the Board of Supervisors approve, in effect, two things: one, the plat, and two, the road plan. It also indicates that should either be disapproved, it would be the duty of the recorder to refuse acceptance of the plat.

Therefore, in answer to your first question, the county Board of Supervisors would have authority to approve a plat and at the same time, refuse to approve the road plans, subject, however, to the limitations hereafter discussed.

Where a Board of Supervisors is given the power to approve or disapprove an act, the exercise of that power may not be arbitrary or capricious.

Whether an action of the Board is an abuse of discretion is a factual question, dependent upon *each* individual circumstance.

Under the provisions of the ordinance quoted in your letter, the County Engineer is given authority to make certain decisions with relationship to the construction of streets. However, the Board would have authority to reject a proposed plat where the roads or streets platted did not meet reasonable requirements.

Therefore, in answer to your second question, although the Board of Supervisors are not authorized to require or accept a bond conditioned upon the fulfillment of certain street requirements, the Board does have authority to reject a proposed plat where the streets platted do not comply with reasonable requirements.

The obvious purpose of Section 306.15 is to insure that streets which may come to be maintained by the governmental body are constructed so that the expense of maintenance will be at a minimum. In this respect, your attention is directed to informal opinions as follows: Keyes to Clauson, 9/18/61, #61-9-11, and Keyes to Larsen, 9/18/61, #61-9-12. Copies of these opinions are enclosed.

It would appear that the Board may, in its discretion, determine whether or not a "private road" is actually one which would be of that type.

In answer to your third question, it is our opinion that the Board would have authority to reject a plat which contained a "private road" which did not meet its requirements.

6.7

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, assignment, mental health claim—§230.15, 1962 Code. Board of Supervisors has no authority to assign its cause of action to third party for collection of mental health expenses.

July 16, 1964

Mr. Martin D. Leir
Scott County Attorney
Davenport, Iowa

Dear Mr. Leir:

This is to acknowledge receipt of your recent request wherein you submit the following:

> "Scott County presently has a claim for the support of a person in Mount Pleasant which is in the process of being compromised as against the estate of the parent of the recipient.
>
> "Apparently the patient, who has now been released, is a beneficiary in the estate and these funds will be used to pay the compromise settlement.
>
> "The interested parties in the estate, however, feel that the separated husband of the patient should ultimately bear this expense, since these expenses were incurred during the marriage between said husband and the patient.
>
> "As a part of the compromise settlement the interested estate beneficiaries desire to receive an Assignment from the Board of Supervisors of this claim, and then hope to process an action against the separated husband.
>
> "Under these circumstances, is it possible for the Board of Supervisors to make a valid assignment of this Chose in Action, which will be used ultimately in requiring the husband to assume the financial obligation."

In reply thereto, you are advised as follows: In 48 O.A.G., page 126, this department held that the several persons named in §230.15, Code of Iowa, 1962, as legally liable for the support of mentally ill persons are jointly and severally liable to the county for payment of such support. This opinion also held that as to which one of the foregoing debtors the county shall pursue in order to effect collection is a matter of determination by the board of supervisors.

This opinion is supported by §613.1 and §613.2, Code of Iowa, 1962, which defines the extent of joint and several liability, and provides in pertinent part:

> "An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others."

Thus, the county may pursue any or all of the persons liable for the payment of the support account until payment thereof is secured.

In the case at bar, the county would still have a cause of action against the husband, and the question remains as to whether or not the board of supervisors can validly assign this cause of action to the interested beneficiaries

of the estate. By statute, the estate in question could be held liable for the entire claim, and this claim is a fixed and certain sum.

In *Kellogg v. Iowa State Traveling Men's Ass'n.*, 239 Iowa 196, 29 N.W. 2d 559, the Iowa court stated:

> "It is a generally accepted principle of law that when a debtor owes a fixed, certain, due, sum of money, commonly called a liquidated debt, the offer of a less sum to the creditor, with a statement or notice that it is in full payment of the obligation, its acceptance and retention by the creditor does not bar him from collecting the balance of the debt, in the absence of any new or additional consideration. The reason being that the debtor is already under legal obligation to pay the full amount, and there is no consideration for a release or waiver by the creditor of the unpaid part of the debt. Where the debtor merely does what he is already bound to do, or that which the creditor was already entitled to, there is no consideration, * * *"
>
> Applying this principle to the situation at hand, it becomes obvious that there is no consideration to support the assignment of the chose in action which rightfully belongs to the county. Additionally, a board of supervisors has only those powers as are conferred upon it by statute.

Board of Supervisors v. District Court, 209 Iowa, 1030, 229 N.W. 711. We find no statutory authority for the assignment of this chose in action.

Therefore, for the foregoing reasons, the board of supervisors cannot validly assign a chose in action which rightfully belongs to the county.

6.8

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, closing of county offices—Chs. 43, 49, 50; §§4.1, 332.3, 1962 Code. (1) Board of Supervisors determine if Court House to be open or closed on election day; (2) Elective county officers determine their office hours; (3) Duties of Auditor on election day requires office to be open.

February 21, 1964

Mr. Claire Steele
Plymouth County Auditor
Le Mars, Iowa

Dear Mr. Steele:

Your letter of recent date, addressed to the Secretary of State, has been referred to this Department for opinion in the following matter:

> "Here in Le Mars one city precinct votes in the Court House. All offices of the Court House are closed on election day except the Auditor's office. I would like to know if this is necessary, or if it is just a custom that has been followed?"

There is no statutory provision requiring county offices to be closed on election day. The opening and the closing of the Court House is the prerogative of the Board of Supervisors. (Section 332.3, 1962 Code; 1950 *O.A.G.*, 111) It has also been held that elective county officers may legally close their respective offices for the whole day of Saturday. (1962 *O.A.G.*, 158).

It has been held previously that elective county officers may determine the hours in which their respective offices will be open for business. (1940 *O.A.G.*, 381)

Your attention is also directed to Section 4.1, 1962 Code, and Rule of

Civil Procedure No. 366, for the computing of time for the perfecting or filing for court, board, commission or official actions.

Although there is no statutory requirement that the Auditor's office shall be open on election day, the duties imposed upon the Auditor by Chapters 43, 49, and 50 of the Code would indicate a necessity that his office be open.

6.9

COUNTIES AND COUNTY OFFICERS: Board of supervisors, conflict of interest by ownership of cooperative stock—§§741.11, 1962 Code. Board of supervisors cannot enter into contract for purchase of goods from cooperative when any of its members own stock in cooperative even though upon calling for sealed bids by advertisement cooperative is low bidder.

June 14, 1963

Mr. Richard D. Morr
Lucas County Attorney
Chariton, Iowa

Dear Mr. Morr:

This is in reply to your letter wherein you state:

"The Lucas County Board of Supervisors, by newspaper publication, called for and gave notice that it would receive sealed bids and proposals on the purchase of a large quantity of gasoline to be used in county vehicles and road equipment. Of the several bids submitted, the bid of Farm Service Company, Humeston, Iowa, met the specifications as established and stated a price for the fixed quantity of gasoline that was substantially lower than the next lowest bid. The contract was awarded to Farm Service Company of Humeston, Iowa.

"Farm Service Company, Humeston, Iowa, incorporated under Chapter 491 of the Iowa Code, is in many respects a co-op type organization, which sells consumer goods (petroleum products, fertilizers, agricultural supplies, etc.) to members of the Iowa Farm Bureau living within its four county (Wayne, Lucas, Clarke and Decatur Counties) business area, and to any other person or party who may wish to purchase its goods. According to information supplied to me by company officials, the company is financed and governed as follows:

"1. Class A Membership Stock. This class of stock is issued only to members of the Iowa Farm Bureau. No member may hold more than one share. This is voting stock. Shareholders are entitled to dividends on a patronage basis only.

2. Class B. Membership Stock. This class of stock is non-voting and dividends are 3% non-cumulative.

3. Organization Stock. This class of stock is owned only by Iowa Farm Bureau Federation, is non-voting, and dividends are 4% non-cumulative.

4. Preferred Stock. This class of stock is non-voting. Dividends are cumulative at five per cent per annum.

'Two members of our three-member Board of Supervisors, by virtue of present membership in the Iowa Farm Bureau, are each owners of one share of Class A Membership Stock, while the other owns shares of Preferred Stock.

"The other bidders have protested the Board's action in awarding the contract to Farm Service Company on the ground that two of its

members will be privately benefited by the business transactions of the County and Farm Service Company. The Board has rescinded its earlier acceptance of the Farm Service Company bid and is holding in abeyance acceptance of any of the submitted bids until the questions arising herein have been resolved by your office.

"Our questions are:

A. Can a Board of Supervisors, when two of its three members own stock in a company, as above indicated, legally enter into contracts with or purchase goods from that company and thereby bind the County for the payment of the contract price?

B. Can a Board of Supervisors, after calling for sealed bids by advertisement, legally accept the lowest and most advantageous bid submitted and enter into a contract with or make purchases based thereon from the company submitting the bid, when two of the three members of the Board of Supervisors own stock, as above indicated, in the company?

"If question A is answered in the affirmative, an answer to question B is unnecessary. The reverse is not necessarily true. Arguments have been advanced that prohibitions against the contract or purchases as set out in question A, if any, are removed if bids are called for by newspaper advertisement and the contract awarded to the lowest bidder. There seems to be no direct authority on this last premise in Iowa.

"The statute relative to the questions is Section 741.11 of the 1962 Code of Iowa. Section 314.2 of the 1962 Code of Iowa, pertaining to general highway administration, possibly is applicable to the situation because the materials or supplies (gasoline) to be purchased are ultimately used in the County highway program. Section 368A.22 is a similar statute which prohibits officers of cities and towns from entering into certain transactions where the officer has an interest as an individual.

'Neither the Supreme Court of Iowa nor your office has construed the above statutes where the public officer involved was a member or a stockholder in a co-oplike company, distributing only patronage dividends and predetermined per centage dividends (interest) to its members or stockholders.

"In this factual situation there has been no concealment, misconduct or fraud on the part of the Board members. All readily acknowledge ownership of stock in the company, as above indicated. If you require more information please advise me."

Section 741.11, Code of Iowa, 1962, provides as follows:

"Members of boards of supervisors and township trustees shall not buy from, see to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material, or labor to the county or township in which they are respectively members of such board of supervisors or township trustees.

Similar provisions are found in the following sections: §§15.3, 18.4, 86.7, 252.29, 262.10, 314.2, 347.15, 368A.22, 372.16, 403.16, 403A.22, 553.23, 741.8.

We would refer you to two opinions of the Attorney General which deal with this problem. The first, dated February 7, 1919 and appearing in 1919-20 *O.A.G.* at page 70, stated that the employment of a member of the Board of Waterworks Trustees as an architect for the construction of a pumping station was prohibited by the provision of the Code relating to officers of city councils, which is comparable to §741.11. The opinion stated that any contract thus entered into was void as being contrary to public policy. The authorities cited in this opinion include the case of *James v. City of Hamburg*,

174 Iowa 301, 156 N.W. 394 (1916). The Court in that case quoted Judge Dillon's work on Municipal Corporations, 2d Vol., 5th Ed., which states in part:

> "The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial."

The second opinion is dated January 13, 1934 and appears in 1934 *O.A.G.* at page 443. This opinion stated that under the provisions of the statute relating to state employees, which is of similar import to the one involved here, a company was prohibited from selling its product to a board of education, a member of which was a stockholder in the corporation. This opinion further stated that a corporation could not sell its product directly to a contractor who was a successful bidder on a project undertaken by the board of education.

There are two Iowa Supreme Court decisions dealing with the problem of interest of members of boards of supervisors in organizations contracting with the board. The first is that of Nelson v. Harrison County, 126 Iowa 436, 102 N.W. 197 (1905). In this case it was held that a contract between the board and one of its supervisors was void. The question of fraud was involved in this case, which is not present in the situation which you have presented. The second case is that of *Harrison County v. Ogdon,* 133 Iowa 677, 108 N.W. 451 (1907), which held that a member of the board of supervisors who purchased evidences of county indebtedness at less than face value could not enforce payment by the county even upon *quantum meruit.*

Other jurisdictions have been faced with similar problems. It was held in *Douglas v. Pittman,* 239 Ky. 548, 39 S.W. 2d 979 (1931), that a member of the county board of education, being president and one-third owner of a company selling merchandise to the board, had an interest within the meaning of a statute similar to the one involved here which required the vacating of his office. It was held in *Benewah County v. Mitchell,* 57 Ida 41, 61 P. 2d 284 (1936), that a county coroner engaged in the undertaking business was not entitled to payment from the county for expenses incurred by him as undertaker in the burial of deceased persons who had been county charges.

In *Logan County v. Edwards,* 206 Ky. 53, 266 S.W. 917 (1924), it was held that a county judge was liable to the county for claims allowed by him as judge against the county in favor of a firm of which he was a member.

Perhaps the most far-reaching decision is that of *Warren v. Reed,* 231 Ark. 714, 331 S.W. 2d 847 (1960). The facts of that case were as follows: The defendant operated a laundry. This business was carried on in a building owned by the chairman of the board of governors of a hospital. The owner of the building had no interest in the business other than that of being the landlord of the defendant. The hospital solicited bids for its laundry. The defendant was the low bidder and the contract was awarded to him. The plaintiff was a taxpayer and brought this suit. It was held that this contract was void.

> "Some men are big enough and strong enough to waive all personal considerations and discharge fairly and impartially a public duty, but not all men are so constituted. The law would remove from public officers these temptations to which, owing to the weakness of human nature, men do sometimes yield." *James v. City of Hamburg,* 174 Iowa 301, 156 N.W. 394 (1916).

From the above authorities, it is apparent that statutes similar to the one involved here have been applied broadly. Based upon these precedents, it is necessary to conclude that a board of supervisors cannot enter into a contract with an organization in which any of the board members have an interest, although their interest may be slight. Therefore, in answer to

your question A, it is our opinion that board of supervisors cannot legally enter into a contract for the purchase of goods from a cooperative incorporated under Chapter 491, Code of Iowa, when any of its members own stock in that company.

In answer to your question B, it is our opinion that board of supervisors cannot legally accept a bid submitted after the calling for sealed bids by advertisment if any member of the board owns stock in the company, as you indicate in your letter, even though the bid might be most advantageous.

6.10

COUNTIES AND COUNTY OFFICERS: Board of supervisors, contracts— §332.7, 1962 Code. Contracting by board of supervisors with several contractors and jobbers for labor and material for repair of county home, with their claims ranging from $25 to $900, without advertising for bidders is a violation of §332.7.

September 25, 1963

Mr. Stanley R. Simpson
Boone County Attorney
Lippert Building
Boone, Iowa

Dear Mr. Simpson:

This is to acknowledge receipt of your recent letter in which you stated the following:

"As you undoubtedly know, the case of Madrid Lumber Company, Boone County, et al, was submitted to the Iowa Supreme Court at the March, 1963 Term, and the Court held that the principal contractor, Madrid Lumber Company, was not entitled to its claim of $5,295.52 for labor and materials furnished.

"At the time of this building improvement, the Board of Supervisors also contracted with other independent contractors, jobbers and individuals for services and materials. Such persons, jobbers and independent contractors dealt directly and independently with the board and they had no connection with the principal contractor, nor did they sub-contract the work or materials furnished with the principal contractor.

"With the exception of some of the electrical and plumbing installation, the labor and material furnished by these jobbers and independent contractors, such as painting, floor tile, fixtures and so forth, took place after the principal contractor had completed his job. Also, the amount of their claims range in an area from approximately $25.00 to $905.00 each.

"As in the case with the principal contractor, there was no advertisement of bids or competitive bidding by the board with these independent contractors and jobbers, or others.

'The legal question now involved is as follows:

"Can the board of supervisors legally allow and pay these claims of independent contractors and jobbers, for labor and materials furnished, when the principal contractor was denied payment thereof, which all arises out of the same general building improvement?"
Section 332.7, Code of Iowa, 1962, provides:

"Contracts and bids required. No building shall be erected or repaired when the probable cost thereof will exceed two thousand dollars except

under an express written contract and upon proposals therefor, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done."

Thus, §332.7 commands that if the cost of erection or repair is to exceed two thousand dollars public bidding is essential.

The rule of law controlling the situation you outlined is to be found in *State v. Garretson*, 207 Iowa 627, 635, 223 N.W. 390, 393 (1929). There it was stated as follows:

"Argument, however, is made by appellant upon the proposition that the statute does not necessarily require the engineer's estimate and the advertising, under the facts and circumstances here presented. Foundation for this premise is laid in the thought that it was the practice for the supervisors of Henry County to maintain what is known as a public lumberyard, from which material was taken, from time to time, as needed on repair work. Following this idea, appellant suggests that 'repair work' under $1,000 need not have the advertisement or engineer's estimate. Authority for this contention is found by appellant in Sections 4648 and 4650 supra. Conclusion then is drawn by him that, although a specific contract for lumber exceeds $1,000, there is not statutory violation if it is placed in the lumberyard and divided into portions each less than $1,000 in value, to be used on separate repair projects from time to time.

"Very evidently such interpretation of the statutory requirements is erroneous. Sections 4647 and 4648, supra, both contemplate an engineer's estimate, regardless of whether or not the repair work is more or less than $1,000. It is the engineer's estimate that determines the value in this regard. Definition of 'repair work' is found in Section 4650, supra, to this effect: 'Repair work shall be known as work not designated by the highway engineer * * *.' A distinction clearly appears in the statutes referred to, between 'designation' and 'estimate.' 'Designation,' as used in the statute, marks the dividing line between the work needing the skill and knowledge of an engineer and that which does not. But all repair work, whether the value thereof is below or above $1,000, is supposed to have the engineer's estimate, under Sections 4647 and 4648, supra. Anyway, the contracts complained of in the case at bar did exceed $1,000, and they were for such work as requires an engineer's estimate, under 4647 and 4648 of the Code. Subsequent division of the original contract is nothing more than a subterfuge, to avoid an express statute.

"What is said in reference to the lumber applies very largely to contracts for oil and gasoline; and the agreement in reference to repairing and decorating the courthouse was clearly illegal, because there was no advertisement for bids."

The holding of the court in the *Garretson* case was most clearly stated in 10 *Drake Law Review*, 53, 55, as follows:

"In those instances where the statutory requirement of competitive bidding is not absolute but depends upon the amount of money involved, the court will not allow this requirement to be avoided, by dividing what is one project into several smaller contracts."

Further reference is directed to 38 *O.A.G.* 11, where this office completely and unequivocally adopted the rule of the *Garretson* case.

Thus it is the opinion of this office that the jobbers and independent contractors mentioned by you also cannot be paid by the board of supervisors, because to do so would amount to a subterfuge and an evasion of the purpose and command of §332.7, previously quoted. The relevant test is whether

the "probable cost" of erection or repair "will exceed two thousand dollars", and not whether each individual contract involved in the erection or repair will probably "exceed two thousand dollars", in determining whether public bidding is essential.

6.11

COUNTIES AND COUNTY OFFICERS: Board of supervisors, courthouse improvement—§§23.1, 23.2, 332.7, 332.8, 1962 Code. Supervisors must comply with §§332.7 and 332.8 in repairing or improving courthouse when cost exceeds $2,000.

July 8, 1964

Mr. Jack M. Fulton
Linn County Attorney
Court House
Cedar Rapids, Iowa

Dear Mr. Fulton:

This is in reply to your recent request for an opinion wherein you state:

"On March 10, 1964, the Linn County Board of Supervisors entered into a contract with Loomis Brother, Inc., a contractor, to do the following work on the Linn County Court House:

1. Lower the ceiling in two Court Rooms and to put new ceilings in the Court Rooms consisting of accoustical tile.

2. Extension of the air ducts in the ceiling to the level of the new ceiling.

3. Replace the existing light with recessed ceiling fixtures.

The total cost of the contract was $4998.00.

"The claim for the said amount was approved by the Linn County Board of Supervisors and was submitted to the Linn County Auditor for payment. The Linn County Auditor has held up payment inasmuch as the contract was in excess of $2000.00 and Sections 332.7 and 332.8 of the 1962 Code of Iowa were not complied with. There were no proposals invited by advertisement for three weeks in an official newspaper, as required by the sections. In fact no bids were obtained.

"When the contract was entered into, the Board of Supervisors were under the impression that they were not bound by sections 332.7 and 332.8 as they felt that the above described work under the contract was for a 'public improvement' under Sections 23.1 and 23.2 of the 1962 Code of Iowa, rather than also being under the language of Section 332.7 which states: 'No building shall be erected or repaired. . .' Inasmuch as the contract was under $5000.00, the Board of Supervisors was not required to advertise for bids as required by Chapter 23.

"I would appreciate receiving your opinion upon the above set of facts as to whether or not it was necessary for the Board of Supervisors before awarding the contract, to comply with Sections 332.7 and 332.8 of the Iowa Code requiring proposals invited by advertisement for three weeks in all the official newspapers in the county."

Section 23.2 provides:

"Before any municipality shall enter into any contract for any public improvement to cost $5000.00 or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and

proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing."

The term "municipality" as used in this section is defined by Section 23.1 to include counties. It should be noticed that Chapter 23 is a general chapter dealing with public contracts of many different type governmental bodies. On the other hand, Chapter 332 deals specifically with the powers of the Board of Supervisors.

Section 332.7 provides:

"No building shall be erected or repaired when the probable cost thereof will exceed $2000.00, except under an express written contract and upon proposals therefor, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done."

Unless statutes are in direct conflict, they will be read together and, if possible, harmonize. (*Hardwick v. Bublitz,* 253 Iowa 49, 111 N.W. 2d 1962). In would not appear that these two statutes are in conflict in that §332.7 merely establishes requirements in addition to the requirements in Chapter 23 under certain circumstances.

The case of *Madrid Lumber Co. v. Boone County,* (Iowa, 1963, 121 N.W. 2d 523) is applicable to your situation. This was a suit against the county and county board of supervisors, for labor and materials furnished for the improvement of the county home. It was held by the Supreme Court that the plaintiff entered into an oral contract with the county for improvement of the county home at a cost of nearly $6,000 and there was no written contract as required by statute and no plans and specifications were filed with county auditor, no advertisement was made in any of official county newspapers, and no time or place was fixed for letting the contract as required by statute, the oral contract was void and plaintiff could not recover even on theory of unjust enrichment.

The Court stated, after quoting sections 332.7 and 332.8:

"It is apparent the foregoing requirement of these quoted sections were violated. . . The law provides just how such matters may be done, and of this everyone is conclusively presumed to have notice. . .We have examined appellee's contentions and hold it is not entitled to recover under any alleged theory. To hold otherwise would require us to nullify Code sections 332.7 and 332.8, I.C.A."

It is therefore our opinion that the county board of supervisors must comply with sections 332.7 and 332.8 in repairing or improving the court house when the cost thereof exceeds the sum of $2000.00.

6.12

COUNTIES AND COUNTY OFFICERS: Board of supervisors, drainage board—Board of supervisors, acting as drainage board, only acts in representative capacity with its powers being defined by statute and has no authority to pay otherwise valid obligations which have been barred by statute of limitations.

April 10, 1963

Mr. Donald E. Skiver
Osceola County Attorney
Sibley, Iowa

Dear Mr. Skiver:

This is to acknowledge your letter of March 25, 1963, wherein you request an opinion on the following:

"In 1919 a drainage district in Osceola County issued Drainage Bonds maturing in 1932. Some of the bonds were not paid for lack of presentation.

"A bond has now been presented for payment and the district has sufficient funds on hand to pay the same.

"Since action on the bond is barred by the statute of limitations, can the supervisors pay the same?"

Your attention is invited to 1932 *O.A.G.* at page 233 thereof, wherein this department stated:

"Another question which may arise in this connection is, where it appears that the statute of limitations has run against drainage warrants, certificates, or bonds would the board have the power to forego the benefit of the statute and proceed to spread and levy assessments and pay the same? Inasmuch as the board of supervisors, acting as a drainage board only, acts in a representative capacity, with its powers defined by statute, we are of the opinion that the board would not have authority to forego the statute of limitations and could not pay an obligation which has been barred by the statute."

The position of this opinion is supported by the well-established principle that a broad of supervisors has only such powers as are conferred upon it by statute.

In *Board of Supervisors vs. District Court,* 209 Iowa 1030, 299 N.W. 711, the Iowa Court stated:

"The powers of such board, however, are limited and defined by statute. . .they (the board of supervisors) act wholly in an official or representative capacity, under the express provisions of the drainage statutes."

We find no statutory authority for the payment of such bonds in this instance. It is, therefore, our belief that the position taken by the department, in the aforementioned Attorney General's report, although *dicta,* is a correct and proper conclusion of law.

6.13

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, institutional fund—§230.24, 1962 Code, Ch. 152, Acts 60th G.A. Board of Supervisors can use statutory amount from institutional fund for establishment of incorporated mental health center with affiliated counties.

April 6, 1964

Honorable Dan Prine
State Representative
Oskaloosa, Iowa

Dear Mr. Prine:

This is in reply to your recent inquiry wherein you submitted the following:

"There has been established at Oskaloosa a mental health center comprising the counties of Marion, Monroe, Mahaska and Keokuk. Now the Board of Supervisors of Lucas County have indicated a desire to

join with the other four counties. Under Chapter 152, page 256, Acts of the 60th General Assembly, the legislature sets out the establishment of these centers.

"The Board of Supervisors of Lucas County want to know if they can use the twenty-five cents (25c) per capita to be taken from their institutional fund until such time as they can establish and use a levy in the county to become affiliated with an institute already in existence but established since January 1st of 1963."

In reply thereto, we advise as follows: Section 230.24, Code of Iowa, 1962, as amended by Chapter 152, Session Laws, 60th General Assembly, provides in pertinent part:

"A county, or affiliated counties, desiring to establish an incorporated mental health center and having a total or combined population in excess of thirty-five thousand (35,000) according to the last federal census, may establish such new mental health center in conjunction with the Iowa mental health authority. In establishing such mental health center, the board of supervisors of each such county is authorized to expend therefor from the state institution fund an amount equal to, but not to exceed, two hundred fifty (250) dollars per thousand (1,000) population or major fraction thereof. Such appropriation shall not be recurring and shall not be applicable to a mental health center established prior to January 1, 1963."

Therefore, it is our belief that the Board of Supervisors has the authority to expend a sum equal to, but not in excess of $250.00 per thousand population, or major fraction thereof, from the state institution fund for the establishment of an incorporated mental health center with affiliated counties, provided said funds are not used for an institute established prior to January 1, 1963.

6.14

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, limitation on "probable cost" of property acquired by county—§345.1.1.1 1962 Code. "Probable cost" of new building cannot exceed statutory limit, even though money is received from sale of old building.

August 7, 1964

Mr. Harley Stipp
Winnebago County Attorney
Forest City, Iowa

Dear Mr. Stipp:

This will acknowledge your letter of recent date, requesting opinion as follows:

"Our board of supervisors is considering the matter of selling a county shed located in Lake Mills in this county, and the site on which it is located, and the purchase of a new site in Lake Mills, and the construction thereon of a new county shed.

"It is estimated that the purchase of a new site and the construction of a new shed will cost approximately $22,000.00, and it would seem that under Section 345.1 an election would be required.

"However, if the sale of the old site and shed could be applied on the cost of the new site and shed, the net cost would be considerably below $20,000.00. I am somewhat in doubt whether this can be done,

and thus avoid an election, but it seems unfortunate that a county-wide election would be required because of this small excess of $2,000.00.

"If you have any suggestion as to any way in which this can be done without requiring an election, I would be grateful for your opinion."

Section 345.1 of the Code provides as follows:

"The board of supervisors shall not order the erection of . . .any . . . building, . . . when the probable cost will exceed ten thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters. . .Except, however, such proposition need not be submitted to the voters if any such erection. . . or purchase of real estate may be accomplished without the levy of additional taxes and the probable cost will not exceed twenty thousand dollars."

It has been held that the dollar limitation of Section 345.1 refers only to the *county funds* to be expended.

In 1934 *O.A.G.*, page 327, it was stated that where thirty per cent of the proposed cost of a proposed $13,000 project was to be financed by donations, it was not necessary to submit the proposition to the voters.

In 1926 *O.A.G.*, page 216, it was stated that there would be no need to require a vote on a proposed county building project where part of the cost was contributed by the State Highway Commission, and the cost from the county funds did not exceed the statutory limitation.

In 1898 *O.A.G.*, page 64, it was held that insurance money received from destruction of an old building by fire could be appropriated for the purpose of replacing the building, in the full amount authorized by statute, without submitting the question of a new building to the vote of the people.

These opinions, however, may be distinguished from the situation described in your letter. In each of these cases the money received by the county was from an external source. In your situation, the present site and shed are actually assets of the county, and as such, should be considered part of the "county funds".

In 1962 *O.A.G.*, page 112, it was also indicated that proceeds from the sale of the site of an old court house must be placed in the county general fund, and could not be used to buy a new site.

It is therefore our opinion that in ascertaining if the limits prescribed by Section 345.1 will be exceeded, it would be improper to deduct from the "probable cost" the amount received from the sale of the old site and shed.

6.15

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, memorial buildings and monuments—§§37.5, 37.18, 1962 Code. County has authority to purchase but not to lease building for use as county museum.

April 6, 1964

Mr. Keith A. McKinley
Mitchell County Attorney
Osage, Iowa

Dear Mr. McKinley:

We hereby acknowledge your recent letter requesting an opinion on the following matter:

"The Mitchell County Historical Society is interested in establishing a

county museum. The building to house such museum is available and now belongs to the Osage Community School District and they are proposing that a petition be circulated under the provisions of Chapter 37, Code of Iowa, 1962, to establish a Veterans Memorial Commission in the City of Osage, Iowa and further that the Commission then proceed to acquire the building presently owned by the Osage Community School District. Under this plan the Commission would, of course, be responsible for the maintenance and operation of the building and the Historical Society would be responsible for setting up the Museum and its contents.

"The School District is willing to lease these premises on a long-term basis at token rent. The question is whether or not such a Memorial Commission would have authority to lease a building rather than have the same building owned by Mitchell County and under the supervision of the Memorial Commission. In addition to the foregoing there appears to be some questions as to whether or not under the terms of Chapter 37 such a Memorial Building could be used as a county museum."

Section 37.1 authorizes the erection and equipping of memorial buildings and monuments at public expense. The proposition to be voted on must follow the form in §37.3. Section 37.5 provides:

"Acquisition of site. When the proposition to erect any such building or monument has been carried by a major vote of all voters voting thereon, any such county, city, or town shall have the power to purchase or condemn grounds suitable for a site for any such building or monument. Such condemnation proceedings shall be in the manner provided for taking private property for works of internal public improvement."

Bonds for providing funds for these purposes are authorized by §37.6 and a tax for the development, operation and maintenance of such building or monument is authorized by §37.8. The levying bodies under §37.8 are a county, city or town owning the building or monument. No authority is granted to a memorial commission by the above sections to carry out the aforesaid purposes.

The authority of a memorial commission is to have charge and supervise the erection of a building or monument and have the management and control thereof when erected. Section 37.9. Funds are disbursed upon the written order of the commissioners. Section 37.16. Sections 37.22 through 37.27 allow commissioners to use unexpended funds.

These sections indicate that the title to property purchased to be used for memorial buildings and monuments is to be held by a county, city or town. No authority to lease property is included in said sections. Therefore in answer to your first question, neither a memorial commission nor a county has authority to lease a building for a memorial but such a building can be purchased by the county for that purpose.

Regarding your second question, Section 37.18 provides:

"Name—uses. Any such memorial hall or building shall be given an appropriate name and shall be available so far as practical for the following purposes:

"1. The special accommodations of soldiers, sailors, marines, nurses, and other persons who have been in the military or naval service of the United States.

"2. For military headquarters, memorial rooms, library, assembly hall, gymnasium, natatorium, club room, and rest room.

"3. County, town, or city hall, offices for any county or municipal

purpose, community house, recreation center, memorial hospital, and municipal coliseum or auditorium.

"4. Similar and appropriate purposes in general community and neighborhood uses, under the control and regulation of the custodians thereof."

Memorial rooms are included in subparagraph 2, while subparagraph 3 includes a recreation center and a community house. We have heretofore advised that a building to house a museum of historical objects may be acquired by a county conservation board (STAFF to Miles, Wayne Co. Atty., 2/7/64). Subparagraph 4 of §37.18 authorizes use of a building for similar and appropriate purposes. We are therefore of the opinion that use of a building as a museum is a similar and appropriate purpose under §37.18(4) to the aforementioned purposes.

6.16

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, mental health--§230.24, 1962 Code. County hospitals in counties having more than 135,000 population are not "a community mental health center" within the meaning of §230.24, Code of Iowa, 1962, and consequently cannot require the Board of Supervisors to levy the additional three-eighths mill provided for in §230.24.

April 5, 1963

Mr. Harry Perkins, Jr.
Polk County Attorney
Polk County Courthouse
Des Moines, Iowa

Attention: Chris L. Becker

Dear Mr. Perkins:

This is to acknowledge your letter of January 25, 1963, wherein you requested an opinion on the following:

"Broadlawns Polk County Hospital is a hospital located in a county having a population of more than 135,000. Broadlawns Polk County Hospital has an established psychiatric department, as authorized by paragraph 8 of Section 347.14 of the 1962 Code of Iowa. According to the administrator of said hospital, the present authorized millage is insufficient to properly operate said hospital. Broadlawns is an independent tax certifying body.

"1. Is Broadlawns Polk County Hospital, as above described, a 'community mental health center' as mentioned in the second one-half of the unnumbered second paragraph of Section 230.24 of the 1962 Code of Iowa?

"2. Can said hospital require the Polk County Board of Supervisors to levy the additional three-eighths mills provided for in the last sentence of the second unnumbered paragraph of Section 230.24 of the 1962 Code of Iowa, and have Polk County reimburse Broadlawns hospital for money expended in the operation of its psychiatric department?"
Section 230.24, Code of Iowa, 1962, in pertinent part provides:

"Any county now or hereafter expending funds from the county fund for mental health for the psychiatric examination and treatment of persons in a community mental health center, may levy an additional tax of not to exceed three-eighths mill."

In an opinion dated April 12, 1961 and directed to Mr. T.E. Tucker, Deputy Lee County Attorney, this office ruled:

"In our opinion, the fund created by the additional three-eighths mill levy must be earmarked and used by the board of supervisors for mental health centers only."

It is doubted that the legislature intended that a county hospital be regarded as a "community mental health center" within the meaning of §230.24. This position is supported by §347.7, Code of Iowa, 1962, which in pertinent part provides:

"* * * in counties having a population 135,000 inhabitants or over, the levy for improvements and maintenance of the hospital shall not exceed three and one-half mills in any one year. The proceeds of such taxes shall constitute the county public hospital fund."

The term "maintenance" within this provision is interpreted to mean the current expenses of the institution (1928 *O.A.G.* 132) and consequently, the authorized millage may be in part appropriated to finance the current expenses of a psychiatric department established under §347.14, Code of Iowa, 1962.

The fact that §347.7 creates a separate hospital fund, and also places a statutory limit on the amount of the levy for county hospitals, is indicative that a county hospital is not entitled to the additional three-eights mill levy as provided in §230.24.

It must be emphasized that §230.24 authorizes a separate county mental health fund; §347.7 authorizes a separate county hospital fund. Inasmuch as the funds are separate and distinct from each other, there cannot be a transfer of funds between them. Your attention is invited to 1948 *O.A.G.* at page 219 thereof, where this department held that there could be "no transfer of funds either permanent or temporary between the county and county board of education." In that opinion it was stated at page 223:

"The county hospital trustees possess one fund, the County Hospital Fund, and, therefore, that fund could not be the subject of transfer by the hospital trustees. And not being a fund of the county within the terms of the statute, it could not, under the terms of the statute, be controlled by the board of supervisors. Unless the same certifying or levying board has control of both the lending and the borrowing funds, compliance with this provision of Section 24.22 (Code of Iowa, 1946) may not be effected. . . . Illustrative of the foregoing analysis, it can be seen that the county hospital fund could not be the subject of lending or borrowing. The county is without power to borrow from a city fund or vice versa because no enforcible provision within the terms of the statute could be made for the restoration of the borrowed fund. This principle is controlling whether the transfer of moneys be permanent or temporary."

We are, therefore, disposed to the belief that Broadlawns Polk County Hospital may not be regarded as a "community mental health center" within the meaning of §230.24 and, consequently, Broadlawns Polk County Hospital cannot require the Polk County Board of Supervisors to levy the additional three-eighths mill to finance its psychiatric department.

6.17

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, power to install sidewalks within a city or town—§320.1, 1962 Code. County board of supervisors is without authority to install sidewalk within city or town leading to schoolhouse located within the boundaries of city or town.

December 30, 1963

Mr. Harry Perkins
Polk County Attorney
Room 406, Court House
Des Moines, Iowa

Attention: C. L. Becker

Dear Mr. Perkins:

This is in reply to your recent letter in which you raised the following question:

"Jackson School is a part of the Independent School District of Des Moines and is located just inside the city limits of Des Moines, Iowa. Most of the property owners south of the schoolhouse and located in the unincorporated area of Polk County have petitioned the Board of Supervisors to construct sidewalks along the east side of Indianola Road for several blocks to join up with the sidewalk at the schoolhouse. The question is whether the Polk County Board of Supervisors has authority to construct said sidewalk, if petitioned for by seventy-five per cent of the interested property owners, and assess the cost thereof against the properties.

"Section 320.1 of the 1962 Code of Iowa, Construction of sidewalks in certain districts, provides as follows:

"Where an independent school district has within its limits a city of one hundred twenty-five thousand population or more, and has a schoolhouse located outside the city limits of such city and outside the limits of any city or town, the board of supervisors of the county in which such school district is located shall upon the filing of a petition signed by the owners of at least seventy-five per cent of the property which will be assessed, order the construction or reconstruction of a permanent sidewalk not less than four feet in width along the highway adjacent to the property described and leading to such schoolhouse."

"The provisions in Section 320.1 appear to apply to situations exactly the opposite to the one involved in the instant case. Under the provisions of Section 320.1, the Board of Supervisors is authorized to construct such a sidewalk where an independent or community school district embracing a city of 125,000 population or more has a schoolhouse located outside the city limits of such city.

"In the instant case, just the reverse is true; the schoolhouse being located in the incorporated area of Des Moines, Iowa.

"We would appreciate it, therefore, if you would favor us with an opinion as to whether county boards of supervisors are authorized to construct a sidewalk in the unincorporated area of the county extending to a schoolhouse which is located within the city of Des Moines, a city of over 125,000 population, and assess the costs thereof against the individual property owners."

Section 320.1, 1962 Code, applies only to situations where a schoolhouse is located outside of the city limits. In the case of In re: *Frentress Estate*, 249 Iowa 783, 89 N.W. 2d 367 (1958), the Court stated:

"The Law is well settled that a county is a creature of statute, a quasi-corporation, and its officials have only such powers as are expressly conferred by statute, or necessarily implied from the powers so conferred." (citing cases)

In addition to the above rule of construction, there is also similar rule that where a particular power is granted and similar corresponding powers are

not mentioned, such corresponding powers are presumably excluded. (See Sutherland, Statutory Constitution, §4915 et seq.) It is, therefore our conclusion that the legislature, in providing that the county board of supervisors may install a sidewalk under the provisions of §320.1 when the schoolhouse is located outside of the boundaries of a city or town has impliedly withheld a power to install a sidewalk across school land within the boundaries of a city or town.

6.18

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, publication, poor fund—§348.19, 1962 Code. Publication of proceedings of the board of supervisors allowing bills shall include name of individual to whom allowance is made.

October 31, 1963

Mr. Chet B. Akers
Auditor of State
L O C A L

Attention: Earl C. Holloway

Dear Mr. Akers:

This is to acknowledge your recent request for an opinion upon the following:

"We have received a question in regard to publishing names of persons receiving assistance from the Poor Fund. It has been the practice to publish in the minutes, name of claimant, nature and amount of claim and to whom said assistance was given e.g. Johnson Grocery, groceries, John Doe, $20.00.

"Is it necessary to publish John Doe's name as in the above example. The Social Welfare director claims the name should not be published." Section 349.18, Code of Iowa, 1962, provides as follows:

"All proceedings of each regular, adjourned, or special meeting of boards of supervisors, including the schedule of bills allowed, shall be published immediately after the adjournment of such meeting of said boards, and the publication of the schedule of the bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon."

In short, §349.18 provides the following must appear in the publication:

(1) The name of each individual to whom the allowance is made.
(2) For what such bill is filed.
(3) The amount allowed thereon.

The example in the letter from the Auditor was as follows:

"Johnson Grocery, groceries, John Doe, $20.00."

Number (1) above is satisfied since the allowance was made to "Johnson Grocery". Number (3) is satisfied since the allowed amount was $20.00. Thus the question boils down to whether number (2) above is satisfied by merely showing the bill was allowed for groceries, or whether John Doe's name should be included to show who the groceries were provided for.

No court has apparently faced this problem before. Logically, it would appear that what the bill was allowed for was not merely groceries, but in addition thereto, it was groceries for John Doe. Not only is this logical, but it also would appear to correspond to the obvious intent of §349.18, that

being a complete disclosure of expenditures of public funds. This would appear to be the obvious intent of §349.18 for the reason that before §349.18 appeared in its present form it read as follows:

> "All proceedings of each regular, adjourned, or special meetings of the board of supervisors, including the schedule of bills allowed, shall be published promptly after such meeting."

This section was amended by the 45th G.A., said amendment appearing at Chapter 105, §2, of the Acts of the 45th G.A. By the amendment a much more specific and comprehensive disclosure was required.

In addition, and in support of this conclusion, the legislature in Chapter 252 did not make poor support information confidential. In some financial assistance programs, e.g., ADC and Soldiers and Sailors Relief, such information has been made confidential, but not so in the case of poor support. This in itself would seem to indicate that the legislature did not intend that the payee's name go unpublished.

6.19

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, release of institutional liens—§230.29, 1962 Code. Board of Supervisors has no authority to grant partial release of institutional liens or enter into subordination agreements.

July 7, 1964

Mr. Phillip N. Norland
Worth County Attorney
Northwood, Iowa

Dear Mr. Norland:

This will acknowledge your letter of recent date, requesting opinion as follows:

> "I should like an opinion on the question of whether the county board of supervisors has the power under Chapter 332 to grant partial releases of institutional liens whereby certain real estate owned by the lienor is released from the effects of the lien and the lien remains effective as against remaining real estate owned by lienor, and whether the Board of Supervisors has the power to grant a subordination agreement in connection with an institutional lien whereby it would be agreed that a proposed mortgage to a bank would be prior to the institutional lien. This power must necessarily be predicated, I am sure, on a finding that the grant of the partial release or a subordination agreement would not jeopardize the security of the institutional lien. . . ."

Chapter 332 contains the general powers of the Board of Supervisors; whereas the specific powers of the Board with respect to release of institutional liens is contained in §230.29 of the Code, which provides:

> "The board of supervisors of the county shall release liens accruing under the provisions of this chapter when fully paid or when compromised and settled by the board of supervisors or when the estate of which the real estate affected by this chapter is a part has been probated and the proceeds allowable have been applied on such liens."

A situation analogous to that described in your letter arose in the case of *In re Estate of Frentress,* 249 Iowa 783, 89 N.W. 2d 367 (1958). This case involved the controversy of whether the lien or mortgages taken by the county to secure the amount of general relief granted the mortgagors by the county

under Chapter 252 would take precedence over the old age assistance lien of the State Board of Social Welfare.

It was held that the mortgages were of no force and effect since the county, in accepting the mortgages, exceeded its authority. The Court stated:

> "The law is well settled that a county is a creature of statute, a quasi corporation, and its officials have only such powers as are expressly conferred by statute, or necessarily implied from the powers so conferred. . . . the care of the poor being purely a statutory obligation, and the only statutory provision existing whereby the county may reimburse itself for funds expended being section 252.13, supra, we are constrained to hold that section 252.13 is exclusive. . .
>
> "While appellee contends section 332.3, Code, 1954, dealing with powers and duties of Board of Supervisors, authorizes the taking of the mortgages, we do not agree. These are general powers which must give way where specific powers are enumerated. . ."

The Court also clearly indicated that §230.29 is exclusive in nature. Therefore, any power the county may have with respect to the granting of partial releases or subordination agreements must be found in the express language of that section or necessarily implied therefrom.

Section 230.29 authorizes a release of the liens only in three circumstances, i.e.:

1. When the lien is fully paid;
2. When the lien is compromised and settled; or
3. When an estate has been probated with allowable proceeds applied on the lien.

Each of these three situations clearly contemplates a final discharge of the debt. The situation described in your letter does not fit into any of these categories.

There is no express authority for the Board to grant either partial releases or subordination agreements; nor can it be said that these are necessary for the administration of §230.29 and therefore implied.

It is our opinion that the Board of Supervisors has no authority to grant a partial release of an institutional lien or enter into an agreement subordinating that lien to any other.

6.20

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, sewer improvement—§§23.2, 23.3, 332.7, 1962 Code. Payment to a city for sewer improvement to county home may be made upon completion of improvement from county general fund by resolution of Board of Supervisors.

August 19, 1964

Mr. Garry D. Woodward
Muscatine County Attorney
112½ E. Second Street
Muscatine, Iowa

Dear Mr. Woodward:

Reference is herein made to yours of the 12th inst., in which you submitted the following:

"This is a request for an Attorney General's opinion construing Sections 23.2, 23.3 and 332.7 of the 1962 Code.

"The City of Muscatine is planning an extensive sewer construction project. They have prepared plans and specifications. As a part of this project, the city plans to construct a new sewer to the Muscatine County Home. The cost of the county home sewer would exceed $5,000.00. The city would comply with Code Sections 23.2 and 23.3 giving the contract to the low bidder on the proposed project. The cost of the sewer for the county home would be set out in a sub-division of the total bid. The city is holding a hearing on August 20th as to the overall project.

"Under such circumstances, would it be legal for the Board of Supervisors by resolution to pay the city for the sewer constructed for the county home upon its completion? I am told that this is a common practice, but it appears to be in violation of Sections 23.2, 23.3 and 332.7 of the 1962 Code."

County property is private property insofar as liability for the cost of public improvements is concerned. Section 391.46 provides:

"Privately owned property" defined. All property except streets, property owned by the United States, and property owned by the city, shall be deemed privately owned property."

This section has been interpreted by our Supreme Court in the case of *Bennett v. Greenwalt,* 226 Iowa 1113, 1135, 286 N.W. 722, as follows:

"* * * It must be kept in mind that with respect to special assessments for sewer, street and other such improvements, the property of a county is privately owned property (Code section 6019), and it is liable for such assessments in the same manner and to the same extent as other privately owned property. . ."

In view of the foregoing, I am of the opinion that it is legal for your Board of Supervisors to pay for the sewer improvement described from the county general fund by resolution, upon the completion of the improvement.

6.21

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, tax levy for conservation—§111A.6, 1962 Code. County Board of Supervisors has authority to levy annual tax for Conservation Board in any amount not exceeding one mill.

February 20, 1964

Mr. Allan M. Oppen
Hardin County Attorney
Iowa Falls, Iowa

Dear Mr. Oppen:

This is in reply to your recent inquiry relative to the following:

"On April 23, 1962 you rendered an opinion to Mr. Robert A. Maddocks, Wright Co. Attorney, relative to whether 'the county board of supervisors have the legal authority to levy an annual tax in amounts of less than ¼ mill but more than no mills?'

"Please advise whether there is any change by legislative action to render any change in your opinion of that date. In that opinion you stated that Iowa Code Section 111A.6 expressly prohibits a levy of less than one-fourth mill."

Section 111A.6 as amended by the 60th General Assembly provides in pertinent part:

"Upon the adoption of any county of the provisions of this chapter, the County Board of Supervisors of such county may, by resolution, appropriate an amount of money from the general fund of the county for the payment of expenses incurred by the County Conservation Board in carrying out its powers and duties it may levy or cause to be levied an annual tax, in addition to all other taxes, of not more than one mill —"

Prior to the 60th General Assembly, the rate of the levy as set forth in the terms of the above statute read as follows:

"And it may levy or cause to be levied -- — of not less than ¼ mill or more than one mill -- — "

Thus it becomes clear that the recent legislative action has operated to change the meaning of this statute. It is equally clear that County Board of Supervisors now has the authority to levy an annual tax in any amount not exceeding one mill.

Further, because of the legislative action, the opinion issued by this department on April 23, 1962, concerning the above section is no longer a proper interpretation of this statute and is hereby withdrawn.

6.22

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, terms of office—§39.18, 1962 Code; Ch. 77, Acts 60th G.A. Staggered terms for board of supervisors and township trustees to be preserved; Sec. 4 of Ch. 77, Acts 60th G.A., not operative and of no force and effect.

January 22, 1964

Mr. Robert Burdette
Decatur County Attorney
Leon, Iowa

Dear Mr. Burdette:

Reference is herein made to your letter and supplemented by yours of the 26th ult., in which you stated the following:

"I am writing this letter as a follow-up to our telephone conversation of yesterday, December 17,1963. My inquiry to you was as to the proper interpretation of Section 4, Chapter 77 of the laws of the 60th General Assembly. This, of course, is with reference to changing the term of the members of the Board of Supervisors from three years to four years. Our County Auditor called to my attention the fact that in his opinion the apparent intention of the law was to change from a three-year term for the Board of Supervisor members to a four-year term, but to maintain the same plan of having the terms expire on a staggered basis so that with a three-man board one term would expire each year.

"However, in studying this matter over, our County Auditor has discovered that if we go on the theory that the Board member whose new term began January 1, 1963 shall complete a three-year term, and then begin a new three-year term as indicated in Section 4 of Chapter 77, his second term would end at the same time as the term of the board member who would be elected in 1964, for a term to begin January 1, 1965 and ending December 31, 1968 so that a new term would have to begin January 1 of 1969. Then the supervisor who was elected to a three-year term beginning after his present three-year term, which began January 1, 1963 and would extend through December 31, 1965, would then have his new term begin January 1, 1966 and it, too, would end on December 31, 1968 so that this supervisor, too, would supposedly begin a new term January 1, 1969.

"The only alternative that our County Auditor and I can see to this dilemma is if we would interpret this same Section 4 to mean that the term beginning January, 1963 would be *shortened to two years* instead of a three-year term. Then we would have his new term begin January 1, 1965 instead of January 1, 1966 and this term would then end on December 31, 1967 so that his next term would then commence January 1, 1968 instead of January 1, 1969. This would then put our supervisor elections in proper rotation as we think the intent of the legislature would have it be, that one new term would begin each year for our three-man board. However, as we would interpret this Chapter 77 the only way this could be done would be to reduce the term which began January 1, 1963 from three years to two years. Our problem, of course, is the correct interpretation of Section 4 of Chapter 77 and we are not sure what it is intended to mean. Since this represents a problem of some consequence and is of immediate importance because of the pending primary election, we would appreciate a prompt reply from your office on this particular point. If a normal opinion has already been issued on this, of course, we would welcome a copy of same, or if not, we would then be interested in a formal opinion on this question."

In reply thereto I would advise the following. Section 39.18, Code of 1962, with respect to the offices of members of the board of supervisors and township trustees, provides staggered terms for the members of both such offices, and further provides the duration of their terms to be three years. The 60th G.A., Chapter 77, amended §39.18 by striking the word "three" therein, insofar as duration of term is concerned, and inserting inlieu thereof the number "four", making the term of such offices four yours instead of three. This amendment became effective July 4, 1963, and, nothing appearing to the contrary, operates prospectively and not retroactively. Thus, according to either statute, a candidate for Board of Supervisors or Township Trustees, whose term begins January 1, 1963, will serve a three year term extending to January 1, 1966. Also, at the 1964 election, such office will be filled, under the provisions of Chapter 77, Section 4, for an additional three year term; and such term would expire January 1, 1969. According to Section 39.18, other supervisors or trustees elected at the 1964 election will be elected for a four year term and the expiration date of their term will likewise be January 1, 1969. Thus, as these statutes, §39.18 as amended by Section 1 of Chapter 77 and Section 4 of Chapter 77, stand, and are codified, there is conflict in two particulars. First, §39.18 provides and has previously provided by its terms, for staggered terms of supervisors and trustees. The provisions of Chapter 77, Section 4, in providing for a succeeding three year term, negates the staggered terms under the provisions of Section 39.18. Second, while Section 39.18, as amended, provides for a four year term for all candidates for supervisors and trustees to be voted for at the 1964 election, Chapter 77, Section 4, provides for election of one supervisor and of a trustee for a three year term.

It is true that the rule where statutes in the same chapter are in conflict, the courts will seek to resolve the conflict if at all possible. It is likewise true that the rule that statutes in pari materia shall be construed together, applies with force to statutes passed at the same session of the legislature. See *Iowa Farm Serum Company v. Board of Pharmacy Examiners*, 240 Iowa 735, 35 N.W. 2d 848. It is also true that sections in the same chapter must be harmonized, if at all possible. As stated in *Dikel v. Mathers*, 312 Iowa 76, 83, 238 N.W. 615 (1931):

"All the foregoing sections in the one chapter must be read in a way that will make each consistent and harmonious with the other, and carry out the clear intention of the legislature."

Statutes relating to the same subject matter and enacted at the same time, are to be construed as in pari materia and harmonized if possible. See *McKinney v. McClure*, 206 Iowa 285, 220 N.W. 354 (1928). Unless statutes

are in direct conflict, they will be read together and, if possible, harmonized. *Hardwick v. Bublitz*, 111 N.W. 2d 309. However, notwithstanding the fact that these statutes are in pari materia, it is plain that this conflict by any rule of interpretation be resolved, and therefore, the conflict survives the pari materia rule.

It is plain that the clear legislative intent of the 60th General Assembly is to preserve provisions for a staggered term for members of the board of supervisors and township trustees and for the terms of such offices after July 4, 1963 for a period of four years. By reason of the foregoing, Section 4 of Chapter 77, Acts of the 60th G.A., is not operative and of no force and effect.

6.23

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, transfer of funds to joint county-city authority—Ch. 239, Acts 60th G.A. Board may transfer county funds as an outright gift to joint county-city authority, only if board deems it proper and appropriate to aid "authority" to effectuate its purposes.

July 9, 1964

Mr. Robert W. Burns
Dubuque County Attorney
457 Fischer Building
Dubuque, Iowa

Dear Mr. Burns:

This will acknowledge receipt of your recent letter in which you submitted the following:

"The County of Dubuque and the City of Dubuque have by joint action created the 'County-City of Dubuque Authority', a corporation, and have also appointed the Commissioners of said 'Authority' all pursuant to Chapter 239 of the Laws of the 60th General Assembly of Iowa.

"The purpose of said 'Authority is to plan the acquisition, construction, furnishing, equipping, owning, improving, altering, enlarging, operating and maintaining a public building, namely, a new County-City Building, and to go forward with said plans and to bring them to reality subject to voter approval as contained in said Chapter 239.

"However, said 'Authority' has no funds with which to operate at this point and there is no provision for said 'Authority' to receive funds of any kind except 'after the fact' so to speak, that is, when they begin to receive money from leases contemplated by Chapter 239.

"It is elemental that prior to the matter being brought to a vote, the 'Authority' will need funds for office expenses, secretarial expense, fees to be paid to experts for preliminary study (such as architects), etc., so that they may present to the voters an intelligent proposition.

"The Dubuque County Board of Supervisors has received a written request from the Board of Commissioners of said 'Authority' which asks the Supervisors to transfer $12,500 from the General Fund to the Treasury of the 'Authority'.

"There seems to be analogous precedent for such action by the Board of Supervisors which is contained in 1954 OAG 98. However, the situation is somewhat different here since the 'Authority' has autonomy to act within its own sphere pursuant to Chapter 239.

"Therefore, I wish to be advised on the following questions:

1. May the Dubuque County Board of Supervisors transfer $12,500 from the General Fund to the 'County-City of Dubuque Authority'?

2. Assuming your answer to question one above is in the affirmative:

a. Is there any limitation upon future additional transfers from the General Fund to said 'Authority', and

b. Can the transfer of funds be an outright gift to the 'Authority' or will it be necessary for the 'Authority' to repay the General Fund any advances so received in the event that the contemplated proposition receives voter approval, or otherwise?"

The pertinent sections of Chapter 239, Laws of the 60th General Assembly, are as follows:

"Sec. 2. Any county and any city or town which is the county seat thereof, may incorporate an 'Authority' for the purpose of acquiring, constructing, furnishing, equipping, owning, improving, altering, enlarging, operating or maintaining a public building or buildings and the necessary site or sites therefor, for the joint use of such county and city or town."

"Sec. 3. The term 'incorporating unit' as hereafter used in this Act shall be deemed to mean the county. . ."

"Sec. 10. This Act being designed to effect a public use and purpose, any incorporating unit may make donations of property, real or personal, to the authority as they may deem proper and appropriate in aiding the authority to effectuate the purpose for its creation."

In answer to your first question, it is our opinion that Section 10 of this Act authorizes your county board of supervisors to transfer $12,500 from the county General Fund to the "County-City of Dubuque Authority", if your board deemed it was proper and appropriate in aiding the "Authority" to effectuate the purpose for its creation.

In answer to your second question, only that property, real or personal, which the county board of supervisors deem proper and appropriate in aiding the "Authority" to effectuate the purpose of its creation may be transferred from the General Fund to the "Authority", and such transfers of funds may be outright gifts to the "Authority".

6.24

COUNTIES AND COUNTY OFFICERS: Board of supervisors, voluntary admission to state institutions–§§223.1, 223.4, 223.13, 1962 Code. Board of supervisors is vested with authority to approve or disapprove voluntary admissions to hospital for epileptics and schools for mentally retarded.

July 25, 1963

Mr. Edward F. Samore
Woodbury County Attorney
204 Courthouse
Sioux City, Iowa

Dear Mr. Samore:

This is to acknowledge your letter of May 17, 1963, wherein you request an opinion upon the following:

"Reference is made to your opinion dated March 4, 1963, in answer to a request made from this office concerning Section 223.13 of the Code of Iowa of 1962:

"Approval of voluntary admissions. Voluntary admissions to the hospitals must be with the approval of the Board of Supervisors of the county of legal settlement, except those private patients received under Section 223.5.

"Reference is further made to the words 'voluntary admissions *must* be with the approval of the Board of Supervisors'.

"Your opinion is respectfully requested as to whether or not the approval is a compulsory act by the Board of Supervisors when applications are made, or whether the intention is that the approval is a prerequisite for admission. In other words, when applications are made to the Board of Supervisors is the Board of Supervisors, under the law, permitted any latitude of discretion whatsoever in the approval, or its disapproval of said applications. If any latitude of discretion is permitted, what are the bounds of the exercise of such discretion?"

Section 223.13, Code of Iowa, 1962, provides as follows:

"Voluntary admissions to the hospitals *must* (emphasis supplied) be with the approval of the board of supervisors of the county of legal settlement, except those private patients received under Section 223.5."

Section 223.1, Code of Iowa, 1962, provides:

"The hospital for epileptics and schools for mentally retarded, hereinafter in this chapter referred to as *'hospitals'* (emphasis supplied) shall be maintained for the purpose of securing humane, curative and scientific care and treatment of epileptics, and for the training, instruction, care, and support of mentally retarded residents of this state."

Section 223.4, Code of Iowa, 1962, provides as follows:

"All adults afflicted with epilepsy who have been residents of Iowa for at least one year preceding the application for admission, and all children so afflicted whose parents or guardians have been residents of Iowa for a like period, shall be eligible for admission to the Woodward State Hospital and School."

Examination of the language of the statutes hereinbefore referred to leads us to the belief that the board of supervisors is vested with the authority to approve or disapprove an application for voluntary admission to the hospital in question. The exercise of this authority will, of necessity, vary factually as to each individual applicant, thus rendering it difficult and undesirable to set forth rigid rules to govern the exercise of the same.

It should be pointed out, however, that when the board determines the applicant qualified under §223.4, Code of Iowa, 1962, and in need of securing humane, curative, and scientific care and treatment for epilepsy or in need for training, instruction, care and support because of mental retardation, the board must approve the same.

6.25

COUNTIES AND COUNTY OFFICERS: Board of supervisors, weed destruction cost—§317.21, 1962 Code. County treasurer may not assess and collect costs of weed destruction when statutory provisions have not been complied with by board of supervisors.

July 18, 1963

Mr. Robert A. Maddocks
Wright County Attorney
Clarion, Iowa

Dear Mr. Maddocks:

This letter is written in answer to your letter in which you present two questions:

"1. May the Treasurer assess property under section 443.12 to realize the cost of the destruction of weeds?

"2. Does failure to comply with any part of section 317.21 automatically cut off the county's claim?"

In answer to question one, it is my opinion that the treasurer may not assess property under §443.12 to realize the cost of destruction of weeds. This section reads in part as follows:

> "When property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall. . . demand of the person, . . . the amount the property should have been taxed. . . ."

The property in this case has not been withheld or from any other cause not listed or overlooked. It had its usual assessment by the assessor and presumably was listed and assessed the usual county taxes. It has not been overlooked within the meaning of the Code, for the parcel did pay taxes. See *Muscatine Lighting Co. v. Pitchforth*, 214 Iowa 952 (1932). But it is also true that the board of supervisors did not comply with §317.21, did not prepare a plat or schedule showing the various parcels to be assessed in accord with the assessor's records, did not fix a time for a hearing on the assessment, and did not assess the costs of destroying the weeds against the lots described in the plat. The supervisors decided to drop the matter because they could not comply with provisions of §317.21 as to notice.

But the county treasurer is not a reviewing officer on assessments required to be made by the board of supervisors. The county treasurer is not authorized to enter an assessment against property already assessed by the assessor. And we cannot say that the property has been overlooked or not listed merely because the board of supervisors has decided to drop the matter of assessing the costs of weed destruction. The county treasurer cannot discharge the discretionary duties which are expressly laid upon the supervisors of granting a hearing, determining the costs, and making the assessments.

In answer to question two, the failure of the board of supervisors to comply with the provisions of paragraph 1, 2 and 3 has barred any claim by the county under the provisions of §317.21.

The board of supervisors must determine the actual cost of the labor and materials used; they must prepare a plat or schedule and fix a time for a hearing on the proposed assessments before assessing the costs. These things they have not done. A taxing statute must be complied with in order to give rise to a valid, enforceable statutory claim.

In my opinion, the county of Wright has no legal claim when the board of supervisors have not complied with the provisions of §317.21 for assessing the costs of the destruction of the weeds. Their failure to grant a hearing and assess the costs of the work done prevents any claim by the county at this time.

6.26

COUNTIES AND COUNTY OFFICERS: Bonds—§§64.2, 64.11, 1962 Code. Individual officers determines surety on his official bond; no authority for board of supervisors to select surety.

March 18, 1964

Mr. Earl E. Hoover
Clay County Attorney
Redfield Building
Spencer, Iowa 51301

Dear Mr. Hoover:

This will acknowledge your letter of recent date, requesting the opinion of this department in the following matter:

"In our county, there are individual bonds filed for each county officer. The premium is paid for by the county and is awarded to an insurance agent on a low-bid basis.

"A question has come up as to whether the action of the county in awarding the bonds on a bid basis was legal and whether they could do this, or whether each officer had the right to choose his own agent to have the bond written and then have the county pay for it. The present procedure allows the county to put the bonds out on a low-bid basis to all the agents in the county and the one with the lowest bid writes all of the bonds individually. My question is if this procedure is proper."

Chapter 64, Code of Iowa, 1962 is applicable to bonds for county officers. In 1956 *O.A.G.* 52 it was stated:

"It has been the consistent opinion of this department that, unless otherwise expressly authorized, public officials are required to furnish individual bonds. This requirement is evident as to deputy county officers in the introductory words of Section 341.4, Code 1954, which are as follows:

" '*Each* deputy shall be required to give a bond in an amount to be fixed by the officer having the approval of the bond of his principal,* * *.'

"As to the other county officers, the matter is controlled by the provisions of Section 64.2, Code 1954, wherein the introductory words appear as follows:

" '*All* other public officers, except as otherwise specially provided, shall give bond with the conditions, in substance, as follows: * * *.' (Italics ours)

"We have repeatedly held that the use of the word 'all' in this section has the connotation similar to the word 'each' in Section 341.4, Code 1954."

Section 64.11 of the Code provides as follows:

"*If any* county treasurer, clerk of the district court, county attorney, recorder, auditor, sheriff, medical examiner, members of soldiers relief commission, members of the board of supervisors, engineer, steward or matron *shall elect to furnish a bond with any association or incorporation* as surety as provided in this chapter, the reasonable cost of such bond shall be paid by the county where the bond is filed."
(Emphasis supplied)

The individual officer may determine whether or not a corporate bond or a private bond will be filed. In a like matter, it is our opinion that it is the individual officer's determination as to who will be his surety; and that it would be improper for the county board of supervisors to ask for bids for county officers' bonds and to give all bonds to the lowest bidder. The only determination to be made by the board of supervisors, in paying for bonds filed by county officers, is whether or not the price is reasonable.

6.27

COUNTIES AND COUNTY OFFICERS: Clerk, attachment bond, non-resident sureties—§682.4, repealed by §708, Ch. 326, Acts 60th G.A.; §639.11, 1962 Code. Surety on attachment bond need not be resident of Iowa, but determination of sufficiency of bond is prerogative of Clerk.

August 4, 1964

Mr. Earl C. Hoover
Clay County Attorney
Spencer, Iowa

Dear Mr. Hoover:

This will acknowledge your letter of recent date, requesting opinion in the following matter:

"I am writing for an opinion as to the interpretation of Chapter 682.4 I.C.A., as amended by Chapter 326, Section 708, Acts of the 60th General Assembly. My question is this, if a person owns land in the State of Iowa of sufficient value, can he sign an attachment bond in a proceeding in a District Court in the State of Iowa even though he is a non-resident of the State of Iowa? We assume that the bond is acceptable to the Clerk of Court where the land is located. Is it necessary that he be a resident of the State, or has this been amended?

"I am waiting on this question to advise our Clerk for sure but it would appear that this section has been amended. Would appreciate your thoughts on this."

Section 682.4 of the Iowa Code formerly read as follows:

"The surety in every bond provided for or authorized by law must be a resident of this state, and worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured, except as otherwise provided by law. Where there are two or more sureties in the same bond, they must in the aggregate have the qualification prescribed in this section."

This section was repealed by Section 708, Chapter 326, Acts of the 60th General Assembly; and enacted in lieu thereof was the following:

"Qualifications of sureties. Each personal surety shall execute and file with the clerk an affidavit that he owns real estate subject to execution, other than real estate held in joint tenancy, equal to double the amount of the bond, and shall include in such affidavit the total amount of his obligations as surety on other official or statutory bonds. Where there are two or more sureties in the same bond, they must in the aggregate have the qualification prescribed in this section."

The Iowa Supreme Court stated, in *Holland v. State of Iowa,* 253 Iowa 1006, 115 N.W. 2d 161 (1962): ". . . a change in language of a statute ordinarily indicates an intention to change its meaning. . .".

With respect to an attachment bond, Section 639.11 of the Code in part provides:

"In all cases before it can be issued, the plaintiff must file with the clerk a bond for the use of the defendant, with sureties to be approved by such clerk, . . .".

It is our opinion that the surety on an attachment bond need not be a resident of this state, but that the determination of the sufficiency of the bond is the prerogative of the clerk.

6.28

COUNTIES AND COUNTY OFFICERS: Clerk, fees equity—§606.15, 1962 Code. $3.00 shall be charged and collected for each equity case, whether tried or dismissed before trial.

October 22, 1964

Mr. Glen M. McGee
Mills County Attorney
Glenwood, Iowa

Dear Mr. McGee:

This is in reply to your recent request for an opinion, wherein you state:

"One of the local attorneys has raised the question with our Clerk of the District Court as to whether or not in an equity case which is dismissed before trial the Clerk is authorized to tax as costs $3.00, under authority of Section 606.15(5).

"I would appreciate an opinion of your office as to whether the trial or dismissal of an equity case has anything to do with taxing the $3.00 as costs."

Section 606.15 in part provides:

"The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasurer for the use of the county except as indicated:

"1. For filing any petition, . . . four dollars. . . . .

"3. For every cause tried by jury, three dollars.

"4. For every cause tried by the court, one dollar and fifty cents.

"5. For every equity case, three dollars. . . ".

The legislature has imposed the condition of "trial" upon the collection of fees established in subsections 3 and 4 of Section 606.15. There is no such condition expressed for the collection of fees established by Section 606.15(5).

In construing statutes, the deletion of words contained in companion statutes should be considered. (See *City of Nevada v. Slemmons*, 244 Iowa 1068, 59 N.W. 2d 793 (1953)). If the legislature had intended that the fee established by Section 606.15(5) would be collected only if the case were "tried", it could well have so provided.

In addition, equity cases are tried to the court. If the condition of "trial" were imposed upon the collection of fees established by Section 606.15(5), that Section would be an inconsistent duplication of Section 606.15(4).

It is therefore our opinion that the Clerk of the District Court shall charge and collect three dollars for each equity case, whether tried or dismissed before trial.

6.29

COUNTIES AND COUNTY OFFICERS: Clerk, marriage licenses, age—§595.4, 1962 Code. Parents may sign affidavit required by §595.4 as to age and qualification of either adult or minor applicants for marriage.

August 9, 1963

Mr. John F. Boeye
Montgomery County Attorney
Red Oak, Iowa

Dear Mr. Boeye:

This is in reply to your letter wherein you request an opinion in regard to the following:

1. "Whether or not a mother and father of legally aged applicants for marriage license are such a disinterested person to sign the affidavit required under Section 595.4.

2. "Whether or not a mother or father, who, having signed a consent for a minor to marry is such a disinterested person as would qualify under Section 595.4."

Section 595.4 provides as follows:

> "Previous to the issuance of any license to marry, the parties desiring such license shall sign and file a verified application with the clerk of the court. . . Such application shall set forth at least one affidavit of some competent and disinterested *person* stating such facts as to age and qualification of the parties as the clerk may deem necessary to determine the competency of the parties to contract a marriage. . ."

There is not statutory definition of "disinterested"nor are there any court decisions defining the word as used in §595.4. There is one Attorney General's opinion in regard to this matter. 1962 *OAG* 175. The words "disinterested persons" are used in §633.9, which prescribes the prerequisites of witnessing a will. There are several cases which define "disinterested persons" in regard to wills. It has been held that a husband is not disqualified from being a witness to a will which devises land to his wife, *Bates vs. Officer,* 70 Iowa 343, 39 N.W. 608 (1886); nor is a legatee disqualified from being a witness, *Hawkins vs. Hawkins,* 54 Iowa 443, 6 N.W. 699 (1880). The Court in the *Hawkins* case stated:

> "This disqualifying interest, however, must be some legal, certain, and inmmediate interest. . . It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred or consanguinity, or to the domestic or social or any official relation or any other motives by which men are generally influenced; for these go only to the credibility. . . .The true test of the interest is, that he will either gain or lose by the direct legal operation and effect of the judgment. . . . It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent."

Interest which disqualifies a witness from deriving benefit under a will, by statute, must be an interest which is definite and legal in matter. *Drosos vs. Drosos,* 251 Iowa 777, 103 N.W. 2d 167 (1960).

Based on the above authorities, it is our opinion that:

1. The fathers or mothers of legally aged applicants for marriage licenses are disinterested persons and may sign the affidavit required by Section 595.4, and

2. A mother or father of a minor applicant for marriage license is a disinterested person and may sign the affidavit required by Section 595.4.

6.30

COUNTIES AND COUNTY OFFICERS: Clerk, marriage license, consent– §§595.1, 595.2, 595.3, 599.1, 1962 Code. Parental consent not required for under age applicants, when court order under §595.2 authorizes issuance.

December 22, 1964

Mr. Martin D. Leir
Scott County Attorney
Davenport, Iowa

Dear Mr. Leir:

This is in reply to your recent request for an opinion wherein you state:

"We have a problem relating to the construction of a recent legislative amendment to Section 595.2 of the Code of Iowa, and its interpretation in respect to the requirements of Section 595.3 of the Code.

"The question is whether, after an Order of Court is entered, pursuant to the second paragraph of Section 595.2, wherein an Application is made to the effect that the female applicant for a marriage license is pregnant, authorizing the issuance of a marriage license by the Clerk but the requirement of subsection (2) of 595.3 is not met, viz, that no certificate of consent of a parent is obtained for either the male or female both of whom are under the age of 18 years, may a marriage license be issued?

"In short, after an Order is entered pursuant to Section 595.2 of the Code, authorizing the issuance of a marriage license by the Clerk, must the requirements of 595.3(2) still be complied with before said marriage license be issued?"

Section 595.1, provides:

"Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts, except as herein otherwise declared.

Section 599.1, provides:

"The period of minority extends to the age of twenty-one years, but all minors attain their majority by marriage, and females, after reaching the age of eighteen years, may make valid contracts for marriage the same as adults.

However, Section 595.2, in part, provides:

"A marriage between a male of eighteen and a female of sixteen years of age is valid; but if either party has not attained the age thus fixed, the marriage will be a nullity or not, at the option of such party, made known at any time before he or she is six months older than the age thus fixed.

"*Notwithstanding the foregoing,* the district court may, when application is made by parties, one or both of whom are under the age thus fixed and the female of whom is pregnant, grant an order authorizing issuance of a marriage license by the clerk of the district court to said applicants and the marriage under such license *shall* be valid. . ."
Section 595.3, provides in part:

"Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court of the county wherein the marriage is to be solemnized. Such license must not be granted in any case:

1. "Where either party is under the age necessary to render the marriage valid.

2. "Where the male is a minor, or the female is under eighteen years of age, unless a certificate of the consent of the parents is filed. If one of the parents is dead such certificate may be executed by the survivor. If both parents are dead the guardian of such minor may execute such certificate but if such minor has no guardian then the judge of the district court having jurisdiction in the county may, after hearing, upon proper cause shown, execute such certificate. If the parents are divorced, the parent having legal custody may execute such certificate.

3. "Where either party is disqualified from making any civil contract. . ."

It is obvious that one of the purposes of Section 595.3 is to insure that there is sufficient capacity to contract marriage. The provisions of Section 595.3 requiring consent in the case of those parties normally unable to contract appears in the Code of Iowa as early as 1897. (See §3141, 1897 Code).

The provisions contained in the second paragraph of Section 595.2 were added in 1961. (See Ch. 276 §1, Acts 59th G.A.). It would appear that Section 595.2 provides another method by which certain minors under certain circumstances may acquire the capacity to contract marriage.

It is therefore our opinion that after an Order is entered pursuant to Section 595.2 of the Code, authorizing the issuance of a marriage license by the Clerk, the requirements of 595.3 (2) need not be complied with before said marriage license is issued.

6.31

COUNTIES AND COUNTY OFFICERS: Clerk, marriage licenses, granting of—§598.17, 1962 Code. Marriage taking place within year after divorce is granted to one of parties is valid. However, county clerk has no authority to issue marriage license within year after divorce is granted where marriage is to occur after year is past.

February 15, 1963

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa

Dear Mr. Samore:

Reference is herein made to your letter in which you submitted the following:

"A divorce is granted to an individual in Iowa on a certain date. Subsequently, an application is made for a marriage before a year has passed. However, the marriage ceremony takes place one day after the year is past. Is such a marriage valid under the laws of the State of Iowa? May the clerk's office grant a marriage license less than a year following the divorce, for a marriage ceremony to take place after the year is past?"

1. In regard to your first question concerning whether the marriage is valid, I call your attention to the case of *Farrell v. Farrell,* 190 Iowa 919, 181 N.W. 20 (1921). In which it was held:

"It is true that plaintiff has been twice divorced, and that each

divorce was followed by another marriage within less than a year. It is also true that we have a statute, Code Supplement, 1913, Section 3181, which provides that, where divorce is granted, neither party shall marry again within a year, except by permission of the court in the decree, and that anyone marrying contrary to the provisions of this act shall be deemed guilty of a misdemeanor. There is no provision declaring void the marriage of a divorced person within the year. The act is made a misdemeanor, as is also the case where a marriage is solemnized without a clerk's license; but, in the absence of any provision in express words, or by necessary implication, making such marriage void, the parties to such union cannot be said to be living in 'illicit relationship'."

Subsequent thereto, *Nystrom v. District Court of Iowa in and for Woodbury Co.*, 244 Iowa 735, 58 N.W. 2d 40 (1953), held:

"Section 598.17, Iowa Code, 1950, provides: 'In every case in which a divorce is decreed, neither party shall marry again within a year * * * unless to do so is granted by the court in such (divorce) decree.' The following code section makes a marriage contrary to the provisions of Section 598.17 a misdemeanor and punishable accordingly. The remarriage is not even declared to be illegal."

Therefore, based upon these preceding authorities, I conclude that such a marriage is valid under Iowa law.

2. Insofar as your second question is concerned, whether the clerk's office can grant a marriage license within the year for a ceremony to occur after the year is past. I advise on the authority of opinion appearing in the 1940 *O.A.G.* 274 that the clerk may not issue a license under the foregoing circumstances.

6.32

COUNTIES AND COUNTY OFFICERS: Clerk, probate fees—§606.15, 1962 Code; §32, 1963 Iowa Probate Code. No fee may be charged or collected for notice of delinquency in probate proceeding.

April 13, 1964

Mr. Paul D. Strand
Winneshiek County Attorney
Decorah, Iowa

Dear Mr. Strand:

This will acknowledge your letter of recent date, in which you request opinion as follows:

"The Clerk of Court has requested an opinion as to charges for filing fees under Code Section 605.15 of the Iowa Code. Under the new Probate Code, Section 32, the Clerk of Court is required to make out each year on May 1 and November 1, a 'Notice of Delinquency'. This has been approved by the Iowa Bar Association, form No. P-160.

"The Clerk advises me that in most estates this Notice of Delinquency will be made out in triplicate – that is, three Notices will have to be made out, one for the fiduciary, one for the attorney, and one for record. The clerk asked the question as to what fee would be chargeable for these Notices."

In *Burlingame vs. Hardin County*, 180 Iowa, 919, 164 N.W. 115, (1917), it was stated:

"The statute prescribes the nature and extent of his official service

and the fees which may be demanded therefor; and if the law imposes upon him any particular duty for which no fee or compensation is provided, he is bound to perform the same without fee or charge."

Section 606.15, 1962 Code, makes no specific provision for the charging of a fee for notices of this type. Paragraph 29 of this section does provide a *gross* fee "for *all* services performed in the settlement of the estate."

Section 32, 1963 Iowa Probate Code, imposes upon the clerk the duty of notifying ". . . the fiduciary and his attorney of any delinquent inventories or reports due by law in any pending estate, trust, guardianship or conservatorship. . .". It would appear that this notice is a necessary part of the "services performed in the settlement of the estate;. . .".

In 1932 *O.A.G.*, page 260, it was stated:

"The fees provided for in. . .(now §606.15(29)) . . .are the fees for all services performed in connection with the probate and settlement of an estate. There could be no other fee taxed for filing the application or petition for the appointment of an administrator.

"A fee of fifty cents (50c) should be taxed in addition to the fee provided for in paragraph 29 of said section for certificate and seal of the clerk. This for the reason that the certification of any part of the probate proceeding is not a part of the settlement of the estate."

In *Estate of Packer vs. Corlette*, 71 Iowa 249, 32 N.W. 271, (1887), a similar statute was construed to mean that *only* the gross amount provided could be taxed as costs, and that additional fees could not be charged for" . . . the order appointing the administrator, another fee for filing and approving the administrator's bond, another item for the commission issued to the administrator, and fees for an application to sell real estate, etc. . . ." The Court said:

"It appears to us that this statute is so plain as to leave no room for doubt or construction. It fixes the clerk's charges or fees for all services in the settlement of an estate at a gross sum."

Based on the above authorities, it is our opinion that no fee may be charged or collected by the Clerk of the District Court for giving notice of delinquency, as is required by §32, 1963 Iowa Probate Code.

6.33

COUNTIES AND COUNTY OFFICERS: Commission of Hospitalization, witness fees—§§228.9(3), 622.71, 1962 Code. Employee county hospital in position of "public official," not entitled to witness fee for testifying in county of his residence on matter coming to his knowledge in discharge of his official duties.

December 20, 1963

Mr. Keith A. McKinley
Mitchell County Attorney
Osage, Iowa

Dear Mr. McKinley:

This will acknowledge your request of recent date, for an opinion concerning the following:

"Is an employee of a county hospital entitled to a witness fee for appearing before the Commission of Hospitalization when such an employee appears during time when he or she is off duty?"

Section 228.9(3), Code of Iowa, 1962 provides that witnesses before the Commission of Hospitalization are to be paid the same fees as witnesses in the District Court.

Witness fees allowable in District Court are set forth in Chapter 622. Section 622.71 provides:

> "No peace officer who receives a regular salary, *or any other public official* shall, in any case, receive fees as a witness for testifying *in regard to any matter coming to his knowledge in the discharge of his official duties* in such case *in a court in the county of his residence,* except police officers who are called as witnesses when not on duty."

In ascertaining whether or not one would be entitled to a witness fee, it is necessary to distinguish a "public official" from an "employee".

The determining factor which distinguishes a "public official" from an "employee" is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public, largely independent of the control of others. (See Tillquist vs. *Dept of Labor and Industry,* 216 Minn. 202, 12 N.W. 2d 512; *State ex rel Newman vs. Skinner,* 128 Ohio State 325, 191 N.E. 127; *City of Groves vs. Ponder* (Tex. Civ. App.), 303 S.W. 2d 485.

Examples may be drawn from decided cases of other jurisdictions. Positions held to be that of "public official" include:

Secretary of school district: *Buell vs. Union Twp. Sch. Dist.,* 395 Pa. 567, 150 A. 2d 852;

Deputy Sheriff: *State vs. Brown,* 129 Md. 169;

Stationery storekeeper, – charged with purchasing and safekeeping of stationeries required by a county, *State vs. Jennings,* 57 Ohio St. 415, 49 N.E. 404;

Superintendent of State insane asylum, *State ex rel Dunn vs. Ayres* 112 Mont. 120, 113 P. 2d 785;

On the other hand, positions held to be that of employee, include:

School teacher: *Gelson vs. Berry,* 233 App. Div. 20, 250 N.Y.S. 577;

Jail matron: *Falconer vs. Cooper,* 23 Ohio Dec. 200, 12 Ohio N.P., N.S., 659;

Janitor of Courthouse: *Scott vs. Scotts Bluff County,* 106 Neb. 355, 183 N.W. 573;

Attendant at state hospital of criminally insame: *Application of Sweeney,* 1 Misc. 2d 125; 147 N.Y.S. 2d 612.

In Iowa, it has been held that a county home steward who receives a salary from the county is a public official and not entitled to a witness fee for testifying at a county insane commission hearing on the insanity of a former county home inmate. 1942 *O.A.G.* 43. It has also been held that a deputy conservation officer is not entitled to witness fees. 1946 *OAG* 412.

After determination of whether or not one is a public official, it is necessary to determine whether or not his testimony was "in regard to any matter coming to his knowledge in the discharge of his official duties". This, of course, is a factual question, and must be determined upon each particular set of facts.

This prohibition applies only to witnesses testifying in the county of their residence. Under this statute, whether one is on or off duty at the

time of testifying has no bearing on whether or not he is entitled to a witness fee.

It is therefore our opinion that an employee of a county hospital occupying the position of a "public official", is not entitled to a witness fee for testifying before the commission of hospitalization in the county of his residence, in regard to a matter coming to his knowledge in the discharge of his official duties.

6.34

COUNTIES AND COUNTY OFFICERS: County Attorney, referee in probate —Ch. 326, §20, Acts 60th G.A. All fees received by county attorney serving in capacity of referee in probate shall become part of the fees of his office and shall be accounted for as such.

April 13, 1964

Mr. Jack H. Bedell
Dickinson County Attorney
Antlers Hotel Building
Spirit Lake, Iowa

Dear Mr. Bedell:

This will acknowledge receipt of your letter wherein you state:

"In our county, all of the attorneys take turns in acting as referee, and the fees for this service are all placed in a fund for the purpose of paying Bar dues of the members of the Bar and for supplying the county law library with certain editions so that the person who does the refereeing does not actually see the fees which are allowed.

"My question is whether or not, as County Attorney, I may perform the services of a referee and still have the fees paid to the Bar Association or whether those fees must go to the County."

The new Iowa Probate Code at 60 G.A. Ch. 326, §20 provides:

"For the auditing of the accounts of fiduciaries and for the performance of such other ministerial duties as the court may direct, the court may appoint a referee in probate whenever in the opinion of the court it seems fit and proper to do so. The referee may be the clerk. No person shall be appointed as referee in any matter where he is acting as a fiduciary or as the attorney. *All fees received by any county officer serving in the capacity of referee in probate shall become a part of the fees of his office and shall be accounted for as such.*" (Emphasis added).

Section 20 was adopted from Section 638.1 of the 1962 Code of Iowa.

The issue presented by you has previously been interpreted by the Attorney General in 1944 *O.A.G.* 75 where it was said in discussing Section 638.1:

"The last sentence in the code section appears to answer the problem which you submit, and provides that all fees received by referees in probate, who are also county officers, shall become a part of the fees of that county office held and shall be so accounted for.

"Obviously the county attorney is a county officer, and it follows that he may not retain these fees while he holds this county office."

For further Attorney General opinions bearing on this issue see 1940 *O.A.G.* 12 and 1938 *O.A.G.* 208.

Based on the authority of Section 20 and the Attorney General's opinions

cited, it is our opinion that when you serve in the capacity of referee in probate, all fees received for serving in such capacity shall become part of the fees of your office and shall be accounted for as such. Such fees cannot be paid to the Bar Association.

6.35

COUNTIES AND COUNTY OFFICERS: County hospital trustees, authority to invest gift of money—§§347.12, 453.1 and 453.10, 1962 Code. There is no statutory authority in county hospital trustees to invest gift of money pending determination of its use.

May 23, 1963

Mr. Douglas J. Burris
Jackson County Attorney
Maquoketa, Iowa

Dear Mr. Burris:

Reference herein made to your letter in which you submitted the following:

"We are facing an interesting problem in this county. The Jackson County Public Hospital received a gift of approximately $450,000.00. Is it possible for the Jackson County Public Hospital Board of Trustees to invest this money until the same is dispersed for other purposes.

"If we can invest the same, please indicate whether it can be invested in (a) Bank time certificates; (b) U.S. bonds; (c) U.S. Treasury notes."

In reply thereto, I would advise that we find no statutory authority vested in the county hospital trustees to invest a gift of money pending determination of its use. Section 453.10 confers power to invest funds upon the governing body having control of any fund, but that power is limited to funds created by direct vote of the people. The gift here is not created by direct vote of the people, and therefore is not within the provisions of Section 453.10. It is the duty of the county treasurer to take charge of this gift and to deposit money as provided by Section 453.1, Code of 1962. See Opinion of the Attorney General for 1932, at page 103, and Section 347.12 of the Code.

6.36

COUNTIES AND COUNTY OFFICERS: County hospital trustees, authority to perform voluntary nontherapeutic sterilizations—§§347.13, 347.14, 347.16, Ch. 145, 1962 Code. Within discretion of board of trustees of county public hospital to allow its facilities to be used for voluntary nontherapeutic sterilizations, but board must obtain reasonable compensation for use of facilities.

November 7, 1963

Mr. Harry Perkins, Jr.
Polk County Attorney
406 Polk County Court House
Des Moines 9, Iowa

Dear Mr. Perkins:

This is in answer to your letter of recent date, wherein you request the following opinion:

"The Trustees of the Broadlawns Polk County Hospital have requested that we obtain an Attorney General's opinion on the following question:

This is in answer to your letter of recent date, wherein you request the following opinion:

Do county hospitals such as Broadlawns Polk County Hospital have authority to perform sterilizations based only on 'socio-economic' reasons?

"We have heretofore indicated to Broadlawns that in our opinion sterilizations for other than therapeutic reasons are not included in the functions of a public hospital. The Hospital Trustees are not quite satisfied and have requested that we obtain an opinion from your department.

"We are enclosing herewith copy of their letter dated May 15, 1963. (This letter describes a situation of a lady requesting sterilization for the sake of her own health and in the interest of the other children. She and her husband have limited education and income. The family of eight children appears to be poorly cared for due to the parents' deficiencies.)

"The first paragraph of Section 347.16 of the 1962 Code of Iowa provides:

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.

"This same section among other things also authorizes the hospital to provide hospital benefits to indigent persons having a legal settlement outside the county and that the county of residence shall pay to the public hospital a fair and reasonable cost of such care, treatment and hospitalization."

Your request in essence raises two questions:

1. Is there any prohibition against sterilizations for other than medical reasons where individuals have consented to the operation; in other words, voluntary montherapeutic sterilizations; and

2. May county public hospital facilities be made available for nontherapeutic services?

With respect to the first question, of course, whether such an operation is for therapeutic reasons or nontherapeutic reasons, must be a medical rather than a legal determination.

Historically, the first Iowa legislature concerning human sterilization was in 1915. The 36th General Assembly provided for sterilization at a governmental expense of certain mentally incompetent persons. This law also provided that the performance of an operation for the purpose of destroying procreation, unless the operation were medically therapeutic, constituted a misdemeanor. Acts 1915 (36th G.A. Ch. 202.

The provision prohibiting nontherapeutic sterilizations was repealed by Acts 1929 (43rd G.A.) ch. 66. Subsequent to the repeal of this provision, the following opinion of the Attorney General (1932 *O.A.G.*, page 35) was issued:

"As to the question of whether a physician may, with the consent of an individual, perform a sterilization operation is a question about which there is some debate. However, we find that the majority opinion is to the effect that an individual has the right and may consent to such an operation, and that the physician may perform said operation without violating any law; the physician, however, being held to the usual rules, that is, he, of course, to be responsible for any negligence on his part which might amount to malpractice."

Chapter 145, 1962 Code provides a method for forcing the sterilization of certain defectives, but does not prohibit voluntary sterilizations.

Apparently the first case regarding voluntary sterilization was that of *Christensen v. Thornby,* 192 Minn. 123, 255 N.W. 620 (1934). It was there held that an operation to sterilize a man whose wife could not have a child without great hazards was not against the policy of the State of Minnesota. The Court said:

"The first question presented is whether a contract to perform such an operation under the circumstances here presented was against public policy and for that reason void. . . There is no statutory prohibition in this state against sterilization, and there is statutory authority under proper safeguards for such operations upon defectives. There is a statutory prohibition against the performance of an abortion, but an exception is made where it is done to save human life. In the five or six states which by statute prohibit sterilization, an exception is made where medical necessity requires the operation.

"We are not here confronted with the question of public policy as applied to sterilization where no medical necessity is involved. Aside from the statutes in the few states that have prohibited it, we find no judicial or legislative announcement of public policy against the practice of sterilization. Certainly, even in those states with the statutory prohibition, the exception of medical necessity would justify a physician in performing the operation here alleged."

The case of *Shaheen v. Knight,* (Penn. 1957), 11 D. & C. 2d 41 should be brought to your attention. There the Court held that in a contract for sterilization of a man for socio-economic reasons, nontherapeutic reasons was not void nor against the public policy of Pennsylvania. In that case the Court said:

"We are of the opinion that a contract to sterilize a man is not void as against public policy and public morals. It was so held in *Christensen v. Thornby,* 192 Minn. 128, 255 N.W. 620. Also see 93 *A.L.R.* 570. It is argued, however, that in the Christensen case the operation was for a man whose wife could not have a child without hazard of her life, whereas in the instant case claimant has contracted for sterilization because he cannot afford children.

"It is only when a given policy is so obviously for or against the public health, safety, morals, or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in declaring such policy void: *Mamlin v. Genoe,* 340 Pa. 320, 17 A 2d 407 (1941). It has been said:

'There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal.'

"It is the faith of some that sterilization is morally wrong whether to keep wife from having children or for any other reason. Many people have no moral compunctions against sterilization. Others are against sterilization, except when a man's life is in danger, when a person is low mentally, when a person is an habitual criminal. There is no virtual unanimity of opinion regarding sterilization. The Superior Court, in *Wilson v. Wilson,* 126 Pa. Superior Ct. 423, 191 A. 666 (1937) ruled that the incapacity to procreate is not an independent ground for divorce where it appears that the party complained against is capable of natural and complete copulation. This case so held whether or not there was natural or artificial creation of sterility, and recognized that in some cases there was artifical creation of sterility. It would appear that an exception would have been made had there been recognized any public policy against sterilization."

In accordance with the above authorities, it would appear that if proper consent is given, nontherapeutic sterilizations in themselves would not be violative of the law of Iowa.

With respect to the second question, the first paragraph of §347.16, 1962 Code quoted in your letter, provides that resident who is "sick or injured" is entitled to the benefits of a county public hospital.

The word "entitled" was judicially defined in the case of *Norton v. State,* 104 Wash. 248 176 P. 347 (1918), as follows:

> "We find few definitions of the word 'entitled'; but, so far as the courts have dealt with the word, it may be gathered that the word means the granting of a privilege or right to be exercised at the option of the party for whose benefit the word is used, and upon which no limitation can be arbitrarily imposed."

As used in this section, the word "entitled" would indicate that a "sick or injured" resident could not be arbitrarily barred from the benefits of the hospital. However, the word "entitled" as used in this section does not limit the benefits of the hospital to only the "sick or injured".

Sections 347.13 and 347.14, 1962 Code establish the powers and duties of the Board of Hospital Trustees. Under the powers granted by these sections the Board of Trustees may determine in its discretion if the hospital facilities are to be used for nontherapeutic services; provided such use does not deprive the "sick or injured" of the services of the hospital.

Section 347.16 provides that the indigent will be provided free care and treatment. However, such free care and treatment may only be furnished the "sick or injured". It would be incumbent upon the Board of Trustees to require payment for all services made available to *any* patient for nontherapeutic purposes.

Apart from the question of use of county hospital facilities, whether or not nontherapeutic sterilizations are to be performed, is the sole determination of the patient and his doctor.

In conclusion, it is our opinion that the decision of whether county hospital facilities are to be used for voluntary nontherapeutic sterilizations is a matter within the discretion of the Board of Trustees, but that if the Board of Trustees allow the hospital facilities to be so used, it must be paid reasonable compensation for the benefits of such use.

But in any event, the determination of whether or not an operation is for a therapeutic or nontherapeutic reason is a factual medical determination to be made solely by the individual doctor treating the patient.

6.37

COUNTIES AND COUNTY OFFICERS: County hospital trustees, nursing home—Chs. 75, 347; §§347.13, 347.14(12), 347.26, 1962 Code. Board of hospital trustees can establish county nursing home in conjunction with county hospital and finance same by sale of bonds; and hospital trustees have sole discretionary power to fix prices to be paid by patients admitted therein.

April 7, 1964

Mr. Frank R. Thompson
Guthrie County Attorney
Guthrie Center, Iowa

Dear Mr. Thompson:

Reference is made to your letter of recent date, which reads:

"Guthrie County has a county hospital. The hospital board of trustees and the community are desirous of building a county nursing home on the hospital grounds to be run by the hospital trustees in conjunction and connection with the county hospital. In order to finance the construction of the same, it would be necessary that a bond issue be voted by the people. The board of trustees of the hospital would like to have your opinion as to whether or not this can be done under the existing statutes.

"If it can be done, they would also like to know whether or not they would be required to admit county patients for whatever amount the county cared to pay, regardless of whether or not that amount was less than the standard rate for private patients."

The pertinent provisions of the Code relating to the first paragraph of your letter provide as follows:

§347.14(12): "Operate a nursing home in conjunction with the hospital."

§347.26: "In any county where there is a county hospital in existence, a nursing home may be established to be operated in conjunction therewith, and all of the provisions of this chapter and all of the proceedings authorized thereby relating to hospital building and additions thereto, shall apply to erecting, equipping and procuring sites for nursing homes and additions thereto, as well as for improvements, maintenance and replacements of such nursing homes."

It is quite clear that under the specific provisions of the cited sections of the Code the Board of Hospital Trustees have the necessary power to erect, equip and procure sites for nursing homes and additions thereto, as well as for improvements, maintenance and replacements of such nursing homes, in conjunction with a county hospital. (See also §347.13)

In accordance with the provisions of Chapter 347, Code of 1962, such a project would require the board of supervisors to submit to the voters of the county a proposition properly presented to said board, to establish such a nursing home and to borrow money therefor, by the issuance of bonds. (See *O.A.G.* 1940, p. 101).

To borrow money by the issuance of bonds the provisions of sections 347.2 et seq. must be followed, as well as Chapter 75 of the 1962 Code as amended by Chapters 82 and 83, Laws of the 60th General Assembly. As bearing upon this matter, see the case of *Dickinson County Memorial Hospital Corporation vs. Johnson,* et al., 248 Ia. 392 (1957), 80 N.W. 2d 756.

In regard to the next proposition stated in the second paragraph of your letter, subsection 8 of section 347.13 provides:

"Determine whether or not any applicant is indigent or tuberculous and entitled to free treatment therein, *and to fix the price to be paid by other patients admitted to such hospital for their care and treatment therein.*" (Emphasis supplied).

In the discussion of this matter we are assuming that you refer to the Board of Supervisors when you state, – "* * *whatever amount the county cared to pay, * * *".

Section 347.26, heretofore cited, was enacted by the 59th General Assembly and therein provided that all the provisions of Chapter 347 relating to hospitals applied to nursing homes.

Our Supreme Court, in the case of *Phinney, et al. vs. Montgomery, et al.,* 218 Iowa 1240, 257 N.W. 208, after summarizing the powers and duties of hospital trustees as defined in Chapter 347, stated at page 1243 of 218 Iowa:

"It seems clear, from the language of these statutes, that it was the intention of the legislature to place the entire control and management of the county hospital in the hands of the hospital trustees."

A fortiori by reason of the provisions of §347.26 making all the provisions of the chapter applicable to nursing homes, the hospital trustees exercise the same powers and duties in the control and management of nursing homes, and with respect to fixing the prices to be paid by patients admitted to a county nursing home. Therefore, it is within the sound discretion of the hospital trustees to fix the prices that will be paid by such patients.

The prices charged must be "* * * reasonable compensation for care and treatment according to the rules and regulations established by the board." (1948 *O.A.G.*, p. 230) (See also 1934 *O.A.G.*, p. 387).

Therefore, it is our opinion that: (1) a board of hospital trustees, under the provisions of §§347.14(12) and 347.26, can establish a county nursing home in conjunction with a county hospital and finance the same by the issuance of bonds under the provisions of Chapters 75 and 347 of the Code of 1962, as amended; (2) and that said hospital trustees have the sole discretionary power to fix the prices to be paid by patients admitted to such county nursing homes.

6.38

COUNTIES AND COUNTY OFFICERS: County hospital trustees, use of bond issue funds—§§347.13, 347.14, 1962 Code. Cost of professional survey to determine type of hospital facilities needed cannot be paid from bond issue for *construction* of hospital.

December 26, 1963

Mr. Robert H. Baker
Humboldt County Attorney
Box 337
Humboldt, Iowa

Dear Mr. Baker:

This will acknowledge your letter of recent date, requesting opinion of this office in the following matter:

"Several years ago the people of Humboldt County in a special election voted bonds for the construction of a county hospital, and following the election a Board of Trustees consisting of seven members was named and has continued to function since that time. However, no hospital has been built. The last of the bonds will be maturing and paid in 1964 and the people of the community, as well as the hospital trustees, are anxious to proceed with the construction of the hospital as authorized.

"A question has arisen as to the power of the Board of Trustees to use some of the funds on hand to have a professional survey made to determine the type of hospital needed by this community. This does not concern the type of construction, but the type of facilities to be offered.

"Section 347.13, setting forth the powers and duties of the trustees, provides in subsection 2:

" 'Cause plans and specifications to be made and adopted for all hospital buildings and equipment. . . before making any contract for the construction of any such building or the purchase of such equipment.'

"Section 347.14 (10) with respect to optional powers of trustees states:

" 'Do all things necessary for the management, control and government

of said hospital and exercise all the rights and duties pertaining to hospital trustees generally, unless such rights of hospital trustees generally are specifically denied by this Chapter, or unless such duties are expressly charged by this Chapter.' * * *"

In answering your question, we are assuming that the bond issue did not provide for a preliminary survey of the type indicated in your letter, but provided only for the *construction* of the county hospital.

"Where it is provided that a bonded indebtedness may be created for specific purposes, the permission and authority so given is exclusive of every purpose not expressly so named." (*City of Long Beach v. Boynton,* 17 C.A. 290, 119 P. 677 (1911)).

We do not believe that a survey of the type mentioned in your letter could be considered a part of the "construction" of the county hospital; nor could a survey of the type indicated in your letter be considered to be part of the "plans and specifications" authorized by Section 347.13.

In the case of *Jenks v. Town of Terry,* 88 Miss. 364, 40 So. 641 (1906), the Court stated:

"The 'plans and specifications' is in no sense to be confused with a 'preliminary survey and estimate of cost.' They are entirely distinct and dissimilar things." (See also, *Young v. Borzone,* 26 Wash. 4, 66 P. 135 (1901)).

Section 347.14, quoted in your letter, is a general statute, which is limited and restricted by specific terms of Section 347.13. (See *Brown v. J. H. Bell* Co., 146 Iowa 89, 123 N.W. 231, 124 N.W. 901 (1910)).

It is therefore our opinion that the cost of a professional survey to determine the type of hospital needed by a county cannot be paid from the funds received from revenue bonds voted for the *construction* of a county hospital.

6.39

COUNTIES AND COUNTY OFFICERS: Employees, supervision—§79.1, Ch. 341, 1962 Code. Each county officer has sole determination of vacation time, working hours and sick leave of employees under his jurisdiction.

May 8, 1964

Mr. William C. Ball
Black Hawk County Attorney
619 Mulberry Street
Waterloo, Iowa

Dear Mr. Ball:

This will acknowledge your letter of recent date, requesting opinion in the following matter:

"The question has been posed to me to the applicable statutory provisions, if any, governing the vacation time, working hours and sick leave of various county employees.

"In examining the Iowa Code 1 find that Chapter 79 specifically deals with certain of these matters, but would appear by its wording to be limited to 'state employees'. An opinion of the Attorney General dated 1948, page 88, indicates that employees of county boards of social welfare are 'state employees' within the definition of Chapter 79.

"Will you please indicate an opinion whether Chapter 79 would apply

to the county board of supervisors, elective offices, duly appointed deputies of all elective offices and other county employees.

"In the event that Chapter 79 would not be applicable to all of the named categories, would you indicate."

Section 79.1, dealing with vacations and sick leave, makes reference only to "employees of the state", and therefore, is inapplicable to county employees. The opinion cited in your letter, holding that employees of the County Board of Social Welfare are "state employees" is based upon the unique interrelationship between the State and County Boards of Social Welfare. This opinion is not controlling with respect to other units of county government.

Several opinions have previously been issued which have consistently declared that each county office is autonomous with respect to its internal operation.

1940 *O.A.G.*, page 381 – Board of supervisors has no authority to direct the other county officers to keep their offices open on Saturday afternoon.

1942 *O.A.G.*, page 29 – Board of supervisors' resolution terminating employment of all married women employees of the county whose husbands had steady employment, was ineffective as to the employees or offices of county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, coroner and county superintendent of schools.

1950 *O.A.G.*, page 111 – County board of social welfare, the county assessor, the county superintendent of schools and the soldiers' relief commission were autonomous offices, and entitled to determine the hours their respective offices would be open to the public. In this opinion it was stated:

"The county officers such as the county recorder, the county auditor, etc., are obligated to perform the duties imposed upon them by statute, and in fulfilling that obligation, their power over their employees in the performance of these duties is exclusive."

1962 *O.A.G.*, page 158 – Elective county officers, and the offices of the county board of social welfare, county assessor, soldiers' relief commission and county superintendent of schools, may legally close their respective offices for the whole day of Saturday.

1964 opinion to Claire Steele, Plymouth County Attorney, Staff 2/21/64 – Elective county officers determine their own office hours.

Based upon these authorities, it is our opinion that the board of supervisors, and all elective county officers, have the sole determination as to the vacation time, working hours, and sick leave to be granted to employees under their jurisdiction.

6.40

COUNTIES AND COUNTY OFFICERS: Incompatibility, city council, conservation board--§111A.4, 1962 Code. Positions of member of county board of conservation and of city councilman incompatible.

January 27, 1964

Mr. Jack M. Fulton
Linn County Attorney
Linn County Court House
Cedar Rapids, Iowa

Dear Mr. Fulton:

We are in receipt of your letter of recent date, requesting opinion on the following question:

"Is the position of a member of a county board of conservation and the position of a city councilman in an incorporated town such that the two positions are incompatible under the laws of Iowa?"

Section 111A.4(2) provides as follows, relative to the powers and duties of county conservation boards:

"2. To acquire in the name of the county by gift, purchase, lease, agreement or otherwise . . . suitable real estate within or without the territorial limits of the county areas of land and water for public parks. . . . The county board of supervisors or the governing body of any city, town or village may upon request of the county conservation board, designate, set apart and transfer . . . to the board for use as parks . . . any land and buildings owned or controlled by . . . such county or municipality . . ."

"4. To plan, develop, preserve, administer and maintain all such areas, places and facilities, and construct, reconstruct . . . and equip and maintain the same."

It has been held that the county conservation board may maintain a park or similar area within an incorporated city limits. (Staff to Barlow, 8/23/63)

In the above opinion it was stated that the offices of city park commissioner and member of the county conservation board were incompatible, in that, "It clearly appears that a situation could arise where the interest of the county and the city would be conflicting. The merging of both positions might result in the loss of objectivity toward the interest of the separate governmental units."

We believe the same rationale would apply with regard to a city councilman. It is therefore our opinion that the position of member of the county conservation board and the position of city councilman in an incorporated town, are incompatible.

6.41

COUNTIES AND COUNTY OFFICERS: Incompatibility, conservation board, park commission—§111A.4, 1962 Code. 1. Offices of city park commissioner and board member of county conservation board are incompatible. 2. A county conservation board may maintain a park or similar area within an incorporated city limits.

August 23, 1963

Mr. Charles H. Barlow
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Mr. Barlow:

This is to acknowledge your inquiry wherein you submit the following:

1. "Are the offices of County Conservation Board Member (an appointive office) and that of a City Park Commissioner (an elective office) compatible?

2. "Can a County Conservation Board maintain or contribute to the maintenance of a park, picnic area, or campground within an incorporated city limits?"

1. Section 11A.4(2), Code of Iowa, 1962, provides in pertinent part:

"The governing body of any city, town or village may, upon request of the county conservation board, designate . . . to the . . . board for use as parks . . . any land and buildings owned or controlled by . . . such . . . municipality. . ."

It clearly appears that a situation could arise where the interest of the county and the city would be conflicting. The merging of both positions might result in the loss of objectivity toward the interest of the separate governmental units. It is, therefore, our belief that the offices of county conservation board member and city park commissioner are incompatible.

2. Section 111A.4(2), Code of Iowa, 1962, provides in pertinent part:

"To acquire in the name of the county by gift, purchase, lease, agreement or otherwise. . .suitable real estate within or without the territorial limits of the county areas of land and water for picnic parks * * * The county board of supervisors or the governing body of any city, town or village may upon request of the county conservation board, designate, set apart and transfer . . . to the board for use as parks . . . any land and buildings owned or controlled by . . . such county or municipality. . . ."

Section 111A.4(4), provides, in referring to the powers of the county conservation board:

"To plan, develop, preserve, administer and maintain all such areas, places and facilities, and construct, reconstruct . . . and equip and maintain the same."

The statutory language employed by the legislature clearly empowers a county conservation board to maintain a park or other recreational area as set forth in the statute. The language further provides that such areas may be within or without the territorial limits of the county.

It is, therefore, our opinion that a county conservation board may maintain a park or other designated recreational area as set forth in the statute within the incorporated limits of a municipality.

6.42

COUNTIES AND COUNTY OFFICERS: Medical examiner, investigations of death—Ch. 339, §§339.4, 339.5, 339.12, 1962 Code. County medical examiner is without jurisdiction or authority to make investigation and report as to cause and manner of death of dead bodies shipped into state for purposes of cremation, where death occurred outside territorial limits of State.

January 31, 1964

Ralph H. Heeren, M.D., M.P.H.
Acting Commissioner
Department of Public Health
L O C A L

Attention: L. E. Chancellor, Director
Division of Vital Statistics

Dear Dr. Heeren:

Reference is made to your favor of recent date, wherein you state that a question has been raised by County Medical Examiners as to the requirements of the law, Chapter 339 of the Code, and as to whether or not it is the duty of a medical examiner to make an investigation as to the cause and manner of death of a body shipped into the state for purposes of cremation, wherein the death occurred outside the territorial limits of the State of Iowa.

In reply thereto, we beg to advise as follows:

Chapter 339, Code of Iowa, 1962, established the office of County Medical Examiner in lieu of the county coroner. (See *O.A.G.* 1962, page 134).

Section 339.4 of the Code provides:

"The death of any person shall be reported to the county medical examiner by the physician in attendance, by any law-enforcement officer having knowledge of such death, by the embalmer, or by any other person present, if the deceased shall have died:

a. From violence.
b. Suddenly, when in apparent health.
c. When unattended by a physician during the period of thirty-six hours immediately preceding his death.
d. As a result of or following an abortion.
e. While in custody of the law.
f. In an accident in a gypsum or coal mine.
g. In a suspicious, unusual or unnatural manner.
h. From a disease which might constitute a threat to public health."

Section 339.5 requires that when a death is reported as stated in §339.4, the county medical examiner shall take charge of the dead body, make inquiries regarding the cause and manner of death, and reduce his findings to writing, etc.

Obviously, where a death has occurred outside the territorial limits of the state there is no duty imposed upon anyone to report such death to a county medical examiner of any county in the State of Iowa.

In 43 *Am. Jur.* 70, in §251, we find this statement:

"Usually, unless authorized by the Constitution or a statute, an officer has no authority to perform official duties outside the territorial limits of the municipality, county, or district for which he was elected or appointed."

And in 18 *C.J.S.* 296, §15, it is stated:

"A coroner's jurisdiction is coextensive with his county."

As noted by the change in the statute, the county medical examiner system has been substituted for the county coroner system in the matter of the investigation of deaths as provided by the statute. Furthermore, as stated in 62 *O.A.G.* 134:

"The medical examiner is never contacted until there has been a death *within* the county, and is under no duty to investigate an accident unless such investigation is within the course of ascertaining the cause of death." (Emphasis added)

Because the county medical examiner need not investigate deaths occurring in other states, §339.12 would not be applicable in such instances. The purpose of that statute is merely to make it a crime to either embalm or cremate a dead body as qualified until the county medical examiner approves. But because the county medical examiner is responsible only for deaths occurring within the county, his approval would not be necessary in instances where the death occurred within another state.

Furthermore, a county cannot be charged for the expense of an investigation unless the death occurred within the county involved. (See *O.A.G.* 1962, pp. 133 & 134).

Therefore, it is our considered opinion that a county medical examiner is without jurisdiction or authority to make an investigation and report as

to the cause and manner of death of dead bodies shipped into the state for purposes of cremation, where the death occurred outside the territorial limits of the State of Iowa.

6.43

COUNTIES AND COUNTY OFFICERS: Sheriff, duties, executions on judgments—§§626.21, 22, 25, 26, 74, 93; 639.31, 642.14, 1962 Code; *R.C.P.* 260. 1. No notice of levy on personal property is required to judgment debtor. 2. Notices of levy of execution on judgment should be given to defendant. 3. Judgment levied upon must be appraised. 4. Proper notices of sale of personal property must contain description to enable purchaser in exercise of ordinary diligence to identify it.

August 1, 1963

Mr. Lake E. Crookhan
Mahaska County Attorney
Court House
Oskaloosa, Iowa

Dear Mr. Crookhan:

This is in reply to your oral request for an opinion in regard to the following questions:

"1. Must a sheriff give notice to a defendant of a levy of execution on personal property?

"2. Must a sheriff give notice to the defendant of a levy of execution on a judgment?

"3. When there is a levy of execution on a judgment, must the judgment be appraised?

"4. Where a levy under R.C.P. 260(b) has been made on personal property exceeding $200.00 in value, may the published notice merely refer to the records of the Recorder where the certified transcript of the inventory is located?"

With respect to your first question, *R.C.P.* 260 provides two methods of levying on personality; (a) by the taking of possession and appending to the execution a description of the property, and (b) by viewing the property, appending to the execution an inventory, and filing a certified copy of the inventory with the recorder.

R.C.P. 260(b) also provides:

". . . Such filing shall then be constructive notice of the levy to all persons. . ."

There is no statutory provision requiring the giving of actual notice to the judgment debtor.

Caveat: Notice to a judgment debtor is required where execution levy is made under (1) §626.25, which states that stock or interest owned in a company may be levied on in the manner provided for attachment, notice being required by §639.31, and (2) §626.26, which states property of the defendant in possession of another, or debt due him, may be reached by garnishment, notice being required by §642.14.

In *Ayres vs. Campbell,* 9 Iowa 213, 74 Am. Decisions 346 (1959), the Court stated:

"There is no provision of the statute requiring notice of an execution,

or of a levy, to be served on a defendant. The law leaves him to ascertain these things at his peril, assuming that he will know when a judgment is recovered against him, and will take notice of what will follow thereon."

It is stated in 33 *C.J.S.*, Executions, §95, p. 239 as a general rule:

"Although an officer, in the absence of statute to the contrary, need not notify the judgment debtor of the issuance of the writ, or make any formal demand on him for payment, before making the levy, it has been said that a good officer, one that is practical, will always inform the debtor of an execution which he may have against him, if he believes that the debtor is not aware of it. . ."

Therefore, in answer to your first question, it is our opinion that notice of a levy of execution on personal property need *not* be given to the judgment debtor.

With respect to your second question, a judgment may be levied on and sold under execution like any other personal property. *Potter vs. Phillips*, 44 Iowa 353 (1876); *Ochiltree vs. M. I. & N. R. Co.*, 49 Iowa 150 (1878); *Elson vs. Chicago R. I. & Pac. Ry Co.*, 154 Iowa 96, 134 N.W. 547 (1912).

The applicable statutes provide as follows:

§626.21 — "Judgements, money, bank bills, and other things in action may be levied upon, and sold or appropriated thereunder, and an assignment thereof by the officer shall have the same effect as if made by the defendant."

§626.22 — "The levy upon a judgment shall be made by entering upon the judgment docket a memorandum of such fact, giving the names of the parties plaintiff and defendant, the court from which the execution issued, and the date and hour of such entry, which shall be signed by the officer serving the execution, and a return made on the execution of his doings in the premises."

§626.26 — "Property of the defendant in the possession of another, or debts due him, may be reached by garnishment."

In *Brenton Brothers v. Dorr*, 213 Iowa 725, 239 N.W. 880 (1931), it was held that where no notice of levy of execution upon a thing in action was given a debtor, the levy was invalid under a statute similar to §626.26, which provided that debts due a debtor under execution and property of his in the hands of third persons are to be levied upon in the manner provided for attaching the same. See discussion in 45 *Iowa Code Annotated* at page 125.

A distinction may be made between a levy on a judgment and on a chose in action. Section 626.22 provides a method of levying on a judgment which does not include notice to the defendant; whereas no specific method is provided for levying on a chose in action, except that §626.26 provides that debts due a defendant may be reached by garnishment which would require notice to the defendant of levy under §642.14.

In *Elson v. Chicago R. I. & Pac. Ry. Co.*, 154 Iowa 96, 134 N.W. 547 (1912), it is indicated that a judgment debtor of the instant defendant may also be garnished for the debt, in which case notice to the defendant would be required by §642.14.

In view of the *Brenton Brothers* case, it would appear that the better practice would be for the sheriff to give notice to defendant of a levy of execution on a judgment. Therefore in answer to your second question, it is our opinion that the sheriff should give notice to a defendant of a levy of execution on a judgment.

With respect to your third question, a judgment is levied upon as other personal property. *Potter v. Phillips, Ochiltree v. M. I. & N.R. Co., & Elson v. Chicago R. I. & Pac. Ry. Co.*, supra.

Section 626.93 provides:

"Personal property . . . levied upon and advertised for sale on execution, must be appraised before sale. . ."

In *Potter v. Phillips,* with regard to a levy upon a judgment, and *Brenton Brothers v. Dorr,* with regard to a levy upon a chose in action, the Court pointed out that the property had been appraised. 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 sale. (See 1954 *OAG* 171).

Therefore, it is our opinion that a judgment levied upon must be appraised before sale as provided in §626.93.

With respect to your fourth question, §§626.74 and 626.75 provide for the required notice of sale. There are no statutory directions as to what description of the property is to be given in the notice. It is stated in 33 *C.J.S.*, Executions, §211, p. 452:

"The description should be as full and complete as in the exercise of ordinary diligence it is possible for the officer to give, in view of the character, condition, and location of the property; but, it is sufficient if the property is described with reasonable certainty so as to enable prospective purchasers in the exercise of ordinary diligence to identify it."

R.C.P. 260(b) provides in regard to the filing of the certified transcript of the inventory:

". . . Such filing shall then be constructive notice of the levy to all persons. . ."

As I understand your problem, the inventory in question is six type-written pages. Applying these facts to the above-quoted action, it would appear that you would be able to identify the property in the published notice of sale by describing it generally and by referring to where the certified transcript of the inventory may be found in the records of the Recorder.

In answer to your fourth question, it is our opinion that as a general rule a published notice of sale of personal property must contain such a description of the property as to enable a prospective purchaser in the exercise of ordinary diligence to identify it.

6.44

COUNTIES AND COUNTY OFFICERS: Sheriff, fees – §§337.11, 337.14, 338.1, 338.12, 1962 Code. Fees collected by sheriff which are not enumerated in §337.14 must be turned over to the county, including fees collected for service and return of notices.

August 9, 1963

Mr. Harry Perkins
Polk County Attorney
Polk County Courthouse
Des Moines, Iowa

Attention: C. J. Becker

Dear Sir:

This is in response to your recent letter, in which you set forth the following:

"On April 2, 1947, you issued an opinion to Mr. Chet B. Akers, State Auditor, to the effect that fees earned by a sheriff for serving 'Notices to Quit' under Section 648.3 of the 1946 Code of Iowa belong to the sheriff and need not be accounted for to the county.

"Until now the Polk County Sheriff has always paid such fees over to the county.

"Mr. Hildreth, Polk County Sheriff, in view of the above holding, has requested an opinion on the following propositions:

"1. May he request the county to refund the amount so paid to the Treasurer and for how many years may he claim a refund?

2. May he claim such fees even though the papers are served by his deputies?

3. Must he furnish his own stationery and postage for returns and billing?

"He also asks whether he can retain the fees for the service of the following items:

"a. forfeiture of real estate contract

b. wage assignments

"c. notice to redeem from tax sale,

the service of which is similar in nature to the service of notices to quit."

The answer to this matter is found in the relevant statutory provisions as follows:

"337.14 Fees in addition to salary. The amounts allowed by law for mileage and for actual necessary expenses paid by him, and for board, washing, and care of prisoners, may be retained by him in addition to his salary."

"338.1 Prisoners—duty of sheriff. The duty of the sheriff to board, lodge, wait on, wash for and care for prisoners in his custody in the county jail in counties having a population in excess of one hundred fifty thousand shall be performed by the sheriff without compensation, reimbursement or allowance therefor except his salary as fixed by law."

"338.12 Nonapplicability of statutes. Subsections 11 and 12 of section 337.11, also section 337.14 insofar as it refers to boarding, washing for, and care of prisoners, shall not be applicable to counties embraced in this chapter."

Fees which a sheriff may charge and collect are enumerated in §337.11. Of these various fees, §337.14 itemizes the specific fees he may retain in addition to salary (limited in part in counties of over one hundred fifty thousand population, §§338.1, 338.12). The inclusion of these fees which may be retained in §337.14 excludes the possibility of retaining any other fees which the sheriff may properly charge and collect.

In conclusion, it is the opinion of this office that, unless fees which the sheriff collects are among those enemerated in §337.14, they must be turned over to the county. Because fees collected for the service and return of a notice are not among those enumerated in §337.14, they may not be retained.

Any opinion inconsistent with this opinion is withdrawn. See 1932 *O.A.G.* 197. This conclusion precludes the necessity of answering the other specific questions asked.

6.45

COUNTIES AND COUNTY OFFICERS: Sheriff, mileage–§337.11(10), 1962 Code. Sheriff entitled mileage for escorting automobile caravan within his jurisdiction when, in his discretion, it was necessary for preservation of peace.

August 5, 1963

Mr. Ira Skinner
Buena Vista County Attorney
Storm Lake, Iowa

Dear Ira:

This is in reply to a recent letter from J. T. Snyder, former Buena Vista County Attorney, in which he requested the following:

"Is a Sheriff entitled to mileage compensation under 337.11(10) of the 1962 Code of Iowa for the performance of traffic escort duties?

"The above question has arisen out of the following facts. The Board of Supervisors has disallowed a claim by the Sheriff of Buena Vista County for mileage from Storm Lake, Iowa, to Early, Iowa, to perform escort and traffic control duties in relation to an automobile caravan traveling from Storm Lake to Early and return in meeting the Storm Lake High School basketball team returning from the State Tournament in Des Moines.

Section 337.11(10) provides for nine cents per mile to be paid to a sheriff for mileage, "in all cases required by law".

The specific duties of a sheriff are not prescribed by Chapter 337; rather, his duties are those which are imposed upon peace officers by §748.4 and by common law. That section and the common law make it incumbent upon a sheriff to preserve the peace and to perform all other duties pertaining to his office throughout his jurisdiction. It is as much the duty of a sheriff to prevent crime as to investigate after a crime has been committed.

He must be reasonably alert with respect to possible violations of the law and is not entitled to wait till they come to his personal knowledge. See 47 *Am. Jur.*, Sheriffs, Police, and Constables, §26, page 839.

The proper discharge of the duties of a sheriff calls for the exercise of judgment and discretion and implies initiative on his part. See 47 *Am. Jur.*, Sheriffs, Police, and Constables, §26; 80 *C.J.S.*, Sheriffs and Constables, §35.

In 1928 *O.A.G.* 377, it is stated that mileage may not be charged for going to a scene of an automobile accident or suicide. However, this would not apply where a sheriff had reason to believe that crime had been or was about to be committed. The situation described in your letter is one which could well give rise to violations of the law and breaches of the peace.

It is therefore our opinion that a sheriff performing the activities described in your letter, within his jurisdiction, would be entitled to mileage compensation under §337.11(10).

6.46

COUNTIES AND COUNTY OFFICERS: Sheriff, prisoners, medical care for poor—§252.27, 356.5, 1962 Code. Keeper of jail in which prisoner is confined has primary responsibility for any medical aid rendered prisoner in custody, even though prisoner may be eligible for poor relief in form of medical attendance.

February 4, 1964

Mr. Phillip N. Norland
Worth County Attorney
Northwood, Iowa

Dear Mr. Norland:

Your letter requests an opinion based on the following statement of facts:

"An individual was involved in an accident in which he sustained certain injuries. The blood test taken by his consent, showed he was intoxicated at the time of the accident and therefore was charged with operating a motor vehicle while intoxicated. The individual would not post bond and remained in custody. *While in jail* he was taken by the sheriff's office to a Dr. in Mason City, Iowa, for the purpose of treating the wound sustained in the accident. *While there* it was discovered the defendent was suffering from bleeding ulcers and *immediate treatment* was advised. The director of social welfare for Cerro Gordo County, of which county the defendant was a resident authorized the admittance to Mason City Hospital upon being advised there was no room at University Hospital at Iowa City for immediate entrance. The hospital in Mason City has now filed a claim with Worth County for payment of treatment for the ulcerous condition." (Underscoring supplied)

Your question is whether Worth County is obligated to pay for treatment for a condition which was obviously in existence prior to the time the man was taken into custody, or whether this treatment is one for which the Welfare Department of Cerro Gordo County would be liable as county of residence of this individual.

From the facts as you have given them, it appears that the individual in question sustained a wound in the accident involved in his arrest and there would appear to be no question as to the responsibility of the sheriff to furnish "medical aid" as to this condition. It would further appear that while such medical aid was being furnished that it was medically determined that the individual had another condition unrelated to the accident but to such urgency as to require immediate medical aid. It would also appear from the facts as given that the individual was entitled to "medical attendance" provided for in §252.27 of the Code. Section 356.5 provides in part that:

"The keeper of each jail *shall*:
"* * *

"2. Furnish each prisoner with necessary bedding, clothing, towels, fuel, and medical aid." (Underscoring supplied)

Section 252.27 of the Chapter on Support of the Poor provides that:

"The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money."

Section 252.25 specifically provides that:

"The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, *shall* provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county home." (Underscoring supplied)

Assuming, therefore, that the individual in question was entitled to poor relief under Chapter 252, it would appear from the facts you have given that the individual was entitled to "medical aid" under §356.5 and "medical attendance" under §252.27, and the real question involved is as to the primary responsibility as between the "keeper of the jail" and the trustees of the place of his legal settlement.

In a case decided by the Supreme Court of Iowa in 1885 (*Miller vs. Dickinson County,* 68 Iowa 102) involving the identical statutory language as to the responsibility of the "keeper of each jail", it was held that:

> "From the time of the arrest under the preliminary information and warrant for resisting a public officer, the prisoner must be regarded, under the evidence in this case, as being in the custody of the sheriff. * * * The sheriff did what any humane man was bound to do, and that is, have him taken care of, and furnished with such reasonable care and sustenance as his condition required. * * * The prisoner being in the custody of the sheriff, it was the duty of the latter to supply him with the necessaries of life suitable to his condition . . . * * * The liability of the county, as we have seen, existed independent of the order, and results from the arrest and custody of the prisoner by the sheriff."

In 1922 *O.A.G.* 334, two men were found by the City Police of the City of Marshalltown robbing some boxcars. A gun fight followed between the officers and the robbers in which the robbers were shot, one of them dying instantly ond the other some two or three hours later. They were taken to a hospital and an effort made to save the life of the man who was wounded. It was held "that the County of Marshall is liable for the medical expenses incurred endeavoring to save this man's life."

In 1936 *O.A.G.* 411, one, Stewart, committed an offense in Dubuque County and, at the request of Dubuque authorities, was apprehended in Waterloo and returned to Dubuque where he was placed in the county jail. While waiting for trial he became so violently ill that it was necessary to remove him to a Dubuque hospital where considerable hospital and medical expense was incurred which the prisoner was unable to pay. It later developed that Stewart was a paroled prisoner and it was contended that the Board of Parole had the responsibility for the expenses of his hospitalization and medical care. The Board of Parole refused to allow the claim and our opinion held that "it is the duty of the Dubuque County Board to pay the expenses incurred in the matter at hand, and it is immaterial that the patient was under the jurisdiction of the Board of Parole."

In 1962 *O.A.G.* 127, in reply to an inquiry as to the feasibility of insurance coverage for prisoners, our opinion stated that "the county is obligated to furnish the necessary medical aid that might be needed by prisoners."

Assuming from the facts that you have given that the individual to whom you refer in your letter was, as a legal resident of Cerro Gordo County, eligible for poor relief in the form of medical attendance for the ulcerous condition, nevertheless, the fact that he was, at the time medical attendance was given him for the ulcerous condition, a prisoner in the custody of the sheriff of Worth County, and that while receiving medical aid for a condition directly connected with his arrest it was medically determined that he had another condition that required immediate attention, it is our considered opinion that the primary responsibility for the medical expenses involved in the treatment of the ulcerous condition is that of the county in which a "keeper of each jail" had the custody of the individual; and, therefore, Worth County has primary obligation to pay for the treatment of the ulcerous condition.

6.47

COUNTIES AND COUNTY OFFICERS: Sheriff, service of assignment of account--§337.3, 1962 Code. Assignment of account owned by private company, individual, or partnership is not writ or process issued by legal authority, is not directed to sheriff and, therefore, service of notice of such assignment is not mandate to sheriff within terms of §337.3.

March 14, 1963

Mr. William C. Ball
Black Hawk County Attorney
619 Mulberry Street
Waterloo, Iowa

Dear Mr. Ball:

This will acknowledge receipt of your letter in which you submitted the following:

"The Black Hawk County Sheriff's Office has in the past received various types of notices to be served on individuals at the request of private citizens. These notices include those pertaining to legal proceedings such as Original Notices pursuant to Rule of Civil Procedure 56 and other such legal notices, writs and legal process arising from the use of the Black Hawk County District Court.

"On occasion the Black Hawk County Sheriff's Office has been requested to serve, by creditors, notices of the assignment of an account. I have enclosed a copy of one of this type of notice. My question is: 'Does service of such a notice pursuant to Section 539.3 fall within the mandate of Section 337.3 of the 1962 Code of Iowa requiring the Sheriff or his deputies to execute and return all writs and other legal processes issued by legal authorities to him directed?"

The statute to which you refer, §337.3, Code of 1962, is clear and unambiguous. Under it there is a duty imposed upon the sheriff and his deputies to execute and return all writs and other processes issued by legal authorities directed to him. It is obvious that the assignment of an account owned by a private company or individual or partnership by such company, individual or partnership is not a writ or process issued by legal authority and is not directed to the sheriff.

In my opinion, therefore, service of notice of such assignment is not a mandate to the sheriff within the terms of §337.3, Code of 1962.

6.48

COUNTIES AND COUNTY OFFICERS: Social Welfare Director, duties--§250.12, 1962 Code. Administration of duties of Soldiers Relief Commission may not be bestowed on Director of Social Welfare.

May 5, 1964

Mr. Jack M. Fulton
Linn County Attorney
Cedar Rapids, Iowa

Dear Mr. Fulton:

Reference is herein made to your letter in which you submitted the following:

"The Board of Supervisors of Linn County and the Linn County

Soldiers and Sailors Relief Commission are vitally concerned as to whether the Director of Social Welfare for Linn County, Iowa, may under the existing statutes and rules of compatibility of offices hold both jobs.

"We have noted the Attorney General's opinion of June 28, 1960, and the 1952 report at page 51, and these opinions deal with the combination of Social Welfare and Overseer of the Poor.

"We realize that these opinions both require that permission from the State Board of Welfare is necessary and our question presumes that permission can be obtained. We will certainly appreciate your opinion presupposing that one fact."

In reply thereto, I am of the opinion:

1. That the situation does not involve a question of compatibility of offices.

2. On the authority of Section 250.12, which provides: "Relief information confidential. It shall be 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, or to publish the names of the veterans or their families who receive relief under the provisions of this chapter."

It is our opinion that the administration of the duties of the Soldiers Relief Commission may not be bestowed by the Board of Supervisors or the Soldiers Relief Commission upon the Linn County Director of Social Welfare.

6.49

COUNTIES AND COUNTY OFFICERS: Soldier's relief, claims – §331.21, 1962 Code. Claims for soldier's relief are claims against county and required to be made under provisions of §331.21, 1962 Code. Such claims are filed with county auditor, and when acted upon by Soldier's Relief Commission, are certified to board of supervisors for review.

November 5, 1963

Mr. Robert H. Baker
Humboldt County Attorney
Humboldt, Iowa

Dear Bob:

Reference is herein made to your recent letter in which you submitted the following:

"Humboldt County has recently been audited by an Auditor from the State Auditor's Office. Appended to the portion of his report regarding the Soldier's Relief Commission is the following statement:

> Warrants are issued for relief claims on the basis of a typewritten list submitted to the board of supervisors monthly by the Soldiers' Relief Commission. This list is not signed by individual claimants, it is not notarized, and it is not itemized. It is the opinion of this examiner that the County Auditor is required by law to have individual claims signed by the claimant, witnessed by a notary public, and completely itemized filed in his office for each warrant issued. It is the recommendation of this examiner that the Soldiers' Relief Commission furnish these claims immediately.

"I believe that the following Code Sections bear on the problem: Sections 250.9, 250.10, 332.21, and 333.2.

"The Soldiers' Relief Commission of Humboldt County, some years ago adopted a procedure that they still follow; this procedure is as follows:

> Each month at our regular meeting, the Soldiers' Relief Commission passes on claims, and certification to the Board is made, signed by at least two of the commissioners and usually by all three commissioners.

"The certification referred to above is as follows:

> We, the Soldiers' Relief Commission of Humboldt County, Iowa, do hereby certify to the Board of Supervisors of Humboldt County, Iowa, in accordance with Section 250.8 of the Code of Iowa, 1962, this list of names to whom relief has been authorized, and the amounts so awarded:

"I, therefore, request an Attorney General's opinion on the following questions at your earliest convenience:

1. "Are itemized claims for solider's relief, such as described in the Auditor's comment, required by law?

2. "If such itemized claims are required, are they to be filed with the Soldiers' Relief Commission, and by them transmitted to the Board of Supervisors; if not, what procedure regarding the filing of claims, by whom, and with what agency, should be followed?"

Section 331.21, 1962 Code of Iowa, provides with respect to claims against the county the following:

> "All unliquidated claims against counties and all claims for fees or compensation, except salaries fixed by statute, shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected."

1. A claim for soldier's relief is a claim against the county. Such claims are not excepted from the terms of the quoted section nor is there any alternative method provided in Chapter 250.

2. Such claims are required to be filed with the county auditor for action by the Soldiers' Relief Commission, and, when acted upon in accordance with the statute, certified by the Soldiers' Relief Commission to the board of supervisors for review by such board of supervisors.

See §250.7, §250.9 and §250.10, 1962 Code of Iowa; and also 1956 *O.A.G.* 114. This discussion in that opinion is related to an emergency relief fund created by §8 of Chapter 128, 56th G.A. That section has been repealed by the 58th G.A. Chapter 180.

6.50

COUNTIES AND COUNTY OFFICERS: Taxes, conveyance of realty in settlement of taxes—§427.11, Chs. 445-448, §569.1, 1962 Code. 1. No authority for county to take title to real estate by deed in settlement of unpaid taxes. 2. Legalizing Act required to vest title in real estate from county to purchasers without payment of taxes, where board of supervisors purported to convey property deeded to county in settlement of unpaid taxes previously suspended.

August 19, 1963

Mr. Lake E. Crookham
Mahaska County Attorney
Oskaloosa, Iowa

Dear Mr. Crookham:

This is in reply to your letter of recent date, in which you state:

"A husband and wife, living in Eddyville, Iowa, were obtaining old age assistance from the State of Iowa. The husband passed away. On July 20, 1962, the surviving spouse gave a warranty deed to Mahaska County, Iowa, which deed was recorded after the releases from the State Board of Social Welfare were filed as to both the husband and wife. The records show that at the time the conveyance was made the suspended taxes amounted to a little over $2300.00. Subsequent thereto, the records show that a resolution was passed by the Board of Supervisors of Mahaska County, which resolution states, 'Be it resolved by the Board of Supervisors of Mahaska County, Iowa, in an adjourned session this 27th day of November, 1962, that Donald A. Allgood, Chairman of said board, be and he is hereby appointed to execute a quit claim deed for and in behalf of the Board of Supervisors of Mahaska County, Iowa, to Lois E. and Wayne Williams, conveying the following described real estate, situated in Mahaska County, Iowa to wit: "Lots Six and Seven, Block 149, Scribner's Addition to the Town of Eddyville, Iowa." This resolution is adopted in accordance with the provisions of Section 569.7 of the 1958 Code of Iowa, moved by McKinney, seconded by Else, that the foregoing resolution be adopted; was voted and passed by unanimous vote.' Subsequent thereto, Mahaska County, by Donald A. Allgood, Chairman of the Board of Supervisors, executed a quit claim deed to Lois E. and Wayne Williams, and the consideration cited was the sum of $1800.00. The question now has arisen as to the legality of this transaction, as it appears that the county did not follow the provisions set forth in 569.7 of the 1962 Code of Iowa.

"My first question is, do the words 'or otherwise' in Section 569.1 permit the county to take title to real estate by deed for the unpaid taxes? Secondly, I would like to know if the county can make a private sale of the real estate without advertising the same and sell it for less than the unpaid taxes.

"If this procedure that has been followed is not legal, can this matter be resolved by a legalizing act of the Legislature so that title to the real estate can be properly vested in the now owners of the real estate. Can this be done by legalizing the act or will it be necessary for the now owners to pay the full amount of the taxes that were due on the real estate, to Mahaska County, and have the same shown in the abstract of title."

A county is a creature of statute, and its officials have only such powers as are expressly conferred by statute, or necessarily implied from the powers so conferred. See *In re Frentress' Estate,* 249 Iowa 783, 89 N.W. 2d 367 (1958), in which it was held that a county exceeded its authority in accepting mortgages given to secure the amount of general relief granted the mortgagors by the county under the provisions of Chapter 252, Code 1954.

Section 569.1 provides:

"Right to receive conveyance. When it becomes necessary, to secure the state or any county or other municipal corporation thereof from loss, to take real estate on account of a debt by bidding the same in at execution sale or otherwise, the conveyance shall vest in the grantee as complete a title as if it were a natural person."

It was stated in 1930 *O.A.G.* 224 that this section only authorizes the county to purchase real estate at an execution sale or other sale when it is necessary to protect a lien of the county against said real estate, and that it did not authorize the county to purchase, at the sale of an incompetent, realty by a guardian, in order to protect its claim against the incompetent for support.

It was stated in 1938 *O.A.G.* 149 that the procedure prescribed for the disposing of land acquired under a school fund mortgage foreclosure must be followed, and that this section was inapplicable, since another method had been specifically provided.

There is no provision in the statutes that a county may accept title to real property in payment of taxes. On the other hand, Chapters 445 through 448 specifically prescribe the manner in which counties are to collect taxes. The provisions of these chapters must be considered to be exclusive. (See, *In re Frentress' Estate, supra*).

Therefore, in answer to your first question, §569.1, Code 1962, would not permit a county to take title to real estate by deed for unpaid taxes, and the county, in accepting the deed in question, exceeded its authority and the deed would be of no force and effect.

In answer to your second question, a county in the collection of taxes must follow the procedure prescribed by Chapters 445 through 448, Code 1962.

Section 427.11 provides in part as follows:

> "In the event that the petitioner shall sell any real estate upon which the tax has been suspended. . . the taxes, without any accrued penalty, that have been thus suspended, shall become due and payable. . ."

Only by legislative action can this provision be avoided.

It is our opinion that a legalizing act of the legislature would be required to vest title to the real estate in the purchasers from the county and to give such purchasers title without payment of the taxes.

6.51

COUNTIES AND COUNTY OFFICERS: Taxes, special assessments — §§391.61, 391.63, 445.13, 1962 Code. 1. County treasurer has no authority to change or modify record of special assessment of property as certified to county auditor by city clerk. 2. Where auditor certifies to treasurer lien on tract of land, treasurer cannot enter on tax list the special assessment against each lot of that tract, but lien remains upon whole tract and upon each lot thereof after being subdivided.

July 31, 1964

Mr. Van Wifvat
Dallas County Attorney
Law Building
Perry, Iowa

Dear Mr. Wifvat:

Reference is herein made to your letter in which you submitted the following:

> "The Dallas County Treasurer has inquired of this office the question regarding the showing of sewer assessments on his records from the Town of Waukee wherein the Town of Waukee in certifying the same on January 21, 1963 to the Dallas County Auditor described it as general

agricultural land. Between the time that the city clerk had obtained the real estate descriptions as agricultural land from the Auditor's office and the time the certification to the Treasurer's office from the Auditor's office, the said agricultural land had been subdivided into what is now known as Corene Acres, Plat, #2, consisting of 94 lots. At the time of certifcation to the Treasurer's office said real estate was listed as Lots 1 through 94 and had been certified as such from the Auditor's office to the Treasurer's office on December 12, 1962, but the land had never been shown as lots when described and certified to by the Town Clerk of Waukee to the Auditor's office.

"This has resulted in three certificates relating to the agricultural land never being listed on the County Treasurer's tax books or shown as a lien on said real estate, the reason being that the Clerk of Waukee had computed the certifications according to the real estate description acquired from the Auditor's office. The problem now is that abstracting is being done with no special assessment amounts shown as a lien on tax lists and further the County Treasurer on the basis of the certification from the Clerk of Waukee is unable to list the special assessments as the same normally would be on each lot. The way the property was certified to the County Auditor by the Clerk of Waukee precludes the County Treasurer in setting out an amount due for the special assessment on each of the respective lots.

"Murray Luther the Dallas County Treasurer, has made inquiry concerning the following questions:

"(1) Is he bound by the certification and description as certified to the auditor in making up his special assessment tax list?

"(2) Does he have the right to list on each of the 94 lots of the current tax book indicating that said lot is subject to assessment by the notation, 'part of certificates #115, #116 & #117'?"

In reply thereto, I advise as follows:

1. On the authority of the opinion of this department appearing in the Report for 1930 at page 369, copy of which is attached, the answer to your question #1 is in the affirmative.

2. Insofar as this is concerned, I find the statutory situation concerned with the listing of taxes and special assessments are these: Section 391.34, Code of 1962, provides that after a contract entered into by any city for the construction or repair of street improvement or sewer, the Clerk thereof shall certify as correct and file with the county auditor of the county in which the city is located, and a copy of the resolution directing the repair or construction of a street improvement or sewer, together with a copy of a plat thereof, and schedule referred to in the resolution of necessity.

According to §391.35, special taxes levied for the cost thereof, with penalty and interest shall become a lien on the described property from the date of filing with the county auditor.

Section 391.61 provides for a certificate of levy of such special assessment showing the number of installments, the rate of interest, and the time payable, and shall be filed with the county auditor of the county in which such city is located, and such special assessments as shown shall be placed upon the tax list.

According to §391.62, the owner of any property against which a special assessment has been made shall have the right to pay the assessment and penalties, etc., thereon.

Section 391.63 provides that the owner of the property assessed may divide the same in two or more lots and if such a plan or division is accepted

or approved by the city council, he may discharge the lien upon any one or more lots by the payment of the amount calculated by the ratio of square feet in area of such lot or lots to the area of the whole lot.

Thus, applied to the situation outlined in your letter, the owner of a tract of land in the city shall be assessed for sewers over all the property involved herein, and such assessment is a lien upon the whole tract of land.

When the owner subdivided it, the lien upon the whole tract remained thereon and upon each of the lots thereof after being subdivided. The owner, according to the statute, could have discharged the lien as to any lot by payment in accordance with the provisions of §391.63. When so paid, the amount of the lien was reduced, but the balance still remained a lien upon the remaining lots. There is no statutory provision for the listing upon the tax list of the special assessment for each lot. The only provision for listing the special assessment is that of §391.61, and that provision concerned the assessment upon the whole property prior to subdividing, so that when and as a lot was sold, it was sold subject to the whole assessment. No provision is made for the purchasers to pay an assessment upon the lot purchased because there was no such listing of the special assessment separately. The fact that the property was platted under the provisions of Chapter 409, Code of 1962, requiring the county auditor to show the amount of assessment of each lot for taxation does not carry with it a listing of special assessment.

Section 409.48 provides for the tax listing of individual lots for taxation purposes in the amount equal to each individual lot's proportionate share on an area basis of the assessed valuation of the entire tract immediately before the platting thereof. It does not authorize the listing of any special assessment. As a matter of fact, §409.48 specifically provides that the provisions of that section respecting the listing of taxes "shall have no effect upon special assessment tax levies".

The answer to your question #2 is that the treasurer cannot enter upon the tax list the special assessment against each lot, but the lien remains upon the whole tract and upon each of the lots thereof after being subdivided.

6.52

COUNTIES AND COUNTY OFFICERS: Treasurer, location of office – §§332.9, 340.62, 340.2, 1962 Code. County treasurer is unauthorized to perform certain of his functions at location other than the county seat where population of such location is less than 6000.

August 19, 1963

Mr. Richard R. Jones
Taylor County Attorney
518 Court Street
Bedford, Iowa

Dear Mr. Jones:

Reference is herein made to your letter in which you submitted the following:

"I am enclosing a notice printed in the Lenox Times Table on Thursday, June 13, 1963, inserted in said paper by our County Treasurer. He informs me no plat books will be removed from his office in our court house. He proposes to deposit the tax money which is received in Lenox in the Lenox bank at the close of each day. He also proposes to take motor vehicle license plates to Lenox for distribution. The balance of the details appear in the notice enclosed. The county seat of Taylor County is here in Bedford.

"Please furnish me with your opinion in writing as to whether or not this proposed action by our County Treasurer is legal. In addition, if this proposed action is legal, will the bond furnished by our treasurer be valid under this circumstance and also must our Board of Supervisors pay the additional expense involved in collecting the taxes due in Lenox which is not our county seat.

"It is my opinion that our County Treasurer has no legal authority to take this action. I am enclosing a carbon copy of the authority on which I base my opinion. Section 332.9, Code of Iowa, 1962, indicates that the Treasurer's Office can only be at the county seat. Section 340.62, Code of Iowa, 1962, appears to make an exception to this rule if there is a city in the county which is not the county seat and which city has a population of six thousand or over. The city of Lenox, Iowa, does not meet this exception. Opinions of the Attorney General, 1919-1920, page 526, involving the permanent removal of a portion of the County Superintendent's Office indicates that the County Superintendent must have his office only in the county seat.

"There are various other code sections concerning specific records of county officers which also indicate that our treasurer can only conduct his business from his office in the county seat. After the reading the above three sources, it is my opinion that our County Treasurer cannot do what he proposes legally."

In reply thereto I would advise you that I agree with both the reading and the conclusion which you have reached. The county treasurer functions at the seat of county government; that is the reason it required legislation to permit the county treasurer to perform certain of his functions in a city, not the county seat, having a population of 6000. See §340.2, Code of Iowa, 1962. There would be no occasion to require the foregoing legislation if the county treasurer were not required to function in the county seat. What the county treasurer proposes to do by his newspaper notice is in excess of his power. It would require legislation to permit what the treasurer is proposing.

6.53

COUNTIES AND COUNTY OFFICERS: Treasurer, special assessment receipts—§§368.4, 391.34, 391.61, 445.5, 1962 Code. County must furnish and pay for receipts given in collection of special assessments.

December 11, 1963

Mr. Frank R. Thompson
Guthrie County Attorney
Guthrie Center, Iowa

Dear Mr. Thompson:

This is to acknowledge receipt of your recent letter in which you presented the following:

"A small portion of the Town of Adair is located in Guthrie County and the balance is located in Adair County. The Town of Adair has levied a sewer assessment against all of the property in the town and has certified the levy for the portion in Guthrie County to the County Auditor, who in turn certified it to the County Treasurer for collection. It has been the policy in Guthrie County for the Treasurer to require that, where special assessments are collected for a town, that the town furnish and pay for the receipts. The Town of Adair has refused to furnish such receipts.

"My questions are these:

1. "Is the Town of Adair legally required to furnish and/or pay for said receipts?

2. "In the event they refuse to do so, can the Guthrie County Treasurer refuse to collect said special assessment?

3. "In the event that the County Treasurer cannot refuse to collect said assessment, can the County Treasurer order and pay for the same and then could the Town of Adair be legally indebted to the County for the expense of such receipts?"

Section 368.4, 1962 Code of Iowa, provides as follows:

"Wherever provision is made in this Code that municipal corporations shall have power to do or cause to be done certain acts and assess the cost thereof against the property, but fails to specify the manner of collection, the clerk of such municipal corporations shall certify said cost to the county auditor and it shall then be collected with, and in the same manner as, general property taxes."

Section 391.34, 1962 Code of Iowa, provides as follows:

"After a contract has been made by any city for the construction or repair of any street improvement or sewer, the clerk shall certify as correct and file with the auditor of each county in which said city is situated, a copy of the resolution directing the construction or repair of said improvement or sewer, and a copy of the plat and schedule referred to in the resolution of necessity and on file in his office. In all counties where taxes are collected in two or more places, they shall be filed in the office of the auditor in the place where said special taxes are collected, and be preserved by him as a part of the records of his office. The auditor shall keep a book properly ruled for the purpose and enter thereon opposite each lot number the amount of the estimated assessment against the same."

Section 391.61, 1962 Code of Iowa, provides as follows:

"A certificate of levy of such special assessment, stating the number of installments, the rate of interest, and time when payable, certified as correct by the clerk, shall be filed with the auditor of the county, or of each of the counties, in which such city is located, and thereupon said special assessment as shown therein shall be placed on the tax list of the proper county."

Section 445.5, 1962 Code of Iowa, provides as follows:

"The treasurer shall in all cases make out and deliver to the taxpayer a receipt, stating the time of payment, the description and assessed value of each parcel of land, and the assessed value of personal property, the amount of each kind of tax, the interest on each and costs, if any, giving a separate receipt for each year; and he shall make the proper entries of such payments on the books or other records approved by the state auditor of his office. Such receipt shall be in full of the first or second half or all of such person's taxes for that year, but the treasurer shall receive the full amount of any county, state, or school tax whenever the same is tendered, and give a separate receipt therefor."

Upon the authority of the foregoing statutory provisions, it is the conclusion of this office that it is the duty of the county to furnish and pay for such receipts. The clerk of a municipal corporation, unless otherwise provided, must certify costs of an assessment to the county auditor and it shall then be collected with and in the same manner as general property tax. (§368.4). Such procedure is applicable in the case of sewer improvements. (§§391.34 and 391.61). In the collection of general property taxes a receipt must be given. (§445.5). In that case the county must bear the cost. Thus in the

absence of statutory provisions to the contrary, the county must furnish and pay for the said receipts in the collection of special assessments as they do in the case of the collection of the general property taxes.

The answer to your three questions is in the negative.

6.54

COUNTIES AND COUNTY OFFICERS: Vacancies—§§441.8, 441.9, 1962 Code. Voluntary commitment to Mental Health Institute by county officer does not, in itself, constitute "removal from county."

May 11, 1964

Mr. James H. Cothern
Clarke County Attorney
Osceola, Iowa

Dear Mr. Cothern:

This will acknowledge your letter of recent date, requesting opinion in the following matter:

"I am requesting an opinion as to whether or not there is at the present time a vacancy in the office of assessor of Clarke County, Iowa. The facts are as follows:

"The duly appointed, qualified and acting assessor for Clarke County, Iowa, did on April 27, 1964 voluntarily commit himself to the Mental Health Institute at Clarinda, Iowa.

"The applicable statute of the 1962 Code of Iowa, §441.8, Term — Filling vacancy, states:

"'. . . In the event of the removal, resignation, death, or removal from the county of the said assessor, the conference board shall within thirty days, at a meeting as provided in Sec. 441.6, select from the list provided in Sec. 441.5 an assessor to serve out the unexpired term; . . . .

"Does the voluntary commitment of the Clarke County Assessor constitute a removal from the county by the said assessor so as to create a vacancy in the office of assessor, thus authorizing the conference board of Clarke County to appoint a new assessor, as provided in Sec. 441.8 of the 1962 Code of Iowa?"

The physical or mental disability of the incumbent of an elective office, in itself, does not create a vacancy. 67 *C.J.S.*, "Officers", §50.

The general rule with respect to the meaning of the words "removal from the county" is stated in 67 C.J.S., "Officers" in §50, at page 209, as follows:

". . . Where an incumbent of a public office who, to be qualified for the office, must reside in a particular district, moves out of the district with the intention of remaining *permanently* outside it, the office which he holds is regarded as vacant, but, if the absence from the district is only *termporary,* such absence is not regarded as a removal. . ."

In addition, the word "removal" has been interpreted to mean the ceasing to be a resident of a county. *Prather vs. Hart,* 17 Neb. 598, 24 N.W. 282.

It has also been held that the word "remove" refers to a permanent removal of residence, and not a temporary absence. *Petition of Gorey,* 2 Ohio N.P., N.S., 389, 40 *Wkly. Law Bulletin,* 490.

It is our opinion that a voluntary commitment to a mental health institute cannot be deemed, in itself, to be a "removal from the county".

The Iowa Court has recognized that, under certain circumstances, a vacancy may result from an abandonment of the office. However, intention is an important element in the question of abandonment. *State vs. Murray,* 219 Iowa 108, 257 N.W. 553 (1934).

We would also point out that §441.9 provides for the removal, by majority vote of the conference board, upon charges of nonfeasance.

Of course, whether the necessary requisites of abandonment or nonfeasance exist must be determined by the facts in each individual situation. Again, it is our opinion that commitment to a mental institution does not, in itself, result in abandonment or nonfeasance.

6.55

Assessor, employees as political candidates—§§441.53, 441.54, 441.55, 740.16, 740.17, 1962 Code. Employees of city or county assessors may not conduct any campaign, including their own, for elective office. (Knoke to Krohn, Jasper Co. Attorney, 10/22/64) #64-10-1

6.56

Board of Supervisors, ambulance service, subsidation—Ch. 14, Acts 60th Ex. G.A. (1964), amending §347.14 1962 Code. No authority for Board of Supervisors to subsidize ambulance service. Cost defrayed in same manner as other service of a county hospital. (Knoke to Burris, Jackson Co. Atty., 8/4/64) #64-8-2

6.57

Board of supervisors, bonds, subdividers—§§306.15, 409.5, 1962 Code; Ch. 218, Acts 60th G.A. The county board of supervisors has no authority under §306.15 to require rural subdividers to provide a bond. (Hard to Ball, Black Hawk Co. Atty., 11/1/63) #63-11-1

6.58

Board of supervisors, contracts with outside firm—§§332.3(4), 332.3(6) 1962 Code. The board of supervisors may contract with an outside firm to establish a complete Physical Inventory and Control System. (Knoke to Wehr, Asst. Scott Co. Atty., 6/28/63) #63-6-8

6.59

Board of supervisors, composition—§39.19, 1962 Code. Discussion of residence of board members in separate townships. (Strauss to Jenkins, Monroe Co. Atty.) #64-12-3

6.60

Bonds, allocation of interest—§453.7, 1962 Code. Interest or earnings on fund created by direct vote of people must be credited to fund to retire indebtedness. (Strauss to Bruner, Carroll Co. Atty., 6/20/64) #64-7-2

6.61

Incompatibility, county engineer, supervisor—§§39.18, 43.8, 69.2, 1962 Code. Member of board of supervisors may not take leave of absence to serve as county engineer; said member, who resigns after election to office of supervisor for term beginning one year after election, is still eligible to fill office to which he was elected; notwithstanding candidate agrees to qualify if elected,

right of elected party to resign prior to qualifying January 2, 1964 is preserved. (Strauss to Wenger, Fremont Co. Atty., 4/9/63) #63-4-3

6.62

Incompatibility, mayor, conservation board, school board–§111A.4, Ch. 279, 1962 Code. 1. Offices of member of County Conservation Commission and mayor of city are incompatible, and election of mayor after appointment of person to County Conservation Commission creates vacancy in County Conservation Commission. 2. Offices of mayor and member of the Community School Board are incompatible, and election as member of community School Board after election as mayor creates vacancy in office of mayor (Strauss to Elwood, Howard Co. Atty., 4/16/64) #64-4-1

6.63

Incompatibility, teacher, school board–§69.11, 1962 Code. Fact that person acted in incompatible offices as teacher and member of board did not invalidate acts of board as concerns third persons or public. Person designated to fill vacancy in county board will serve until school election in 1965. (Strauss to Strothman, St. Rep., 10/30/63) #63-10-8

6.64

Recorder, fee for recording brands–§§187.2, 335.14, 1962 Code. Fee for recording brand is $1.00 (Knoke to Shafer, Allamakee Co. Atty., 7/20/64) #64-7-3

6.65

Recorder, notice of personal property tax lien–§§445.6, 558.51, 558.60, 1962 Code. Indexing of treasurer's notice of personal property tax lien by recorder is neither authorized nor required. (Strauss to Burdette, Decatur Co. Atty., 4/15/64) #64-4-2

6.66

Recorder, recordation of instruments–§§335.2, 409.12, 1962 Code. Recorder has no authority to refuse to accept instruments for recordation that exceed size of record book. (Knoke to Wood, Hamilton Co. Atty.) #64-12-4

6.67

Sheriff mileage–§§127.19, 337.11(10), 1962 Code. Mileage accumulated by sheriff is allowed under §337.11(10), regardless of ownership of automobile used in such accumulation. He cannot accumulate mileage in use of publicly owned conveyance. (Strauss to Charlton, Delaware Co. Atty.) #64-12-1

6.68

Tax Sales Certificate, Property of old age assistance recipient–§§446.18, 446.19, 1962 Code. Ch. 274 Acts 60th G.A. When three elements of Ch. 274 are present on and after July 4, 1963, it is mandatory that County Treasurer issue public bidder tax sale certificate to County Auditor. (Snell to Hays, Marion County Atty., 6/10/64) #64-6-2

6.69

Zoning–§358A.2, 1962 Code. Zoning ordinance more restrictive than the statute is invalid. (Knoke to Rasche, Clinton Co. Atty., 12/10/63 #63-12-1

CHAPTER 7

COURTS

STAFF OPINIONS

LETTER OPINIONS

7.1

COURTS: Judicial nominating commission, membership—§605.7, 1962 Code; Ch. 343, Acts 59th G.A.; Ch. 80, Acts 60th G.A. 1. Certified court reporter is ineligible to membership in district nominating commission. 2. District judge, as member of such commission, cannot have power to break tie among members of commission.

September 19, 1963

Mr. Samuel O. Erhardt
Wapello County Attorney
Courthouse
Ottumwa, Iowa

Dear Mr. Erhardt:

Reference is herein made to your letter in which you request an opinion on the following questions:

1. "Can a certified court reporter, who is also an attorney, but who is regularly employed in the district as a court reporter, legally be a member of the district judicial nominating commission?

2. "In case of a tie vote among the members of the district judicial nominating commission, does the district judge of such district, who is a senior in length of service, have a right to vote to split the tie?"

1. The constitutional amendment relating to the election of judicial nominating commissions for the purpose of naming candidates for Supreme and district court judges (Ch. 343, 59th G.A.), provides that members of such commissions "shall hold no office of profit of the United States or of the state during their terms". Section 605.7, 1962 Code, treats such a court reporter as holding an office. There it is said, "Such reporter shall take an oath faithfully to perform the duties of his office". On the foregoing authority, the court reporter holds office of profit, and therefore is ineligible to membership on a district judicial nominating commission.

2. Insofar as your second question is concerned, I am of the opinion that the district judge will not have the power to vote to break a tie among the members of the district judicial nominating commission. The district judge, who is a member of the commission and is its chairman, is so by operation of the Constitution. The constitutional amendment for the election of judges provides, in Ch. 343, 59th G.A. page 344:

"The district judge of such district who is a senior in length of service will also be a member of such commission and will be its chairman."

On the other hand, Chapter 80, 60th G.A., provides in §14 thereof the following:

". . . Such nominees shall be chosen by the affirmative vote of a majority of the full *statutory number of commissioners* upon the basis of their qualifications. . ." (Emphasis supplied)

Statutory members of the commission are those appointed by the Governor and those elected by the bar. The district judge holds membership in the commission by neither of the foregoing procedures. His appointment is provided by the *constitutional amendment.*

7.2

COURTS: Judicial nominating commission, registration by lawyers—Art. V, §16, Const. of Iowa; Ch. 80, §§7, 8, Acts 60th G.A. Members of bar must register in person with clerk of court.

May 28, 1963

Mr. Harry Perkins
Polk County Attorney
Room 406, Courthouse
Des Moines, Iowa

Dear Mr. Perkins:

Your request for an opinion of recent date states in part:

"This has reference to Senate File 402, which has recently been enacted by the State Legislature. * * * Mr. Doyle, Clerk of the Polk County District Court of Iowa, has received numerous written requests from members of the local bar requesting him to register them in the bar register maintained by the Clerk.

"We would appreciate an Attorney General's opinion as to whether the language used in this bill would require members of the bar to personally appear in person at the Clerk's office and personally sign the bar register."

Senate File 402 was passed to implement the provisions of the recently adopted constitutional amendment concerning selection and tenure of judges. As part of that selection process, members of the bar are eligible to vote for judicial nominating commissioners upon proper registration. The applicable sections of S.F. 402 are:

"Sec. 7. Eligibility to vote. To be eligible to vote in elections of judicial nominating commissioners, a member of the bar must have registered in writing with the clerk of the district court of the county of his residence at the last bar registration preceding such election. * * *"

"Sec. 8. Bar Registration. A book known as the bar register shall be maintained in each county in the office of the clerk of the district court. * * * In May, 1963, and every two years thereafter, each such clerk of the district court shall post in his office and publish once in an official newspaper in his county a notice substantially as follows:

NOTICE TO THE BAR

———————— County, Iowa

"Each member of the bar of the State of Iowa residing in this county is

notified to register in writing his name, address, and year of admission to the Iowa Bar, in the office of the undersigned in May, 19––, (Specifying 1963 the first year) to be eligible to vote in elections of judicial nominating commissioners."

Under this statute, a lawyer is not registered until his name, address and year of admission is actually spread on the pages of the bar register. The only method whereby a lawyer could possibly register in writing" would be to appear personally in the clerk of court's office and enter his name, address and year of admission to the bar, in the bar register.

Therefore, you are advised that members of the bar must register in person in the office of the clerk of court and that the clerk shall not accept any other method of attempted registration.

7.3

COURTS: Judicial retirement system, contributions – §605A.4, 1962 Code; Ch. 1, §§33, 43, Acts 59th G.A. 1. Contribution of each supreme, district, municipal, or superior court judge must be credited in separate accounts, but such contributions of each such judge are placed in separate funds, one established for the contributions of supreme and district court judges and one established for the municipal and superior court judges. 2. In event fund established for payment of annuities to supreme or district court judges is not sufficient to pay annuity of retired judges, state shall supply deficit by appropriations made by legislature.

May 3, 1963

Mr. Marvin R. Selden, Jr.
Comptroller
L O C A L

Dear Mr. Selden:

Reference is herein made to your letter in which you submitted the following:

"Section 605A.4, Code of Iowa, 1962, relating to judicial Retirement System, beginning with line twenty-three (23), states as follows:

'The amounts so deducted and withheld from the basic salary of each said judge shall be paid to the state comptroller for deposit with the treasurer of state to the credit of the judicial retirement fund, and said fund is hereby appropriated for the payment of annuities, refunds, and allowances herein provided, except that the amount of such appropriations affecting the payment of annuities, refunds, and allowances to judges of the municipal and superior court shall be limited to that part of said fund accumulated for their benefit as hereinafter provided.'

"I respectfully request an opinion as to the following:

"1. Do the contributions of each district and/or supreme court judge have to be kept separate and intact, or may annuities to a retired judge be paid from the total contributions of all municipal and supreme court judges who are members of the judicial retirement system?

"2. Do the contributions of each municipal and/or superior court judge have to be kept separate and intact, or may annuities to a retired judge be paid from the total contributions of all municipal and superior court judges who are members of the judicial retirement system?

"Further, Section 605A.4, Code of Iowa, 1962, states:

'The state shall contribute a sum not exceeding three percent of the basic salary of all judges of the district and supreme court for the years 1949 and 1950 and thereafter such sums as may be necessary over the amount contributed by the district and supreme court judges to finance the system, but only to the extent that the system applies to them.'

"Also, we call your attention to the appropriation bill of the 59th General Assembly, Chapter 1, Section 33, for supreme court judges, and section 43 for district court judges, which states:

'For salaries of the judges of the supreme court (district courts) of Iowa and for the state's contribution, in the amount of three percent of such salaries, to the judicial retirement system provided for a chapter 605A, Code 1958. . .'

"If your answer to the first question above is that the contributions of each judge must be kept separate and intact and further that amounts similar to those amounts appropriated by previous General Assemblies is not sufficient to pay the annuities as they mature, we respectfully request an opinion as to the following:

"3. Shall the annuities and benefits to retired judges be paid from funds of the state treasury not otherwise appropriated?"

1. The contributions of each supreme, district, municipal and superior court judge must be credited in separate accounts for each judge who is a member of the system.

2. However, the contributions of each such judge, whether deducted from salary or contributed by the state, city or county, are placed in separate funds; one established for the contributions of supreme and district court judges, and one established for the contributions of municipal court and superior court judges.

3. In the event such fund established to pay annuities to supreme and district court judges is not sufficient to pay the annuity of retired supreme and district court judges, the state shall contribute sufficient money to finance any deficiency in such fund in order to pay the annuities of retired supreme and district court judges. There is no authority to pay such annuities of such retired judges from funds in the state treasury not otherwise appropriated. On the other hand, it is plain from Chapter 605A, Code of 1962 that such deficiency is required to be made up by appropriations made by the legislature. The statute, in providing for such a contribution by the state, is authority to make such appropriation.

7.4

COURTS: **Justice of peace, abolishment**—§602.17, 1962 Code. All justice of peace courts in township, part of which is annexed by city having municipal court, shall cease to exist upon completion of annexation proceedings.

May 7, 1964

Mr. Noran L. Davis
Pottawattamie County Attorney
Pottawattamie County Court House
Council Bluffs, Iowa

Dear Mr. Davis:

This will acknowledge receipt of your letter wherein you request an opinion as follows:

"There is presently established in the City of Council Bluffs, Iowa, a Municipal Court. The corporate city limits of Council Bluffs, Iowa, embrace only one township, namely, Kane Township of Pottawattamie County, Iowa.

"There has now been filed an annexation suit by the City of Council Bluffs, Iowa, said suit being filed on April 1, 1964, in the District Court of Iowa, in and for Pottawattamie County at Council Bluffs, Iowa, which suit will, after judgment and decree are entered on May 7, 1964, bring a substantial part of Lewis Township of Pottawattamie County, Iowa, within the corporate city limits of Council Bluffs, Iowa.

"There are presently two Justice of Peace Courts in Lewis Township, Pottawattamie County, Iowa, and there are no incorporated cities or towns within Lewis Township, Pottawattamie County, Iowa.

"From an examination of Section 602.1 and 602.17 it would appear that upon part of Lewis Township, Pottawattamie County, Iowa, becaming a part of the incorporated city of Council Bluffs, Iowa, that all Justice of Peace Courts within Lewis Township, Pottawattamie County, Iowa, *shall* be abolished.

"We would appreciate your opinion of our interpretation as set forth in the preceding paragraph in order that we might avoid any questions of jurisdiction and power to act as a court after May 7, 1964."

Section 602.17, 1962 Code of Iowa, provides:

"Upon the qualification of the officers of the municipal court, the police court, mayor's court, except in incorporated cities or towns other than the city in which said court is established, justice of the peace courts, and the superior court, in and for the municipal court district, and the offices of police judge, clerk of police court, justices of the peace, constables, judge and clerk of the superior court, shall be abolished."

Section 602.1 provides that a municipal court may be established in any city having a population of five thousand or more and states that "all the civil townships in which such city *or any part thereof* is located shall constitute the municipal court district." (Emphasis added).

It appears that upon completion of the annexation to which you refer in your letter, part of the city of Council Bluffs will be located in Lewis Township and all of Lewis Township will therefore be within the municipal court district of the city of Council Bluffs. Under Section 602.17, all justice of the peace courts within Lewis Township will thereafter be abolished upon qualification of the officers of the municipal court. Since the officers of the municipal court of the city of Council Bluffs have already been qualified, it it our opinion that the justice of the peace courts within Lewis Township shall cease to exist upon completion of the annexation proceedings to which you refer.

7.5

COURTS: Justice of Peace, jurors, selection—§§601.1, 601.49, 607.1, 609.3, 762.16, 1962 Code. Jurors for justice of peace court may be taken from anywhere within county of jurisdiction of such court, except that jurors in counties divided for judicial purposes must be taken from the division in which court is situated.

April 10, 1963

Mr. Edward F. Samore
Woodbury County Attorney
204 Courthouse
Sioux City, Iowa

Dear Mr. Samore:

This will acknowledge receipt of your letter in which you request an opinion as follows:

"In picking members of a jury for a Justice of the Peace Court, must the jury be picked from the township in which the Justice of the Peace holds court?"

There are five sections of the 1962 Code of Iowa which are pertinent to the consideration of your question. The first is §601.1, which provides:

"The jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties; . . "

The second is §601.49, which provides:

"If a jury be demanded, the justice shall issue his precept to some constable of the township, directing him to summon the requisite number of jurors possessing the same qualifications as are required in the district court."

The third is §607.1, which provides:

"All qualified electors of the state, of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, and who can speak, write, and read the English language, are competent jurors in their respective counties."

The fourth is §762.16, which deals with the trial of nonindictable offenses, and it provides as follows:

"If a trial by jury is demanded, the justice shall direct any peace officer of the county to make out a list of eighteen inhabitants of the county having the qualifications of jurors in the district court, from which list the prosecutor and defendant may each strike out three names."

The fifth is §609.3, which provides:

In counties which are divided for judicial purposes, and in which courts are held at more than one place, each division shall be treated as a separate county, and the grand and petit jurors and talesmen, selected to serve in the respective courts, shall be drawn from the division of the county in which the court is held, at which they are required to serve."

On the basis of the foregoing statutes, it is our opinion that jurors for a justice of the peace court may be taken from any place within the county of jurisdiction of such court, except in those counties which are divided for judicial purposes. In such counties, the jurors must be taken from the division in which the court is situated.

7.6

COURTS: Justice of peace, jury trials—§§367.4, 367.6, 367.8, 603.17, 602.28, 1962 Code. Defendant would not be entitled to jury trial in prosecution for city ordinance violation where case was transferred from a mayor's court to justice of peace court.

October 10, 1963

Mr. Robert F. Schoeneman
Butler County Attorney
Aplington, Iowa

Dear Mr. Schoeneman:

This will acknowledge receipt of your letter in which you request an opinion as follows:

"Under Section 367.8, 1962 Code of Iowa, it is stated in substance that in proceedings before a Mayor's Court in actions or prosecutions under ordinances there shall be trial by the Court without a jury. Section 367.6, 1962 Code of Iowa states that if the Mayor is absent or unable to act the nearest Justice of Peace shall have jurisdiction and hold court in criminal cases. If a criminal case were transferred according to Section 367.6 from a Mayor's Court to a Justice of Peace Court on a prosecution under a city ordinance, would the defendant be entitled to a trial by jury before the Justice of Peace Court?"

Section 367.6, 1962 Code of Iowa, provides as follows:

"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."

Section 367.4 provides that superior, municipal or police courts shall have exclusive jurisdiction of prosecutions for violations of city ordinances in cities where such courts exist. In all other cities, the mayor pro tempore have exclusive jurisdiction of such cases. It is therefore clear that when a justice of the peace court obtains jurisdiction by virtue of §367.6, it is acting in the capacity of one of the above-named courts.

Prosecutions for violations of city ordinances are tried summarily by the court without a jury in mayor's and police courts, superior courts and municipal courts by virtue of §§367.8, 603.17 and 602.28.

It is therefore our opinion that a defendant would not be entitled to a trial by jury in a justice of the peace court in a prosecution for violation of a city ordinance.

7.7

COURTS: Mayor as Justice of Peace, fees—§§367.15, 601.131, 1962 Code. Mayor acting as Justice of Peace in townships with population less than 10,000 required to repay to county 50% of fees in excess of $1200 collected on state cases.

October 22, 1964

Mr. Gordon L. Winkel
Kossuth County Attorney
Box 405
Algona, Iowa 50511

Dear Mr. Winkel:

This is in reply to your recent request for an opinion in which you state:

"I would like to request an opinion concerning the accounting for fees collected by a Mayor in the handling of State cases.

"As you know, a Justice of the Peace is required to remit 50 per cent of fees collected in excess of $1200.00 per year to the county. In Kossuth County the Mayor of Algona handles a considerable volume of State cases and usually exceeds the $1200.00 per year.

"Under these circumstances is the Mayor required to repay the county 50 per cent of fees collected on State cases in excess of $1200.00?

"The State Auditor is presently auditing Kossuth County, and this question will undoubtedly come up in regard to 1963 business, and the Mayor involved and myself would appreciate your reply as soon as possible."

Section 367.15, 1962 Code of Iowa, provides:

"For holding a mayor's or police court, or discharging the duties of a justice of the peace, the mayor shall receive in addition to his regular salary as mayor, such fees or salary as it by law or ordinance provided for officers performing such duties."

The provisions relating to the accounting of fees by justices appears in Section 601.131, 1962 Code.

By virtue of Section 367.15, it is our opinion that a Mayor discharging the duties of a Justice of the Peace in townships having a population of less than ten thousand, would be required to repay to the county 50 per cent of fees in excess of $1200.00 collected on state cases.

7.8

COURTS: Mayor's court, jurisdiction—§§367.5, 602.1, 602.15, 602.17, 602.20, 1962 Code. Mayor's court which is in municipal court district has jurisdiction only over actions or prosecutions for violations of its city ordinances.

April 8, 1964

Mr. William C. Ball
Black Hawk County Attorney
619 Mulberry Street
Waterloo, Iowa

Dear Mr. Ball:

This will acknowledge receipt of your letter wherein you state:

"Question has arisen whether the Mayor's Court of Evansdale, Iowa will have jurisdiction as defined by Section 367.5 in view of the provisions of Section 602.17 through 602.20 of the Iowa Code."

Municipal courts are created under the statutory authority of Chapter 602, Code of Iowa, 1962, their jurisdiction also being defined therein. Section 602.1 provides:

"A municipal court may be established in any city having a population of five thousand or more, by proceeding as hereinafter provided. All the civil townships in which such city or any part thereof is located shall constitute the municipal court district."

Section 602.17 provides:

"Upon the qualification of the officers of the municipal court, the police court, mayor's court, *except in incorporated cities or towns other than the city in which said court is established,* justice of the peace courts, and the superior court, in and for the municipal court district, and the offices of police judge, clerk of police court, justices of the peace, constables, judge and clerk of the superior court, shall be abolished." (Emphasis added).

Section 602.19 provides in part:

"All other causes pending in the superior court, and all causes pending in the police court, and mayor's court, *except for violation of ordinances of incorporated cities or towns other than that in which said court is*

established, and justice of the peace courts shall forthwith be transferred to the municipal court. . . ." (Emphasis added).

Sections 602.15 and 602.20 are also applicable.

Section 367.5 of the Code defines the jurisdiction of mayor's courts. It provides:

"In other cities and towns, the mayor, or mayor pro tempore *when authorized* to hold mayor's court, *shall have exclusive jurisdiction of all actions or prosecutions for violations of city or town ordinances,* and the mayor shall have, in criminal matters, the jurisdiction of a justice of the peace, coextensive with the county, and in civil cases, the jurisdiction within the city or town that a justice of the peace has within the township." (Emphasis added).

As early as 1918 the Attorney General held in an opinion that the establishment of the Waterloo municipal court did not abolish the mayor's court in the incorporated towns of Cedar Heights and Castle Hills, 18 O.A.G. 340. Section 694-C5, Code of Iowa, 1915, cited in the opinion, provided:

"After the adoption of the proposition to establish a municipal court under the provisions of this act, and upon the election and qualification of the officers herein provided for, the police court, mayor's court justice of the peace court and the superior court in and for the territory within the municipal court district, shall be abolished."

This provision was an antecedent of Section 602.17, Code of Iowa, 1962. The reason given for not abolishing these mayors' courts when the 1915 statute appeared by its wording to do so was stated thusly at p. 341:

"There is a good reason why these courts should continue to exist, in order to enforce the laws and ordinances which are alone applicable to the separate municipalities."

It is our opinion, pursuant to the statutory authority cited above, and the 1918 Attorney General's opinion, that the mayor's court of Evansdale, which is in the municipal court district of Waterloo, has jurisdiction only over actions or prosecutions for violations of its city ordinances.

7.9

COURTS: Municipal court, costs and jury fees—§§602.31, 602.37, 607.6, 333.3, 1962 Code. 1. County not responsible to city for costs of docketing and other bookkeeping entries by clerk of municipal court. 2. Jury fees of municipal court jurors are paid by county, but no mileage is paid to municipal court jurors.

April 3, 1964

Mr. Jack M. Fulton
Linn County Attorney
Courthouse
Cedar Rapids, Iowa

Dear Mr. Fulton:

This will acknowledge receipt of your letter in which you request an opinion as follows:

"Several problems have arisen recently in regard to the expenses of the Municipal Court. Linn County has been referred bills from the clerk of the Cedar Rapids Municipal Court which involve the two situations enumerated below.

"1. The costs which the clerk has entered for docketing the case and the other bookkeeping entries of the clerk. These particular cases involve dismissal by the State because of no further prosecution, and where the defendant may be found not guilty.

* * *

"2. In addition we are concerned with the expenses of the Municipal Court jury. Chapter 602 does not make any provision for reimbursement of the Municipal Court for the selection of jurors. Chapter 607 does not provide or make any provision for the City Auditor or Treasurer to take care of jurors fees.

* * *

". . . Your opinion as to resolving the present problems would be most helpful."

In answer to your first question and as noted in your letter, this office has previously issued an opinion concerning the subject which you have presented. 42 *O.A.G.* 116. It does not appear that the statutes referred to in that opinion have been altered so as to change the effect thereof and we see no reason to change our position. It is therefore our opinion that the county is only liable to the city for witness fees and mileage as mentioned in Section 602.31, 1962 Code of Iowa, and that the county is not responsible to the city for the costs set out in your first question.

In answer to your second question, Section 607.6, 1962 Code of Iowa, provides as follows:

"Immediately after the adjournment of each term of a court of record, the clerk thereof shall certify to the county auditor a list of the jurors, with the number of days attendance to which each is entitled."

Section 33.3, 1962 Code of Iowa, in pertinent part, provides as follows:

The county auditor is hereby authorized to issue warrants as follows before bills for the same have been passed upon by the board of supervisors:

"1. For jury fees and mileage on certificate of the clerk of the court upon which they were in attendance, which certificate shall be issued when the juror entitled thereto shall have been discharged or excused by the court."

It should be noted that no distinctions are drawn in these statutes as to the type of case on which the juror serves and we would not be warranted in making any such distinction. It is therefore our opinion that the jury fees of municipal court jurors are paid by the county, pursuant to §607.6 and §333.3, 1962 Code of Iowa, but that no municipal court jurors are entitled to mileage, according to the express terms of §602.37, 1962 Code of Iowa.

7.10

COURTS: Municipal Court, juries for indictable misdemeanor cases—§602.28, 1962 Code. Under this section it is required that jury of twelve be selected for trial of indictable misdemeanors in municipal court.

February 24, 1964

Mr. Jack M. Fulton
Linn County Attorney
Linn County Courthouse
Cedar Rapids, Iowa

Dear Mr. Fulton:

This will acknowledge receipt of your letter in which you request an opinion as follows:

"In trial of indictable misdemeanors in Municipal Court, must the jury consist of 12 individuals under Section 602.28, which states, * * * 'Shall be tried in the same manner as like cases in the District Court' or may the jury consist of 6 in number as provided for in Code Section 602.39."

In the case of *In re Lieurance's Estate,* 181 Ore. 646, 185 P. 2d 575, the court, in considering similar language, stated as follows:

"This statute is considered in terms which are familiar to all. The grammatical arrangement is commonplace. The phrases 'the same manner' and 'like effect' are often employed in legislation and receive from the courts their ordinary meaning, unless employed in an unorthodox way. * * * In this statute the two terms are used in the same way as they occur in ordinary speech. The phrase, 'proceed and be tried and determined in the county court', plainly means that when a contested probate matter is transferred by the county court to the circuit court, the latter in adjudicating upon it does not apply its general powers by only those of the county court."

See also, *In re Desotelle's Estate,* 258 N.Y.S. 119, 12Y 143 Misc. 732.

Section 602.28, 1962 Code of Iowa, provides that in Municipal Court, "Misdemeanor cases in which the punishment exceeds a fine of one hundred dollars or exceeds imprisonment for thirty days shall be tried in the same manner as like cases in the district court." In the district court such cases are tried before a jury of twelve pursuant to the provisions of Chapter 779, 162 Code of Iowa.

It is therefore our opinion that Section 602.28 plainly means that indictable misdemeanors shall be tried before a jury of twelve in municipal court just as they are tried in district court.

7.11

COURTS: Municipal court, reporters, payment by county—§§602.46, 602.47, 602.48, 603.51, 605.6, 605.7, 1962 Code. Municipal court reporters are entitled to per diem pay when in attendance upon municipal court at direction of judge, whether they take shorthand or not. However, they are not entitled to per diem pay when on vacation or on sick leave.

March 1, 1963

Mr. Jack M. Fulton
Linn County Attorney
Cedar Rapids, Iowa

Dear Mr. Fulton:

This is in reply to your recent inquiry in which you request an opinion of this office as follows:

"Under Section 602.46 of the 1962 Iowa Code, Linn County is required to pay one half the cost of Cedar Rapids Municipal Court Shorthand reporters.

"My questions are:

"1. What is meant by 'for the time actually engaged in their court duties,' as set out in Sec. 602.46?

"2. Can a Municipal Court Shorthand reporter be paid for duties other than reporting class 'A' cases, as set out in Sec. 602.46, Preliminary Examinations as set out in Sec. 602.47 and class 'B' cases, if the party demanding the reporter shall pay the reporter shall pay the reporter fees in advance to the Clerk of the Court, as set out in Sec. 602.48?

"3. Is there any provision for a Municipal Court Shorthand reporter to be paid sick leave or vacation pay?

"4. Does Sec. 605.6 and .7 relating to the duties of Shorthand reporters in District Court, have any application to Shorthand reporters in Municipal Court?"

Section 602.46 of the Code of Iowa (1962) provides in part:

"Each judge of the municipal court may appoint a shorthand reporter. All provisions relating to shorthand reporters and their duties in the district court, insofar as applicable, shall govern, except their compensation which shall be fixed by order of the court. . .for the time actually engaged in their court duties. . ."

Section 602.46 relates the duties of municipal court reporters to those of the district court reporters in the same language as §603.51 relates the duties of superior court reporters to those of the district court. Section 605.7, pertaining to the duties of district court reporters, provides that: "He shall attend such sessions of the court as the judge who appointed him may direct. . . ."

Section 605.8 provides that the district court reporters are to be paid: ". . . for each day's attendance upon said court, under the direction of the judge. . . ."

While §602.46 states that municipal court reporters are to paid "for the time actually engaged in their court duties", it also provides that their duties shall be the same as those of the district court reporters. Thus, it is the duty of municipal court reporters to attend such sessions of the court as the judge who appointed them may direct. This duty is imposed upon them by the Legislature just the same as if they were actually taking shorthand, and if they are in attendance upon the court at the direction of the judge, they are entitled to payment. The reference by §602.46 to the applicable provisions of the district court would clearly include §§605.6 and 605.7. Sections 602.46, 602.47 and 602.48 provide that reporting fees must be taxed as costs in the particular situations covered, but these sections have nothing to do with by whom or to what extent the municipal court reporters are paid. See 1930 *O.A.G.* 235.

The preceding construction of these sections finds considerable support in the case of *Ferguson v. Pottawattamie County,* 126 Iowa 108, 101 N.W. 733 (1904). In that case a reporter in the superior court was in attendance upon the court for 298 days, but only engaged in writing shorthand for 189 days of that time. The county refused payment for the days on which no shorthand was taken. The Iowa Supreme Court related the duties of the district court reporters to the superior courts, and held that the superior court reporter was entitled to compensation for all the days he was required by the judge to attend the court. The court considered the concurrent jurisdiction of the superior and district courts and the reference in the superior court statutes to the duties of district court reporters, both of which are present in the case. In so holding, the Court stated at 126 Iowa 110:

". . . Were the statute under consideration to be construed as strictly and as narrowly as the appellant claims it should be, the reporter would be compelled to count the hours and fractions thereof during which he was actually engaged in writing shorthand. We do not believe that the word 'employed,' as used by the Legislature, was intended to restrict the

reporter's compensation to the time actually engaged in reporting the testimony or the proceedings. All lawyers, judges, and legislators know that courts must necessarily devote some time to matters other than the trial of cases, and that they cannot always foresee just when a reporter's services may be required; and for this very reason the reporter is placed under the control and direction of the court, and may be required to attend upon the order of the judge. We think that the attendance thus required is the employment contemplated by the statute. To hold otherwise would be to declare that a reporter may be required to attend upon the court days, weeks, and months, without compensation. That the Legislature did not intend such a result, or to so discriminate between reporters of the district and superior courts, is very clear to us."

Although a municipal court reporter is only required to be in attendance upon the court in order to receive his per diem, and there is no necessity of actually taking shorthand at some time within the day, it is clearly essential under §605.7 that his attendance be at the direction of a judge. The general rule as to what length of attendance is required to receive the per diem is set forth in 43 *Am. Jur.*, Public Officers, §358, at 148, as follows:

"A 'day' means a calendar day in all cases where the statute merely provides for an officer's compensation at a certain or reasonable sum per day. No length of time of occupation on a day is necessary to entitle an officer to his per diem, for in fixing salaries and fees for the performance of public services at so much per day, the law does not consider fractions of a day."

Section 602.46 provides for pay for municipal court reporters only when they are "actually engaged in their court duties". It is apparent that shorthand reporters are not attending the court or performing other duties when they are sick or on vacation. There is no statutory authority for payment for sick leave or vacations.

In summary, the provisions of §§605.6 and 605.7 are applicable to municipal court reporters by the reference of §602.46. Municipal court reporters are entitled to their per diem for every day they are in attendance upon the court at the direction of a judge, whether they actually take shorthand or not, but they may not receive their per diem when on sick leave or vacation.

7.12

COURTS: Records, preservation of court reporters' notes—§§624.9, 624.10, 1962 Code. Official court reporters' notes must be retained with case records and may not be destroyed.

July 30, 1964

Mr. William C. Ball
Black Hawk County Attorney
619 Mulberry Street
Waterloo, Iowa

Dear Mr. Ball:

This will acknowledge your letter of recent date, requesting opinion as follows:

"In July of 1964 the site of the Black Hawk County Courthouse will be changed. Necessarily, this will entail the transfer of voluminous records out of the various offices to the new courthouse building.

"The Clerk of District Court in and for Black Hawk County, Iowa has

in his care and custody as required by law, the records of the various civil cases filed in Black Hawk County since the commencement of the keeping of such records. Question has arisen as to whether the official court reporters' shorthand notes must under the provisions of Iowa law be retained with the records of the case indefinitely.

"In view of the implicit statutes relative to the right of appeal in civil cases, it would appear that at some point it should be permissible to destroy such shorthand notes in view of the bulk and uselessness of keeping the same.

"As to criminal cases, of course, we realize in the light of the scope of the Federal Court's review of State criminal actions that these must be preserved."

Section 624.9 in part provides:

"In all appealable actions. . . any party thereto shall be entitled to have reported the whole proceedings upon trial or hearing. . ."

Section 624.10 in part provides:

"Such report. . . shall be filed by the clerk and . . . shall be a part of the record in such action. . ."

The general rule with respect to the destruction of public records is stated in 45 *Am. Jur.*, Records, §12, as:

"Public records and documents are the property of the state and not of the individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made."

The Iowa Supreme Court, in the case of *Coppock v. Reed*, 189 Iowa 581, 178 1/8 N.W. 382, (1920), quoted from the case of *In re Molineux*, 177 N.Y. 395 (65 L.R.A. 104) the following:

" 'The custodian of a public record cannot deface it or give it up, without authority from the same source which required it to be made. The statute directed the superintendent to make the record, and when he made it, the state made it, and it has not authorized him to destroy it under any circumstances, . . ."

The Iowa Court, in the Coppock case, concluded:

"The statutes, on sound reason, direct the preservation of the records or trials. If these are defective, the power to correct or amend is conferred on the courts; but neither the clerk, who is custodian thereof, nor the courts are clothed with authority to destroy or expunge a record, or any part thereof, . . ."

Based on the above authorities, it is our opinion that official court reporters' shorthand notes must be retained with the records of the case, and may not be destroyed.

7.13

Judicial nominating commission, vacancies—Ch. 80, Acts 60th G.A.; Art. IV, §10, Iowa Const. Where only four persons are nominated for the office of District Judicial Commissioner and statute requires nominating of five, there will be a vacancy in office to be filled by the Governor. (Strauss to Lyman, Clerk Supreme Court, 6/7/63) #63-6-2

7.14

Justice of peace, abolishment—§602.17, §602.19, 1962 Code. Upon abolishment of justice of peace court, all powers duties and functions of justice of peace cease as of moment of abolishment of said court. (Bianco to Davis, Pottawattamie County Attorney, 10/27/64) #64-10-3

7.15

Mayor's court, fees—§§363A.4, 367.15, 1962 Code. City ordinance providing that mayor shall receive salary but no fees from any other source is violative of §367.15 of Code, which provides that mayor shall receive, in addition to his regular salary, such fees as are provided by law or ordinance for holding mayor's court. (Bump to Bedell, Dickinson Co. Atty., 4/2/63) #63-4-1

7.16

Police courts, fees—§367.13, 1962 Code. If city council has by ordinance provided salary in lieu of all fees for police judge, all fees collected thereafter shall be paid into municipal treasury. (Allen to Dickey, Lee Co. Atty. 7/20/64) #64-7-4

CHAPTER 8

CRIMINAL LAW

STAFF OPINIONS

LETTER OPINIONS

8.1

CRIMINAL LAW: Alternative punishments—§321.482, 1962 Code. Under this section court may impose either fine or imprisonment, but not both, and punishment may be less than maximum prescribed.

April 13, 1964

Mr. Grant E. McMartin
Shelby County Attorney
Harlan, Iowa

Dear Mr. McMartin:

This will acknowledge receipt of your letter in which you request an opinion as follows:

> "With reference to Section 321.482 of the 1962 Code, I have been asked if under this section, 1, as Justice of the Peace, can levy a fine of less than $100.00 and also impose a jail sentence of less than the 30 days, . . ."

Section 321.482, 1962 Code of Iowa, provides in pertinent part:

> "Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days."

It will be noted that this section provides in the alternative for either a fine or imprisonment. The interpretation of such a provision is well-settled and is expressed in 15 Am. Jur., Criminal Law, §459, page 117, as follows:

> The word 'or' in criminal statutes cannot be interpreted to mean 'and' when the effect is to aggravate the offense or increase the punishment. The word, when used in respect of punishments, indicates alternative punishments, only one of which can be imposed."

See also, State v. Merry, 62 N.D. 339, 243 N.W. 788, 790. It is for the Court to determine whether a fine or imprisonment shall be imposed. A sentence of imprisonment without the alternative of a fine is valid. *State v. Davis*, 86 S.C. 208, 68 S.E. 532. See 24B C.J.S., Criminal Law, §1982 C., p. 571. Since Section 321.482 is not governed by the indeterminate sentence law, the Court can impose punishment less than the maximum fine or the maximum imprisonment. See 24B C.J.S., Criminal Law, §1982 A., p. 569.

It is therefore our opinion that under Section 321.482, 1962 Code of Iowa, a Court may impose either a fine or imprisonment, but not both, and the punishment may be less than the maximum prescribed.

8.2

CRIMINAL LAW: Communications by arrested persons, effect of "uniform chemical test for intoxication"—Ch. 321B, §755.17, 1962 Code. (1) Where demand has been made for chemical test, person arrested has right to invoke §755.17; refusal to allow communications by arrested person would constitute misdemeanor, but would not affect revocation of operating privileges resulting from refusal to submit to blood test. (2) It is mandatory for peace officer to place call desired by intoxicated person.

August 1, 1963

Mr. John L. Duffy
State Representative
Fischer Building
Dubuque, Iowa

Dear Mr. Duffy:

This is in reply to your letter wherein you request an opinion in regard to the following:

1. "Whether Section 755.17 relating to communications by arrested persons is applicable where the 'Uniform chemical test for intoxication' is being invoked.

2. "Whether or not the person arrested, where a demand has been made that he submit to a chemical test, has the right to invoke said Section 755.17, to phone his attorney, and consult with his attorney before he can be bound by refusal to submit to such chemical test.

3. "In view of the fact that said Section 755.17 states if the person arrested or restrained is intoxicated, the call must be made by the person having custody, does it make it incumbent then where the person arrested is intoxicated, for the officer in such a case to make the call under Section 755.17, where the 'uniform chemical test for intoxication' is being invoked under said Senate File 437?"

The pertinent portions of §755.17, Code of Iowa, 1962, provide:

"Any peace officer . . . having custody of any person arrested . . . *shall* . . . permit that person . . . without unnecessary delay after arrival at the place of detention to call, consult, and see a member of his or her family or an attorney of his or her choice. . . . If the person arrested . . . is intoxicated . . . the call *shall* be made by the person having custody . . . . A violation of this section shall constitute a misdemeanor." (Emphasis supplied).

The case of *Finocchairo v. Kelly,* 226 N.Y.S. 2d 403, 11 N.Y. 2d 58, 181 N.E. 2d 427 (1962), cert. den. 82 S. Ct. 1259, involved the New York "Implied Consent" law and the constitutional right to consult with an attorney afforded one arrested by due process. The statutory rights afforded by §755.17 are analogous to the constitutional rights involved in the *Finocchairo* case. The facts are set forth in the opinion as follows:

" . . . this man, after he had been arrested and brought to the substation, asked permission to telephone to his lawyer before deciding whether to submit to the test, but was told that he could not consult with a lawyer before making that decision even by telephone. He therefore declined to submit to the test in consequence whereof his license has been revoked."

The Court stated:

". . . it was in violation of due process of law *as part of a criminal prosecution* to have refused respondent opportunity to telephone his

lawyer. . . the revocation of his license by the commissioner of Motor Vehicles is to be regarded as though it were done in a civil administrative proceeding. The right to counsel mandated by due process of law is confined to the criminal prosecution which terminated in his favor."

It was held that the revocation was proper even though the defendant was not allowed to telephone counsel and even though he had been subsequently found not guilty of the offense of driving upon the highways while intoxicated.

The provisions of the "uniform chemical test for intoxication act" and of §755.17 are not interdependent upon one another. Two statutes may stand together though they cover in some respects the same ground. *School Dist. Tp. of Union v. Independent School Dist. of Stockport,* 149 Iowa 480, 128 N.W. 848 (1910).

Therefore, in answer to your first question, it is our opinion that §755.17 is applicable where the uniform chemical test for intoxication is being invoked, and not allowing one the rights afforded under that section would constitute a misdemeanor.

In answer to your second question, a person arrested has the right to invoke §755.17 where a demand has been made to submit to a chemical test, but a refusal to allow the rights afforded by §755.17 would in no way affect a subsequent revocation of his privileges resulting from his refusal to submit to a blood test.

In answer to you third question, the word "shall" used in §755.17 must be construed to be mandatory. *Hansen v. Hendersen,* 244 Iowa 650, 56 N.W. 2d 59 (1953). Since it is a prerequisite to the invoking of the "Uniform chemical test for intoxication act" that a peace officer have reasonable cause to believe that one has operated a motor vehicle while intoxicated and that such person has been arrested for that crime, it is necessary for the peace officer having custody of the intoxicated person to place the call desired. Failure to do so would constitute a misdemeanor.

8.3

CRIMINAL LAW: **Counsel before grand jury**—§771.23, 1962 Code. Grand jury proceeding is secret and witness before that body cannot insist as matter of constitutional right upon being represented by his counsel.

April 30, 1963

Mr. James Van Ginkel
Cass County Attorney
Atlantic, Iowa

Dear Mr. Van Ginkel:

This will acknowledge receipt of your recent letter, wherein you request an opinion as follows:

"Does a witness, 18 years of age, subpoenaed before the grand jury, have a right to have his attorney present with him in the grand jury room while being questioned by the grand jury?"

A grand jury proceeding is an investigatory proceeding, and §771.23, 1962 Code of Iowa, provides that it shall be secret. There is no provision in the Code of Iowa which extends to a witness testifying before the grand jury the right to have his counsel present, nor is there any such right guaranteed by the Constitution of the United States.

As stated by the Supreme Court of the United States in *in re Groban,* 352 U.S. 330, 333:

"A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. * * * Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination."

We must therefore answer your question in the negative.

8.4

CRIMINAL LAW: Counsel for indigent defendants—14th Amend., U.S. Const. Magistrate must appoint counsel for indigent defendant accused of felony or indictable misdemeanor at preliminary hearing, and such counsel must be paid reasonable compensation by county responsible for maintaining proceeding.

October 5, 1964

Mr. Martin D. Leir
Scott County Attorney
Court House
Davenport, Iowa

Dear Mr. Leir:

This will acknowledge receipt of your recent letter in which you request an opinion as follows:

"In view of some recent United States Supreme Court decisions involving the right of indigent defendants to counsel at all stages of their trial, this question has arisen as to whether or not such right to counsel includes a preliminary hearing and whether or not the laws of the State of Iowa permit a Municipal Court Judge to appoint counsel for such defendants.

"The question also has arisen as to the power of such Court to appoint counsel for indigent defendants charged with simple misdemeanors and indictable misdemeanors, and if so, at what stage of the proceedings.

"Funds for the cost of administration of the Municipal Court come one-half from the City of Davenport and one-half from Scott County and, if counsel is to be appointed by this Court, the further question has arisen as to what provision should be made for their compensation, and from what fund or funds such compensation should be paid, assuming the Court has any power of appointment."

In *Gideon v. Wainwright,* 372 U.S. 335, 82 S.Ct. 792, 9 L.Ed. 2d 799, the Supreme Court of the United States held that the Fourteenth Amendment to the Constitution of the United States requires the states to comply with the Sixth Amendment thereto by assuring one accused of crime of his right to the assistance of counsel for his defense. It is therefore the duty of a trial court to appoint counsel for an indigent person accused of a crime. We shall first consider the question of how serious an offense must be before appointment of counsel is required.

The Sixth Amendment to the Constitution speaks of the right to counsel in "criminal prosecutions" and the court in *Gideon v. Wainwright,* supra, refers to "one charged with crime". It therefore becomes necessary to determine what degree of offense constitutes "crime" within the meaning of these pronouncements. In *District of Columbia v. Clawans,* 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843, the Supreme Court had occasion to pass upon the meaning of the word "crime" as used in Article III with respect to the

necessity of providing a trial "by jury". In that case, the petitioner was convicted of an offense which was punishable by a fine of not more than $300 or imprisonment for not more than 90 days. In finding that such violation was a petty offense which did not constitute a crime and therefore did not necessitate a trial by jury, the Supreme Court stated as follows:

> "We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted. . . . But we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much. . . .
>
> "This record of statute and judicial decision is persuasive that there has been no such change in the generally accepted standards of punishment as would overcome the presumption that a summary punishment of ninety days' imprisonment, permissible when the Constitution was adopted, is permissible now. Respondent points to no contrary evidence. We cannot say that this penalty, when attached to the offense of selling second-hand goods without a license, gives it the character of a common law crime or of a major offense, or that it so offends the public sense of propriety and fairness as to bring it within the sweep of a constitutional protection which it did not previously enjoy." 300 U.S. 627-630.

In Iowa, public offenses are separated into two general categories — felonies and misdemeanors. Section 687.1, 1962 Code of Iowa. A felony is a public offense which may be punished with death or with imprisonment in the penitentiary or men's reformatory and every other public offense is a misdemeanor. Sections 687.2, 687.4, 1962 Code of Iowa. Misdemeanors are further divided into indictable misdemeanors and nonindictable misdemeanors. A non-indictable misdemeanor may be punished by imprisonment for thirty days or by a fine which does not exceed one hundred dollars. Section 762.1, 1962 Code of Iowa. Any misdemeanor which carries a greater penalty is indictable. On the basis of the Clawans case, supra, and the many cases cited therein, it is our opinion that criminal prosecutions which require appointment of counsel within the purview of the Constitution include felonies and indictable misdemeanors, but do not include the offenses referred to as simple misdemeanors.

We now turn to the question of whether or not counsel must be appointed for indigent defendants at preliminary hearing. The definitive case on this point would appear to be *White v. Maryland,* 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed. 2d 191. In that case, the petitioner had been arrested on a charge of murder and was taken before a magistrate for preliminary hearing. He entered a plea of guilty without having the advice or assistance of counsel. An attorney was later appointed for him and he entered a plea of not guilty at his formal arraignment. At his trial the plea of guilty at preliminary hearing was introduced in evidence and the jury found him guilty. The Supreme Court of the United States held that whatever may be the normal function of the preliminary hearing under Maryland law, it was, in this case, a critical stage of the criminal proceeding and the absence of counsel when he entered the plea of guilty violated his rights under the Due Process Clause of the Fourteenth Amendment.

In Iowa, while it is not the normal function of a magistrate at preliminary hearing to receive pleas of guilty, such a plea, if made at preliminary hearing may be introduced at trial as an admission of guilt. *State v. Briggs,* 68 Iowa

416, 27 N.W. 358. An Iowa preliminary hearing, then, may be just as critical a stage as the Maryland preliminary hearing in *White v. Maryland*, supra. It is therefore our opinion that a magistrate in Iowa has a constitutional duty to appoint counsel for an indigent defendant at preliminary hearing.

The final question to be considered deals with the compensation of counsel appointed at preliminary hearing. There is no Iowa statute providing for payment of such counsel and it is therefore necessary to determine whether such compensation must be paid in the absence of statutory authority. *Ferguson v. Pottawattamie County*, 224 Iowa 516, 278 N.W. 223, is the most recent case dealing with this subject. It was an action brought by certain attorneys who had been appointed to represent juvenile delinquents in the Municipal Court of Council Bluffs, Iowa. Statutory authority existed for the appointment of such counsel but there was no provision for payment of attorneys' fees. The Supreme Court of Iowa pointed out that the services were not rendered voluntarily but in obedience to statute and under such circumstances an obligation arose on the part of the county to pay a reasonable compensation therefor. It cited the leading Iowa case of Hall v. Washington County, 2 G. Greene 473, in which an attorney had been appointed to defend a pauper prisoner without any statutory authority for his compensation. In that case, the court said:

> "Where an act of service is performed in obedience to direct mandate of statutory law, under the direction of a tribunal, to which enforcement of that law is committed, reasonable compensation to the person who performs that service is a necessary incident; otherwise the arm of the law will be too short to accomplish its designs. If attorneys, as officers of the court, have obligations under which they must act professionally, they also have rights to which they are entitled, and which they may justly claim in common with other men in the business of life. . . . In this case, the right of an action in the plaintiff does not arise from an express contract; but it is necessarily given by the statute. The statute authorizes the appointment of counsel, in defense of a pauper when accused of crime, in view of the right of that counsel to compensation for the service rendered, in obedience to that law, as an incident necessarily attaches a liability for the services to the county which is properly chargeable with the maintenance of the proceeding." 2 G. Greene 476.

We believe that this principle is just as applicable when the appointment of counsel is required by the Constitution and a liability for the services of such counsel falls upon the county which is responsible for maintaining the proceeding.

It is therefore our opinion that counsel must be appointed for indigent defendants accused of felonies and indictable misdemeanors at the preliminary hearing and that the attorneys who are so appointed are entitled to compensation from the county which maintains the proceeding.

8.5

CRIMINAL LAW: Destruction of condemned gambling devices—§§751.25, 726.5, 1962 Code. Where seized pinball machine is gambling device with free game feature, the magistrate must order destruction of the entire machine.

October 28, 1963

Mr. Mervin J. Flander
Bremer County Attorney
123½ East Bremer Avenue
Waverly, Iowa

Dear Mr. Flander:

This will acknowledge receipt of your letter in which you request an opinion as follows:

"In recent hearings upon the seizure of alleged gambling devices under search warrants, a magistrate, pursuant to the provisions of Section 751.25 of the 1962 Code of Iowa, found that the property seized under the search warrant was of an illegal nature or character as alleged in the informations and entered judgment of forfeiture together with an order directing the destruction of all such property which does not have a legitimate use.

"The section referred to provides further that the property, other than money, with a legitimate use should be ordered sold.

"The Bremer County Historical Society has expressed an interest in the outer cases of the devices seized after the removal of the electronic and other interior parts and would like to acquire these outer cases for use as display cases to display items of historical interest such as arrowheads and the like.

"The statute referred to uses the words 'property or any part thereof seized' and the question arises as to whether or not a part of a single machine may be destroyed and the remainder sold or whether those words have the obvious meaning that part of the property seized, as in the case where more than one machine is seized, may be destroyed and the remainder sold.

"Your further opinion is requested as to whether or not a machine which registers a score, only without the elements of free games involved, has a legitimate use which would permit the sale of the machine after the destruction of the free game device."

In answer to your request, it should first be noted that at the time these machines were seized they were gambling devices. *State v. Wiley,* 232 Iowa 443, 3 N W. 2d 620. As such, the possession thereof is prohibited by §726.5, 1962 Code of Iowa, which provides:

"Possession of gambling devices prohibited. No one shall, in any manner, or for any purpose whatever, except under proceeding to destroy the same, have, keep, or hold in possession or control, any roulette wheel, klondyke table, poker table, punchboard, faro, or keno layouts or any other machines used for gambling, or any slot machine or device with an element of chance attending such operation."

It is therefore clear that in this state there is no property right in the gambling devices you have described and that there can be no legitimate use thereof. *State v. Cowen,* 231 Iowa 1117, 3 N.W. 2d 176; 1948 *O.A.G.* 106.

Here, each part of the machine in question was part of a gambling device at the time it was seized and condemned, and the fact that any such part could subsequently be separated from the remainder of the machine does not offset its illegal nature at the time of condemnation. Since it could not have a legitimate use at such time, the magistrate has no alternative but to order destruction of the entire machine. §751.25, 1962 Code of Iowa.

We must therefore answer your questions in the negative.

8.6

CRIMINAL LAW: False drawing and uttering of checks—§713.3, 1962 Code. This section not violated by making, uttering, drawing, delivering or giving of false check in payment of past indebtedness.

April 6, 1964

Mr. James Van Ginkel
Cass County Attorney
Home Federal Savings & Loan Building
Atlantic, Iowa

Dear Mr. Van Ginkel:

This will acknowledge receipt of your letter wherein you request an opinion as follows:

"On August 3, 1963, a bank check was given to a workman as payment for wages for the work done during the week ending on July 27, 1963. This check went through the usual channels and was returned by the bank upon which it was drawn marked 'insufficient funds'. My question is whether or not this check is a violation of Section 713.3, the false drawing and uttering of a check statute?"

Section 713.3, 1962 Code of Iowa, in pertinent part provides:

"Any person who with fraudulent intent shall make, utter, draw, deliver, or give any check, draft, or written order upon any bank, person, or corporation and who secures money, credit, or thing of value therefor, and who knowingly shall not have an arrangement, understanding, or funds with such bank, person, or corporation sufficient to meet or pay the same, shall be guilty of a felony, . . ."

It is clear that in Iowa, payment on an account or for a past indebtedness does not constitute payment for money, credit, or a thing of value within the terms of Section 713.3. *State v. Dillard*, 225 Iowa 915, 281 N.W. 842. See 1934 *O.A.G.*, p. 139; 35 *C.J.S.*, False Pretenses, §21C, p. 837.

Under the facts which you have presented, it would appear that the check was given to pay a past indebtedness. It is therefore our opinion that it did not result in a violation of Section 713.3, 1962 Code of Iowa.

8.7

CRIMINAL LAW: Fingerprints—§749.2, 1962 Code. It is duty of local sheriff or chief of police to take fingerprints of juveniles held for investigation and forward them to Bureau of Criminal Investigation within 48 hours. Fingerprints will then be destroyed unless juvenile is convicted of an offense.

October 29, 1963

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Mr. Hoover:

This will acknowledge receipt of your letter in which you request an opinion as follows:

"Several juveniles recently were arrested because of breaking and entering and stealing several items. The boys subsequently were questioned by the authorities and their fingerprints and photographs were taken. Hearing was held in Juvenile Court, the boys were found to be dependent and neglected and were placed on probation for an indefinite period. In connection with this proceedings and future cases, I would like to know the following:

"1. Is the local Sheriff or Chief of Police authorized under Section 749.2 of the 1962 Code of Iowa to photograph and fingerprint juveniles

who are brought in and questioned regarding crimes as listed above and under these circumstances?

"2. If Section 749.2 is not applicable, is there any other section which is applicable?

"3. If Section 749.2 is applicable and if it requires the Sheriff or Chief of Police to fingerprint and photograph juveniles, what is the disposition of these fingerprints and photographs following the conclusion of the juvenile proceedings in which the juveniles have been found to be dependent and neglected children and placed on probation? Are these records to be forwarded to the Bureau of Criminal Investigation?"

Section 749.2, 1962 Code of Iowa, provides in pertinent part:

"It shall be the duty of the sheriff of every county, and the chief of police of each city regardless of the form of government thereof and having a population of ten thousand or over, to take the fingerprints of all persons held either for investigation, for the commission of a felony, as a fugitive from justice, or for bootlegging, the maintenance of an intoxicating liquor nuisance, manufacturing intoxicating liquor, operating a motor vehicle while intoxicated or for illegal transportation of intoxicating liquor, . . . if the fingerprints of any person are taken under the provisions hereof whose fingerprints are not already on file, and said person is not convicted of any offense, then said fingerprint records shall be destroyed by any officer having them. In addition to the fingerprints as herein provided any such officer may also take the palm prints of any such person."

In answer to your first question, it is the duty of the officer named in §749.2 to take the fingerprints of all persons held for investigation. This would certainly include juveniles held under the circumstances you have set forth. There is, however, no authority in this section for the taking of photographs, and in this regard you are referred to §782.8, 1962 Code of Iowa.

In answer to your second question, §749.2 refers to "all persons" and would therefore be applicable to juveniles.

In answer to your third question, §749.2 requires that the fingerprints taken by the local authorities be forwarded to the Bureau of Criminal Investigation within forty-eight hours after they are taken. If the person whose fingerprints are taken is not convicted of any offense and his fingerprints are not already on file, his fingerprint records must be destroyed by any officer having possession of them. Under the circumstances you have described, the fingerprints would be destroyed by the Bureau of Criminal Investigation, since a finding that the juveniles were dependent and neglected children would not be a conviction of any offense.

8.8

CRIMINAL LAW: Imprisonment for nonpayment of fine – §789.17, 1962 Code. When defendant is sentenced to term of imprisonment to enforce payment of fine, court is not obligated to give defendant credit on his jail time for that portion of fine which may have been paid prior to issuance of mittimus.

May 26, 1964

Mr. Jack M. Fulton
Linn County Attorney
Linn County Courthouse
Cedar Rapids, Iowa

Dear Mr. Fulton:

This will acknowledge receipt of your letter wherein you request an opinion as follows:

"The Linn County, Iowa District Court, in the cases of OMVI fines, has for some time had the practice of permitting a man to pay the $300 or $500 fine on the basis of $50 down at the time of conviction and the balance of such fine payable at the rate of $50 per month until such fine and court costs have been fully paid.

"The order of sentence also generally provides that upon default of the payments on the fine as the same become due that a mittimus may issue and the defendant stand committed in the Linn County jail for the statutory period.

"There are occasions wherein the defendant in such situations will have paid a portion of the fine, but then fails, neglects or refuses to pay the balance thereof, at which time we generally approach the Court and have the mittimus issued.

"Our specific question at this time, for which we would appreciate your opinion, is this:

"At the time of issuing a mittimus in such situations for the non-payment of part of the fine, is the Court obligated to give the defendant credit on his jail time for that portion of the fine which he may have paid prior to the issuing of the mittimus?

"To phrase the question another way in order to avoid any misunderstanding:

"May the Court, at the time of issuing a mittimus in a case where a portion of the fine has been paid, compel the defendant to serve the amount of time in the county jail that he would be required had no payments been made on the fine?"

Section 789.17, 1962 Code of Iowa, provides:

"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine."

When a judgment provides for imprisonment until the fine is satisfied, it must specify the extent of imprisonment. *State v. Ludden,* 196 Iowa 275, 194 N.W. 49. One committed for nonpayment of a fine must remain in custody for the whole of the term fixed in the sentence unless the *whole* fine is sooner paid. In *Galles v. Wilcox,* 68 Iowa 664, 27 N.W. 816, after quoting what is now Section 789.17, the Supreme Court of Iowa stated:

"The duration of the imprisonment was determined, under this section, by the amount of the fine. That duration was 30 days. It was fixed and certain, and did not depend upon future partial payments of the fine. The judgment was that he should be imprisoned for 30 days, unless the fine should be sooner paid. The term of imprisonment was for the whole fine. The statute does not contemplate that the convict shall himself control and direct the manner of enforcement of the judgment against him by choosing to serve in jail for a part of his fine, and to pay the balance of it in money."

In other words, the imposition of imprisonment under this section is for the purpose of enforcing payment of the entire fine and is not a method by which the prisoner can transform his pecuniary obligation into prison time. The term

of imprisonment for enforcing payment is based upon the full amount of the fine and it remains fixed and unaltered until the entire fine is satisfied.

It is therefore our opinion that when a defendant is sentenced to a term of imprisonment to enforce payment of a fine under Section 789.17, the Court is not obligated to give the defendant credit on his jail time for that portion of the fine which may have been paid prior to the issuing of the mittimus.

8.9

CRIMINAL LAW: Incarceration to serve out fine, place—§789.17, 1962 Code. Convict sentenced to term of imprisonment and fine may be required to serve out fine in same institution to which sentenced to serve primary punishment whether or not execution of primary punishment is suspended.

April 6, 1964

Mr. Robert B. Dickey
Lee County Attorney
Keokuk, Iowa

Attention: Thomas E. Tucker, Deputy County Attorney
Fort Madison, Iowa

Dear Sir:

This will acknowledge receipt of your letter in which you request an opinion as follows:

> "Recently the penitentiary received a man who had been sentenced for a term not to exceed 8 years and fined $1000.00 under Chapter 690.10 of the 1962 Code of Iowa. The 8 year penitentiary sentence was suspended, however, the fine was not. . . . The prison officials have questioned whether or not they have authority to hold this man to serve out the fine when in fact he will not be serving time in the penitentiary for the primary offense."

As you noted in your letter, we have previously issued a letter opinion stating that in circumstances similar to those outlined by you, a prisoner "may be required to serve time for nonpayment of the fine, as provided under Section 789.17, in the same place as the incarceration for the primary offense." (Neely to Bennett, Board of Control, 3/30/60 #60-3-28). See Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175; 36A C.J.S., Fines, §11, p. 446. The state penitentiary remains as the place of commitment for the primary offense in the case you present even though execution of the sentence has been suspended during good behavior.

It is therefore our opinion that a convict may be required to serve out his fine in the same institution to which he was sentenced to serve his primary punishment whether or not execution of such primary punishment was suspended.

8.10

CRIMINAL LAW: Lotteries—§726.8, 1962 Code. Suit club wherein members pay $2.00 per week for 30 weeks for $60.00 suit and drawing is held each week whereby winner obtains his suit without paying remainder of $60.00 is lottery in violation of §726.8.

March 14, 1963

Mr. Robert A. Maddocks
Wright County Attorney
Clarion, Iowa

Dear Mr. Maddocks:

This will acknowledge receipt of your letter where in request an opinion as follows:

> "A clothing merchant in Wright County has a scheme whereby he organized 100 members to pay $2.00 per week for 30 weeks. Once each week a man's name was drawn from a hat and that person would receive a $60.00 suit without having to continue to pay $2.00 per week. Any persons left at the end of a 30 week period would automatically receive their $60.00 suit.
>
> "Is this suit club, operating such as this, illegal as a lottery and gambling?"

Article 111, §28 of the Iowa Constitution, prohibits lotteries within the State of Iowa, and §726.8, 1962 Code of Iowa, provides:

> "Lotteries and lottery tickets. If any person make or aid in making or establishing, or advertise or make public any scheme for any lottery; or advertise, offer for sale, sell, negotiate, dispose of, purchase, or receive any ticket or part of a ticket in any lottery or number thereof; or have in his possession any ticket, part of a ticket, or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars, or both."

The Supreme Court of Iowa has held that the three elements necessary to constitute a lottery are consideration, prize and chance. *State v. Hundling*, 220 Iowa 1369, 264 N.W. 608, 103 A.L.R. 861. In the situation you have presented, the consideration is the weekly payment of two dollars, the prize is the possible discount on a sixty-dollar suit, and the chance is obviously inherent in the drawing. Similar clubs were found to be illegal in the following opinions of the Attorney General: 1940 *O.A.G.* 7, 1936 *O.A.G.* 468, 1898 *O.A.G.* 189.

It is therefore our opinion that the suit club you have described is a lottery and violates §726.8, 1962 Code of Iowa.

8.11

CRIMINAL LAW: Parolees, supervision—Art. 1, §8, Iowa Const., 4th Amend., U.S. Const., §247.9, 1962 Code. For purpose of supervision and determining parolee's rehabilitative progress parole agent has legal right without search warrant to demand that parolee open his room for search by parole agent. Search of parolee's room during his absence, however, may only be commenced when parole agent has reasonable cause to believe that parolee has breached his parole. Any parolee held under order of recommitment issued by Board of Parole and charged with a bailable offense may be admitted to bail without consent of Board of Parole even if as a practical matter he cannot be released since he is subject to provisions of §247.9. If such recommitment order has not been issued parolee can then be admitted to bail and released.

February 19, 1964

Mr. R. W. Bobzin
Secretary & Director of Parole
The Board of Parole
L O C A L

Dear Mr. Bobzin:

This is to acknowledge receipt of your letter of October 21, 1963, wherein you state:

"1. Does a parole agent have a legal right to search the room of a parolee or probationer under jurisdiction of the Board of Parole and the Parole Agent without first procuring a search warrant?

"2. When any parolee or probationer under the jurisdiction and supervision of the Board of Parole is held on a warrant issued by the Board of Parole, can the parolee or probationer by admitted to bail without the consent of the Board of Parole or its authorized agent?" Your questions will be considered in their respective order.

The Iowa Constitution provides in its Bill of Rights at Article 1, Section 8:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized."

Article 1, Section 8, is substantially the same wording that is found in the Fourth Amendment to the Constitution of the United States.

Section 247.9, Code of Iowa, 1962, provides in part:

"All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of said board, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled."

Does then Article 1, Section 8, of the Iowa Constitution apply in any respect to a parolee who by the provisions of Section 247.9 remains in the legal custody of the warden and under the control of the Board of Parole subject at any time to recommitment?

It is our opinion that the constitutional guarantee of Article 1, Section 8, does apply in some respects to a parolee. 38 N.Y.U.L. Rev. 702, 710, 730.

For the purpose, however, of determining a parolee's rehabilitative progress, a condition requiring the parolee to open his home would not violate the right of privacy protected by Article 1, Section 8, Constitution of Iowa. Some unexpected visitation is necessary for effective supervision. *Frank v. Maryland,* 359 U.S. 360, 79 S.C. 804 (1959); *People v. Tricke,* 148 Cal. App. 2d 198, 306 P. 2d 616 (1st Dist. 1957); 38 N.Y.U.L. Rev. 702, 730.

In the *Tricke* case a parole officer suspecting a parolee of associating with an undesirable woman and of using narcotics entered the apartment where the parolee and woman were staying. He entered during their absence. The parole officer identified himself to the landlady and asked her if she would open the door of the apartment which she did using a key. The officer then entered the apartment where during a search he found four bundles of heroin. Instead of seizing the evidence for use in effecting a revocation of parole he called the police who without a warrant entered and seized the evidence. It was later employed to convict the parolee of a narcotics offense.

In discussing the search by the parole officer the court said at p. 618 of the P. 2d Reports:

"The question whether the search by the parole officer was illegal is largely governed by the special character of the relationship between such officer and his parolee, ably analyzed in the recent case of People v. Denne, 141 Cal. App. 2d 499, 507-510, 297 P.2d 451. It was there held that the granting of parole does not change the status of a parolee as a prisoner. He is in penal custody in a prison without bars, subject to the rules and regulations for the conduct of paroled convicts to be enforced by the parole officer. For the protection of the community as to whose security the parolee constitutes a calculated risk, the parole officer exercises an ubiquitous supervision over him, including broad

visitational powers. Having constructive custody of his prisoner at all times, there is noting unreasonable in a parole officer's search of the prisoner's premises *where he has reasonable cause to believe* that the parole has been breached. It is unnecessary for a parole officer to apply for a warrant to arrest a parolee, who is already his prisoner and who is at all times in custodia legis. In the case before us *there was reasonable cause to believe* that Tricke, defendant, had breached his parole and the search of the premises where he admittedly lived and acted in violation of his parole was under the above rule no invasion of his constitutional right to be free from unreasonable searches or seizures." (Emphasis added).

Thus for the purpose of supervision and determining a parolee's rehabilitative progress the parole agent has a legal right, without a search warrant, to demand that the parolee, under the jurisdiction of the Board of Parole and the parole agent, open his room for a search by the parole agent. Where the parolee is absent from his room and the parole agent has reasonable cause to believe that the parole has been breached he may make a search of the parolee's room. However, a search of the parolee's room during his absence should *only* be commenced when the parole agent has reasonable cause to believe that the parolee has breached his parole.

In regard to your second question, any parolee held under an order of recommitment issued by the Board of Parole and charged with a bailable offense may be admitted to bail without the consent of the Board of Parole. There is no statutory authority requiring that such consent be given by the board. As a practical matter, however, such parolee cannot be released from custody for he is subject to the provisions of Section 247.9, Code of Iowa, 1962 (cited in part earlier in this opinion). However, if such recommitment order has not been issued and the parolee is charged with a bailable offense, he can then be admitted to bail and thus released.

8.12

CRIMINAL LAW: Preliminary hearing—§§761.13, 761.15, 1962 Code. Under §761.15, court reporter could not officially record testimony at preliminary hearing without agreement of parties or their attorneys, but if hearing is public, rather than private, under §761.13, stenographer could unofficially record the testimony without such agreement.

May 17, 1963

Mr. Samuel O. Erhardt
Wapello County Attorney
Ottumwa, Iowa

Dear Mr. Erhardt:

This will acknowledge receipt of your letter, in which you request an opinion as follows:

"Does counsel for a defendant, at preliminary hearing, have a right, over the objection of counsel for the state, to have a court reporter take down the testimony of the state's witnesses?"

Section 761.15, 1962 Code of Iowa, provides for the taking of testimony at a preliminary hearing as follows:

"By agreement of the parties or their attorneys, the magistrate may order the examination taken down in shorthand and certified substantially in the manner provided for taking depositions by a stenographer, but the costs therof shall not be taxed against the county."

This section is the only provision for taking shorthand notes of testimony

at preliminary hearing. It therefore seems clear that in order for an *official* transcript of the preliminary hearing to be prepared, it must be done upon agreement of the parties or their attorneys and by order of the magistrate.

Another section of the Code, however, is applicable in answer to your question. That section is 761.13, which provides for a private preliminary hearing as follows:

> "The magistrate must also, upon request of the defendant, exclude from hearing the examination all persons except the magistrate, his clerk, the peace officer who has custody of the defendant, the attorney or attorneys representing the state, the defendant and his counsel."

Unless a private hearing is requested by the defendant, the preliminary hearing would, therefore, be public. As long as the hearing is public, there would be nothing to prevent a stenographer from unofficially recording the testimony given by the witnesses therein.

In answer to your question, then, counsel for a defendant at preliminary hearing would not have a right, over objection of counsel for the State, to have a court reporter officially record the testimony of State's witnesses. If the hearing is public, however, a stenographer could unofficially record the testimony without agreement of the parties or their counsel.

8.13

CRIMINAL LAW: Right to speedy trial—§795.2, 1962 Code. Accused who is admitted to bail or represented by counsel, or both, must make a demand for early trial before time limitations set forth in §795.2 become effective.

October 28, 1963

Mr. Edward F. Samore
Woodbury County Attorney
204 Courthouse
Sioux City, Iowa

Dear Mr. Samore:

This will acknowledge receipt of your recent letter in which you request an opinion as to whether §795.2, 1962 Code of Iowa, as amended by House File 52 (now Chapter 332, Acts of the 60th General Assembly), requires that a defendant be brought to trial within sixty days from the time that an indictment or county attorney's information is filed against him, regardless of the fact that he is represented by an attorney and that he has been admitted to bail.

Section 795.2, 1962 Code of Iowa, as amended by House File 52, Acts of the 60th General Assembly, provides as follows:

> "If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next regular term of the court in which the indictment is triable *or within* 60 *days whichever first occurs,* after the same is found, the court must order it to be dismissed, unless good cause to the contrary be shown. *An accused not admitted to bail and unrepresented by legal counsel shall not be deemed to have waived his privilege of dismissal or be held to make demand or request to enforce a guarantee of speedy trial, and the court on its own motion shall carry out the provisions of this act as to dismissal.*"

The underlined portion of the above section represents the amendment made by the 60th General Assembly.

Before §795.2 was amended, it had been construed by the Supreme Court

of Iowa in the case of *McCandless v. District Court of Polk County*, 245 Iowa 599, 61 N.W. 2d 674, as follows:

> "The rule in most jurisdictions now is clear. In order for an accused to enjoy the privilege of a 'speedy trial', he must make a demand to the court for an early trial. If he fails to do so he waives not only the privilege provided by the constitution but the requirement of the statutes as well, and it is therefore unnecessary for the state to show 'good cause' for the delay. Thus we conclude the privilege afforded the accused for an early trial is considered waived when no demand is made to the court, and there can be no dismissal of the charge solely on the ground that 'good cause' for the continuance was not shown by the state. It is only after the demand has been made to the court that the statutory provisions become effective and place the burden on the state to show 'good cause' for continuance."

Under the statute as it existed prior to the amendment, it was necessary, therefore, to demand an early trial in order to invoke the provisions of §795.2. Otherwise, the defendant was deemed to have waived his privilege with respect thereto. The amendment, however, does provide an exception to that rule. It does not purport to abrogate the old rule entirely, but only to make a specific exception for those persons who are not admitted to bail *and* are not represented by legal counsel. If an accused is either represented by counsel or admitted to bail, or both, he must make a demand for early trial pursuant to the rule set forth in the *McCandless* case.

It is therefore our opinion that an accused who is admitted to bail or represented by legal counsel, or both, need not be brought to trial within the time specified by §795.2, 1962 Code of Iowa, unless he makes proper demand therefor.

8.14

CRIMINAL LAW: Sentence of female—§245.4, 1962 Code. When any female over 18 or any married female under 18 is convicted in district court of an offense punishable by imprisonment in excess of 30 days and sentence of imprisonment is imposed, place of imprisonment must be the women's reformatory whether or not sentence is suspended.

January 27, 1964

Mr. Jack M. Fulton
Linn County Attorney
Courthouse
Cedar Rapids, Iowa

Dear Mr. Fulton:

This will acknowledge receipt of your recent letter in which you request an opinion as follows:

> "May a female over the age of eighteen years be given a jail sentence in excess of 30 days, with said sentence being suspended, or must all the sentences of females over eighteen in excess of 30 days be to the Women's Reformatory under Section 245.4 of the 1962 Code of Iowa. Specifically, we would like to be able to advise the Court that if the female is not to be imprisoned, that she may be given a suspended sentence in the county jail for a time up to one year or whatever the criminal statute calls for instead of being sentenced to the Women's Reformatory and placed on probation."

Section 245.4, 1962 Code of Iowa, provides:

> "All females over eighteen years of age, and married females under

eighteen years of age, who are convicted in the district court of offenses punishable by imprisonment in excess of thirty days, shall, if imprisonment be imposed, be committed to the women's reformatory."

In the situation which you present, it is clear that a sentence of imprisonment would be imposed before it is suspended. The mere fact that execution of the sentence is suspended during the good behavior of the defendant would not exempt her from the provisions of §245.4. This, we believe, is the plain and ordinary meaning of the statute. See *Dingman v. City of Council Bluffs,* 249 Iowa 1121, 1126, 90 N.W. 2d 742.

It is therefore our opinion that when any female over eighteen years of age, or any married female under eighteen years of age, is convicted in district court of an offense punishable by imprisonment in excess of thirty days, and a sentence of imprisonment is imposed, the place of imprisonment must be the women's reformatory whether or not execution of the sentence is suspended.

8.15

CRIMINAL LAW: Summons, traffic offenses—§§321.485, 321.486, 321.487, 762.1, 762.2, 762.5, 1962 Code. (1) Justice of the Peace where information first filed has jurisdiction over offense to exclusion of other J.P.'s in county; (2) Offender must appear before J.P. directed in summons, regardless of disposition of offense charged.

March 3, 1964

Mr. Richard R. Jones
Taylor County Attorney
518 Court Street
Bedford, Iowa

Dear Mr. Jones:

Your letter of recent date, requesting opinion of this Department with regard to appearance before a Justice of the Peace, states as follows:

"Members of the Iowa Highway Patrol, and in some cases our city police, issue a summons for a motor vehicle violation, notifying the violator to appear in the court of Justice A. Instead of appearing before Justice A at the time and place specified in the summons, the violator then goes to the court of Justice B. The information is in the hands of Justice A. Justice B, without conferring with Justice A, levies the fine and considers the matter closed. Justice A, however, has waited for the violator to appear, and when the violator does not do so he issues a warrant for the violator's arrest. At all times Justice A is present in his court and ready to dispose of the matter placed in his hands by way of the information.

"Please furnish me with your opinion as to whether or not Justice B can legally dispose of a matter when the summons has been issued notifying the violator to appear in the court of Justice A, and Justice A is willing and able to dispose of this matter."

Justices of the Peace have jurisdiction of nonindictable offenses committed within their counties. (§762.1, 1962 Code). All the justices of the county have concurrent jurisdiction over offenses committed within their county.

Criminal actions for nonindictable misdemeanors are commenced by the filing of an *information* with a court of competent jurisdiction. (§762.2) A justice must file the information when received, and mark thereon the time of filing. (§762.5)

A summons is not an information, as contemplated by §762.2. A summons does not initiate a criminal proceedings, but serves only as a procedure in lieu of arrest. (§321.485)

"It is in accord with the familiar rule prevailing everywhere, that where courts have concurrent jurisdiction the court whose jurisdiction first attaches must retain the case for final disposition. "(Ex parte *Baldwin*, 39 Iowa 502, (1886)).

". . . It is universally held in such cases (concurrent jurisdiction) that the court first taking jurisdiction holds it to the end." (*State vs. Spayle*, 110 Iowa 726, 80 N.W. 1058 (1899)).

It is the time of filing of the information which determines which justice has jurisdiction. The summons has no bearing upon this determination. One must look to the time marked on the information to ascertain with which court it was first filed.

It is our opinion that the justice within the county where a nonindictable offense is committed, with whom an information is filed first, has the jurisdiction to the exclusion of any other justice, unless a transfer is accomplished as provided by §§601.34, 601.116 or 601.118, irrespective of any designation contained in a summons.

Section 321. 485 authorizes a peace officer to issue a summons in lieu of immediate arrest of one believed to have committed a misdemeanor. That section further provides that the summons enumerate "the time when and place where such person *shall* appear in court."

Section 321.486 provides that the offender sign the summons, and provides that "the signing shall constitute a written promise to appear as stated in said summons."

Section 321.487 provides that one willfully violating a summons to appear is guilty of a misdemeanor. A violation of this provision is a separate and distinct offense, unrelated to the offense charged in the summons.

Your attention also is directed to 1938 *O.A.G.*, 47, and to Section 758.1, 1962 Code, which provides as follows:

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

It is our opinion that one issued a summons must appear at the court of the justice indicated in the summons, and failure to appear is punishable by Section 321.487, regardless of the outcome of the charge for which summoned.

8.16

Civil Rights Act, beauty shops—§735.1, 1962 Code. Beauty shops are not included within the terms of the Iowa Civil Rights Act, Ch. 735 of the Code. (Bianco to Ely, St. Rep. 1/31/63) #63-2-1

CHAPTER 9

ELECTIONS

STAFF OPINIONS

LETTER OPINIONS

9.1

ELECTIONS: Candidates on ballot by petition—§§45.1, 49.32, 1962 Code. Names of candidates for president and vice-president of group of petitioners may be placed upon the ballot upon the filing of nomination papers for presidential electors signed by not less than 1,000 qualified voters of state.

July 22, 1964

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Reference is herein made to your letter in which you submitted the following:

"Your opinion is respectfully requested on the question raised in the last paragraph of the attached letter which I received from Tom Leonard, Ballot Coordinator for the Socialist Workers Party.

"This organization appears interested in having the names of its candidates for President and Vice-President placed on the General election ballot through the petition system set forth in Chapter 45, Code of Iowa, 1962.

"Is this permissible and does the petition from which this organization submitted (attached hereto) meet the necessary requirements of the statute providing that the petition may be used?"

In reply thereto, I would advise you that on the authority of the following statutes to-wit: Section 49.32 which reads as follows:

"The candidates for electors of president and vice-president of any political party or group of petitioners shall not be placed on the ballot, but in the years in which they are to be elected the names of candidates for president and vice-president, respectively, of such parties or group of petitioners shall be placed on the ballot, as the names of candidates for United States senators are placed thereon, under their respective party, petition, or adopted titles for each political party, or group of petitioners, nominating a set of candidates for electors."

and Section 45.1,

"Nominations for candidates for state offices may be made by nomination paper or papers signed by not less than one thousand qualified voters of the state; for county, district or other division, not less than a county, by such paper or papers signed by at least two percent of the qualified voters residing in the county, district or division; as shown by the total vote of all candidates for governor at the last preceding general election in such county, district or division; and for township, city, town or ward, by such paper or papers signed by not less than twenty-five qualified voters, residents of such township, city or ward."

both Code of 1962,

I am of the opinion that the answer to the question posed in the letter of Tom Leonard, Ballot Coordinator for the Socialist Workers Party, reading as follows:

"We would like to utilize the democratic process stated in Chapter 45 corresponding with the U.S. Constitution in order to conduct a public campaign to earn the right to get on the ballot by direct petition to the voters of Iowa."

is in the affirmative. Support for this is found in the opinion of this department appearing in 1911-12 *O.A.G.* at page 775, where in interpreting §1173, Code of 1897 (now Section 54.1, Code of 1962) appearing in substantially the same form it was said:

"Hence in my judgment the two electors for the state at large are in effect state officers, and nomination papers nominating electors at large should have the same number of names as state officers, to wit, five hundred. (Now 1000)"

In view of the foregoing, I am of the opinion that Chapter 45, Code of Iowa, 1962, is applicable and that first, the names of the candidates for President and Vice-President of this party may be shown on the ballot for the 1964 election; and second, the form of the petition of the Affidavit of Signers and the nominating petition are in statutory form.

9.2

ELECTIONS: Canvassers, State Board's Duty – Art. I, §4, U.S. Const., §§50.39, 50.41, 50.43, 1962 Code. State Board of Canvassers has duty to certify election of candidates voted for office at 1964 general election, and specifically of election of senator or representative in Congress.

December 10, 1964

W. C. Wellman, Secretary
Executive Council of Iowa
L O C A L

Dear Mr. Wellman:

Reference is herein made to yours of the 7th in which you submitted the following:

"At the Executive Council meeting held this date, the question arose as to the Board of State Canvassers' responsibility to certify as to the election of the Hon. H. R. Gross, as being duly elected to the office of Representative in Congress from the Third District, for the term of two years beginning at noon on January 3, 1965.

"Specifically, the question concerns their obligation to sign the certification of Mr. Gross's election in view of the announced plans to contest the ballots cast.

"An immediate opinion is requested to expedite the Canvass Board's obligations."

In reply thereto, Section 4, Article 1 of the Federal Constitution provides:

"The time, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing senators."

In implementation of such authority, the State of Iowa has enacted statutes devoted to the procedures for the nomination and election of candidates for public office, including that of the nomination and election of the members of Congress. Among other statutes pertinent to the problem submitted relating to the canvass of votes so cast for the candidates for the several offices, state and national, are Sections 50.39, 50.41 and 50.43, Code of 1962.

Section 50.39 provides for the making of an abstract of the ballots cast for each office, the names of the persons voted for, for what offices, the number of votes each received, and for whom the Canvassing Board declares to be elected; which abstract shall be signed by the state canvassers in their official capacity, and shall bear the seal of the state.

Section 50.41 provides that each person declared elected by the State Board of Canvassers shall receive a certificate of election signed by the Governor and attested by the other canvassers. The form of this certificate is therein exhibited.

Section 50.43 provides for the certificate of the election of a senator or representative in Congress to be signed by the Governor with the seal of the state affixed and countersigned by the Secretary of State.

Thus under these three statutes there are certifications of the result of the canvass, two of which shall be signed by the state canvasser, and the third by the Governor and the Secretary of State. The State Canvassing Board consists of the Governor and Secretary, the Auditor of State, the Treasurer of State, and the Secretary of Agriculture. Their duty as canvassers is ministerial, and such duty includes the duty of complying with the state law as set forth in the foregoing designated statute. This view of the federal constitutional provision first quoted has the support of authority:

"The exclusiveness of the power of Congress with respect to the elections, returns, and qualifications of its own members does not deprive the courts of jurisdiction to compel state election officials to comply with the state laws and to perform their ministerial duties in connection with elections of members of Congress." 107 A.L.R., page 208.

In *Keogh v. Horner*, 8 F. Supp. 933, holding that a Federal district court had no jurisdiction to issue a writ of prohibition restraining the governor of a state for issuing a certificate of election as provided by state law, the issuance of such certificate being a ministerial duty, the court said:

"In other words, the power of the respective Houses of Congress with reference to the qualifications and legality of the election of its members is supreme. The many volumes of election contest cases in which every conceivable question has been raised with reference to the right of persons to sit as members of Congress, together with the fact that there are no court decisions to be found controlling such matters, bear mute but forcible evidence that this court has no authority to be the judge of the manner in which such members were elected, or to interfere with the governor in furnishing them a certificate or commission as to what the convass shows with reference to their election."

In *People ex rel. Brown v. Suffolk County,* 216 N.Y. 732, 110 N.E. 776, the court said:

"It is true that Congress is the final judge of the qualifications of its own members, and that Congress has now convened. But it remains our duty to require the public officers of the state to comply with the state's law. . . The certificate of election will establish a prima facie right, and should register the true result . . ."

In the case of *Territory ex rel. Sulzer v. Canvassing Bd.* 5 Alaska, 602, it was held that while mandamus would not lie to decide an actual election contest between two candidates for the office of delegates to Congress, such remedy was proper to compel a canvassing board to issue a certificate of election, which was only prima facie evidence.

In *State ex rel. McDill v. State Convassers,* 36 Wis. 498, involving an application for a writ of mandamus against the State Board of Canvassers to compel them to perform their duty with respect to a congressional election, the court said:

"We cannot determine the right to the office, but only the duty of the board of state canvassers in respect to the canvass. The power to determine the right is, by the Constitution of the United States, vested exclusively in the House of Representatives. Art. 1, §5. Hence we cannot go behind the returns and investigate and correct frauds and mistakes and adjudge which of the candidates was elected, but can only determine whether the board of state canvassers ought to include in its canvass and statement of the votes cast for Representative in Congress those returned from Wood county. This proposition is not controverted."

And in the case of *Odegard v. Olson,* 119 N.W. 2d, 717, where was involved the election of one Olson as the apparent winner of the office of representative in the United States Congress, and where there was a statute which provided that the auditor of any county and the secretary of state may not issue a certificate of election to any person declared elected by the canvassing board, and further that in case of a contest, the certificate may not be issued until the proper court has determined the contest. In this situation the Supreme Court of Minnesota after denying the applicability of the foregoing statute said of the point here under consideration, the following:

"After carefully examining these statutory provisions, we must come to the conclusion that §204.32, subd. 2, has no application to a contest in the United States Senate or House of Representatives. Our courts are divested of jurisdiction by U.S. Const., Art. 1, §5, which provides:

" 'Each House shall be the Judge of the Election Returns and Qualifications of its own Members, * * *.'

"The determinative fact in the mechanics of this particular election is the act of the state canvassing board in declaring the election of the respondent pursuant to authority of that board under Minn. St. 204.31, subds. 3 and 4. The certificate of election as provided by §204.32 has no greater significance than a publication by the secretary of state of the official action taken by the canvassing board. The effect of any order of this court enjoining the secretary of state from performing the ministerial function of furnishing respondent a certificate of election would be gratuitous and of no force as bearing upon the merits of the election contest pending in the House of Representatives. It would, as expressed in State ex rel. 25 Voters v. Selvig, 170 Minn. 406, 408, 212 N.W. 604, be 'officious and nugatory.' "

In view of the foregoing, I am of the opinion that the Board of State Canvassers have a duty to certify the candidates in accordance with the

provisions of Section 50.39 and 50.41, Code of 1962, and that the Governor and the Secretary of State have a like duty under the provisions of Section 50.43.

9.3

ELECTIONS: Constitutional amendments, other propositions submitted – S.J.R. 1, Acts 60th G.A. No other proposition may be submitted to public for vote at special election in December, 1963, on the constitutional amendment known as the Shaff plan.

August 1, 1963

Mr. Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Reference is herein made to a request submitted to you by letter as to whether or not it is permissible for a township to have a special election on a fire question in conjunction with the election on the constitutional amendment to be held on the first Tuesday in December, 1963.

A new Senate Joint Resolution 1, 60th G.A. provides in respect to your question the following:

> "The foregoing amendment to the Constitution of the State of Iowa has been adopted and agreed to by the Fifty-ninth (59th) General Assembly, and having been referred by such election, being the 60th General Assembly, and having been duly published in accordance with and in compliance with the direction of the Fifty-ninth (59th) General Assembly, it is now adopted and agreed to by the Sixtieth (60th) General Assembly in this Joint Resolution, and shall be submitted to the people at a special election to be held for that purpose on the first Tuesday in December in the year nineteen hundred sixty-three (1963) in accordance with the directions of Article X of the Constitution of Iowa. The submission at said election shall in all respects be governed and conducted as prescribed by law and the Constitution of Iowa for the submission of a constitutional amendment at a general election."

It will be observed that the foregoing is an act of legislation fixing by specific terms the time and manner of submitting this proposed amendment to the Constitution to the electors at a special election. No provision of law appears that authorizes the holding of a special election or the submission of a special proposition on the same day and at the same place as the special election above referred to.

The foregoing special election is concerned with the adopting or rejecting of an amendment to the Constitution, and the Legislature has meticulously set forth the manner and time of submitting such amendment.

The rules in respect to the holding of special elections, or the submission of special propositions at elections fixed by law, were stated in 18 *Am. Jur.* at page 181, paragraph 5, as follows:

> "Although under some constitutional and statutory provisions it is held that a general and a special election may be held upon the same day and at the same place, it has been said that the weight of authority favors the definition that a special election is one which takes place at a time different from that at which an election fixed by law is held, and that the submission of special propositions at such an election does not convert it into a special election."

I am of the opinion that neither your township proposition nor any other public measure may be submitted at the special election on the constitutional amendment to be held December, 1963.

9.4

ELECTIONS: Constitutional amendment, voting machines – §52.24, 1962 Code. At special election to be held December 3, 1963, §52.24 provides that separate ballot shall be used for submission of constitutional amendment. Such provision is satisfied by use of voting machines for casting of such ballots where only election is submission of constitutional amendment.

September 25, 1963

Mr. Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

This is in response to your inquiry concerning the submission of the Constitutional Amendment at the special election to be held December 3, 1963. The exact question is whether this Amendment can be submitted on a voting machine. At the outset, this proposition is to be distinguished from the factual situation discussed in 1962 *O.A.G.* 204, which involved the submission of a proposed constitutional amendment at a primary election, where candidates were to be voted upon. In the present case, no other election issue will be before the people. (STAFF to Synhorst, 8/1/63)

The statute under which this question arises is §52.24, 1962 Code, which provides as follows:

> "All of the provisions of the election law now in force and not inconsistent with the provisions of this chapter shall apply with full force to all counties, cities, and towns adopting the use of a separate ballot for public measures; provided, however, that separate ballots shall be used for the submission to the people of the question of a constitutional convention or amendments or contracting state debts."

The primary requirement of this statute is a separate ballot. It will not be questioned that a machine ballot is just as much a separate ballot as a paper ballot. The view that I take is not that the Amendment is voted upon the voting machine as a separate instrument of the election process, but that a separate ballot is provided to be voted within the secrecy of the machine instead of the statutory booth, whether it be submitted at a primary, general or special election.

The substitution of the voting machine as a method of voting for the voter and the principles upon which that view is based has the support of the case of *Younker v. Susong*, 173 Iowa 663, where there was litigation on the constitutionality of abolishing the justice of the peace courts and establishing municipal courts. In answer to the question raised in the case that unconstitutionality was present "because no booths were provided," it was said:

> "Statutes prescribing the mode of proceeding of public officers are regarded as directory unless there is something in the statute which shows a different intent. In the instant case, the electors were not to blame for the failure of the officers to provide voting machines and booths; but the mistakes, if any, were those of the officials. Under such circumstances, prejudice must be shown in order to defeat an election fairly held. *Kinney v. Howard,* 133 Iowa 94, 103.
>
> "Legislative restrictions upon the exercise of the right of suffrage are enforced by the courts without hesitation to the very letter, so long as

they relate to matters within the control of the individual voter. But, with respect to regulations regarding the conduct of others, the effort is to seek such a construction of the law as will accomplish, rather than defeat, the expressed wishes of the people. *Peabody v. Burch,* (Kan.) 89 Pac. 1016.

Further on the proposition of no booths, the Court said:

"Appellant's next contention is that, by virtue of the statutes, particularly Section 1113, it was incumbent upon the mayor and clerk to provide the necessary supplies and equipment for the holding of elections, including the booths for screening the voter while marking his ballot, and provide for the secrecy in such marking so that there could be no interference or influence upon a voter while exercising the right of suffrage.

"Much that has been said in a prior division of the opinion in regard to voting machines is applicable to the point now under consideration in regard to the failure to furnish booths. . ."

Consequently, the directory nature of §52.24 is clear, even though the word "shall" is used (concerning the submission of constitutional amendments on separate ballots). What was intended was that a constitutional amendment should not be joined on a printed ballot or on a machine ballot with any other election contest. Compare: 1962 *O.A.G.* 204. Provision is made for submitting the amendment to a vote on a voting machine (§52.25) with the requirement that it be submitted upon a separate ballot which is satisfied in the submission of this single amendment on a voting machine ballot.

9.5

ELECTIONS: Contest, representative to Iowa House – §§50.8, 59.1, 62.8, 1962 Code. Legislature does not have jurisdiction over election contest for seat in General Assembly where allegations of illegal voting were not supported by list of alleged illegal voters. Allegations, even if true, that judges or clerks of election were allowed to reopen election material of precinct and to reject or reconfirm returns in order to ascertain true intent of electorate, do not afford basis for relief as matter of law, since such procedure is proper.

February 5, 1963

Honorable Chester Hougen
State Representative
L O C A L

Dear Mr. Hougen:

This will acknowledge receipt of your letter in which you submitted a question concerning the election contest between Adrian Brinck, contestant, and Charles O. Frazier, incumbent. The question involves the sufficiency of the records submitted and the jurisdiction of a committee of the House of Representatives to determine the election contest.

The following allegations appeared in Mr. Brinck's statement of contest:

"That the Board of Canvassers were guilty of mistake, and misconduct, in the procedure and conduct of the canvass of said votes and in declaring Charles O. Frazier the winner of said election contest in that:

"a) Said election board permitted the judges and clerks of said election board in the Third Precinct to re-open the election materials of said precinct and in permitting the judges and clerks of said election board to recompute, recheck and re-certify their returns.

"b) In permitting the judges and clerks of the election board in said

precinct to have access to the poll books used in said election for the purpose of changing the tallies entered therein and the results shown thereby.

"c) In that the Board of Canvassers were in error in failing to suspend the canvass of said election and set aside election in the Third Precinct in Fort Madison and failing to order a new election therein as required by Section 50.8 of the 1962 Code of Iowa, in that it appeared from the records of the judges and clerks of said election board of said precinct that the ballots cast for all officers exceeded the number of voters in the poll list.

"d) That all of the foregoing affected the results of said election.

"In addition thereto, illegal votes were received and legal votes were rejected at the polls in various precincts sufficient to change the result of said election in that there were errors made in counting so-called 'straight ballots' and in counting ballots with so-called 'switch-overs'."

The allegations in paragraph IV do not confer jurisdiction on the committee, for the reason that the contestant was bound to submit a list showing the reception of illegal votes or the rejection of legal votes to the House as provided for in §§59.1 and 62.8, Code of Iowa, 1962. Failure in this regard and the ground stated therein results in the conclusion that no jurisdiction exists in the committee to entertain this contest. 57 *House Journal* 124, *In the Election Contest of Woolridge v. Robinson.*

Paragraph III further indicates that the allegations of the contestant even if taken as true do not afford a basis for relief as a matter of law. Parts (a) and (b), alleging that the judges and clerks were allowed to reopen the election material of the precinct and to recompute, recheck and recertify returns, merely state facts which, if true, do not show acts of mistake or misconduct, but to the contrary, are required acts of the board of canvassers. It has been held that such procedure is proper in an effort to indicate the true intent of the electorate. *Rummel v. Dealy,* 112 Iowa 503, 84 N.W. 526 (1900); See also 52 *O.A.G.* 157.

If it should be found that the claimed error was, in fact, corrected by the board of canvassers through the conduct complained of above, and that the results of the election were not changed thereby, the committee should find that there was no error in not suspending the canvass and ordering a new election. §50.8, 1962 Code of Iowa.

9.6

ELECTIONS: Counting boards—§49.19, 1962 Code. While §49.19 provides that election board of any special election shall be same as last preceding general election, this section cannot be enlarged to include counting board within its terms.

August 22, 1963

Mr. James W. McGrath
Van Buren County Attorney
Keosauqua, Iowa

Dear Mr. McGrath:

Reference is herein made to your letter in which you submitted following:

"An election under Section 123.27 (7) (E) has been scheduled in this County for September 3, 1963.

"Said section provides 'that the provisions of the statutes . . . relating

to . . . conduct of elections, manner of vote, counting votes, . . . Section 49.19 provides that the election board, at any special election, shall be the same as in the last preceding general election.

"At the last preceding general election several voting precincts had double boards under the provisions of Chapter 51. The question is: May the special election be conducted by a single election board in all precincts or will it be necessary to have the extra counting board in those precincts where it was used at the last general election?

"The extra counting board involves considerable additional expense and supplies. Provisions will have to be made for these immediately if they are required. We would appreciate your prompt advice by telephone if possible."

(1) Section 49.19, Code of Iowa, 1962, cannot be enlarged by interpretation to include a counting board within its terms. (2) A counting board is not authorized in the conduct of a special election. (3) The language of §49.19 is concerned only in the composition of an *election board* and not a *counting board*. These are recognized by statute as different boards. (See §51.3, Code of Iowa, 1962).

9.7

ELECTIONS: Destruction of ballots—§§50.13, 50.46, 1962 Code. Constitutional amendment election ballots may be destroyed six months after delivery by election officials to official who provided them.

April 24, 1964

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Reference is herein made to an inquiry sent to this department with a request from L. E. Ricker, County Auditor at Waukon, Iowa, as to the earliest date that special election ballots cast for the Shaff Plan constitutional amendment can be destroyed.

In reply thereto, I would advise you that there is no express statute insofar as the constitutional amendment election is concerned, fixing this time. However, this being a special election, it is provided by §50.46, Code of 1962, that:

"All the provisions regulating elections, obtaining returns, and canvass of votes at general elections, except as to time, shall apply to special elections."

Such authority to destroy ballots cast at the general election is found in §50.13, Code of 1962, where it provides for the destruction of such ballots six months after their delivery by the election judges to the official who provided them with the ballots. Therefore, I am of the opinion that ballots cast at the special election December 3, 1963, can be destroyed six months after their delivery by the election officials to the officer who provided them.

9.8

ELECTIONS: Election board, selection of members—§49.15, 1962 Code. In selecting members of election board, the largest and next largest number of votes in any precinct at last general election in non-presidential years is determined by largest vote cast for office of governor of Iowa.

May 25, 1964

Mr. Maynard Hayden
Warren County Attorney
Indianola, Iowa

Dear Mr. Hayden:

This will acknowledge receipt of your letter in which you submitted the following:

"I have submitted a verbal opinion upon request to the Board of Supervisors and the County Auditor of Warren County in regard to the construction and interpretation of Section 49.15 of the 1962 Code of the State of Iowa. The first sentence of said statute is in question.

" 'The membership of each election board shall be made up or completed by the board of supervisors from the parties which cast the largest and the next largest number of votes in said precinct at the last general election, or that one which is unrepresented.' "

"My opinion is that the 'largest number of votes cast' would be to the candidate drawing or receiving the most votes on the ballot in each precinct. Said statute is silent and makes no reference to any designated office or candidate on the ballot upon which to base a computation of the 'largest vote cast'. Further, said statute does not state the composite or total of all votes cast for any one party on the ballot for a precinct.

"I would appreciate an opinion from your office as soon as practicable in regard to the above and specifically upon the question of what is the basis of the determination of how the Board of Supervisors makes up or completes the Election Board or how to compute the 'largest number of votes cast' in each respective precinct."

In reply thereto, I would advise you that this statute has had the previous consideration of this department, and the language quoted by you, likewise existent in the 1931 Code, was interpreted in an opinion appearing in the Report of the Attorney General for 1934 at page 507, as follows:

"In so far as determining what is meant by the largest vote, we will say that it means the largest vote cast for the head of the ticket, which in the fall of 1932 would have been the largest vote cast for President of the United States. You may wonder why we say the largest vote cast for the President of the United States, rather than Governor of the State of Iowa, in view of the last paragraph of Section 546 of the Code of 1931. It will be noted, however, that Section 546 applies only to the number of signatures on nomination papers, and has nothing to do with judges and clerks of election. For that reason, we are of the opinion that the only proper method of determining which party had the largest number of votes is by ascertaining the vote for the head of the ticket."

In view of the foregoing, the largest and next largest number of votes in any precinct at the last general election, being the general election held in 1962, is determined by the largest vote cast for the office of governor of the State of Iowa in selecting membership of an election board in each respective precinct.

9.9

ELECTIONS: Municipal Court Judges—§363.11, 1962 Code. Where municipal courts have been established, at first election thereafter to select judge thereof, the vote for that office will be by write-in.

August 26, 1963

Mr. Martin D. Leir
Scott County Attorney
Scott County Court House
Davenport, Iowa

Dear Mr. Leir:

This is to acknowledge receipt of your recent inquiry appearing as follows:

"The City of Davenport election will be held next November, at which will be elected, among others, two persons to the office of Municipal Court Judge.

"Section 363.11 of the Code of Iowa (1962) provides:

'*Candidates — filing.* Any person desiring to become a candidate for any elective municipal office shall, at least four weeks prior to the election, file with the clerk of the municipal corporation a petition signed by qualified voters equaling in number at least two percent of the greatest number of votes cast for any candidate for such office at the last regular municipal election, and in no case less than ten, requesting that his (or her) name be printed upon the official election ballot. . . .'

"Inasmuch as this is the first election for the office of Municipal Court Judge in Davenport, I interpret the section to mean that a candidate for such office must file with the Clerk a Petition signed by not less than 10 qualified voters.

"Would you therefore be good enough to advise whether or not you concur in this conclusion."

I direct your attention to an almost axiomatic rule of statutory construction found in 2 *Sutherland, Statutory Construction,* §4705, in which is stated the following:

"Effect given every word. 'It is an elementary rule of construction that effect must be given, if possible, to every word, and sentence of a statute'. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative, superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

Section 363.11, referred to by you, imposes upon any person seeking to become a candidate the mandatory duty of filing his petition duly signed. The legislature clearly intended that a petition contain two percent of the greatest number of votes for any candidate for the office he sought in the last regular municipal election. However, in no case shall the two percent amount be less than ten, and if the two percent amount is less than ten, then ten signatures must be obtained. To construe otherwise would fail to give effect to every word, clause or sentence of §363.11. Thus, I cannot concur with your conclusion. These requirements are applicable to election to the municipal court, as shown by the provisions of §602.12, Code of Iowa, 1962.

Because there has never before been an election for the office of Municipal Court Judge, there is no figure upon which two percent may be calculated. The statutory facts being unavailable, a correctly signed petition for the office is impossible. Thus, it will be impossible for any person to become a candidate for the office.

Without a candidate available for election, resulting in no one authorized to be nominated to occupy the office, the office should be filled at the general election by write-in vote. (See 1958 O.A.G. 92). The situation resulting from the inability to make a nomination for this position requires legislative action.

9.10

ELECTIONS: Nominations, by conventions—Ch. 43, 1962 Code. Nomination of candidate by convention is not limited to those whose names appeared on primary ballot.

June 18, 1964

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Reference is herein made to your letter in which you submitted the following:

"Your formal opinion is respectfully requested on the following question:
"When none of the candidates whose names appear on the Primary Election ballot receives 35% of all of the votes cast by his party for the office of Representative in Congress, and a district congressional convention is held for the purpose of making the nomination, is the choice limited to one of those candidates who had his name printed on the Primary ballot, or may the convention nominate any qualified person of its choice?"

In responding to the foregoing, I call your attention to the opinion of this department appearing in the Report for 1960 at page 112, in which a like problem was submitted and considered, and it was there declared that a state convention in making a nomination for United States Senator was not limited in its choice for that office to those whose names appeared on the primary ballot.

The foregoing is a precedent for a like conclusion in a similar situation in a district congressional convention for the nomination of a candidate for the Congress of the United States.

A copy of the opinion referred to is attached.

9.11

ELECTIONS: Nominations, by county convention of district supervisor—§43.97, 1962 Code. County convention has no authority to nominate candidate for board of supervisors who is to be elected only by voters of subdivision of county.

August 4, 1964

Mr. Carroll Wood
Hamilton County Attorney
801 Des Moines Street
Webster City, Iowa

Dear Mr. Wood:

This will acknowledge receipt of your recent letter, in which you state the following:

"In the primary election on June 1, 1964 a write-in candidate for the office of supervisor of the Third District, being a six township district in Hamilton County, Iowa received less than 5% of the vote of the six townships for his party's candidate for governor in the 1962 general election.

"Consequently, on June 26, 1964 at the county convention the

candidate was nominated as the candidate for the office of supervisor of the Third District of Hamilton County, Iowa and his name was certified to the Hamilton County Auditor on July 9, 1964 by the Chairman and Secretary of the party.

"Section 43.52 and 43.53, Code of Iowa, 1962 and your opinion of August 10, 1962 both indicate that had such person received 5% of the vote cast for governor at the 1962 election by the party with which he is affiliated he would have been nominated. However, there is no discussion as to the circumstances whereby the County Convention may nominate a supervisor who has write-in votes of less than 5%.

"Sections 43.97(1) states 'the said County Convention shall make nominations of candidates for the party for any office to be filled by the voters of the county when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such parties therefor.' When read in connection with 43.98 it would appear that perhaps a candidate who has received less than 5% for the office of supervisor but received more than 1/2 of the 5% figure may be nominated by the Convention.

"I should therefore appreciate your opinion on whether a person who receives write-in votes for the office of supervisor in a six township district less than 5% of his party's vote for governor in the last general election may be nominated for that office by the County Convention of the party with which he is affiliated."

In answer thereto, I would advise that the county convention has no authority to make a nomination for this office. According to section 43.97, its power is to nominate a candidate for an office to be filled by voters of the *county*. The office here in question is filled by voters of a subdivision of the county. Thus it would make no difference how many votes the person received in the Primary, as the county convention could not, in any event, nominate.

9.12

ELECTIONS: Nominations, two offices—Ch. 43, 1962 Code. No prohibition against nomination for two offices.

N.B. S.F. 14, Acts 60th G.A. (Ex. Sess.) Appr. by Gov., 3/25/64, requiring one filing nomination papers to elect between offices in order to have name on primary ballot.

March 25, 1964

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Reference is herein made to your letter in which you submitted the following:

"On March 10, 1964, Ernest J. Seemann of Waterloo, Iowa, filed in this office nomination papers and an affidavit of candidacy for the office of United States Representative, 3rd Iowa District, to be voted for at the June, 1964 Primary Election.

"Today, March 18, 1964, I received from Ernest J. Seemann of Waterloo, Iowa, nomination papers and an affidavit of candidacy for the office of Lieutenant Governor, State of Iowa, to be voted for at the June, 1964 Primary Election.

"I had a telephone conversation with Mr. Ernest J. Seemann of Waterloo, and he confirmed that he is the same Ernest J. Seemann who would like to have his name printed on the Primary Election ballot as a candidate for both of these offices.

"Shall I file the affidavit of candidacy and the nomination papers for the office of Lieutenant Governor which Mr. Seemann has submitted to this office? Is it permissible for Mr. Seemann to be a candidate for nomination to both of these offices in the same Primary Election?"

In reply thereto, I would advise you that I know of no statutory provision at present that would deny the right of a person to stand for nomination for two different offices at the June, 1964 primary. If nominated then for both offices and thereafter elected to both offices, the question of qualifying for both or either of said offices is then present. It is not present now.

However, I should point out that there is proposed legislation now pending in this Special Session of the General Assembly which, if enacted, would place a duty on a candidate in situations similar to this to elect a single office by the final date of filing.

9.13

ELECTIONS: Nominations, write-in candidate—§43.53, Ch. 45, 1962 Code. No nomination if write-in candidate received less than 5% of vote cast for Governor at last general election; however, may be nominated by complying with provisions of Ch. 45 of Code.

July 24, 1964

Mr. Carroll K. Wood
Hamilton County Attorney
Webster City, Iowa

Dear Mr. Wood:

Reference is herein made to a request for an opinion arising out of the following situation in your county:

It appears that in the primary election held June 1, 1964, no name appeared on the Democratic ballot for the office of Third District Supervisor. However, the canvass disclosed that there were 22 write-in votes for a named Democratic candidate. It appears that the vote cast for Governor on the Democratic ticket in the general election for 1962 was 714 votes. A query is made as to whether or not it is possible that this person's name can appear in the 1964 general election.

I would advise that the situation is covered by Section 43.53, Code of 1962, providing as follows:

"Who nominated for township office. The candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate or candidates of his party for such office, except that no candidate whose name is not printed on the official primary ballot, who receives less than five percent of the votes cast in such subdivision for governor on the party ticket with which he affiliates, at the last general election, nor less than five votes, shall be declared to have been nominated to any such office."

Applying the foregoing to the situation described, it is clear that the write-in candidate did not receive 5% of the vote cast for Governor in this township at the last general election. 5% of the votes cast in that township in that election would amount to 35. The candidate received 22 votes. In that

situation, there is no nomination and the name of this write-in candidate may not appear on the November ballot as a result of the primary. However, such candidate may be nominated and have his name appear on the ballot by complying with the provisions of Chapter 45, Code of 1962.

9.14

ELECTIONS: Presidential electors, compensation—§54.9, 1962 Code. Compensation of presidential electors is payable out of general fund of state, without appropriation.

November 23, 1964

Marvin R. Selden, Jr.
State Comptroller
L O C A L

Attention: Mr. Croft

Dear Mr. Selden:

Reference is herein made to your oral request for an opinion as to your authority to pay the compensation of the presidential electors elected in the 1964 election.

In reply thereto, I would advise you that the compensation of presidential electors is fixed by Section 54.9, Code of 1962, providing as follows:

> "The electors shall each receive a compensation of five dollars for every day's attendance, and the same mileage as members of the general assembly."

This language constitutes an appropriation of the money to pay the electors the specified compensation. Authority for this conclusion is found in the case of *Riggs v. Brewer,* Vol. 64, Alabama Reports, at page 282, where it is stated:

> "The statute (Code of 1876, §586) fixed the salary of the marshal and librarian of the Supreme Court at two thousand dollars annually. The salary being thus fixed by a general statute, permanent in its nature, no special appropriation by the General Assembly was necessary, to entitle him to demand payment of it, nor to authorize the auditor to draw a warrant on the treasurer for its payment. The statute, of itself, operated as an appropriation, and satisfied the constitutional requirement that money shall be drawn from the treasury only upon appropriations made by law. *Nichols v. Comptroller,* 4 St. & Port. 154; *Reynolds v. Taylor,* 43 Ala. 420."

This case was affirmed subsequently by the case of *In re Opinion of the Justices,* 186 So. 731, where it is stated:

> "It is the law that an act which creates an office and fixes a definite salary by law carries an appropriation to pay the salary from time to time. *Riggs v. Brewer,* 64 Ala. 282."

This compensation is fixed by Section 54.9 and is payable out of the general fund of the state.

9.15

ELECTIONS: Schools and school districts—§§49.1, 49.92, 277.13, 277.33, 1962 Code; Ch. 81, Acts 60th G.A. §49.92, Code 1962, is applicable to school elections, and electors in school elections may record their votes by either "check" or "cross."

August 19, 1963

Mr. Paul F. Johnston, Superintendent
State Department of Public Instruction
State Office Building
L O C A L

Dear Mr. Johnston:

This is in reply to your recent letter in which you raise the following question:

"The 60th General Assembly passed H.F. 114 which was signed by the Governor. This Act amends Chapter 49 and makes it possible for a voter to use a check as well as an "x" in marking his ballot.

"H.F. 114 amends Chapter 49, but school elections are specifically excepted in Section 49.1. The regular annual school elections will take place on September 9, 1963, and we have the problem of whether or not patrons in voting on a school board may use a check. Is it necessary for school elections, that only an "x" may be used on the ballot because of this exception stated in Section 49.1?"

Section 49.1 of the Code of Iowa (1962) provides:

"The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections."

Section 277.33 provides:

"So far as applicable all laws relating to the conduct of general elections and voting thereat and the violation of such laws shall, except as otherwise in this chapter provided, apply to and govern all school elections."

Section 277.13 provides:

"Voting at all school elections shall be by ballot or by voting machines."

It is apparent that §49.1, providing that Chapter 49 of the Code does not apply to school elections, and §277.33, stating that the laws relating to conduct of general elections are applicable to school elections, are in conflict. Although §277.33 was last enacted by Chapter 100, §33, of the 43rd G.A. (1929), it is the same section as was originally enacted by S.F. 101, §10, of the 40th G.A. (Ex. Sess. 1924). Section 49.1 was also enacted by S.F. 25, §1, of the 40th G.A. (Ex. Sess. 1929). Since both provisions were enacted in the same session of the General Assembly, it cannot be presumed that either repeals the other. In the case of *Thompson v. Roberts,* 220 Iowa 854, 263 N.W. 491 (1935), there was a question raised as to the applicability of the provisions of present Chapter 49 to a school subdistrict election. While the Court concluded that Chapter 49 did not apply to a subdistrict election because nominations and official ballots were not required, the implication of the decision is clearly that the provisions of Chapter 49 are applicable to all other school elections unless the express provisions of Chapter 277 are in conflict with those of Chapter 49. Section 277.13 provides only that voting must be by ballot or voting machine and is silent as to the proper mark to be made.

In *Sutherland, Statutory Construction,* §5208, the rules here applicable are stated to be:

"A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute.

"A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted."

The rule is similarly stated in 82 *C.J.S., Statutes,* §370, as follows:

"The question whether one statute absorbing or incorporating by proper reference provisions of another will be affected by amendments made to the latter is one of legislative intent and purpose. As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and, therefore, it is not affected by any subsequent modification of the statute adopted unless an intention to the contrary is clearly manifested; but, where the legislative intent to do so clearly appears, the adopting statute will include subsequent modifications of the original act.

"A well-established exception to, or qualification of, the general rule exists where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof; in such case the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, at least as far as the changes are consistent with the purpose of the adopting statute."

The reference made by §277.33 is to *"all laws relating to the conduct of general elections and voting thereat"*. There is no specific reference to any statutory provision. Apparently all general election laws are applicable *"except as otherwise in this chapter* (277) *provided"*. Chapter 277 has no provisions pertaining to the mechanics of voting. Prior to the 60th General Assembly, §49.92 read as follows:

"The voting mark shall be a cross which shall be placed in the circle at the head of a ticket, or in the squares opposite the names of candidates."

Chapter 81, §4, Acts of the 60th G.A. (H.F. 114) amended §49.92 as follows:

"Section forty-nine point ninety-two (49.92), Code 1962, is hereby amended by inserting in line two (2) after the word 'cross' the words 'or check'."

In summary, the provisions of Chapter 49 of the Code are applicable to school elections, except subdistrict elections, and except as otherwise provided by Chapter 277. Chapter 277 does not cover the mechanics of voting. In conclusion, §49.92 as amended is applicable to school elections, and electors in school elections may record their votes by either a "check" or a "cross".

9.16

ELECTIONS: Vacancies, District Congressional Central Committee—§§43.101, 43.102, 43.103, 43.105, 43.96, 23.90, 1962 Code. Ch. 78, Acts 60th G.A. 1. Vacancies on district central committee may be filled by reconvening county convention in each county of district that elected them, which is 1962 county convention. 2. Delegates originally selected at such county conventions, notwithstanding now having no legal status, have de facto status as delegates and may participate in such reconvened county conventions.

June 17, 1964

Honorable Bernard J. Murphy
State Representative
Carroll County
Carroll, Iowa

Dear Sir:

This will acknowledge receipt of your letter in which you submitted the following:

"The seventh congressional district June primary election in 1964 did not nominate any Democratic candidate as a result of no one receiving 35 per cent of the total Democratic vote for that office.

"It has come to the attention of the undersigned that it is the duty of the congressional district central committee, whose members were elected by each of the county statutory conventions in 1962, to, pursuant to law, convene and set a time, place and apportionment of delegates for the district congressional convention to select the nominee.

"Some of the counties in 1962 did not elect a congressional district committeeman and, therefore, there is no present representative on the district congressional committee from those counties.

"My question is two-fold:

1. Can these vacancies be filled so that the counties involved may have representation on the district congressional central committee?

2. If so, how can it be done and by whom?"

In reply thereto, I would advise that the district convention for the nomination of a candidate for Congress is described in Section 43.101. The call for such convention is provided by Section 43.102, Code of Iowa, 1962, in terms as follows:

"Call for district convention. The district central committee, through its chairman, shall as soon as practicable after the necessity for such convention is known, issue a call for such senatorial or congressional convention, and immediately file a copy thereof with each county auditor in the district. Said call shall state the number of delegates to which each county will be entitled, the time and place of holding the convention, and the purpose thereof."

Under the foregoing provisions, the district central committee by and through its chairman is required to call a convention, which call shall state the number of delegates to which each county will be entitled, the time and place of holding the convention, and the purpose thereof, and requires that a copy thereof be filed with each county auditor in the district. The chairman of such committee is selected by delegates appointed by the several county conventions of the county making up the district. It would appear that the delegates of such county, in whole or in part, either were not selected or the membership thereof is not of record. However, in the absence of a designated chairman of this county, it is the opinion of this department as shown in an opinion appearing in the report for 1934, page 69, that in a like situation:

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

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

this district central committee selected by your county may act as chairman for the purpose of issuing the call for the district convention."

Thus in view of the foregoing, the call may be made as provided by statute setting forth not only the time and place of the convention and its purpose, but also providing the number of delegates each county shall be entitled to. A copy of each such call is required to be filed with each county auditor in the district, who in case the district delegates for his county have not been selected, shall deliver a copy of such call to the chairman of the convention which selects said delegates. Section 43.103 states that such convention when organized shall make nominations to meet any of the conditions named in Section 43.101. See Section 43.105. However, the direction of this statute to the auditor and any duty imposed upon the chairmen of these conventions cannot be complied with because such delegates to such conventions have no longer statutory status.

The 60th General Assembly, Chapter 78, in force and effect, on July 4, 1963, amended Section 43.90, which required the county convention to be composed of delegates selected at the preceding primary and inserted in lieu of the words "primary election" the words "precinct caucus", therefore requiring that such delegates to the county convention be selected by party caucuses and not by primary. Thus a convention composed as required by Section 43.90 cannot be convened because the term of such delegates expired on July 4, 1963, and the authority for their election withdrawn. Therefore, such county convention with delegates chosen at a primary no longer exists.

Notwithstanding, there is inability in officials to perform in accordance with the terms of the statute in reconvening county conventions for the purpose of choosing members of the district central committee. It does appear that the statutory situation other than the described situation displays a method by which county conventions may act to fill these offices.

There can be no doubt of the legislative intent to legislate as to what the legislature has told the election officials what to do to effectuate the nomination for Congress. What was said in the case of *Harless v. Lockwood*, 68 A.L.R. 2d, 1317, is as follows:

"If, however, a literal application of the language leads to a result which produces an absurdity, it is our duty to construe the act, if possible, so that it is a reasonable and workable law, not inconsistent with the general policy of the Legislature, even though in so doing we may be compelled to change the punctuation or even the precise language of the act."

In that aspect and in recognition of the fact that a congressman is a federal officer, that he is nominated in pursuance of state statutes covering primary elections, and that he is, by the federal constitution, elected every second year (see Article 1, Sec. 2, Federal Constitution) that I deem that the delegate to the district convention chosen at the 1962 convention is de facto official available and eligible to a county convention that may be required in order to fill a vacancy in the district central committee. The fact that a precinct is only partially represented by delegates in the county convention or has no representation at all and proxies are not allowed (see Sec. 43.96, Code of 1962) will not prevent the county convention from proceeding in the selection of a district committeeman.

Therefore, in answer to your question, I would advise you that vacancies in the counties where they do not have representation in the district congressional central committee can be filled in the manner hereinabove described.

In short:

1. Vacancies in the district central committee may be filled by the re-

convening of the county convention in each county of the district that elected them, which is the 1962 county convention.

2. That the delegates originally selected at such county conventions, notwithstanding now having no legal status, have de facto status as delegates and may participate in such reconvened county conventions.

9.17

ELECTIONS: Voting machines—§§49.12, 52.9, 1962 Code. Provisions of statutes with respect to number of booths required in any precinct are no longer applicable in view of provisions of §52.9 fixing number of voting machines to be used in any one precinct.

October 15, 1964

Mr. Noran L. Davis
Pottawattamie County Attorney
Courthouse
Council Bluffs, Iowa

Dear Mr. Davis:

Reference is herein made to your letter in which you submitted the following:

"Pursuant to my telephone conversation with you this date, I would appreciate an opinion at your earliest possible convenience of the following statute:

'Section 49.25(6), "The number of voting booths shall not be less than one to every sixty voters or fraction thereof who voted at the last preceding election in the precinct."'

"This request is made in view of the fact that the chairman of the Democratic Central Committee in Pottawattamie County has insisted that in the forthcoming election on November 3, 1964, the county Auditor for Pottawattamie County provide either a voting machine at each precinct for every 60 voters or fraction thereof who voted at the last election, or in the alternative, a voting booth and the use of paper ballots in the same proportion.

"There is an earlier attorney general's opinion dated 1911-12, at page 839, but this opinion is now more than 50 years old and the vast majority of counties within this state are now using voting machines in place of booths, and further in view of the fact that none of the counties contacted by our county auditor are providing voting machines in the proportion as stated in Section 49.25(6), it would be imperative that this section be interpreted as to whether the same effect should be given as was apparently given to this section in 1912."

In reply thereto, I advise the following. The opinion of this department appearing in the Report for the years 1911-12, at page 839, is not now applicable to the situation you describe. In that opinion is the assertion made therein:

"The chapter which makes provision for the use of voting machines instead of booths makes no provision for the number of voting machines required in any particular precinct."

That situation no longer exists. There is now statutory provision fixing the number of voting machines required in any particular precinct. Section 52.9, Code of 1962, provides as follows:

"Duties of local authorities--certificate of test. The local authorities adopting a voting machine shall, as soon as practicable thereafter, provide for each polling place one or more voting machines in complete working order, and shall thereafter keep them in repair, and shall have the custody thereof and of the furniture and equipment of the polling place when not in use at an election. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at any election following such adoption, as many may be supplied as it is practicable to procure, and the same may be used in such election district or districts within the county, city, or town as the officers adopting the same may direct."

And further note in this connection the provisions of §49.12, providing as follows:

". . . in any precinct using voting machines in which more than three such machines are used, the board of supervisors is authorized to name one additional judge for said precinct for each such additional machine, maintaining the bipartisan political balance hereinbefore referred to."

In view of the foregoing, I am of the opinion that neither §49.25(6), Code of 1962, nor the opinion appearing in the Report for 1911-12 have any applicability to this situation.

9.18

Absentee ballots--§§43.7, 53.2, 53.17, 53.18, 53.19, 53.20, 1962 Code. Notwithstanding fact that Saturday and Sunday immediately preceding election day are holidays, they are included in days upon which absentee ballots may be voted. (Strauss to Synhorst, Sec. of State, 5/22/64) #64-5-2

9.19

Constitutional amendment, expenses--§6.9, 1962 Code. Payment of claims made under §6.9 is authorized from money in the treasury not otherwise appropriated. (Strauss to Selden, St. Compt., 8/21/63) #63-8-3

9.20

Election board, members--§§49.15, 49.19, 49.64, 49.67, 1962 Code. Election board at special election to be held December 3 will be composed of same members as at last preceding general election, as provided by §49.15. Number of ballots to be printed pursuant to §§49.64 and 49.67 will be based upon vote at precincts as they existed at time of general election in 1962. (Strauss to Samore, Woodbury Co. Atty., 10/29/63) #63-10-5

9.21

Nomination Requirements, party affiliation--§§43.18, 1962 Code. No requirement that candidate file declaration of party affiliation in addition to affidavit of candidacy required by §43.18. (Strauss to Smith, O'Brien Co. Atty., 2/6/64) #64-2-3

CHAPTER 10

HEALTH

STAFF OPINIONS

LETTER OPINIONS

10.1

HEALTH: Board of Eugenics, sterilization consent—§145.14, 1962 Code. Parents are nearest in consanguinity to son, and their signature qualifies as written consent as nearest known kin to son.

May 11, 1964

Dr. W. C. Brinegar
State Board of Eugenics
L O C A L

Attention: Norma Casserly

Dear Dr. Brinegar:

This is to acknowledge your request for an opinion wherein you set forth the following:

> "The person to be considered for sterilization is a 25 year old man with an IQ of 51. Both he and his wife have signed the application for sterilization. According to Broadlawns Hospital, the wife is not mentally competent. The parents of the man are willing to sign for the sterilization. There is no legal guardian for the person to be sterilized."

In reply thereto, we advise as follows: Section 145.14, Code of Iowa, 1962, provides:

> "In case the person to be operated upon be feeble-minded or insane, the consent hereinbefore mentioned in Section 145.13 shall be construed to mean the written consent of such person's legal guardian, or if such person has no legal guardian, then the written consent of such person's nearest known kin or personal friend within the state of Iowa, or if such person be insane, or feeble-minded, and has neither legal guardian nor known kin or personal friend within the state of Iowa, then the written consent of the guardian appointed by the court for such person as provided in this chapter."

The question therefore arises as to whether or not the signature of the parents qualifies as the written consent of such person's "nearest known kin" within the meaning of the statute. Primarily, the words "nearest of kin" indicate the nearest degree of consanguinity, and are used in this sense more often than in any other, *Swasey v. Jaques*, 10 N.E. 758, and in the instant case, the parents clearly stand in the nearest degree of consanquinity to the person being considered for sterilization.

It is therefore our belief that the parents qualify as proper persons to provide a written consent for such sterilization within the meaning of §145.14, Code of Iowa, 1962.

10.2

HEALTH: Board of Eugenics, sterilization, epilepsy—§§145.2, 145.9, 1962 Code. Epilepsy is insufficient in itself to require the sterilization of a person having the same. "Insanity" and "mental illness" are synonymous.

December 27, 1963

Doctor Willard C. Brinegar, M.D.
State Board of Eugenics
Mental Health Institute
Cherokee, Iowa

Dear Doctor Brinegar:

This is to acknowledge your recent inquiry in which you submit the following:

1. "145.9 of the Code of Iowa lists, among other things, epilepsy as reason for sterilization. However, the first sentence of this paragraph refers to 'such persons' which apparently refers back to Section 145.2 in which the other diagnoses are mentioned but not epilepsy. Therefore, there is some question as to whether or not the Board may order the sterilization of epileptics. It would appear to me to have been the intent of the legislature that epileptics could be sterilized since 145.9 specifically says so; however, since it also refers to 'such persons,' as mentioned above, we wonder if we are safe in ordering the sterilization of epileptics who are not also afflicted by other disabilities listed. I would very much appreciate your opinion on this.

2. "As you know, the word 'insanity' was removed from most of the Code, including the chapter on the State Board of Eugenics, sometime ago. We, therefore, wonder whether we have the power to sterilize a person who is not psychotic, which we have always considered more or less synonymous with insane, but who is mentally ill. We are thinking particularly of severe psychopathic personalities or sociopathic personalities, and perhaps the question might occur, although I don't recall that it has, in the case of severe neurotics. In other words, I would appreciate your opinion on what the words 'mentally ill' now in the Code mean. Should we interpret them to mean the same thing as 'insane' meant at the time the law was written originally, or may we assume that the legislature, when it changed the terminology, broadened the concept of mental illness to include people with types of mental illness who wouldn't have been considered insane at the time the word insanity was used?"

Section 145.2, 1962 Code provides as follows:

"Each member of said board, and the warden of the penitentiary and the warden of the men's reformatory, shall, annually, on the first day of January, April, July and October, report to the state board of eugenics the names of all persons, male or female, living in this state, of whom he or she may have knowledge, *who are mentally ill or retarded, syphilitic, habitual criminals, moral degenerates, or sexual perverts and who are a menace to society.*" (Emphasis supplied).

Section 145.9, 1962 Code provides:

"If in the judgment of a majority of said board procreation *by such persons* would produce a child or children having inherited tendency to mental retardedness, syphilis, mental illness, epilepsy, criminality, or degeneracy, or who would probably become a social menace or ward of the state, . . . then it shall be the duty of such board to make an order embodying its conclusions with reference to such person in said respects and specifying such a type of sterilization as may be deemed by said

board best suited to the condition of said person and most likely to produce the beneficial results in the respects specified in this section, . . ." (Emphasis supplied).

1. The legislature in enumerating the conditions which could result in sterilization of an individual, failed to include an epileptic. It becomes clear that the State Board of Eugenics can only order the sterilization of an individual who is mentally ill or retarded, syphilitic, habitual criminal, degenerate, sexual pervert, and who is a menace to society, since §145.9 necessarily refers to §145.2.

Further, this sterilization may only be permitted if in the judgment of a majority of the board, procreation by the class of persons enumerated in §145.2 would result in an inherited tendency of the potential issue having one of the conditions enumerated in §145.9.

2. The 58th G.A. in amending various provisions of the Code amended §4.1(6) which defines "mentally ill person" as follows:

"The words 'mentally ill person' includes mental retardates, lunatics, distracted persons, and persons of unsound mind."

The legislature, being its own lexicographer, saw fit to define mentally ill person, and with that definition we are bound.

The explanation in H.F. 701, 58th G.A. which substituted the term "mentally ill" for the term "insane" provided:

"This bill deletes objectionable terms dealing with mental health from the Code and replaces them with modern terminology."

A similar act was construed in *Interstate Life & Accident Insurance Co. v. Houston,* 360 S.W. 2d 71 (Tenn.), and in that case the Court held in construing this statute:

"Wherever the term 'insane' shall appear, the term 'mentally ill' shall be substituted therefor.

"It thus appears to us that by legislative enactment, the terms 'insanity' and 'mental illness' are made synonymous with each other."

It is therefore our belief that the words "insanity" and "mental illness" in the State of Iowa are synonymous, but also include by virtue of the legislative definition in §4.1(6), mental retardation, lunatics, distracted persons, and persons of unsound mind.

Thus, the Board of Eugenics has only the power to order the sterilization of those persons that fall within the definition as discussed herein.

10.3

HEALTH: Dentists, venipuncture for diagnosis and treatment, privileged communications—§§140.28, 153.1, 153.3, 155.1, 622.10, 1962 Code. Duly licensed dentists can use method of venipuncture to draw blood for purposes of examination, diagnosis and treatment of dento-oral diseases. Information obtained under the patient-dentist relationship is privileged communication under §622.10 of the Code.

December 22, 1964

Honorable Kenneth Benda
State Senator
Hartwick, Iowa

Dear Senator Benda:

Reference is made to your favor of recent date, in which you request our opinion upon the following questions:

"1. May a dentist, duly licensed to practice in the State of Iowa, draw blood by venipuncture for purposes of serological examination for syphilis, and request appropriate examination of such blood specimens by the State Hygiene Laboratory, and be entitled to receive the reports of such examinations?

2. Is a dentist in the legal practice of his profession in Iowa covered by the statutes relating to privileged communications when he requests and obtains information of a confidential nature that is necessary for the proper diagnosis and treatment of the dento-oral diseases of his patients?

"3. Is there any restriction imposed by the laws of Iowa that prohibits to dentists the use of any diagnostic or therapeutic method that is appropriate to the diagnosis or treatment of dento-oral disease if the use of such methods is within the competence of the individual dentist?"

The answer to your questions we believe are to be found in the provisions of the law relating to the practice of dentistry, Chapter 153, Code of Iowa, 1962, and particularly the following quoted sections, to wit:

153.1: " 'Practice of dentistry' defined. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of dentistry:

"1. Persons publicly professing to be dentists, dental surgeons, or skilled in the science of dentistry, or publicly professing to assume the duties incident to the practice of dentistry.

"2. Persons who treat, or attempt to correct by any medicine, appliance, or method, any disorder, lesion, injury, deformity, or defect of the oral cavity, teeth, gums, or maxillary bones of the human being, or give prophylactic treatment to any of said organs."

153.3: "Every applicant for a license to practice dentistry shall:

"2. Pass an examination prescribed by the dental examiners in the science of dentistry and the practice of dental surgery."

155.1: "For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of pharmacy:

"2. Persons who compound or dispense drugs and medicines or fill the prescriptions of licensed physicians and surgeons, dentists, or veterinarians."

Questions 1 and 3 will be discussed together, since they are closely related with respect to modern diagnosis and treatment of oro-facial structures or dento-facial disease.

We note that the definition of the practice of dentistry contains these significant words:

"*Persons who treat, or attempt to correct by any medicine, appliance or method any disorder, lesion, injury, deformity or defect of the oral* cavity, teeth, gums, or maxillary bones of the human being, or give prophylactic treatment to any of said organs."

This definition certainly provides a broad and extensive professional base for the practice of dentistry, as a branch of the healing arts, and those seeking to enter this field must pass an examination in the "science of dentistry and

the practice of dental surgery." And it is common knowledge that more and more modern practitioners are specializing in specific areas of dentistry, such as extractions, oro-facial surgery, and treatment of periodontal disease.

Perhaps we should here point out that syphilis is a communicable disease and must be reported to the State Department of Health under its rules, I.D.R. 1962, page 146, Section II A, and that specimens may be submitted by physicians and others licensed in one of the healing arts, to the State Hygienic Laboratory, and there examined free of charge. I.D.R. 1962, page 476, Section I (1) (2) A and Section II 1.A. There can be no question but that dentists are licensed in one of the healing arts and are authorized to submit specimens and report any findings with reference to communicable diseases.

The practice of dentistry has come a long way from its early beginnings, where at one time they were denominated as "mechanics". A "dentist" may be classified as a member of one of the learned professions like unto a physician or surgeon. (*Rice v. Rinaldo*, Ohio App., 119 N.E. 2d, 657, 649).

"Dentistry" is a branch of the science of the healing arts which relates strictly to diagnosis, treatment, restoration, and prevention of diseases and abnormalities of oral cavity and related structures, . . .". (*Haden v. McCarty*, 152 So. 2d, 141. 143, 275 Ala. 76). "Dentistry" is a special department of medical science, and a dentist is a dental surgeon. (*Commonwealth v. Heller*, 121 A. 558, 559, 277 Pa. 539). "Dentistry" is a subdivision of surgery. (*Gasal v. Michigan Mut. Liability Co.*, 104 N.E. 2d 122, 345 Ill. App. 504).

Given the necessary basic training in schools of dentistry to become qualified in "the science of dentistry and the practice of dental surgery", and licensed as such; such persons are presumed to be competent to "treat or attempt to correct by any *medicine, appliance or method*" the various disorders of the oro-facial structures as defined in Section 153.1 of the Code.

Diagnosis and treatment of periodontal diseases is becoming increasingly important in dental practice and will become as prominent as restorative dentistry. One of *the methods* that can be used for diagnosis and treatment is to draw blood by venipuncture for purposes of serological examination, not only for syphilis, but such examinations of the blood are needed to determine various conditions of the blood, such as: erythrocyte count, erythrocyte sedimentation rate, leukocyte counts, hematocrit, hemoglobin, icterus index, partial prothrombin time, blood coagulation time, clot retraction time, serum ascorbin acid, serum calcium, serum phosphorus, serum alkaline phospatase, serum acid phosphatase; as well as nutritional disorders, anemia, leukemia, infection, infectious hepatitis, hemorrhagic disorders and bone lesions.

In the use of the method of venipuncture to obtain blood for serologic and other determinations, much diagnostic information needed in periodontology and surgery and endodontics can be obtained.

Having been trained in the necessary skills of the healing art of dentistry, a licensed practitioner cannot be denied the exercise of his rights within the field of dentistry in which he chooses to practice, and if this requires blood specimens, it must be assumed he has been trained in this skill and can exercise the method of venipuncture, and request necessary examinations of blood specimens from the State Hygienic Laboratory.

Therefore, in answer to your first question, under the plain wording of the statutes regulating the practice of dentistry, it is our considered opinion that a duly licensed practitioner, skilled in the science of dentistry and the practice of dental surgery, can legally draw blood by the method of venipuncture and request appropriate examination of such blood specimens by the State Hygienic Laboratory and be entitled to receive the reports of such examinations.

It is our further opinion, in answer to your third question, that there is no statutory restriction imposed by the laws of Iowa that prohibits the use of any diagnostic or therapeutic method that is appropriate to the diagnosis or treatment of dento-oral disease if the use of such methods is within the competence of the individual dentist.

Referring next to your second question, we note the provisions of Section 140.28 of the Code, which reads in pertinent part:

> "Confidential matter. The identity of persons infected with venereal disease shall be kept secret, and all information, records, and reports concerning the same shall be confidential and shall be inaccessible to the public, . . .".

We believe that the privileged communication evidentiary rule would apply to the dentist as well as to the physician, when the information obtained by the dentist is necessary and required for the diagnosis and treatment of the oral disease of the patient. This assumes, of course, that the dentist-patient relationship exists at the time such information is obtained by the dentist, and that no third party overheard or took part in obtaining such information, so that the nature of the information remained confidential between the patient and the dentist.

It was stated in the case of *Van Wie v. United States*, D.C. 1948, 77 F. Supp. 22, that the essential elements of a communication privileged by physician and patient relation are the relation of physician and patient, information acquired during such relation, and necessity and propriety of information to enable physician to treat patient skillfully in his professional capacity.

As was stated and held in the *Gasal* case, supra, that dentistry is a subdivision of surgery, it would logically follow that a dentist likewise would have the same status as a physician or surgeon within the provisions of Section 622.10 of the Code, inasmuch as the purpose of the statute is to ensure a free, frank and full disclosure of all pertinent information and facts to the dentist which may be necessary for the diagnosis and treatment of the oral condition of the patient.

Therefore, it is our opinion that a dentist, in the legal practice of his profession in Iowa, is covered by the statutes relating to privileged communications when he requests and obtains information of a confidential nature that is necessary for the proper diagnosis and treatment of the dento-oral diseases of his patients.

10.4

HEALTH: Mental health centers—H.F. 18, 60th G.A., Ex. Sess., 1964. Department of Public Health authorized to act as sole agency for administering and supervising construction of community mental health centers and mental retardation facilities.

May 6, 1964

Honorable Harold E. Hughes, Governor
State of Iowa
L O C A L

Dear Governor Hughes:

Replying to your recent request relative to the proper single state agency for administering and supervising the construction of community mental health centers and mental retardation facilities under Public Law 88-164 entitled "Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1936", you are advised as follows:

It is my opinion that House File 18, enacted by the General Assembly during the Extraordinary Session of the 60th General Assembly, complies in all respects to permit the State of Iowa to participate in any and all programs created by virtue of Public Law 88-164, and that by virtue thereof the State Department of Public Health is authorized and empowered to act as the sole agency of the State of Iowa for administering and supervising a state plan for the construction of community mental health centers and mental retardation facilities.

10.5

HEALTH: Public Housing Law, "area"—§413.1, 1962 Code, as amended by Ch. 254, Acts 60th G.A. 1. Jurisdiction, extending to any area adjacent to and within one mile of municipalities of 15,000 or more population, applies only to unincorporated areas. 2. Act applies to any city when it attains a population of 15,000 or more by a federal census.

August 30, 1963

Mr. P. J. Houser, Director
Division of Public Health Engineering
State Department of Health
L O C A L

Dear Mr. Houser:

Reply is made to your letter of June 5, requesting opinion of this office, reading as follows:

> "Under provisions of House File 122, Acts of the 60th General Assembly, a copy of which is attached hereto, Section 413.1 of the housing law was amended to extend coverage to 'any area adjacent to and within one mile of such municipalities,' these being those with population of 15,000 or more.
>
> "The question arises as to whether 'any area' includes an area within another municipality which is within the one mile limit. For example, an area in the cities of Urbandale or Windsor Heights which is within the one mile from the City of Des Moines.
>
> "A second question is in regard to 'any area' which is within the one mile limit but is located in a county other than the city with 15,000 or more population. It appears that such areas exist in Plymouth County north of Sioux City, in Warren County south of Des Moines and probably in Boone County west of Ames."

Section 413.1, as re-enacted by House File 122 (now Chapter 254, Acts 60th G.A.), reads as follows:

> "This chapter shall be known as the housing law and shall apply to every city which, by the last federal census, had a population of fifteen thousand or more, *and shall apply to any dwelling in any area adjacent to and within one mile of such municipalities, except estates of real property of ten acres or more in said adjacent area,* and to every city as its population shall reach fifteen thousand thereafter by a federal census."

The underlined portion is the new language incorporated in this statute. In answer to your first question, you are advised that the phrase in said section reading, ". . . any dwelling in any area adjacent to and within one mile of such municipalities, . . . " extends jurisdiction only over unincorporated areas.

In answer to your second question, the new law as re-enacted will apply to

any city, if and when such municipality attains a population of 15,000 or more by a federal census.

10.6

Birth certificates, execution—§144.14, 1962 Code. If attending physician is incapacitated and cannot execute birth certificates, then any other qualified person in attendance at birth can sign birth certificates while acting in same capacity as a "midwife". (Bianco to Heeren, Com'r. of Health, 7/31/63) #63-7-8

10.7

Board of Nurse Examiners, applicable status—§§147.11, 147.80, 147.81, 152.3, 1962 Code; §§7(1), 7(2), 7(3), 13, Ch. 125, Acts 60th G.A. 1. Registered nurse is not required to pay annual renewal fees who does not engage in nursing during the year succeeding the annual expiration of the license, provided such nurse so notifies the Board. 2. For each re-examination for license to practice as professional nurse, the applicant shall pay sum of $20. 3. Penalty fee of $2 for late payment of renewal fee applies only to registered nurses, and provision in H.F. 554 that person holding license or certificate validly issued under law prior to enactment of H.F. 554 shall be determined to be licensed under said Act applies only to registered, not practical nurses. (Bianco to Sage, Bd. of Nurse Exam., 7/10/63) #63-7-2

10.8

Cosmetologists, unprofessional conduct—§§147.1(3), 147.56(1), 157.1, 157.9, 1962 Code. Solicitation of students to attend school of cosmetology, by agents employed by said schools, does not constitute unprofessional conduct on part of duly licensed cosmetologists who may be operators or proprietors of said schools, within terms of §147.56(1). (Bianco to Doderer, State Repres.) #64-12-2

10.9

Mobile home parks, fees, amount—§135D.5, 1962 Code. First annual license fee for mobile home park having facilities for three or less mobile homes is $25. The annual renewal fee thereafter is $10. (Snell to Zimmerer, Comm. Public Health, 6/24/63) #63-6-5

10.10

Mobile home parks, fees, collection—§§135D.2, 135D.5, 135D.18, 1962 Code. It is the obligation of licensees of mobile home parks to pay and the duty of the Department of Health to collect the annual (renewal) license fee for such parks. (Bianco to Zimmerer, Health Comm., 2/20/63) #63-2-5

10.11

Mobile homes, definition, types considered as such—§135D.1(1), 1962 Code. Wheeled vehicles, licensable as such, constructed with attachable or detachable appurtenances, used for sleeping or living quarters, without permanent foundation and supported by wheels, jacks or similar supports, are mobile homes within the definition of such in §135D.1(1). (Bianco to Houser, Dept. of Health, 10/30/63) #63-10-7

10.12

Sterilization, consent, retarded child—§145.14, 1962 Code. Where mentally retarded person is in custody of both parents, both signatures are required to satisfy the statutory requirement of consent. (Yost to Brinegar, Bd. of Eugenics, 10/18/63) #63-10-3

CHAPTER 11

HIGHWAYS

STAFF OPINIONS

11.1

HIGHWAYS: Farm to market roads, research—§§310.2, 310.4, 1962 Code. Counties may enter into agreements with state or federal authorities to provide money from farm-to-market road fund for highway research.

July 16, 1963

Mr. L. M. Clauson
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Clauson:

This will acknowledge receipt of your letter requesting our opinion on the following question:

> "We wish to know whether Section 310.2 of the 1962 Code of Iowa provides the necessary legal authority for the counties to enter into arrangements and agreements with the State or Federal Government whereby each county would assign a part of their apportioned share of the farm-to-market road fund created by Section 312.5 of the 1962 Code of Iowa to be used for highway planning such as traffic counts and research to match the federal allotment for this purpose."

In answer to your question, we refer you to 1940 *O.A.G.* 235, where the question was asked whether §4755-bl of the 1935 Code of Iowa, now §313.1 of the 1962 Code, provided the necessary authority for the Highway Commission to use primary road funds to match federal allotments for a highway planning project; the last two paragraphs of such opinion we set out in full for your reference:

> "By the provisions of Section 4755-bl of the Code, 1935, the Highway Commission is '* * * empowered to enter into any arrangement or contract with or required by the duly constituted federal authorities, in order to secure the full cooperation of the Government of the United States, and the benefit of all present and future federal allotments in aid of highway construction, reconstruction, improvement or maintenance. * * *'
>
> "In view of the broad provisions of the section last quoted we conclude that the proposed expenditure from the primary road fund for state-wide highway planning is authorized in amount contemplated."

In addition, our Supreme Court has adopted a broad interpretation of the word "construction" in the case of *Edge v. Brice,* 253 Iowa 710, 113 N.W. 2d 755, when it stated: "It is fair to say the intent of the term 'construction' includes all things necessary to the completed accomplishment of a highway for all uses properly a part thereof."

Section 310.2 of the 1962 Code of Iowa contains the almost identical language to that referred to above in quoting from §4755-bl of the 1935 Code of Iowa, as it provides:

"The county board of supervisors of any county is empowered, on behalf of the county, to enter into any arrangement or agreement with or required by the duly constituted federal or state authorities in order to secure the full cooperation of the Government of the United States and of the State of Iowa, and the benefit of all present and future federal or state allotments in aid of secondary road construction, reconstruction or improvement."

Section 310.4 of the 1962 Code of Iowa prescribes the use of the farm-to-market road fund and provides as follows:

"Said farm-to-market road fund is hereby appropriated for and shall be used in the establishment, construction, reconstruction, or improvement of the farm-to-market road system, including the drainage, grading, surfacing, resurfacing, construction 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 said farm-to -market road system under this chapter."

Therefore, it is our opinion that the broad language of the statutes quoted above, together with the broad interpretation our Supreme Court has placed upon the word "construction", would allow the counties to enter into arrangements and agreements assigning a portion of their share of the farm-to-market road fund to be used to match federal funds for highway planning such as traffic counts and research.

11.2

HIGHWAYS: Farm to market roads, source of funds—§§310.34, 310.35, 310.36, 1962 Code; Ch. 168, Acts 59th G.A. Said sections impliedly repealed by the provisions of Ch. 168.

February 21, 1963

Honorable Dewey E. Goode
State Representative
State House
Des Moines, Iowa

Dear Mr. Goode:

This will acknowledge receipt of your letter requesting an opinion as follows:

"As Chairman of the Roads and Highways Committee in the House, I would like your opinion on the following subject: Did the passage of Senate File 466 of the 59th General Assembly repeal or make ineffective Section 310.34, Code 1962 and I will give you just a few facts about Senate File 466.

"Section 14 of bill as passed the Senate repealed Sections 310.34, 310.35, 310.36 and took money off the top of the State Road Fund instead. The House by amendment struck all after the enacting clause and re-wrote the bill and did not take money off the top, but left Sections 310.34, 310.35 and 310.36 in the Code. The Senate refused to agree and the bill went to Conference Committee and the Conference Committee took the money off the top, but failed to repeal said sections. If we intended to leave said sections in the Code, we would have said so in Section 312.5, Code 1962 by adding to the exception to the farm to market road funds to be allotted back to the counties. Senate File 466 which was passed after Sections 310.34, 310.35 and 310.36 says that 'all farm to market road funds except funds which under Section 310.20

come from any county's allottment of the road use tax fund, shall be allotted among the counties by the State Highway Commission should be the governing section as it is the latest act passed by the General Assembly.

"I have the Senate Files and all the amendments to Senate File 466 and all the actions on same and if you wish any further information, feel free to call on me."

In light of the fact that the legislature used the words, "*all* farm to market road funds except funds under section 310.20. . .", no exceptions, other than those specifically set forth, were intended. Consequently, those sections providing other uses for these funds are in conflict with this section.

As a general rule, repeals by implication are not favored, but such rule has no application to repugnant statutes covering identical subjects. *Owens v. Smith*, 200 *Iowa* 261, 204 *NW* 439. Where repugnant statutes cannot be reconciled, the one last enacted must be given effect. *Waugh v. Shirer*, 216 *Iowa* 468, 249 NW 246. A prior statute repugnant to a later act on the same subject is determined repealed by implication. *Clear Lake Co-op Livestock Shippers Association v. Weir*, 200 *Iowa* 1293. 206 NW 297. See also 1960 O.A.G. 104, 107.

Applying these rules to the provisions of §§310.34, 310.35, and 310.36, Code 1962, and Chapter 168, 59th G.A., it is our opinion that the sections numbered are inconsistent with the later enacted provisions and have been impliedly repealed.

11.3

HIGHWAYS: Road Use Tax Fund, allocations—§312.2(5), 1962 Code. Sums credited to primary road fund for expenses incurred by secondary and urban road departments cannot be used for secondary road research expenses.

May 15, 1963

Honorable Martin Wiley
State Senator
State House
Des Moines 19, Iowa

Dear Senator Wiley:

We have received your letter requesting an opinion as follows:

"Senate File 466, passed by the 59th General Assembly, has a provision which allows $500,000.00 off the top of the Road Use Tax Fund to reimburse the Primary Road Department for administrative and engineering services to the Secondary and Urban Road Departments.

"Can the Primary Road Department draw on these funds for Secondary Road research purposes?"

That part of Senate File 466, 59th G.A., in question, now in §312.2(5) of the 1962 Code of Iowa, reads as follows:

"The treasurer of state shall . . . credit annually to the primary road fund the sum of Five Hundred Thousand Dollars to be used for paying expenses incurred by the secondary and urban road departments of the Commission, other than expenses incurred for extensions of primary roads in cities and towns."

The quoted language clearly states that the fund in question is intended to pay the expenses incurred by the secondary and urban road departments.

The fund cannot be applied to all expenses incurred by the Highway Commission incidental to secondary roads, but only to those of the secondary road department. However, though the terms of the statute are clear, there remains the unanswered factual question of whether secondary road research is an expense of the secondary road department, for, if it is not, the fund may not be so used. In determining this question, the rule of construction set out in *City of Cherokee v. Northwestern Bell Telephone Company*, 199 Iowa 727, 202 N.W. 886, to the effect that statutes should be construed in the light of conditions existing at the time of their adoption, is, in our opinion, applicable.

There existed, at the time of the enactment of Senate File 466, specific authorization in §§310.36, Code 1958, providing a secondary road research fund. Section 310.35 provides as follows:

> "310.35 Use of fund. The secondary road research fund shall be used by the state highway commission solely for the purpose of financing engineering studies and research projects which have, as their objective, the more efficient use of funds and materials that are available for the construction and maintenance of secondary roads, including bridges and culverts located thereon."

As shown by the quoted section, secondary road research was not an expense of the secondary road department at the time of the adoption of Senate File 466, but rather was intended by the Legislature to be paid by the highway commission from the fund so established, regardless of what department thereof conducted such research.

This office, however, has ruled, in its opinion to Representative Dewey E. Goode, of February 21, 1963, that §§310.34, 310.35 and 310.36, Code 1958, were repealed by implication by Senate File 466. The repeal by implication of statutes providing a secondary road research fund and the creation in the same act of a new fund to be used to pay the expenses incurred by the secondary road department cannot be interpreted to indicate a legislative intent that the new allocation of funds be used for the same purpose as provided by the former repealed statute. A change in the language of a statute ordinarily indicates an intent to change its meaning. *State v. Flack*, 251 Iowa 529, 101 N.W. 2d 535; *City of Ottumwa v. Taylor*, 251 Iowa 618, 102 N.W. 2d 376; *Holland v. State*, 115 NW 2d 161.

In determining further the conditions existing at the time of the enactment of Senate File 466, we have noted that in accord with §307.5(8) of the Code, 1962, the Iowa State Highway Commission, on November 17, 1961, submitted to the Governor its annual report covering the fiscal year of July 1, 1960, through June 30, 1961. It is reported therein that the secondary and urban road departments of the Highway Commission were then a part of the division of planning within the internal structure of the Commission, as were also the departments of traffic and highway planning and highway research. This report further shows that as of May 15, 1961, the date of the enactment of Senate File 466, 59th G.A., research, whether concerning primary or secondary roads, was conducted by the highway research department of the division of planning, and not by the secondary road department. In other words, at the time of the enactment of this legislation, secondary road research was not an expense of the secondary road department.

In addition, the same report for the fiscal year of July 1, 1961 through June 30, 1962, reveals that the $500,000.00 fund in question, subsequent to its creation was not used for secondary road research purposes. The Supreme Court has stated, in *John Hancock Insurance Company v. Lookingbill*, 218 Iowa 373, 253 N.W. 604, at page 387 of the Iowa Report, that:

> "The legislature is presumed to know the construction of its statutes by the executive departments of the state, and if the legislature of this

state was dissatisfied with the construction which has been placed upon them by the duly elected officials in the past years, the legislature could very easily remedy this situation, as it has the power to pass such legislation. . ."

For these reasons, you are advised that, in our opinion, Senate File 466 does not allow the $500,000.00 allocated therein for the payment of expenses incurred by the secondary and urban departments of the Highway Commission to be used for secondary road research purposes.

11.4

HIGHWAYS: Secondary roads, closing—§§306.4-306.11, 1962 Code. Vacating secondary road by action of board of supervisors also constitutes formal closing of road.

July 25, 1963

Mr. Mervin J. Flander
Bremer County Attorney
123½ East Bremer Avenue
Waverly, Iowa

Dear Sir:

We are herewith responding to your request for an opinion on the following questions:

(1) "Your opinion is requested as to whether or not a Board of Supervisors having control of secondary roads may vacate without closing a secondary road within its jurisdiction.

(2) "Your further opinion is requested, in the event of an affirmative answer to the foregoing question, as to whether or not there is any means by which the Board of Supervisors may transfer control of the abandoned but unclosed road to the Conservation Commission."

Sections 306.4 through 306.11 of the 1962 Code of Iowa contain the authority for the various highway authorities within the State of Iowa to vacate and close roads and also contains the procedure to be followed in so doing. This statutory procedure is the only manner in which highways can be vacated and closed. *McCarl v. Clark County,* 167 Iowa 14, 148 N.W. 1015.

The above-cited sections of Chapter 306 of the 1962 Code of Iowa make no distinction between the words "vacate" and "close" and, throughout the various sections contained in said chapter dealing with this subject, the terms are not used individually, distinct from one another, but are always used jointly. The legislature has thus made no distinction between the terms "vacate" and "close", and so it must be presumed that the two words are to be used interchangeably in referring to the same act. *McCarl v. Clark County, supra.*

This interpretation is supported by our Supreme Court in the recent case of *Christensen v. Bd. of Supv. of Woodbury Co.,* 253 Iowa 978, 114 N.W. 2d 897, where, in interpreting these same Code sections, the Court uses the words "vacate" and "close" interchangeably throughout the opinion in referring to the same action.

Since these words are used interchangeably, the action of a board of supervisors in vacating a road would also be a formal closing of such road. Even if the formal vacating of the road does not involve its closing without further action, a highway which is lawfully vacated ceases to be a highway and is completely discharged from the public servitude. *Tomlin v. Ry. Co.,* 141 Iowa 599, 120 N.W. 93; *McKinney v. Rowland,* 197 Iowa 180, 197 N.W. 88.

Although municipalities have fee title to city streets, the public has ordinarily only an easement in a country highway. *Clare v. Wogan,* 204 Iowa 1021, 216 N.W. 739; *Kitzman v. Greenhalgh,* 164 Iowa 166, 145 N.W. 505. Thus, a distinction must be drawn upon the effect of a formal vacation of a highway between those situations where the highway authority undertaking the vacation has acquired fee title to the highway and those situations where the highway authority has only acquired an easement for highway purposes. Upon the formal vacation of a highway in which the public has acquired only an easement for highway purposes, the vacated highway ceases to be a highway and the land involved becomes private property reverting to the owner of the underlying fee. *Kirtzman v. Greenhalgh, supra.* However, when a highway is formally vacated of which the public is the owner of the underlying fee, such as a city street, title to the property upon which the highway was located still remains in the public and the property may then be diverted to other uses and conveyed by the public body holding such title. *Tomlin v. Railway Company, supra; Harrington v. Railway Company,* 126 Iowa 388; *Town of Marshalltown v. Forney,* 61 Iowa 578.

Therefore, the answers to your questions are as follows:

(1) There is no distinction made between the vacating and closing of a secondary road within the jurisdiction of a board of supervisors, and the formal act of vacating said road also constitutes the formal closing thereof.

(2) Since the answer to your first question is in the negative, no answer need be given to your second question.

11.5

HIGHWAYS: Speed limits—§§321.285, 321.290, Ch. 66, Acts 60th G.A. (Ch. 17A). 1. Highway Commission has authority to determine, after engineering and traffic investigation, speed limits other than those set out in subsection 5, §321.285, 1962 Code, ". . . upon any part of the primary road system . . ." but such determination must be reasonable. 2. Legislature and not Highway Commission makes it criminal offense to exceed posted speed limits and determination of speed limit by Highway Commission becomes effective when signs are posted giving notice thereof and not through procedure prescribed in Ch. 66, Acts of the 60th G.A. In order to afford reasonable notice of effective speed limit, Highway Commission must post speed signs at sufficient intervals along affected primary highways.

November 6, 1963

Honorable Dewey E. Goode
Iowa State Representative
201 North Madison Street
Bloomfield, Iowa

Dear Mr. Goode:

This is in response to your recent letter wherein you submitted in part the following:

"Section 321.285, subsection five (5) sets the speed limit on the primary roads at 60 miles per hour in the nightime and 70 miles in the daytime.

1. "Section 321.290 gives the state highway commission authority to lower this speed limit at intersections or other places that they think it is not safe to drive at that speed, but can they place a blanket speed limit on primary no. 2 going across the state at 60 miles an hour day or night, even on a 25 mile strip of real good 25 foot wide new pavement between Bloomfield and Centerville?

2. "If they can do this and make it a criminal offense for one to go over 60 miles an hour in the daytime, would not their rules be subject to Chapter 66, Acts of the 60th G.A.?

3. "If they can change the State law on a long strip of highway, would not they be required to post a speed limit sign at every public road that enters this highway. . .?"

Section 321.290 of the 1962 Code of Iowa reads as follows:

"Special restrictions. Whenever the state highway commission shall determine upon the basis of an engineering and traffic investigation that any speed limit hereinbefore set forth is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of the primary road system or upon any part of a primary road extension, said commission shall determine and declare a reasonable and safe speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway."

In view of the above-quoted section, it was the apparent intention of the legislature to confer upon the Highway Commission the exclusive authority to reduce speed limits below those prescribed in §321.285 of the 1962 Code of Iowa where, after an engineering and traffic investigation, it determines that the prescribed speed limit is greater than is reasonable or safe under the conditions found to exist ". . . *upon any part of the primary road system. . .*". (Emphasis supplied). The wording of this statute is plain and unambiguous and capable of no other construction. (1940 *O.A.G.*, pages 306 at 307). The determination of the Commission must not be unreasonable and arbitrary and it must be reasonably supported by an engineering and traffic survey, which would include as one of the factors considered, the width of the traveled lanes. Courts will not interfere with the exercise of duly delegated authority unless such authority is abused by unreasonable and arbitrary action. (A & S, *Inc. v. Highway Commission,* 253 Iowa 1377, 116 N.W. 2d 496; *Porter v. Highway Commission,* 241 Iowa 1208, 44 N.W. 2d 682).

It is the legislature and not the Highway Commission which makes it a criminal offense not to obey the posted speed limit. Section 321.290 of the 1962 Code of Iowa provides that such speed limits shall be effective when appropriate signs giving notice thereof are erected. Section 321.285 of the 1962 Code of Iowa provides for speed limits which ". . . shall be the lawful speed except that as hereinbefore and hereinafter modified, and any speed in excess thereof shall be unlawful." Section 321.482 of the 1962 Code of Iowa makes it ". . . a misdemeanor for any person to do any acts forbidden or fail to perform any act required by any of the provisions of this chapter. . .".

Chapter 66, Acts of the 60th General Assembly, which repealed Chapter 17A of the 1962 Code of Iowa and enacted a substitute therefor, provides a procedure for the promulgation of rules and regulations by any administrative agency so empowered by law. It further provides when said rules and regulations shall become effective and upon what conditions. It does not appear that it was the intention of the legislature to include within the operation of Chapter 66, 60th G.A., the authority of the Highway Commission as contained in §321.290 of the 1962 Code of Iowa to determine reasonable and safe speed limits ". . . effective when appropriate signs giving notice thereof are erected. . .". No attempt was made by this legislation to amend or repeal section 321.290. It would be presumptuous to assume that the legislature intended that a speed limit would become effective and that the public would be afforded notice of the applicable speed limit through the filing of a rule as required by Chapter 66, 60th G.A., and not by erecting signs. Even if it was the intent of the legislature to include §321.290 under the operation of Chapter 66, 60th G.A., both acts are intended to prescribe a method under which rules and regulations of public agencies become effective and the

public is given notice of such rules and regulations. Chapter 66, 60th G.A., is a general statute applying to all rules and regulations to accomplish the above purposes. Section 321.290 of the 1962 Code of Iowa is a special statute designed to deal solely with speed limits and it sets up a method whereby the determined speed limit becomes effective and the public is given notice of the applicable speed limit. Thus, in case of a conflict, it would be deemed that §321.290 is controlling over Chapter 66, 60th G.A., as where a general statute and a special statute include the same subject matter and conflict with each other, the special statute will be considered as an exception to and controlling over the general statute, whether it was passed before or after the enactment of the general statute. (*Workman v. District Court of Delaware County*, 222 Iowa 364, 269 N.W. 27; *State v. Flack*, 251 Iowa 529, 101 N.W. 2d 162).

Section 321.290 of the 1962 Code of Iowa provides that the speed limit determined thereunder shall become effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway. It was the intention of the legislature that the public be afforded reasonable notice of the speed limit. Although the question of whether or not a violator had received reasonable notice of the effective speed limit through the posting of signs must be determined as a factual question in each and every case, it is our opinion that it would be necessary to post signs with such sufficient regularity as is necessary to assure that an operator of a motor vehicle would be afforded reasonable notice.

Therefore, the answers to your questions are as follows:

1. The Highway Commission has authority to determine, after an engineering and traffic investigation, speed limits other than those set out in subsection five (5), §321.285, 1962 Code of Iowa, ". . . upon any part of the primary road system. . ." but such determination must be reasonable.

2. The legislature and not the Highway Commission makes it a criminal offense to exceed the posted speed limits and the determination of the speed limit by the Highway Commission becomes effective when signs are posted giving notice thereof and not through the procedure prescribed in Chapter 66, Acts of the 60th General Assembly.

3. In order to afford reasonable notice of the effective speed limit, the Highway Commission must post speed signs at sufficient intervals along the affected primary highways.

11.6

HIGHWAY: State park roads--§§306.2, 306.3, 1962 Code; Ch. 181, Acts 60th G.A. Certain state park roads in Lake Manawa State Park are extensions of secondary roads and are subject to concurrent jurisdiction in accordance with §306.3.

November 13, 1963

Mr. L. M. Clauson
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Clauson:

We have your recent letter whereby you request as follows:

"Section 306.3 of the 1962 Code of Iowa, as amended by Chapter 181 of the Acts of the 60th General Assembly, sets forth the jurisdiction and control over the highways of the State. This section provides for concurrent jurisdiction, '. . . as to any state park road which is an extension

of either a primary or secondary highway which both enters and exists from the state park at separate points.'

"A question has arisen in the application of the above-quoted language to the state park roads located in Lake Manawa State Park in Pottawattamie County. As can be seen on the attached plat, the state park roads in question join with secondary roads which are either entering or exiting from the park in three different places, which are numbered in red.

"Section 306.2(6) defines 'state park roads' as follows: 'The term "state park roads" shall include all those highways and roads, either inside or outside of cities and towns, upon land belonging to the state at any state park.'

"Assuming that the roads between points one and two, and one and three on the attached plat fall within the above definition, (excluding roads marked 004, 006, 007) we request your opinion as to whether or not these state park roads are extensions of a secondary highway which both enters and exits from the state park at separate points."

The state park roads described in your letter, and as shown on the attached plat, join or intersect with secondary roads at separate points on the boundaryline of the state park in question. However, in order to determine whether or not the described roads fall within the appropriate provisions of §306.3, 1962 Code of Iowa, which provides, in part, as follows,

". . . as to any state park road which is an extension of either a primary or secondary highway which both enters and exits from the state park at separate points. . ."

it is necessary that we attempt to ascertain and give effect to the intention of the legislature. (*Keokuk Water Works v. City of Keokuk*, 224 Iowa 718, 277 N.W. 291; *Manilla Community School District v. Helverson*, 251 Iowa 496, 101 N.W. 2d 705). Further, a statute should be construed to accomplish the ends of the enacting body and give effect to their purpose in enacting the legislature. (*State v. Balsley*, 242 Iowa 845, 48 N.W. 2d 287; *Case v. Olson*, 234 Iowa 869 at 872, 14 N.W. 2d 717, at 719).

The statute in question, §306.3 of the 1962 Code of Iowa, was first enacted as §4 of Chapter 103, Acts of the 54th General Assembly, and provided as follows:

"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."

This enactment was subsequently modified by §9, Chapter 137, Acts of the 57th General Assembly, which added the following language,

"Provided however, that as to any state park road which is an extension of either a primary or secondary highway which both enters and exits from the state park at separate points, the state highway commission in the case of a primary road, and the county board of supervisors in the case of secondary roads, shall have concurrent jurisdiction with the state conservation commission over such roads, and the state highway commission in the case of a primary road, and the board of supervisors in the case of a secondary road, may expend the moneys available for such roads in the same manner as they expend such funds on other roads over which they exercise jurisdiction and control. The parties exercising concurrent jurisdiction shall enter into agreements with each other as

to the kind and type of construction or maintenance and the division of cost thereof, but in the absence of such agreement the jurisdiction and control of said road shall remain under the conservation commission."

and finally was amended again by Chapter 181, Acts of the 60th General Assembly, which added the following sentence to the section:

"Provided, however, that the Iowa state highway commission, in the case of a primary highway extension, and the board of supervisors in the case of a secondary highway extension, shall perform maintenance on said road in the same manner as performed on a highway of a like type of surface or construction."

It is apparent from the above that it was the initial purpose of the legislature to place jurisdiction and control over state park roads in the State Conservation Commission, and by a subsequent amendment of the 57th General Assembly, to provide, subject to agreements, aid to the State Conservation Commission by specifically providing for concurrent jurisdiction as to construction and maintenance of certain state park roads which were extensions of primary or secondary roads which both entered and exited from the state park at separate points. The amendment of the 60th General Assembly provided further aid by completely relieving the Conservation Commission of the maintenance responsibility of such roads.

Since the state park roads referred to in your letter both join or intersect with secondary roads at two different points on the state park boundary, and since it was the obvious intention of the legislature in the later amendments to §306.3 to provide aid for the State Conservation Commission in the maintenance and construction of state park roads, it is our opinion that the legislature has included within the phrase, ". . . as to any state park road which is an extension of . . . a . . . secondary highway which both enters and exits from the state park at separate points, . . ." the roads described in your letter and as shown on the attached plat.

CHAPTER 12

INSTITUTIONS

STAFF OPINIONS

LETTER OPINIONS

12.1

INSTITUTIONS: Charge or lien of county for cost of maintenance at state institutions—§§223.16, 223.20, 1962 Code. Charge may not be entered for full cost of patient at Glenwood and Woodward. Only percentage of total cost allowed by statute is lien on property of persons liable.

January 15, 1963

Honorable Thomas E. Tucker
Deputy Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Tucker:

This will acknowledge receipt of your request for an opinion regarding the allowable charge for a patient in a state-supported institution. You state in your letter that §§223.16 and 223.20 of the 1962 Code impose a "charge or lien" upon the property of certain patients, and upon the persons legally bound for the support of such patients, for only a percentage of the total obligation of the county to the state for maintenance and care of those patients at the institutions, and your questions are:

1. May a charge be entered for the full cost of the patient at the institution?

2. Do these sections only provide a certain percentage of the total cost shall be a lien on the property of the persons liable, or do these sections mean that this is the maximum limit that the county may charge the persons liable when sending them a statement or when they come to the Auditor's office to voluntarily pay their obligations?

In 1956 *O.A.G.* 156, in response to a question as to whether the words "charge" and "lien" used in ch. 120, Acts of the 56th G.A. were synonymous, it was stated that the words "charge" and "lien" are used separately and not synonymously, and further stated that a patient at Woodward or Glenwood under twenty-one years of age is entitled to support and treatment without charge or a lien therefor. In an opinion dated September 24, 1956, from Strauss to Orvey C. Buck, Van Buren County Attorney, interpreting the amendatory proviso of §223.16 and the new §223.20, it was stated:

"1. The words "charge" and "lien" as used in these sections of the statute are severable and not synonymous, that support for a patient over age of twenty-one and under the age of thirty-one is chargeable to those

legally bound to pay therefor, in the amount of seventy-five per cent of the cost of such support; that as to those patients over the age of thirty-one and under the age of fity, the charge for support shall be fifty per cent of the cost; and for those patients over fifty years of age no charge of support shall be made.

"2. The lien for such support can only be imposed upon the real estate of the person committed and the husband or wife of such person, and that as to liability up to seventy-five per cent and cost of support of patients between the age of twenty-one and thirty-one and the liability for such support of patients between the age of thirty-one and fifty, the liability for such support by statute becomes a lien upon the property of person committed or husband or wife or such person.

"3. The balance of the cost over the amount of seventy-five per cent or fifty per cent thereof, as the case may be, falls upon the county and is a liability of the institution fund."

The first sentence of §223.16, by its reference to patients in hospitals for the mentally ill, in effect establishes the persons set out in §230.15 as the persons liable for support of patients in Woodward and Glenwood. By the same reference, the property subject to a lien for support of patients in Woodward and Glenwood is that set out in §230.25, and the decedent's estate subject to a claim of the second class for cost of support of patients in Woodward or Glenwood is set out in §230.30.

Both the proviso added to §223.16 and the new §223.20 were specifically stated by the Act approved on April 22, 1955, to be amendatory to Chapter 223, Code of Iowa, 1954, so that while the second sentence of §223.16 states that a patient in Woodward or Glenwood and those legally bound for his support shall be liable to the county *to the same degree* and in the same manner as though such patient were a patient in a hospital for the mentally ill, that phrase is now immediately followed by a proviso that *no charge or lien* shall be imposed upon the property of any patient in Woodward or Glenwood under twenty-one years of age or upon the property of persons legally bound for the support of such patient. Section 223.20 limits the amount of the charge or lien as to patients in Woodward or Glenwood over the age of twenty-one and under the age of fifty, and again specifies no charge or lien as to patients over the age of fifty.

The language of the statute would appear to be plain and unambiguous and conveys a clear and definite meaning. In answer to your first question, a charge may not be entered for the full cost to the county of maintaining a patient at Woodward or Glenwood. In answer to the first part of your second question, only that percentage of the total cost which is permitted as a charge under the statute can be a lien on the property of the persons liable under the statute; and as to the second part of your second question, the maximum limit that the county can charge the persons liable, either when sending them a statement or when they come voluntarily to the Auditor's office, is that percentage of the total cost permitted as a charge under the statute.

12.2

INSTITUTIONS: **Cost of care, county's liability for payment** – §§223.14, 223.15, 230.20, 230.21 230.22, 244.14, 255.26, 269.2, 270.2, 271.14, 1962 Code. Counties are liable for 1% penalty on delinquent payment of costs of care in accordance with §230.22 for patients and inmates at mental health institutes, Woodward and Glenwood. Although counties are liable for costs of care for inmates at Annie Wittenmyer Home, State Juxenile Home, Braille & Sight-Saving School, School for the Deaf, University Hospitals and Oakdale Sanatorium, there is no express provision for penalty assessment if payment by county is delinquent.

January 24, 1963

Mr. Marvin R. Selden, Jr.
State Comptroller
L O C A L

Dear Mr. Selden:

This will acknowledge receipt of your recent opinion request wherein you stated:

"It appears section 230.22, Code of Iowa, 1962, provides a penalty of one per cent per month on and after sixty days from date of charges provided in Section 230.20, Code of Iowa, 1958. Section 223.15, Code of Iowa, 1962, provides that section 230.22, Code of Iowa, 1958, is applicable to the charges provided in section 223.14, Code of Iowa, 1962. Section 271.14, Code of Iowa, 1962, provides for the collection of charges for patients at the State Sanatorium in the same manner required from counties for the support of insane patients to which section 230.22, Code of Iowa, 1962, is applicable.

"With reference to the above provisions, we respectfully request an opinion on the following questions:

"1. Are the counties liable for the penalty of 1% per month on and after sixty days from the date of abstract of charges from the following institutions:

Mental Health Institute–Cherokee
Mental Health Institute–Clarinda
Mental Health Institute–Independence
Mental Health Institute–Mt. Pleasant
Glenwood State School–Glenwood
State Hospital and School–Woodward
State Sanatorium–Oakdale

"2. Are the counties liable for a penalty on late payment of abstracts of charges from the following institutions:

The Annie Wittenmeyer Home–Davenport
State Juvenile Home–Toledo
Iowa Braille and Sight-Saving School–Vinton
Iowa School for the Deaf–Council Bluffs
State University of Iowa, University Hospitals–Iowa City

"3. If the institutions under '2' are subject to a penalty, at what rate is the penalty assessed and when is the penalty assessed?"

1. As you know, §§230.20 and 230.21, 1962 Code establish the counties' liability for the support of patients in the following State Mental Health Institutions:

(a) Mental Health Institute–Cherokee
(b) Mental Health Institute–Clarinda
(c) Mental Health Institute–Independence
(d) Mental Health Institute–Mt. Pleasant

Section 230.22, 1962 Code, provides for a penalty of 1% per month on and after sixty days from the date the abstract of charges is delivered to the county. Section 271.14, 1962 Code, establishes liability upon the county for the support of patients in the State Sanatorium at Oakdale. Section 271.14 in pertinent part provides:

"Liability of county. Each county shall be liable to the state for the support in the state sanatorium of all patients having a legal settlement

in that county, . . . The amounts due shall be certified by the superintendent *to the state comptroller, who shall collect the same from the counties liable, at the times and in the manner required for the certification and collection of money from counties for the support of insane patients.*" (Emphasis ours)

Section 271.14 provides that the comptroller shall collect from the county of legal settlement the cost of care for patients at the state sanatorium at the time and in the manner of certification and collection of cost of care as provided in §§230.20 and 230.21. See 1942 *O.A.G.* 115. Section 271.14 does not provide for the penalty provisions of §230.22. It is, therefore, the opinion of this office that the penalty provisions of §230.22 do not apply to the state sanatorium. The penalty provision would not be included by implication. See 23 *Am. Jur.* Forfeitures and Penalties, §37, where the general rule is stated to be:

"It is a general rule of statutory construction that penal statutes are to be strictly construed. Statutes imposing penalties are subject to this rule of construction. They will not be construed to include anything beyond their letter, even though within their spirit."

Section 223.14, establishes county liability for the support of patients in the Glenwood State School and the Woodward State Hospital and School. Section 223.15 expressly makes §§230.20 and 230.22 applicable to the aforesaid state school and state hospital and school, and therefore, the 1% per month penalty would apply.

2. County liability is established for the cost of care of inmates or patients at the following institutions by the indicated sections of the 1962 Code:

(a) Annie Wittenmyer Home–§244.14
(b) State Juvenile Home–§244.14
(c) Iowa Braille and Sight-Saving School–§269.2
(d) Iowa School for the Deaf–§270.5
(e) State University of Iowa, University Hospitals–§255.26

However, there is no express provision for penalty assessment if the payment by the county is delinquent.

3. Your second question having been answered in the negative, the third question need not be answered.

12.3

INSTITUTIONS: Funds for mental health services – §230.20, 1962 Code. Amount due state from counties for necessary mental health services includes only funds appropriated from tax sources, and excludes collections from voluntary mental illness patients. Board of Control properly determines particular appropriated funds that are necessary for mental health sehvices.

July 1, 1964

Jim O. Henry, Chairman
Board of Control
L O C A L

Dear Mr. Henry:

This is to acknowledge your recent request wherein you submit the following:

"Please give us a formal opinion on the legal interpretation of the method to be used by the Superintendents of each state hospital, where mentally ill patients are cared for, in computing the certification of

amounts needed to provide mental health services being due the state from the several counties having patients chargeable thereto.

"Chapter 230.20, Code of Iowa, 1962, provides as follows:

" 'Each superintendent of a state hospital where mentally ill patients are cared for shall certify to the state comptroller on the first days of January, April, July, and October, the amount not previously certified by him due the state from the several counties having patients chargeable thereto, and the comptroller shall thereupon charge the same to the county so owing. In determining the amount due the state from the counties the superintendent shall include only funds appropriated from tax sources needed to provide the mental health services but shall not include amounts collected in the payment of services provided voluntary mental illness patients whether provided by the patient, relatives or other persons on behalf of the patient or by the county of residence of the patient. A duplicate certificate shall also be mailed to the auditor of each county having patients chargeable thereto. This section shall apply to all superintendents of all institutions having patients chargeable to counties.'

"Chapter 2, Section 17, Acts of the 60th General Assembly limits the amount of collected receipts that may be used in operating such state hospitals as follows:

" 'The budget of total expenditures for each institution under the control of the board of control, including state appropriations and such other receipts as may be available for the same purpose as the state appropriations, during the biennium shall not exceed the budget for each institution as hereinafter set forth, . . .'

"Prior to the effective date of the restrictions in Section 17 the certification of such amounts needed to provide mental health services was determined on the basis of expenditure made in providing all services at each of such state hospitals after deducting from the total of such expenditures the total amount of collected receipts. This net cost could never exceed the amount appropriated by the legislature from 'tax sources' and it was used in determining the 'patient per diem' cost for voluntary self-paying, voluntary county-paid, state voluntary, state committed and county committed patients.

"The Board of Control in seeking to comply with the restrictions on the use of collected receipts imposed by Chapter 2, Section 17, instructed the superintendents to compute their certifications to the State Comptroller, of providing such mental health services, on the basis set out in Chapter 230.20—'the superintendent shall include only funds appropriated from tax sources needed to provide the mental health services but shall not include amounts collected in the payment of service provided voluntary mental illness patients. . .'

"Both of these methods of computing the amounts certified to the State Comptroller determined the number of patient days of each of the types of patients served, as shown above, and determined the 'patient per diem rate' by dividing the total patient days of service to all types of patients served, into the total net cost or total appropriation from tax sources and then prorating these costs to each patient of each type served during the quarter.

"Please give us the legal interpretation of the following questions.

"1. Is the manner of determining the 'patient per diem rate' for providing mental health services legally accomplished by:

a. Dividing the total days of mental health services rendered to all

patients into the legislature's appropriation of funds from tax sources, 'not including any amounts collected in the payment of services provided voluntary mental illness patients.'

b. Dividing the total days of mental health services rendered to all patients into the legislature's appropriation of funds from tax sources deducting therefrom the amounts collected in the payment of services provided voluntary mental illness patients.

c. Dividing the total days of mental health services rendered to all patients into the amount of expenditures needed to provide such services providing the total of such expenditures do not exceed the amount of legislative appropriation for the quarter.

d. Dividing the total days of mental health services rendered to all patients into the net amount of expenditures after deducting from the total expenditures for the period such amounts collected in the payment of services provided voluntary mental illness patients.

"2. You may find that any of the four methods can be used and be the legal manner of determining such amounts for certification.

If so, does the limitation of the use of such collected receipts have any effect on the amounts of such collected receipts that shall be deducted in formula (b) and (d).

"3. Is it the prerogative of the Board to determine what 'funds appropriated from tax sources needed to provide the mental health services' shall be."

In reply thereto, we advise as follows: Section 230.20, Code of Iowa, 1962, provides in pertinent part:

". . . In determining the amount due the state from the counties, the superintendent shall include only funds appropriated from tax sources needed to provide the mental health services, but shall not include amounts collected in the payments of services provided voluntary mental illness patients whether provided by the patient, relatives or other persons on behalf of the patient or by the county of residence of the patient. * * *"

This language casts upon the superintendent the responsibility of determining the amount due the state from the counties, and such determination by virtue of this language can be based solely upon funds appropriated from tax sources necessary to provide the mental health services, and cannot be based upon amounts collected in the payment of services for voluntary mental illness patients, whether such payment is provided by the patient, a relative, another person, or by the county of residence.

The method presently employed as indicated in your request of dividing the total patient days of service to all types of patients served into the appropriation from tax sources, and subsequently prorating these costs to the respective type of patient served during the quarter, would appear to be in compliance with the pertinent language set forth in Section 230.20.

Thus the question you now raise is whether or not possible methods of determining the per diem rate can be employed in conformance with this statutory language.

For the purposes of clarification, the method employed in example (a) would result in a formula as follows:

1. Assuming the appropriation was $500,000.00, and this was divided by the total patient days. The figure resulting therefrom would constitute the per diem rate.

2. The method employed in (b) would result in the following formula:

Assuming the appropriation was $500,000.00, subtracting a fictional figure of $100,000.00 for sales and collections, then divide the total patient days into $400,000.00, would result in the per diem rate.

3. The method employed in (c) would result in a formula as follows: Assuming that the expenditures were $500,000.00, and dividing the total patient days into the total expenditures would equal the per diem rate.

4. The method employed in (d) would result in the following formula: Assuming the expenditure was $500,000.00, subtracting therefrom a fictional figure of $100,000.00 for sales and collections, and dividing the total patient days into the sum of $400,000.00, would result in the per diem rate.

It would seem a reasonable and proper method in determining the amount due the state from the counties to divide the total days of mental health services rendered to all patients into the legislature's appropriation of funds from tax sources, excluding any amounts collected in the payment of services provided voluntary mental illness cases, to arrive at the per diem rate, and subsequently prorating these costs to the respective types of patients served during the quarter.

The example submitted in (b) would appear to be outside the meaning of the language in Section 230.20, inasmuch as it requires a deduction to be made from the appropriation rather than an exclusion. Likewise, the example submitted in (c) contemplates a choate expediture rather than a determination of what may be necessary to provide the mental health services, and consequently would appear to be improper.

The example submitted in (d) must fail for the reasons that (b) and (c) were improper.

In reply to your second inquiry, you are advised since it is our opinion that the formula as set forth in (b) and (d) is improper, results in rendering your question as to the effect of Section 17 of Chapter 2, Acts of the 60th General Assembly, as being moot.

In replying to your third inquiry, you are advised as follows: The phrase "medical services" has been defined as services reasonably necessary for the care, comfort and treatment of a patient upon the advice of a physician. It has also been stated that such words should not necessarily receive a restricted construction. *Park View Hospital Association v. Peoples Bank and Trust Company.* 189 S.E. 766, 211 N.C. 244.

We think it proper for the Board of Control and its professional and administrative personnel to enjoy a certain expertise in ascertaining what is necessary for the care, comfort and proper treatment in the fulfillment of their duties in providing mental health services. This ascertainment should be uniform in nature and operate with consistency upon all affected institutions. Consequently, it is within the province of the Board of Control to determine the particular appropriated funds from tax sources that are necessary to provide the proper mental health services.

12.4

INSTITUTIONS: Inmates clothing—Ch. 218, 1962 Code. While legal obligation exists to provide inmates with adequate clothing, there is no statutory authority to provide such inmates with uniforms while serving as custodial employee.

February 4, 1964

Honorable Seeley G. Lodwick
State Senator
Wever, Iowa

Dear Senator Lodwick:

This is in reply to your recent request wherein you submit the following:

"In the past consideration has been given to the Board of Control furnishing uniforms for the custodial employees at Fort Madision and Anamosa. This consideration has continued into the present to the point where I would appreciate your opinion on the following question:

" 'Under the present laws, does the Board of Control have sufficient authority to furnish uniforms for the custodial employees at Fort Madison and Anamosa?'

"In other words, would it be necessary to pass another law to permit them to do this?

"This, of course, refers only to authorization, and I realize that appropriations is another facet of the problem."

In reply thereto, we advise that an examination of the appropriate statutes covering the obligations, duties and authority of the persons and departments charged with the care and custody of inmates reveals no authority to furnish uniforms for the inmate custodial employees at Fort Madison and Anamosa.

12.5

INSTITUTIONS: Legal settlement, erroneous charge—§§230.20, 252.13, 1962 Code. 1. Person who continuously resides in any county for period of one year acquires settlement in that county, and this settlement is not changed if individual becomes inmate in different county. 2. Erroneous charge against State where patient is county patient can be corrected; statute of limitations does not apply to State of Iowa, and county is required to reimburse State.

October 8, 1963

Board of Control of State Institutions
State Office Building
L O C A L

Attention: M. J. Brown

Gentlemen:

This is to acknowledge your recent request for an opinion upon the following:

"The above named patient was committed to the Iowa Annie Wittenmyer Home, Davenport, Iowa, on July 8, 1931 by the Juvenile Court of Boone County. On May 15, 1947 he was transferred to the Training School for Boys at Eldora, Iowa, from which institution he was discharged on December 15, 1948.

"Patient arrived in California in April, 1949 and was admitted to the Patton State Hospital, Patton, California as a non-resident mentally ill person on April 14, 1949. California requested authorization to return the patient to Iowa for further care on May 9, 1949. On May 12, 1949, the Board of Control authorized return and Boone County received a copy of this correspondence.

"Patient was returned to the Mental Health Institute, Clarinda, Iowa, and was committed to the Institute by the Hospitalization Commission of Page County on November 16, 1949 as a State Case. On November 22, 1949, the Board of Control advised Page County that Robert Jones was not a State Case, that he retained legal settlement in Boone County and

costs of commitment should be submitted to Boone County for payment. Boone County paid these costs on December 13, 1949.

"On December 6, 1962, the Clarinda Mental Health Institute wrote the Division of Mental Health concerning the placement of this patient outside the Institute. In reviewing the case we found that Clarinda had been charging his care to the State of Iowa. The total costs from November 16, 1949 up to and including December 13, 1962 amount to $18,-920.81.

"We have had several conversations with Clerk of the District Court of Boone County concerning this case. The Clerk asked Mr. A.V. Doran, Attorney for the guardianship, to submit information to this office.

"You will note that some years ago this patient inherited $1,000.00 After the costs of the guardianship were paid Boone County filed claim and collected the remaining funds to apply on the costs of his care and keep. At present there is a guardianship in Boone County and as of July 25, 1962 there were funds in the amount of $6,664.01. Mr. Doran states that Boone County was not and is not the County of residence. However, Boone County had previously accepted charges for his care and had filed a claim for such charges. The patient had not been out of the State of Iowa for a period of one year, Boone County was advised the patient was being returned to Iowa, and commitment charges were paid by that County. In fact, Boone County was the acknowledged County of legal settlement and would have undoubtedly paid the costs of care of this patient if Clarinda had billed them.

"At present this patient has received maximum hospital care and is awaiting transfer to a County Home.

"There are no outstanding charges on this case as the costs of care have been billed to the State.

"I would appreciate you requesting an opinion from the Attorney General relative to the following questions:

1. Is Boone County the County of legal settlement?

2. Should Boone County be required to reimburse the State of Iowa for the charges erroneously billed to the State?"

Section 252.16(2), Code 1962, provides as follows:

"Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year."

Section 252.16(3), Code 1962, provides as follows:

"Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county."

From the facts submitted, it is patent that the patient in question has not acquired legal settlement in any new county in the State of Iowa, inasmuch as he has always been an inmate of some state institution from the time of his original commitment, except for a period of approximately five months, which is insufficient under the statute to result in the acquisition of a new legal settlement. At the end of this five-month period, the patient in question was committed in the State of California as a non-resident.

The Iowa State Board of Control and Boone County acquiesced in the State

of California's determination by the subsequent payment of commitment costs. It is obvious therefore that the original legal settlement in Boone County remains unaltered.

Statutes of limitations normally do not run against the state (*In re Estate of Peers*, 234 Iowa 403, 12 N.W. 2d 894), and if this were not true, it has been held that the account for support is an open running account and the statute of limitations does not run until five years subsequent to the last charge. See *Scott Co. v. Townsley*, 174 Iowa 192, 156 N.W. 291.

Section 230.20, Code 1962, provides in pertinent part:

"Each superintendent . . . shall certify . . . the amount not previously certified by him due the state from the several counties having patients changeable thereto, and the comptroller shall thereupon charge the same to the county so owing. . . . "

In 1906 O.A.G. 111, 312 this department held that where an erroneous charge was made against the county by the State for the support of a patient, the auditor had the authority to correct the erroneous entry; and we are also of the opinion that where an erroneous charge is made against the State the rule will operate the same.

Thus it is our belief that Boone County is the county of legal settlement, and as such is required to reimburse the State of Iowa for charges erroneously billed to the State.

12.6

INSTITUTIONS: Legal settlement, insane persons—Person once adjudged insane can subsequently acquire legal settlement if he has sufficient mental capacity. Discharge as "cured" presumes return of sanity. Fact of continuing guardianship does not rebut presumption since guardianship was established at time patient was incompetent.

November 8, 1963

Board of Control
L O C A L

Attention: James O. Cromwell, M.D.
Director of Mental Health

Gentlemen:

This is in reply to your recent letter wherein you submitted the following:

"The following is a record of the hospitalization of the above named patient:

Date of Admission	Institution	Date of Disch.	County of Settlement
3-2-1941	Mt. Pleasant	11-18-1942 Cured	Jefferson
3-20-1947	Cherokee	7-26-50 Trans. Mt. Pleasant	Jefferson
7-26-1950	Mt. Pleasant	12-14-53 Cured	Jefferson
8-18-1955	Mt. Pleasant	8-16-57 Cured	Jefferson
11-6-1962	Mt. Pleasant	(Still Hospitalized)	

"On November 6, 1962, the patient was admitted to Mt. Pleasant by

order of the Commission of Hospitalization of Johnson County as a charge to Jefferson County.

"Jefferson County denied responsibility stating the patient had gained legal settlement in Johnson County. Patient had been on Convalescent Leave for several months prior to discharge on August 16, 1957. The Convalescent Leave sponsors were A and B, cousins, and the patient occupied a room at the home of C, Fairfield, Iowa, who is the mother of A. Patient later rented a small house and lived in it for a few months. Later she moved to Iowa City, and according to Jefferson County, spent virtually all of her time for the next five years in Johnson County with the exception of an occasional visit in Fairfield, Iowa.

"The patient's attorney and guardian, contends that the patient retains legal settlement in Jefferson County. He feels since she is under guardianship as an incompetent person, she would be unable to exercise an intent to establish another legal settlement and would retain her original legal settlement.

"Although the patient has been discharged on three occasions as "cured" the guardianship has never been dismissed.

"Costs of care are presently being charged to Jefferson County but they have deducted charges.

"I would appreciate your opinion as to the county of legal settlement of the patient for determining which county is financially responsible for the costs of her care at the State Institution."

Your attention is invited to 1946 *O.A.G.* 121, which held in part:

"A person having legal settlement in one county and being discharged as 'not cured' from an institution; keeps legal settlement in the first county unless he is declared sane and has intention to establish a new legal settlement."

The patient in the instant case was released as cured on August 16, 1957. Thereafter, this individual was physically present for the requisite period of time in Johnson County that is necessary to establish legal settlement.

70 *C.J.S.* 42 states:

"The fact that a person has once been adjudged insane will not prevent him from gaining a settlement if he has mental capacity sufficient to choose his own residence, although he has not formally been declared restored to sanity."

In the instant case, it is undisputed that the patient was discharged as cured. Your attention again is invited to 1946 *O.A.G.* 122, wherein this department stated:

"Upon full discharge, which is a discharge as cured, the presumption that sanity has returned is also clear."

Your attention is invited to *Mileham v. Montagne,* 148 Iowa 476, wherein the Iowa Court held that a full discharge from a hospital for the insane is prima facie evidence of sanity.

It does not appear that the guardianship in the instant case would rebut the presumption, since the guardianship was established at a time when the patient was incompetent and not at the time of her discharge as cured. The establishment of her home in Johnson County subsequent to her discharge as cured, and the maintenance of the same for approximately five years, is operative to invest legal settlement in Johnson County.

12.7

INSTITUTIONS: **Legal settlement, married woman, temporary hospitalization**—§252.16(1)(4), 1962 Code. Married woman has settlement of her husband if he has one; if not, or if she lives apart from or is abandoned by him, she may acquire settlement as if she were unmarried. Any settlement which wife had at time of her marriage may at her election be resumed upon death of her husband, or if she be divorced or abandoned by him. Absence of patient from county temporarily, for purpose of treatment in hospital, is without relevance to acquisition of legal settlement.

July 25, 1963

Board of Control of State Institutions
L O C A L

Attention: M. J. Brown

Gentlemen:

This is to acknowledge your letter wherein you request an opinion upon the following:

"The above named patient was originally admitted to the Mental Health Institute on November 21, 1957 from Lee County as a charge to that County. Patient was discharged as "Recovered" on March 23, 1959.

"James and Annie Brillion, with their children, had resided in Keokuk, Iowa, Lee County, prior to February 4, 1960, at which time James deserted the family. Mrs. Brillion and the children moved to Davenport, Iowa on April 16, 1960. They resided at 707 Marquette Street until February, 1961 at which time they moved to 613 Myrtle where they resided until April, 1962, when they returned to Keokuk, according to Lee County; Scott County stated they returned May 7, 1962.

"On May 31, 1960, James Brillion was convicted for larceny and sentenced to the Penitentiary at Fort Madison. He was paroled in January, 1962. Lee County states the Brillions were divorced in April, 1962; Scott County says August, 1962.

"On December 6, 1962, Mrs. Brillion was admitted to the Mental Health Institute, Mount Pleasant, Iowa, from Lee County as a charge to Scott County. Scott County denied legal settlement.

"We felt Mrs. Brillion would have established legal settlement in Scott County as she resided in Scott County for approximately two years and was living apart from her husband. Further, it would seem this was her intent as she later obtained a divorce. Scott County has denied responsibility stating that Mrs. Brillion could not establish legal settlement until after her divorce, that she was living in her mother's home and had not established her own domicile; had gone to the State University Hospital on May 4, 1960 returning to Davenport on June 23, 1960, and they felt this interrupted her residence.

"We are enclosing copies of the correspondence we received from the counties which will give the Attorney General more complete and detailed information.

"I would appreciate an opinion from the Attorney General as to the county of legal settlement of Annie Brillion for the purpose of determining which county is financially responsible for the costs of her care at the State Institution."

Section 252.16(1) provides:

"A legal settlement in this state may be acquired as follows:

(1) Any person continuously residing in any county in this state for a period of one year acquires a settlement in that county."

Section 252.16(4) provides:

"A married woman has the settlement of her husband, if he has one in this state; if not, or if she lives apart from or is *abandoned by him,* (emphasis supplied), she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or *abandoned by him,* (emphasis supplied), if both settlements were in this state."

It becomes clear from the facts submitted that the patient in question, as an abandoned woman, was empowered to establish a legal settlement independently from that of her husband. The mere fact that the residence may have been with her mother would only be operative to show an intention to resume the settlement which the wife had at the time of her marriage.

The absence of the patient from Scott County for approximately two months while in the University Hospital is without relevance to the acquisition of a legal settlement. See *Washington County v. Mahaska County,* 47 Iowa 57.

It is therefore our belief that the county of legal settlement of the patient in question, by virtue of §252.16(4), clearly and unequivocally rests in Scott County.

12.8

INSTITUTIONS: Legal settlement, minor child—§§230.1, 252.16(5), 1962 Code. Legal settlement of minor child is that of his father, if there be one; if not, then that of his mother, unless guardian has been appointed.

February 19, 1963

Mr. M. J. Brown
Administrative Assistant
Board of Control of State Institutions
L O C A L

Dear Mr. Brown:

This will acknowledge receipt of your letter wherein you request an opinion on the following:

"A dispute has arisen between Des Moines and Scott Counties concerning the legal settlement of this minor child who was admitted to the Mental Health Institute, Mount Pleasant, Iowa, on July 27, 1961.

"The mother and step-father resided in Burlington, Des Moines County, Iowa from 1952 to 1958. They then moved to Davenport, Scott County, Iowa on September 1, 1958 where they purchased a home. On January 15, 1960, the mother obtained a divorce and custody of the children. On February 5, 1960 the mother and children returned to Burlington for five months and then moved back to Davenport. Scott County contends the mother resumed legal settlement in Des Moines County and returned to Davenport merely because she was unable to sell the home she owned in Davenport. It was later determined the mother had not resumed settlement in Des Moines County as she had not established settlement in that county prior to her marriage, having lived in Illinois before coming to Burlington.

"This minor has made his home with his grandparents in Burlington,

Iowa, for some time. According to Scott County he had lived with his grandparents for two years before his mother came to Iowa and has never lived in Scott County. Scott County feels he acquired the legal settlement of the grandparents although they were never given legal custody or appointed guardians by the court."

Section 252.16(5), 1962 Code, provides:

"Settlement—how acquired. A legal settlement in this state may be acquired as follows:

"5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother."

Section 230.1 provides:

"Liability of county and state. The necessary and legal costs and expenses attending the taking into custody, care, investigation, commitment, and support of a mentally ill person committed to a state hospital shall be paid:

"1. By the county in which such person has a legal settlement, or

"2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.

"The residence of any person found mentally ill who is a patient of any state institution shall be that existing at the time of admission thereto."

Neither the Code of Iowa nor the courts have provided that legal settlement can be acquired by a minor child through grandparents of such child where the grandparents have not been appointed guardians, or both the parents are deceased.

The statutes herein above set forth are applicable to the situation of Lewis Allen Smith. The statutes are clear and unambiguous as to how a legitimate child acquires a legal settlement. Lewis Allen Smith has legal settlement in Scott County, since that is the settlement of his mother. See: §252.16(5).

12.9

INSTITUTIONS: Minor patients, authority to impose contribution—§§223.13, 223.16, 1962 Code. Board of supervisors has no authority to impose conditions of financial contribution when admitting minor patients.

March 4, 1963

Mr. Edward F. Samore
Woodbury County Attorney
204 Courthouse
Sioux City, Iowa

Dear Mr. Samore:

This is to acknowledge receipt of your recent opinion request, wherein you submit the following:

"Section 223.13 of the Iowa Code provides that voluntary admissions must be with the approval of the board of supervisors. Sec. 223.16 makes those legally bound for the support liable to the county to the same degree and in the same manner as though such patient were an inmate of a hospital for the mentally ill except that no charge or lien shall be imposed upon the property of any patient under twenty-one years of age or upon the property of persons legally bound for the support of any such

minor patient. To what extent, if any, can the board of supervisors impose conditions of financial contribution upon the admission of minor patients?"

It has been frequently held that a public body has no powers other than those expressly or impliedly granted. *Gritton v. City of Des Moines,* 247 Iowa 326, 73 N.W. 2d 813. Iowa Code §223.13 contains no authority, either express or implied, which would allow the board of supervisors to impose conditions of financial contribution when admitting minor patients. Section 223.13 merely designates the board of supervisors as the approving agency for the voluntary admission of patients under Chapter 223.

Your attention is directed to two prior opinions issued by this department that interpret §223.16, one dated November 15, 1961, and the other found in 1956 *O.A.G.* at page 156 thereof, and holding that patients under twenty-one years of age are entitled to free support and treatment at Glenwood State School and Woodward State Hospital. Thus, the board of supervisors has no authority to impose conditions of financial contribution when admitting minor patients to these institutions.

12.10

INSTITUTIONS: Students' tuition—§§282.18, 282.24, 1962 Code. Residents of Board of Control institutions who attend summer school in district where institution is situated, entitled to payment of tuition by Treasurer of State.

May 27, 1964

Board of Control of State Institutions
L O C A L

Attention: Mr. Jim O. Henry, Chairman

Dear Mr. Henry:

This is in reply to your request for an opinion upon the following:

"Some children from the Annie Wittenmeyer Home attend public high school during the summer, which creates tuition and transportation expenses. How should these expenses be paid?"

In reply thereto, we advise as follows: Section 282.18, Code of Iowa, 1962, as amended by the 60th General Assembly provides:

"Children who are residents of a charitable institution organized under the laws of this state, or residents of any institution under the jurisdiction of the Board of Control, and who have completed a course of study for the eight grades as required by section 282.19, shall be permitted to enter any approved public high school in Iowa that will receive them, and the tuition and transportation when required by law shall be paid by the treasurer of the state from any money in his hands not otherwise appropriated, and upon warrants drawn and signed by the state comptroller on requisition issued by the superintendent of public instruction."

Tuition payments by the treasurer of state for residents of such institutions are not prohibited merely because the pupil is enrolled in summer school, nor where the tuition rate exceeds the maximum amount contained in §282.24. Section 282.24 provides in pertinent part:

"The superintendent of public instruction shall determine a maximum tuition rate to be charged for students, elementary or high school, *residing within another school district or corporation.*"

By virtue of the emphasized language in the above statute, it becomes

inoperative to the case at bar. Children of school age who are residents of the institutions set forth in §282.18 are residents of the district in which such institution is located. *Salem Independent School District v. Kiel,* 206 Iowa 967, 221 NW 519; *School Township 76 of Muscatine County v. Nicholson,* 227 Iowa 290, 288 NW 123. Section 279.10, Code of Iowa, 1962, provides:

> "The school year shall begin on the first of July and each school regularly established shall continue for at least thirty-six weeks of five school days each and *may be maintained during the entire calendar year.*"

Thus the authority to provide educational training throughout the calendar year has been provided, and a school district or corporation which sees fit to maintain a summer school program in a district wherein an institution is situated permits those residents of that institution to avail themselves of this school privilege in the same manner that they could avail themselves of the benefits in the regular school year.

It is, therefore, our opinion that payment of tuition for persons who are residents of institutions under the jurisdiction of the Board of Control who attend summer school sessions in a district in which the institution is situated should be made in accordance with §282.18, and §282.24 is without application in this instance.

12.11

INSTITUTIONS: Transfers, county home to private institution — §§139.31, 218.1, 227.1, 227.2, 227.6, 227.11, 227.14, 227.15, 227.16, 252.27, 252.38, 343.8, 1962 Code. (1) Board of supervisors of county without proper facilities may transfer mentally ill to private institution, with consent of Board of Control and proper certification by Commission of Hospitalization or as provided by §227.15. (2) County may receive state aid for such transferees, provided the expense for their care is paid out of county mental health fund. (3) Board of supervisors may transfer poor from county home to private institution upon compliance with §252.38.

December 10, 1963

Mr. Samuel O. Erhardt
Wapello County Attorney
Wapello County Court House
Ottumwa, Iowa

Attention: A. Hollis Horrabin
Assistant County Attorney

Dear Mr. Erhardt:

Receipt is acknowledged of your letter of recent date, requesting opinion in the following matter:

> "Wapello County has a tuberculosis sanitorium called Sunnyslope. It is in danger of being closed because of a lack of patients. The Wapello County Home is overcrowded and more room is needed. Sunnyslope has one wing that is entirely vacant and the Board of Supervisors want to know if they can legally transfer inmates of the County Home to the Sunnyslope Sanitorium.
>
> "If a transfer is legally possible, then they want to know,—will the county still be eligible for the $3.00 a week per person that they receive from the State Institutional Fund.
>
> "Also, can the Board enter into a valid contract with the T. B. trustees for paying the trustees rent or money for the care and keep of the county home inmates."

We assume that "Sunnyslope" is not under ecclesiastical or sectarian management or control. See §343.8. We assume, also, your county home cares for two classes of individuals, the mentally ill and the poor.

The first class would be those persons found by the County Commission of Hospitalization, under Chapter 229, to be mentally ill and fit subjects for custody and treatment in a state hospital. These persons may be patients as a result of direct commitment by the commission, or as a result of a transfer from a state hospital.

The Board of Control is responsible for the management of the state hospitals (§218.1) and the supervision of all county and private institutions where the mentally ill are kept (§227.1).

Section 227.14 provides:

"Boards of supervisors of counties having no proper facilities for caring for the mentally ill may, with the consent of the board of control, provide for such care at the expense of the county in any convenient and proper county or private institution for the mentally ill, which is willing to receive them."

The Board of Control has the authority to make inspections of private and county institutions caring for the mentally ill (§227.2), and to remove mentally ill persons from private or county institutions to a state hospital or other institution for failure to comply with its rules (§227.6).

Section 227.15 provides:

"No person shall be confined and restrained in any private institution or hospital or county hospital or other general hospital with psychiatric ward for the care or treatment of the mentally ill, except upon the certificate of the commission of hospitalization of the county in which such person resides, or of two reputable physicians, at least one of whom shall be a bona fide resident of this state, who shall certify that such person is a fit subject for treatment and restraint in said institution or hospital, which certificate shall be the authority of the owners and officers of said hospital or institution for receiving and confining said patient or person therein."

It is therefor our opinion that, if the county has no proper facilities for the care of the mentally ill, the Board of Supervisors, with the consent of the Board of Control, may transfer a mentally ill person to a private non-ecclesiastic, non-sectarian institution; provided the County Commission of Hospitalization or two reputable physicians certify that such person is a fit subject for treatment and restraint in that institution.

With respect to the state aid, §227.16 provides:

"For each patient heretofore or hereafter received on transfer from a state hospital for the mentally ill under the provisions of section 227.11, or committed to a county home by a commission of hospitalization, the county shall be entitled to receive the amount of three dollars per week for each patient from the state mental aid fund hereinafter provided for."

Since the mentally ill being cared for in the county have either been transferred from a state hospital or committed to the county home by the Commission of Hospitalization, the requirements for state aid have been met.

The purpose of this provision is to induce counties to care for the mentally ill at the local level, thus alleviating overcrowding at state hospitals. Acts 1949, 53rd G.A., Ch. 99.

Lack of proper facilities being a prerequisite to transfer from a county home presupposes that these patients would have to be cared for in a state hospital if not sent to a private institution.

A county may receive state aid for one transferred under §227.11 from a state hospital to either a county home or private institution. 1956 *O.A.G.* 95.

It would be inconsistent, and would defeat the purpose of the statute, if the county could receive state aid for a mentally ill person transferred to a private institution from a state hospital, but could not receive that aid for such a person transferred to a private institution from a county home which lacked proper facilities.

However, §227.18 provides, "The state aid herein provided. . . shall be credited to the county fund for mental health." Chapter 99, Acts 53rd G.A., which created this aid, stated:

> " . . . in order to accomplish the purposes desired . . . the State of Iowa should absorb a portion of the expense incurred by the counties providing such needed and adequate care. . .".

Since the fund, which is reimbursed, is the mental health fund, it would be incumbent on the county to pay for the care of these patients from the mental health fund, in order to be eligible for this aid.

It is therefore our opinion that a county would be eligible to receive state aid for mentally ill patients transferred from the county home to a private institution, provided the expense for their care is paid out of the county mental health fund.

The second class of individuals cared for in the county, the poor, are "those who have no property, exempt or otherwise, and are unable, because of physical or mental disability, to earn a living by labor". (§252.1).

Section 252.27, providing for the type of relief to be given the poor, states:

> "The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money. The amount of assistance issued to meet the needs of the person shall be determined by standards of assistance established by the county boards of supervisors. They may require any able-bodied person to labor faithfully on the streets or highways at the prevailing local rate per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways."

In addition, Section 252.38 provides:

> "The board of supervisors may make contracts with the lowest responsible bidder for furnishing any or all supplies required for the poor, for a term not exceeding one year, or it may enter into a contract with the lowest responsible bidder, through proposals opened and examined at a regular session of the board, for the support of any or all the poor of the county for one year at a time, and may make all requisite orders to that effect, and shall require all such contractors to give bonds in such sum as it believes sufficient to secure the faithful performance of the same."

Supervisors may transfer the poor from the county home to a private, non-ecclesiastic, non-sectarian institution, provided the requirements and procedures outlined in §252.38 are followed.

Since "Sunnyslope" is a tuberculosis sanitorium, your attention is directed to §139.31, which provides:

> "Any person who knowingly exposes another to infection from any communicable disease, or knowingly subjects another to the danger of contracting such disease from a child or other irresponsible person, shall be liable for all damages resulting therefrom, and be punished as provided in this chapter."

Section 139.32 makes a violation of any provision of the chapter punishable as a misdemeanor.

12.12

INSTITUTIONS: Transfers, inmates—§§218.1, 218.90, 1962 Code. Board of Control is expressly authorized by statute to transfer an individual institutionalized in one institution under its purisdiction to any other institution under its jurisdition.

June 24, 1963

Board of Control
L O C A L

Attenton: Jim O. Henry

Dear Mr. Henry:

This is in reply to your request of May 22, 1963, for an opinion upon the following:

"Section 218.90, Code of Iowa, 1962 provides 'The board of control may transfer any prisoner under its jurisdiction from any institution supervised by the board of control and may transfer any prisoner to any other institution for mental or physical examination and treatment, retaining jurisdiction of said prisoner when so transferred.

"A fifteen year old boy, Robert Moser, was recently committed to Fort Madison Penitentiary for life after being convicted for the crime of first degree murder. Does the Board of Control have the authority to transfer this prisoner to the Boy's Training School at Eldora for a period of time, but no longer than his twenty-first birthday?"

Section 218.90, Code of Iowa, 1962, provides in pertinent part:

"The board of control may transfer any prisoner under its jurisdiction from any institution supervised by the board of control to any other institution under said board of control. . ."

Section 218.1, Code of Iowa, 1962, provides in pertinent part:

"The board of control shall have full power to . . . manage, control, govern . . .

"(8) Training School for Boys

"(14) State Penitentiary . . ."

In construing a statute, the courts are required to interpret the language used by the legislature fairly and sensibly, in accordance with the plain meaning of the words used. *Green vs. Brinegar,* 228 *Iowa* 477, 292 N.W. 229.

Accordingly, the language of §218.90 plainly and clearly provides that the Board of Control has the authority to transfer any prisoner under its jurisdiction from any institution supervised by the board to any other institution falling under the control of said Board.

It becomes manifest then, since the Board of Control has jurisdiction over individuals institutionalized in the State Penitentiary as well as those at the Training School at Eldora, that the Board of Control is vested with the authority to transfer the fifteen year old boy from Fort Madison Penitentiary to the Boy's Training School at Eldora.

12.13

INSTITUTIONS: Transportation, indigent patients—§§271.10, 271.11, 1962 Code. Advance payments for actual and necessary expenses attending transportation of indigent patients to and from State Sanatorium shall be made

by Finance Committee of Board of Regents. Certification to Finance Committee that transportation costs are proper may be made by rule upon Superintendent of State Sanatorium.

August 24, 1964

Mr. Carl Gernetzky
Chairman, Finance Committee
State Board of Regents
L O C A L

Dear Carl:

Reference is herein made to yours of the 16th ult., in which you submitted the following:

"Chapter 271 of the 1962 Code of Iowa deals with the State Sanatorium. Chapter 271.10 and 271.11 particularly deal with the payment of transportation costs for indigent patients.

"We have not been paying the necessary expenses for transportation of those patients coming to the Sanatorium. The question has been asked of us why are we not paying these transportation costs.

"We would appreciate it very much if you would tell us if there is anything in the way of a former opinion or any other evidence that might have led us not to pay these costs. If there is nothing that may have prevented us from paying these costs, is it now mandatory that we take the necessary steps to define a procedure whereby such transportation costs may be paid as defined in 271.10 and 271.11.

"We have another question in connection with this and that is whose responsibility is it to certify to the Finance Committee that such transportation costs are proper."

In reply thereto, I advise as follows. These statutes to which you refer, being Sections 271.10 and 271.11, Code of 1962, appear as follows:

"§271.10. *Indigent patients.* The state shall, on certificate of the finance committee of the board of regents, pay, out of any money in the state treasury not otherwise appropriated, the actual and necessary expense attending the transportation of an accepted applicant for admission, to and from the sanatorium, and the expense of treating said applicant at said institution, if said applicant is entitled to free treatment under Chapter 254."

§271.11 *Advancing transportation expense.* In cases contemplated by section 271.10, the finance committee shall certify an itemized estimate of the expense attending such transportation, which certificate shall be filed with the state comptroller who shall thereupon issue his warrant to the finance committee for said amount. Within thirty days thereafter the finance committee shall file with said comptroller, an itemized and verified statement, approved by the board, of the actual and necessary expense attending said transportation, together with the receipt of the treasurer of state for any part of said warrant not expended. If said warrant prove insufficient, said certificate shall show the amount of such deficiency, and the comptroller shall at once issue his warrant therefor."

It is clear from these statutes that the Finance Committee of the Board of Regents shall in the first instance pay the actual and necessary expense attending the transportation of an accepted applicant for admission to and from the State Sanatorium, and prescribe the method of making the foregoing described payment. This duty, imposed upon the Finance Committee of the Board of Regents by these statutes, previously was the obligation of the Superintendent of the Sanatorium, then under the jurisdiction of the Board of Control. See Section 3395, Code of 1935.

This duty imposed upon the Superintendent continued until the 48th General Assembly by Chapter 93, paragraph 9, substituted the words "business manager" for the word "superintendent". As so amended, the statute remained the same until the 52nd General Assembly by Chapter 110, paragraph 4, substituted the words "finance committee of the Board of Education" for the words "business manager approved by the Board of Control", and as so amended, subject only to the change made in the name of the Board of Education to the Board of Regents. See 56th General Assembly, Chapter 131, and has so remained and now exhibited in Section 271.10 and 271.11.

The quoted statutes §271.10 and §271.11, are plain in prescribing the duty and the means of fulfilling the duty imposed upon the Finance Committee. They were designed to provide indigent patients advance transportation expense to and from the State Sanatorium. It is to be said that this duty of imposing this transportation expense upon the state, and with subsequent billing back the expense to the county was expressed in opinions of this department appearing in the Report for 1938 at page 97 and 359. These opinions were issued prior to the amendment by the 52nd General Assembly by Chapter 110, imposing these duties upon the Finance Committee of the Board of Education. At any rate, there does not presently appear any statutory duty upon the county to pay these transportation expenses and we do not regard these opinions as precedents.

There appears to be no statutory provision expressly imposing the duty of providing the Finance Committee with information it is necessary to have in order that such committee can comply with the duties imposed upon it by Section 271.10. This is a duty the Board of Regents could *by rule* impose upon the Superintendent. See Section 271.4(1).

12.14

INSTITUTIONS: Voluntary patients, statutory penalties—Ch. 147, §2(2), Acts 60th G.A., §230.22, 1962 Code. 1% penalty provided by §230.22 does not apply to voluntary patients in hospitals controlled by Ch. 230, 1962 Code.

May 27, 1964

Marvin R. Selden, Jr.
State Comptroller
L O C A L

Dear Mr. Selden:

Reference is herein made to yours of February 19, 1964, in which you submitted the following:

"The 60th G.A. enacted Chapter 147 and made it necessary for the State Comptroller to enforce collection against counties for voluntary patients.

"Section 2 of the above chapter amended Sec. 229.42, Code of Iowa, 1962, but they added in lines 11 and 12 the following:

" 'All the provisions of Chapter two hundred thirty (230) of the Code shall apply to such voluntary patients so far as is applicable.' "

"Chapter 147 (House File 342) had as an explanation the following:

" 'This bill provides that income to state hospitals for care of voluntary patients be paid to the State Comptroller and requires the counties to perform all the functions as required for other mental hospital patients."

"Taking into consideration lines 11 and 12 of Chapter 147, and the explanation on the House Bill 342, we would like to know if Sec. 230.22

as clarified by an Attorney General opinion, dated January 24, 1963, would apply also to voluntary patients where payment has been delayed 60 days after date of certification.

"If the 1% penalty applies to voluntary patients also, would the amount assessed and collected as a penalty go into the General Fund the same as on involuntary patients?"

In reply thereto, I advise as follows: Section 230.22, Code of Iowa, 1962, provides the following:

"Penalty. Should any county fail to pay these bills within sixty days from the date of certificate from the superintendent, the state comptroller shall charge the delinquent county the penalty of one percent per month on and after sixty days from date of certificate until paid. Provided, however, that the penalty shall not be imposed if the county has notified the comptroller of error or questionable items in the billing, in which event, the comptroller may suspend penalty only during the period of negotiation."

It was provided by Chapter 147, §2(2), Acts of the 60th General Assembly, the following:

"All the provisions of chapter two hundred thirty (230) of the Code shall apply to such voluntary patients so far as is applicable."

This statute, as amended above, is claimed to be applicable to the claims against voluntary patients in state hospitals controlled by Chapter 230. It is to be noted that the penalty provision provided in §230.22 does not expressly provide for the imposition of this penalty upon voluntary patients. The claim arises by implication from the language used in Chapter 147, noted above.

However, the rule of law is that statutory penalties will not attach for violation of statutes creating the penalties by implication. The penalty must be expressly created and imposed by the statute. The rule is stated in 23 Amer. Juris., title, *Forfeitures and Penalties*, paragraph 37 and 38, as follows:

"It is a general rule of statutory construction that penal statutes are to be strictly construed. Statutes imposing penalties are subject to this rule of strict construction. They will not be construed to include anything beyond their letter, even though within their spirit . . ."

"The rule of construction that penalty statutes are to be strictly construed, and not construed to include anything beyond their letter governs the extent of the operation of such statutes. A statutory penalty must be expressly created and imposed by the statute, and cannot be raised or extended by implication. Therefore, no person shall be subjected to a penalty unless the words of the statute plainly impose it. . ."

See also *State of Iowa v. CM&St. Paul R.R. Co.*, 122 Iowa 22, and Sutherland on Statutory Construction, 3rd Edition, Chapter 56.

By reason of the foregoing, I am of the opinion that the 1% penalty provided by §230.22, Code of Iowa, 1962, does not apply to voluntary patients in hospitals controlled by Chapter 230, Code of 1962.

12.15

Tubercular patients, free care—§254.8, 1962 Code. Certificate of free care must be issued for tubercular patient to receive free care at sanatorium. (Rehmann to Goodenberger, Madison Co. Atty., 1/2/63) #63-1-1

CHAPTER 13

INSURANCE

STAFF OPINIONS

LETTER OPINIONS

13.1

INSURANCE: Premium tax on Medical Assistance for the Aged funds—§432.1, 1962 Code. Insurance company, acting as fiscal agent for State Department of Social Welfare for administration of Medical Assistance for Aged program, is not subject to gross premium tax either on funds it administers or on compensation received for its services.

September 18, 1963

Mr. William E. Timmons
Commissioner of Insurance
L O C A L

Dear Mr. Timmons:

This is in response to your letter in which you submit the following:

"As a result of legislation enacted during the 60th General Assembly the Iowa Department of Social Welfare contemplates contracting with a fiscal agent to administer a program of Medical Assistance for the Aged. Certain commercial insurance companies licensed by this department are interested in the possibility that they might serve in the capacity of the fiscal agent under this program.

"Our question is this: Will any amount of the money payable to a fiscal agent under the terms of the proposed contract between the Iowa Department of Social Welfare and the fiscal agent, if the fiscal agent is a company subject to the tax provision of Chapter 432, be subject to the tax imposed under said chapter?"

Section 432.1, Code of Iowa, 1962 provides:

"Tax on gross premiums. Every insurance company or association of whatever kind or character, not including fraternal beneficiary associations and nonprofit hospital and medical service corporations, shall, at the time of making the annual statement as required by law, pay to the treasurer of state as taxes, an amount equal to the following:

"1. Two percent of the gross amount of premiums received during the preceding calendar year by every life insurance company or association, not including fraternal beneficiary associations, or the gross payments or deposits collected from holders of fraternal beneficiary association certificates, on contracts of insurance covering risks resident in this state during the preceding year, including contracts for group insurance and annuities and without including or deducting any amounts received or paid for reinsurance. * * *

"2. Two percent of gross amount of premiums, assessments, and fees received during the preceding calendar year by every company or association other than life on contracts of insurance other than life for

business done in this state, including all insurance upon property situated in this state, after deducting the amounts returned upon canceled policies, certificates and rejected applications."

This section is not applicable to the present situation because these insurance companies would not be engaged in the collection of premiums but would be acting as an agent of the State in dispersing old age medical assistance funds.

The fact that a company's main business is insurance does not mean that it is subject to a gross premium tax on all of its undertakings. Here, the relationship existing between the fiscal agent and the State would be that of principal and agent. The Iowa Supreme Court, in *Associates Discount Corp v. Goetzinger,* 245 Iowa 326, 62 N. W. 2d 191 (1954), stated that an automobile dealer's status as an agent of a finance company was not altered by the fact that the dealer's main business was selling automobiles and his main interest was in making such sales.

The State of Iowa, acting through its agent, is not engaged in the insurance business. The rule is stated in 29 *Am. Jur.* 440:

"Generally speaking, a corporation, whether or not organized for profit, the object of which is to provide the members of a group with medical services and hospitalization, is considered not engaged in the insurance business and hence not subject to the insurance laws."

In this regard, see 1960 **O.A.G.** 140, employee contributions to welfare funds are not taxable as insurance premiums. See also *Donald v. Chicago, B. & Q. R. Co.,* 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492 (1895); and 167 *A. L. R.* 322.

Consequently, the function performed by the insurance companies is not the insuring of a risk for a premium to be paid by the insured as contemplated under §432.1, and the company acting as the fiscal agent for the State is not subject to the gross premium tax either on the funds it administers or on compensation received for the company's services.

13.2

County hospitals, employee benefit coverages, Blue Cross—§§347.14(9), 347.14(10), 517A.1, Ch. 514, 1962 Code. §§347.14(9) and (10) provide no authority for purchase of Blue Cross-Blue Shield or other personal need policies for employees, but merely provide additional authorization for purchase of liability types of insurance deemed necessary by board of trustees. (Bump to McKinley, Mitchell Co. Atty., 4/23/63) #63-4-5

13.3

Fraternal benefit societies—§§512.1, 512.56, 1962 Code. Fraternal benefit societies are not authorized to take applications from persons who are not members of society for insurance coverage on dependent children. (Bump to Timmons, Com'r. of Insurance, 9/19/64) #63-9-2

CHAPTER 14

LABOR

STAFF OPINIONS

14.1

LABOR: Boiler Inspection Insurance—§§89.2, 89.6, 1962 Code. Section 89.6 does not require insurance companies to inspect equipment specified in Ch. 89 as condition precedent to writing insurance on same. If insurance company does not inspect, it is duty of the state boiler inspector to inspect as required by §89.2.

July 13, 1964

Mr. Dale Parkins, Commissioner
Bureau of Labor
Des Moines, Iowa

Dear Mr. Parkins:

This is in response to your opinion request of recent date in which you state:

"The Bureau of Labor requests a written opinion regarding the inspection of boilers and unfired steam contained pressure vessels.

"It has been brought to this department's attention that a group of insurance companies are including these pressure vessels on a fire coverage policy giving broad coverage. In the past these vessels were written under the boiler and machinery policy and were inspected by the insurance company inspectors, submitting written report of each object or vessel to this department.

"When covered on the fire insurance policy no inspection or registering with State will be done.

"Opinion requested on the following questions:

"In accordance with Chapter 89 are the Insurance Companies required to inspect boilers or unfired pressure vessels where they write insurance on the same?

"If under Chapter 89 of the Code it is your determination that the insurance company is not required to make such inspections, then are we correct in assuming that it is the responsibility of this department to make the inspections?"

Section 89.2, Iowa Code, 1962 as amended by Chap. 92, Acts 60th G.A. provides in pertinent part:

"1. It shall be the duty of the state boiler inspector, to inspect or cause to be inspected internally and externally, at least once every twelve months, except as otherwise provided in this section, in order to determine whether all such equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used, all steam boilers, tanks, jacket kettles, generators and other appurtenances used in this state for generating or transmitting steam for

power, or for using steam under pressure for heating or steaming purposes, in order to determine whether said equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used.

"3. Upon making an inspection of any equipment covered by this chapter, the inspector shall give to the owner or user thereof a certificate of inspection, upon forms prescribed by the labor commissioner, which certificates shall be posted in a place near the location of said equipment."

Section 89.6 provides in pertinent part:

"1. The inspection required by this chapter shall not be made by the state boiler inspector where any owner or user of any equipment specified by this chapter obtains an inspection by a representative of reputable insurance company and obtains a policy of insurance from said company upon said equipment.

"The insurance company shall file a certificate of inspection on forms approved by the commissioner of labor stating that such equipment is insured and that inspection shall be made in accordance with section 89.2. Upon such showing and the payment of a fee of one dollar the commissioner of labor shall issue a certificate of inspection by the bureau of labor which shall be valid only for the period specified in section 89.2."

Section 89.6 does not create a duty to inspect as a condition precedent to the issuance of a policy of insurance upon that equipment specified in Chapter 89. Said section only establishes the condition precedent by which the state boiler inspector shall waive the duty to inspect created by §89.2. Section 89.6 clearly indicates that an inspection by the state boiler inspector shall not be made only where any owner or user of equipment specified in Chapter 89 *obtains an inspection* by a representative of a reputable insurance company *and* obtains a policy of insurance from said company upon said equipment. The second paragraph of §89.6 (1) provides in mandatory terms that the insurance company shall file a certificate of inspection stating that the equipment is insured and that inspection shall be made in accordance with §89.2. None of these provisions, however, create an affirmative duty on the part of insurance companies to inspect such equipment before a policy of insurance may be issued. These provisions relate only to the showing that must be made by an insurance company before the normal inspection duty created by §89.2 shall be waived.

It is, therefore, the opinion of this office that §89.6 does not require insurance companies to inspect the equipment specified in Chapter 89 as a condition precedent to writing insurance on the same. If such insurance company fails to inspect and to make the showing required by §89.6 it is then the duty of the state boiler inspector to inspect the specified equipment as required by §89.2.

14.2

LABOR: Employment Agency, Branches, license requirement—§§94.11, 95.1, 95.2, 1962 Code. Separate license is required for each separate location of employment agency branch office whether any such branch office is operated by agents of principal agency or franchised owner of branch office.

October 27, 1964

Mr. Dale Parkins
Commissioner
Bureau of Labor
Des Moines, Iowa

Dear Mr. Parkins:

This is in response to your letter of September 22, 1964, wherein you present the following questions:

1. Does an employment agency licensed under Ch. 95 of the Iowa Code, 1962, need a separate license for each branch office:

a. Operated by employees of the licensee and under the direct control of the licensee?

b. Owned and operated by individuals enfranchised by the licensee?

The answers to both phases of the above question are identical and are contained in §§95.1, 95.2 and 94.11 of the Code of Iowa, 1962. Section 95.1 of the Code of Iowa, 1962 states:

"Every person, firm, or corporation who shall keep or carry on an employment agency for the purpose of procuring or offering to procure help or employment, or the giving of information as to where help or employment may be procured either directly or through some other person or agency, and where a fee, privilege, or other thing of value is exacted, charged or received either directly or indirectly, for procuring, or assisting or promising to procure employment, work, engagement or situation of any kind, or for procuring or providing help or promising to provide help for any person, whether such fee, privilege, or other thing of value is collected from the applicant for employment or the applicant for help, shall before transacting any such business whatsoever procure a license from a commission, consisting of the secretary of state, the industrial commissioner, and the labor commissioner, all of whom shall serve without compensation."

Section 95.2 of the Code of Iowa states in part:

"Application for such license shall be made in writing to the commission provided in section 95.1. It shall contain the name of the applicant, and if applicant be a firm, the names of the members, and if it be a corporation, the names of the officers thereof; and the name, number and address of the building and place where the employment agency is to be conducted. * * *"

It will be noted that §95.1, supra, uses the phrase "an employment agency" in the singular without reference to any possibility of branch offices or branch agencies.

It will also be noted that §95.2 calls for the application for such a license to contain "the name, number and place where the employment agency is to be conducted," and this information as to location likewise is in the singular and contemplates but one location per license.

Reason for the singularity of location for each licensee may be found in the investigative and enforcement powers of the Labor Commissioner and his delegates under Chapter 94 of the Code relating to employment agency regulation. Section 94.11, Code of Iowa, 1962, provides:

"The labor commissioner, his deputy or inspectors, and the chief clerk of the bureau shall have authority to examine at any time the records, books, and any papers relating in any way to the conduct of any employment agency or bureau within the state, and must investigate any complaint made against any such employment agency or bureau, and if any violations of law are found he shall at once file or cause to be filed, an information against any person, firm, or corporation guilty of such violation of law."

A separate license for each separate office would facilitate such investiga-

tion and regulation in that the records of the commissioner would then disclose a business address for each agency and each branch of said agency.

In **Hardwick vs. Bublitz,** 253 Iowa 49.54, 111 N.W. 2d 309, the Supreme Court of Iowa in dealing with a question of statutory interpretation said:

> "* * * where the words of the statute make clear its meaning, there is no cause for judicial construction."

Accordingly, it is our opinion that a separate license is required for each separate location of an employment agency branch office whether any such branch office is operated by agents of the principal agency or a franchised owner of the branch office.

14.3

LABOR: Employment Agency, contracts, copy delivery and basis for fee limition—§§94.6, 94.8, 1962 Code. 1. Non-delivery of copy of application or agreement with employment agency to job applicant voids any rights otherwise enforceable thereunder against applicant whether or not applicant signs same. 2. Maximum fee rate, chargeable by employment agency for its services to applicant actually paid less than $250 wages for first month of employment is 25% of such wages, regardless of ultimate unrealized wage potential of position.

November 30, 1964

Mr. Robert Chesher
Deputy Commissioner
Bureau of Labor
Des Moines, Iowa

Dear Mr. Chesher:

This is in response to your letter wherein you ask:

1. Is an application for employment from, or agreement with an employment agency to furnish or procure for an applicant employment binding upon the applicant if there is no delivery to the applicant at the time of making thereof of a true and full copy of such application or agreement? If the applicant should sign such an application or agreement would such signing make such an application or agreement binding in the absence of such delivery?

2. In the situation where an employment agency contract specifies a rate of compensation to the agency for its services of: 1. 5% of the annual gross earnings of an applicant successfully placed in "permanent employment" in "executive, administrative, technical and sales positions," and, 2. specifies other rates ranging from 25% of the first month's gross earnings on "all other positions" paying less than $250.00 per month to 60% of the first months salary on such positions paying $400.00 per month and up, and, 3. 25% of the first month's gross earnings of "all hourly paid unskilled production workers" such classifications being in the alternative and mutually exclusive what is the maximum legal rate of charge for such services under said contract where the proposed compensation to be paid a successful applicant for a position as "telephone collector" for a credit bureau is to be $1.25 per hour to start—then commission, with a potential of $400 to $500 per month.

The first question propounded seems to relate to a matter of civil liability between an agency and its applicants in which the Bureau of Labor would have no interest under the statute and as to which the Bureau of Labor would have no duty or authority to advise anyone and for this reason we can only advise informally that the question seems to be answered in the negative by Section 94.8, Code of Iowa, 1962; *Dodson vs. McCurnin,* 178 Iowa 1211, 1215, 160 N.W. 927; and *Rock vs. Ekhern,* 162 Wis. 291, 156 N.W. 197, 198. Sec. tion 94.8, Code of Iowa, 1962, states:

"It shall be unlawful for any person, firm or corporation to receive any application for employment from, or enter into any agreement with, any person to furnish or procure for said making such application or contract, at the time of the making thereof, a true and full copy of such application or agreement, which application or agreement shall specify the fee or consideration to be paid by the applicant. (S13, §2477-i; C24, 27, 31, 35, 39, §1547; C46, 50, 54, 58, §94.8)"

Rock vs. Ekhern, 162 Wis. 291, 156 N.W. 197, 198 states:

"In *Melchoir vs. McCarty,* 31 Wis. 252, 11 Am. Rep. 605, it was held:

"Then general rule of law is that all contracts which are repugnant to justice, or founded upon an immoral consideration, or are against the general policy of the common law, or contrary to the provisions of any statute are void even where such statute does not expressly declare them void."

Dodson vs. McCurnin, 178 Iowa 1211, 1215, 160 N.W. 927 states:

"But it is not necessary that a prohibited evil should be made criminal, or even penalized, to vitiate contracts made in furtherance of that evil. Jemison v. Birmingham & A. R. Co. (Ala.), 28 So. 51; McGehee v. Lindsay, 6 Ala. 16; Moog v. Espalla (Ala.), 9 So. 596. And a contract which, in its execution, contravenes the policy and spirit of a statute, is equally void if made against its positive provisions. Hunt v. Knickerbacker, 5 Johns. (N.Y.) 327; Wetmore v. Brien, 3 Head (Tenn.) 723."

Accordingly, it is our opinion that any such "application" or any such agreement" relating to services in furnishing or procuring employment unaccompanied by delivery to the applicant of a true and full copy thereof at the time of its making contravenes the expressed public policy of the state as set out expressly in its statutes made for the protection of the applicant and is thus wholly void and unenforceable against the applicant. Whether such an application or agreement is signed by the applicant is entirely immaterial under said controlling statute to the answer to this question.

The answer to your second question which is clearly within the scope of the authority and duties of the Bureau of Labor is governed by §94.6 of the 1962 Code of Iowa, which provides:

"No such person, firm, or corporation shall charge a fee for the furnishing or procurement of any situation or employment paying less than two hundred fifty dollars per month which shall exceed twenty-five percent of the wages paid for the first month of any such employment or situation furnished or procured, but in no event shall the charge for the furnishing or procurement of any situation or employment be in excess of five percent of the annual gross earnings. The provisions of this section shall not apply to the furnishing or procurement of platform attractions or amusement enterprises. (C27, 31, 35, §1546-al; C39, §1546.2; C 46, 50, 54, 58, §94.6)"

Obviously, the exceptions stated in the last sentence of said section are not applicable to the position of "telephone collector" and the only question to be determined in finding the maximum rate of compensation to the employment agency for placing the applicant in the position is the exact amount of compensation to be paid the applicant for the applicant's services as telephone collector. Under the statute cited above the nature of the work to be performed by the applicant is quite immaterial and only two maximum rates apply:

1. Twenty-five percent of the wages "paid" for the first month of employment where the total "paid" is less than $250.00.

2. Five percent of the gross annual earnings in other situations.

The word "paid" above is unqualified and means just what it says. It is in no way synonomous with potential payment for any period subsequent to said first month.

Accordingly, any charge by an employment agency in excess of 25% of the wages paid a job applicant for the first month of employment in a situation where the total wages in fact paid for that period are less than $250.00 per month is illegal regardless of what the ultimate unrealized wage potential of the position might be.

14.4

LABOR: Employment agency, definition—§§94.6, 95.1, 1962 Code. A theatrical booking agency must be licensed as an employment agency but is not restricted in the amount of fees it may charge.

July 16, 1963

Mr. Dale Parkin
Commissioner of Labor
L O C A L

Dear Mr. Parkin:

This is in reply to your letter dated June 19, 1963, in which the following questions were asked:

1. "Whether an agency engaged in theatrical bookings is required to be licensed as an employment agency, and

2. "Whether an agency is restricted in its fees by section 94.6" Section 95.1 provides as follows:

"License. Every person, firm, or corporation who shall keep or carry on an employment agency for the purpose of procuring or offering to procure help or employment, or the giving of information as to where help or employment may be procured either directly or through some other person or agency, and where a fee, privilege, or other thing of value is exacted, charged or received either directly or indirectly, for procuring, or assisting or promising to procure employment, work, engagement or situation of any kind, or for procuring or providing help or promising to provide help for any person, whether collected from the applicant for employment or the applicant for help, shall before transacting any such business whatsoever procure a license * * *".

The type of agency intended to be regulated by the legislature is one that holds out to the applicant that the agency can provide help or employment by virtue of contacts which the agency has with various employers and employees. (1942 *O.A.G.* 146). The broad scope of the statute would appear to embrace the activities of a theatrical booking agency.

Therefore, in answer to the first question, it is our opinion that an agency engaged in theatrical bookings would be required to obtain a license as an "employment agency".

Section 94.6, which provides the maximum fees which may be charged by any employment agency, contains the following exception: "The provisions of this section shall not apply to the furnishing or procurement of vaudeville acts, circus acts, theatrical, stage or platform attractions or amusement enterprises."

In answer to the second question, it is therefore our opinion that by the express wording of the statute, an agency engaged in theatrical bookings would not be restricted in the fees that it could charge.

14.5

LABOR: Workmen's compensation, payment to minors—§§85.45, 85.49, 668.3, 1962 Code. Injured minor employee may be paid "healing period" benefits directly without complying with the requirements of Ch. 668.

May 1, 1963

Honorable Jake B. Mincks
State Senator, Ninth District
Wapello County
Route 1
Ottumwa, Iowa

My dear Senator Mincks:

This is in reply to your letter of April 10, 1963, in which you state:

"An Act recently passed by the Sixtieth General Assembly, namely, House File 36, strikes from Section 85.49, Code 1962, the words 'an injured minor employee, or'. The intent of the Act was to allow an injured minor employee to receive workmen's compensation payments during the time he was away from his employment due to plant incurred injury.

"The question has been raised that even though the intent of this legislation was to allow, in the above-named instances, payments to be made directly to the minor, Chapter 668, Code 1962, would still apply regarding guardianships and payments to minors.

"My question specifically, is, 'Would an injured minor employee be entitled to workmen's compensation benefits to be paid directly to him during the healing period under the provisions of Chapter 85, Code 1962, or would this be suspended by the provisions of Chapter 668?"

Section 85.49, Code 1962, reads as follows:

"When an *injured minor employee, or* a minor dependent or one mentally incompetent, is entitled to compensation under this chapter, payment shall be made to the clerk of the district court for the county in which the injury occurred, who shall act as trustee, and the money coming into his hands shall be expended for the use and benefit of the person entitled thereto under the direction and orders of a judge of the district court, in which such county is located, during term time or in vacation. The clerk of the district court, as such trustee, shall qualify and give bond in such amount as the judge may direct, which may be increased or diminished from time to time as the court may deem best. The cost of such bond shall be paid by the county as the court may direct by written order directed to the auditor of the county who shall issue a warrant therefor upon the treasurer of the county. If the domicile or residence of such *injured minor employee or* minor dependent or one mentally incompetent be in a county other than that in which the injury to the employee occurred the industrial commissioner may order and direct that compensation to such minors or incompetents be paid to the clerk of the district court of the county wherein they shall be domiciled or reside." (Italics supplied)

House File 36 passed by the House on January 28, 1963, passed by the Senate on February 28, 1963, and signed by the Governor on March 14, 1963, will become effective upon publication. It reads as follows:

"Be it Enacted by the General Assembly of the Senate of Iowa:

"Section 1. Section eighty-five point forty-nine (85.49), Code 1962, is hereby amended as follows:

"1. By striking in lines one (1) and two (2) following the word 'when' the words 'an injured minor employee, or'.

"2. By striking in lines twenty-two (22) and twenty three (23) following the word 'such' the words 'injured minor employee or'.

"Section 2. Section eighty-five point forty-five (85.45), Code 1962, is amended by adding thereto the following subsection:

"When the recipient of commuted benefits is a minor employee, the industrial commissioner may order that such benefits be paid to a trustee as provided in section eighty-five point forty-nine (85.49) of the Code."

EXPLANATION OF HOUSE FILE 36

"Under the present law, weekly benefits due a minor employee must be paid through a trustee. This is unwieldly and is an inconvenience to minor employees, many of whom have dependents to support. Since the benefits paid under workmen's compensation are less than what the wages paid to the minor employees while on the job, the minor employees should be allowed to receive their weekly compensation benefits directly."

Section 668.3, Code of Iowa, 1962, provides as follows:

"If a minor owns property, a guardian must be appointed to manage the same. If no guardian has been appointed, money due the minor or other property to which the minor is entitled, not exceeding in the aggregate the sum of five hundred dollars in value, may be paid or delivered to a parent of the minor entitled to the custody of the minor or to the natural guardian, or to the person with whom said minor resides, for such minor, upon written assurance verified by the oath of such person that all of such money or property of the minor does not exceed in the aggregate the sum of five hundred dollars; and the written receipt of such person shall be acquittance of the person making such payment of money or delivery of such property."

At the outset it is important to note that it is the primary rule of statutory construction and interpretation that the legislative intention must be given effect. *In re Klug's Estate,* 251 Iowa 1128, 104 N.W. 2d 600 (1960).

Preliminarily, the interrelationship between §85.49 *before* amendment and §668.3 should be considered. There appear to be no judicial interpretations regarding this interrelationship.

Section 668.3 is a general statute dealing with the protection of the property rights of minors. This section as originally enacted in 1843 (Rev. St. 1843 (Terr.), Ch. 99, §1) required a guardian to be appointed if a minor owned property regardless of the value of that property.

"If a minor owns property, a guardian must be appointed to manage the same." §668.3, Code of Iowa, 1939.

In 1951 the legislature amended §668.3 to read as it does today. This would appear to manifest a legislative intent to liberalize the requirements with regard to the administration of the property of minors. Ch. 219, §1, Acts 54th G.A.

Section 85.49 *before* amendment dealt with a special class of minors under limited circumstances; i.e., "injured minor employee or minor dependent." It is as such a special statute.

"The law is equally well established that where a general statute, if standing alone, would include the same matter as a special statute and thus conflict with it, the special statute will be considered an exception to

the general statute." *Wilson vs. City of Council Bluffs,* 253 Iowa 162, 164; 110 N.W. 2d (1961)

The legislative intent appears to be to except minors receiving benefits under Chapter 85 from the provisions of §668.31.

With respect to §85.49 *as amended,* it is a rule of statutory construction that an amended statute is to be interpreted as if it read originally as amended. Neidermeyer vs. Neidermeyer, 237 Iowa 685 22 N.W. 2d 346 (1946).

Section 85.49 *as amended* no longer includes "an injured minor employee" as an exception to §668.3. However, §85.45 *as amended* does give the commissioner discretion to make lump sum payments to injured minor employees under the provisions of §85.49. Thus, if the commissioner exercises his discretion and orders payment of commuted benefits to a minor employee under §85.49, there would be no necessity of complying with the provisions of §668.3, since the amended §85.45 should be considered a special statutory exception to the general statute.

If, however, the commissioner does not order the commuted benefits to be administered under §85.49, must there be compliance with §668.37? Likewise, must §668.3 be complied with when an injured minor employee is entitled to weekly benefits? There is no explicit language in Chapter 85 *as amended* which specifically answers these two questions. There is now no provision relating to the method by which an injured minor employee is to be paid in these two instances.

"The intention of the lawmakers is the law. This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. In construing a statute, the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute, though not within the letter. A thing within the letter is not within the statute, if not also within the intention. When the intention can be collected from the statute, words may be modified or altered, so as to obviate all inconsistency with such intention. When great inconvenience or absurd consequences will result from a particular construction, that construction should be avoided, unless the meaning of the legislature be so plain and manifest that avoidance is impossible. The courts are bound to presume that absurd consequences leading to great injustice were not contemplated by the legislature, and a construction should be adopted that it may be reasonable to presume was contemplated. A statute is passed as a whole, and not in parts or sections; hence, each part or section should be construed in connection with every other part or section. In order to get the real intention of the legislature, attention must not be confined to the one section to be construed." *Oliphant vs. Hawkinson,* 192 Iowa 1259, 1263, 183 N.W. (1920).

It would seem to be absurd to require a guardianship to be established for an injured minor in order for him to receive small amounts of healing period compensation, when if it were a larger amount under a lump sum settlement a guardianship could be avoided by using the clerk as trustee under §85.49. It would also seem to be inconvenient to require a guardianship when the amount to be received by a minor is in fact less than he received directly as a working employee.

"A statute should be construed with reference to its general purpose and aim, which involves consideration of its subject matter, the change in or addition to the law, and the mischief sought to be remedied and the nature and reason of the remedy." *Elks vs. Coon,* 186 Iowa 48, 172 N.W. 173 (1919).

The court should, when possible to do so, construe a legislative enactment so as to give intelligent purpose to its provisions and assume that the legislature realized the need therefor. *Hansen vs. Henderson,* 244 Iowa 650, 56 N.W. 2d 59 (1952).

In construing statutes courts seek to ascertain the intention that existed in the legislative mind when the statute was enacted. *State ex rel. True vs. City of Council Bluffs,* 230 Iowa 1109, 300 N.W. 264 (1941).

It seems abundantly clear, as stated in the explanation of House File 36, that the legislature intended to "permit minor employees to draw benefits in the same manner that they draw their wages or salaries except in cases of commutations wherein it would give the industrial commissioner discretionary powers. . . It would seem that the legislative intent, the controlling factor, is to except *all* provisions of Chapter 85 from the restrictions of Chapter 668.

Therefore, it is our opinion that workmen's compensation benefits may be paid directly to an injured minor employee during the healing period under provisions of Chapter 85, without complying with the requirements of Chapter 668, Code of Iowa, 1962.

CHAPTER 15

LIQUOR, BEER AND CIGARETTES

STAFF OPINIONS

15.1

LIQUOR, BEER AND CIGARETTES: Advertising, interstate commerce — §123.47, 1962 Code. State may constitutionally prohibit advertisement of alcoholic beverages under police power whether advertising media is engaged in interstate commerce or not. Regulation prohibiting advertisement of alcoholic beverages by price is valid.

May 26, 1964

Mr. Homer Adcock, Chairman
Iowa Liquor Control Commission
L O C A L

Dear Mr. Adcock

This is in reply to your recent request wherein you submit the following:

> "Would it be lawful under Iowa law and regulations promulgated thereunder, to show Iowa liquor prices in the advertisements appearing in a magazine which is clearly engaged in interstate commerce?"

Although the manufacture and sale of intoxicating liquors, where permitted, is a lawful business which is fully entitled to protection, it is nevertheless regarded as dangerous to public health, safety, and morals and is thus subject to strict regulation or control by the states under their police power, which has generally been held to include the prohibition or regulation of advertising.

Thus, a statute prohibiting signs exceeding a certain size advertising any alcoholic beverage and prohibiting altogether signs using the words "bar," "barroom," "saloon," "cocktail bar," "lounge," or words of similar import upon or adjacent to any premises licensed to sell alcoholic beverages was held to be a valid exercise of the state's police power in *Premier-Pabst Sales Co. vs. State Board of Equalization* (1936, D.C. Cal.) 13 F. Supp. 90, notwithstanding the fact that beer manufacturers had already erected such signs prior to the enactment of the statute and that the enforcement of the statute would result in the signs' destruction. The court said that since the state is permitted, under its police power, to wholly prohibit the business of intoxicating liquors from being carried on, it can, within the meaning of the Fourteenth Amendment, prohibit and control advertising as one of its incidents.

And a statute prohibiting the advertisement of liquors on signboards or billboards, but providing that signs advertising beer or malt liquors could be

placed upon a brewery or premises where beer or malt liquor was lawfully stored or kept, was held not to be unconstitutional as an unreasonable interference with a lawful private business in *Fletcher vs. Paige* (1950 Mont.) 220 P.2d 484, 19 A.L.R.2d 1108, the court stressing the exceptional nature of the business, which subjected it to a high degree of control by the legislative branch.

And a municipal ordinance prohibiting advertising of intoxicating liquors within 200 feet or schools or churches was held to be reasonable and valid in *Horton vs. Old Colony Bill Posting Co.* (1914) 36 R.I. 507, 90 A.822, Ann. Cas. 1916A 911.

In *Advertisor Co. vs. State* (1915) 193 Ala. 418, 69 So. 501, the court, in rejecting the defendant's contention that the state could not enjoin the sale of periodicals and newspapers containing liquor advertisements in violation of the state's anti-advertising liquor law on the ground that it would impair the obligation of outstanding contracts which the defendant had for their publication, stated that a citizen had no vested right to engage in the sale of liquor or otherwise to deal in it and that the business, which necessarily included all contracts made in pursuance thereto, was completely subject to the police power of the state. In any event, the court noted, the defendant would not be bound by its contract with dealers, in view of the rule which avoids a promise where the act or thing contracted to be done is subsequently made unlawful by an act of the legislature.

Section 123.47, Code of Iowa, 1962, provides:

"Advertisements. Except as permitted by federal statute and regulations, there shall be no public advertisement or advertising of alcoholic liquors in any manner or form within the state.

"1. No person shall publish, exhibit, or display or permit to be displayed any other advertisement or form of advertisement, or announcement, publication, or price list of, or concerning any alcoholic liquors, or where, or from whom the same may be purchased or obtained, *unless permitted so to do by the regulations enacted by the commission and then only in strict accordance with such regulations.* (Emphasis supplied)

"2. This section of the chapter shall not apply, however:

a. To the liquor control commission.
b. To the correspondence, or telegrams, or general communications of the commission, or its agents, servants, and employees.
c. To the receipt or transmission of a telegram or telegraphic copy in the ordinary course of the business of such agents, servants, or employees of any telegraph company."

Examination of the federal statutes and regulations reveal that they pertain solely to labeling and adulteration standards. They contain no grant whatsoever to permit the advertisement by price of alcoholic liquors.

The regulations promulgated by the Iowa Liquor Control Commission implementing §123.47 authorize certain forms of advertising by liquor licensees, and certain forms of advertising by non-licensees. The pertinent portions to the question at bar are as follows: Rule 1.1, subsection (a), provides in pertinent part:

"No person engaged in business as a producer, manufacturer, bottler or importer of distilled spirits, directly or indirectly, or through an affiliate, shall publish or disseminate or cause to be published or disseminated in any newspaper, magazine or similar publication any advertisement of distilled spirits, unless such advertisement is in conformity with these regulations:"

Rule 2.2, headed "Prohibited Statements," provides:

"An advertisement shall not contain * * *"

and thereafter sets forth several classifications of statements.

Rule 2.3, headed "Other Prohibited Statements", enumerates in subsection (e) as one of the "other prohibited statements" as being "the code number or price". The question, therefore, arises as to whether or not §123.47 can validly prohibit advertising of alcoholic liquors which is carried on in a media engaged in interstate commerce and, if so, can regulations promulgated thereunder lawfully control the same.

By virtue of the Wilson Act, 27 U.S.C., §121, which provides that all intoxicating liquors transported into any state shall, upon arrival therein, be subject to the operation and effect of its laws enacted in the exercise of its police power, to the same extent and in the manner as though such liquors had been produced in such state, and shall not be exempted therefrom by reason of being introduced therein in original packages, it has been uniformly held that a statute making it a punishable offense to advertise or give notice of the sale or keeping for sale of intoxicating liquors does not violate the commerce clause of the Constitution, the court's reasoning that the state's power to prevent the sales of intoxicating liquors carries with it the power to prevent the solicitation of sales, which is deemed to be the equivalent of advertising.

Your attention is invited to the following authorities which support this view: *Advertiser Co. v. State* (1915) 193 Ala. 418, 69 So. 501; *State ex rel. Black v. Delaye* (1915) 193 Ala. 500, 68 So. 993, L.R.A.1915E 640. *State v. J. P. Bass Pub. Co.* (1908) 104 Me. 288, 71A. 894, 20 L.R.A. NS 495. *State ex rel. West v. State Capital Co.* (1909) 24 Okla. 252, 103 P. 1021.

Administrative rules or regulations prohibiting or controlling the advertising of intoxicating liquors have generally been upheld providing they are reasonable and are adopted pursuant to statutory authority.

Thus, a regulation of the Liquor Control Commission prohibiting any retail licensee from having any exterior sign or other advertising matter bearing the name or trademark of any manufacturer or wholesaler of an alcoholic beverage was held to be reasonable and within the scope of the powers conferred on the commission in *Amarone v. Brennan* (1940) 126 Conn. 451, 11 A.2d 850, where the general statute, pursuant to which the rule was adopted, directed that all advertising of alcoholic liquors should be subject to such rules and regulations as the Liquor Control Commission prescribed.

By the very language of the Iowa statutes, it is clear that advertising of alcoholic liquors is prohibited unless authorized by the Iowa Liquor Control Commission, and then only in strict accordance with such regulations. It is, therefore, our opinion that the prohibition preventing the advertisement of alcoholic liquors in Iowa is a valid and constitutional exercise of the state police power and the regulations promulgated thereunder controlling the advertisement of Iowa liquor prices in an advertising media engaged in interstate commerce are lawful and must be strictly complied with.

15.2

LIQUOR, BEER AND CIGARETTES: Advertising, solicitation by police officers--Ch. 114, Acts 60th G.A. Unlawful for off-duty law enforcement officer to solicit advertising from liquor licensee.

August 19, 1963

Mr. Homer Adcock, Chairman
Liquor Control Commission
L O C A L

Attention: Lawrence F. Scalise, Director
Law Enforcement Division

Dear Mr. Adcock:

This is in reply to your letter where you inquire:

"Specifically, we would like to know whether or not an off-duty policeman would have the right to sell advertising to merchants or anyone on behalf of the Des Moines Police Burial Association. The money derived from these ads, I have been advised, goes to the widows and children of the deceased members."

Senate File 437, as amended, (now Ch. 114, Acts of the 60th G.A.), provides in pertinent part:

"It shall be unlawful for any law-enforcement officer or other official to accept or solicit donations, gratuities, advertising, gifts or other favors, directly or indirectly, from any licensee hereunder. Anyone violating this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than one hundred (100) dollars nor more than one thousand (1,000) dollars, or shall be subject to a jail term of not less than thirty (30) days, nor more than six (6) months, or to both such fine and imprisonment."

This prohibition is clear and explicit and leaves little for interpretation except the question of whether or not the prohibition applies to an off-duty policeman.

Your attention is invited to *Van Ness v. Borough of Haledon,* 56 A. 2d 888, 136 N.J.L. 623, in which the question at bar was posed and that Court stated:

"It is commonplace that a policeman is 'always on duty'. He is, indeed, in the sense that, even though not on regular service or a special or temporary assignment, he is yet chargeable with the same degree or responsibility, in dealing with an emergency or a special need, as if on a regular assignment. He is vested with police authority and obligated to exercise it when the occasion arises."

Sound and logical reasoning would have to be discarded to say that an off-duty policeman who is not performing the duties of his commission is not a law enforcement officer.

If the legislature had sought to prohibit the solicitation of advertising by law enforcement officers from liquor licensees only while on duty, they would have so declared. The legislative language only prohibits the solicitation of advertising from licensees, and is not operative to prohibit an off-duty policeman from solicitating advertising from non-licensees.

15.3

LIQUOR, BEER AND CIGARETTES: "Beer garden," Class B permits—§§124.9, 124.12, 1962 Code. Under permit issued within provisions of §124.9, a Class B permit holder can dispense beer in a so-called "beer garden" provided premises are equipped with tables and seats (§124.12), and complies with all other provisions of law with respect to sale of beer for consumption on the premises.

May 22, 1963

Mr. Keith A. McKinley
Mitchell County Attorney
Osage, Iowa

Dear Mr. McKinley:

Reference is made to your letter requesting an opinion on the following question:

"I have been requested by the sheriff of Mitchell County to obtain an opinion with regard to the following question:

"Under the provisions of Section 124.9, subsection 2 (b), can a Class "B" permit holder establish as part of the premises upon which he dispenses beer, a beer garden which is screened and which has a roof and the access to which is through the tavern adjacent thereto?"

Pertinent to your question are the following provisions of the Code of Iowa:

"124.9 Class "B" application. Except as otherwise provided in this chapter a class "B" permit shall be issued by the authority so empowered in this chapter to any person who:

"2. Establishes:
"(b) That the place or building where he intends to operate conforms to all laws, health and fire regulations applicable thereto, and is a safe and proper place or building."

"124.12 Authority under class "B" permit. Subject to the provisions of this chapter, any person holding a class "B" permit, issued as herein provided, shall be authorized to sell beer for consumption on or off the premises; provided however, that unless otherwise provided in this chapter, no sale of beer shall be made for consumption on the premises unless food is served and consumed therewith, and unless such place where such service is made is equipped with tables and seats sufficient to accommodate not less than twenty-five persons at one time. It shall be unlawful for any licensee hereunder to give away beer, or to promote the sale of beer by the gift of any lunch, meal, or articles of food except pretzels, cheese or crackers."

The question raised in your letter has been the subject of several opinions previously issued upon analogous situations, as indicated in the following excerpts of previous opinions issued by the Attorney General:

"Section 14 of the act defines what a Class B permit holder may do with reference to sales on the premises. It will be recalled that this section was amended by House File 611, and now provides, in substance, that a Class B permit shall entitle the holder to sell beer on or off the premises, 'provided, however, that unless otherwise provided in this act, no sale of beer shall be made for consumption on the premises unless food is served and consumed therewith, and unless such place where such service is made is equipped with tables and seats sufficient to accommodate not less than twenty-five persons at one time.' This amended Section 14, seems to be quite definite and specific in providing that the place where such service is made must be equipped with tables and seats sufficient to accommodate not less than twenty-five persons at one time. Of course, the rendering of such service to occupants of an automobile outside the building where the tables and seats for twenty-five persons are maintained, even though the automobile were on the premises, would not be in accordance with the language of this amended Section 14, and we are, therefore, of the opinion that a Class "B" permit holder cannot legally and properly serve beer outside the building where the tables and seats are maintained to occupants of an automobile even though the automobile is standing on the premises and off the public highway." (1934 O.A.G. 199, 200).

"A designation that there must be tables and seats, such as that just outlined, could not be construed in any other manner, in our opinion,

than that the Legislature intended, by making such a qualification, that the tables and seats be used. To say otherwise would be a fallacy of thought. The fact that there is a designation with reference to tables and seats, would mean that the beverage is to be served at the tables and seats. Otherwise it would serve no useful purpose in the act, whatsoever. It would simply be surplusage. Accordingly, the serving of beer to cars, in our opinion, is an evasion of the law. We are of the opinion that as long as the act says 'place or building' and that the permits issued describe the entire premises, if a permit holder so desires, he could serve the beverage at tables and seats on the lawn of the premises described in the permit. . . ." (1934 *O.A.G.* 246, 247).

"As the Legislature designated that there should be 'tables and seats sufficient to accommodate not less than twenty-five persons at one time,' we are of the opinion that the sale of beer to customers in parked automobiles is an evasion of the act. The fact that a designation was made about serving beer at tables and seats, leads us to the conclusion that it was the intention of the Legislature that beer should be served at tables and seats and not to patrons in parked automobiles. If such patrons cared to leave their automobiles and drink the beer on the lawn at tables and seats, we see no objection." (1934 *O.A.G.* 292, 293).

"This Department has rules that, as a permit describes the premises, upon which the building is located, the permit holder may sell any place in the building or on the premises. In other words—he may sell on the lot for which his permit is granted provided he has a sufficient number of tables and seats, as set out in Section 14 of the act under consideration.

"However, we do not feel that this would permit him to sell beer from an attached stand on the sidewalk, owing to the fact that there would not be the required seating capacity and the sidewalk could not be construed as a part of the premises over which the permit holder has exclusive control.

"In the case of where he desires to sell beer in the street in front of the building, where he holds a permit, we would construe this to be an evasion of the act, as it is not a part of the premises, described in his permit.

"Section 11 of the act deals with the application and the issuing of a permit. Subdivision (d) of that section states as follows:

"'d. The location of the place or building where the applicant intends to operate.

"We construe this to be the premises for which the permit is granted. This would not include the sale of beer on the sidewalk or in the street in front of the premises." (1934 *O.A.G.* 265, 266).

"Please be advised that it is the opinion of this Department that beer may be sold at any place on the premises by the Class "B" permit holder as long as Section 15 of the act is complied with, especially with reference to 'tables and seats sufficient to accommodate not less than twenty-five (25) persons at one time,' in each place where it is sold and that the places where sold on the premises are contained in the original permit. . . . ." (1934 *O.A.G.* 543).

"In accordance with Section 12 of House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, it is the opinion of this Department that beer could be sold at any place on the premises described in the permit if, at each place, the provisions with reference to seating capacity to accommodate twenty-five (25) persons at one time are complied with.

"In our opinion the matter which controls the situation is as to the description of the premises as it appears in the permit. If the additional room in which the permit holder desires to sell beer is not described in the permit, then, upon application to the city council, the council could allow the description to be amended to include the additional room. However, if they do not care to allow such an amendment, the only redress of the permit holder would be to make application for a new permit to cover the additional room." (1934 *O.A.G.* 570).

"In answer to your second question, will say that class "B" permit holders have the right to sell beer, under their permit, for the place described in said permit only." (1934 *O.A.G.* 603, 604).

It also has been the ruling of the Attorney General that cities and towns may not, by ordinance, designate additional places of business for any class "B" permittee other than the one place of business covered by the permit issued, and this lack of authority applies to permits issued to clubs equally with other class "B" permits. (Copy of said opinion, issued under date of January 19, 1956, is attached hereto).

It appears to be the general conclusion of the opinions hereinabove cited that the class of permit and the premises described in the permit would control in any given situation.

Therefore, in answer to your question, it would appear that a Class "B" permit holder, under a permit issued within the provisions of Section 124.9 of the Code, can dispense beer in a so-called "beer garden", provided that the premises are equipped with tables and seats as provided in Section 124.12, and complies with all other provisions of the law with respect to the sale of said beer for consumption on the premises.

15.4

LIQUOR, BEER AND CIGARETTES: Beer permits, relationship to liquor license—Class "A" liquor licensee who subsequently changes to commercial class "C" liquor license, should change nature of his beer permit from "B" club permit to "B" permit.

December 12, 1963

Mr. Melvin D. Synhorst, Chairman
State Permit Board
L O C A L

Attention: Virginia Carpenter

Dear Mr. Synhorst:

This is in response to your recent request wherein you submit the following:

"The State Permit Board respectfully requests an opinion on the following question. A private organization having a Class 'B' Club beer permit made application and obtained a Class 'A' liquor license. A short time later said private organization cancelled their Class'A' liquor license and made application and obtained a Class 'C' liquor license. Said organization *retained* their Class 'B' Club beer license. Is it plausible to assume that they will be selling liquor to the general public, and beer only to private club members? Would this involve two different types of business and enforcement?"

In reply thereto we advise the §10 of S.F. 437, 60th G.A. provides in pertinent part:

"Liquor control licenses issued under this chapter shall be of the following classes:

a. Class 'A'. A class 'A' liquor control license may be issued to a club and shall authorize the holder thereof. . .to sell alcoholic beverages so purchased to bona fide members and their guests by the individual drink for consumption on the premises only.

b. . . .

c. Class 'C'. A class 'C' liquor control license may be issued to a commercial establishment. . .and shall authorize the holder. . .to sell alcoholic beverages so purchased to patrons by the individual drink for consumption on the premises only."

Section 10 of S.F. 437, 60th G.A. further provides as follows:

"Upon posting bond. . .liquor control licenses may be issued to any person who (or whose officers and stockholders, in the case of a club or corporation, or whose partners, in the case of a partnership) is of good moral character, is the holder of a retail beer permit as defined in chapter one hundred twenty-four (124) of the Code, . . ."

The legislature in its requirement that an applicant for a liquor control license be a holder of a retail beer permit, failed to distinguish between a class "B" club beer permit and a class "B" beer permit.

Your attention is invited to 1934 *O.A.G.* 222, wherein this department held that sales of beer by a holder of a class "B" club beer permit must be confined to members only. Consequently, a class "C" liquor licensee who is the holder of a class "B" club beer permit has no authority to sell beer to the general public.

While the Liquor Control Act does not distinguish between the two types of retail beer permits in its requirements, to avoid the incongruities of this situation, it is deemed advisable that a class "C" liquor licensee make application for a change in the type of beer permit to conform with the nature of its commercial operation.

15.5

LIQUOR, BEER AND CIGARETTES: Bottles, breaking—Ch. 114, Acts 60th G.A. Licensee is required to immediately break bottles which contain liquor as soon as empty, and therefore may not use them for display purposes.

October 18, 1963

Mr. Homer Adcock, Chairman
Liquor Control Commission
L O C A L

Attention: Lawrence F. Scalise

Dear Mr. Adcock:

This is in reply to your recent letter wherein you submitted the following:

"In regard to 123.46(4e), as amended by the 60th General Assembly, which states:

'4. No person or club holding a liquor control license under this chapter, his agents or employees, shall:

(e) Reuse for the packaging of any spirits or wine any bottle or other container which has been used for the packaging of alcoholic beverages or possess any such bottle or container, or in any manner alter or increase, by the addition thereto of any substance, any portion of the original contents remaining in such bottle or container in which any portion of the original contents has been so altered or increased, or . . .'

"I have the following question. May anyone have in his possession empty whiskey bottles and use them for display purposes?"

Chapter 114, Acts of the 60th G.A., provides in pertinent part:

"No person or club holding a liquor control license under this chapter, his agents or employess, shall:

(e) Reuse for the packaging or any spirits or wine any bottle or other container which has been used for the packaging of alcoholic beverages or possess any such bottle or container, or in any manner alter or increase, by the addition thereto of any substance, any portion of the original contents remaining in such bottle or container in which any portion of the original contents has been so altered or increased, or . . ."

The prohibition contained in the above language specifically provides that a liquor licensee may not possess any bottle or container which has been used for the packaging of alcoholic beverages.

Your attention is also invited to the following pertinent prohibition:

"Every holder of a liquor control license shall keep a daily record of the gross receipts. . .and type of bottles emptied. . .Each bottle emptied, except beer bottles, *shall be broken immediately* by the licensee or his agent into a container provided for that purpose."

Thus it is clear that possession of empty bottles or other containers by a licensee which have been used for the packaging of alcoholic beverages is a violation of the Liquor Control Act.

15.6

LIQUOR, BEER AND CIGARETTES: Brewers, prohibited interest—§124.22, 1962 Code. It would be illegal for a Class "A" permittee to sell or rent to Class "B" or "C" permittees fixtures or personal property used in handling, serving, or dispensing of any utility items which would not be construed primarily as advertising and it would be further illegal for him to purchase or rent floor space upon the premises of a "B" or "C" permittee for any period. However, such items as are related to public health such as tapping equipment may be sold by Class "A" to "B" and "C" permittees.

October 22, 1963

Mr. A. L. George, Chairman
Iowa State Tax Commission
L O C A L

Dear Mr. George:

This is in response to your inquiry wherein you inquire as follows:

"1. Would it be illegal for a Class 'A' beer permittee to SELL OR LEND such items as bars, back bars, booths, trays, napkins, coasters, gas drums used in beer tapping equipment, tapping equipment, glass cleaning equipment and glassware to the holders of Class 'B" and Class 'C' permits?

"2. Would it be illegal for a Class 'A' permittee to purchase sign space or floor space for any period from a Class 'B' or Class 'C' permittee?

"3. Would it be illegal for a Class 'A' permittee to SELL OR LEND such items as air conditioner equipment, license frame holders, cash registers, or other utility items which would not be construed as primarily advertising pieces but used *within* the place of business of Class 'B' or Class 'C' permittees in the conduct or operation of the business?

With regard to your inquiry Number One, it is my opinion that the providing of such items as bars, back bars, booths, trays, napkins, gas drums used in beer tapping equipment, glass cleaning equipment and glassware to the holders of Class "B" and Class "C" permits by the holder of a Class "A" permit would be a violation of Section 124.22, Code of Iowa, 1962 (as amended by the Acts of the 60th G.A.) which provides as follows:

"124.22 Brewers, etc.—prohibited interest. No person engaged in the business of manufacturing, bottling or wholesaling beer nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving or dispensing of beer or food within the place of business of another permittee authorized under the provisions of this chapter to sell beer at retail; nor shall he directly or indirectly extend credit to any permittee for beer, or be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter."

In 34 *O.A.G.* 266, we held that the sale of fixtures for drawing of beer or bar fixtures by outright sale where the entire purchase price is paid in cash would be in violation of Section 124.22. In that opinion we said:

"We construe this to not only bar the sale, by conditional sales contract, in which case the title does not pass, also, where a chattel mortgage is given but that it also forbids a sale by the designated parties to the holder of a Class 'B' permit, because of the use of the words 'supply or furnish' that this includes a sale of any nature and that the intent of the Legislature, as expressed in this section forbids the supplying or furnishing by any means of fixtures or equipment to the holder of a Class 'B' permit.

"We feel that any other construction, that could be placed on the wording of this section would lead to endless subterfuges and evasions of the act. Each case would have to be investigated on its individual merits. Also, there might be a valid sale for cash consideration and the consideration would be inadequate and in the nature of a bonus for the handling of the product of the brewer from a business standpoint, in many cases, undoubtedly, the handling of such fixtures and equipment is for the purpose of inducing sales of their product. It is a side-line and used largely for the purpose of stimulating sales, It was obviously the intent of the Legislature not to encourage such a practice."

Certainly the language of that opinion clearly expressed the intention of the Legislature to prohibit sales of such items as you describe in your inquiry Number One to Class "B" and "C" permittees.

However, at this point it may be well to consider the specific problem which arises in connection with "tapping equipment," since, as a practical matter, that particular category possesses some unique characteristics.

Under FAA Regulation 6.22 tapping accessories such as rods, vents, taps, hoses, washers, couplings, vent tongues, and check valves may be sold to a retailer and installed. This Federal Regulation excepts the supplying of such items from the purview of the "tied-house" prohibitions by recognition of the custom in the beer industry which places the responsibility upon the wholesaler to provide a sanitary tapping system which will draw a clean and palatable product from the kegged bulk package he sells. He is the individual within whose particular knowledge and skill rest the best methods of maintaining sanitary and properly functioning tapping equipment. We do not believe that the Legislature intended to place the responsibility for maintaining this equipment upon what could in many cases be an unskilled and untrained

retailer. Furthermore, this tapping equipment is more in the nature of an integral part of the bulk keg which it is the wholesaler's business to sell, and, in any event, permitting a Class "A" permittee to supply or furnish such items would not be inconsistent with the purpose of the statutory "tied-house" prohibition, particularly where matters of consumer health are the primary motive, rather than an inducement to handle that wholesaler's product to the exclusion of another's. Once the brand has been selected by the retailer, these installations are available from any wholesaler, and, therefore, since the retailer's choice has been influenced by the promise of sale or loan of this tapping equipment, the element of inducement which the statute seeks to eliminate, is moot. For these reasons, then, tapping equipment may be provided by sale for fair consideration or loan by the Class "A" permittee to his Class "B" draft account. After the beer leaves the facuet, however, the providing of proper facilities for its service becomes the complete responsibility of the retailer, just as the cooling of the keg itself is his responsibility. To the extent, then that 34 *O.A.G.* 266 refers to beer drawing equipment, that opinion is modified to permit the Class "A" permittee to provide and maintain that equipment on the retailer's premises; as to any equipment and furnishings, however, the same strict prohibition must apply.

In 34 *O.A.G.* 268, we held that even in the case where a wholesaler was a dealer in refrigerating coolers and cabinets which he sold on conditional sales contracts to "B" permit holders, whether customers or not, such activity was in violation of the statute, since the wording of the section under consideration "is so broad as to include a sale of any nature because of the use of the words 'supply or furnish,' and hence we construe this to be a violation of the section of the act under consideration."

In both of the opinions quoted above, the property under consideration was in the nature of "fixtures." We hold that the same prohibition exists as to items of personal property "supplied or furnished" by the Class "A" permittee, and that such items are included within the terms of Section 124.22.

The above quoted opinions, insofar as we rely upon them here, were concerned with the state of fixtures and equipment. You also inquire as to the legality of loans of property even though provided without charge to the customer, title remaining in the wholesaler, could not be placed on the Class "B" permittee's premises without violation of Section 124.22.

We said in that opinion:

> ". . . and in arriving at this conclusion we take into consideration the fact that the refrigerator or cooler is not the property of the permit holder, but belongs to the brewer, bottler, or wholesaler. . . In the case where the permit holder continues to use the cabinet, it is not his property and in the event that he discontinues the sale of the particular product of the brewer, bottler, or wholesaler, the refrigerator or cooler can be taken away, such a procedure is a clear violation of the act under consideration."

In 38 *O.A.G.* 447 we held that the statute was violated when a wholesaler provided refrigeration equipment in the customer's tavern and charged a fee for it above the price of the beer purchased. Such an arrangement appears to be somewhat in the nature of a rental.

From the foregoing opinions we feel that the answer to the question you have posed in your inquiry Number One must be wholly in the affirmative (with the exception of tapping equipment) regardless of whether fixtures, equipment, or any other furnishings, are sold by any means, loaned, or rented. In other words, the terms "supply, furnish, give or pay for" are to be given their broadest meaning, as we believe the Legislature intended in its desire to eliminate any possibility of the "tied-house evil."

In your question Number Two you inquire as to the legality of a purchase

for any period of sign space or floor space by a Class "A" permittee from the holder of a Class "B" or "C" permit. It is my opinion that such an arrangement would not only violate the terms of Section 124.22, but also the provisions of Section 124.7 which provides as follows:

"124.7. Prohibited interest. It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of permit."

If a Class "A" permittee rented or purchased display space on a retailer's premises, payment would be made to the retailer for rendering a display service and the Class "A" permittee would acquire an interest to the property of the Class "B" or "C" permit holder. Such a situation would be at least an indirect interest such as is prohibited by Section 124.7. (Accord Rev. Ruling 56-628, FAA, which regards this arrangement as the acquisition of an interest in the property of the retailer and a violation of the "tied-house evil."

In your third question you inquire as to the legality of providing non-advertising utility items to the holders of Class "B" and "C" permits. It seems clear that such a direct subsidation of retailers must be a violation of Section 124.22 inasmuch as the Class "A" permittee would then acquire an interest in the "ownership, conduct, or operation of the business of another permittee," with the resultant danger described in 34 *O.A.G.* 266, supra. There would exist the opportunity for subterfuge and evasion. Sales might be made for inadequate consideration, and in effect would amount to a bonus to the retailer in the form of an excessive discount. The loans of utility items would place the retailer, at least to some extent, under the control of the Class "A" permittee and it is the elimination of those elements of control, coercion and dependence that the Legislature sought to accomplish. This sort of relationship between permittees would entail the same factor of inducement to purchase certain brands to the exclusion of others, as is forbidden by the "tied-house" prohibition. The purpose of the statute is to prevent a Class "A" permittee from controlling the retail outlet and gaining an advantage or control of the local marketing facilities.

It is my conclusion that sales or loans of items described in your question One and Three and all similar items, used on the premises of a Class "B" or "C" permit holder whether fixtures or items of personal property (with the exception of tapping equipment) are in violation of Section 124.7 and 124.22, in that such arrangements amount to at least an indirect subsidation of retailers. The purchase or rental of advertising space by the Class "A" permittee referred to in Question Two would be a clear violation of Section 124.7, since the Class "A" permittee would then acquire an interest such as prohibited by both Sections 124.7 and 124.22.

15.7

LIQUOR, BEER AND CIGARETTES: Cigarettes, possession by minors— §§98.2, 98.4, 98.5, 1962 Code. No person may give minor under 18 years of age written order to secure cigarettes; except tobacco in any other form; and minor found with cigarettes in his possession, at any place other than home of parents, can be charged with violation of §98.4.

February 4, 1964

Mr. D. E. Skiver
Osceola County Attorney
Sibley, Iowa

Dear Mr. Skiver:

Reference is made to your favor of recent date, which reads as follows:

"1. Is the written order referred to in Section 98.2 applicable only

to a specific purchase, or can it be in a form allowing the minor to purchase cigarettes at other times in the future?

"2. Is the written order referred to in Sect. 98.2 applicable only to a minor who purchases cigarettes for a parent or guardian or person in whose custody he is, and to be used only for transporting the cigarettes to the parent or guardian?

"3. If a minor is picked up at school for having cigarettes in his possession and it is determined that the cigarettes were purchased pursuant to written order of the parents, can the minor be charged under 98.5?

"4. Suppose a minor is found with cigarettes in his possession which have been given to him by his parents. In this instance, can he be charged under 98.5?"

Referring to your first question, we quote herewith §98.2 of the Code, which provides:

"Sale or gift to certain minors prohibited. *No person shall furnish to any minor* under eighteen years of age by gift, sale, or otherwise, any cigarette or cigarette paper, or any paper or other substance made or prepared for the purpose of use in making of cigarettes. No person shall directly or indirectly by himself or agent sell, barter, or give to any minor under eighteen years of age any tobacco in any other form whatever except upon the written order of his parent or guardian or the person in whose custody he is."

It is apparent from your question that you are under the assumption that a minor can obtain possession of cigarettes as long as he has the written order referred to in §98.2. Such is not our reading of the statute. We believe that this assumption, on your part, is probably due to the prevailing thought which arose out of the earlier provisions of the law as it appeared in the Code of Iowa for 1897, §5005, which provided:

"No person shall, directly or indirectly, by himself or agent, sell, barter or give to any minor under 16 years of age, any cigar or tobacco, in any form whatever, except upon the written order of his parent or guardian, * * *"

and a later provision of the law as it appeared in §1 of Chapter 61 (Laws of the 25th G.A.), which provided:

"From and after the passage of this Act, it shall be unlawful for any person, directly or indirectly, by himself or agent, to sell, barter or give to any minor under 16 years of age, within this state, any cigar, cigarettes or tobacco in any form whatever, except upon the written order of his parent or guardian."

By subsequent amendments, this conception of the law was radically changed, the former law being divided in two parts. The first sentence of the present statute, §98.2, prohibits any person from furnishing to a minor under 18 years of age, cigarettes or cigarette paper by gift, sale or otherwise. By the provisions of the second sentence, a minor under 18 years of age may be permitted to obtain *tobacco in any other form* only upon the written order of parent, guardian or person in whose custody he is.

Nowhere in the statute is an exception made as to parents, the written order in the last sentence of §98.2 referring only to "any tobacco in any other form."

In Volume 28A, *Words and Phrases*, page 286, there are cited cases holding that, in criminal statutes, there is no implied exception to the phrase "no person":

"No Person. Under statute providing that 'no person' not being authorized by sender shall intercept communication and divulge contents thereof, 'no person' includes party placing call. *U.S. v. Stephenson, D.C.D.C.,* 121 F. Supp. 274, 276.

"The statute providing that 'no person' shall hang or ride on the outside or rear of any vehicle includes infants as well as adults. *D'Ambrosio v. City of Philadelphia,* 47 A. 2d 256, 257, 354 Pa. 403, 174 A.L.R. 1166.

"In National Prohibition Act, tit. 2 §10, 27 U.S.C.A. §22, providing that 'no person' shall manufacture any liquor without making record, etc., 'no person' refers to person authorized under other provisions of act to carry on traffic in alcoholic liquors. *United States v. Katz,* (Pa), 46 S.Ct. 513, 516, 271 U.S. 354, 70 L.Ed. 986.

"The words 'no person' in a criminal statute are to be given their literal meaning, and, when a statute provided that no person should practice dentistry without having complied with its provisions, there was no implied exception of persons holding certificates entitling them to practice as a physician or surgeon. *State v. Taylor,* 118 N.W. 1012, 1013, 106 Minn. 218, 19 L.R.A. N.S. 877, 16 Ann. Cas. 487. (1907).

"Under statute providing that 'no person' shall be disqualified from testifying concerning gaming on ground that such testimony may incriminate him, but granting immunity from prosecution for offense concerning which he testifies, any person is granted immunity for any gaming offense concerning which he testifies, regardless of whether he was called by the people or by a defendant. West's Ann. Pen. Code, §334. *Ex parte Petraeus,* (Cal. App.,) 82 P. 2d 700, 702."

Section 98.2 has been further clarified by an Attorney General's opinion (Creger to Dunn, Hardin County Attorney, (4-14-61), headnoted in 1962 *O.A.G.,* 263). There it was stated:

"In our opinion, this section (§98.2) by its terms, prohibits the furnishing of cigarettes *to any person under the age of* 18, whether or not that person is an inmate of the State Training School for boys, and *whether or not consent to said furnishing is obtained* from the parents of the inmates in question." (Emphasis supplied).

That this is a blanket prohibition with but one exception is clarified by §98.4, which reads:

"Minors required to give information. Any minor under eighteen years of age in *any place other than at the home of his parent or parents,* being in the possession of a cigarette or cigarette papers, shall be required at the request of any peace officer, juvenile court officer, truant officer, or teacher in any school to give information as to where he or she obtained such article."

The lone exception set out in the statute is when the person under 18 years of age has possession of cigarettes while at the home of his parent or parents.

Thus, it is our opinion, regardless of a written order from his parents, a person under 18 who is in possession of cigarettes outside his parents' home, who refuses to comply with §98.4 would be subject to penalties mentioned in §98.5, namely:

"Violation. Any minor under eighteen years of age refusing to give information as required by section 98.4 shall be guilty of a misdemeanor. Said minor shall be certified by the magistrate or justice of the peace before whom the case is tried, to the juvenile court of the county for such action as said court shall deem proper.

"If any minor having been convicted of violating section 98.4 shall give information which shall lead to the arrest of the person or persons having violated any of the provisions of section 98.2 and shall give evidence as a witness in any proceedings that may be prosecuted against said person or persons, the court in its discretion may suspend sentence against the offending minor."

This interpretation makes unnecessary a discussion of whether written orders for cigarettes could be given in the future, for transporting cigarettes or for carrying them to school.

It might be noted that it has consistently been against the public policy of this state to allow persons under certain ages to obtain cigarettes, as evidenced by the previous statutes referred to herein.

The use of tobacco in schools is prohibited by §279.9, and as held by Attorney General's opinion 1930 *O.A.G.*, 337, the school's board of directors could prohibit attendance of any pupil addicted to the use of tobacco.

Permission to have cigarettes in possession only with a written order, for persons under 16, was enacted by the 25th General Assembly in 1894. A blanket prohibition against smoking by persons under 21, except when accompanied by their parents, was enacted by the 33rd General Assembly in 1909. Current law stems substantially from Acts of the 39th General Assembly (1921), which prohibited possession of cigarettes other than on the premises of parent or parents, in regard to persons under 21. The age was placed at "under 18" by the 58th General Assembly in 1959.

Therefore, it is our considered opinion that no person mentioned in §98.2 can give a minor under eighteen years of age a written order to secure cigarettes by gift, sale, or otherwise; such written order applying only to "tobacco in any other form"; nor can such an order be given to the minor for purposes of transporting cigarettes to the parent or guardian. Furthermore, a minor found with cigarettes in his possession, at any place other than at the home of his parent or parents, can be charged for failing to comply with §98.4 of the Code.

15.8

LIQUOR, BEER AND CIGARETTES: Closing hours—Ch. 114, Acts 60th G.A., as amended; §124.34, 1962 Code. Cities and towns have no authority to fix hours of sale or consumption of alcoholic liquor and must abide by the fixed limitations of statute.

July 15, 1964

Mr. Joseph H. Sams
Acting County Attorney
Mitchell County
Osage, Iowa

Dear Mr. Sams:

This is to acknowledge your recent request wherein you inquire as to the authority of a city or town to limit the hours of sale or consumption of alcoholic liquor. In reply thereto, you are advised as follows:

Section 124.34, Code of Iowa, 1962, provides in pertinent part:

"* * * and said city and town councils are further empowered to adopt ordinances, subject to the express provisions of §124.20 for the fixing of the hours during which beer may be sold and consumed in the places of business of Class "B" permittees, and further providing that subject to the express provisions of §124.20, no sale or consumption of

beer shall be allowed on the premises of a Class "B" permittee as above provided, between the hours of 1:00 a.m. and 6:00 a.m.; * * *"

The above statutory language extends to municipalities the power to adopt ordinances for the fixing of hours during which beer may be sold and consumed in the place of business of Class "B" permittees.

In 38 *O.A.G.*, page 480, this department is construing this section and the authority of a city or town to regulate the hours during which beer may be sold by a Class "C" permittee, held:

"It is to be noted that the statute which grants to municipalities power to adopt ordinances for the fixing of hours during which beer may be sold and consumed limits this power by the language, 'in the place of business of Class "B" permittees'. Since the legislature saw fit to expressly provide that such ordinances are to affect places of business of 'B' permittees, the conclusion must be reached that the power was not extended to cities and towns to adopt ordinances fixing hours of operation for Class 'C' permittees. Such result follows the application of the familiar rule of statutory construction that where a statute directs the performance of certain things in a particular matter, it implies that it shall not be done otherwise. * * *"

Senate File 437, as amended by the 60th General Assembly, provides in pertinent part:

"4. No person or club holding a liquor license under this chapter, his agents or employees, shall:

(a) * * *

(b) sell or dispense any alcoholic beverage on the licensed premises, or permit the consumption thereon, between the hours of 1:00 a.m. and 7:00 a.m. on any week day, and between the hours of 12:00 midnight on Saturday and 7:00 o'clock on the following Monday. * * *"

We have previously held in Staff to Duffy, July 30, 1963, that standard time will be employed under this particular law.

Further examination of Chapter 123, as amended by the 60th General Assembly, fails to reveal any legislative grant to cities and towns relative to the fixing of hours during which alcoholic liquor may be sold or consumed. Thus, it would appear that the legislature saw fit for the state to occupy the field much in the same manner as the analogous situation set forth in 38 *O.A.G.*, page 480.

Therefore, it is our opinion that cities and towns have no authority to regulate the hours of sale or consumption of alcoholic liquor within the fixed limitations of Senate File 437, as amended.

15.9

LIQUOR, BEER AND CIGARETTES: Club membership—Ch. 114, Acts 60th G.A. Bona fide membership by an individual is factual question which must be ascertained individually in accordance with principles that such membership must be in good faith and the intention to fulfill ends and purposes of organization.

October 10, 1963

Mr. Harry Perkins, Jr.
Polk County Attorney
Room 406, Courthouse
Des Moines, Iowa

Dear Mr. Perkins:

This is to acknowledge your recent letter wherein you submit the following:

"I am informed that several private clubs having Class 'A' Liquor Licenses are accepting for limited social membership persons who would not be qualified for full membership. According to my information this is true of both Veterans of Foreign Wars and the American Legion. I direct your attention to Chapter 123.27, sub-section 6(a):

'Class 'A'. A class 'A' liquor control license may be issued to a club and shall authorize the holder thereof to purchase spirits and wine from the commission only, and to sell alcoholic beverages so purchased to bona fide members and their guests by the individual drink for consumption on the premises only.'

"Are the social members 'bona fide' members as contemplated by the statute and may sales of liquor be made under the Class 'A' club license to such individuals?"

Authority to dispense alcoholic beverages arises from the legislative grant in Chapter 114, Acts 60th G.A. The pertinent language authorizing the dispensing of alcoholic beverages under a Class "A" license is as follows:

"A class 'A' liquor control license may be issued to a club and shall authorize the holder thereof to purchase spirits and wine from the commission only, and to sell alcoholic beverages so purchased to bona fide members and their guests by the individual drink for consumption on the premises only."

Your attention is invited to *Appanoose County Farm Bureau v. Board of Supervisors,* 218 Iowa 945, wherein the Court, in discussing the meaning of bona fide members, stated:

"The term 'bona fide members', as used in the statute, has a definite and well-understood legal significance. It means in good faith—honesty as distinguished from mala fide—bad faith."

The Court further discussed the meaning of bona fide members, wherein they stated:

"Only members of corporations who become such in compliance with the terms and provisions of the articles of incorporation and by-laws thereof and who in good faith intend performance of the obligations imposed and compliance with the statutory purpose of the organization can be bona fide members. Their intention must be to become members, to pay the dues, and to unite with the membership in general to in good faith promote the ends and purposes of the organization."

Thus, it is our belief that whether or not a social member is a bona fide member within the meaning of Chapter 114 becomes a factual question to be ascertained in each and every instance in accordance with the guides as set forth in the above referenced Supreme Court decision.

15.10

LIQUOR, BEER AND CIGARETTES: Conventions, bona fide—§124.31, 1962 Code. Bona fide convention or meeting must be held on premises of liquor licensee and they may furnish their own alcoholic liquor. However, hours controlling consumption shall apply to such convention or meeting. The hours control does not apply to occasional private social gathering of friends or relatives in private home or place.

September 4, 1963

Mr. Lawrence F. Scalise
Enforcement Division
Liquor Control Commission
L O C A L

Dear Mr. Scalise:

This is in reply to your letter in which you submitted the following:

"An opinion is requested in regard to Section 30 of S.F. 437, which states:

"It is unlawful for any person, firm, corporation, partnership, or association to allow the dispensing or consumption of intoxicating liquor or intoxicating beverages except sacramental wines and beer, in any establishment unless such establishments are licensed under this title. Provided, however, the provisions of this section shall not apply to bona fide conventions or meetings where mixed drinks are served to delegates or guests without cost. All other provisions of this chapter shall be applicable to such rooms. The provisions of this section shall have no application to occasional private social gatherings of friends or relatives in a private home or place.

"Under this section may a license holder allow anyone to bring a bottle of liquor upon his premises?

"If the answer to this question is in the affirmative, may this activity be engaged in on Sunday?

"May a non-license holder other than in a private home or place, allow anyone to bring a bottle of liquor upon his premises? If the answer to this question is affirmative, may it also be true on Sunday?"

In reply thereto I would advise as follows. Section 123.1, Code of Iowa, 1962, as amended provides:

"This chapter shall be cited as the Iowa Liquor Control Act, and should be declared an exercise of the police power of the state, for the protection of the welfare, health, peace, morals and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose, and it is declared to be the public policy that the traffic of alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as hereinafter provided for in this chapter."

From the above section, it is clear that it was the intention of the Legislature to control all traffic in alcoholic liquors. §30, Chap. 114 60th G.A. provides in pertinent part:

"It is unlawful for any person, . . . to allow the dispensing or consumption of intoxicating liquors or intoxicating beverages except sacramental wines and beer, in any establishment unless such establishments are licensed under this title. Provided, however, the provisions of this section shall not apply to bona fide conventions or meetings where mixed drinks are served to delegates or guests without cost. *All other provisions of this chapter shall be applicable to such rooms.* . . . (Emphasis supplied).

Ch. 114, as amended, provides in pertinent part:

"No person or club holding a liquor control license under this chapter, his agents or employees, shall:

"(g) *Allow any person other than the license holder or his employees to use or keep on the licensed premises any spirits or wines in any bottle or other container* (emphasis supplied) which is designed for the trans-

porting of alcoholic beverages, provided that this shall not apply to the lodging quarters of a class "B" liquor control license, or to common carriers holding a class "D" liquor control license."

It becomes clear that by virtue of this provision, any alcoholic beverage other than that of the licensee is prohibited from being on the licensed premises except the stated exceptions pertaining to lodging quarters of a class "B" liquor control license, and common carriers holding a class "D" liquor control license.

The question arises as to whether or not a bona fide convention or a bona fide meeting can be held upon the licensed premises of a liquor licensee wherein the convention furnishes its own alcoholic beverages. The pertinent language in §30, ch. 114, as amended, 60th G.A., "All other provisions of this chapter shall be applicable to such rooms" which follows directly the provision allowing bona fide conventions and meetings, is indicative that the legislature intended this to be an exception to the prohibition which denies a licensee from allowing any person other than himself to keep on the licensed premises any alcoholic beverages.

It is axiomatic, that in construing statutes, each provision must be given effect, if possible, *Coggeshall v. City of Des Moines,* 138 Iowa 730, 117 N.W. 309; 128 Am. St. Rep. 221, and it is well settled that where the manifest intention of the Legislature may be gathered from the prevailing tones of other sections, conflicting words may be diverted from their literal meaning, in order to harmonize with more explicit provisions. They may be restrained, enlarged, or qualified so as to give effect to the obvious intention of the law. *Noble v. State,* 1 Greene 325.

It is equally well settled the Courts will give effect to the spirit of the law rather than the letter, particularly where the letter would result in absurdity, or defeat the plain purpose of the Act. *Case v. Olson,* 234 Iowa 869, 14 N.W. 2d 717.

To give meaning and effect to the language "All other provisions of this chapter shall be applicable to such rooms", it must necessarily follow that if such bona fide conventions and meetings are to be held, they must he held upon the premises of a liquor licensee. To say otherwise would render this language meaningless, for it would strip the Liquor Control Act of its controls and frustrate the obvious and explicit declaration of public policy in §123.1, Code of Iowa, 1962, as well as the prevailing tones of control throughout Chapter 123.

Your attention is invited to §124.31, Code of Iowa, 1962 which provides in pertinent part:

"No liquor for beverage purposes having an alcoholic content greater than four percent by weight shall be used, or kept for any purpose in the place of business of a class "B" permittee, or on the premises of such class "B" permittee at any time. . . ."

The Legislature provided an exception to this statute for the holders of liquor control licenses wherein they provided in S.F. 437, 60th G.A.:

"Notwithstanding the provisions of §124.31 of the Code, a person who is a holder of a liquor control license may keep, sell and allow alcoholic liquors to be consumed on the premises covered by the liquor control license."

With this exception the prohibition contained in §124.31 remains unchanged and is illustrative of the Legislature's intention to contain the consumption of alcoholic beverages upon the premises of a liquor licensee only, unless they are otherwise specifically exempt.

It is clear that the Legislature's inaction with respect to this language

supports the manifest intention that liquor consumption shall take place upon the licensed premises of a liquor licensee. Equally, it is obvious that the language "All other provisions of this chapter shall be applicable to such rooms" would be vestigial, meaningless, and would result in absurdity, defeating the plain purpose of the Act, if this department were to hold that bona fide conventions or meetings could be held in any establishment except that of a liquor licensee. Thus, it becomes clear that a liquor control licensee is prohibited from allowing anyone from bringing his own liquor upon his licensed premises, except in the case of a bona fide convention or meeting which must be held upon the licensed premises of a liquor licensee.

Ch. 114, as amended, 60th G.A. provides in pertinent part:

> "No person or club . . . having a liquor control license. . . shall sell or dispense any alcoholic beverage on the licensed premises, or permit the consumption thereon between the hours of 1:00 a.m. and 7:00 a.m. on any weekday, and between the hours of 12:00 midnight on Saturday and 7.00 a.m. on the following Monday. . ."

To give effect to the language "All other provisions" and to give effect to the pertinent language set forth above, interpretation becomes too clear to admit of discussion that bona fide conventions or meetings where delegates or their guests provide their own liquor, must necessarily fall within the control which prohibits the consumption of alcoholic liquors beyond the hours set forth in the statute. A contrary holding could result only by ignoring the provisions set forth above.

Since we have previously ruled that a bona fide convention or meeting may be held only upon the premises of a liquor licensee, the only possible exception which could remain for a non-licensed establishment is where an occasional private social gathering of friends or relatives may be held.

Ch. 114, 60th G.A. designates that such a gathering may only take place at a private home or place. A private place cannot be any place, building or conveyance to which the public has or is permitted to have access since the Legislature has defined public place in §123.5(19), Code of Iowa, 1962, nor could a private place be an enclosure, room or building where the public, by general invitation attend, for reasons of business, entertainment, instruction, or the like and are welcome so long as they conform to what is customarily done there.

The term private is a relative term and the question of what constitutes a private place is always one of fact and must be determined in each instance on the basis of the individual circumstances. The provision "All other provisions of this chapter shall be applicable to such rooms" precedes the exception provided by the Legislature for occasional gatherings of friends or relatives, and thus does not apply to this exception.

Thus, it is obvious that the control such as hours do not apply to such a gathering. Therefore, it is the opinion of this department that a bona fide convention or meeting must be held upon the premises of a liquor licensee, and such bona fide convention or meeting may furnish its own alcoholic liquor and the consumption of the same falls within the prohibition concerning the hours within which the same may be consumed.

It is further our opinion that the hours control does not apply to an occasional social gathering of friends or relatives when the same is held in a private home or place.

15.11

LIQUOR, BEER AND CIGARETTES: Credit card sales – §123.46, 1962 Code, as amended. Liquor licensee may not extend credit to individual pur-

chaser through the use of a credit card used by the licensee. This does not apply to sales by a club nor to sales by a hotel or motel to its guests.

October 11, 1963

Mr. Homer Adcock, Chairman
Liquor Control Commission
L O C A L

Attention: Lawrence Scalise

Dear Mr. Adcock:

This is in reply to your recent letter wherein you inquire as to whether or not a liquor licensee may issue a credit card to anyone for the purpose of purchasing liquor by the drink.

Section 123.46(4c), 1962 Code, as amended, provides in pertinent part:

"No person or club holding a liquor control license under this chapter, his agents or employees, shall:

(c) Sell alcoholic beverages to any person on credit, except that this provision shall not apply to sales by a club to its members nor to sales by a hotel or motel to bona fide registered guests, or with a bona fide credit card, or . . ."

It is obvious from the above language that this provision does not apply to sales by a club to its members nor to sales by a hotel or motel to bona fide registered guests. Thus, the remaining question is what constitutes a bona fide credit card.

In *Williams v. United States*, 192 Fed. Supp. 97, the phrase "credit card" was defined. That Court held:

"A credit card is nothing more than an indication to sellers of commodities that the person who has received a credit card from the issuer thereof has a satisfactory credit rating and that, if credit is extended, the issuer of the credit card will pay (or see to it that the seller of the commodity receives payment) for the merchandise delivered. A credit card signifies that the legal owner thereof is a good credit risk and the issuer guarantees payment for goods, wares and merchandise sold and delivered on the basis of the card."

The Court went on to say:

"As a general rule, the holder of a credit card presents it to the merchant and, upon the strength of the credit card, a charge slip is made out and signed by the purchaser. The original charge slip is then sent to the proper place for redemption and is paid by the issuer of the credit card. This may be either before or after the holder of the credit card is billed for the merchandise sold to him when he presented his credit card."

It would appear, therefore, that the ordinary meaning adapted to "credit card" implies a third party guarantor.

Section 4.1(2), 1962 Code, provides in pertinent part:

"Words and phrases shall be construed according to the context and the approved usage of the language: . . ."

In the absence of an express definitive meaning by the legislature, the ordinary usage will be adopted. It is our belief that the normal usage and proper definition of "credit card" is that which is pronounced in the above-referenced decision. This belief is further supported by *Appanoose Co. Farm Bureau v. Board of Supervisors*, 218 Iowa 945, wherein the Court, in discussing the meaning of "bona fide", stated:

"The term 'bona fide' . . . has a definite and well-understood legal significance. It means in good faith—honesty as distinguished from mala fide—bad faith."

In view of the above decision and the failure of the legislature to adopt any special definition to the phrase "bona fide credit card", we are disposed to the belief that the legislative intention was to prohibit credit transactions where a liquor licensee would issue his own credit card. To hold otherwise would be allowing a subterfuge of the statute.

15.12

LIQUOR, BEER AND CIGARETTES: Discounts—§123.18, 1962 Code. Liquor Commission has authority to give discount on quantity purchase, and such discount must be available to non-licensees as well as licensees, if given.

August 6, 1964

Homer R. Adcock, Chairman
Iowa Liquor Control Commission
L O C A L

Dear Mr. Adcock:

This is to acknowledge receipt of your recent request wherein you submit the following:

"The Iowa Liquor Control Commission requests an Attorney General's Opinion on the following:

"Chapter 123.18, Code of Iowa, as amended by the 60th General Assembly, 1964. '. . . The Commission may, from time to time, as determined by it, fix the prices of the different classes, varieties, or brands or liquor to be sold.'

"Would this particular paragraph apply to the granting of discounts on quantity purchases of liquor and if so,, would it apply only to holders of liquor licenses or to the general public as well?"

In reply thereto, we advise that §123.18, Code of Iowa, 1962, provides in pertinent part:

"The commission may, from time to time, as determined by it, fix the prices of the different classes, varieties, or brands of liquor to be sold."

The above statutory language is the only authority conferred on the Iowa Liquor Commission relative to fixing prices on liquor to be sold. We find no authority for the commission to give a special price to a liquor licensee; however, the above statutory language does not prohibit the Iowa Liquor Commission from giving a special price on a quantity purchased as opposed to the purchase of a single bottle, but such price differentials must be given in a nondiscriminating manner. The price must extend to all purchasers without distinction between a liquor licensee and a non-liquor licensee.

The authority to fix prices necessarily carries with it the authority to give a quantity price unless otherwise prohibited by law. Examination of the pertinent statutory provisions reveals no such prohibition. If the commission in its discretion sees fit to fix a quantity price, then such price must be uniform in nature and available to all on the same basis.

It is our opinion that the Iowa Liquor Control Commission has the authority to give price discounts to a liquor licensee only if such discount is extended to all persons, uniformly and upon the same basis.

15.13

LIQUOR, BEER AND CIGARETTES: Elections, local option petition circulation—Ch. 114, Acts 60th G.A.; §124.34, 1962 Code. The circulation of a petition for an election under the Liquor Control Act, prior to its effective operative data, results in rendering the petition void. If a county should vote dry, approving authorities are prohibited from issuing new additional permits until 4 years have elapsed and a contrary result obtained. If a city or town limits the number of retail beer permits, the number of liquor control licenses are also limited in accordance therewith. There is no provision for restraining the issuing authorities granting of licenses pending the outcome of a local option election.

June 17, 1963

Honorable Earl Elijah
State Senator
Clarence, Iowa

Dear Senator Elijah:

This is to acknowledge your letter of May 25, 1963 wherein you request an opinion upon the following:

"Several questions relative to the new Iowa Liquor laws have been propounded to me concerning which I need some help to answer.

"1. There is talk in our county relative to circulating a petition for an election to determine whether or not any more liquor licenses may be issued within our county. If such petitions for an election are circulated would they be declared void if signatures were obtained prior to July 4th when the new law takes effect?

"2. If the county should vote dry would that preclude any city or town within the county from issuing any more permits until at least four years later when another election might be held and a wet vote is obtained?

"3. Since a city or town may limit the number of beer licenses to a minimum of one to five hundred inhabitants or fraction thereof and since the new law requires a beer license as a prerequisite for a liquor license would not that provision also limit the number of liquor licenses? Is the 1960 census the basis for the population figure involved?

"4. If a movement is underway for a county-wide vote is there any way except by a gentleman's agreement to restrain a county or city board from granting any licenses until the results of the election are determined?

"5. Would you kindly phrase a proper heading for each page of an election petition?"

1. Section 3.7, 1962 Code, provides in pertinent part:

"All Acts and resolutions of a public nature passed at regular sessions of the general assembly shall take effect on the 4th day of July following their passage. . ."

Your attention is further invited to the case of *Butters vs. City of Des Moines,* 202 Ia. 30, 209 N.W. 401 (1926), wherein the Iowa Court held that a statute passed by both houses of the legislature and approved by the executive is without force before the date it takes effect.

We are disposed to the belief that the circulation of a petition for an election under the Act prior to July 4, 1963, would constitute an official act under a law not yet operative and result in rendering the petition void. It does not appear, from an examination of the judicial principles, that the passage of time and the mere arrival of the effective date of the Act would be operative to breathe life into a petition that was otherwise void.

2. The pertinent language in S.F. 437, as amended, concerning your second question is as follows:

"If a majority of the ballots cast are 'yes' the board shall not issue any new licenses. However, if at the time of such election there are liquor control licenses in effect in the county, they shall not be revoked except for cause for a period of three (3) years. No new election shall be held for a period of four (4) years. . .Except for filing of the petition and the conduct of elections, whenever the word 'board' appears in this paragraph it shall include the county board of supervisors and city and town councils. . . ."

In ascertaining the intention of the legislature, we are compelled to accept the expressed intention as adduced from the language contained therein. We are further compelled to interpret the language used by the legislature fairly and sensibly in accordance with the plain meaning of the words used, *Green vs. Brinegar*, 228 Ia. 477, 292 N.W. 229.

The language employed in the instant case plainly provides that the board is prohibited from issuing new licenses; however, liquor control licenses in effect cannot be revoked except for cause for a period of three (3) years. Thus, a board of supervisors or a city or town council is expressly prohibited from issuing new additional permits until at least four (4) years later when another election might be held and a contrary result obtained.

3. S.F. 437, as amended, provides in pertinent part:

". . . Liquor control licenses may be issued to any persons who . . . is the holder of a retail beer permit as defined in Chapter 124 of the Code. . ."

It becomes clear that an applicant for a liquor control license must hold a retail beer permit as a condition precedent to obtaining a liquor control license.

Section 124.34, 1962 Code, provides in pertinent part:

". . .Cities and towns are hereby empowered to adopt ordinances for the enforcement of this chapter, and are further empowered to adopt ordinances providing for the limitation of class "B" permits, provided, however, where an ordinance is adopted providing for the limitation of class "B" permits the minimum limitation shall not be less than one class "B" permit to be issued upon application meeting the requirements of this chapter for each five hundred population or fractional part thereof over and above twenty-five hundred population. However, in towns having a population of one thousand or less, at least two permits shall be allowed. . . ."

We are, therefore, disposed to the belief that §124.34, 1962 Code, operates as a matter of law to limit the number of liquor control licenses in accordance with the limitations imposed upon the number of retail beer permits, provided the city or town has enacted limiting ordinances thereunder. Further, it is our belief that it would be proper to employ the 1960 census as the basis for determining the population figure involved by virtue of §4.1(26), 1962 Code.

4. By virtue of the grants in S.F. 437, as amended, city and town councils and county boards of supervisors are vested with the authority to approve the issuance of a liquor license.

Your attention is invited to the following language contained in S.F. 437, as amended:

"Before the issuance, renewal, or denial of a liquor control license by local authorities, the board or council may conduct a referendum on the

question of whether liquor control licenses shall be approved for the city, town, or county in question. . . The purpose of such referendum shall be solely to assist the board of council members in determining public sentiment toward liquor by the drink sales, and shall not be binding on the council or board members in determining whether or not to approve the issuance or renewal of liquor control licenses."

Examination of Chapter 123, 1962 Code, as amended, reveals no provisions which would allow the restraining of the board of supervisors or city or town councils from approving the issuance of licenses until the results of a proposed election are determined, and the language hereinbefore quoted is strongly persuasive that the contrary was intended. It is, therefore, our opinion that this question should be answered in the negative.

5. S.F. 437, as amended, provides in pertinent part, when referring to the petition for submitting the question of whether or not the licensing of the sale of alcoholic beverages (exceeding four percent by weight) by the drink should be submitted to the electors of the county, as follows:

"At the top of each sheet shall be stated the proposition to be submitted."

It would, therefore, seem proper to place at the top of each sheet of the petition, the following: The undersigned electors request that the question of licensing the sale of alcoholic beverages (exceeding four percent by weight) by the drink be submitted to the electors of ———— county.

15.14

LIQUOR, BEER AND CIGARETTES: Elections, local option petition signatures—Ch. 114, Acts 60th G.A. 1. Ditto marks on petition are sufficient indication of date and residence. 2. Circulator of petition may sign petition without making petition illegal, but his signature would not be counted. 3. "Mr. and Mrs. Mary Smith" is not sufficient personal signature to be counted in ascertaining number of signers.

September 5, 1963

Mr. R. K. Richardson
Greene County Attorney
Jefferson, Iowa

Dear Mr. Richardson:

This is to acknowledge your request wherein you inquire:

"I request of you an opinion as to the requirements necessary on the signatures on the petitions on the liquor referendum.

"The specific question would be, 'Is it necessary that the address and date be signed to the petition, also, can the person acknowledging the petition also sign that particular petition, thereby acknowledging their own signature; and is a signature legal if it is signed Mr. and Mrs. Mary Smith. Also, would ditto marks as to address or date be sufficient?' "

1. Senate File 437, as amended (now Chapter 114, Acts of the 60th General Assembly), provides in pertinent part:

"Each sheet of the petition shall contain not more than 30 names of electors with their personal signature, address, and the date of signing. If residing within a city or town where the electors are required to be registered, the signature shall be the same as it appears upon the registration record."

It becomes evident that the legislature requires the affixing of the address

and date on the petition. Your attention is invited to a prior opinion of this department (Strauss to Smith, February 16, 1960) wherein this department ruled that ditto marks are permissible and legal insofar as fixing the date upon which the signature was written.

The question of whether or not ditto marks may be used to indicate residence of a signer on a nomination paper was raised and answered in 1910 O.A.G. 255, and this department held:

> "Ditto marks are to be read as a repetition of what appears on the line above them, and are as much as part of the English language as are punctuation marks. . . being regarded as a part of the language. . . The Court will, of course, take judicial notice of their meaning."

It is our opinion, therefore, that the ditto marks used on the petition are a sufficient indication of the date and the residence of those signing said petition.

2. The question as to whether or not the person acknowledging the petition may also sign that particular petition has been previously posed to this department, and was disposed of in 1910 O.A.G. 254, wherein this department held:

> "Where the person circulating a nomination paper, and who makes affidavit as to the signatures thereon, also signs said nomination paper, his signing would not make the nomination paper illegal, but his name would not be counted among the signers of said paper."

3. Senate File 437 provides in pertinent part:

> "Each sheet of the petition shall contain not more than 30 names of electors with their personal signatures, . . . *if residing within a city or town where the electors are required to be registered, the signature shall be the same as it appears upon the registration records.*" (Emphasis supplied)

The emphasized language, although involving a different Iowa statute, was construed by the Iowa Supreme Court in the cases of *Potter v. Butterfield,* 116 Iowa 725, 89 N.W. 199; *Wilson v. Bohstedt,* 135 Iowa 451, 110 N.W. 898; and *Scott v. Naacke,* 122 N.W. 824, 144 Iowa 164; and the construction adopted required that the names appearing on the petition that are not identical with the corresponding name on the poll list cannot be counted.

In the absence of required registration, the question remains as to whether or not "Mr. and Mrs. Mary Smith" is a sufficient personal signature to be counted in ascertaining the number of signers.

The prefix "Mrs." has been held to be not a name but a mere title, in *City of Camilla v. May,* 27 S. E. 2d 777; and has also been held as a title of courtesy prefixed to the name of a woman to indicate that she is married, *Guide Pub. Co. v. Futrell,* 7 S. E. 2d 133.

In *Branch v. Bekins Van & Storage Co.,* 290 Pac. 146, the Court held that the use of the title "Mrs." is no part of a name. The signature on an independent nominating petition which was preceded by the abbreviation "Mrs." and followed by the first and middle initial of the signer's husband was declared void in *Lyden v. Sullivan,* 269 App. Div. 942, 57 N.Y.S. 657.

It is therefore our belief that the composite name of "Mr. and Mrs. Mary Smith" does not constitute a personal signature as required by the statute and accordingly cannot be counted.

15.15

LIQUOR, BEER AND CIGARETTES: Elections, local option, primary elections—§43.1, 1962 Code, Ch. 114, Acts 60th G.A. Local option liquor election cannot be held in connection with state primary election.

February 21, 1964

Mr. Richard H. Wright
Davis County Attorney
Bloomfield, Iowa

Dear Mr. Wright:

This is in reply to your recent inquiry wherein you set forth the following:

"Does Chapter 114, Acts of the 60th General Assembly authorize and permit the Board of Supervisors of Davis County, Iowa, to set the date for a Chapter 114 Liquor Referendum in conjunction with the June 1964 Primary Election to be held in Davis County?"

"The question seems to be one concerning the construction to be given to Section 10, Subsection 7, Paragraph E, Last sentence of Chapter 114. This last sentence is as follows:

"This Election shall not be held within thirty (30) days of any General Election."

In reply thereto, we advise as follows:

Section 43.1, Code of Iowa, 1962, provides:

"The term 'primary election' as used in this chapter shall be construed to apply to an election by the members of the various political parties:

1. For the purpose of placing in nomination candidates for public office.

2. For selecting delegates to conventions.

3. For the selection of party committeemen."

Further examination of Chapter 43 reveals that the statutory language is confined to an election as set forth and for the purposes enumerated in Section 43.1, Code of Iowa, 1962. While Chapter 14, Session Laws of the 60th General Assembly, does not prohibit expressly the holding of a local option election in conjunction with the state primary election, it appears that the well settled rule of statutory construction known as *designatio unius est exclusio alterius* would apply. That is to say that where stated things are enumerated in a statute, the things not named are excluded. *Pierce v. Beacon's Van & Storage Company,* 185 Iowa 1346, at Page 1350.

Therefore, it is our belief that the stated purposes in Section 43.1, Code of Iowa, 1962, operates to exclude the possibility of holding a local option liquor election in connection with the state primary election.

15.16

LIQUOR, BEER AND CIGARETTES: Elections, municipal, serving liquor—§§49.2, 123.46, 1962 Code. The sale of alcoholic beverages is not prohibited on a municipal election day, even when the election in question pertains solely to a proposal as opposed to the election of officers.

October 18, 1963

Mr. Homer Adcock, Chairman
Liquor Control Commission
L O C A L

Attention: Lawrence Scalise

Dear Mr. Adcock:

This is in reply to your recent letter wherein you inquire as to whether or not an election involving a city bus franchise is a special election which would prohibit the sale of alcoholic beverages during the hours the polls are open.

Section 123.46(4b), 1962 Code, as amended, provides in pertinent part:

"No person or club holding a liquor control license under this chapter, his agents or employess, shall:

(b) Sell or dispense any alcoholic beverage on the licensed premises or permit the consumption thereon between the hours of . . . or on any general, special or primary election day during the hours that polls are open . . ."

Section 49.2(2), 1962 Code, provides in pertinent part: "The term 'city election' means any municipal election held in a city or town."

Your attention is invited to the case of *Hutchins v. City of Des Moines,* 176 Iowa 189, wherein the Iowa Court announced:

"The term 'general election' is limited to the choice of certain officers other than those of cities; but the term 'city election,' though limited to elections held in the city or town, is broad enough to include any municipal election held therein, and really is synonymous therewith."

The legislature's prohibition contained in §123.46 is limited to general, special or primary election days, and by that very omission municipal elections do not fall within the purview of the prohibition.

Thus, it is our belief that the election involving a city bus franchise is a municipal election, and as such the sale of alcoholic beverages is not prohibited on that day for that reason.

15.17

LIQUOR, BEER AND CIGARETTES: Elections, serving liquor—Ch. 123, §§49.1, 462.11, 462.12, 462.14, 1962 Code. 1. Chapter 123 does not prohibit the sale of beer during the hours the polls are open on a special, general or primary election day. 2. Levee and drainage district election does not operate to prohibit the sale or consumption of alcoholic beverages during the hours the polls are open, nor does a school election during the same.

November 1, 1963

Mr. William L. Mathews
Louisa County Attorney
Wapello, Iowa

Dear Mr. Mathews:

This is in reply to your recent letter in which you submitted the following:

"Chapter 114, Section 16 thereof, the Acts of the 60th General Assembly provides in part that it shall be unlawful to sell or dispense any alcoholic beverage on licensed premises on any General, Special or Primary Election Day during the hours that the polls are open.

"Inasmuch as there are several elections in Louisa County in the immediate future I would respectfully request your opinion on the following matters:

1. "Am I correct in assuming that the permit holder will be allowed to open his premises on that day and dispense beer because of the exceptions stated in Section 1, Chapter 115, of the Acts of the 60th General Assembly?

2. "Am I correct in assuming that the word 'Special' as used in Subsection B, Section 16, Chapter 114, of the Acts of the 60th G.A., includes Levee and Drainage elections by virtue of the definition in Chapter 49.2, Sub-section 3?

3. "Does the prohibition apply to School elections, where the School District includes territory in which there exists a licensed premises, inasmuch as it appears that Chapter 49 excepts School elections from the provisions and definitions therein?"

Section 123.4(5), as amended by the 60th General Assembly, provides in pertinent part:

"Alcoholic liquor or alcoholic beverage includes the three varieties of liquor above defined, except beer as defined in Chapter 124 of the Code (alcohol, spirits & wines). . ."

Section 123.46(4) provides in pertinent part:

'No person or club holding a liquor control license under this chapter, his agents or employees, shall:

(b) Sell or dispense any alcoholic beverage on the licensed premises or permit the consumption thereon . . . on any general, special or primary election day during the hours that the polls are open, . . ."

The prohibiting language contained in §123.46 applies only to the dispensing or consumption of alcoholic beverages and does not include beer, because the legislative definition of alcoholic beverage specifically excludes beer. Thus, in the absence of a local ordinance prohibiting the sale of beer during the hours that the polls are open on any special, general or primary election day, it is lawful for a liquor licensee to sell and dispense beer on the days in question.

Section 123.46(4) provides in pertinent part:

"No person or club holding a liquor control license under this chapter, his agents or employees, shall:

(b) Sell or dispense any alcoholic beverage on the licensed premises or permit the consumption thereon . . . on any general, special or primary election day during the hours that the polls are open. . ."

Section 49.2, Code of Iowa, 1962, provides in pertinent part:

"For the purposes of this chapter:

(1) The term 'general election' means any election held for the choice of national, state, judicial, district, county, or township officers.

(2) The term 'city election' means any municipal election held in a city or town.

(3) The term 'special election' means any other election held for any purpose authorized or required by law."

To ascertain whether or not a levee and drainage election falls within the meaning of §49.2, requires the examination of the pertinent statutes covering drainage elections. Section 462.10, Code of Iowa, 1962, provides:

"Anyone who has acquired ownership of assessed lands since the latest certificate from the auditor shall be entitled to vote at any election

if he presents to the election board for its inspection at the time he demands the right to vote evidence showing that he has title."

Section 462.11, Code of Iowa, 1962, provides:

"Each landowner over twenty-one years of age without regard to sex and any railway or other corporation owning land in said district assessed for benefits shall be entitled to one vote only, except as provided in Section 462.12."

Section 462.12, Code of Iowa, 1962, provides in pertinent part:

"When a petition asking for the right to vote in proportion to assessment of benefits at all elections for any purpose thereafter to be held within said district, signed by a majority of the landowners. . . then, in all elections of trustees thereafter held within said district, any person whose land is assessed for benefits without regard to age, sex, or condition shall be entitled to one vote for each ten dollars or fraction thereof of the original assessment. . ."

Section 462.14, Code of Iowa, 1962, provides in pertinent part:

"The vote of any person who is a minor, mentally ill, or under other legal incompetency shall be cast by the parent, guardian, or other legal representative of such minor, mentally ill, or other incompetent person."

From the examination of the above pertinent drainage statutes, we find that an individual acquires his right to vote by virtue of ownership of land; that the right to vote is not limited to an individual, but is extended to railways or other corporations owning land; that a person need not necessarily be 21 years of age; and that, in certain instances, an individual may be entitled to more votes than other individuals at the same election. We further find that the elections do not exclude the mentally ill or persons who are under other legal incompetency.

We are, therefore, of the belief that a drainage district election is an election of its own nature and, as such, is not an election within the meaning of §49.2, Code of Iowa, 1962. Thus, a levee and drainage election does not operate to prohibit the sale or consumption of alcoholic beverages during the hours the polls are open.

Section 49.1, Code of Iowa, 1962 provides in pertinent part: "The provisions of this chapter shall apply to all elections. . . except school election."

By virtue of the above explicit statutory exception, it becomes clear that a school election is neither a general election nor a city election nor a special election within the meaning of §49.2, Code of Iowa, 1962. We are, therefore, of the opinion that the statutory prohibition, concerning the consumption and sale of alcoholic beverages during the hours that the polls are open, does not apply to school elections.

15.18

LIQUOR, BEER AND CIGARETTES: Licenses, beer, limitation—§§4.1(26), 124.34, 1962 Code. Cities and towns have power to enact and amend ordinances limiting the number of class "B" beer permits, not less than minimum quotas in §124.34, based upon the population according to last national census.

September 4, 1964

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Receipt is acknowledged of your favor of July 31, 1964, in which you request an opinion upon the following question:

"The question involved is whether the town council can amend their existing beer ordinance, limiting the number of beer permits.

"Traer is a community of 1,627 official population, and they have valid ordinance on the books, No. 65, which limits the number of beer permits to one per every 500 population or portion thereof as per the minimum limitation of Section 124.34 of the Iowa Code as amended."

The pertinent statute involved in this question is Section 124.34, as we quote therefrom:

". . . Cities and towns are hereby empowered to adopt ordinances for the enforcement of this chapter, and are further empowered to adopt ordinances providing for the limitation of class "B" permits, provided, however, where an ordinance is adopted providing for the limitation of class "B" permits the minimum limitation shall not be less than one class "B" permit to be issued upon application meeting the requirements of this chapter for each five hundred population or fractional part thereof up to twenty-five hundred population and one additional permit for each seven hundred fifty population or fractional part thereof over and above twenty-five hundred population. . . ."

We understand that the town council, pursuant to their ordinance, have issued four permits, which conforms to the provisions of their ordinance and the minimum limitations specified in Section 124.34 of the Code, supra.

If no ordinance is adopted by a city or town pursuant to the powers granted to cities and towns in Section 124.34, in that event there is no limitation on the number of class "B" permits that may be issued. Such was the ruling of this office in 1938 *O.A.G.*, page 110, stated in the conclusion, as follows:

"Therefore, unless cities and towns avail themselves of the power granted to them to limit the number of Class "B" permits to be issued by their council, there is no limitation upon the number of permits that may be granted in cities and towns."

As bearing also on this question, see 1938 *O.A.G.*, page 509, copies of which are attached hereto.

Therefore, in answer to your question, it is within the power of the town council to enact or amend their existing beer ordinance limiting the number of Class "B" beer permits to any number providing the limitation is not less than the minimum quotas set forth in Section 123.34 based upon the population, according to the last national census. (Sec. 4.1(26), 1926 Code.)

15.19

LIQUOR, BEER AND CIGARETTES: Licenses, liquor, limitation—§§123.26, 427.1(9)(26), 1962 Code; Ch. 114, Acts 60th G.A. 1. Limitation on number of Class "C" liquor licenses which may be issued to each qualified applicant applies only to local agencies and not Liquor Control Commission. 2. Possession of open bottle of alcoholic liquor in vehicle is not violation of law.

August 7, 1963

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Dear Mr. Winkel:

This is to acknowledge your letter wherein you submit the following:

"1. Under 123.27(9) may a qualified applicant obtain two 'C' Class permits in different cities for separate and distinct businesses?

"2. What is the status under the new law of an open bottle in your motor vehicle? Is possession of an open bottle in the vehicle a violation of any section of the law?

1. Senate File 437, as amended (now Chapter 114, Acts of the 60th G.A.), provides in pertinent part:

"There shall be no limit upon the number of liquor control licenses which may be issued by a city or town council or board of supervisors, except that not more than one Class 'C' liquor control license may be issued to each qualified applicant."

Specifically, the language contained therein is limited to a city, town council or board of supervisors, and does not impose this limitation upon the Liquor Control Commission. While a city, town council or board of supervisors does not, in fact, issue the license, examination of other pertinent provisions of Senate File 437, as amended, leads us to the conclusion that the Liquor Control Commission and the respective local governing bodies operate in a dual capacity with reference to the issuance of a liquor control license, to wit:

". . . If the city or town council or county board of supervisors, as the case may be, approve the *issuance* (emphasis supplied), of a license, . . ."

"Before the *issuance*, (emphasis supplied) renewal, or denial of liquor control licenses by local authorities, . . ."

"The purpose of such referendum shall be solely to assist the board or council members. . . and shall not be binding on the council or board members in determining whether or not *to approve the issuance or renewal* (emphasis supplied) . . ."

Thus, it becomes clear that the local governing agency exercises power in the issuance of a liquor control license but is limited in issuing one Class "C" license to each qualified applicant. This limitation, however, does not fall upon the Liquor Control Commission, and thus we are disposed to the belief that a qualified applicant may obtain one Class "C" license in one city and the same applicant could obtain a Class "C" license in another city without violating this prohibition.

2. Section 123.26, Code of Iowa, 1962, provides:

"It shall be lawful to transport, carry, or convey liquors as defined by this chapter from the place of purchase by the commission to any state warehouse, store, special distributor or depot established by the commission for the purposes of this chapter or from one such place to another and when so permitted by this chapter the regulations made thereunder and in accordance therewith, it shall be lawful for any common carrier, or other person to transport, carry or convey liquor sold by a vendor or a special distributor from a state warehouse, store or depot to any place to which the same may be lawfully delivered under this chapter and the regulations established by the commission; provided, however, *that no common carrier or other person shall break, open, allow to be broken or opened any container or package containing alcoholic liquor or to use or drink or allow to be used or drunk any* (emphasis supplied) liquor therefrom while in the process of being transported or conveyed; provided, however, that nothing in this chapter shall affect the right of any permit holder to purchase, possess, or transport alcoholic liquors as

defined by this chapter and subject to the provision of this chapter and the regulations made thereunder."

Your attention is further invited to 1952 *O.A.G.* 128, 129, which states in pertinent part:

"It is our view that this section applies to the transportation of intoxicating liquors both by private persons and by common carriers and their agents. An analysis of section 123.26 shows that the statute makes it legal for the State Liquor Control Commission to transport liquor, through its own employee or through common carrier, from the place of purchase by the commission to its state warehouse and stores, and by the person who purchases liquor at a commission store to transport it from the place of purchase to the places where it is legal to possess it and consume it under the other provisions of Chapter 123.

"The provisions in section 123.26 which provide that ' * * * no common carrier or other person shall break, open, allow to be broken or opened any container or package containing alcoholic liquor or to use or drink or allow to be used or drunk any liquor therefrom while in the process of being transported or conveyed;' *are intended to cover the act of opening a bottle or the act of consuming the contents thereof while the bottle is being transported. These provisions of section* 123.26 *do not make it illegal to transport an open bottle or a bottle, the contents of which have been partially consumed.* (Emphasis supplied). To establish a violation of section 123.26 it would not be sufficient simply to show that the bottle of liquor was open or that a part of its contents was gone when the bottle was seized, if the seized liquor had been legally purchased from a state liquor store, and was legally possessed under the provisions of Chapter 123."

Thus, the law as analyzed in the above-quoted opinion remains the same as it existed prior to the enactment of Chapter 114 as amended, 60th G.A.

15.20

LIQUOR, BEER AND CIGARETTES: Licenses qualifications—Ch. 114, Acts 60th G.A. Requirement that liquor applicant be holder of beer permit is continuing requirement, and loss of beer permit disqualifies licensee from continuing to hold his liquor license. Member of city or town council or board of supervisors is directly chargeable with administration of liquor law, and as such cannot hold liquor license.

October 28, 1963

Mr. Homer Adcock, Chairman
Liquor Control Commission
L O C A L

Attention: Lawrence F. Scalise

Dear Mr. Adcock:

This is in reply to your recent letter wherein you submitted the following:

"In regard to 123.47(4) of the 1962 Code of Iowa as amended by the 60th General Assembly, which states:

" '4. Upon posting bond in the penal sum of five thousand (5000) dollars with surety and conditions prescribed by the commission, which bond shall be conditioned upon the payment of all taxes payable to the state under the provisions of this chapter and compliance with all provisions of this title, liquor control licenses may be issued to any person

who (or whose officers and stockholders, in the case of a club or corporation, or whose partners, in the case of a partnership) is of good moral character, *is the holder of a retail beer permit* as defined in chapter one hundred twenty-four (124) of the Code, has not been convicted of a felony, does not possess a federal gambling stamp, is a citizen of the United States and a resident of the State of Iowa for the past two (2) years or licensed to do business in the case of a corporation in the State of Iowa for the last two (2) years, *is not chargeable directly or indirectly with the administration or enforcement of the alcoholic beverages laws of the State of Iowa,* and is, in the judgment of the commission, of such financial standing and good reputation as will satisfy the commission that the licensee will comply with the law and the regulations of the commission. . .

"I have the following questions:

1. "If a beer permit is revoked by a city council or a County Board of Supervisors, must the liquor license also then be revoked or cancelled?

2. "Is a member of a city council or County Board of Supervisors, or anyone who has the authority to recommend the granting or denial of a liquor license precluded from obtaining a liquor license for himself?"

1. While the pertinent language in Chapter 114, Session Laws 60th G.A., requires that an applicant for a liquor license be a holder of a retail beer permit at the time of his application and is silent to the consequences for subsequently losing a retail beer permit, it is our belief that *State v. Mosher,* 128 Iowa 82, 103 N.W. 105, is controlling upon this point. The Iowa Court held that one of the requisites for admission to the bar was being of good moral character, and the fact that an attorney ceases to be of good moral character, though not within the statutory causes given for revocation of an attorney's license, was a ground for disbarment.

Thus, it is our belief that the conditions enumerated in the Liquor Control Act, which must be satisfied to obtain a liquor license, are continuing conditions which must be met to obtain entitlement to its retention. Therefore, if a beer permit is revoked by a city or town council or a county board of supervisors, the liquor license must also then be surrendered.

2. Chapter 114, Session Laws 60th G.A., provides in several of the provisions the following:

"There shall be no limit upon the number of liquor control licenses which may be issued by a city or town council or board of supervisors, . . . and

"If the city or town council or county board of supervisors, as the case may be, approve the issuance of a license . . . and

"Before the issuance, renewal, or denial of liquor control licenses by local authorities, . . . and

"The purpose of such referendum shall be solely to assist the board of council members. . . and shall not be binding on the council or board members in determining whether or not to approve the issuance or renewal . . ."

Thus, it is clear from the above statutory provisions that a city or town council and a county board of supervisors are directly chargeable with the administration of the alcoholic beverage laws of the State of Iowa, and as such are precluded from obtaining a liquor control license.

15.21

LIQUOR, BEER AND CIGARETTES: Licenses, renewal—§10(7)(a), Ch. 114, Acts 60th G.A. Applications for renewal of liquor control licenses must be filed first with the appropriate local authorities.

November 6, 1963

Mr. Homer Adcock
Liquor Control Commission
L O C A L

Attention: Lawrence F. Scalise

Dear Mr. Adcock:

This is in reply to your recent request wherein you submitted the following:

"In regard to Section 123.27(7) of the 1962 Code of Iowa, as amended by the 60th General Assembly, which states:

> An application for class 'A', class 'B', or class 'C' liquor control license, accompanied by the required fee and bond, shall be filed with the appropriate city or town council if the premises proposed to be licensed are located within the corporate limits of a city or town, or with the board of supervisors if the premises proposed to be licensed are located outside the corporate limits of a city or town. . .

"I have the following question. Must the application for *renewal* of a liquor license be filed first with the appropriate city or town council or county board of supervisors?"

Section 10(7)(a), (Chapter 114, 60th General Assembly) provides in pertinent part:

"Before the issuance, renewal, or denial of liquor control licenses by local authorities, the board or council may conduct a referendum on the question of whether liquor control licenses shall be approved for the city, town, or county in question. . . . The purpose of such referendum shall be solely to assist the board or council members in determining public sentiment toward liquor by the drink sales, and shall not be binding on the council or board members in determining whether or not to approve the issuance or renewal of liquor control licenses."

By the express statutory language as set forth above, the renewal of liquor control licenses initiate with the appropriate local authorities.

15.22

LIQUOR, BEER AND CIGARETTES: Licenses, revocation—Ch. 114, Acts 60th G.A. Cities and towns and board of supervisors have the authority to suspend or cancel a liquor control license for the grounds enumerated in the Liquor Control Act.

November 1, 1963

Mr. Homer Adcock, Chairman
Liquor Control Commission
L O C A L

Dear Mr. Adcock:

This is in reply to your recent letter wherein you submitted the following:

"In regard to 123.32 of the 1962 Code of Iowa as amended by the 60th General Assembly, which states:

Any liquor control license issued under this chapter may, after notice in writing to the license holder and reasonable opportunity for hearing, be suspended or canceled by the issuing authority to the commission for any of the following causes: . . .

"I have the following question. Does a city council or a county board of supervisors have the authority to suspend or cancel a liquor license?"

Chapter 114, Session Laws 60th G.A., provides in pertinent part:

"Any liquor control license issued under this chapter may, after notice in writing to the license holder and reasonable opportunity for hearing, be suspended or canceled by the issuing authority or the commission for any of the following causes: . . ."

Examination of other pertinent provisions in the Iowa Liquor Control Act reveals that a city council and a county board of supervisors are referred to as an issuing authority such as, "If the city or town council or county board of supervisors, as the case may be, approve the *issuance* (emphasis supplied) of a license, . . ."; and, "Before the *issuance,* (emphasis supplied) renewal, or denial of liquor control licenses by local authorities, . . ."; and, "The purpose of such referendum shall be solely to assist the board or council members . . . and shall not be binding on the council or board members in determining whether or not to approve the *issuance* or renewal . . ." (Emphasis supplied).

Thus it becomes clear that while the local governing agencies do not ultimately issue licenses, they are, in fact, in one sense an issuing authority. It is equally clear that the legislative declaration conferring authority to suspend or cancel on the *"issuing authority or the commission"*, admits of no construction.

It is a well settled principle that meaning and effect will be given to all words and phrases, and the legislative language obviously refers to separate and distinct bodies. Therefore it is our belief that a city or town council or a county board of supervisors has the authority to suspend or cancel a liquor license for the grounds enumerated in the Liquor Control Act.

15.23

LIQUOR, BEER AND CIGARETTES: Minors, on premises—§§124.34, 366.1, 1962 Code; Ch. 114, Acts 60th G.A. There is no statutory prohibition against persons under age of 21 years being upon licensed premises of establishment selling beer or alcoholic liquors. However, municipal corporations and boards of supervisors are empowered to enact ordinances prohibiting same. Liquor Control Commission has authority to adopt such prohibition by regulation.

August 13, 1963

Honorable Charles F. Griffin
State Senator
Mapleton, Iowa

Dear Senator Griffin:

This is to acknowledge your letter wherein you request an opinion upon the following:

"Our local police have been searching the Code and new regulations of the Liquor Control Act for restriction on minors' access to such taverns. Evidently there is no specific mention in the beer chapter either. Have we overlooked this point somewhat or should our city council take action to pass an ordinance regarding this matter?

"Nearly all places in Iowa have been restricting minors in beer taverns

but there is a possibility that this was extra-legal or by local ordinance. I will appreciate your comments so that we can take up some sort of local regulation if it is necessary. Perhaps you might have a sample ordinance that would be particularly effective in regulating the matter with inclusion of adult responsibility or parents control over minors, etc."

Examination of the Iowa statutes fails to reveal any statutory prohibition which would be operative to prevent a person under the age of 21 years from being in an establishment which sells or dispenses beer or alcoholic liquors, nor has the Liquor Control Commission adopted a regulation prohibiting the same.

Section 366.1, Code of Iowa, 1962, vests certain powers in municipal corporations and provides as follows:

"Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

Section 124.34, Code of Iowa, 1962, further empowers municipal corporations by providing in pertinent part:

"Cities and towns are hereby empowered to adopt ordinances . . . governing any other activities or matters which may affect the sale and distribution of beer under class 'B' permits and the welfare and morals of the community involved."

In *City of Des Moines v. Reisman,* 248 Iowa 821, 83 N. W. 2d 197, the validity of an ordinance which provided, "it shall be unlawful for a person under 21 years of age to be in, or for any person to permit a person under the age of 21 years to be in, a place where beer is sold unless the major portion of the business conducted by the permit holder is other than the sale of beer and the sale of beer is merely incidental thereto", was upheld by the Iowa Court.

The Court, in holding that such an ordinance was valid, quoted §124.34, Code of Iowa, 1962, wherein they announced:

"It not only authorizes cities and towns to adopt ordinances for the enforcement of this chapter, not in conflict with the provisions of this chapter, but it expressly empowered enactment of ordinances governing any other activities or matters which may affect the welfare and morals of the community involved."

Section 123.1, Code of Iowa, 1962 provides:

"This chapter shall be cited as the 'Iowa Liquor Control Act', and shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals and safety of the people of the state. . . and it is declared to be the public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as hereinafter provided. . ."

Section 123.6, Code of Iowa, 1962, provides in pertinent part:

". . . The commission shall be held strictly accountable for the enforcement of the provisions of this chapter."

Thus, it appears that the only regulation prohibiting persons under the age

of 21 years from being in establishments licensed to sell beer or alcoholic liquors must emanate from the local governing bodies or from the Liquor Control Commission.

15.24

LIQUOR, BEER AND CIGARETTES: Minors, serving beer—§124.21, 1962 Code. Married person under age of 21 years is prohibited from serving beer where business of selling beer constitutes more than 50% of gross business transacted therein.

August 7, 1963

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Dear Mr. Winkel:

This is to acknowledge you request wherein you inquire:

"Would you kindly give me your opinion on your interpretation of Section 124.21 of the 1962 Code of Iowa. In particular, please advise whether or not a married person under the age of 21 years is prohibited from serving beer under the circumstances of said Section.

"In requesting your opinion, I am cognizant of prior opinions wherein you have ruled that a married person cannot purchase beer or drink beer if said person is under the age of 21 years."

Most American jurisdictions have followed the common law view that any person below the age of twenty-one (21) is a minor, and that the only effect of a marriage by a minor or between minors is that of emancipation of the minor from parental control and his consequent entitlement to the retention of his own earnings.

Section 124.21, Code of Iowa, 1962, provides:

"Minors are prohibited from serving beer in the place of business of any permit holder in which the business of selling beer constitutes more than fifty percent of the gross business transacted therein."

Your attention is invited to the case of *City of Des Moines v. Reisman,* 248 Iowa 821, 83 N.W. 2d 197, which approves as valid a city ordinance which provided that it was unlawful for a person under twenty-one (21) years of age to be in, or for any person to permit a person under the age of twenty-one (21) years to be in, a place where beer is sold unless the major portion of the business conducted by the permit holder is other than the sale of beer.

Chapter 124 known as the Beer and Malt Liquors chapter provides in various sections in its prohibitions the use of the word "minor" as opposed to adopting a definite numerical age to which the prohibition applies.

It is to be further noted that cities and municipalities have only those powers to enact ordinances in this area which are not inconsistent with the provisions of Chapter 124. Thus, the Supreme Court of Iowa in upholding the validity of this ordinance tacitly approved the city's definition of "minor" as being a person under twenty-one (21) years of age. In this case, the defendant was a married person under the age of twenty-one (21) years. The Iowa Court rejected the argument that §599.1 operated to make this person an adult by virtue of his marriage for the purpose of consuming or being in a place where beer is sold. In so doing, the Iowa Court announced at page 825:

"It would have been much easier, had the legislature so intended, and more simple and normal to have expressly provided in chapter 124 for emancipation by marriage for its purposes as was done for civil purposes in Code section 599.1."

Thus, we are disposed to the belief that a married person under the age of twenty-one (21) years is prohibited from serving beer where the business of selling beer constitutes more than fifty percent of the gross business transacted therein, by virtue of §124.21.

15.25

LIQUOR, BEER AND CIGARETTES: Minors, working—§124.31, 1962 Code. Minors cannot serve beer in taproom, or sell beer to, or handle beer for guests or other persons on any of premises covered by beer permit.

August 7, 1963

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Dear Mr. Winkel:

Reference is made to your request for an opinion which reads:

"I would like to request an Attorney General opinion on the following proposition: A local hotel is the holder of a Class B beer permit duly issued under the appropriate City Ordinance of Algona and under Chapter 124 of the Iowa Code. Said hotel is an incorporated business located in Algona, Iowa. The hotel operates the usual facilities including room rentals, dining rooms and a tap room which is an integral part of the hotel. Beer is sold in the tap room, and is also occasionally carried from the tap room to the dining rooms and to the rented rooms. Less than 20% of the gross business of the hotel would come from the sale of beer. However, more than 50% of the gross business done in the tap room would be from the sale of beer. The City Ordinance of the City of Algona relating to the sale of beer contains language identical to Section 124.21 which prohibits a minor from serving beer in the place of business of any permit holder in which the business of selling beer constitutes more than 50% of the gross business transacted therein. The City Ordinance does not prohibit a minor from entering the place of business of a Class B permit holder unless the selling of beer constitutes more than 50% of the gross business transacted therein.

"A question has arisen whether Section 124.21 of the Iowa Code prohibits a minor from serving beer in the tap room of the hotel under the circumstances previously outlined."

From the facts stated it is obvious that a minor cannot serve beer in the tap room within the terms of §124.21.

There remains the question as to whether or not said minor can serve beer in other parts of the hotel, assuming that the Class B beer permit covers and includes the entire premises occupied and operated by the hotel corporation.

We must also determine what is meant by the words "place of business" of any permit holder, within the intent and purpose of the legislature when it enacted §124.21 of the beer law.

The beer law, Chapter 124, Code of Iowa, 1962, is primarily a "Police regulation" and relates to an occupation or business regarded as requiring substantial restrictions, supervision, and control, for the protection of the public welfare and morals. (See *Soursos v. Mason City,* 230 Iowa 157, 296

N.W. 807 (1941); *Berstein v. City of Marshalltown,* 215 Iowa 1168, 248 N.W. 26, 86 A.L.R. 782).

The act itself recognizes the necessity of strictly regulating the handling and sale of beer for the protection of the public welfare and morals. (*Madsen v. Town of Oakland,* 219 Iowa 216, 257 N.W. 549; *State v. Talarico,* 227 Iowa 1315, 290 N.W. 660).

The operation of the tap room is a separate business, under a separate and distinct license, from the operation of the hotel business itself and in effect constitutes the operation of two separate businesses. (See Chapter 170 of the Code). Cities and towns also have power to regulate and license hotels and restaurants. (§368.6(1) of the Code). See also 1962 *O.A.G.* 323 where it was held that the closing hours as established by §§124.20, 124.34 and 124.35 of the Code, under Class "B" permits for sale and consumption of beer, does not preclude the continued operation of the public restaurant portion of the business after said closing hours; the tavern portion and the restaurant portion of the business being licensed separately.

The legislature did not define the words "place of business", and hence they must be construed according to the context and the approved usage of the language in relation to the operation of a tavern under a Class "B" permit. (§4.1(2) of the Code).

Under a prohibition law of the state of Georgia, said words were construed in this manner, to-wit: "A place of business within the purview of the prohibition law, means a place devoted by the proprietor to the carrying on of some form of trade or commerce. *Redding v. State,* 85 S.E. 278, 279, 16 Ga. App. 315".

In the matter before us, the business, trade or commerce of the permittee in question is that of the handling and sale of beer under the Class "B" permit in the tap room of the hotel, and is subject to substantial restrictions, supervision and control.

A minor is clearly prohibited from serving beer in the tap room, and we believe he is likewise prohibited from serving beer out of the tap room to guests of the hotel, or other persons, in any other part of the hotel premises. To do so he would of necessity have to enter the tap room to secure the beer and deliver it to the patrons of the permittees on the premises.

In 50 *Am. Jur.* 420, §395, we find this statement which we believe is pertinent to the question at hand:

> "A liberal construction is generally given to statutes introducing some new regulation for the advancement of the public welfare, or having for their end the promotion of important and beneficial public objects. This is true of statutes necessary for the protection of the health, morals, and safety of society, . . . Such statutes should receive such construction as would affect their object, suppress the mischief, advance the remedy, and defeat all evasions for the continuance of the mischief."

If the entire operation or volume of business of the hotel were combined with the volume of business of the tap room, to result in the gross business of the hotel amounting to less than 20% including the sale of beer, this would result in an evasion of the statute, §124.21, and defeat object and purpose of the statute as expressly stated therein, in the matter of minors working in or for the operators of a tavern or tap room.

Therefore, it is our opinion that it was the intent of the legislature in the enactment of §124.21 to prohibit minors from, in any manner, serving beer in the place of business of a permit holder, which would involve the handling and sale of the beer any place on the premises of the permittee as covered by the permit.

15.26

LIQUOR, BEER AND CIGARETTES: Occupational tax, cabaret tax—Ch. 114, Acts 60th G.A. Occupational tax of 10% is upon gross receipts of liquor licensee. When gross receipts include cabaret tax, the cabaret tax is to be excluded before computing the state tax.

July 7, 1964

Homer Adcock, Chairman
Liquor Control Commission
LOCAL

Attention: Gene Needles

Dear Mr. Adcock:

In reply to your oral request wherein you set forth the following matters:

A liquor licensee charges a consumer 50c for a drink. This amount is placed in the cash register. Should the state tax on this drink be (.05) five cents, or should it be computed as follows:

Drink	$	.4545
State Tax		.0455
Total	$	.5000

Secondly, a licensee, having entertainment that is required to pay a federal cabaret tax, charges 55c a drink, which includes the federal cabaret tax. Should the state tax be computed::

(1)	10% of the 55c		
(2)	10% of the amount charged after excluding the cabaret tax, or		
(3)	Drink	$	.4584
	10% State Tax		.0458
	10% Federal Tax		.0458
	Total	$	.5500

In reply thereto, we advise as follows: Chapter 114 of the Acts of the 60th General Assembly provides in pertinent part:

"There is hereby imposed on every individual, partnership, corporation, association or club licensed to sell alcoholic beverages for consumption on the premises where sold, an occupational tax to be computed on all alcoholic beverages sold, as follows:

"An amount equivalent to ten (10) percent upon the gross receipts of any licensee from all sales of alcoholic beverages in the state of Iowa. This occupational tax on gross receipts shall be in lieu of sales tax thereon."

"Gross receipts" is subsequently defined in Chapter 114 as

". . . the amount received in money, credits, property or other moneys worth in consideration of sales of such alcoholic beverages within this state, without any deduction on account of the cost of the property sold, the costs of the materials used, the cost of labor or services, purchases, amounts paid for interest or discount, or any other expenses whatsoever."

The legislature, being its own lexicographer, clearly provided that the tax in question is an occupational tax to be measured by the gross receipts of the licensee from sales of alcoholic beverages. The statutory language is in accord with other jurisdictions which have held:

"Where a tax is imposed and measured by the amount of . . . the gross receipts of a business, it is an occupation tax." *Viquesney v. Kansas City*, 266 S.W. 700, 305 Mo. 488. *Portland Van & Storage Co. v. Hoss*, 9 P. 2d 122. *McMillan v. City of Knoxville*, 202 S.W. 65, 139 Tenn. 319. *Reif v. Barrett*, 188 N.E. 889, 355 Ill. 104.

The statutory language is clear and admits of no construction. The incidence of the occupational tax in the amount of 10% must fall upon the gross receipts from the sale of alcoholic beverages and, therefore, with respect to your first inquiry the amount of the tax is five cents.

Your second inquiry involves the capability and authority of a state to impose its powers of taxation upon an existing federal tax. It is universally recognized that the states are absent the authority to impose the incidences of their taxes upon federal taxes so as to pretermit further discussion.

Consequently, the federal cabaret tax should be excluded prior to computing the 10% tax on the balance in accord with the manner employed, which was dispositive of your first inquiry.

15.27

LIQUOR, BEER AND CIGARETTES: Occupational tax, computation—Ch. 114, Acts 60th G.A. Occupational tax is imposed upon gross amount of sale of alcoholic beverage without deduction for any expenses whatsoever.

August 13, 1963

Mr. Homer Adcock, Chairman
Liquor Control Commission
L O C A L

Attention: Lawrence Scalise, Director
Law Enforcement Division

Dear Mr. Adcock:

This is in reply to your request for an opinion upon the following:

"In regard to Section 31 of S. F. 437, which states:

"There is hereby imposed on every individual, partnership, corporation, association or club licensed to sell alcoholic beverages for consumption on the premises where sold, an occupational tax to be computed on all alcoholic beverages sold, as follows:

'An amount equivalent to ten (10) percent upon the gross receipts of any licensee from all sales of alcoholic beverages in the state of Iowa. This occupational tax on gross receipts shall be in lieu of sales tax thereon.'

"I have the following question: Does 'alcoholic beverages' mean the liquor without mix of any kind, or does it mean the liquor plus the mix?"

Senate File 437, as amended, (now Chapter 114, Acts of the 60th G.A.), provides in pertinent part:

"There is hereby imposed on every individual, partnership, corporation, association or club licensed to sell alcoholic beverages for consumption on the premises where sold, an occupational tax to be computed on all alcoholic beverages sold as follows: An amount equivalent to ten (10) percent upon the gross receipts of any licensee from all sales of alcoholic beverages in the State of Iowa. This occupational tax on gross receipts shall be in lieu of sales tax thereon."

Section 124.3, as amended by Senate File 437, 60th G.A., provides:

"1. . . .

"2. 'Alcohol' means the product of distillation of any fermented liquor, rectified either once or oftener whatever may be the origin thereof, and includes synthetic ethyl alcohol.

"3. 'Spirits' means any beverage which contains alcohol obtained by distillation mixed with drinkable water *and other substances in solution,* (emphasis supplied) and includes, among other things, brandy, rum, whisky and gin.

"4. 'Wine' means any alcoholic beverage obtained by the fermentation of the natural sugar contents of fruits, (grapes, apples, etc.) and other agricultural products containing sugar (honey, milk, etc.).

"5. 'Alcoholic liquor' or *'alcoholic beverage'* (emphasis supplied) includes the three varieties of liquor above defined except beer. . . and every liquid or solid, patented or not, containing alcohol, spirits, or wine, and susceptible of being consumed by a human being for beverage purposes. * * *"

The legislative definition of "alcoholic beverage" means, in part, any beverage which contains alcohol. . .mixed with drinkable water and other substances in solution. Therefore, by this definition alone, it is manifest that the legislature intended to embrace more than alcohol within the definition of "alcoholic beverages".

In ascertaining the intentions of the legislature, it becomes necessary to examine all the language in the section which imposes the occupational tax; and in so doing, we find this legislative declaration:

"This occupational tax on gross receipts shall be in lieu of sales tax thereon."

It is axiomatic that a sales tax is imposed upon the gross amount of a sale, and to effectuate meaning to this language, it becomes necessary to conclude that the occupational tax should fall upon the gross amount of such a sale. In fixing the imposition of the tax in question, the legislature saw fit to employ the words "gross receipts". If alcoholic beverages meant only the alcoholic liquor without mix of any kind, it would have been meaningless to employ the language "gross receipts".

Senate File 437 defines gross receipts as follows:

" 'Gross receipts' as used in this chapter as amended, means the amount received in money, credits, property or other moneys worth in consideration of sales of such alcoholic beverages within this state, without any deduction on account of the cost of the property sold, the costs of the materials used, the cost of labor or services, purchases, amounts paid for interest or discount, or any other expenses whatsoever. No deductions shall be allowed for losses of any nature."

The legislature, being its own lexicographer, has seen fit to define gross receipts and with that definition we are bound. Thus, the pertinent language renders it inescapable that gross receipts includes the entire amount received at the time of the sale without an allowance for the cost of the materials used, or any other expenses whatsoever.

Therefore, it is our belief that the incidence of this occupational tax shall be upon the entire amount of such a sale; for if the legislature had intended otherwise, they would have so declared.

15.28

LIQUOR, BEER AND CIGARETTES: Penalties—§123.46, as amended, 1962 Code. The Iowa Liquor Control Commission has no authority to imprison or fine a person who violates the provisions of the Liquor Control Act.

October 25, 1963

Mr. Homer Adcock, Chairman
Liquor Control Commission
LOCAL

Dear Mr. Adcock:

This is in reply to your recent letter wherein you submitted the following:

"In regard to 123.46(5), as amended by the 60th General Assembly, which states:

'. . . whoever violates any of the provisions of this section shall be subject to a fine of not to exceed one hundred (100) dollars or to imprisonment for not more than thirty (30) days in the county jail or to both such fine and imprisonment.'

I have the following question. Does the Liquor Control Commission have the authority to imprison or fine any person who violates 123.46 of the 1962 Code of Iowa as amended by the 60th General Assembly?"

The Iowa Liquor Control Commission is but an administrative arm of the State of Iowa, and is not a court within the meaning of the Constitution. Thus, it is rudimentary that the Iowa Liquor Control Commission has no authority to imprison or fine any person who violates any provision of the Iowa Liquor Control Act.

15.29

LIQUOR, BEER AND CIGARETTES: Time of liquor sales, standard time—Ch. 114, Acts 60th G.A. Rule that solar time will be applied in Iowa is but presumption, and this presumption has been rebutted by general adoption of standard time for mode in measuring time. Daylight savings time does not supersede standard time under Ch. 114.

July 30, 1963

The Honorable John L. Duffy
State Representative, Dubuque County
Dubuque, Iowa

Dear Mr. Duffy:

This is to acknowledge your request based upon the following:

"The City of Dubuque through a resolution passed by the City Council has adopted a so-called 'Daylight Savings Time'.

"Will you kindly let me have your written opinion as to whether the same is applicable to Senate File 437, as amended, in regard to the time of dispensing liquor and beer under the recently enacted liquor-by-the-drink law.

"You perhaps have received similar requests for an opinion relative to this subject matter and if you have, I would appreciate a copy of the same.

"May I call your attention to the Iowa case of Jones vs. German Insurance Co. of Freeport, reported in 81 Northwestern Reports, page 188, which states:

"'* * * Time when it concerns a legal duty, should be fixed with reference to a certain unvarying, uniform standard, and that standard in this state is the meridian of the sun * * *.'"

Senate File 437, as amended, 60th G. A., provides in pertinent part:

"4. No person or club holding a liquor control license under this chapter, his agents or employees, shall: * * *

"(b) Sell or dispense any alcoholic beverage on the licensed premises, or permit the consumption thereon between the hours of 1:00 A.M. and 7:00 A.M. on any week day, and between the hours of 12:00 o'clock midnight on Saturday and 7:00 o'clock A.M. on the following Monday * * *"

We are not unmindful of the case of *Jones v. German Insurance Co.,* 110 Iowa 176, which in substance held:

"* * * Time when it concerns a legal duty should be fixed with reference to a certain unvarying, uniform standard, and that standard in this state is the meridian of the sun * * * and not standard time."

We are of the belief that the application of the same is not controlling in the question at bar. Our belief is based upon some of the pronouncements contained within that case, as follows:

"The presumption is that common or solar time is the time intended by the parties when reference to the time of day is made in contracts, unless a different standard is shown to have been intended."

Our belief is further buttressed by the Iowa Court's announcement that, "exigencies of some lines of business may require the adoption of a system which shall definitely fix the same hour and minute at a particular instant at localities widely separated in longitude, so that the delay of and occasional mistake in computation may be avoided. . .The presumption is that common time is that relied upon *where there is nothing to show that a different mode of measuring time has been in general use.*" (Emphasis supplied)

This decision, rendered in the year 1899, was prior to the enactment of the Act of March 19, 1918, Chapter 24, §§1, 2 and 4 U.S.C.A., §§261, 262 and 263, which established standard times of the United States into five zones as we know them today.

The effect of this federal statute resulted in the acceptance of all walks of life in using these standards for the mode of measuring time. The antiquity of solar time is most clearly demonstrated by the absence of sun dials and the exigencies in requiring a computation of orderly time has resulted in all agencies relying upon and employing standard time.

Experience has demonstrated the inestimable importance to government and other businesses to operate with absolute certainty as to time. Without such certainty, chaos and confusion would be paramount. We believe that the principle in the above-referenced case is but a presumption, and that this presumption has been rebutted beyond all doubt in that the general mode of measuring time adopted by all walks of life is that of standard time.

This Department has ruled in prior opinions that daylight savings time will not supersede standard time. (Strauss to Leir, Scott Co. Atty., April 6, 1960, and Kading to Calhoun, Des Moines Co. Atty., June 29, 1954). We believe that this is a correct and proper interpretation of the law and the same are hereby reaffirmed. Thus, standard time shall be employed under Senate File 437, as amended, 60th G.A.

15.30

LIQUOR, BEER AND CIGARETTES: Wineries, native—§§123.47(1), 123.56, 1962 Code. Native wineries may advertise native wines except by those methods expressly prohibited by regulations promulgated by Liquor Control Commission.

April 4, 1963

Mr. Homer R. Adcock, Chairman
Iowa Liquor Control Commission
L O C A L

Attention: Pauline Dawson, Superintendent of Permits

Dear Mr. Adcock:

This is to acknowledge your letter of February 8, 1963, wherein you request an opinion on the following:

First: Is it permissible for a native winery to have and to hand to its customers at its place of business a card similar to the one attached?

Second: May a native winery have and hand to its customers at its place of business match books with the native winery's name thereon?

The matter to which you refer in question is substantially as follows:

EHRLY BROS. WINERY
Alma C. Ehrle, Owner & Proprietor

Makers of
GRAPE & RHUBARD WINES
Bonded Winery 15
Homestead, Iowa

Phone AMANA 622-5602

Your attention is invited to §123.47(1), Code of Iowa, 1962, which provides in part:

"Except as permitted by federal statute and regulations, there shall be no public advertisement or advertising of alcoholic liquors in any manner or form within the state.

"1. No person shall publish, exhibit, or display or permit to be displayed any other advertisement or form of advertisement, or announcement, publication, or price list of or concerning any alcoholic liquors, or where, or from whom the same may be purchased or obtained, unless permitted so to do by the regulations enacted by the commission and then only in strict accordance with such regulations."

Section 123.56, Code of Iowa, 1962, provides in pertinent part:

"Notwithstanding anything in this chapter contained, but subject to any regulations or restrictions which the commission may impose, manufacturers of native wines from grapes, cherries, other fruit juices, or honey grown and produced in Iowa may sell, keep, *or offer for sale* (emphasis supplied) and deliver the same in such quantities as may be permitted by the commission for consumption off the premises."

Native wineries are by virtue of the language employed in the above statute specifically authorized to "sell, keep, or offer for sale" native wines subject to any regulations or restrictions the commission may impose. We invite your attention to *Unted States v. Dodge*, 25 Fed. Cas. 879, which defines the phrase "offer for sale" as an attempt to sell without a special or personal

solicitation of any particular person to become a purchaser. This case further holds that it may be accomplished by general advertisement in the press, or by exhibition of signs or symbols in the vicinity of the place of business.

In view of the above decision, it is our belief that "advertising" and "offer to sell" can be and are in this instance synonymous. Except for the language, "*notwithstanding anything in this chapter contained* (emphasis supplied) . . . manufacturers . . . may . . . offer for sale . . ." employed in §123.56, §123.47-(1) would prohibit what §123.56 authorizes. The authorizations extended to native wineries under §123.56 are subject, however, to regulations or restrictions which the commission may desire to impose. Regulation one (1), subparagraph (j), promulgated by the Liquor Commission, effective October 1, 1961, provides:

> "Such manufacturer shall not advertise such native wines by signs or posters, but he may have a sign in the place of manufacture identifying his business and not more than two signs there simply stating without description or price, that wine or native wines is for sale there."

The above regulation clearly prohibits the advertisement of native wines by "signs or posters". It is a well settled rule of law that inclusion by specific mention of the mode of performance in a statute excludes what is not mentioned. *Pierce v. Bekins Van and Storage Company* (1919), 185 Iowa 1346, 172 N.W. 191.

Having failed to prohibit advertising generally, or the specific modes employed by the winery in the case at bar, we are disposed to the belief that under the above rule of construction, the modes employed by the winery in this specific case are excluded. Therefore, both questions are answered in the affirmative.

CHAPTER 16

MOTOR VEHICLES

STAFF OPINIONS

LETTER OPINIONS

16.1

MOTOR VEHICLES: Accident reports, confidential nature – §§321.266, 321.271, 321.273, 622.46, 1962 Code. Only information contained in accident report required to be filed by driver that may be disclosed by Public Safety Department, city, town or municipality, is identity and address of person involved in accident; and then only to person involved or his attorney, upon request.

August 10, 1964

William F. Sueppel, Commissioner
Department of Public Safety
State Office Building
L O C A L

Dear Mr. Sueppel:

This is in reply to your recent request for an opinion, which states:

"It has been the practice of this division, and of highway patrol district offices to disclose names and addresses of all people involved in an accident as well as the exact time and location of an accident if available to any person who requests the information, provided such person establishes a legitimate interest in the matter. This information has been freely given to insurance adjustors, the press, and members of the family of people directly involved in the accident.

"It is also the known practice of some municipalities to require the driver file with a designated city department a report of the accident or a copy of the report filed with this department–as permitted by Section 321.273–and persons interested in the accident can oft times obtain photo copies of the record from the designated city department.

"In view of the provisions of Section 321.266, 321.271, 321.273 and 622.46, an opinion is requested setting forth exactly what information from the accident reports may be released by either this department or the designated city departments, and to whom this information may be given without violating the confidential nature to the reports."

Section 321.266 of the Code requires a driver of a vehicle involved in an accident resulting in injury or death of a person, or property damage to the extent of $100.00 or more, to forward a written report to the department.

Section 321.273 authorizes cities and towns to require written reports of such accidents, and provides:

"All such reports shall be for the confidential use of the city department and subject to the provisions of Section 321.271."

Section 321.271 provides:

"All accident reports shall be in writing and the written report shall be without prejudice to the individual so reporting and shall be for the confidential use of the department, except that upon the request of any person involved in an accident, or the attorney for such person, the department shall disclose the identity of the person involved in the accident and his address. A written report filed with the department shall not be admissible in or used in evidence in any civil case arising out of the facts on which the report is based."

Section 622.46 provides:

"Every officer having the custody of a public record or writing shall furnish any person, upon demand and payment of the legal fees therefor, a certified copy thereof."

This section, however, is general in nature and cannot take precedence over the explicit restrictions of §321.271.

In 1952 *O.A.G.*, 117, it was stated:

"Under the provisions of §321.271 the written reports relating to motor vehicle accidents which are made by *parties involved* in an accident are privileged and are not to be made available for examination by any persons whomsoever. . . . records of the department other than those declared by law to be confidential. . . may be inspected by the public, and . . . certified copies of such records shall be provided upon payment of a fee . . ." (Emphasis supplied)

Under the provisions of §321.273 the same restrictions are applicable to cities.

In §321.271 the words "without prejudice" denote without injury, damage or impair; the word "confidential" denotes something communicated in trust, private, or secret. (Webster's International Dictionary, 2nd Edition). The exceptions provided in §321.271 must be strictly construed.

It is therefore our opinion that the Department of Public Safety, or a city, town or other municipality may disclose *only* the identity of a person involved in an accident, and his address, and then only to a person involved in an accident, or to his attorney, upon request; otherwise, *no* information contained in an accident report required to be filed by a driver under §§321.266 or 321.273 may be divulged.

16.2

MOTOR VEHICLES: Apportionment, credit for ton-mile tax—Ch. 326, 1962 Code. Whether ton-mile taxes paid to state not party to prorating agreement should be considered in determining fees due on prorating fleet of vehicles is an administrative decision lying within discretion of Iowa Reciprocity Board, as circumscribed by Iowa statutes.

August 1, 1963

Mr. Carl F. Schach, Charman
Iowa Reciprocity Board
L O C A L

Dear Mr. Schach:

We hereby acknowledge receipt of your request for an opinion pertaining to the following question, as stated in your letter:

"A question has been raised as to whether or not the fees paid to a State imposing a ton-mile tax should be considered in the determination of registration fees due the State of Iowa on a vehicle included in the prorate fleet of a resident of Iowa when the ton-mile fees have been paid to a state not a party to the prorate agreement and which state has only an informal straight reciprocity arrangement with the State of Iowa on registration fees.

"The informal arrangement referred to in paragraph one does not include any waiver of mileage fees and does not provide for reciprocal apportionment of mileage fees and/or registration fees."

We assume that the prorate agreement referred to in your letter is one of the two compacts to which Iowa belongs. It is our understanding that Iowa is currently a party to the "Midwest Vehicle Prorate Company" and the "Uniform Vehicle Registration Proration and Reciprocity Agreement". Both compacts constitute written agreements between several states regarding the registrations of motor vehicles.

Whether or not fees paid to a state imposing a ton-mile tax should be considered in determining registration fees due to Iowa on a prorated fleet of trucks upon the terms of the aforesaid agreements and the Iowa statutes. Such a consideration is not resolved by the terms of an arrangement with a state not a party to said prorate agreements.

Chapter 326 of the 1962 Code sets out the statutory creation of the Iowa Reciprocity Board and provides the authority for its operations. The advisability of making a particular agreement between Iowa and another state is an administrative function lying within the sound discretion of the Board as circumscribed by the Iowa statutes.

It is our understanding that in the past the Board has determined that fees paid to a state imposing a ton-mile tax should not be considered in the determination of registration fees due to the State of Iowa on vehicles included in a prorated fleet. This is a proper determination for an administrative agency to make and must be uniformly applied during the registration period effected. See *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 161 S. W. 2d 1022 (1942); *In the Matter of O'Brien v. Delaney*, 7 N.Y.S. 2d 596, 255 App. Div. 385, *aff.* 21 N. E. 2d 202, 280 N. Y. 697 (1939); *Stanton v. Mun. Civil Service Comm., of City of Newburgh*, 75 N.Y.S. 2d 732, 189 Misc 782 (1947); *Mallen v. Morton*, 99 N.Y.S. 2d 521 (1950).

Thereafter, if the Board felt that the interests of the State of Iowa justified a change in policy so that ton-mile taxes were considered, said change necessarily rests within the discretion of the Board and must be prospectively administered.

16.3

MOTOR VEHICLES: Chauffeur's licenses, firemen—§321.1(43), 1962 Code. (1) Person hired as fireman who, as incidental to performing his duties, operates motor vehicle which does not exceed five tons in gross weight is not required to have chauffeur's license. (2) However, if fireman operates truck tractor, road tractor or motor truck as defined by §321.1 which has gross

weight classification exceeding five tons, and that operation is not "occasional or merely incidental," he would be required to have chauffeur's license.

December 22, 1964

Mr. Edward F. Samore
Woodbury County Attorney
Sioux City, Iowa

Dear Mr. Samore:

This is in response to your opinion request in which you state:

"There is a difference of opinion between this office and the City Attorney over the question of whether or not Sioux City firemen operating fire trucks, vehicles used by the Chief of the fire department and his assistants, and other emergency vehicles, should be required to have chauffeur's licenses."

Section 321.1(43), in part, provides as follows:

" 'Chauffeur' means any person who operates a motor vehicle in the transportation of persons, including school busses, for wages, compensation or hire, or any person who operates a truck tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding five tons, or any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt except when such operation by the owner or operator is occasional and merely incidental to his principal business. . ."

Under the above section, the term "chauffeur" applies to two classifications of persons:

1. Those operating certain vehicles "for wages, compensation or hire", and

2. Those operating certain types of motor vehicles which exceed five tons in gross weight, unless operation is "occasional" or "merely incidental".

With respect to the first classification, there is no statutory duty or authority to employ a fireman only to operate a fire department vehicle. (See Section 368.11 and Section 365.15, Code of Iowa, 1962.)

As far as the statute is concerned, one is employed as a fireman with no assigned, specific duties within the department. In other words, he is employed as a fireman and not as a driver of a vehicle.

In that situation, it is to be noted that the term under statutes like §321.1-(43) and other statutes of substantially the same terms, has had the consideration of the courts and writers.

In 60 C.J.S., paragraph 151, titled "Motor Vehicles", it is stated:

"The term 'chauffeur' may have different meanings, dependent on the terms of the statute in which it appears; as used in those regulations requiring a person who desires to operate a motor vehicle as a chauffeur, or as a paid operator, first to obtain a chauffeur's or driver's license, it means a paid operator or employee, that is, person who is employed and paid by the owner of a motor vehicle to drive and attend to the car, and does not include operators who are not employed and paid for operating the motor vehicle, and therefore does not include an employee who receives his compensation for services rendered, other than the operation of motor vehicles, although in performing such services he may incidentally operate a motor vehicle."

A like view is taken of this situation by the Supreme Court of Iowa in the case of *Des Moines Rug Cleaning Co. v. Automobile Underwriters*, 215 Iowa 246, 249-253, 245 N.W. 215 (1932), in which the Court was faced with the issue of determining who was included within this definition. The statute involved there was Par. 6, §4863, Code 1927, similar to the statute now under consideration, and it stated:

"A 'chauffeur' as defined by our motor vehicle law is:

"Any person who operates an automobile in the transportation of persons or freight and who receives any compensation for such service in wages, commission or otherwise, paid directly or indirectly, or who as owner or employee operates an automobile carrying passengers or freight for hire, including drivers of hearses, ambulances, passenger cars, trucks, light delivery, and similar conveyances; * * *"

The Court in determining who fell within this definition stated:

"The import of the decisions upon this question is that the term 'chauffeur', as used in the statutes, requiring a person who desires to operate a motor vehicle as a chauffeur first to obtain a chauffeur's license, means a *paid operator or employee*,—that is, a person who is employed and paid by the owner of a motor vehicle to drive and attend to the car, and does not include operators who are not employed and paid for operating the motor vehicle, *and therefore does not include an employee who receives his compensation for services rendered other than the operation of motor vehicles, although in performing such services he may incidentally operate a motor vehicle.*" (Emphasis added.)

See also *State v. Depew*, 175 Md. 274, 1 A.2d 626 (1938); 60 C.J.S. Motor Vehicles, §151, page 475.

With respect to the second classification of "chauffeur" an opinion which appears in 1962 *O.A.G.*, page 276, involved a similar question. There it was stated that a city employee who repaired, cleaned and removed snow from streets, who, in connection with his work drove a city motor vehicle which exceeded five tons in gross weight, but whose work was not confined exclusively to driving, was required to have a chauffeur's license. The opinion also pointed out that the words "occasional and merely incidental" as used in the statute, mean a fortuitous happening as if by chance or accident; and that the question of what is "occasional" and "incidental" is necessarily one of fact.

It is therefore our opinion that a person hired as a fireman who, as incidental to performing his duties, operates a motor vehicle which does not exceed five tons in gross weight is not required to have a chauffeur's license; however, if a fireman operates a truck tractor, road tractor or motor truck as defined by Section 321.1, which has a gross weight classification exceeding five tons, and that operation is not "occasional or merely incidental", he would be required to have a chauffeur's license.

16.4

MOTOR VEHICLES: Implements of husbandry – §321.1(16), 1962 Code. Definition of "implement of husbandry" includes farm tractor but does not include motor truck pulling trailer that is hauling liquid commercial fertilizer.

August 23, 1963

Mr. Walter L. Saur
Fayette County Attorney
22 East Charles Street
Oelwein, Iowa

Dear Mr. Saur:

This is to acknowledge receipt of your request for an opinion in which you state:

"Firstly, may a motor vehicle be an 'implement of husbandry' as set forth in Section 321.18(3) of the Code of Iowa and defined in Section 321.1(16) of the Code of Iowa?

"Secondly, if number one above is answered affirmatively, may a truck or tractor pulling a trailer which is hauling liquid commercial fertilizer, be exempt from registration as set forth in the above statute?

"Thirdly, if number one is answered affirmatively, may a truck, carrying no load, but on its way to pick up tanks of liquid commercial fertilizer be exempt from registration under the aforementioned statutes?"

In answering your first question, it is necessary to analyze the definitions in §321.1. An "implement of husbandry" is defined in §321.1(16) as:

" 'Implement of husbandry' means every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations and shall include portable livestock loading chutes without regard to whether such chutes are used by the owner in the conduct of his agricultural operation, provided however, that such chutes are not used as a vehicle on the highway for the purpose of transporting property. It shall also include equipment of any kind for the storage, transportation, application, or any combination thereof, of anhydrous ammonia or other liquid commercial fertilizer used by owners or agricultural operations or dealers and distributors in delivering to and supplying such owners."

Section 321.1(1) defines "vehicle" and §321.1(2) defines "motor vehicle" as follows:

" 'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks."

" 'Motor vehicle' means every vehicle which is self-propelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolley wires, but not operated upon rails. The terms 'car' or 'automobile' shall be synonymous with the term 'motor vehicle'."

From the facts stated in your questions, it may be seen that the word "vehicle" is defined in terms sufficiently broad to include a motor vehicle as defined by the statute. Since the definition of "implement of husbandry" commences by stating that it includes every vehicle that meets the requirements of the entire definition. it would seem that a qualifying motor vehicle is included thereunder.

The first sentence of the definition of "implement of husbandry' specifies that the vehicle be designed for agricultural purposes. The word "designed" has been defined as follows:

" 'Designed' has been defined as 'appropriate, fit, prepared, or suitable', and also as 'adapted, designated, or intended . . . . When applied to property, 'designed' ordinarily refers to the purpose for which it has been constructed (26 *C.J.S.* 863), and the purpose contemplated and intended by the manufacturer, not the purchaser, usually becomes the controlling factor." **State v. Lasswell,** 311 S.W. 2d 356, 358 (Mo., 1958).

" 'Design' is sometime synonymous with 'intent'; but physical property

has no intention; and, ordinarily, if property is spoke of as 'designed', it refers to the purpose for which it was constructed."

"An ordinary truck may be used as an aid in the manufacture of liquor; the owner intends to so use it; but the owner did not design the truck; the truck was designed by its manufacturer for the transportation of any commodity; no person would ever colloguially say that an ordinary truck was 'designed for the manufacture of liquor'." *U.S. v. Sommerhauser*, 58 F. 2d 812, 813 (Kan., 1932).

The trailer that is hauling liquid commercial fertilizer in your factual statement is clearly within the definition of "implement of husbandry" if it is designed by the manufacturer for agricultural purposes. The second sentence of the definition of "implement of husbandry" states that it shall include equipment of any kind for the transportation of liquid commercial fertilizer.

A farm tractor under the definition of §321.1(7) is defined as:

" 'Farm tractor' means every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry."

This definition coincides with the definition of "implement of husbandry" in being specifically directed toward an agricultural purpose. A farm tractor is designed for agricultural purposes and, when exclusively used by the owner thereof in the conduct of his agricultural operations, it would be included within the definition of "implement of husbandry".

A motor truck is defined by §321.1(4) as:

" 'Motor truck' means every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers."

As so defined, a motor truck is not specifically related to a farming operation. It may, of course, be used for agricultural purposes, but is not "designed" for such purposes. The manufacturer has not necessarily intended a motor truck to be used for agricultural purposes, nor constructed it for such purposes, since it is capable of being used for many nonagricultural purposes. Thus, a motor truck does not come within the meaning of the phrase "designed for agricultural purposes" used in the first sentence of the "implement of husbandry" definition. Nor does it come within the ambit of the second sentence of this definition, since in our opinion the legislature intended that the equipment included thereunder be also designed for agricultural purposes.

On the basis of the above considerations, therefore, the definition of "implement of husbandry" in §321.1(16) is broad enough to include motor vehicles if the other requirements of the definition are met. Said definition would include a farm tractor but does not include a motor truck pulling a trailer that is hauling liquid commercial fertilizer.

16.5

MOTOR VEHICLES: Implements of husbandry, dry fertilizer—§§321.1(16), 321.18, 1962 Code. Trailer used by dealer supplying *dry* fertilizer is not "implement of husbandry," and is required to be registered.

June 10, 1964

Mr. James Van Ginkel
Cass County Attorney
Atlantic, Iowa

Dear Mr. Van Ginkel:

This will acknowledge your letter of recent date, requesting opinion as follows:

"The use of commercial fertilizer in this state in the agricultural pursuit has become a very common practice. One of the first commercial fertilizers. . .was in liquid form known as anhydrous ammonia, (which) was transported from the retailer to the farm in large metal tanks mounted on a four-wheel trailer. The question arose whether or not these were implements of husbandry and had to be licensed under our motor vehicle laws. In 1957 the legislature took care of this problem by amending the definition of implements of husbandry as set forth in §321.1, subsection 16 of the Code.

"Now, we have the identical problem as to dry commercial fertilizer, (which) is in dry form in the shape of pellets or granules and is transported from the retail dealer to the farm in small four-wheeled wagon box type flare type metal trailers, . . . 8 to 10 feet long, with webb or augur in the bottom and fan at the rear which distributes the fertilizer when it gets to the farm. These trailers are filled with the commercial fertilizers, pulled to the farm by the dealer, left at the farm, (where) the farmer hooks his tractor onto the trailer and pulls the trailer to the farm ground where the fertilizer is to be used. (When empty) . . .the farmer calls the dealer (who) returns to the farm and gets his trailer.

"My question is, do these trailers come under the definition of 'implements of husbandry' as defined in §321.1, subsection 16 of the Code?"

Any implement of husbandry is excepted by §321.18(3), 1962 Code of Iowa, from the registration provisions of Chapter 321, otherwise applicable when it is driven or moved on a highway. The pertinent portion of §321.1(16) provides:

" 'Implement of husbandry' means every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations and shall . . . also include equipment of any kind for the storage, transportation, application, or any combination thereof, of anhydrous ammonia or other liquid commercial fertilizer used by owners of agricultural operations or dealers and distributors in delivering to, and supplying such owners."

Under the rule of ejusdem generis, where general words follow enumeration of particular classes of persons or things, they apply only to persons or things of the same general nature. *Rohlf vs. Kasemeier,* 140 Iowa 182, 118 N.W. 276 (1908).

In construing a statute, the express mention of one thing implies the exception of others. *Dotson vs. City of Ames,* 251 Iowa 467, 101 N.W. 2d 711 (1960).

Applying these rules of statutory construction to the wording of the statute, necessarily results in the conclusion that the express mention of "anhydrous ammonia", a liquid fertilizer, and of the words "other *liquid* commercial fertilizers, necessarily excludes from the definition, dry fertilizer.

Even though the result reached appears incongruous with the legislative purpose sought to be achieved, the statute must be corrected by legislative action. The legislative definition specifically exempts liquid commercial fertilizers but a trailer for storage, transportation and application of commercial *dry* fertilizer used by dealers and distributors in delivering and supplying *dry* fertilizer to owners of agricultural operations does not fall within the definition of "implement of husbandry", and is therefore required to be registered under §321.18.

16.6

MOTOR VEHICLES: Implied consent—Ch. 114, Acts 60th G.A. 1. "Formal Police Training" means practice at law enforcement under supervision. 2. (a) Request that blood not be withdrawn need not be in writing. (b) Peace Officer determines whether breath, saliva, or urine will be withdrawn. 3. (a) "Licensed physician" is physician and surgeon licensed under Chapter 148 or osteopathic physician licensed under Chapter 150. (b) Samples of breath, saliva or urine may be obtained by peace officer. (c) Withdraw means to take away; method used to withdraw must not be inherently brutal or offensive. 4. Advice that failure to submit to test will result in revocation of license need not be in writing. 5. Commissioner may revoke license for any period, but it must be not less than 120 days nor more than one year. 6. (a) Record of review proceeding need not be taken by certified shorthand reporter. (b) Tape recorder may be used, but tape must be transcribed.

June 27, 1963

Mr. Carl H. Pesch
Commissioner
L O C A L

Dear Mr. Pesch:

This is in reply to your letter wherein you state the following:

"Senate File 437, an Act relating to the control, sale and use of alcoholic beverages and law enforcement with respect to alcoholic beverages, will become law on July 4, 1963. Sections thirty-seven (37) through fifty (50) thereof are of concern to this department, more particularly the division of Iowa Highway Safety Patrol. It is quite urgent that certain matters be clarified so that the members of this division can be aware of the extensions and limitations placed upon them. To this end I respectfully request your opinion on the following questions:

1. Section 38 defines a peace officer to include: '4. Regular deputy sheriffs who have had formal police training.' What constitutes 'formal police training?'

2. Section 39 provides that a person may request that a specimen of his blood not be withdrawn. Does this request have to be in writing? Further, if such a request is made, who then determines what specimen (breath, saliva, or urine) shall be withdrawn, the person from whom the same is to be withdrawn or the peace officer?

3. Section 40 provides that only a licensed physician, or a medical technologist or registered nurse designated by a licensed physician as his representative, acting at the written request of a peace officer may withdraw such body substances for the purpose of determining the alcoholic content of the person's blood.

(a) Who are included as licensed physicians?

(b) Must a licensed physician or his designee withdraw the sample of breath, saliva, or urine? In other words, for example, must the licensed physician or his designee actually collect a measured volume of alveolar air? Further, to illustrate. A Harger Drunkometer is available. Must a licensed physician or his designee collect the breath sample in the rubber balloon?

(c) For guidance of the licensed physicians and their designees, what does the word 'withdraw' mean, what does it include and what are the limitations. For example, how does one withdraw a urine sample?

4. Section 42, provides that the peace officer shall advise any

person. . . . that a refusal to submit to such test will result in revocation of the persons license. Must the peace officer advise in writing?

5. Also in Section 43, the revocation period is specified for a period of not less than 120 days nor more than 1 year. What determines, therefore what the length of revocation shall be? Must it be either the minimum or the maximum disregarding the inbetween?

6. Section 44 provides that the hearing therein provided shall be recorded. What does the word recorded mean? Does this comprehend that the hearing shall be reported by a certified shorthand reporter? Would tape recording satisfy the intent of this section?"

In answer to your questions:

1. The words "formal police training" are not defined by the Act. There is no statutory distinction between regular deputies with or without "formal police training" appearing elsewhere in the Code. Therefore these words must be given their normal and natural meaning. Webster's Second International Dictionary defines formal as:

"Of or pertaining to form or a form; especially of or pertaining to established form or custom; conventional."

"Training" as defined contemplates "practice with supervision." "Police" refers to the maintaining of order and the enforcement of laws. In reading these three words in the light of their definitions they would appear to mean the conventional or customary practice with supervision in maintaining order and the enforcement of laws.

This then would be the on-the-job training presently given deputies under the supervision of the sheriff. The reason for the use of these words appears to be the intention of the legislature to distinguish between purely "office" deputies and those engaged in direct law enforcement.

Therefore it is our opinion that any deputy who has had practice at law enforcement under supervision of the sheriff has had "formal police training."

2. (a) The legislature was explicit in stating that the request of the Peace Officers must be in writing. The deliberate omission of this language in regard to the individual's request that blood not be withdrawn indicates a legislative intent that this request need not be in writing.

2. (b) The case of *Timm vs. State* (1961 N.D.) 110 N.W. 2d 539 it was held that, under a statute in effect the same as the one in question here, the operator did not have a choice of tests. In that case the Court commented that if the law gave to the person suspected of driving while under the influence of intoxicating liquor, the absolute right to choose which of the four tests he was to be given, he could demand that which he knew the local police were not equipped to give and thus, avoid the effect of the provisions of the law. See also *Lee vs State*, 187 Kan. 566, 358 P. 2d 765 (1961). It could not have been the intent of the legislature that every peace officer would be required to have equipment to provide all the tests enumerated.

It is therefore, our opinion that should the operator request that his blood not be withdrawn, the peace officer may then in writing at his option, request that either breath, saliva, or urine be given for chemical testing.

3. (a) Section 135.1(5) defines physician as:

"A person licensed to practice medicine and surgery, osteopathy and surgery, osteopathy. . ."

See also 1936 O.A.G. 46. It is our opinion that "a licensed physician" is

one licensed as a physician and surgeon under Chapter 148 or osteopathic physician licensed under Chapter 150.

3. (b) In addition to the provisions of Section 40 stated in your Question Two, Section 40 also provides:

". . . Only new originally factory wrapped disposable syringes and needles, kept under strictly sanitary and sterile conditions shall be used for drawing blood."

Reading the section as a whole, the obvious purpose of these provisions is to protect the health of the individual involved. The method for withdrawing of blood is different from the method used in obtaining samples of breath, saliva, or urine. Blood must be obtained internally, while the other samples are obtained externally.

It is our opinion that although blood must be withdrawn by a "licensed physician, or a medical technologist or a registered nurse designated by a licensed physician" samples of breath, urine or saliva may be obtained by the peace officer.

3. (c) The word "withdraw" as used in this section is not a medical term. According to Websters Second International Dictionary, the word "withdraw" means:

"To take back or away."

The only limitation would be that the method used to take body substances could not be "inherently brutal or offensive." (See *Lee vs State,* 187 Kan. 566, 358 P. 2d 765 (1961)). The common method employed to "withdraw" urine is to have one urinate into a specimen bottle.

4. As stated in the answer to your Question Two, the legislature has been specific in requiring "writing" in particular instances. Its omission of that requirement indicates a legislative intent that the peace officer need not advise a person in writing that refusal will result in revocation of a license.

5. It appears that the legislature has left to the discretion of the commissioner the period of revocation. That period is one of not less than 120 days nor more than one year.

It is our opinion that the commissioner may revoke a license for any period of time of not less than 120 days nor more than one year.

6. (a) It would appear that the intent of the legislature was to provide a record of the proceedings which might be used upon review. Therefore, it would be necessary that the method employed would result in a document which would be capable of being read. This is an administrative rather than judicial hearing.

It is therefore our opinion that an accurate account of the hearing must be taken down by a competent person and transcribed so that it would be capable of being read, but that such a person need not be a certified shorthand reporter.

6. (b) A tape recorder would be a statisfactory method of preserving what was said at the hearing, but the tape would not be suitable for review purposes. It is therefore our opinion that a tape recorder may be used to record the hearing, but that a transcript would have to be made from the tape.

16.7

MOTOR VEHICLES: Implied consent, physician's representative, revocation notice, hearing—§§40, 43, 44, Ch. 114, Acts 60th G.A. (1) Designation of

medical technologist or registered nurse as physician's representative need not be in writing; (2) Notice of revocation must be sent by registered or certified mail, but need not be restricted to addressee only; (3) Request for hearing may be made any time between denial or revocation of license and thirty days after *effective date* of revocation.

August 22, 1963

William F. Sueppel, Commissioner
Department of Public Safety
L O C A L

Dear Mr. Sueppel:

This is in reply to your letter wherein you state:

"Certain questions have arisen regarding the Implied Consent provision of Senate File 437, an act relating to the control, sale, and use of alcoholic beverages and law enforcement with respect to alcoholic beverages. An official opinion is respectfully requested from your office on the following questions:

"(1) Section 40, Senate File 437 states, 'Only a licensed physician, or a medical technologist or registered nurse *designated by a licensed physician as his representative,* . . . may withdraw such body substances . . .' (emphasis added). Must the designation of a medical technologist or registered nurse, as the representative of a licensed physician, be in writing and if it need not be in writing will a verbal designation suffice?

"(2) Section 43 states, in the last sentence, '. . . after the commissioner has mailed notice of revocation to such person by registered or certified mail'. In view of the provisions of Section 321.16, Code 1962, which sets forth the general provisions for the giving of notice, does Section 43, Senate File 437, take precedence and thus preclude this department from giving the notice, required by said section 43, by personal delivery?

"(3) Also in Section 43, must the mailed notice of revocation by registered or certified mail be delivered to the addressee only?

"(4) Under the applicable provisions of Section 44 what effect, if any, must be given to a written request for a hearing which is received prior to the effective date of the revocation or denial?"

In answer to your first question, since the word "designated" is not defined by the statute, it must be given its normal and natural meaning. *Webster's Second International Dictionary* defines "designate" as: "To work out and make known; to point out, to name, indicate, show; to distinquish by marks or description; to specify."

The word "designated" does not in itself connote a written instrument. See *State v. Madison State Bank of Virginia City.* 77 Mont. 498, 251 P. 548.

The legislature was explicit in requiring that the request of a peace officer that one submit to a blood test, and the request for a hearing on a revocation, be in writing. The deliberate omission of such a requirement in regard to the doctor's designation indicates that the legislature did not require that it be in writing.

It is therefore our opinion that the designation of a medical technologist or registered nurse as the representative of a licensed physician need not be in writing.

In answer to your second question, §43 of Senate File 437 now Chapter 114, Acts 60th G.A., provides:

"The effective date of . . . revocation shall be twenty days after the

commissioner has mailed notice of such revocation to such person by registered or certified mail."

Section 321.16 provides:

"Whenever the department is authorized or required to give notice . . . *unless a different method of giving such notices is otherwise expressly prescribed,* such notice shall be given either by personal delivery . . . or by restricted certified mail . . ." (Emphasis supplied)

The legislature has expressly provided another method of giving notice in Senate File 437. It must take precedence over §321.16. See *Wilson v. City of Council Bluffs,* 253 Iowa 162, 110 N.W. 2d 569 (1961). The requirements of Senate File 437 with respect to notice must be complied with to effectuate a revocation. However, this does not preclude the Commissioner from giving additional notice if he so desires.

In answer to your third question, there is no requirement that the registered or certified mail be restricted to delivery to the addressee only.

In answer to your fourth question, §43, Senate File 437, provides:

". . . the commissioner (of public safety), *upon the receipt* of a sworn report of the peace officer . . . *shall revoke* his license . . . the commissioner shall deny to the person the issuance of a license or permit within one year from the date of the alleged violation. . . The effective date of any such revocation shall be twenty (20) days after the commissioner has mailed notice . . ." (Emphasis supplied).

Section 44, Senate File 437, provides:

"Upon the written request of a person whose privilege to drive *has been revoked or denied,* the commissioner of public safety shall grant the person an opportunity to be heard within ten days after the receipt of the request, but the request must be made within thirty days *after the effective* date of revocation or denial. . ."

It is clear that the request for hearing may be made only after a revocation or denial. In regard to a revocation, the legislature appears to have made a distinction between the time of the revocation and the effective date of the revocation. The Commissioner's actual revocation must take place upon the receipt of the peace officer's statement, for it is at that time that he is directed to act.

It would appear that the legislature intended that an aggrieved person should have the opportunity for a hearing before his revocation becomes effective.

Therefore, in regard to a revocation, the commissioner must act upon a request for hearing made any time between the Commissioner's revoking the license upon receipt of the peace officer's statement and thirty days after the effective date of revocation.

In regard to a denial of a license, after the Commissioner has denied a license, a request for a hearing made within thirty days after the effective date of the denial must be acted upon by the Commissioner.

16.8

MOTOR VEHICLES: Length limitations, special permits—§§321.453, 321.457, 321.467, 1962 Code; Ch. 205, Acts 60th G.A. Highway Commission has no authority to issue annual permits authorizing movement of vehicle more than 50 feet in length upon highways having paved surface of less than 22 feet in width unless annual permit is specifically authorized under §321.467.

July 31, 1963

Mr. L. M. Clauson
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Clauson:

This is in response to your letter in which appeared the following:

"During the last session of the legislature the length limitation for commercial vehicles was increased. With the enactment of this legislation the truck-tractor semitrailer combination is permitted an overall length of 55 ft. on highways with an improved surface of 22 ft. or more. Combinations of the same type hauling vehicles or boats are permitted 60 ft. lengths on these wider highways. The 'so-called' double bottom combinations, which are truck-tractor semitrailer and trailer combinations, are also permitted 60 ft. lengths on the 22 ft. or wider surfaced highways. . .

"This is to request that your office review the newly enacted legislation in this regard and make a determination whether or not it is permissible for the Highway Commission to issue annual permits to vehicles in regular operation having 55 ft. and 60 ft. overall lengths to travel highways having an improved surface width less than 22 ft. Is this altered by the fact that the bill providing for this increased length was defeated in the Senate when it included the Coleman amendment to the Nolan amendment which provided for the travel of these longer vehicles for distances up to ten miles on lesser width highways for the purpose of pickup and delivery? After the bill failed to pass with this amendment, it was recalled in the Senate and the Coleman amendment was withdrawn. At that time the bill was passed by the Senate to include only 22 ft. limitation."

The legislation referred to in your letter, Senate File 275, Acts 60th G.A., which amended §321.457 of the 1962 Code, increased the length allowed for a truck-tractor and semitrailer combination from 50 feet to 55 feet and added the following new subsections:

1. "No combination of vehicles coupled together which are used exclusively for the transportation of vehicles and boats, unladen or with load, shall have an overall length, inclusive of front and rear bumpers in excess of sixty (60) feet.

2. "No combination of three (3) vehicles coupled together, one of which is a motor vehicle, unladen or with load, shall have an overall length, inclusive of front and rear bumpers, in excess of sixty (60) feet.

3. "No vehicle or combination of vehicles in excess of fifty (50) feet in overall length shall be operated on any highway of this state which has an improved or paved surface of less than twenty-two (22) feet in width."

The provisions of this Act are clear and unambiguous. Therefore, no effort need be made to look behind this Act to determine legislative intent when such intent is clearly expressed on the face of the Act. **Cook v. Bornholdt,** 250 Iowa 696, 95 N.W. 2d 749; *Smith v. Sioux City Stockyards,* 219 Iowa 1142. 260 N. W. 551.

Section 321.453 of the 1962 Code of Iowa provides:

"The provisions of this chapter governing size, weight, and load shall not apply to fire apparatus, . . . or to a vehicle operating under the terms of a special permit issued as provided in sections 321.467 to 321.470, inclusive."

Since S.F. 275, Acts 60th G.A., does not except the operation of this section upon the new maximum length standards set up in that Act, §321.453 must be deemed to be applicable to present §321.457 of the Code as amended by S.F. 275. For, in construing statutes, the courts search for the legislative intent as shown by what the legislature said, rather than what it should or might have said. I.R.C.P. 344(f) (13).

Thus, in order to answer your question, it becomes necessary to construe the provisions of §321.467 of the 1962 Code, which contains the authority of the Highway Commission to issue special permits for the movement of oversize and overweight vehicles as it operates, under certain conditions, as an exception to the length limitations set up in S.F. 275, Acts 60th G.A.

Sections 321.467 and 321.469 both provide that the issuance of any special permit is a discretionary act of the Highway Commission. This discretion is limited to issuing permits specifically authorized by §321.467 and does not give the Commission the discretion to issue permits not so authorized. Section 321.467 provides a statutory exception to the limitations on size and weight of vehicles, and as such it must be strictly construed so as to not encroach unduly upon the general statutes to which it is an exception. *Heiliger v. City of Sheldon*, 236 Iowa 146, 18 N. W. 2d 182; *Eddington v. Northwestern Bell Telephone Co.*, 201 Iowa 67, 202 N. W. 374.

Section 321.467 provides the authority for the issuance of only three types of annual permits. They are as follows:

1. ". . . provided further that the state highway commission may issue annual permits for vehicles used exclusively for the transportation of motor vehicle . . ." (11.69-73) ". . . it being a condition of such permits that the combined length of the transporting vehicle shall not exceed forty-five feet and that the combined length of the transporting vehicle's load with the two-foot load tolerance shall not exceed forty-seven feet. . ." (11. 76-82)

2. " . . . The state highway commission may issue annual permits to a retail farm implement dealer to transport, on his regular delivery vehicle, farm machines. . ." (11. 86-89)

3. " . . . the highway commission . . . may issue annual permits to any manufacturer of construction machinery or equipment manufactured or assembled in Iowa . . ." (11. 100-105)

It is a primary rule of statutory construction that the express mention of one thing in a statute implies exclusion of others. *Dotson v. City of Ames*, 251 Iowa 467, 101 N.W. 2d 711; *Archer v. Board of Education*, 251 Iowa 1077, 104 N.W. 2d 621. Thus, the Highway Commission has only the authority to issue annual permits in the instances set forth above and only upon the terms and conditions contained in the statutory authorization for those permits.

It is, therefore, our opinion that the Highway Commission may not issue annual permits authorizing the movement, on highways that have a surfaced width of less than 22 feet, of a vehicle in regular operation at lengths of 55 or 60 feet on 22-foot wide highways, unless such vehicle meets the conditions and requirements authorizing the issuance of an annual permit under §321.467 of the 1962 Code of Iowa.

16.9

MOTOR VEHICLES: Lighted head lamps—§§321.384, 321.415, 1962 Code. Motor vehicles must display lighted head lamps from one-half hour after sunset to one-half hour before sunrise, subject to exceptions with respect to parked vehicles, and at such other times when conditions similar to those

enumerated in the statute provide insufficient lighting to render clearly discernible persons and vehicles at distance of five hundred feet ahead.

November 5, 1963

Mr. Ira F. Morrison
Washington County Attorney
P.O. Box 67
Washington, Iowa

Dear Mr. Morrison:

This will acknowledge your letter of recent date, which states:

"A controversy has arisen over the interpretation of Section 321.384, which states in part, 'every motor vehicle upon the highway within the state, at any time from one-half hour after sunset to one-half hour before sunrise, and at such other times when conditions such as fog, snow, sleet, or rain provide insufficient lighting. . .'. The question is whether or not the legislature intended that the specified conditions are all inclusive and exclude all other situations, or whether there would be a violation if (lighted head lamps were not displayed) at any other time when there is not sufficient light 'to render clearly discernible persons and vehicles on the highway. . . '.

"I am aware of Attorney General's opinion of February 1, 1951, to McMurry, Commissioner of Public Safety, which was of the opinion that it is necessary for lights at any other time when there is not sufficient light.

"I am also aware that this opinion was written concerning Section 321.384 of the 1950 Code, which has been changed."

The Attorney General's opinion referred to in your letter appears in 1952 *O.A.G.*, page 6.

Section 321.384(1), Code of Iowa, 1962, provides:

"Every motor vehicle upon a highway within the state, at any time from one-half hour after sunset to one-half hour before sunrise, and at such other times when conditions such as fog, snow, sleet, or rain provide insufficient lighting to render clearly discernible persons and vehicles on the highway at a distance of five hundred feet ahead shall display lighted head lamps as provided in section 321.415, subject to exceptions with respect to parked vehicles as hereinafter stated."

The present statute is the result of Acts of 1955 (56th G.A.), Chapter 165, §1.

Prior to 1955 this section provided:

". . . Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of five hundred feet ahead shall display lighted lamps. . ."

The words "such as", used in the present statute, should be construed to mean "similar to", and should not be considered a limitation of conditions. (See *Charles Behlen Son's Co. v. Ricketts*, 164 N. E. 436, 30 Ohio App. 167; *Board of Adjustment of City of San Antonio v. Levinson, Tex.* Civ. App., 244 S. W. 2d 281).

The explanation attached to the original bill which brought about the change in this section (H. F. 97, 56th G. A.) clearly indicates that such was the intent of the legislature. This explanation states:

"The purpose of this bill is to require head lamps to be turned on during heavy fog, snow, sleet or rain as well as during darkness, and to make it a misdemeanor to violate the provisions of this section; to define more definitely the terms 'head lamps and lighting devices'. The present law is not definite enough when driving in fog, snow, sleet or rain *and other conditions impairing visibility.* This will further clarify the law regarding lighting of motor vehicles." (Emphasis supplied).

Your attention also is drawn to the case of *Marr v. Olson,* 241 Iowa 203, 40 N.W. 2d 475 (1950), wherein it was held that whether a condition existed which would require the display of lighted lamps was a fact question to be determined by the jury.

It is our opinion that every motor vehicle must display lighted head lamps as provided by §321.415, subject to exceptions with respect to parked vehicles, at any time from one-half hour after sunset to one-half hour before sunrise, and at such other times when conditions similar to those enumerated in the statute provide insufficient lighting to render clearly discernible persons and vehicles at a distance of five hundred feet ahead.

16.10

MOTOR VEHICLES: Microfilming, motor number file—§321.31, 1962 Code. Department of Public Safety may microfilm motor number file, if it will constitute permanent history record of ownership of each vehicle.

August 2, 1963

Mr. William F. Sueppel
Commission of Public Safety
L O C A L

Dear Mr. Sueppel:

This will acknowledge receipt of letter from Mr. Carl Pesch, former Commissioner of Public Safety, requesting an opinion upon the following question:

"In light of the provisions of Section 321.31, Code of Iowa, 1962, is it possible for the Motor Vehicle Registration Division of this department to microfilm existing records containing the description of the vehicle as described on certificate of title and the name and address of previous owners?"

Section 321.31, Code of Iowa, 1962 reads as follows:

"The department shall install and maintain a numerical file . . . The department shall also install and maintain an alphabetical file under the name of the owner for the state at large and not for individual counties. Such file shall consist of a copy of the certificate of title. . . The department shall also install and maintain a file by motor number, or other identifying number of the vehicle, which shall contain a full description of the vehicle as described on the certificate of title and the name and address of the previous owner. This file shall constitute the permanent history record of ownership of each vehicle titled under the laws of this state."

This section requires the department to maintain three files, namely a numerical file, an alphabetical file, and a motor number file. This section as it now reads was enacted in 1953 by the 55th General Assembly in Chapter 127, §11. The source of this law dates to the Act of the 30th G.A. (1904), Chapter 53, §2. In 1943 there was stricken out of this section a direction that the department use "for such files the duplicate registration receipts".

Although this section requires a copy of the certificate of title to be included in the alphabetical file, there is no requirement for the motor number file except that it "shall contain a full description of the vehicle as *described on the certificate of title* and the address of the previous owner" and "shall constitute the permanent history record of ownership of each vehicle titled under the laws of this state".

Therefore, it is our opinion that the department may use microfilming in maintaining its file by motor number so long as it will constitute "the permenent history record of ownership of each vehicle. . .".

16.11

MOTOR VEHICLES: Registration, apportioned carriers—§§321.1(36), 321.20, 321.98, 326.2, 326.6, 1962 Code. Registration certificate for vehicle apportioned under Chapter 326, to be in name of owner as defined in §321.1(36).

April 24, 1964

Iowa Reciprocity Board
L O C A L

Gentlemen:

You have asked whose name is required, under Iowa law, to be on the registration certificate where a vehicle is leased by its owner to an Iowa motor carrier fleet operator and included in the carrier's fleet for purposes of apportioning registration fees between Iowa and other contracting states in which the carrier operates; the lessee, the owner, or both.

The motor vehicle registration requirements including the fees to be charged are set out in Chapter 321, 1962 Code. Section 321.20 requires that the application for registration shall contain the name of the owner. Section 321.98 provides that an "owner" shall not knowingly permit the operation of a vehicle owned by him without proper registration. Chapter 321, in its definition of "owner" set out in Section 321.1(36) does not include a lessee of a motor vehicle unless the lease involved is coupled with a right of purchase.

Chapter 326 of the Code of Iowa permits the apportionment (between Iowa and other states in which such fleets operate) of registration fees of vehicles included in interstate fleets. Such apportionment may be on a dollar allocation basis or on a vehicle allocation basis.

Section 326.2, 1962 Code provides:

> "Notwithstanding any provisions of Iowa statutes to the contrary or inconsistent herewith, such agreements may provide with respect to resident or non-resident owners of fleets of two or more commercial vehicles which are engaged in interstate commerce, or simultaneously engaged in interstate and intrastate commerce, that the registrations of such fleets can be apportioned between this state and other states in which such fleets operate. . ."

And Section 326.6 provides:

> "The board may, notwithstanding any provision of the Code to the contrary, enter into reciprocity or apportionment agreements which extend the benefits thereof to leased vehicles on the basis of the residence of the lessee."

The question is whether Chapter 326 in providing for beneficial apportionment of fees for vehicles included in fleets of interstate operators has changed the requirement of Chapter 321 that the registration certificate be in the

vehicle owner's name. In our opinion, the answer to this question is in the negative.

There is no language in Chapter 326 which requires that registration certificates of vehicles leased to a fleet operator shall be in the name of the fleet operator rather than the owner of the vehicle. There is no language in Chapter 326 which repeals, amends or modifies the requirements of Chapter 326 or its predecessors (originally adopted in 1951 as a part of Chapter 321) to change the definition of "owner" to include the lessee of a vehicle included in a fleet with respect to which fees are apportioned.

Repeal or modification of existing law by a new enactment should be clear and conclusive and will not be implied unless there is a clear and irreconcilable conflict. No such conflict exists here and Chapters 321 and 326 may be construed together harmoniously. The requirements of Chapter 321 with respect to registration certificates being in the name of the vehicle owner are not "contrary" to or "inconsistent" with the provisions for apportionment of fees contained in Chapter 326.

In our opinion a vehicle, whether or not it is part of a fleet which permits the apportionment of fees applicable to the vehicle, is required to be registered in the name of the owner of the vehicle.

This is not to say, however, that in addition, and for purposes of convenient administration of the apportionment of fees under Chapter 326 the registration application, receipt and other records may not also quite properly designate, by name or number or other convenient designation the fleet or carrier operator with respect to which such apportionment is made.

16.12

MOTOR VEHICLES: Registration, manufacturer-owned demonstration automobiles—§§321.45, 321.53, 321.54, 321.55, 321.57, 1962 Code. Dealer may use for demonstration purposes vehicles owned by nonresident manufacturer, provided such vehicles are properly registered under §321.55.

June 25, 1963

Mr. Carl H. Pesch, Commissioner
Department of Public Safety
L O C A L

Dear Mr. Pesch:

This is in answer to your letter wherein you request the following question:

"May a licensed dealer, under the provisions of Chapter 322, Code 1962, and Section 321.57, Code 1962, use a motor vehicle licensed under the provisions of Section 321.55, Code 1962 and owned by a nonresident manufacturer, for purposes of demonstrating such motor vehicle?

"The demonstration vehicle is used for demonstration only and is not to be sold, title and ownership remaining in the nonresident manufacturer. Such vehicle is used to expose the product to prospective buyers."

Briefly summarized, the fact situation which brought about your question for an opinion is this: the Buick Motor Division of General Motors Corporation, a foreign corporation, to stimulate sales for certain specific dealerships and itself, brought into the State of Iowa some 29 cars titled in the name of the foreign corporation, duly licensed in the State of Missouri where the zone office is located, so that certain dealers throughout the state might demonstrate these cars to prospective customers. The Department of Public Safety required that these cars be registered in the State of Iowa. Buick paid the sales tax and obtained nonresident licenses. They are not for sale

and will be taken out of the state when their tour of the specified dealerships is completed. On occasion they are loaned to prospective buyers so they might drive them and become acquainted with their qualities.

The pertinent portion of §321.53 provides as follows:

> "A nonresident owner, except as provided in sections 321.54 and 321.55, of a private passenger motor vehicle, not operated for hire, may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration plate or plates issued for such vehicle in the place of residence of such owner."

The word "private" is not defined by the statute so it must be given its usual or ordinary meaning. Webster's New International Dictionary defines "private" as:

> "Belonging to, or concerning, an individual person, company, or interest; peculiar to oneself; unconnected with others; personal; one's own; not public; not general; separate."

A vehicle used for demonstration could not be considered to be "private" within the meaning of this section. Section 321.55 provides as follows:

> "Every nonresident, in addition to those mentioned in section 321.54, but not including a person commuting from his residence in another state or whose employment is seasonal or temporary, engaged in remunerative employment or *carrying on business within this state,* and owning and operating any motor vehicle, trailer, or semitrailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state." (Emphasis supplied)

The words "carrying on business" have varying legal significance, dependent upon the purpose for which they are used. There appear to be no cases which define these words as they are used in the motor vehicle statute.

As far as service of process is concerned, it was held in the case of *Mayer vs. Wright,* 234 Iowa 1158, 15 N.W. 2d 268 (1944), that a foreign corporation was *not* "doing business within the state" by:

1. Shipping its product to an Iowa corporation to be processed and subsequently sold to consumers, and

2. Meeting with their purchaser and advising on methods of increasing sales.

The Court laid down a general rule that, in order for one to fall within the term of doing business, the business must be of such a nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction. In the case of the *International Shoe Co. vs. Lovejoy,* 219 Iowa 204, 257 N.W. 576 (1934), it was held that a foreign corporation *was* "doing business in this state" when:

1. It permanently maintained in Iowa a showroom for samples of its goods,

2. Solicited orders through its agents for its goods,

3. Assisted its purchasers in an advisory way in carrying on their business and

4. Received from customers, checks to be forwarded to the main office in the foreign state.

Under the facts involved it would seem that Buick is engaged in doing business within this state, thus requiring the licensing of these vehicles in Iowa. It should also be pointed out that Buick could not qualify for a special dealers' plate under §321.57 because it is not a "manufacturer or dealer" as defined by §321.1(38) and (40).

The next question to be considered is whether or not the method used by Buick to demonstrate its cars would be a violation of §322.3. That section prohibits one without a license from engaging in the business of selling at retail new motor vehicles. From the facts here, it is evident that there is to be no sale of the automobiles to either the dealer or the general public. Therefore, there is no violation of this section.

Section 321.45 provides in effect that no person shall sell or otherwise dispose of a new vehicle to a dealer to be used by the dealer for the purpose of display and lease or resale without delivering to the dealer a manufacturer's certificate and that a dealer shall not purchase or acquire a new vehicle without obtaining a manufacturer's certificate. There is to be no sale by Buick to a dealer; but has Buick "otherwise disposed of" the automobiles to a dealer? Since there is no statutory definition of "dispose of", it must be given its ordinary meaning. Webster's New International Dictionary defines "disposed of" as:

> "To get rid of; to put out of the way; to finish with, to transfer to the control of someone else, as by selling; to alienate; part with; relinquish; bargain away."

The facts involved here show that Buick has not permanently divested itself of the ultimate control of these vehicles. In addition, these vehicles are not for "resale" nor for "display and lease." Therefore, there is no violation of §321.45. There is nothing to prohibit an owner allowing another to operate a properly registered vehicle.

It is, therefore, our opinion that a licensed dealer, under the provisions of Chapter 322 and §321.57, may use a motor vehicle licensed under the provisions of §321.55 and owned by a nonresident manufacturer for the purpose of demonstrating such a vehicle.

16.13

MOTOR VEHICLES: Registration, motor truck, semi-trailer – §§321.1, 321.119, 321.122, 321.123, 1962 Code. (1) Motor vehicle, designed primarily for carrying goods to be registered as "motor truck," even though turn-table hitch mount is attached to its bed. (2) Vehicle without motive power, designed for carrying goods, and being drawn by motor vehicle, and constructed so its weight rests upon another vehicle, is semi-trailer to be registered on basis of combined weight of semi-trailer and motor vehicle.

December 1, 1964

Mr. James P. Hayes
Deputy Commissioner
Department of Public Safety
LOCAL

Dear Mr. Hayes:

This is in reply to your recent letter in which you state:

> "A certain corporation manufactures a tandem axle trailer with a hitch which attaches to a turntable hitch mount in the bed of the drawing motor truck, forward of the rear axle. The purpose of such a device is to distribute a share of the trailer weight to all four wheels of the motor truck. The turntable hitch mount, commonly referred to by the Motor

Vehicle Division as a 'fifth wheel', is mounted in the bed of the drawing motor truck, and is attached to the frame of the vehicle either by means of welding or by bolts.

"An official opinion is respectfully requested from your office on the following question:

"For purposes of motor vehicle registration, how is the above described combination of drawing vehicle and drawn vehicle classified?"

Your letter refers to the drawing vehicle as a "motor truck". A "motor truck" is defined by Section 321.1(4) as:

". . . every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over nine persons as passengers."

We must assume, therefore, that this motor vehicle is "designed primarily for carrying" goods. Thus the question appears to be whether the mounting of a "fifth wheel" as described in your letter converts the vehicle from a "motor truck" to a "truck tractor."

A "truck tractor" is defined by Section 321.1(6) as:

". . . every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn."

The word "designed" refers to the purpose for which the vehicle was originally constructed by the manufacturer. (See Opinion of Attorney General, Staff to Saur, August 23, 1963, and authorities cited therein.)

An analogous problem was faced by the Iowa Supreme Court in *Crown Concrete Co. v. Conkling*, 247 Iowa 609, 75 N.W. 2d 351 (1956). That case involved the question of whether a motor truck upon which a concrete mixer was permanently mounted was special mobile equipment as defined by §321.1(17). The court held that such a truck was not "special mobile equipment". This holding indicates that a special mounting upon a truck chassis will not change the purpose for which the truck was "designed".

In addition, a "truck tractor" by definition cannot be constructed to carry a load other than part of the weight of the drawn vehicle. The vehicle described in your letter is not so constructed. Therefore, it is our opinion that the drawing vehicle is to be registered as a "motor truck" as provided in §321.119.

With respect to the drawn vehicle, §321.1 provides in part:

" . . .

"9. 'Trailer' means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle.

"10. 'Semitrailer' means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle.

"Wherever the word 'trailer' is used in this chapter, same shall be construed to also include 'semitrailer'.

Your letter states that part of the weight of the drawn vehicle rests upon the towing vehicle. Thus the drawn vehicle cannot be considered a "trailer" under the definition set forth above, but must be considered as a "semitrailer".

Section 321.123 provides in part:

"All trailers and mobile homes except those defined as semi-trailers under the provisions of section 321.122 shall be subject to a registration fee to be fixed in accordance with the following schedule. . ." (based on weight of the trailer.)

The pertinent portions of §321.122 provides:

"2. For semitrailers the annual registration fee shall be:

"For each semitrailer drawn by a truck, road tractor or truck tractor, with a combined gross weight of twelve tons or less, thirty dollars.

"For each semitrailer drawn by a truck, road tractor or truck tractor, with a combination gross weight exceeding twelve tons, sixty dollars."

There is no definition of "truck" provided in chapter 321. Since the other forms of "trucks", i.e. road tractor and truck tractor, are specifically mentioned in §321.122, the term "truck" in that section must refer to a "motor truck".

It is therefore our opinion that the drawn vehicle described in your letter is a semitrailer and that its registration fee under §321.122 is to be based upon the combined gross weight of the motor truck and the semitrailer.

16.14

MOTOR VEHICLES: Registration, nonresident livestock trucks—§§321.1(16), 321.17, 321.18, 321.53, 321.56, 1962 Code. Semitrailer truck hauling cattle raised and owned by nonresident owner of truck traveling on Iowa highways with out-of-state registration for which there is no reciprocity agreement, is subject to registration under §321.18.

June 14, 1963

Mr. Howard B. Wenger
County Attorney
Martin Building
Hamburg, Iowa

Dear Mr. Wenger:

This is in answer to your letter wherein you request the following opinion:

"I would like your opinion concerning the statutory authority for requiring a nonresident owner of a truck to purchase Iowa license when the truck is properly licensed for use in his home state. The facts concerning the matter are as follows:

"The driver of a semi-trailer truck was hauling cattle raised and owned by the owner of the truck and was traveling on the Iowa highways under a NR (Natural Resource) Arkansas license. The operator was arrested for having improper license and registration contrary to Iowa Code, Section 321.17. The charge was filed before the Justice of the Peace and the driver was advised by the arresting officers that he would have to register the truck and purchase Iowa licenses. The Iowa Reciprocity Board has advised that they have no agreement with the State of Arkansas permitting the use of NR or any Special Plates on Iowa highways and will not recognize the same here.

"The question concerns (1) the validity of a charge under Code Section 321.17 against the operator of the truck for failure to have proper registration and (2) the statute requiring the operator of such a vehicle to purchase Iowa plates and register same here."

Section 321.17 provides as follows:

"It is a misdemeanor punishable as provided in section 321.482, for any person to drive or move or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered here under which is not registered, or for which the appropriate fee has not been paid when and as required."

Section 321.18 provides as follows:

"Every motor vehicle, trailer, and semi-trailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:

1. Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers, transporters, dealers, or nonresidents as contemplated by sections 321.53 and 321.56, or under a temporary registration permit issued by the department as hereinafter authorized."

An "implement of husbandry" as defined by §321.1(16) means, so far as is applicable to this situation:

". . . every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations *and shall include portable livestock loading chutes without regard to whether such chutes are used by the owner in the conduct of his agricultural operation, provided however, that such chutes are not used as a vehicle on the highway for the purpose of transporting property. . .*"

The portion underlined was added by the 57th General Assembly in 1957.

A 1939 Attorney General's opinion (1940 *O.A.G.* p. 304) sets out three requirements which must be met in order to conform with the definition of "implement of husbandry". These three requirements are:

"1. It must be designed for agricultural purposes.

2. It must be exclusively used by the owner thereof in the conduct of his agricultural operations.

3. Its movement upon the highway must be temporary."

Subsequent to this opinion, the legislature amended §321.1(16) as indicated above. This amendment indicates a legislative intent that vehicles used upon the highways for transporting property are not to be considered as "implements of husbandry" excepted from registration by §321.18(3).

The next determination to be made is whether such a vehicle is excepted from registration by §321.18(1).

Section 321.53 provides as follows:

"A nonresident owner, except as provided in sections 321.54 and 321.55, of a private passenger motor vehicle, not operated for hire, may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration plate or plates issued for such vehicle in the place of residence of such owner. A nonresident who leases a vehicle from a resident owner shall not be considered a nonresident owner of such vehicle for the purpose of exemption under this section. This section shall be operative to the extent that under the laws of the foreign country, state, territory, or federal district of such nonresident owner's residence like exemptions and privileges are granted to vehicles registered under the laws, and owned by residents,

of this state. A truck, truck tractor, trailer or semi-trailer owned by a nonresident and operated on Iowa highways must have displayed upon it a valid registration plate or plates and a valid registration certificate, card, or other official evidence of its allowable weight in the state, district, or county in which it is registered."

Section 321.56 was repealed by Ch. 250, §8, Acts 58th G.A., since chapter 326 relating to reciprocity took its place.

In the 1939 Code of Iowa, §321.53 provided:

"A nonresident owner, except as otherwise provided in sections 321.54 321.55, owning *any* foreign vehicle of a type otherwise subject to registration may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration card and registration plate or plates issued for such vehicle in the place of residence of such owner."

In 1953 the legislature passed an act which is known as Chapter 128, Acts 55th general assembly. The vehicle for this legislation was Senate File 130. When originally introduced it was identical with House File 201 and provided for repeal of §321.53. The explanation appearing on House File 201 states:

"Section 2 of Chapter 113, Acts 54 G.A., in the first subsection thereof made section 321.53 obsolete after July 1, 1952 or on the date reciprocity agreements with other countries, states, territories or federal districts were completed whichever date first occurred. Since that date has now passed the section no longer has any application and should be repealed. The bill repeals the section and co-ordinates references in other sections of the Code."

Had §321.53 been repealed as was contemplated in the original Senate File 130 it would have meant that nonresident private passenger vehicles would have been subject to the provisions of the reciprocity laws. Senate File 130 was amended in the House to correct this situation. As finally passed, the Act provided that §321.53 read as do the first two sentences of the present section.

It is clear from the legislative history of these provisions that the legislature at the time of the passage of Senate File 130 intended that §321.53 apply only to a nonresident "private passenger motor vehicle, not operated for hire".

In 1959 the third sentence of §321.53 was added §4, Ch. 219, 58th G.A. Originally this was Senate File 542 to which is attached the following explanation:

"This bill is intended to require plain and easily seen evidence of the weight classification for which a vehicle is registered in Iowa. It will make detection of insufficient registration much easier and will be a definite protection against unfair competition for operators, both Iowa and foreign, who do carry sufficient registration and who pay the fees therefor. There will be much less delay in the checking of registration on the highways.

"Reciprocity agreements with other states require adequate registration in the state of registry. Provisions of this bill will require that evidence of such registration be carried in the vehicle when operating on Iowa highways."

Nowhere does there appear any legislative intent to have §321.53 apply to any other than a nonresident private passenger vehicle not operated for hire; on the other hand the manifest intent is otherwise.

In conclusion, the vehicle referred to in your letter is not exempt from the requirement of registration in this state by §321.53; according to your letter it is not exempted from registration in this state under a reciprocity agreement; and it is not an "implement of husbandry". Therefore, it is not excepted from registration by §321.18(1) or (3).

It is therefore our opinion that a semitrailer truck hauling cattle raised and owned by the nonresident owner of the truck, traveling on Iowa highways under an out-of-state registration for which there is no reciprocity agreement, is subject to registration under §321.18, and its operation without Iowa registration is a violation of §321.17.

16.15

MOTOR VEHICLES: Registration, piggy-back operations -- §§321.1(36), 321.1(38), 321.1(39), 321.1(40), 321.1(41), 321.18, 321.57, 321.58, 321.309, 1962 Code. Double saddle full amounts may be operated and moved on highways upon display of transporters' plates, but no fee required if transporter submits proof of proper license in state of residence.

August 4, 964

Mr. William F. Sueppel
Commissioner of Public Safety
State Office Building
L O C A L

Dear Mr. Sueppel:

This is in reply to your recent request for an opinion under the following facts:

A nonresident corporation is engaged in the business of transporting new motor vehicles, primarily trucks, from manufacturers in foreign states to dealers in this and other states. These vehicles have either a manufacturer's certificate of origin or a title in the name of a dealer. None are titled in the name of the transporter, and the transporter has no interest in them except for their delivery. These vehicles are transported over the Iowa highways in piggy-back fashion, as follows:

One motor vehicle is used as the power unit. On the rear of the power unit the front end of a second motor is loaded with its rear wheels on the surface of the roadway. On the rear of the second motor vehicle the front end of a third motor vehicle is loaded with its rear wheels on the surface of the roadway. The power unit is modified so that a fourth motor vehicle is loaded completely upon the power unit, none of its wheels on the surface of the roadway. A fifth motor vehicle is loaded completey upon the third motor vehicle, none of its wheels on the surface of the roadway.

Is this permissible, and if so, what are the registration requirements?

Section 321.309 would be applicable to the situation described in your request. This section in part provides:

"No person shall pull or tow by motor vehicle, for hire, another motor vehicle over any highway outside the limits of any incorporated city or town . . . unless such person has complied with the provisions of Sections 321.57 and 321.58. Provided, however, if such person is a nonresident of the State of Iowa and has complied with the laws of the state of his residence governing licensing and registration as a transporter of motor vehicles, he shall not be required to pay the fee provided in Section 321.58, but only to submit proof of his status as a bona fide manufacturer or transporter as may reasonably be required by the de-

partment . . .". (Provisions for manufacturer's plates were deleted from §321.57 by Ch. 189. §§4 - 8, 20, Acts 60th G.A.)

This section makes it mandatory that the vehicles described in your request comply with the provisions of §321.57, but waives the Iowa fee for nonresident transporters if properly licensed in their state of residence.

This section was interpreted in 1940 *O.A.G.*, page 285, where it was stated:

"It will be observed that Section 339-a1 forbids the towing of one motor vehicle by another. . . but excepts from this rule . . . transporters and dealers *properly registered either in this state or in a foreign state.* It therefore follows that a transporter of motor vehicles, who is properly registered in another state may drive a motor vehicle towing another motor vehicle in the State of Iowa for the purpose of his business as such transporter. . . ."

There is no prohibition against the *carrying* of motor vehicles, provided the carrying vehicle is properly registered and the size, height and weight provisions of the Code are complied with. (See Atty. Gen. Op., Lyman to Clauson, 2-20-64).

With respect to registration, §321.18 in part provides:

"Every motor vehicle, trailer or semi-trailer when *driven or moved* upon a highway, shall be subject to the registration provisions of this chapter except:

1. "Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers, transporters, dealers, or nonresidents as contemplated by sections 321.53 and 321.56 (now Chapter 326), . . .".

The provisions of Chapter 321 relating to transporters and dealers appear in Section 321.57, which in part provides:

"A dealer owning a vehicle of a type otherwise required to be registered hereunder, may operate or move the same upon the highways solely for the purposes of transporting, testing, demonstrating or selling the same, without registering each such vehicle, on the condition that any such vehicle display thereon. . . as special plate or plates issued to such owner. . .

"Also a transporter may operate or move any vehicle of like type upon the highways *solely* for the purpose of delivery upon likewise displaying thereon like plates issued to him as provided in these sections.

"The provisions of this section and sections 321.58 to 321.62, inclusive, shall not apply to work or service vehicles *owned* by a transporter, or dealer."

The term "transporter" is defined in Section 321.1(39), which provides:

" 'Transporter' means every person engaged in the business of delivering vehicles of a type required to be registered hereunder from a manufacturing, assembling or distributing plant to *dealers* or sales agents of a manufacturer."

Although the terms "dealer" and "manufacturer" are so defined by Sections 321.1(38) and 321.1(40) as to require a dealer or manufacturer to have an "established place of business in this state", (see §321.1(41); a Constitutional question might arise if §§321.57 and 321.309 were construed to allow vehicles to be transported as described in your request to Iowa dealers, but to prevent them from traversing this state to a dealer or sales agents of a manufacturer in another state.

The construction of a statute should not be given which will render it unconstitutional, or which may even create serious doubts as to its constitutionality, if any other construction is within bounds of reason. (*Gilchrist v. Bierring,* 234 Iowa 872, 10 N.W. 2d 561 (1944).

It is therefore our opinion that the words "dealer" and "manufacturer" as used in the definition of transporter in §321.1(39) must be given their ordinary and customary meaning instead of the definitions ascribed to them by §§321.1(38), (40) and (41).

You inquire whether vehicle #1 in your diagram, the power unit, as a result of its carrying another vehicle, can be considered to be operated "solely for the purpose of delivery", and whether it is a "work or service vehicle owned by a transporter", so as *not* to fall within the exception from registration requirements.

The word "solely" is defined by Webster's International Dictionary, Second Edition, as:

> "without another; singly; alone; . . . exclusively, to the exclusion of other purposes. . .".

There appears to be no question but that a motor vehicle towing or pulling another motor vehicle could be operated on the highway with the special plates provided for under §321.57. To hold otherwise would require each such motor vehicle to be operated under its own power, making the provisions of §321.309 inoperative. The purpose of the power vehicle in that case is no different than the purpose of the power vehicle which carries another vehicle.

It is our opinion that the first vehicle or power unit described in your request would be operated "solely for the purpose of delivery".

If, however, that vehicle were carrying another product, such as tires, it could be said it was being operated for two purposes, i.e., its own delivery and that of the tires, and therefore would not be excepted from the general registration requirements of §321.18.

Nor could this vehicle be classed as a "work or service vehicle *owned* by a transporter".

"Owner" is defined by §321.1(36) as:

> " 'Owner' means a person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter."

Under the facts stated in your request, this vehicle is not "owned" by the transporter.

Therefore, it is our opinion that the motor vehicles, under the facts stated, may be operated and moved upon the Iowa highways upon the display of special plates as contemplated by Section 321.57, but that no fee would be required if the transporter submitted proof of proper licensing in its state of residence.

16.16

MOTOR VEHICLES: Registration, self-propelled combines – §§321.1(1) (2) (16) (17), 321.18, 321.57; **Speed, size, weight, and load requirements**–

§§321.285, 321.453. 1. Self-propelled combine, being operated by implement dealer from its point of manufacture to place of business of dealer, is exempted from all registration as special mobile equipment. 2. Such vehicle is subject to speed, size, weight, and load requirements of Code.

June 19, 1963

Mr. Ira F. Morrison
Washington County Attorney
Washington, Iowa

Dear Mr. Morrison:

This is in reply to your letter wherein you state:

"I have had a situation arise in Washington County for which I would appreciate an Attorney General's Opinion.

"Factually, the situation is that an implement dealer from Mahaska County took delivery of a self propelled combine in Moline, Illinois and instead of trucking the combine, drove it on the highway from Moline at a top speed from fifteen to eighteen miles an hour, and as he was passing through Washington County was involved in an accident.

"Code Section 321.1(16) in defining an implement of husbandry states; 'means every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operation.'

"Question Number One. Is a self propelled combine being transported by an implement dealer from the manufacturer in Illinois to the dealer's place of business in Mahaska County, Iowa, an implement of husbandry?

"If the answer to Question Number One is No, and I do not see how it fits within the definition, brings forth Question Number Two.

"Question Number Two. Would such a vehicle under the above circumstances be subject to registration under Section 321.18, making it a violation under Section 321.98 for operating such a vehicle without registration?

"Question Number Three. If it is exempt from registration under subsection 1 of 321.18 relating to dealers, would such a vehicle be subject to the provisions of operation under special plates for dealers under Section 321.57?

"Question Number Four. Code Section 321.285 pertaining to speed restrictions states: 'Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing.' If the above described vehicle is not an implement of husbandry, would there be a chargeable violation for driving same at a speed less than is reasonable and proper under this section?

"Question Number Five: Would the above described vehicle be subject to the provisions of the Code pertaining to size, weight, and load, or would it fall within the provisions of the exceptions of Section 321.453?"

A "vehicle" is defined by §321.1(1) as:

". . . every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks."

A "motor vehicle" is defined by §321.1(2) as:

". . . every vehicle which is self-propelled. . ."

A self-propelled combine of the type described in your letter would be a motor vehicle.

Every motor vehicle is subject to registration when driven or moved upon a highway unless specifically excepted by §321.18, Code of Iowa, 1962.

The pertinent portions of §321.18 provide as follows:

"Every motor vehicle, trailer, and semi-trailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:

(1) Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers transporters, by Sections 321.53 and 321.56 or under a temporary registration permit issued by the department as hereinafter authorized.

(3) Any implement of husbandry.

(4) Any special mobile equipment as herein defined."

With respect to subsection (3) of §321.18, an "implement of husbandry" is defined by §321.1(16) as:

". . . every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations. . .It shall also include equipment of any kind for the storage, transportation, application, or any combination thereof, of anhydrous ammonia or other liquid commercial fertilizer used by owners of agricultural operations or dealers and distributors in delivering to, and supplying such owners."

The first sentence of the definition includes only vehicles used exclusively by the owner thereof in conduct of his agricultural operations and makes no reference to dealers or distributors.

The second sentence of this definition was added by the 57th G.A. (Ch. 145, §1). The question raised by this amendment is whether the legislature intended to change the scope of the original statute and, if so, in what manner.

In construing amendments to statutes, it has been held that an addition to a statute is to be construed as though it formed a part of the statute as originally enacted. *Disbrow v. Deering Mfg. Co.*, 233 Iowa 380, 9 N.W. 2d 378 (1943). See also *State ex rel Board of Pharmacy Examiners vs. McEwen*, 250 Iowa 721, 96 N.W. 2d 189 (1959).

The rule of construction "expressio unis est expressio alterius" requires the determination that, although an item of equipment relating to commercial fertilizer would be an "implement of husbandry" when used by dealers in delivering to or supplying the owners, such would not be the case with respect to other vehicles.

Although a self-propelled combine is a "vehicle which is designed for agricultural purposes", in order for it to be classed as an "implement of husbandry" it must be "exclusively used by the owner thereof in the conduct of his agricultural operations".

Therefore, in answer to your Question Number One, it is our opinion that a self-propelled combine being operated by an implement dealer from its point of manufacture to the place of business of the dealer could not be considered exclusively used in the conduct of agricultural operation and would not be an "implement of husbandry".

With respect to subsection (4) of §321.18, "special mobile equipment" is defined by §321.1(17) as:

". . . every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including road construction or maintenance machinery and ditchdigging apparatus. The foregoing enumeration shall be deemed partial and shall not operate to exclude other such vehicles which are within the general terms of this subsection; provided that nothing contained in this section shall be construed to include portable mills or cornshellers mounted upon a motor vehicle or semi-trailer."

In the case of *State vs. Griswald,* 225 Iowa 237, 280 N.W. 489 (1938), it was held that a feed grinder consisting of a grinding mill and motor permanently affixed to the chassis of a truck which could not be used to transport passengers or property, and which was driven from farm to farm for the purpose of grinding farm feed, was "special mobile equipment" exempt from registration. At the time this case was decided the definition of "special mobile equipment" read substantially as it now exists, with the exception of the underlined portion which was added a year after this case was decided. In this case the Court said:

"The definition above quoted indicates that vehicles that are "special mobile equipment" have two characteristics; first, they are not designed or used primarily for the transportation of persons or property; and second, they are incidentally operated or moved over the highways."

The type of equipment described in your letter would appear to conform with the first characteristic quoted above. The Court in discussing the second characteristic said:

"It seems more reasonable to look upon this word 'incidentally' as characterizing the operation of a vehicle when the operating is something 'naturally happening or appearing, esp. as a subordinate or subsidiary feature, '. . . In saying 'incidentally operated' the legislature evidently had reference to such operation over the highways as naturally appertains to the use of the special mobile equipment."

In the case of *Crown Concrete Co. v. Conkling,* 247 Iowa 609, 75 N.W. 2d 351 (1956), it was held that trucks with a concrete mixer permanently mounted thereon used for the purposes of delivering ready mix concrete was not "special mobile equipment". The Court said:

"In any event, it may not fairly be said plaintiffs trucks equipped as they were, are 'not designed or used primarily for the transportation of . . .property and incidentally operated or moved over the highways. . .'".

An Attorney General's opinion dated June 27, 1939, appearing at 1940 *O.A.G.* p. 281, stated that a truck equipped with a three legged derrick and special motor on the rear used for setting poles and also in shifting or moving them a short distance along the road is "special mobile equipment". See also 1940 O.A.G. p. 166.

In view of these citations, it would appear that the vehicle described in your letter would conform to the second characteristic described in the *Griswald* case in that its operation on the highways would be a "subordinate or subsidiary feature".

Therefore, in answer to your Question Number Two, it is our opinion that a self-propelled combine being operated by an implement dealer from its point of manufacture to the place of business of the dealer would not be subject to registration under §321.18 because of its being excepted as "special mobile equipment" under §321.18(7).

In answer to your Question Number Three, §321.18(1) excepts from registration vehicles which conformed to the provisions relating to manufacturers, transporters, or dealers. The provisions referred to are those of §§321.57 through 321.70.

Section 321.57 in part provides that:

"A manufacturer or dealer owning any vehicle of a *type otherwise required to be registered hereunder* may operate or move the same upon the highways solely for purposes of transporting, testing, demonstrating, or use in the ordinary course and conduct of his business as a dealer or manufacturer or selling the same without registering each such vehicle upon condition that any such vehicle display thereon in the manner prescribed in sections 321.58 to 321.62, inclusive, . . .". (Emphasis supplied)

These two sections read together makes it apparent that a dealer may operate a vehicle which is excepted from registration without special plates since it would be of a type *not* required to be registered.

In answer to Question Number Four, §321.285 which is quoted in your letter is in no way dependant upon whether or not a vehicle is subject to registration. Section 321.285 would, therefore, apply to any motor vehicle as defined by §321.1(2). The question of whether or not there would be a violation in driving such a vehicle as described in your letter is a factual determination. This is a matter that would have to be left to the Court or a jury.

In answer to Question Number Five, §321.453 states as follows:

"The provisions of this chapter governing size, weight, and load shall not apply to fire apparatus, road machinery, or to implements of husbandry temporarily moved upon a highway, or to implements moved between the dealer and farm purchaser within a twenty-five mile radius of his place of business where the transaction was made except on any part of the interstate highway system, or to a vehicle operating under the terms or a special permit issued as provided in Sections 321.467 to 321.470, inclusive."

The vehicle described in your letter could not be regarded as being within the class of "fire apparatus, road machinery" or "implement of husbandry". Therefore it is our opinion that such a vehicle would be subject to the provisions of the Code pertaining to size, weight, and load.

16.17

MOTOR VEHICLES: Registration, transfer of stored vehicles—§§321.4, 321.5, 321.20, 321.24, 321.30, 321.46, 321.48, 321.130, 321.134, 1962 Code. Ownership of motor vehicle which is subject to registration and which has been properly stored cannot be transferred to purchaser without being registered for year in which transfer is made, unless it falls within exception of §321.48.

August 5, 1963

Mr. Ira F. Morrison
Washington County Attorney
213 S. Marion Avenue
Washington, Iowa

Dear Mr. Morrison:

This is in reply to your letter in which you state:

"Pursuant to request of Washington County Treasurer, I would appreciate receiving an Attorney General's opinion to the following question:

" 'May the ownership of a motor vehicle which has been properly stored in accordance with the provisions of Chapter 321 be transferred to a purchaser without being registered for the year in which such transfer is made?'

"As I understand the Iowa Certificate of Title law, no vehicle can be titled unless it is currently licensed, with the exception of the provisions contained in 321.48 of the Code, which refers to a vehicle held by a dealer for resale and which he has placed on his U.D. list which is provided in Section 321.70 of the Code.

"Your attention is also called to page 461 of the 1962 volume, Iowa Departmental Rules, sub-paragraph number 2, wherein it states that ownership of a stored vehicle may be transferred without being registered."

Paragraph 2 of the Departmental Rules of the Motor Vehicle Registration Division of the Department of Public Safety, appearing at 1962 *I.D.R.* 461, provides:

"The ownership of a vehicle which has been properly stored in accordance with the provisions of Chapter 321, Code 1946, may be transferred to a purchaser without being registered for the year in which such transfer is made."

A departmental rule cannot be inconsistent or in conflict with statutory enactments. (§321.4 and §321.5)

The applicable statutes are as follows:

321.20 ". . . every owner of a vehicle subject to registration . . . shall make application . . . for the registration and issuance of a certificate of title . . ."

321.24 "Upon receipt of the application for title and *payment of the required fees for motor vehicle* . . . the county treasurer shall . . . issue a registration receipt and certificate of title. . ." (Emphasis supplied)

321.30 "The treasurer shall refuse registration and issuance of a certificate of title or any transfer of title and registration upon any of the following grounds:

". . .

5. "That the required fee has not been paid. . ."

321.46 "The purchaser or transferee shall immediately apply for and obtain . . . a transfer of registration and a new certificate of title. . ."

321.134 ". . . the owner of a vehicle who, before February 1 of any year, surrenders all registration plates. . . *shall have the right to register said vehicle at any later period* of said year by paying the full yearly registration fee without penalty." (Emphasis supplied)

321.130 "The registration fees. . . shall be in lieu of all taxes. . . and if a motor vehicle . . . shall have been registered at any time. . . it shall not be subject to a personal property tax unless such motor vehicle . . . shall have been in storage continuously *as an unregistered motor vehicle* . . . during the preceding registration year." (Emphasis supplied)

Every *part* of a legislative enactment pertaining to the same subject matter in the same chapter must be taken into consideration. *State vs. Jacobs*, 251 Iowa 314, 100 N.W. 2d 601 (1960).

Under the above statutes every motor vehicle subject to registration (§321.18) is required to be titled. A title can be issued only if required fees

are paid (§§321.20, 321.24, 321.30). The ownership of such a motor vehicle can only be transferred by assignment of the certificate of title (§321.45(2)).

To transfer a certificate of title, the transferee must apply for the transfer of registration (§321.46), with the exception contained in §321.48. A vehicle which is "stored" is not "registered" (§§321.130, 321.134). Therefore, there can be no transfer of ownership of a motor vehicle required to be registered unless it is registered, again subject to the exception of §321.48.

Therefore, it is our opinion that the rule quoted in the first paragraph of this opinion is inconsistent and in conflict with the law and therefore void.

It is also our opinion that the ownership of a motor vehicle which is subject to registration and which has been properly stored cannot be transferred to a purchaser without being registered for the year in which the transfer is made, unless it falls within the exception of §321.48.

16.18

MOTOR VEHICLES: School bus, speed limit—§§321.1(27), 321.377, 1962 Code. (1) Automobile owned or leased by public school district, equipped with "official school" plates, operated by employee of school district carrying school students not related to operator, to school from speech or music contest, is a "school bus." (2) Operation of such vehicle in excess of 50 miles per hour constitutes violation of §321.377.

April 7, 1964

Mr. Robert H. Baker
Humboldt County Attorney
Humboldt, Iowa

Dear Mr. Baker:

This will acknowledge your letter of recent date, requesting an opinion in the following matter:

"An automobile owned or leased by a public school district and equipped with "official school" plates is operated on the public highways of Iowa by an employee of the school district. The passengers in the vehicle are school students (not related to the operator) returning to the school from a speech or music contest held in a distant city.

"I would appreciate an Attorney General's opinion on the following questions which frequently arise out of the above fact situation:

"1. Is such a vehicle a school bus within the meaning of Section 321.1(27) of the 1962 Code of Iowa?

"2. If such a vehicle is not a school bus, is it a vehicle in use as a school bus within the meaning of Section 321.377 of the 1962 Code of Iowa?

"3. If either or both of the above questions are answered in the affirmative, is the operation of such a vehicle under the above specified conditions at a speed in excess of 50 miles per hour a violation of Section 321.377 of the 1962 Code of Iowa?"

In answer to your first question, §321.1(27) defines "school bus" as follows:

" 'School bus' means every vehicle operated for the transportation of children to or from school, except privately owned vehicles, not operated for compensation, or used exclusively in the transportation of the children in the immediate family of the driver."

It is our opinion that the vehicle described in your letter is a "school bus" as set out in §321.1(27) of the Code. Your first question having been answered in the affirmative, there is no need to answer your second question.

In answer to your third question, §321.377 provides:

"No motor vehicle in use as a school bus shall be operated at a speed in excess of forty-five miles per hour, except that when used for purposes of an educational trip or for transporting pupils to and from any extracurricular activity a school bus may be operated at a speed not exceeding fifty miles per hour. Any violation of this section, by a driver, shall be deemed sufficient cause for canceling his contract."

In 1962 *O.A.G.*, 302, it was stated:

"The speed limit imposed by §321.377 is placed upon motor vehicles '. . . *in use* as a school bus . . .'. Different speed limits are imposed for different uses of the bus; i.e., when the bus is used for transporting pupils on an educational trip, the speed limit is fifty miles per hour instead of the normal forty-five. Thus, the speed limit is placed not upon the type of vehicle, but upon the purpose for which the vehicle is used."

This opinion was noted in 1962 *O.A.G.* 309, where it was stated:

"We have heretofore considered the question of the speed limit for a school bus when operated on an interstate highway. In an opinion to Carl H. Pesch, Commissioner of Public Safety, dated April 10, 1961, we stated that a motor vehicle in *use* as a school bus when operating on an interstate system is no less a school bus when operating on any other highway. For this reason, the opinion was given that §321.377 applies to a motor vehicle in *use* as a school bus when operated on an interstate highway."

It is our opinion that the operator of an automobile owned or leased by a public school district, and equipped with "official school" plates, carrying school students not related to the operator, returning to the school from a speech or music contest, who exceeds a speed of 50 miles per hour, would be guilty of a violation of Section 321.377.

16.19

MOTOR VEHICLES: Speed limits, secondary road—§321.285(7), 1962 Code, Ch. 200, Acts 60th G.A. In absence of appropriate signs, speed limits on secondary roads, reasonable and proper, to stop within clear distance ahead, with maximum 60 miles per hour from sunset to sunrise and 70 miles per hour from sunrise to sunset on roads surfaced with concrete or asphalt, or combination of both, and 50 miles per hour from sunset to sunrise and 60 miles per hour from sunrise to sunset on all other secondary roads.

July 20, 1964

Mr. L. M. Clauson
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Clauson:

We have your letter wherein you request an opinion as to the proper interpretation of Section 321.285(7) of the 1962 Code of Iowa, as amended by Chapter 200, Acts of the 60th G.A., dealing with speed limits on secondary roads. You have called to our attention an opinion on this subject, issued by this office on January 5, 1961, to Mr. James L. McDonald, Cherokee County Attorney, as reported in 1962 O.A.G. 303, wherein it was stated:

". . . it is my opinion that the effective speed limit on secondary roads which have not been posted in accordance with the provisions of Chapter 228, Acts 58th G.A., is the general speed limit; that is, reasonable and proper, having due regard to the traffic, surface and width of the highway and other conditions, not greater than will enable the vehicle to be brought to a stop within the assured clear distance ahead, and in no case greater than the maximum mile-per-hour limit of sixty miles per hour from sunset to sunrise and seventy miles per hour sunrise to sunset."

Chapter 200, Acts of the 60th G.A., further amended this subsection by adding to line five (5) thereof, after the words "secondary roads" the words "unless such roads are surfaced with concrete or asphalt or a combination of both, in which case the speed limit shall be the same as provided in subsection five (5) of this section" and by striking from lines sixteen (16) and seventeen (17) the words "The speed limits provided and as determined in this subsection and inserting, in lieu thereof, the words "Such speed limits as determined by the board of supervisors", so as to make the last sentence of this subsection read:

"Such speed limits as determined by the boards of supervisors shall be effective when appropriate signs giving notice thereof are enacted by the boards of supervisors at such intersection or other place or part of the highway."

Since a change in language of a statute ordinarily indicates an intention to change its meaning (*Holland v. State,* 253 Iowa 1006, 115 N.W. 2d 161) and since, by the plain meaning of the words in Section 321.285(7) as amended the only speed limits which need be posted to be effective are those determined and declared by the board of supervisors when they have determined that the speed limit provided is greater than is reasonable and proper under conditions found to exist, it would be my opinion that, unless a speed limit to the contrary had been posted in accordance with the statute:

(1) The speed limit on secondary roads surfaced with concrete or asphalt or a combination of both would be reasonable and proper, having due regard to the traffic, surface and width of the highway and other conditions, not greater than will enable the vehicle to be brought to a stop within the assured clear distance ahead, and in no case greater than the maximum miles-per-hour limit found in subsection five (5) of section 321.285, of sixty miles-per-hour from sunset to sunrise and seventy miles per hour from sunrise to sunset.

(2) And the speed limit on all other secondary roads would be reasonable and proper, having due regard to the traffic, surface and width of the highway and other conditions, not greater than will enable the vehicle to be brought to a stop within the assured clear distance ahead, and in no case greater than the maximum speed limit provided in Section 321.285(7) of the 1962 Code of Iowa, as amended, of sixty miles per hour at any time between sunrise and sunset, and fifty miles per hour at any time between sunset and sunrise.

16.20

MOTOR VEHICLES: Suspension of license upon recommendation of Court— §§321.207, 321.210, 1962 Code. Department may suspend operator's or chauffeur's license upon recommendation of Court, appearing on record of conviction forwarded to department, even though such recommendation does not appear on original docket.

May 22, 1963

Mr. Carl H. Pesch, Commissioner
Department of Public Safety
LOCAL

Dear Mr. Pesch:

This will acknowledge receipt of your letter requesting an opinion upon the following question:

"A matter has come to the attention of this department wherein an individual appearing before a justice of the peace pled guilty to an offense over which said justice of the peace had jurisdiction. This department has received a copy of the transcript of the criminal docket duly certified by the justice of the peace and such transcript showing the original docket and does not contain a recommendation of suspension of operator's or chauffeur's license. However, the record of conviction which is required to be sent to this department by the convicting court does show such recommendation."

"The question, therefore, arises as to whether or not the original docket must show such recommendation, or whether such recommendation appearing on the record of conviction is sufficient for this department to act under the circumstances attendant to this matter. In other words, is the court having jurisdiction required to show its recommendation on the original docket before such recommendation may be considered valid by this department."

Section 321.207 provides in part as follows:

"Every court having jurisdiction over offenses committed under this chapter, or any other law of this state or any city traffic ordinances, other than parking regulations, regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person as convicted, and the department shall thereupon consider and act upon such recommendation in such manner as may seem to it best."

Section 321.210 provides in part as follows:

"The department is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

"1. Has committed an offense for which mandatory revocation of license is required upon conviction.

"2. Is an habitually reckless or negligent driver of a motor vehicle.

"3. Is an habitual violator of the traffic laws.

"4. Is incompetent to drive a motor vehicle.

"5. Has permitted an unlawful or fraudulent use of such license.

"6. Has committed an offense in another state which, if committed in this state, would be grounds for suspension or revocation.

"7. Has committed a serious violation of the motor vehicle laws of this state."

The following has been abstracted from 1940 *O.A.G.* p. 193:

". . . the Motor Vehicle Department is delegated the exclusive right of the revocation or suspension of operator's or chauffeur's licenses. No court upon conviction may revoke or suspend a license. . . . It is the duty of the court in all cases involving the violation of motor vehicle law to forward a copy of the record to the department. . . The theory of the law relating to the suspension and revocation of licenses is that the sole duty of revocation shall rest with the Motor Vehicle Department, the merits of

the offense alone resting with the court, . . . It is, therefore, our opinion that the department has authority to suspend the license upon the recommendation of the court even though the violation is not expressly set forth in Section 241." (Now Section 321.210)

Since the above opinion was rendered, subsection 7 of §321.210, allowing suspension for the commission of a serious violation, has been added. Suspension under subsection 7 may be made without any §321.207 recommendation. The only evidence of a recommendation of suspension necessary to be forwarded to the department by the court under §321.207 is a record of conviction. The record of conviction referred to in §321.207 is not a transcript of a judgement. (See 1942 *O.A.G.* p. 6)

In neither §321.207, nor §321.210 does there appear any requirement that a recommendation of suspension of a court must appear on any criminal docket before a suspension may be made.

Therefore, it is our opinion that the department may suspend an operator's or chauffeur's license upon a recommendation of a Court appearing on the record of conviction forwarded to the department, even though such recommendation does not appear on the original docket.

16.21

MOTOR VEHICLES: Suspension of operating privileges of non-licensed resident—§321.210, 1962 Code. Department of Public Safety may suspend privilege of operating motor vehicle of unlicensed Iowa resident under provisions of §321.210.

June 20, 1963

Mr. Carl H. Pesch, Commissioner
Department of Public Safety
L O C A L

Dear Mr. Pesch:

This will acknowledge receipt of your letter requesting an opinion upon the following question:

". . . whether this department has authority to suspend the driving privilege of an Iowa resident who has not secured an operator's or chauffeur's license under the provisions provided in 321.210, Code of Iowa 1962."

There can be no question but that operation of a motor vehicle upon the public highways is a privilege, not a right. This privilege is qualified by the requirements or conditions imposed by the legislature.

"Appellant further contends that the suspension of the license without a hearing is depriving him of his property without due process of law. The fallacy of this claim is that his so-called property right is not such in the ordinary sense. It is a privilege granted to him under certain specific conditions, subject to all laws pertaining thereto at the time the same is issued or may be later enacted, if otherwise valid." *Doyle v. Kahl,* 242 Iowa 153, 158, 46 N.W. 2d 52 (1951).

Originally this privilege was subject to very few restrictions. Until 1926 there was no provision for any licensing of either an "operator" or "chauffeur". The 1926 Code provided for licensing of "chauffeurs" only (§4943).

In the 1926 Code there appears the first provision for revocation of "license". Section 4957 provided:

"The official head of the department may . . . suspend or revoke the

chauffeur's license issued to any person under this chapter, for any cause which he may deem sufficient, . . .".

The 44th G.A. first imposed restrictions of licensing subject to revocation and upon those other than chauffeurs. The legislature exempted from the licensing provision certain classes of persons, thus extending to those classes the privilege of driving, subject to revocation or suspension of that privilege. The pertinent provisions read as follows:

"4960-d33 Mandatory suspensions or revocations. The department shall forthwith *revoke the license* of any person upon receiving a record of the conviction of such person of any of the following crimes. . .".

"4960-d35 Optional suspensions or revocations. The department may immediately *suspend the license* of any person without hearing or without receiving a record of conviction of such person of crime whenever the department has reason to believe that. . .".

"4960-d37 Nonresidents—suspensions or revocations. The department is hereby authorized to suspend or revoke the *right* of any nonresident to operate a motor vehicle in this state of any cause for which the license of a resident operator or chauffeur may be suspended or revoked."

"4960-d38 Violations by nonresidents. Any nonresident who operates a motor vehicle upon a highway when his *right to operate* has been suspended or revoked by the department shall be guilty of a misdemeanor. . .".

"4960-d51 Driving while license suspended or revoked. Any person whose *operator's or chauffeur's license* has been suspended or revoked, as provided in this act, and who shall drive any motor vehicle upon the highways of this state while such license is suspended or revoked, shall be guilty of a misdemeanor, . . .".

It should be noted that in regard to persons required to be licensed the legislature uses the term "operator's or chauffeur's license" when speaking or revocation or suspension. The legislature refers, however, to the exempted persons having their "right to operate" suspended or revoked. In addition the legislature made two separate provisions for violations; one for violations by nonresidents, and one for "licensees".

In 1939 the 47th G.A. enacted a new motor vehicle law. The pertinent provision of Ch. 34 Acts 47 G.A. are as follows:

"Section 234. Suspending privileges of nonresidents. The *privilege of driving* a motor vehicle on the highways of this state given to a nonresident hereunder shall be subject to suspension or revocation by the department in like manner and for like cause as an *operator's or chauffeur's license issued* hereunder may be suspended or revoked."

"Sec. 240. Mandatory revocation. The department shall forthwith revoke the *License of any operator or chauffeur* upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses. . .".

"Sec. 241. Authority to suspend. The department is hereby authorized to suspend the *license of an operator or chauffeur* without preliminary hearing. . .".

"Sec. 245. No operation under foreign license. Any *resident or nonresident whose operator's or chauffeur's license or right or privilege* to operate a motor vehicle in this state has been suspended or revoked as provided in this chapter shall not operate a motor vehicle in this state. . .".

"Sec. 249. Driving while license denied, suspended, or revoked. *Any person* whose *operator's or chauffeur's license, or driving privilege,* has been denied, canceled, suspended or revoked as provided in this chapter, and who drives any motor vehicle upon the highways of this state while such license or privilege is denied, canceled, suspended, or revoked, is guilty of a misdemeanor. . .".

The legislature still refers to a nonresident's "driving privilege" or "right" and a resident's license". The violation of suspension or revocation of either the "license" or "privilege" is now combined in one section.

The 48th G.A. amended this act by deleting "or right" from §245 above and changed "right" to "privilege" in a section dealing with financial responsibility. In addition the legislature amended §240 above to read as follows:

"Mandatory revocation. The department shall forthwith revoke the *license of any operator or chauffeur or driving privilege* upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses. . .".

It would appear that these changes were to clarify that operation of a motor vehicle upon the public highways which was a "privilege" rather than a "right". It appears that the legislature did not intend to change the effect of these sections or to distinguish between suspension of licensed and unlicensed residents.

With reference to residents it is apparent that the legislature has used the term "license" to encompass and be synonymous with the term "privilege". The "privilege" existed before the "license". When licensing became a requirement, that terminology replaced "privilege" but did not qualify its meaning.

"While, in strict propriety, the term "license" refers to the right or privilege conferred, and the certificate of license is merely the written document which evidences such right, it must be conceded that "license" is used frequently by courts and by textwriters to signify impartially both right and the certificate." *State vs. Martin,* (Ore., 1947), 176 P. 2d 636, 643.

"*A license* to operate an automobile upon the highways of the Commonwealth *is a privilege* and not a property right. . ." *Commonwealth vs. Cronin,* (Pa. 1939), 9 A. 2d 408, 410.

"*A license is merely* a permit or privilege to do what otherwise would be unlawful." *Payne vs. Massey,* (Texas, 1946), 196 S.W. 2d 493, 495.

It would be inconceivable that the legislature would intend that a *licensed* resident could be suspended for having committed an offense for which mandatory revocation of license is required upon conviction under §321.210(1) and an *unlicensed* resident could not. Nor would the legislature have intended that an unlicensed resident's privilege could not be suspended if he were an incompetent as contemplated by §321.210(4).

It is therefore our opinion that the Department has authority to suspend the driving privilege of an Iowa resident who has not secured an operator's or chauffeur's license under the provisions of §321.210, Code of Iowa, 1962.

16:22

MOTOR VEHICLES: Value, fixing for registration purposes – §§321.157, 321.161, 321.162, 1962 Code. "Retail list price" under §§321.157 and 321.162 means price expected to be paid by ultimate consumer, exclusive of freight cost. Said price under §321.157 is same as retail price suggested by manufacturer required by Title 15, §1232(f)(1), U.S.C.A.

February 6, 1963

Mr. Allan E. Reyhons, Director
Iowa Legislative Research Bureau
L O C A L

Dear Mr. Reyhons:

This will acknowledge receipt of your letter asking for an opinion, in which you pose the following questions:

"The Legislative Research Bureau has been directed by the Honorable Dewey E. Goode, State Representative and member of the Iowa Highway Study Committee, to request of your office, on behalf of the Study Committee, an opinion clarifying Sections 321.157 and 321.162, Code of Iowa, 1962.

"Does Section 321.162 provide that the value shall be fixed at the next even one hundred dollars above the retail list price less freight cost or does Section 321.162 provide that the value shall be fixed at the next even one hundred dollars above the retail list price less freight cost, less federal excise tax and less company handling charges?

"Does the retail list price referred to in Section 321.157 mean the official manufacturer's suggested retail prices, *exclusive of destination charges*, as printed in official 1962 price guides mailed to automobile dealers and the manufacturer's suggested retail price label affixed to each new automobile pursuant to federal law?"

Section 321.157, Code of 1962, reads:

"Schedule of prices and weights. Every manufacturer of a motor vehicle sold or offered for sale within this state, either by the manufacturer, distributor, dealer, or any other person, shall, on or before the first day of August, annually, file in the office of the department a sworn statement showing the various models manufactured by him, and the retail list price and weight of each model as of August 1 of that year. He shall also make the same report on subsequent new models manufactured prior to August 1 of the following year."

Sections 321.161 and 321.162, 1962 Code of Iowa, state:

"321.161 Department to fix values and weights. The department shall, on or before the first day of August, annually, and at such other times as new makes or models of motor vehicles are offered for sale or sold in this state, fix the value and weight of each of the different makes and models of motor vehicles which are sold or offered for sale within the state."

"321.162 Method of fixing value and weight. The value shall be fixed at the next even one hundred dollars above the retail list price f.o.b. the factory, and the weight shall be fixed at the next even one hundred pounds above the manufacturer's shipping weight or the actual weight of the vehicle fully equipped."

The value to be fixed by the Department is based on the retail list price *f.o.b. the factory*, not the retail list price at destination. By §321.157, the legislature provided that the information to fix these values be supplied by the manufacturer. When there are two statutes relating to the same subject matter, they should be construed, if it can be done, so that both may have full force and effect. *State v. Kroll*, 244 Iowa 173, 55 N. W. 2d 251 (1952). Statutes in *pari materia* must be construed together, particularly if statutes are passed at the same legislative session, and it is presumed that such acts are imbued with the same spirit and actuated with the same policy, and they are to be construed together as if part of the same Act. *Manilla Community*

School Dist. v. Halverson, 251 Iowa 496, 101 N. W. 2d 705 (1960). Sections 321.157, 321.161 and 321.162 were passed by the same legislature, relate to the same subject matter, and are thus in *pari materia*. The price information to be forwarded by the manufacturer under §321.157 must have been intended by the legislature to be f.o.b. the factory in order to coordinate with the values fixed by the Department under §321.162. Thus, the retail list price f.o.b. the factory would exclude freight cost and destination handling charges.

The federal excise tax to which your question is apparently directed is that imposed on automobiles by §4061, Chapter 32, Title 26, U.S.C.A. This tax is a tax on automobile and truck chassis and bodies, and tractors sold by a manufacturer, producer or importer. The tax is equivalent to a percent of the price for which the article is sold, and is payable by the manufacturer, producer or importer making the sale. *Fed. Reg.*, §40.4061 (a)-1(c). What relation, if any, this tax has with the registration fees for motor vehicles must be determined from the requirements of the above-quoted Iowa statutes.

Section 321.157 was passed in 1919 by the 38th G. A. H. F. 550, §12, 38th G. A. This statute provided then, as now, for the filing with the Department of Public Safety of the retail list price of the various models manufactured. The question then is: to what does the phrase "retail list price" refer?

The word "retail" has been distinguished from the word "wholesale" by the United States Supreme Court, in the case of *Roland Co. v. Walling*, 326 U.S. 657, 66 Sup. Ct. 414, 90 L. Ed. 383 (1946). In that case, on pages 673 and 674 of the U.S. Reports, the Court said:

> "Wholesaling includes all marketing transactions in which the purchaser is actuated solely by a profit or business motive in making the purchase.
>
> " 'Retailing includes all marketing transactions in which the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the personal use of the commodity or service purchased' (Beckman and Engle in Wholesaling Principles and Practice (1937) p. 25.)
>
> "Similarly the *Encyclopedia of Social Sciences* states that 'The distinguishing feature of the retail trade . . . consists in selling merchandise to ultimate consumers,' (Vol. 13, p. 346), whereas wholesaling is said to cover sales 'to a retailer, or wholesaler or an industrial consumer so long as the purpose of the customer in buying such goods is to resell them in one form or another or to use them for business needs as supplies or equipment.' (Vol. 15, p. 411.)"

In the case of *Guess v. Montague*, 51 Fed. Supp. 61 (E. D. So. Carolina (1942), the Court construed the term "retailer" as used in the Fair Labor Standards Act of 1938. In that case, the Court observed that the term was not defined in the Act, and therefore presumed that Congress used the word in the sense in which it is used in ordinary trade or commercial transactions. On page 65 of the Federal Report, the Court stated:

> "As thus construed, and as stated by Judge Holmes in White Motor Co. v. Littleton, 5 Cir., 124 F. 2d 92, 93, the word retail means 'a sale in small quantity or direct to the consumer, as distinguished from the word wholesale, meaning a sale in large quantity to one who intends to resell.' It may be added that in commercial circles the terms retail and wholesale convey distinct and entirely different meanings. A retail price is the price that the ultimate consumer is expected to pay, and a wholesale price is that price which the retailer pays in the expectation of obtaining a higher price by way of profit from the ultimate consumer."

Since the word "retailer" is not defined in the Iowa statute, it is presumed that the Iowa legislature gave it its general meaning as stated in the above

decisions by the United States Supreme Court and District Court. Retail price therefore refers to the price expected to be paid by the ultimate consumer.

The meaning of the words "list price" has also been construed by the courts, in the case of *A. W. Feeser, Inc. v. American Can Company*, 2 Fed. Supp. 561 (D. Maryland, 1932). At page 566 the Court commented:

> "It is a matter of common knowledge that manufacturers often publish a so-called list price or 'official price' for their goods and it is not uncommon practice for manufacturers to grant discounts from this list or 'official price' to certain classes of customers . . ."

The use to which a price list is put was also considered by the Federal Court in *Tag Mfrs. Institute v. Federal Trade Commission*, 174 Fed. 2d (1st Cir., 1949), which determined that it is a price guide. On page 453 of the Federal Reporter, the Court made the following distinction:

> "A price list is normally not construed to be a general offer in the sense that a contract would be formed by a communication from an intending buyer stating that he agrees to take a specific quantity of the goods at the listed price; rather, the preferred construction is that the price list is merely an invitation to customers to make offers to buy on the basis of the list prices."

It would seem that the legislature, in requiring manufacturers to furnish the retail list price, had in mind the furnishing of an official list of prices for use as a guide by retailers in selling the product. It is apparent from the use of the word "retail" rather than the word "wholesale" that the phrase "retail list price" does not mean that price for which a manufacturer sells his product to a wholesaler, distributor or retailer. Moreover, the phrase must refer to a suggested price rather than an actual price for which the product is sold at retail, since it is obviously not the manufacturer who sells the product to the ultimate consumer.

At the present time, the federal law requires a manufacturer to affix a suggested retail price label to each new automobile offered for sale. This law is designated Title 15, Chapter 28, U.S.C.A., and is popularly known as the "Automobile Information Disclosure Act". Section 1232 of Chapter 28 provides in pertinent part that:

> "Every manufacturer of new automobiles distributed in commerce shall, prior to the delivery of any new automobile to any dealer, or at or prior to the introduction date of new models delivered to a dealer prior to such introduction date, securely affix to the windshield, or side-window of such automobile a label on which such manufacturer shall endorse clearly, distinctly and legibly true and correct entries disclosing the following information concerning such automobile— . . .
>
> "(f) he following information:
>
> (1) the retail price of such automobile suggested by the manufacturer;
>
> (2) the retail delivered price suggested by the manufacturer for each accessory or item of optional equipment, physically attached to such automobile at the time of its delivery to such dealer, which is not included within the price of such automobile as stated pursuant to paragraph (1);
>
> (3) the amount charged, if any, to such dealer for the transportation of such automobile to the location at which it is delivered to such dealer;
>
> (4) the total of the amounts specified pursuant to paragraphs (1), (2), and (3)."

Subsection 3 of §1232(f) clearly requires the transportation charges to be separately set out. Subsection 4 requires a total which includes the transportation charges and the suggested retail price. Consequently, the suggested retail price required by subsection 1 of §1232(f) is f.o.b. the factory. Nothing is said by the Act regarding either handling charges or manufacturer's excise tax. If these are included in the retail price suggested by the manufacturer, it is because the manufacturer chose to do so, not because the federal Act required it. Similarly, the aforesaid Iowa statutes do not require the Department of Public Safety to add these costs to the retail list price in fixing the value of motor vehicles. We understand that the administrative interpretation and practice has been to this effect for many years. What is required of the Department is to base the value on the retail list price f.o.b. the factory, as stated by the manufacturer in a sworn statement. We think that this requirement is exactly met by using the figure supplied by the manufacturer as the suggested retail price of an automobile, in complying with §1232(f)(1) of Title 15, U.S.C.A.

16.23

Negligence, roadworkers—§§321.233, 321.298, 1962 Code. Operating county-owned maintainer while engaged in dragging county road on left hand side of road would not be negligence provided due care was exercised in all other respects. (Knoke to Van Ginkel, Cass Co. Atty., 5/17/63) #63-5-1

16.24

Railroad crossings, stop required, warning devices—§321.343, 1962 Code. Vehicles enumerated in §321.343 must stop at railroad crossings for warning device, unless police officer or traffic control signal affirmatively indicates traffic may proceed. (Knoke to Hayes, Pub. Safety) #64-12-5

16.25

Speed limit, institutional roads—Ch. 165, Acts 60th G.A. (1) Board of Regent's action, reducing institutional road speed limit, not administrative rule under Ch. 66, Laws 60th G.A. (2) Reduction of speed limit requires resolution of Board and posting of signs. (Knoke to Gernetsky, chairman, Finance Committee, State Board of Regents, 12/10/63) #63-12-2

CHAPTER 17

SCHOOLS

STAFF OPINIONS

LETTER OPINIONS

17.1

SCHOOLS: Board of directors, qualifications—§§273.3, 273.4, 1962 Code. Resident of independent or consolidated school district which is not part of county school system is not eligible to serve as member at large on county board of directors. Qualified elector of joint county school district is not eligible to serve as member from his election area if he is resident of another county.

August 22, 1963

Mr. Ira Skinner, Jr.
Buena Vista County Attorney
111 West Fifth Street
Storm Lake, Iowa

Dear Mr. Skinner:

This is in reply to your recent letter in which you raise the following questions:

"Is a qualified elector from an independent or consolidated school district, which maintains a four-year high school, eligible to file nomination papers for his candidacy to serve, if elected, as a member at large on the county board of education even though according to law electors of such types of districts are not eligible to vote in an election for a board member at large?

"Can a qualified elector of a joint county school district file nomination papers for the county board of education if he is a resident of another county? For example: Can a resident of Clay County who is a qualified elector of the Sioux Rapids Comm. School District, which is a part of our county school system, file said papers?"

In reply to your first question I enclose a copy of 1948 *O.A.G.* 144 which deals at length with this problem, the summary of which opinion states:

"A resident elector of a school district maintaining a four-year high school, whether in an independent or consolidated district, is eligible to

serve on the county board of education as a member from the area within which such district is located. The member at large of the county board may not be a resident of any such district which maintains a four-year high school."

In reply to your second question, §273.4 provides:

"The county board of education shall consist of five members, *electors of the county, one member to be elected from each of the four election areas* by the electors of the respective areas . . ." (Emphasis added)

The term "election areas" as used in §273.4 is defined by §273.3 as follows: "The territory of the entire county shall be divided into four election areas. . ." Section 273.3 further provides: "Where districts have territory in more than one county, the district will belong to the election area of the county where the school buildings are located."

Thus, while §273.4 provides that directors are to be elected by the "electors of the respective areas", and §273.3 provides that joint county districts are a part of the election area where the buildings are located, §273.4 still requires that the directors be "electors of the county". Although the electors of that portion of the joint county district which lies in an adjacent county may be eligible to vote as residents of the election area, they may not vote for a resident of their own county because he would not be an elector of the county in which the school board exists.

17.2

SCHOOLS: Bonds, successive elections—§75.1, as amended, Acts 60th G.A. New petition for school bond issue can be accepted prior to lapse of six months after last issue failed.

August 12, 1964

Mr. Richard G. Davidson
Page County Attorney
Clarinda, Iowa

Dear Mr. Davidson:

This will acknowledge your opinion request in which you state:

"You will recall that on your recent trip to Clarinda, we discussed the legal aspects of a petition recently submitted to our School Board following a bond election held last May.

"Specifically we would like to know the following:

"1. Following a bond election, when can the School Board legally accept a Petition for another bond election?

2. Does the School Board have the right to refuse a legal petition (refusing to put it to a vote)?

"3. Should two petitions be submitted, can the Board choose between the two, or are they obligated to vote on the first one submitted?

"The above questions were submitted to our office by the Committee proposing the recently defeated school bond issue in Clarinda appears to be posed under Senate File 191, as appears in 60 G.A., 128. It is our thinking that the position of the Board might be enhanced by an Attorney General's Opinion that states that filing can be before the six months period so long as it is not 'submitted to the electors for a period of six (6) months from the date of such regular or special election'. Of course, if

the Board would reject the proposal, there is probably very little that can be done about it."

(1) The amendment to §75.1, Chapter 82, Code of Iowa, 1962, as enacted by the 60th General Assembly provides:

"When a proposition to authorize an issuance of bonds has been submitted to the electors under this section and the proposal fails to gain approval by the required percentage of votes, such proposal, or any proposal which incorporates any portion of the defeated proposal, shall not be submitted to the electors for a period of six (6) months from the date of such regular or special election."

Prior to the enactment of this section, bond elections could be held as often as petitioned for according to the rule laid down in *Taylor v. Brounfield* (1875) 41 Iowa 264, 266, where it was stated:

"There are no sufficient charges of fraud made in the petition, and certainly none established by the evidence, to invalidate the proceedings. The fact that a prior election upon a proposition to borrow a large sum of money had resulted unfavorably, is no ground to defeat the subsequent action of the directors and electors. It is shown that a majority of all the votes of the district were in favor of issuing the bonds."

The general rule as contained in 79 *C.J.S.* 107-108 provides:

"*Successive elections.* Unless otherwise restricted by statute, and subject to a reasonable exercise of the discretionary power given, succesive elections may be called and held in the discretion of the district officers on a school bond proposition after defeat of the same proposition at earlier elections although within the same year; hence an election approving the issue is not necessarily invalid because repeated elections were called until the consent of the voters was obtained."

Section 75.1 as amended, now requires successive elections to be at least six months apart. No such restriction has been placed upon the circulating of bond petitions, however.

The statute limits the time the proposal, or any portion of the defeated proposal can again be "submitted to the electors."

This phrase as interpreted in *State v. Blaisdell* (1909) 18 N.D. 31, 119 N.W. 360, 362, refers to the actual holding of an election:

"We therefore, conclude that the word 'electors" as used in section 168 means all persons who, by the terms of the Constitution, have the qualifications necessary to entitle them to vote. Persons qualified to vote, but who do not vote, are still electors. Proceeding, the phrase 'shall be submitted to the electors' must mean that the question of the creation of the new county of Mountraille must be submitted to the electors of the present county of Ward; that is, that all persons who are qualified to vote in said county shall be given an opportunity to vote on the creation of Mountraille county. Whether they exercise their rights of suffrage on this question, or neglect to do so, in no way affects the fact of its submission. If the proper authorities, in a proper manner (which is not controverted in this proceeding), gave them an opportunity to vote on it at the general election last held, it was then submitted to them. These propositions are so plain that they hardly seem to require a citation of authorities. Yet we find the same principle enunciated in Sanford v. Prentice, 28 Wis. 358; Beardstown v. Virginia, 76 Ill. 34. See also United States v. Badinelli (C. C.) 37 Fed. 143; O'Flaherty v. City of Bridgeport, 64 Conn. 159, 26 Atl. 466."

(2) Provisions for a petition are contained in §296.2 which reads:

"Petition for election. Before such indedtedness can be contracted in excess of one and one-quarter percent of the assessed value of the taxable property, a petition signed by a number equal to twenty-five percent of those voting at the last election of school officials shall be filed with the president of the board of directors, asking that an election be called, stating the amount of bonds proposed to be issued and the purpose for which the indebtedness is to be created, and that the necessary schoolhouse or schoolhouses cannot be built and equipped, or that sufficient land cannot be purchased to add to a site already owned, within the limit of one and one-quarter percent of the valuation."

This statute does not contain any limitation as to the time when such petitions can be circulated.

The provisions of Chapter 296.2 have been held to be mandatory, 36 *O.A.G.* 196.

Therefore, in answer to your second question, it is my opinion a school board cannot refuse a legal petition.

36 *O.A.G.* 196 states:

"The electors of a school district, or some of them desire to have constructed a gymnasium and other improvements to the school. The board of directors have refused to consider the proposed improvements and have so voted. It will not be necessary to issue bonds and the proposed expenditure will not be in excess of 1¼% of the actual value of the taxable property of the district. Will you please advise whether under the provisions of Chapter 225 of the Code it is necessary that the board submit such matter to the electors upon petition being presented to them with the proper number of signatures as provided in Section 4354 of the Code?"

"Section 4355 of the Code provides as follows:

" 'Election called. The president of the board of directors on receipt of such petition shall, within ten days, call a meeting of the board which shall call such election, fixing the time and place thereof, which may be at the time and place of holding the regular school election.'

"You will note that this is mandatory and that the president of the board on receipt of said petition, shall call a meeting and fix the time and place of the election. It is, therefore apparent, that if Section 4354 of the Code is complied with, that the election must be had.

"I also call your attention to the case of *Mershon vs. Consolidated School District,* 204 Iowa, 221, which may assist you in regard to the procedure."

(3) In answer to your third question, you are referred to 1916 *O.A.G.* 168, where it was stated:

"Replying to your inquiry as to whether or not under the provisions of sections 2820-dl to 2820-d5 inclusive, two or more separate propositions to vote a tax for the building of two or more separate school buildings may be submitted at the same election and whether or not, when separate petitions are filed asking for two or more such school buildings, it is incumbent upon the board to submit each question to a vote of the people and whether or not either would take precedence over the other and as to whether the petitioners signing petitions for such purposes must sign in ink, will say that, in my judgment, it is incumbent upon the board to submit each of the propositions properly petitioned for even though they may be, to some extent, conflicting, and, in such case, neither petition nor propositions would take precedence over the other.

"In my judgment, however, the board would not be required to submit both questions at the same election, but they might do so. In the event that such propositions would carry and the aggregate amount of bonds voted exceeded the limit of indebtedness which the district might incur, then, of course, it would be impossible for the district to sell the full amount of bonds voted and in such case they might even have difficulty in selling an amount equal to the amount of indebtedness which the statute permits the district to incur.

"If the propositions are submitted separately then, in my judgment, the one last submitted should not be submitted for an amount which would make the aggregate indebtedness of the district greater than the statutory limit permits.

"Such petitioners need not sign in ink."

In summary, it is my opinion that a new petition for a school bond issue can be accepted by the board prior to the lapse of six months after the last issue failed; the board has no right to refuse a legal petition; and when two petitions are submitted, the board is obligated to vote on the first one submitted.

17.3

SCHOOLS: Buses, transit buses as schoolbuses—§§285.1(5), 285.5(8), 321.372, 321.373, 1962 Code. Transit-type bus not used exclusively to transport school pupils may be operated as schoolbus within city limits without being equipped as provided by §321.373; however, said bus if not equipped according to §321.373 cannot operate outside corporate limits of city as schoolbus.

July 31, 1963

Mr. Paul F. Johnston
Superintendent of Public Instruction
L O C A L

Dear Mr. Johnston:

This is to acknowledge receipt of your request for an opinion wherein you state as follows:

"In recent weeks we have received a considerable number of telephone calls from parents of youngsters who are transported to school by city transit buses. The parents have expressed concern for the safety of their youngsters since the operational procedures of these vehicles vary from those of a conventional school bus.

"I would appreciate your opinion on the following questions:

"(1) Is it permissible under the above mentioned portion of Section 285.5 for a common carrier to operate a conventional transit type bus on special routes in the morning and evening for the purpose of transporting pupils to and from school or must the vehicle meet all requirements for school-owned buses as to construction and equipment? During the intervening period of the day these vehicles are used on regular city routes.

"(2) If the answer to the first question is in the affirmative, may these buses operate outside the corporate limits of a city?"

Section 285.1(5), Code 1962, provides in pertinent part:

"Where transportation by school bus is impracticable or not available or other existing conditions warrant it, arrangements may be made for use

of common carriers according to uniform standards established by the state superintendent of public instruction. The cost shall be the actual cost of service not to exceed forty dollars per pupil per year."

In addition, §285.5(8), Code 1962, in pertinent part provides:

"Private buses other than common carriers not used exclusively in transportation of pupils while under contract to a school district shall meet all requirements for school-owned buses, as to construction and operation."

The General Assembly has made it expressly clear that special consideration is given in some instances to those common carriers which maintain transit buses. These are clearly set out in the aforementioned Code sections.

The problem raised in your first question is twofold in nature, based upon the foregoing section. It is permissible under §285.1(5) for a common carrier to operate a conventional transit bus for the purpose of transporting pupils. The designation of routes that will be taken is in the exclusive jurisdiction of the school authorities. Under §285.5(8) it is not necessary for the common carrier who operates a conventional transit bus to meet the same requirements as those school-owned buses as to construction and equipment, provided the transit buses are not used exclusively in the transportation of pupils.

Thus, in answer to your first question, it is permissible for a common carrier to operate a transit-type bus on school routes for the purpose of transporting pupils even though the vehicle does not meet the requirements for school-owned buses as to construction and equipment. As to the latter, the statute specifically excludes these requirements, provided the transit buses are not used exclusively in the transportation of pupils.

The provisions of §321.372, Code 1962, place certain mandatory obligations upon a driver of any vehicle approaching a school bus which is equipped as provided in §321.373. Section 321.372 relates to the discharging of pupils on public highways outside of the normal city limits of a city or town; however, it is applicable to the discharge of students in suburban districts of cities and towns. A transit bus may not be equipped as required under §321.373, which would preclude them from operating as a school bus outside the corporate limits of a city as they would not comply with the provisions of §321.372, Code 1962.

Thus, in answer to your second question, transit buses not equipped according to §321.373 cannot operate outside the corporate limits of a city.

17.4

SCHOOLS: Bus garage—Ch. 178, Acts 60th G.A. Bonded indebtedness upon approval of voters for cost of building garage permitted. General Fund may not be expended for said purpose.

May 5, 1964

Hon. Al Meacham
State Representative
Grinnell, Iowa

Dear Representative Meacham:

Receipt is hereby acknowledged of your recent request for an opinion regarding the following question as outlined by the attorney for the school district:

"The School District is in need of a new bus garage. This garage can be constructed for a sum not to exceed $25,000.00. The District presently

has on hand approximately $10,000.00 in the School House Fund. The Board desires to obtain $15,000.00 from the General Fund.

"It is my thought that a vote of the people will be required, conferring authority in this matter, and that such an election can be held under the provisions of Section 277.2, Code of Iowa. The Board desires to submit the matter earlier than the general school election. I assume that the Board would be acting properly under Section 277.2 in submitting the matter to the electorate. Assuming that I am correct in that matter, I have drafted a form of ballot, and I would appreciate being advised as to whether the form of ballot is correct. The form of ballot is as follows:

"Shall the following public measure be adopted? Yes / No

"That the Board of Education of the Grinnell Newburg Community School District be authorized to construct a bus garage at a cost not to exceed $25,000.00, and to expend for that purpose, funds from the School House Fund in an amount not to exceed the sum of $10,000.00, and from the General Fund in an amount not to exceed $15,000.00.

"We also wish to be advised as to whether the budget for the year commencing July 1, 1964, may properly include an item for bus construction of $15,000.00 in the General Fund."

This office has previously issued opinions pertaining to questions you have raised. In an opinion dated July 7, 1950, from Oscar Strauss to E. A. Norelius of Denison, Iowa, we advised that authorization for the construction of a school bus garage must come from the electorate. That opinion incorporated an opinion dated January 6, 1950, to Harvey Uhlenhopp, Franklin County Attorney, which gave the same advice.

We have also advised that a $10,000 expenditure from the general fund may not be made to remodel a school building. Work in excess of "repair" may be made only from the schoolhouse fund which may not be expended except pursuant to authority granted by the electors. See opinion Ables to Pappas, Cerro Gordo County Attorney, dated July 18, 1957. Copies of these opinions are enclosed. Since money in the general fund may not be used for construction of a bus garage the budget may not include an item for said purpose.

The 60th General Assembly has authorized, subject to the approval of the voters, school corporations to contract indebtedness and issue general obligation bonds to provide funds for building a school bus garage. See Ch. 178, Laws of the 60th G.A. This authorization would appear to provide the appropriate means to accomplish your purpose.

17.5

SCHOOLS: Classrooms, rental from sectarian institution—§343.8, 1962 Code; Art. I, §3, Iowa Const. Board of directors of school district cannot enter into contract for rental of classrooms with parochial school because of the prohibition of §343.8 that no public moneys can be appropriated to any sectarian institution.

August 23, 1963

Mr. Robert S. Bruner
Carroll County Attorney
126 East Fifth Street
Carroll, Iowa

Dear Mr. Bruner:

This is in reply to your recent letter in which you raise the following question:

"Under the provisions of Chapter 281 of the 1962 Code of Iowa and in connection with its program for children requiring special education, the Carroll County Board of Education has been renting, occupying and paying rent on a classroom in the Carroll Public School. Because of the school's need of this classroom for its own purposes, this arrangement has now been terminated.

"The Carroll County Board of Education has determined that the most practicable and accessible quarters available for this program is a vacant classroom located in SS. Peter and Paul Catholic Grade School building in this city and a tentative arrangement has been worked out for the renting of this classroom at an agreed monthly rental. This school is, of course, a parochial school which is operated by SS. Peter and Paul Roman Catholic Church of this city.

"My question is whether the Board of Education may rent this classroom for this purpose and pay rent on same."

Enclosed herewith is a copy of a recent opinion of this office (Staff to Elwood and Johnston, 7/10/63), indicating that school boards may enter into contracts in excess of one year for rental of schoolrooms unless there is some prohibition against the specific arrangement. The specific question presented by your letter is whether there is such prohibition.

Article I, §3, of the Iowa Constitution provides:

"The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

Section 343.8 of the Code of Iowa (1962) provides:

"Public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control."

It should be noted that while Article I, §3 of the Constitution is a general prohibition against legislative or other compulsory support of sectarian institutions, §343.8 of the Code in conjunction with §343.9 amounts to a criminal preclusion of any appropriation of public moneys to any school which is under ecclesiastical or sectarian control. See *Knowlton v. Baumhover*, 182 Iowa 691, 706, 166 N.W. (1918); 1914 *O.A.G.* 117.

Two previous opinions of this office are evidence of the strictness with which §343.8 has been applied. In an opinion in 1936 *O.A.G.* 629, the question presented was whether a sectarian teacher dressed in her religious garb is under vows to transfer her salary to her order could teach in the public schools of this state. In reply thereto it was said at page 633:

"It is further the opinion of this department that a Catholic nun dressed in the garb of her order, or a representative of any other creed wearing a particular distinctive religious garb, cannot teach in the public schools of the State of Iowa while wearing such distinctive ecclesiastical garb, *and that no public moneys can be paid to any teacher where the money is transferred by such teacher under her own particular vows to any sectarian institution, school, association or order.*" (Emphasis added)

In an opinion found at 1926 *O.A.G.* 59, the question presented was whether a county may make allowances to sectarian orphanages on the same basis as it does to other private orphanages. In reply to that question it was stated at page 60:

> "These sections undoubtedly authorize the expenditure of the fund raised by such a tax for the support of such children in a private institution with the one limitation that no money shall be appropriated, given, or loaned to or in favor of any institution, school, association or object under ecclesiastical or sectarian management or control."

A further opinion of this office, Strauss to Dunkle, Assistant Woodbury County Attorney, dated July 14, 1952, discusses the question of transportation of parochial school students in public school busses. While that opinion was concerned primarily with construction of the transportation statutes, it does support the legislative intent to maintain the distinction between the public and parochial school systems. The case of *Silver Lake Consolidated School District* v. Parker, 238 Iowa 984, 29 N.W. 2d 214 (1947), also discusses the position of the public school system in Iowa and indicates that the Iowa statutes pertain only to the public schools.

In the case of *Knowlton v. Baumhofer,* 182 Iowa 691, 166 N.W. 202 (1918), the Court discusses at length the relationship of the public schools to sectarian institutions and their membership. In this case the local school board rented a room in a building owned by a Roman Catholic church under a lease entered into with the priest in charge of the church. While the facts of the case indicated that the teacher was dressed in religious garb and that religious pictures adorned the walls, the Court, in discussing the Iowa law, stated at 182 Iowa 706:

> "In this state, the Constitution (Article 1, §3) forbids the establishment by law of any religion or interference with the free exercise thereof, and all taxation for ecclesiastical support. We have also a statute forbidding the use or appropriation or gift or loan of public funds to any institution or school under ecclesiastical or sectarian management or control (Code section 593)."

The Court further stated at 182 Iowa 704:

> "If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used, directly or indirectly, for religious instruction, and above all, that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief. So well is this understood, it would be a waste of time for us, at this point, to stop for specific reference to authorities or precedents, or to the familiar pages of American history bearing thereon."

In summary, therefore, I must conclude that the board of directors of a school district is precluded by the Iowa Constitution, Article I, §3, and by §343.8 of the Code, from entering into a contract for rental of classrooms in a parochial school.

17.6

SCHOOLS: Course requirements—H.F. 20, Acts of 60th G.A. (Extra. Sess.). Effect of H.F. 20 on statutory course requirements for schools.

July 20, 1964

Mr. Paul F. Johnston
State Superintendent of Public Instruction
L O C A L

Dear Mr. Johnston:

We hereby acknowledge receipt of your recent request for an opinion on the following questions stated in your letter:

"Section 1 of House File 20, Acts of 60th General Assembly, Extraordinary Session, reads, 'All public grade and high schools and public junior colleges presently or hereafter operating in this state and offering the courses required by statute * * *'

"My first question is, does the word 'offering' used in conjunction with the words 'courses required by statute' mean that a school must be teaching the statutory course, or does it mean that they can say it was made available to all students?

"My second question is, must all the courses in Chapter 280 be presented either by teaching or offering (depending upon your answer to my first question)?

"Pursuant to the language in House File 20, is the basic curriculum as defined in Chapter 286A, Subsection 7, statutory courses? If your answer to the above question is in the affirmative, does Subsection 2 of Section 286A.7 wherein it states, 'In the junior and senior high school the following: require that these courses must be offered in a junior high and also in the senior high if a school is organized to have a special junior high school and a senior high school?'

"Section 2 of the Act refers to the private and parochial schools and refers to these schools also as 'accredited, qualified and approved schools' if they teach the statutory courses.

"Now with the passage of this Act in relation to private and parochial schools, if they are to be accredited and approved, do we officially determine their compliance with the statutory courses as defined above and issue or maintain a list of officially accredited and approved private and parochial schools?

"It also refers to junior colleges teaching the statutory courses. I know of no statutory courses set forth that must be taught by a junior college. Is this correct?"

House File 20 was passed by the 60th General Assembly in Extraordinary Session as a curative act. The explanation to the bill sets out the occasion for its enactment as follows:

"Certificates of approval to schools and junior colleges have in the past been issued by the state superintendent of public instruction pursuant to the authority of section 257.18 (13), 1962 Code of Iowa. This section has recently been held unconstitutional by the Iowa Supreme Court. As a consequence, doubts have arisen as to the status of schools and junior colleges and the purpose of this bill is to put these doubts at rest."

The Iowa Supreme Court in *Swanson v. Pontralo,* 238 Iowa 693, 27 N.W. 2d 21 (1947), considered the nature of curative acts, saying on page 700:

"A curative act in the ordinary sense of that term is a retrospective law acting on past cases and existing rights. The power of the legislature to enact such laws is, therefore, confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements. (Cooley's Constitutional Limitations, p. 454.)"

The intent of House File 20, therefore, was to approve and accredit schools the status of which was in doubt. There is nothing in House File 20 to indicate an intent to change the statutory requirements for schools.

In answer to questions one and two, section 280.3 sets out what courses are required to be taught in public schools and in private schools to students who are available to take these respective subjects. Section 280.3 was originally enacted as a part of Senate File 111, §1, Acts of the 40th Extraordinary General Assembly, in which the words "such schools" referred to both public and private schools. See also 1906 OAG 130 which assumes that the statutory course requirements apply to both. Section 280.1 establishes that the board of education shall prescribe the courses of study. But the course of study provided by statute does not circumscribe the board of education in determining what other courses shall be taught. 1940 *O.A.G.* 409. There is nothing in these sections or in any others in Chapter 280 indicating an intent that all courses specified must be taught before a school can be deemed approved and accredited. Nor does House File 20 indicate any such intent. But Chapter 280 does indicate that required courses must be taught to students who are available for the course.

In answer to your question regarding Chapter 286A it is our view that said chapter determines the mathematical basis for distribution of general aid to schools. Section 286A.7 provides that general aid moneys distributed to a public school district shall be placed in the general fund of the district and shall be used for operating and maintaining the school and for the cost of instruction and supervision occasioned by teaching the basic curriculum. For the purposes of Chapter 286A the basic curriculum is established by Section 286A.7. Section 286A.7 does not determine what courses are required to be taught in schools.

Regarding your question on private schools, section 257.17 (1) requires the state superintendent to exercise educational supervision over non-public schools to the extent that is necessary to ascertain compliance with the provisions of the Iowa school laws. House File 20 does not require the department of public instruction to maintain a list of officially accredited and approved private and parochial schools.

In answer to your final question no specific courses for junior colleges are specified in House File 20 or other existing statutes.

17.7

SCHOOLS: Elections, director districts as voting precincts—Ch. 274, §§275.12, 277.5, 1962 Code. Place of voting in director districts existing under §275.12 (d) must be within said director districts.

December 11, 1963

Mr. Eugene W. Mullin
Adams County Attorney
Corning, Iowa

Dear Mr. Mullin:

This is in reply to your recent letter in which you raised the following question:

"The question has come up in the Corning Community School District as to how elections should be held.

"The district is divided into five director districts as provided under Section 275.12(d), 1962 Code.

"The question is does the school board have to provide voting in the

subdistricts or can they designate one place within the whole community area?"

Chapter 275 of the Code is concerned with reorganization of school districts. The provisions of Ch. 275, in some respects, different than pre-existing provisions contained in other parts of the school law. Section 277.5 pertaining to precincts for voting in school elections has been in our law in substantially the present form since the enactment of Ch. 100, §5, 43rd G.A., 1929. At that time the provision contained in the last paragraph of §277.5 was enacted. That provision is:

"In subdistrict elections the subdistrict shall constitute a single voting precinct."

However, the reference to subdistricts in §277.5 refers only to those subdistricts existing under the provisions of Ch. 274, since the reorganization provisions of Ch. 275 were not enacted at that time. The legislature did provide, however, for geographical director subdistricts known as director districts under §275.12. Section 275.12(2) sets out various methods by which the board of directors of reorganized districts may be elected. Under §275.12(2)(a-c), the directors are chosen by the vote of the entire district even though under certain options "director districts" may exist. Section 275.12(d), however, provides as follows:

"Division of the entire school district into designated geographical subdistricts, to be known as director districts, each of which director district shall be represented on the school board by one director who shall be elected by the voters of said director districts. *Place of voting in such director districts shall be designated by the county board.*" (Emphasis added)

It should be noted that only in subsection (d) is there the provision that:

"Place of voting in such director districts shall be designated by the county board."

This provision clearly corresponds to the last paragraph of §277.5 making subdistricts existing under Ch. 274 single voting precincts. Section 273.12(d) clearly states that the county board may designate the place of voting in such director districts.

In view of the above it is my opinion that the place of voting in the director districts existing under §275.12(2) must be within said director districts.

17.8

SCHOOLS: Elections, reorganization—§275.26, 1962 Code. Legislature has, by first paragraph of §275.26, provided for payment of school district reorganization election expenses regardless of ultimate outcome.

December 30, 1963

Mr. Allen M. Oppen
Hardin County Attorney
Iowa Falls, Iowa

Dear Mr. Oppen:

This is in reply to your recent letter in which you raised the following question:

"Your opinion is respectfully requested relative to the liability for payment of expenses incurred in a school reorganization election (which

election was rendered void by judicial proceedings) and particularly the application of Section 275.26 of the Code of Iowa (1962).

"In 1961 the Hardin County Board of Education permitted voting by electors of the entire Owasa Community School District in an election to authorize the addition of twelve sections of land in the Owasa District to the Iowa Falls Community School District. Certiorari proceedings were undertaken to determine the legality of the County Board's decision to allow the entire Owasa District to vote and resulted in the Hardin County District Court voiding the election on the grounds that only the voters in the twelve affected sections of land in the Owasa District were entitled to vote. The case was affirmed by the Iowa Supreme Court (117 Northwestern Reporter, Second Series, at Page 474).

"The specific question is—Has the Iowa Falls Community School District any liability for a proportionate share of the expenses of the voided election under the provisions of Section 275.26 of the Code?"
In reply thereto, §275.26 provides in part:

"If a district is established or changes its boundaries it shall pay all expenses incurred by the superintendent and the board of education in connection with the proceedings, including the election of the first board of directors. If the proposition is dismissed or defeated at the election all expenses shall be apportioned among the several districts in proportion to the assessed valuation of property therein."

The first sentence of §275.26 is clearly not applicable as it applies only when a new district is established or changes in boundaries are made as a result of the election. The second sentence of this paragraph provides that expenses shall be apportioned "if the proposition is dismissed or defeated at the election." The outcome of this election, as shown at 117 N.W.2d. 474, was 101-27 against the reorganization in the Owasa district, and the vote in the Iowa Falls election was 76-1 in favor of the reorganization. Thus, the question actually submitted was defeated even though many residents of the Owasa district were not entitled to vote. What the outcome would have been if only the proper 12 sections in the Owasa district had been permitted to vote is purely speculative. It is clear, however, that regardless of what the outcome would have been, the proposition was in fact dismissed by the Hardin County District Court and the case was affirmed by the Iowa Supreme Court.

It is our opinion that the legislature has, by the first paragraph of §275.26, provided for payment of election expenses regardless of the outcome. The proposition was dismissed and the expenses should be apportioned among the several districts in proportion to the assessed valuation of the property therein.

17.9

SCHOOLS: Long-term leases—§§174.2, 279.12, 285.10(3), 297.12, 504.2, 1962 Code. Board of directors of school district may enter into lease of space for schoolroom purposes with county agricultural society, and may lease school buses for terms extending beyond term of present board, when it is necessary to do so in the good faith determination of school board.

July 10, 1963

Mr. Henry Elwood
Howard County Attorney
Cresco, Iowa

Mr. Paul F. Johnston
Superintendent of Public Instruction
L O C A L

Gentlemen:

Recent inquiries have been received by this office as follows:

"Because of a growing shortage of classroom facilities, coupled with the increasingly difficult task of procuring the passage of a favorable bond issue, there has been developing a desire on the part of school districts to rent temporary or so-called portable classroom facilities. * * *

"The Board of Directors of the Howard-Winneshiek Community School District has the opportunity to rent classroom facilities from the Howard County Agricultural Society (and which is in reality the local fair association) and the Board of the Agricultural Society will improve facilities so that they will be able to rent to the school district adequate classroom space. * * *

"Questions have arisen in connection with the authority of the School District and the authority of the Agricultural Society to enter into a lease relative to the rental of classroom space. The first question involved is whether or not the Board of Directors of a school district is limited to a year to year lease, or may the Board enter into a longer term lease, which longer term lease would then be more amenable to being used as collateral for a loan to be procured by the lessor? and

"Secondly, would there by any prohibition as to the Howard County Agricultural Society (Fair Board) entering into a lease for the rental of facilities to the school district? * * *"

"In recent weeks there has been a number of requests in regard to leasing of school buses by a school district. At the request of several school districts I was visited in my office by a leasing corporation and they left with me two copies of leases which they are proposing to use with school districts in the state.

"In a review of Section 285.10(3) the statute provides that a school board shall have the power to purchase or lease school buses or other transportation facilities and maintain same and enter into contracts for the transportation subject to any provisions of law affecting same.

"Chapter 285 fails to disclose any guidelines as to what the Legislature intended in regard to the lease of school buses as contained in the above mentioned section. As a result, the following question arises as to what general concepts should apply to the leasing of school buses when the statute fails to specifically mention the extent to which the school district has the authority to lease."

In response to the first question, §297.12 of the Code of Iowa (1962) provides specific authority for the board of directors of the school district to rent schoolrooms, and §279.12 provides authority for the board to "make all contracts necessary or proper for exercising the powers granted and performing the duties required by law." In determining whether a school board has the power to enter into long-term contracts of a proprietary nature, the Iowa Supreme Court, in *Dodds v. Consolidated School District*, 220 Iowa 812, 263 N.W. 522 (1935), stated at page 815:

"The contract involved in this suit is entirely outside the employment of teachers. It goes into the general powers of the corporation, and the right of the board of directors to contract in reference thereto. It was held in Dubuque Female College v. Dubuque Dist. Tp., 13 Iowa 555, that a school board may bind its successors by a lease of a building for a school, even though the lease was entered into subsequent to the election of their successor. The opinion in Burkhead case, 107 Iowa 29, 77 N.W. 491, heretofore quoted from, holds that the officers change, but the corporation continues unchanged. The contracts are of the corporation and not of the

members of the board individually, and it is not essential that contracts be limited to the terms of office of the individuals making up the board."

In the case of *Burkhead v. Ind. Dist. of Independence,* 107 Iowa 29, 77 N.W. 491 (1898), the Court stated as follows:

"By section 2743 (274.1) of the Code the school district is a body politic, and as such may sue and be sued. The board of directors represents the district,—from a legal standpoint, it is the district. It is a continuing body. The officers change, but the corporation continues unchanged. The contracts are of the corporation, and not of the members of the board individually. It is not essential, then, that contracts be limited to terms of office of the individuals making up the board."

These cases find further Iowa support in *City of Des Moines v. City of West Des Moines,* 239 Iowa 1, 30 N.W. 2d 500 (1948); First Nat. Bank v. *Emmetsburg,* 157 Iowa 555, 138 N.W. 451 (1912); *Scripture v. Burns,* 59 Iowa 70, 12 N.W. 760 (1882); 1932 *O.A.G.* 231. In addition to the Iowa authorities, the general law elsewhere would also permit a reasonable lease extending beyond the terms of the present board. The general rule is stated in *McQuillan, Municipal Corporations,* §29.101, pp. 411-412, as follows:

"Within reasonable limitations, a council may give a lease to municipal property for a time extending beyond the term of such council, and may take a lease from a third person for a term not to expire until after such council would be out of office."

In accord with the above position are *Ambrozich vv. Eveleth,* 200 Minn. 473, 274 N.W. 635 (1927) (ten-year lease "for a public rest room, tourist waiting room, office rooms, or any other lawful purpose"); *Gale v. Kalamazoo,* 23 Mich. 344 (1871) (long-term lease of property to be used as a public market); 37 *Am Jur.,* Municipal Corporations, §66; Annot. 149 *A.L.R.* 336; Annot. 70 *A.L.R.* 798. In 149 *A.L.R.* 336, at page 341, in reference to a quasi-municipal corporation, the author states:

"In Herberer v. Chaffee County (1930) 88 Colo. 159, 293 P. 349, the board of county commissioners accepted a lease for twenty-five years on a tract of land and a building to be erected thereon suitable for use as a county courthouse. In holding the lease valid, the court pointed out that the board not only had the power, but was under a statutory duty, to provide suitable rooms for the transaction of district court and county business. The court cited with approval Liggett v. Kiowa County (1895) 6 Colo. App. 269, 40 P. 475."

In addition to the general principles above mentioned, §279.12 of the Code, granting the board of directors the power to "make all contracts necessary and proper for exercising the powers granted" to them, would appear to specifically authorize leases in excess of one year when in the good faith determination of the board it is necessary to do so to exercise its authority under §279.12.

There appears in 1962 *O.A.G.* 129 an opinion indicating that administrative interpretation by the State Department of Public Instruction precluded agreements extending beyond the term of the present board. Such interpretation is no longer adopted by the Department, however.

In response to the second question, §174.2 of the Code provides, in relation to the powers of county fair or agricultural societies, as follows:

"In addition to the powers granted herein the society shall possess the powers of a corporation not for pecuniary profit under the laws of this state and those powers enumerated in its articles of incorporation, such powers to be exercised before and after the holding of such fairs."

Thus, §174.2 refers to §504.2 which lists the powers of corporations not for pecuniary profit, among which are the powers to "make contracts, borrow

money and transfer property." In addition to these general powers, an individual fair or agricultural society would also have any specific powers contained in its articles of incorporation, as provided by §174.2. Support for the view that a county fair society may lease its facilities to a school district is found in 1962 *O.A.G.* 129, in which this office ruled that the society may enter into a lease of its fair building for the non-fair purpose of storing schoolbuses.

In response to the third question, the discussion contained above in reply to the first question is equally applicable.

In summary, the board of directors of a school district may enter into a lease of space for schoolroom purposes with a county agricultural society and may lease school buses for terms extending beyond the term of the present board, when it is necessary to do so in the good faith determination of the school board.

17.10

SCHOOLS: Officers, term of vacancy appointee – §§69.11, 277.1, 277.29, 279.6, 279.7, 1962 Code. Interim appointment of elective school official lasts until reorganization meeting after next regular school election.

August 19, 1963

Honorable R. O. Burrows
State Senator
Belle Plaine, Iowa

Dear Senator Burrows:

This is in reply to your recent letter in which you raised the following question:

"I would like your opinion on the following situation. We have a consolidated school district consisting of five areas, one town, (District 5) and four rural, (Districts 1, 2, 3, 4). This year one director is to be elected from District 5 at the school election September 9th. In the other areas, the directors' terms expire in 1964 and 1965.

"In September, 1962, in addition to two directors, a school treasurer was elected to succeed herself, who according to Section 277.26 of the 1962 Code of Iowa was to take office on July 1, 1963. In December of 1962, the treasurer resigned because she was leaving the school district; and in her place a man was appointed to fill her unexpired term.

"My question is: Would that appointment be until the regular school election on Sept. 9, 1963, or would the appointment run until July 1, 1965, which would be the remainder of her present term and all of the term beginning July 1, 1963, and running to July 1, 1965?"

Section 277.29 of the Code of Iowa (1962) provides that resignation of an incumbent school officer constitutes a vacancy. Section 279.6 provides:

"Vacancies occurring among the officers or members of a school board shall be filled by the board by appointment. A person so appointed to fill a vacancy in an elective office shall hold until the organization of the board the third Monday in September immediately following the next regular election and until his successor is elected and qualified."

Section 69.11 provides:

"An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified.

Appointments to all other offices, made under this chapter, shall continue for the remainder of the terms of each office, and until a successor is appointed and qualified."

In an opinion in 1924 *O.A.G.* 351, the question was raised whether an interim appointee to a school board held office for the full term of his predecessor or only until the next regular election. The opinion request suggested that there might be some ambiguity between present §69.11 and the provisions relating to filling school vacancies. The opinion found no such conflict and indicates that the general provisions of §69.11 are applicable to school appointments.

Section 279.6 specifically states that a vacancy appointee "shall hold until the organization of the board the third Monday in September immediately following the next regular election and until his successor is elected and qualified." Section 277.1 provides that the regular election is to be held on the second Monday in September. In contrast to the term fixed by §279.6 when there is an interim appointment, §279.7 provides for a term "for the residue of the unexpired term" in those cases where there is a special election and the will of the people is thus expressed.

Construction of §§69.11, 277.1, and 279.6 can lead only to the conclusion that interim appointments of elective school officials are until the next regular school election and until a successor is qualified. In specific reply to your question, the appointment made in December 1962 was for a term lasting until the third Monday in September 1963 and a new treasurer should be elected at the regular election on the second Monday in September, 1963.

17.11

SCHOOLS: Special education classrooms, authority of county board—§281.4, 1962 Code. County board of education is without authority to rent or purchase buildings or rooms in order to establish and organize special education classes from funds provided under §273.13(10).

May 23, 1963

Mr. Van Wifvat
Dallas County Attorney
Perry, Iowa

Dear Mr. Wifvat:

This is to acknowledge receipt of your request for an opinion in which you state as follows:

"(1) May a County Board of Education spend County Board of Education funds for the purposes of a building to be used for special education purposes?

"(2) May a County Board of Education spend County Board of Education funds for the maintenance and operation of a building for special education purposes with the building being owned by some other organization or individual?

"(3) May a County Board of Education spend County Board of Education funds for rental of rooms for use for special education purposes?"

Section 281.4, Code 1962, relating to the powers of the board of education, provides in pertinent part as follows:

"* * * In the event that there are not enough children of any special type in any school district to warrant the establishment of a special class, such children may be instructed in any nearby school in which such special classes have been established, by mutual agreement of the board

of directors of the school district affected, and by payment of regular tuition, or the county board of education may establish such special classes in cooperation with local boards. * * *"

The statute, while not completely free from ambiguity, is clear in regard to when classes for special education can be established if a school district does not have sufficient students to warrant the establishment or the organization of suitable special classes to provide special education. The local board of directors must contact the county board of education in an effort to establish and organize suitable special education classes. However, the board has only the authority to cooperate with the local boards in establishing these classes.

A complete examination of Chapter 281 relating to special education and Chapter 273 relating to the county school system in general fails to disclose any statutory authority wherein the county board is vested with authority to expend from its funds moneys for the purpose of acquiring a building to be used for special education courses. Under the provisions of Chapter 297, Code 1962, relating to the acquisition of buildings for school purposes, there is no reference to the power of the county board of education to acquire school buildings even though for a specific purpose, and the statute refers only to the power of the local school districts to procure buildings and the repair of same.

Thus, under the doctrine of *expressio unius est exclusio alterius*, the county board of education cannot spend from funds as provided under §273.13(10) moneys for the purpose of acquiring or renting a building to be used for special education purposes. In view of the fact that the board has no authority to acquire a building, your second question relating to the maintenance of same is moot.

17.12

SCHOOLS: Special education, rental of buildings—§281.4, 1962 Code. County board of education or board of directors of any school district is authorized to rent appropriate buildings for use of children requiring special education, with approval of State Department of Public Instruction.

March 16, 1964

Mr. Paul F. Johnston
Superintendent of Public Instruction
L O C A L

Dear Mr. Johnston:

This is in reply to your recent letter in which you request a review of our opinion dated May 23, 1963, addressed to Mr. Van Wifvat. In that opinion we stated that a county board of education cannot spend moneys for the purpose of acquiring or renting a building to be used for special education purposes. It is to the question of rental of space for special educational purposes that the instant opinion is directed.

Section 281.4, 1962 Code, relating to the powers of the board of directors of any school district or any county board of education provides:

"The board of directors of any school district or any county board of education, with the approval of the state department of public instruction, may provide transportation and may establish and organize one or more suitable special classes, or provide for instruction in regular classes or in the home, and may provide facilities and equipment for special classes and special schools or home instruction as a part of the local or county school system for such children requiring special education as required for their effective education, a type of instruction different from that ordinarily given as classroom instruction."

The powers and duties of the State Department of Public Instruction, Division of Special Education, are set out in Section 281.3. In subparagraph (1) of that section the division of special education is directed to aid in the organization of special schools, classes and instructional facilities for children requiring special education. In subparagraph 4, the division is directed to adopt plans for the establishment and maintenance of day classes, schools, home instruction and other methods of special education for children requiring it. The division of special education is required by subparagraph 6 to prescribe courses of study and curricula for special schools, special classes and special instruction for children requiring special education.

In ascertaining legislative intent it is important to note that in each of the above subparagraphs the legislature has referred to special schools and to special classes. The obvious inference therefrom is that the reference to schools is to buildings, whereas the reference to special classes is to a particular program that might be provided in a building. Section 281.4 makes a similar distinction between classes and schools by providing that the board of directors or any county board of education may provide special facilities and equipment for special classes and special schools. The inference here again appears to be that the legislature intended to permit the establishing of a special school in a building apart from a school building in which regular instruction is provided.

As indicated in our previous opinion there is no statutory authority in Chapter 281 for the expenditure of moneys to purchase a building for special schools. The provisions for buying a schoolhouse are found in Chapter 297 which seem to apply as well to special schoolhouses. However, since the legislative intent of Chapter 281 appears to be that special schoolhouses can be established, we think that the legislature must have contemplated the renting of appropriate buildings for special education purposes.

Therefore, it is our opinion that a county board of education or a board of directors of any school district is authorized under Section 281.4 to rent appropriate buildings for use of children requiring special education with the aproval of the State Department of Public Instruction. Our opinion of May 23, 1963, is hereby modified only to the extent above indicated.

17.13

SCHOOLS: Tax levies in new districts—Ch. 274, §§274.37, 275.40, 278.1(7), 300.3, 1962 Code. Board of new school district created by either merger, boundary change or reorganization may not levy taxes for playground or schoolhouse unless so authorized by electorate of new district.

June 25, 1964

Marvin B. Selden, Jr.
State Comptroller
L O C A L

Dear Mr. Selden:

This will acknowledge receipt of your letter in which you submitted the following:

"We have received a number of inquiries regarding playground (voted) under Section 300.3, Code of Iowa, 1962, and schoolhouse (voted) under Section 278.1., Par. 7. These questions are all related to *mergers* under Section 275.40 and boundaries changed under Section 274.37.

"In an Attorney General's opinion dated September 8, 1955 (copy attached), addressed to Mr. Martin D. Leir, Scott County Attorney, it says in part:

" 'Where a new district is formed with such new governing body, and, necessarily, with a new electorate, any schoolhouse tax certified by such new board under section 278.1(7), must necessarily depend on the will of the new electorate as expressed at a proper election, and bears no relation to what the electorate of some former district authorized its board to do at some prior time. In other words, section 278.1 confers power on the electors of a given school district to direct their board to do certain things but the power is expressed only in terms of the district in which they are electors and not in terms of some districts which at some future time succeed to all or part of its territory.

" 'In summary, the board of a new community school district may levy a tax under section 278.1(7), Code 1954, only if authorized to do so by the electorate of the new community school district.'

"In another Attorney General's opinion dated December 11, 1957 (copy attached), addressed to Mr. Glenn D. Sarsfield, State Comptroller, says in part:

" 'Basically, the tax provided in the quoted sections, is identical in type with the 2½ mill tax provided in that both require authorization from the electorate prior to levy.

" 'You are, accordingly, referred to the enclosed opinion dated Sept. 8, 1955, to the effect that a 2½ mill levy under Section 278.1, Code 1954, voted prior to reorganization, is terminated by reorganization. By the same reasoning, the same is true of a tax voted under Section 300.2.'

"It is our contention that with a merger the two levies are void unless a new election is held, since the taxpayers coming into the district should have a chance to vote on such a proposition. In fact, this may get into the constitution.

"If there is a merger under Section 275.40, do they have to vote again in order to make these two levies?

"If there are boundaries changed under Section 274.37, do they also have to vote again?

"School budgets are being prepared now and this office will have to advise all county auditors by July 15th if they should reduce budgets where these levies are involved."

Section 274.37, Code of Iowa, 1962, deals with boundary changes while §275.40 provides for an alternate merger procedure to the general reorganization provisions contained in Chapter 275.

The question of the legality of a tax imposed by a newly formed school corporation to satisfy old debts of one of the corporations included in the new district has not been decided by the Iowa Supreme Court. However, the problem was recognized in *Thie v. Consolidated Independent School District of Mediapolis* (1924) 197 Iowa 344, 197 N.W. 75, 76 where the Court stated:

"The argument in the case has taken a wide range, and it is strenuously urged that the property of appellants is being taxed by the newly formed corporation for old debts of one of the independent districts that was included in the newly formed corporation and that appellants' property cannot be taxed for such debts. This question, however, is not before us. The question of the legality of the use of public funds arising from any tax imposed by the newly formed corporation upon appellants' property is not involved in the decision of this appeal. The sole question raised by this appeal is with regard to the constitutionality of the statute providing for the organization of consolidated independent school districts. We limit our ruling to a decision of that question and hold that said

statute is not in violation of constitutional provision upon any ground urged by appellants."

The question you ask in reference to reorganization has been dealt with in prior opinions of the Attorney General and you are referred to the following: Attorney General to Sarsfield, State Comptroller, 8/8/58, in which it was asked:

"Who has the authority, if anyone, to reduce or eliminate a tax levy certified to the levying board in the following manner:

"2. School House (Voted 2½ mills) and/or Playground tax, under the provisions of Section 278.1, and Section 300.2, where the tax was voted prior to reorganization into a community district by which the taxes are certified."

and the reply stated:

"2. In answer to your question #2 I am of the opinion that levies voted to reorganization into community districts terminate upon the reorganization. See opinion of the Attorney General dated December 11, 1957, addressed to the State Comptroller, opinion dated September 8, 1955, addressed to Martin Leir, Scott County Attorney, opinion issued March 6, 1958 to John J. Wilkinson, Iowa County Attorney, and opinion issued May 15, 1957, to G. A. Cady, Franklin County Attorney."

A definition of reorganization by the Iowa Supreme Court indicates the term includes merger and boundary changes.

In *Smaha v. Simmons* (1953) 245 Iowa 163, 60 N.W. 2d 100, the Court said:

"In 1945 the legislature, Chap. 128, Acts, 51st G.A., adopted what is now Chapter 275. It supplied a new method or reorganization of districts by unions and mergers. We recognize that in all of these school laws the legislature is using such terms as reorganization, consolidation and merger or union of districts in much the same sense: the uniting of smaller areas into one."

In view of the foregoing, it is my opinion that the board of a newly formed school corporation may levy taxes for playground or schoolhouse use only if authorized to do so by the electorate of the new district and there is no basis for distinction in that the new district may have been created by merger or boundary change rather than by the general provisions for reorganization contained in Chapter 175 of the Code of Iowa, 1962.

17.14

SCHOOLS: Tax levies in reorganized districts—Ch. 275, §§274.13, 274.37, 275.1, 275.9, 275.40, 278.1, 300.3, 1962 Code. Taxes for playground (§300.3) or schoolhouse (278.1) use may not be levied in new district where there has been merger, boundary change or reorganization under Ch. 275 unless authorized by electorate of new district. Situations involving bonded indebtedness, annexation under §275.1; attachment under §274.13, and boundary change under §274.37 not subject to provisions of Ch. 275 requiring authorization by electorate.

August 26, 1964

Marvin B. Selden, Jr.
State Comptroller
L O C A L

Dear Mr. Selden:

This will acknowledge receipt of your letter of June 4th in which you submitted the following:

"We have received a number of inquiries regarding playground (voted) under Section 300.3, Code of Iowa, 1962, and schoolhouse (voted) under Section 278.1, Par. 7. These questions are all related to *mergers* under Section 275.40 and boundaries changed under Section 274.37.

"It is our contention that with a merger the two levies are void unless a new election is held, since the taxpayers coming into the district should have a chance to vote on such a proposition. In fact, this may get into the constitution.

"If there is a merger under Section 275.40, do they have to vote again in order to make these two levies?

"If there are boundaries changed under Section 274.37, do they also have to vote again?"

Iowa school laws concerning the consolidation of school districts were completely revised with the enactment of Chapter 275 of the Code in 1953.

Section 275.9, Code of Iowa, 1962, provides:

"Methods of effectuating reorganization plans. When any school district is enlarged, reorganized, or changes its boundaries pursuant to the plans hereinabove provided for, such enlargement, reorganization, or boundary change shall be accomplished by the method hereinafter provided.

"The provisions of sections 275.1 to 275.5, inclusive relating to studies, surveys, hearings, and adoption of county plans shall constitute a mandatory prerequisite to the effectuation of any proposal for district boundary change. It shall be the mandatory duty of the county board or joint county boards to dismiss the petition if the above provisions are not complied with fully."

The legislature intended Chapter 275 to cover completely the subject of school district reorganization. In *Liberty Consolidated School District v. Schindler* (1955) 246 Iowa 1060, 70 N.W. 2d 544, 548, it was stated:

"The legislature evidently intended chapter 275 to cover completely the subject of school district reorganization and to provide a comprehensive plan therefor. Obviously it was intended to encourage the reorganization of districts in the interests of economy, efficiency and higher educational standards."

The legislative history of §275.9 further illustrates the proposition that reorganization includes the merger procedure contained in §275.40. Section 275.9 was changed to provide for accomplishment "by one of the methods" to "the method hereinafter provided." Section 275.40 reads:

"Alternate merger procedure. In addition to the procedure set forth in sections 275.12 to 275.23, inclusive, relating to the organization of a proposed school district, a school district not operating a high school that is contiguous to a high school district may merge with said high school district in the following manner: * * *"

In *Wapello County Board of Education v. Jefferson County Board of Education* (1962) 253 Iowa 1072, 115 N.W. 2d 212, 214, 215, the court made is clear that merger is a form of reorganization:

"We have several times said that in matters of reorganization of school districts we will liberally construe the law with a view to promoting a better structure of the schools in the state. Turnis v. Board of Education of Jones County, Iowa, 109 N.W. 2d 198, 208; Branderhorst v. County Board of Education 251 Iowa 1, 6, 99 N.W. 2d 433, 435, 436; Board of Education in and for Franklin County v. Board of Education of Hardin

County, 250 Iowa 672, 676, 95 N.W. 2d 709, 711, 712. Indeed, the legislative intent to encourage the reorganization of school districts into more economic and efficient units is clearly expressed in Section 275.1. We must conclude that the legislature was following this purpose in enacting Section 275.40. As to contiguous high school and non-high school districts it apparently felt the procedure outlined in Sections 275.12 through 275.23 was not in all cases the best; that some less cumbersome and technical method was needed; and it acted accordingly."

In addition, in *Board of Directors of Pleasant Hill Independent School District v. Board of Education of Polk, Jasper and Marion Counties* (1961) 252 Iowa 1000, 109 N.W. 2d 218, 224, the Court stated:

"Counsel for appellant do not question the foregoing decisions but argue at length that they are not factually in point. They say section 275.9 refers to three types of proceedings, (1) Enlargement, (2) Reorganization, and (3) Changes in the boundaries of a school district, and that the section singles out the third type and limits its requirement of strict compliance to cases where, as here, only part of a school district (Pleasant Hill) is to be taken into the reorganized district leaving the remaining part in existence as a separate school district. This contention is not meritorious. The language stated by appellant, (3) Changes in the boundaries of a school district,' does not correctly reflect the language of Code section 275.9, I.C.A. The language of this statute is: 'When any school district is enlarged, reorganized, or changes its boundaries. * * * such enlargement, reorganization, or boundary change * * *.' It refers to the boundaries of the enlarged or reorganized district not to those of the part of a school district remaining after another part has been placed in a reorganized district. Archer et al. v. Board, etc., supra, makes it clear the boundaries referred to in section 275.9 are those of the proposed reorganized district.

"Moreover, appellants' contention that the language in section 275.9, Code of 1958, I.C.A., 'enlargement, reorganization, or boundary change,' refers to three types of reorganization, proceedings, is negatived by the recent legislative history of that statute. In the 1954 Code, section 275.9, I.C.A., stated: 'such enlargement, reorganization, or boundary change shall be accomplished *by one of the methods* hereinafter provided.' However, in 1957, section 275.9 was amended by substituting for the words, *by one of the methods* etc., the statement *'by the method* hereinafter provided.' (Italics supplied.) The apparent reason for this amendment was the repeal, in the same act, of section 275.10 which had provided another method or reorganization and the amendment of 275.11 to make it include reorganizations involving two or more districts. The amendment indicate the legislature interpreted the phrase in section 275.9, enlargement, reorganization or boundary change, as referring to only one method of procedure."

The Court therefore has stated Chapter 275 covers completely the subject of reorganization. However, the 59th G.A., Chapter 156, §1, now §274.37, provided for boundary changes by an alternate method.

The problem presented by this amendment has been considered in an Attorney General's opinion (Rehmann to Shaff, State Senator, 7/14/61) #61-7-15, where it was said §274.37 provides for an alternate method of adjusting boundaries irrespective of the provisions of Chapter 275. The opinion stated:

"Prior to the enactment of Senate File 469 it was impossible for contiguous school districts to adjust their boundaries without submitting a petition as required under Section 275.12, et seq., Code 1958. However, Senate File 469 now affords a manner in which a boundary change can be made even though there are other statutory provisions, namely those found

in Chapter 275, Code 1958. The Supreme Court held that such provisions were valid in the case of *Shaw v. Southfork Twp. Sch. Dist.*, 231 Iowa 27, 300 N.W. 650.

"The statute has general application to all school districts within the state and would be applicable to community school districts as well. The provisions of section 275.9, Code 1958, relevant to boundary changes, are inapplicable to boundary changes contemplated under Senate File 469." (which enacted §§274.37 and 274.38)

In conclusion, taxes for playground or schoolhouse use may not be levied unless so authorized by the electorate of a new district where there has been a merger, boundary change or reorganization under Chapter 275. However, the provisions of Chapter 275, Code of 1962, concerning the authorization by the electorate do not apply to the following sections: §275.1, insofar as it provides for annexation by the county Board of Education; §274.13, on attachments by the County Superintendent made because of natural obstacles, and §274.37, which provides an alternate procedure for boundary change.

As a caveat, it should be noted that this opinion does not involve the question of prior indebtedness of separate school districts which have been reorganized under Chapter 275.

17.15

SCHOOLS: Transportation—§285.1, 1962 Code. Under facts stated city of Oskaloosa must provide transportation for elementary pupils, but need not provide transportation for high school pupils who reside in that part of rural independent district that was voted into city of Oskaloosa.

May 8, 1964

Mr. Lake E. Crookham
Mahaska County Attorney
Oskaloosa, Iowa

Dear Mr. Crookham:

This is in answer to your recent request for an opinion wherein you stated:

"A portion of Walker School District which is a rural independent district without an elementary attendance center, has been voted into the City of Oskaloosa. That portion of the district voted in remains a part of the Walker Rural District. What changes, if any, are made in the transportation requirements of that portion of Walker that is incorporated in Oskaloosa? What, specifically is the required mileage for transportation of elementary and high school pupils as specified in section 285.1 of the Iowa Code in the area in Walker now within the corporated limits of Oskaloosa?

"Can the rural district * * * require the transporting and designated high school district to pick up these children, assuming there are no incompatibilities of bus operation such as roads?"

Section 285.1(1) establishes the transportation requirements for pupils attending public schools, kindergarten through twelfth grade, unless the exceptions (a) through (e) of subparagraph 1 apply. It is our understanding that the Walker School District at this time provides neither an elementary school nor a high school in the district. The school pupils who reside in that part of the Walker School District that is now within the city limits of Oskaloosa are apparently attending schools in Oskaloosa. Elementary pupils in this category are entitled to transportation under the provisions of 285.1(1) because none of the exceptions (a) through (e) apply to them. Thus an elementary pupil

who is attending a school in Oskaloosa that is more than one mile from his residence is entitled to transportation.

A high school pupil who resides in that part of the city of Oskaloosa that is in the Walker School District is not entitled to transportation because of the provisions of Section 285.1(1) (d). The school designated for attendance by the high school pupil in this instance is located within the city limits of Oskaloosa and said section therefore applies.

In answer to your last question it is our view that Section 285.1(6) is applicable. Pursuant to this section the Walker School District pupils shall make use of the transportation provided by Oskaloosa unless other arrangements can be shown to be more efficient and economical and are approved by the county board of education.

17.16

SCHOOLS: Transportation, resident pupils—§§285.1(1)(11), 285.11(2), 1962 Code. School board has no authority to transport resident pupils who are not entitled to transportation or the cost thereof, and collect the cost from parents.

April 7, 1964

Mr. W. T. Edgren
Assistant Superintendent
Department of Public Instruction
L O C A L

Dear Mr. Edgren:

We hereby acknowledge receipt of your letter requesting an opinion on the following matter:

"We have some questions relating to the discretionary authority of a local school board to transport resident pupils who are not entitled to 'transportation or the costs thereof' as provided in section 285.1, Code of Iowa.

* * *

"Section 285.11, subsection 2, was amended by the 56th General Assembly by adding the second paragraph.

"The amendment was enacted in the interest of the Saydel board of education who, because of traffic congestion in the area, wanted a clear legal right to transport *all* children.

"We assumed that this amendment did not necessarily eliminate all the discretionary rights of the board of education. This view has, however, been challenged. We would appreciate answers to the following questions:

"1. Are all discretionary rights to transport resident pupils who are not entitled to 'transportation or the costs thereof' eliminated?

"2. May a local board transport resident pupils who are not entitled to 'transportation or the costs thereof' if the board charges the parents full pro rata costs of such transportation?"

Section 285.11(2) provides:

"Each bus route shall serve regularly only pupils whose homes are beyond the statutory walking distance to the nearest appropriate school. It is provided, however, that in areas of any county having a population of over one hundred and fifty thousand, where, in the opinion of the

board, the volume of traffic is such that the pupils' safety depends upon transportation, regular transportation may be provided for pupils living less than the statutory walking distance from the designated school."

It is noted that the section itself grants discretionary powers to the board. The word "may" imports a grant of opportunity of power and is never properly used in denial, restriction or limitation except in connection with "not." *John Deere Waterloo Tractor Works of Deere & Co. v. Derifield,* 252 Iowa 1389, 110 N.W. 2d 560 (1961). Moreover, Section 285.1 contains paragraphs granting discretionary powers to boards. Section 285.1(1)(c)(e). Nothing in Section 285.11(2) diminishes the discretionary powers authorized under Section 285.1. But by the same token those discretionary powers are no greater than the scope of the language creating them. That language did not give boards the discretion to provide transportation to resident pupils who "are not entitled to transportation or the cost thereof." Question number 1 thus begs the question.

Section 285.1(11) provides:

"Boards in districts operating busses may transport nonresident pupils who attend public school, kindergarten through junior college, who are not entitled to free transportation provided they collect the pro rata cost of transportation from the parents."

There appears to be no statute that grants similar powers to a board regarding resident pupils who are not entitled to free transportation. Thus the answer to question 1 is in the negative since that cannot be eliminated which never existed. The answer to question 2 is also in the negative since there is no statutory authority in a board to transport resident pupils who are not entitled to transportation or the cost thereof.

17.17

SCHOOLS: Tuition, Junior College, offsetting taxes—§§278.1, 280.2, 280.12, 282.1, 282.2, 282.6, 1962 Code. Offset of taxes provided by §282.2 is not applicable to junior college fees charged to children of nonresidents in excess of those fees charged to children of residents of school district sponsoring junior college.

October 30, 1963

Honorable A. V. Doran
State Senator
Boone, Iowa

Dear Senator:

This is in reply to your recent letter regarding the tuition rate of $100 charged to the children of nonresidents who attend the Boone Junior College, as opposed to the $85 fee charged to children of the Boone Community School District residents, and the applicability of the offsetting of taxes provided by §282.2 to the extra $15 charged to nonresident students. The specific question posed is:

"Are the parents of these students, which said students are under twenty-one years of age, entitled to deduct from the tuition they pay for the attendance of their children in Boone Junior College the amount of school tax paid by them in said Boone Community School District in excess of the resident rate of $85."

Section 278.1(8) of the 1962 Code provides that the voters may authorize a junior college in their school district, and §280.12 grants to the State Superintendent of Public Instruction certain supervisory powers over such junior colleges. Section 280.2 states that any school maintained in part by taxation is a public school. Section 282.6 provides in part:

"Every person, however, who shall attend any school after graduation from a four-year course in an approved high school or its equivalent shall be charged a sufficient tuition fee to cover the cost of the instruction received by such person."

Section 282.1 provides in part:

"Nonresident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine."

Thus, it appears that sufficient tuition to cover the cost of instruction must be paid under §282.6 by any and all students attending junior colleges. It will be noted that §282.6 prescribes only a minimum tuition that must be charged. The board need not admit nonresidents at all, and if nonresidents are admitted it may be upon such conditions as the board prescribes. In 1942 *O.A.G.* 12, a somewhat similar question was posed, and it was there stated:

"Should the student in question seek postgraduate high school work in a school district other than that of the residence of the parent, the parent is still not entitled to a tax offset as against the tuition he must pay.

"The tax offset privilege was obviously not intended to apply to tuition charged a parent for postgraduate high school work. Section 4273 requires a tuition fee of all students seeking postgraduate high school work and this is true whether the attendance is within or without the school district of the parent's or guardian's residence. The legislature could not reasonably have contemplated an offset to tuition paid to a high school located outside of the district of the parent's residence and none against the tuition paid to the high school within the district of the parent's residence.

"It is, therefore, our opinion that no tax offset may be allowed a parent against a postgraduate high school tuition regardless of whether the high school attended is located within or without the school district of the parent's or Guardian's residence."

In the case of *Chamber v. Everett,* 191 Iowa 49, 181 N.W. 867 (1921), the Court said:

"It may be assumed that, as school boards have the authority to refuse the admission of nonresident pupils to approved high schools in their respective districts, they would ordinarily deny all pupils admission thereto, unless a sum sufficient, when added to the $8.00 per month to be paid by the school corporation of which such pupil is a resident, to make the full tuition substantially equal to the average cost per resident pupil, is paid. Just how the legislature in the first place arrived at the amount to be paid, we are not informed, but we find nothing in the act to indicate that it was the intention of the legislature to prohibit school boards from charging nonresident pupils an additional tuition."

Thus, in view of the discretionary nature of the decision of the board in admitting nonresident students to junior colleges, and in view of the above authorities, we are of the opinion that the offset permitted by §282.2 is not applicable to fees charged by junior colleges.

17.18

SCHOOLS: Tuition, summer school—§§282.6, 282.1, 1962 Code. Residents between the age of 5 and 21 years are entitled to attend summer school free of tuition.

June 11, 1964

Mr. Harry Perkins
Polk County Attorney
Room 406, Court House
Des Moines, Iowa

Dear Mr. Perkins:

This will acknowledge receipt of your recent request for an opinion on the following matter stated in your letter:

"The precise question which the Des Moines Independent Community School District wishes to have answered is whether or not it can charge tuition or fees for pupils attending summer school who are between the ages of 5 and 21 years and residents of the district."

Section 282.6, 1962 Code, provides:

"Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years and to resident honorably discharged soldiers, sailors, and marines, as many months after becoming twenty-one years of age as they have spent in the military or naval service of the United States before they became twenty-one. Every person, however, who shall attend any school after graduation from a four-year course in an approved high school or its equivalent shall be charged a sufficient tuition fee to cover the cost of the instruction received by such person."

School age is determined by Section 282.1 which states:

"Persons between five and twenty-one years of age shall be of school age. * * *"

The school year is prescribed by Section 279.10:

"The school year shall begin on the first of July and each school regularly established shall continue for at least thirty-six weeks of five school days each and may be maintained during the entire calendar year."

The word "residents" in Section 282.6, was given a liberal construction by the Supreme Court in *Mt. Hope School District v. Hendrickson*, 197 Iowa 191, 197 N.W. 47 (1924). On page 194 of the Iowa Report the Court said, "The principle of free education is the richest legacy of our Puritan civilization, and a liberal construction of our statute must be given, in order that its benefits may inure to those who claim its privileges." This approach should also be applied to the matter at hand.

Section 279.10 clearly authorizes a board of directors to establish a summer school. If summer school is taught, actual residents between the ages of five and twenty-one years are entitled to attend free of tuition.

17.19

SCHOOLS: Warrants not paid for want of funds—Ch. 74, §§24.13, 24.14, 279.27, 1962 Code. School district's method for handling warrants not paid for want of funds deemed illegal as in violation of above Code provisions.

February 28, 1964

Mr. Harry Perkins
Polk County Attorney
Room 406, Courthouse
Des Moines, Iowa

Dear Mr. Perkins:

We herewith acknowledge your letter in which you request an opinion on

the following matter involving the Des Moines Independent Community School District. In your letter you set out the school district's method of handling its payroll where there is no money in the general fund with which to pay teachers.

"The school district has approximately 1700 teachers and the payroll for the month of October, for example, was $1,145,700.99. Instead of writing checks to 1700 teachers for their respective salaries and having each of them stamped not paid for want of funds, the school district drew three warrants for $300,000.00 each and one for $245,700.99 on the general fund which were stamped not paid for want of funds, and the amount was deposited in the payroll account which is simply a division of the general fund used for accounting purposes.

"The Federal Auditor has claimed that these warrants were illegally drawn in violation of Chapter 74 of the Code of Iowa 1946 (1962) and Section 24.13 and Section 24.14, Code of Iowa 1946 (1962).

"The method of bookkeeping used by which the payroll is separated from the balance of the general fund results in only four warrants being stamped not paid for lack of funds instead of 1700, and requires only four computations of interest instead of 1700, and makes it much easier for the school to reconcile its books with the bank.

"The Federal auditor's comment is as follows:

" 'Four warrants dated 10-31-63, drawn on general fund and not paid for lack of funds. Proceeds were credited to the payroll account to provide funds with which to pay individual warrants of school district employees. Warrants paid on the payroll account are retained by the bank. The warrants drawn on the general fund are apparently illegally drawn, in violation of Chapter 74, Code of Iowa 1946 and Section 24.13 and 24.14, Code of Iowa 1946. The issuance and use of notes by school boards for the purpose of borrowing, is unknown in the Iowa Statutes and is apparently illegal.' "

It is our understanding that the board feels this is merely an internal bookkeeping procedure and has nothing to do with the borrowing of money.

Although the above method of handling warrants not paid for want of funds may be easier it cannot be reconciled with the statutory requirements. Chapter 74 of the 1962 Code sets out the specific method for handling these warrants.

Section 74.2 declares that when any warrant is presented for payment and is not paid for want of funds, the treasurer shall endorse the fact thereon with the date of presentation and sign said endorsement. Thereafter said warrant shall draw interest at four percent per annum. Compliance with this section is not met because the warrants the school district are not able to pay are the warrants to teachers, not the four large warrants issued in their stead. It is the former and not the latter warrants that must be stamped not paid for want of funds and consequently treated as Section 74.2 provides.

Under Section 74.2 a warrant stamped not paid for want of funds draws interest only from the date of presentation. *Brown v. Bd. of Com. of Johnson Co.*, 1 Greene 486 (Iowa 1848). It is apparent that 1700 warrants could not all be presented as promptly as would the four large warrants above described. For this reason also the practice of issuing the four large warrants on the general fund is outside statutory authority since it probably results in the payment of more interest by the school district than is legally required. See 1932 O.A.G. 215 regarding computations of interest.

The procedure of issuing the four large warrants does not comply with Section 279.27. That section specifies:

"Each warrant shall be made payable to the person entitled to receive such money."

The previous section provides that the board shall audit and allow all just claims against the corporation. In the situation here considered it cannot be said that these large warrants have been made payable to the person entitled.

In a previous opinion the question of using warrants as a means of borrowing money was considered. 1947 *O.A.G.* 5. The pertinent part of that opinion is as follows:

" 'Can a school district legally issue warrants payable to a bank for the purpose of borrowing money, the funds being used for the purchase of school busses or other equipment?

" 'Or can the secretary of the school board legally issue warrants payable to the treasurer in round figures which he in turn endorses payable to a bank for the purpose of borrowing money to provide the school treasurer with funds for payment of current operating expenses?

. . .'

"I would advise you

"1. That financing the purchase of school busses or other equipment by the issuance of warrants to a bank for the purpose of borrowing to finance the purchase, is illegal. (See action 279.26 et seq. for the statutory directions for use and issuance of school warrants.)

"2. Nor is there statutory authority, either express or implied, in a school board to borrow money for current operating expenses or the payment of purchase price of busses, and using school warrants in the manner described in your letter, for the purpose of such borrowing."

We think that this opinion is applicable to the instant situation. Based upon the above analysis it is our opinion that the method described for handling school warrants not paid for want of funds is in violation of the statutes specified and is therefore illegal.

17.20

Discontinuance, school facilities—§§274.15, 282.7, 1962 Code. Board of directors of school district may close school pursuant to §282.7 which section by virtue of its later enactment impliedly repealed §274.15. (Snell to Ford, Assistant Des Moines Co. Atty., 8/17/64) #64-8-3

17.21

Expenditures, lights on baseball field—§1, Ch. 178, Acts 60th G.A.; §291.13, 1962 Code. (1) Such expenditure is capital improvement payable out of schoolhouse fund and must be authorized by electors. (2) Ch. 178, Acts 60th G.A. is not applicable to expenditure when issuance of bonds and contracting indebtedness is not involved. (Snell to Jordan, Madison Co. Atty., 8/17/64) #64-8-4

17.22

Federal aid—H.F. 10, Acts 60th G.A. (Ex. Sess.). This Act establishing commission to administer plan for higher education facilities and to qualify for federal funds, complies with all requirements of Federal Higher Education Facilities Act of 1963 (Public Law 88-204). (Byers to Hughes, Governor of Iowa, 4/21/64) #64-4-3

17.23

Funds, temporary transfer—§§24.22, 279.31, 291.13, 1962 Code. Temporary transfers from schoolhouse fund to general fund cannot be made unless authorized by electors for certain limited purposes. (Snell to Fulton, Linn Co. Atty., 2/11/64) #64-2-5

17.24

Purchases, home by school board—§§296.2, 297.5, 1962 Code. (1) Question of purchasing home as school property even though purchase price does not exceed 1¼% of assessed value of property is required to be submitted to electorate. (2) §297.5 does not apply to Rolfe Community School District because said district is not composed wholly or in part of territory occupied by a city. (Snell to Hudson, Pocahontas Co. Atty., 8/17/64) #64-8-6

17.25

Power to lease land—§297.12, 1962 Code. School board has no power to lease land for school purposes as lessee. (Snell to Wood, Hamilton Co. Atty., 8/17/64) #64-8-5

17.26

Reimbursement, State to school districts—§286A.5, 1962 Code. Reimbursement to school districts provided by §286A may not be made piecemeal and duty of payment thereof by Comptroller as soon as possible means administratively possible. (Strauss to Selden, St. Compt., 2/28/63) #63-2-6

17.27

Sales, real estate for less than appraised value—§§297.19, 297.24, 1962 Code. School board of directors can accept best bid received pursuant to §297.24, although it is less than appraised value, if said bid is deemed adequate. (Snell to McDonald, Assistant Dallas Co. Atty., 8/17/64) #64-8-7

17.28

Sales, time to seek bid—§§297.23, 297.24, 1962 Code. School board has six months during which it can seek best bid for property advertised for sale. (Snell to Fitzgibbons, Emmet Co. Atty., 8/7/64) #64-8-8

17.29

Teachers' contracts, sick leave—§§279.13, 279.40, 1962 Code. A teacher is entitled to use unexpended sick leave on the opening day of school, even though not contracted for under §279.13. (Rehmann to Perkins, Polk Co. Atty., 6/3/63) #63-6-1

17.30

School bus garages, acquisition—§§278.1, 285.10, 285.11, 291.13, 297.5, 1962 Code. Ch. 178, Acts 60th G.A. Only method for financing purchase of site and building for school bus garage is general obligation bond; cannot be done by use of tax money. (Strauss to Frye, Floyd Co. Atty., 12/29/64) #64-12-7

CHAPTER 18

STATE OFFICERS AND DEPARTMENTS

STAFF OPINIONS

LETTER OPINIONS

18.1

STATE OFFICERS AND DEPARTMENTS: Adjutant General, claims – §29.27, 1962 Code. (1) Time limitation for filing claim for hospitalization and medical treatment, arising out of sickness, includes claims arising out of injuries suffered in line of duty. (2) Adjutant General has no authority to initiate proceedings on claim for injuries, death or disease, where claim has not been made previously within time prescribed by statute.

January 22, 1963

Major General Junior F. Miller
The Adjutant General
L O C A L

Dear Sir:

Reference is herein made to your letter in which you set forth the following:

"Section 29.27 Code of Iowa 1962, set forth, in part, hereafter, provides benefits to National Guardsmen, and their dependents, in the form of hospitalization, medical treatment, and pay and allowances during periods of total or partial disability, in the event of injury incurred in line of duty while on duty or while in active State service.

"' * * * Any officer or enlisted man who suffers injuries or contracts disease, in line of duty, while on duty or in active state service, shall receive hospitalization and medical treatment, and during the period that he is totally disabled from engaging in any gainful occupation he shall also receive the pay and allowances as may be determined by a board of three officers to be appointed by the governor. At least one member of the board shall be a medical officer.'

"The referenced statute further provides a limitation as to the period of time within which claims must be filed, as follows:

"'Any claim for death, illness, or disease contracted in line of duty while on duty or in active state service, shall be filed with the adjutant general within six months from the date of death or contraction of the illness or disease.'

"It is desired to point out that the language of the statute with reference to the time limitation for filing claims specifies only 'death, illness, or disease' and does not specify 'injuries'.

"Two questions are submitted for guidance or rulings in this connection:

"1. Does the time limitation referenced in paragraphs 2 and 3, above, also apply to claims for total or partial disability resulting from *injuries;* and

"2. Does the Adjutant General of Iowa have authority, under the provisions of the referenced statute, to initiate a request to the Governor for the appointment of a Board for the purpose of determining the degree of a disability or eligibility for total or partial pay and allowances, when a claim in connection therewith has not been filed by the injured guardsmen, and when an investigation discloses that the degree of disability or eligibility for total or partial pay and allowances may be in question."

I would advise that it is clear from the quoted statute that the legislative intent was that any officer or enlisted man who, while in active service, suffers injuries or contracts disease, shall receive the benefits described in such statute. It is manifest that there is failure to include claims for injuries to secure the benefits to which an officer or enlisted man is entitled. This failure thereby frustrates the legislative intent. In other words, while providing the benefits and the method of obtaining them for death, illness or disease, but omitting any claim for injuries, the legislative purpose is destroyed.

It is a rule that "words may be supplied in a statute in order to give it effect where the legislative intent is indicated by the context or other parts of the statute." *Sutherland Statutory Construction,* Volume 3, §4924, citing numerous cases.

(1) The situation here is obviously within the rule and, therefore, in answer to question 1, the time limitation referred to in paragraphs 2 and 3 above also apply to claim for total or partial disability resulting from injury.

(2) In answer to your question 2, I am of the opinion that the Adjutant General would not have authority to initiate proceedings on a claim for injury, death or disease where there has not been claim made within the time prescribed by the statute. The governing rule is that where a statute clearly expresses, as does the statute herein under consideration, the legislative intent, there is no room for construction. See *Callaghan Digest,* Statutes, Volume 5, Supp., page 349.

Therefore, the Adjutant General does not have authority to initiate a request where no claim has been filed.

18.2

STATE OFFICERS AND DEPARTMENTS: Architectural examiners – Ch. 118, 1962 Code. Landscape architect may refer to himself as such without violating provisions of Ch. 118, 1962 Code, or H.F. 39 with House amendments, Acts 60th G.A.

May 14, 1963

Honorable Howard C. Reppert, Jr.
State Representative, Polk County
L O C A L

Dear Mr. Reppert:

This will acknowledge receipt of your recent request for an opinion, in which you stated:

> "The publicity resulting from the consideration of H.F. 39 pertaining to the practice of architecture appears to have caused concern to some of the landscapers. In particular, the landscapers who draw plans, supervise the grading and planting, because they—or at least, some of them—are listed as landscape architects.
>
> "I would appreciate an official opinion from your office as to whether or not a person, or firm, can refer to himself as a landscape architect, without violating the present Iowa statutes, and also, this status if House File 39 should pass as amended by the House."

Chapter 118 of the 1962 Code of Iowa contains the present statute relating to the registration of architects. This chapter provides, by §118.6, for the issuance of a certificate of registration in the following terms:

> "Certificate. Any person wishing to practice architecture in the state of Iowa under the title "architect" shall secure from the board a certificate under the title "Architect" as provided by this chapter. Each member of a firm or corporation practicing architecture must have a certificate of registration under the provisions of this chapter. Any properly qualified person, who shall have been exclusively engaged in the practice of architecture in the state at the time this chapter takes effect, may, within ninety days after the approval of this chapter, apply for and will be granted a certificate of registration without examination, by payment to the board of the fee for certificate of registration as prescribed in §118.11."

Section 118.14 has been said to be a regulatory statute insofar as the use of the term "architect" is concerned, in that it provides a penalty for the use thereof without a certificate. See *Davis, Brody, Wisniewski v. Barrett*, 115 N.W. 2d 839, 841 (Iowa, 1962). A definition of the term "architect", however, is not included in the provisions of Chapter 118.

A statement of what is included in the practice of architecture is contained in §1, paragraph 2 of House File 39, 60th G.A. That provision states as follows:

> "The practice of architecture includes any professional service, such as consultation, investigation, evaluation, planning, and design, or responsible supervision of construction, in connection with the construction of buildings, or related structures and projects, or the addition to or alteration thereof, wherein the safeguarding of life, health, or property is concerned or involved."

In neither House File 39 nor Chapter 118 of the 1962 Code of Iowa is any reference made to a "landscape architect". The definition of "architect" itself as found in *Webster's New International Dictionary*, 2d ed., indicates that its meaning is distinct from that of "landscape architect". The definition of "architect" is there shown as:

"1. A person skilled in the art of building; a professional student of architecture or one who makes it his occupation to form plans and designs of and to draw up specifications for buildings and to superintend their execution—compare landscape architect, marine architect."

"Landscape architect" and "landscape architecture" are defined by Webster as follows:

"Landscape architect—one whose profession is to arrange and modify the effects of natural scenery over a tract of land so as to produce the best aesthetic effect with regard to the use of which the tract is to be put."

"Landscape architecture—the planning and design of landscape by a landscape architect."

The above definitions indicate that landscape architecture is not ordinarily included within the description of work performed by an architect. Since landscape architecture is nowhere included in Chapter 118, the legislative intent would seem to be that this work be not included in the chapter. A similar intent is manifest from House File 39, which also makes no reference to landscape architecture.

Therefore, on the basis of the above analysis of authorities, I am of the opinion that a landscape architect may refer to himself as such without violating the provisions of Chapter 118, 1962 Code of Iowa, or House File 39 with House amendment, 60th G.A.

18.3

STATE OFFICERS AND DEPARTMENTS: Board of Control, federal funds for mental health—§§218.1, 218.96, 223.1, 226.1, 226.6, 227.1, 1962 Code. Board of Control is the proper state agency to be designated by State of Iowa in applying for federal grants that may be authorized under H.R. 3386 for purpose of combating mental retardation.

June 14, 1963

Board of Control of State Institutions
State of Iowa
L O C A L

Attention: M. J. Brown

Dear Mr. Brown:

This is to acknowledge your letter of May 6, 1963 wherein you request an opinion upon the following:

"A bill, H.R. 3386, was introduced in the 88th Congress by Mr. Mills on February 5, 1963, to provide among other things a grant for planning comprehensive action to combat mental retardation. A copy of the proposed bill is attached.

"Page eight, Sec. 1703(1) of the bill states the requirement for eligibility of a state for such a grant.

"Is the Board of Control the designated State Agency as the 'sole agency' by virtue of its responsibility by statute for the mentally retarded in Iowa?"

Section 1703, H.R. 3386, provides in pertinent part:

"In order to be eligible for grants under Section 1702, a State must submit an application therefor which—

"(1) designates or establishes a single State agency as the sole agency for carrying out the purposes of this title;". . .

Section 1702 of H.R. 3386 provides in pertinent part:

"Any such grants to a State may be used by it to determine what action is needed to combat mental retardation in the State and the resources available for this purpose, to develop public awareness for the mental retardation problem and of the need for combating it, to co-ordinate State and local activities relating to the various aspects of mental retardation and its prevention, treatment, or amelioration, and to plan other activities leading to comprehensive State and community action to combat mental retardation."

Section 218.1, 1962 Code, provides as follows:

"The Board of Control shall have full power to contract for, manage, control, and govern, subject only to the limitations imposed by law, the following institutions:

"1. . . .

2. Glenwood State School.

3. Woodward State Hospital and School.

4. Mental Health Institute, Cherokee, Iowa.

5. Mental Health Institute, Clarinda, Iowa.

6. Mental Health Institute, Independence. Iowa.

7. Mental Health Institute, Mount Pleasant, Iowa."

Section 223.1, 1962 Code, provides as follows:

"The hospital for epileptics and schools for mentally retarded, hereinafter in this chapter referred to as "hospitals", shall be maintained for the purpose of securing humane, curative, and scientific care and treatment of epileptics, and for the training, instruction, care, and support of mentally retarded residents of this state."

Section 226.1, 1962 Code, provides as follows:

"The hospitals for the mentally ill shall be designated as follows:

"1. Mental Health Institute, Mount Pleasant, Iowa.

2. Mental Health Institute, Independence, Iowa.

3. Mental Health Institute, Clarinda, Iowa.

4. Mental Health Institute, Cherokee, Iowa."

Section 226.6, 1962 Code, provides as follows:

"The superintendent shall:

"(1) Have the control of the medical, mental, moral, and dietetic treatment of the patients in his custody subject to the approval of the board of control."

Section 227.1, 1962 Code, provides as follows:

"All county and private institutions wherein insane mentally ill persons are kept shall be under the supervision of the board of control of state institutions."

Section 218.96, 1962 Code, provides as follows:

"The Board of Control is authorized to accept . . . grants . . . from the federal government or any source . . . ."

It becomes clear that by virtue of §218.1, 1962 Code, the Board of Control has been designated by the legislature to have the full power to contract for, manage, control, and govern the institutions in Iowa which have been established for the purpose of preventing mental retardation and for treatment of the same.

It is equally clear, by virtue of §218.96, 1962 Code, that the Board of Control is fully authorized to accept grants from the federal government.

Being charged with the responsibility of governing and administering the various state institutions which have been created for the purpose of combating mental retardation, it would only seem proper, and we believe to be authorized, if the State of Iowa should submit an application for grants under H.R. 3386, that the Board of Control should be designated as the single State agency for carrying out the purposes of this proposed federal act.

18.4

STATE OFFICERS AND DEPARTMENTS: Board of Control, interest – §§12.8, 452.1, 453.1, 453.6, 453.7(2), 1962 Code. Interest on earnings on investments made under provisions of §§12.8, 452.10, 453.1 and 453.6 shall be credited to General Fund of governmental body making investment or deposit, unless investments are made from specific funds for which investments are otherwise provided for, constitutional funds, or funds diverted to the state sinking fund.

July 9, 1964

Mr. Jim O. Henry
Board of Control
L O C A L

Dear Mr. Henry:

Reference is herein made of yours of recent date in which you submitted the following:

"Recently the Board of Control has deposited with the Comptroller the sum of $172,500 and if our interpretation of the statutes is correct, we should be credited with interest thereon.

"Would you kindly give us an Opinion of your office as to our right to receive the full credit for any interest earned on this deposit."

In reply thereto, I would advise that the foregoing interest is controlled by §453.7(2), providing as follows:

"2. Interest or earnings on investments and time deposits made in accordance with the provisions of sections 12.8, 452.10, 453.1 and 453.6 shall be credited to the general fund of the governmental body making the investment or deposit, with the exception of specific funds for which investments are otherwise provided by law, constitutional funds, or when legally diverted to the state sinking fund for public deposits. Funds so excepted shall receive credit for interest or earnings derived from such funds. Such interest or earnings on any fund created by direct vote of the people shall be credited to the fund to retire any such indebtedness after which the fund itself shall be credited."

Such interest is credited to the general fund of the state unless it be a specific fund for which investments are otherwise provided by law, constitutional funds or when legally diverted to the state sinking fund for public deposit. Unless there be showing made that this money is one of the foregoing described funds, the interest upon the described deposit is credited to the general fund of the state.

18.5

STATE OFFICERS AND DEPARTMENTS: Board of Cosmetology Examiners, appointment of managing secretary—§§69.3, 157.8, 1962 Code. Appointment of "managing secretary" to Board under §157.8 is to be made by Commissioner of Public Health, with approval of Board; §69.3 regarding vacancies in office is inapplicable to position of managing secretary since it is one of ordinary employment; Governor's appointment to fill this position is in excess of his authority under §69.3.

September 4, 1963

Mrs. Mary Grobman Henniges, Chairman
Board of Cosmetology Examiners
State Department of Health
L O C A L

Dear Mrs. Henniges:

This is in reply to your recent letter in which you raise a question as to who will be the proper managing secretary of the Board of Cosmetology Examiners after September 1, 1963.

The present managing secretary is Mrs. Mildred Bittinger, but Mrs. Bittinger has received a letter from Governor Harold E. Hughes dated August 5, 1963, in which he states:

> "It is my duty to inform you that, under the provisions of Sections 69.3 and 157.8, Code of Iowa 1962, I am appointing Mrs. Grace M. West to succeed you as managing secretary, Board of Cosmetology Examiners, effective September 1, 1963.
>
> "As I understand that you have three weeks accrued vacation time coming, your active services in this position will terminate at the close of business on Friday, August 9, 1963."

Section 157.8 provides that the Commissioner of Public Health with the approval of the Cosmetology Examiners shall appoint such clerical assistants as are necessary. It should be noted that there is no statutory office of managing secretary to the Board of Cosmetology Examiners and that the managing secretary is merely an employee of the administrative agency. Section 157.8 prescribes the only method of appointment of employees of that board. Mrs. West was not appointed by the Commissioner of Public Health nor has she been approved by the board. See 1958 *O.A.G.* 134 on appointment of division heads and other employees of the Department of Health. Thus, Mrs. Bittinger is the only managing secretary appointed in accordance with the procedures outlined in §157.8.

Since the position of managing secretary is one of ordinary employment, §69.3, providing that the Governor may take possession of the "office room, the books, papers, and all things pertaining thereto", does not apply. Section 69.3 by its own terms is applicable only to statutory offices.

While it is true that a vacancy in the office of Commissioner of Public Health, itself, did arise upon the death of Dr. Zimmerer, §69.3 authorizes the Governor to take only custodial care of the effects of the office but does not include the right to exercise the discretionary powers and duties of the office. 1938 *O.A.G.* 415.

It is my conclusion that the letter signed by Governor Hughes dated August 5, 1963, is in excess of his authority and that Mrs. Bittinger is therefore entitled to continue as an employee of the State of Iowa.

A copy of this opinion is being dispatched to the Governor.

18.6

STATE OFFICERS AND DEPARTMENTS: Board of Engineering Examiners, per diem compensation for members, incidental expenses—§114.8, 1962 Code. (1) Member of Board of Engineering Examiners may receive per diem compensation even though employed by State of Iowa in another capacity. (2) Securing aid of specialized assistance in preparation and evaluation of examination questions is authorized as "incidental expenses."

September 14, 1964

Mr. H. O. Ustrud
Vice Chairman
Engineering Examiners
506 Shops Building
Des Moines, Iowa

Dear Mr. Ustrud:

This is in response to your letter of recent date in which you state:

"Will you please furnish this Department with an opinion regarding the following two situations:

"1. Code Section 114.8 provides in part: "Each member of the board shall receive as compensation the sum of ten dollars per day for the time actually spent in traveling to and from and in attending sessions of the board and its committee." Pursuant to this quoted portion of Section 114.8 may a member of Board of Engineering Examiners, who is employed by the State of Iowa, receive the per diem compensation that is provided in this section?

"2. Section 114.8 further provides: "Each member of the board shall receive . . . incidental expenses incurred in the discharge of his duties . . ." Do such incidental expenses include the *actual* expenses incurred by a board member in securing the aid of specialized assistance in the preparation and evaluation of examination questions?"

It is well established that persons in the employ of the state, working for a salary are not entitled to other compensation from the state *unless it is expressly provided for by statute,* 1962 O.A.G. 354.355; 1962 O.A.G. 286. Here there is such an express statutory authorization of compensation and your first question is therefore answered in the affirmative.

In regard to your second question the word "incidental", used in section 114.8, has been defined as liable to happen; apt to occur; befalling, hence naturally happening or appertaining. *Wolf vs. Mallinckrodt Chemical Works,* 336 Mo. 746, 81 S.W. 2d 323.330. In *Security Nat. Ins. Co. vs. Sequoyah Marina,* Inc. 246 F. 2d 830, 833 (C.A. Okla.) the word "incident" was said to mean that which appertains to something else which is primary.

In the situation herein considered, the question is whether securing the aid of specialized assistance in the preparation and evaluation of examination questions is incidental to the discharge of a member's duties under Chapter 114. The court in *Stokes vs. Paschall,* 243 S.W. 611.614 (Tex.) held that where a commissioner's court finds it reasonably necessary to employ bond brokers to aid in the sale of bonds of a road district, they may lawfully pay a reasonable commission under the statute as an expense "incident to the issuance" of the bonds.

Similarly, it would seem that securing the aid of specialized assistance in the preparation and evaluation of examination questions is an expense incidental to the duties imposed on members of the board by Chapter 114. Unquestionably it is the duty of the members of the board under Chapter 114 to prepare, administer and evaluate examinations. The technical complexity and the many and varied areas of engineering may well necessitate

securing the aid of specialized assistance in the preparation and evaluation of examination questions. Thus, these expenses are apt to occur or liable to happen in connection with the board's duties.

Therefore, provided that these expenses are necessary and reasonable, which must be separately determined for each given situation, it is the opinion of this office that specialized assistance may be procured in the preparation and evaluation of examination questions.

18.7

STATE OFFICERS AND DEPARTMENTS: Board of Regents, bonds—Ch. 166, Acts 60th G.A. There appears to be no statutory direction with respect to denominations of bonds issued by State or its agencies.

September 18, 1963

Mr. David A. Dancer, Secretary
State Board of Regents
L O C A L

Dear Mr. Dancer:

This will acknowledge receipt of your letter in which you submitted the following:

> "There is no provision in House File 543 regarding the size of the bonds or notes to be issued. Is there any stipulation in Iowa laws which limits the size of our bonds or notes, or may the State Board of Regents determine the size as it deems best. Also does House File 250 (Chapter 83, Laws of the 60th G.A.) limit our bonds to any particular size?"

Insofar as bonds of the State or its agencies are concerned, there appears to be no statutory direction with respect to the denominations of such bonds issued by the State or its agencies. In that statutory situation, the Board of Regents would have the authority to determine the denominations of bonds or notes which it may issue under the authority of H.F. 543, 60th G.A., now Chapter 166 of the Laws of that Assembly.

House File 250 (Ch. 83, 60th G.A.) defines the denominations of public bonds issued by counties, cities, towns and school districts. It does not include bonds of the State or its agencies.

18.8

STATE OFFICERS AND DEPARTMENTS: Board of Regents, transfer of real estate—§262.9, 1962 Code. Power vested in Board of Regents to dispose of its real estate does not include power of giving or donating such real estate. Such land may be disposed of when no longer necessary for purpose of Board and adequate consideration has been paid therefor.

February 18, 1963

Mr. W. C. Wellman, Secretary
Executive Council of Iowa
L O C A L

Dear Mr. Wellman:

Reference is herein made to your recent letter with request of the Board of Regents relative to the transfer by State patent of certain real estate located in the City of Ames, to the City of Ames, Iowa, for the purpose of widening a portion of Gray Avenue.

The State Board of Regents, like its predecessor, the State Board of Education, is a creature of statute and a mere agent of the State. Therefore, it is limited to those powers conferred upon it by statute, and such implied powers as may be necessary to be exercised in order to carry out the powers expressly conferred. *Merchants Motor Freight v. State Highway Commission,* 239 Iowa 888, 32 N.W. 2d 773; 38 *O.A.G.* 385. Pertaining to the duties of the Board, attention is directed to §262.9(5), 1962 Code of Iowa, providing as follows:

"262.9 Powers and duties. The board shall: * * *

"5. With the approval of the executive council, acquire real estate for the proper uses of said institutions, and dispose of real estate belonging to said institutions when not necessary for their purposes. A disposal of such real estate shall be made upon such terms, conditions and considerations as the board may recommend and subject to the approval of the executive council. All transfers shall be by state patent in the manner provided by law."

Thus, the only express power which the Board has pertaining to property held by it is that of disposing of it if no longer necessary to its purposes. This power has been recently interpreted not to include an exchange transaction for the reason that the term "dispose" meant sale.

Further attention is called to *Gritton v. City of Des Moines,* 247 Iowa 326, 73 N.W. 2d 813 (1955). There the Court held that municipal corporations are wholly creatures of the legislature and possess and can exercise only the powers expressly granted by the legislature, necessarily or fairly implied in or incident to the power expressly granted, and those indispensably essential—not merely convenient— to the declared objects and purposes of the municipality. Therefore, a power of use and disposal of municipal property does not include the power of donation or gratuitous disposition.

Upon the authority of the *Gritton case, supra,* it must follow that in the absence of express authority, the Board of Regents may not donate property held under its authority for the reason that such a power cannot be implied from its general power to dispose of property.

In connection with the foregoing interpretation, it is interesting to note that the word "give" in connection with the disposition of State, county, city or town property does not appear in the Code. Such wordage as "disposed of, sell, exchange or release" is used to confer authority upon the State and its agencies and subdivisions in the disposition of their respective real property. It is a fair inference, therefore, that if the legislature intended the power of giving to be vested in the State and such agencies, it would have so stated. This is especially true in view of the extent of such power over the many valuable properties of the State and its agencies if the power be conferred in general terms.

Therefore, it is the opinion of this office that the patent in question should be issued if the following facts are found to exist:

(1) The land is no longer necessary for the purpose of the Board.

(2) An adequate consideration has been paid therefor.

18.9

STATE OFFICERS AND DEPARTMENT: Civil Defense, salaries—§28A.4, 1962 Code; Ch. 1, Acts 60th G.A. Director's salary shall be fixed by Civil Defense Administration provided it does not exceed amount specifically appropriated for this purpose.

August 21, 1963

Iowa Civil Defense Administration
State Office Building
L O C A L

Attention: Ray C. Stiles

Dear Mr. Stiles:

This is to acknowledge your letter of June 20, 1963, wherein you submit the following:

"Your written opinion is requested as to whether Section 28A.4, Code of Iowa, 1962, is valid permissive authority for the Iowa Civil Defense Administration to fix the salary of the Director thereof, or will the salary of the Director be as established by Section 38, House File 595."

Section 28A.4, Code of Iowa, 1962 provides in pertinent part:

"The director shall be appointed by and responsible to the administration, who shall fix his compensation out of funds hereafter appropriated to or otherwise available to the administration for such purpose."

Subsequently, Ch. 1, Acts 60th G.A. was enacted and provides in §38 thereof the following:

"For the civil defense administration there is hereby appropriated from the general fund . . . the sum of thirty-six thousand four hundred fifty dollars ($36,450.00), or *so much thereof as may be necessary to be used in the following manner;* for salary of director of civilian defense . . . nine thousand dollars ($9,000.00)". (Emphasis supplied).

In *Hard v. State,* 228 Ala. 517, 154 So. 77, the Alabama Court announced:

". . . officers . . . engaged in governmental activities, are chargeable with notice of legislative control over such agencies in the matter of salaries payable from public funds."

A similar question arose in *State ex rel. Williams v. Lee,* 140 Fla. 380, 191 So. 697, wherein the salary of a state officer was set by statute. Subsequently, the Florida legislature passed an appropriation bill which did not provide a sufficient appropriation to meet the amount as set forth in the statute. The Florida Court in solving this question held:

"Any Act fixing the compensation of state officers . . . different from the amount subsequently provided by an appropriation act, suspends the former act during the life of the appropriation bill."

In the question that is presently posed, it is our belief that the two statutes peacefully co-exist and are not necessarily in conflict with each other.

The Administration clearly retains its discretionary authority to fix the director's salary provided that it does not exceed the sum of $9,000.00.

18.10

STATE OFFICERS AND DEPARTMENTS: Commission on Alcoholism, funds—Ch. 123A, 1962 Code; Ch. 1, Acts 60th G.A. Ch. 1 allocates funds from Iowa Liquor Control Fund to Iowa Commission on Alcoholism created by Ch. 123A for purposes specified in that chapter; no allocation is made to Board of Regents for Psychopathic Hospital in Iowa City for research study of alcoholism.

July 26, 1963

Mr. Marvin R. Selden, Jr.
State Comptroller
L O C A L

Dear Mr. Selden:

This will acknowledge receipt of your letter in which you submit the following:

"Your attention is directed to Section 47 of House File 595, Acts of the 60th General Assembly, which reads as follows:

'Sec. 47. For the liquor control commission there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1963, and ending June 30, 1965, the sum of three million nine hundred forty thousand nine hundred dollars ($3,940,900.00), or so much thereof as may be necessary to be used in the following manner:

GENERAL OFFICE	
For salaries of board members (3 at $9,600.00 each)	$ 28,800.00
For other salaries	2,980,650.00
For support, maintenance and miscellaneous purposes (amplified by estimated reimbursements of $2,150.00)	731,450.00
Total for general office	$3,740,900.00
LIQUOR ENFORCEMENT DIVISION	
For salaries	$ 108,200.00
For support, maintenance and miscellaneous purposes	91,800.00
Total for liquor enforcement division	$ 200,000.00
Grand total of all appropriations for all purposes for each year of the biennium for the liquor control commission	$3,940,900.00

'There is hereby transferred from the Iowa liquor control fund the sum of twenty-five thousand dollars ($25,000.00) for each year of the ensuing biennium to the Iowa commission on alcoholism created by chapter one hundred twenty-three A (123A) of the Code for the purposes specified in said chapter.'

"We respectfully request your opinion on the following question: 'Does the $25,000.00 to be transferred annually from the Iowa Liquor Control fund go to the Iowa Commission on Alcoholism to be administered by them, or does it go to the State Board of Regents for the Psychopathic Hospital at Iowa City, Iowa to further the research studies of alcoholism?' "

House File 595, §47 thereof, 60th G.A., being the general appropriation act, transferred from the Iowa Liquor Control Fund the sum of $25,000 for each year of the ensuing biennium to the Iowa Commission on Alcoholism created by Chapter 123A of the 1962 Code for the purposes specified in that chapter. In specific terms, the provision is this:

". . . There is hereby transferred from the Iowa liquor control fund the sum of twenty-five thousand dollars ($25,000.00) for each year of the ensuing biennium to the Iowa commission on alcoholism created by chapter one hundred twenty-three A (123A) of the Code for the purposes specified in said chapter."

This language is plain and unambiguous and from its terms the intention of the legislature may be deduced. According to the case of *Drazich v. Hollowell,* 207 Iowa 427, 223 N. W. 253, primary legislative intention is to be

deduced from the language used and the language is to be construed according to its plain and ordinary meaning.

It is my opinion, as a result of this legislative situation, that this money is allocated to the Iowa Commission on Alcoholism in the sum of $25,000 each year of the biennium for the purposes specified in Chapter 123A, 1962 Code, and not to the Board of Regents for the Psychopathic Hospital at Iowa City, Iowa.

It is true that money was allocated previously by the 56th General Assembly, Chapter 1, §53, to the College of Medicine, Iowa City, for the purpose of study of alcoholism, and that by Chapter 104 of the 59th General Assembly there was appropriated to the State Board of Regents for the Psychopathic Hospital at Iowa City the sum of $25,000 out of the Liquor Control Fund to further the research study of alcoholism. But no such allocation for the specific purpose is either expressly or impliedly made by the 60th General Assembly. If such purpose is to be fulfilled under the provisions of Chapter 123A and the quoted §47 of H.F. 595, it will be under the discretionary powers of the Iowa Commission on Alcoholism.

18.11

STATE OFFICERS AND DEPARTMENTS: Employment Security Commission, eligibility for unemployment compensation, T.A.P. benefits — §96.19(10)(a), 96.19(13), 1962 Code. T.A.P. payments made under Armour union contract constitute "wages" under §96.19(13); said payments as "wages" are made with respect to weeks following the termination of employment and employee receiving benefits is therefore not "totally unemployed" under §96.19 (10)(a); T.A.P. benefits are subject to Iowa Employment Security tax; employee is eligible for unemployment compensation benefits after T.A.P. benefits expire.

June 7, 1963

Employment Security Commission
112-116 Eleventh Street
Des Moines 8, Iowa

Attention: Don G. Allen, General Counsel

Dear Judge Allen:

This will acknowledge receipt of your request for an opinion regarding the following question as stated in your letter:

"The Iowa Employment Security Commission respectfully requests your opinion in regard to the application of the Iowa Employment Security Law to Technological Adjustment Pay which arises out of contracts between labor unions and employers relating to situations created by industrial plants converting some of their operations to automation. . . . For the sake of brevity, the people who deal with this problem refer to the plan and payments made to employees displaced by automation as T.A.P. In this request we will follow this new form of designation.

". . . this plan is being pioneered in Iowa at the plant of Armour and Company, Sioux City, Iowa. Two questions have been raised, to wit:

"1. Is T.A.P. subject to the Iowa Employment Security tax as wages?

"2. Is T.A.P. to be deducted from employment security benefits?

"Under the T.A.P. plan the company pays $65.00 less unemployment benefits or earnings from other employment. In other words, $65.00 is the maximum T.A.P. benefit and not in addition to Unemployment Compensation."

The agreement between Armour and Company and United Packinghouse, Food and Allied Workers, AFL-CIO, covering the period September 1, 1961 to August 31, 1964, states in Article XXV the provisions of the Technological Adjustment Plan. Section 25.2 states the plan as follows:

"Any employee in any bargaining unit listed in the Master Agreement who is permanently separated from service under circumstances which entitle him to a separation allowance under Section 19.1 shall receive supplemental unemployment benefits under the Technological Adjustment Plan in accordance with the schedule and conditions set forth in Section 25.4 below, provided such employee meets all the other eligibility requirements in Section 25.3 below."

Section 19.1 above referred to states:

"Separation allowances, determined in accordance with Section 19.3, shall be paid to employees having one or more years of continuous service, as defined in the vacation provisions, who are permanently dropped from the service because of a reduction in forces arising out of the closing of a department or unit of the business, or as a result of technological changes and when it is not expected that they will be reemployed."

The contractual provisions regarding unemployment compensation are found in §25.3(3) of the agreement:

"Employee must meet the requirements of the applicable Unemployment Compensation law as to active search for employment, if not employed elsewhere. Exhaustion of unemployment benefits shall not be considered as a disqualification for T.A.P. benefits. Moreover, in the event that a State deems receipt of benefits herein provided as a basis for disqualification for unemployment benefits, such disqualification shall not in turn be deemed a basis for disqualification for these T.A.P. benefits."

The amount and period of benefits to the employees is stated as follows in §25.4:

"(a) *Amount.* T.A.P. benefits shall be $65.00 per week less unemployment and/or earnings from other employment.

"(b) *Period.* Length of T.A.P. benefits by years of continuous service:

Years of Continuous Service	Number of Calendar Weeks of Eligibility after Expiration of 90-Day Notice Period or Permanent Separation, Whichever is Later
5–15	26
15–20	29
20–25	33
25 and Over	39

The Iowa statutory law on employment security is found in Chapter 96, 1962 Code of Iowa. Section 96.3(2) of that chapter states that each eligible individual who is totally unemployed in any week shall be paid with respect to such week benefits in an amount which shall be equal to his weekly benefit amount.

"Total unemployment" is defined in §96.19(10):

"a. An individual shall be deemed 'totally unemployed' in any week with respect to which no wages are payable to him and during which he performs no services."

"Wages" is defined by §96.19(13):

" 'Wages' means all remuneration for personal services, including

commissions and bonuses and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash, shall be estimated and determined in accordance with rules prescribed by the commission. Wages payable to an individual for insured work performed prior to January 1, 1941, shall, for the purposes of sections 96.3, 96.4, and this section, be deemed to be wages paid within the calendar quarter with respect to which such wages were payable."

Various causes of unemployment for which an employee is disqualified for unemployment compensation are set out in §96.5. Among others, that section states that an individual shall be disqualified for benefits for any week with respect to which he is receiving, has received, or is entitled to receive, payment in the form of wages in lieu of notice (5a), workmen's compensation payments (5b), old age benefits under Title 11 of the Social Security Act (5c), or benefits paid as retirement pay or as private pension (5d). Section 96.5(7) also provides that payments made for vacation pay, for vacation pay allowance, or as pay in lieu of vacation, shall be deemed "wages" as defined in §96.19(13).

In the case of *Bradshaw v. California Employment Stabilization Commission*, 46 C. 2d 608, 297 P. 2d 970 (Cal., 1956), an employee of the San Francisco Chronicle was discharged from his job for reasons of economy. Upon his discharge, he received vacation pay, pay in lieu of two weeks' notice, and "dismissal pay" in an amount dependent upon the length of service. Since the employee did not raise a question regarding the receipt of vacation pay and pay in lieu of notice, the sole question before the court was the propriety of denying unemployment benefits for a period equal to the number of days he received dismissal pay. The case called for an interpretation of §1252 of the California Unemployment Insurance Code, which defined "unemployed" as does our definition of "totally unemployed". Section 1252 stated:

"An individual is 'unemployed' in any week during which he performs no service and with respect to which no wages are payable to him."

The employee conceded that the dismissal payments under the contract were within the California definition of "wages". The question, then, was whether the dismissal payments were payable "with respect to" a period before the employee's date of discharge or "with respect to" a period after that date. The petitioner contended that the dismissal payments were made with respect to the weeks during which he admittedly performed services for the Chronicle, while the Department of Employment asserted that they were payments with respect to the weeks following discharge. The California court noted that the state's purpose in providing unemployment insurance was to reduce involuntary unemployment and the suffering caused thereby to a minimum. An unemployed person who satisfied the requirements of the unemployment insurance act was entitled to receive from the unemployment fund payments reasonably sufficient to tide him over until he could secure employment. This same purpose is stated at §96.2 of the Iowa Employment Security Law as a guide for interpretation.

In reviewing the contract between the employee and the Chronicle, the court observed that the parties obviously intended the dismissal payments provided for therein to serve the same purpose as unemployment compensation, namely, to tide the discharged employee over until he could secure employment. The court said that, although the dismissal pay coverage under the contract was broader than coverage under the unemployment insurance act, the fact still remained that an award of unemployment benefits to the petitioner for the dismissal period would seem to duplicate the dismissal payments he had received. In considering whether the employee was unemployed within the terms of the statute, the court stated:

"Section 1252 contemplates that wage payments are to be allocated to specific periods. The week 'with respect to which' a wage payment is made by an employer to an employee depends upon the provisions of the employment contract. However, interpretations of employment contracts and of the Unemployment Insurance Act that result in duplication of payments to a discharged employee are not encouraged. This principle finds support in decisions of this court involving duplication of workmen's compensation by unemployment disability benefits. . . The policy against duplication of payments should not be thwarted by any so-called liberal construction of the act, especially when such construction is not justified by the language of the contract. Unemployment insurance was not intended to protect employees already protected for the same period by their private contracts."

The California court concluded that the receipt of dismissal pay temporarily prevented the employee from qualifying for unemployment compensation benefits. In support of this holding, the court also noted that a contrary holding would create an anomalous distinction between dismissal pay on the one hand and "in lieu of notice" pay and "vacation" pay on the other.

In considering the Iowa Employment Security statute and the contract between Armour and Company and the union, many similarities to the situation in the *Bradshaw* case are apparent. The same purpose is served by both the Armour contract and the Iowa statute, i.e., to relieve the economic hardship resulting from unemployment. The Iowa statute, like the California law, indicates a policy against duplication of benefits, in specifically stating that an employee is disqualified from receiving unemployment compensation benefits if he is at the same time receiving workmen's compensation benefits, benefits from pay in lieu of notice, or vacation pay benefits. It is also clear from the contract itself that duplicate benefits are not intended, since any benefits received from unemployment compensation are deducted from the amount an employee is to receive as T.A.P. benefits from a company. Moreover, the contract states that if a state deems receipt of benefits under T.A.P. to be a disqualification for unemployment compensation benefits, such disqualification shall not in turn be deemed the basis for disqualification for T.A.P. benefits.

In *In re Tyson*, 117 S.E. 2d 854 (N.C., 1961), the Supreme Court of North Carolina considered a contract between Swift and Company and the United Packinghouse Workers of America, which provided for severance pay to its employees "who are permanently separated from the service either because of a reduction in forces arising out of the closing of a department or unit of the business or because of technological change in production adopted by the company, and when it is not expected that they will be reemployed." The severance pay ranged from $249.60, equivalent to three weeks' wages, to $1,407.60, equivalent to eighteen weeks' wages. The contract required the payment of this sum irrespective of when the employee might find new employment. If he died before the sum was paid to him, his widow and dependents received it. The court concluded that the parties intended to accomplish by contract the same laudatory purpose declared in the Employment Security Act. It observed that the statute and the contract followed different paths to accomplish the desired purpose and that the contract provisions were more favorable to the employee. However, at the expiration of the payments made under the contract, the employee could, if still unemployed, collect unemployment benefits for the full statutory amount. To the question of whether these payments were for past services, the court addressed these remarks on pages 858 and 859 of the area Reporter:

"Claimants contend the moneys paid pursuant to the contract had no relation to their unemployment but were the payment of a debt for past services. This contention is without merit. It ignores the express language of the contract. If, as claimants argue, the payments were a

debt owing for past services, a voluntary termination of the relationship would not discharge the debt nor would a discharge for cause; but the contract by express language declares claimants are not entitled to the moneys in either of these events. They have no right to collect under the contract unless they meet its express provisions and there is a total and permanent termination of the relationship due to no fault of theirs."

From this, the North Carolina court concluded that its Employment Security statute deferred the employee's right to unemployment benefits until the lapse of the period for which the contract payments were made.

The reasoning of the *Tyson* case is even more persuasive on the question presented by the Armour contract. In *Tyson,* the severance payments were found not to be payments for past services because, if they were, a voluntary termination or a discharge for cause would not discharge the debt. This is also true of the Armour contract. Furthermore, the Armour contract, unlike the contract in the *Tyson* case, deducts from T.A.P. benefits any earnings from other employment, which indicates even more clearly that the T.A.P. payments are not made for past services rendered by the employee.

The Massachusetts Supreme Judicial Court considered the question presented by severance pay, in *Kalen v. Director of Division of Employment Security,* 136 N.E. 2d 257 (Mass., 1956), where the severance pay amounted to $1,452.50 and was computed on the length of the employee's service. The Armour contract also computes the T.A.P. benefits on the basis of years of continuous service. In the *Kalen* case, the court noted that there was no provision for payment of the employee's benefits into a trust fund under management independent of the employer during the period of employment. There was simply a contractual obligation on the part of the employer to make the stipulated payment upon the death of the employee or termination of his employment. The suggestion thereby made was that the payments are not for past services renedered by the employee, because no vested interest in a trust fund existed and the employer retained control of the fund. This is also true of the Armour contract, which does not create a separate trust fund out of which to pay T.A.P. benefits. The Massachusetts court held that the severance payment was applicable to weeks immediately following severance, which therefore disqualified the employee from unemployment benefits during that period.

A distinction has sometimes been made between the payment of weekly benefits following termination of employment and a lump sum payment. See *Ackerson v. Western Union Telegraph,* 48 N.W. 2d 338 (Minn., 1951). The suggestion here is that weekly benefits paid under a contract indicates more than does a lump sum payment that the benefits are not for past services rendered. Here again, under the Armour contract, is a fact showing that the benefits conferred are for the same purpose as is the Employment Security Act, rather than for compensating past services rendered by the employee.

Thus, on the basis of the authorities herein cited and an analysis of the legislative intent in enacting the Employment Security Act, I am of the opinion that (1) the T.A.P. payments made under the Armour contract constitute "wages", as defined by §96.19(13), because they are remuneration for personal services; (2) the T.A.P. payments as "wages" are made with respect to weeks following the termination of employment in which they are received, and as such an employee is not eligible for unemployment compensation benefits until the expiration of T.A.P. benefits because the employee is not "totally unemployed" within the meaning of §96.19(10) (a); (3) since T.A.P. benefits constitute wages, they are subject to the Iowa Employment Security tax; and (4) after the expiration of T.A.P. benefits, an employee who meets the requirements of the Employment Security law may receive unemployment compensation benefits for the statutory period.

18.12

STATE OFFICERS AND DEPARTMENTS: Employment Security Commission, investment of contribution fund—§§97C.12, 97C.13, 453.7, 1962 Code. No specific means for investment being provided for in Section 97C.12 which creates the state contribution fund, interest and earnings acquired through the use of said fund must be retained in the general fund of the State of Iowa.

Mr. Don G. Allen
General Counsel
Iowa Employment Security Commission
1000 East Grand Avenue
Des Moines, Iowa

Dear Mr. Allen:

The opinion of this office dated June 24, 1964, regarding the investment of the contribution fund created by Chapter 97C, Iowa Code, 1962, is hereby withdrawn and the following opinion is given in lieu thereof. The questions propounded by your opinion request basically are whether or not the contribution fund created by Section 97C.12, Iowa Code, 1962, is a specific fund for which investments are otherwise provided by law within the meaning of Section 453.7, Iowa Code, 1962, and whether or not interest and earnings from investments of this contribution fund may be retained with said fund or whether they must be paid over to the general fund of the State of Iowa.

Section 453.7, Iowa Code, 1962, provides in pertinent part:

"Interest and earnings on investment and time deposits made in accordance with the provisions of sections 12.8, 452.10, 453.1, and 453.6, shall be credited to the general fund of the governmental body making the investment or deposit, *with the exception of specific funds for which investments are otherwise provided by law.* * * *"

Section 97C.12 provides:

"There is hereby established in the office of the treasurer of state a special fund to be known as the contribution fund. Such fund shall consist of, and there shall be deposited in such fund: (1) all taxes, interest, and penalties collected under sections 97C.5, 97C.10, and 97C.11; (2) all moneys appropriated thereto under this chapter; (3) any property or securities and earnings thereof acquired through the use of moneys belonging to the fund; (4) interest earned upon any moneys in the fund, and (5) all sums recovered upon the bond of the custodian or otherwise for losses sustained by the fund and all other moneys received for the fund from any other source. Subject to the provisions of this chapter, the state agency is vested with full power, authority and jurisdiction over the fund, including all moneys and property or securities belonging thereto, and may perform any and all acts whether or not specifically designated, which are necessary to the administration thereof and are consistent with the provisions of this chapter. All moneys in this fund shall be mingled and undivided. ** *"

It is clear that although a special fund is created by Section 97C.12, that there is no provision within said section which specifically provides for investments. The provisions of 453.7 regarding specific funds was enacted later than the provisions of 97C.12 and should a conflict exist, the latter enactment must control. *State vs. Blackburn* 237 Iowa 1019, 22 N.W. 2d (1946).

It is therefore the opinion of this office that the provisions regarding specific funds contained in Section 453.7 are not complied with by the mere creation of a special fund. There must also be created within the statute providing for the special fund a specific means by which said fund must be in-

vested to prevent the interest and earnings accruing thereto from going into the general fund of the state under the provisions of 453.7. Since no specific means for investment is provided in Section 97C.12, the interest from investments referred to in your opinion request must be retained in the general fund of the State of Iowa.

18.13

STATE OFFICERS AND DEPARTMENTS: Executive appointments—§§63.7, 69.1, 69.2, 217.2, 307.2, 1962 Code. If Senate, during regular session of General Assembly, fails to approve appointment of Governor to office, term of which expires June 30, there is no vacancy on that date for which interim appointment can be made, since incumbent upon requalification holds over.

June 19, 1963

Honorable R. O. Burrows
State Senator
Belle Plaine, Iowa

Dear Senator Burrows:

This is in reply to your letter wherein you state:

"The governor has announced that he has or is going to appoint Mr. Berry to the Highway Commission and Mr. Crawford to the Board of Control. The appointments of both have been submitted to the Senate and disapproved for such positions.

"Chapters 217 and 307 of the Iowa Code, in relation to the appointment of members of the Board of Control and the Highway Commission provide, 'The governor shall, within 60 days following the organization of each regular session of the General Assembly, appoint, with the approval of two-thirds of the members of the Senate * * *, *successor* (*or successors*) to the member (or members) of said board (commission) whose term (or terms) of office will expire July 1, following'.

"and also provides,

" 'Vacancy on said board (commission) that may occur while the General Assembly is not in session shall be filled by appointment of the governor, which appointment shall expire at the end of 30 days from the time the General Assembly last convenes * * *.'

"Also Chapter 69 of the Code provides, 'Except as otherwise provided, every officer elected *or appointed* for a fixed term *shall hold office until his successor* is elected and qualified, * * *.'

"In view of the above statutory provisions I would like to have an opinion from your office and answers to the following questions:

"1. Can the governor appoint a member of either the Board of Control or the Highway Commission *to succeed* a member whose term is expiring without having such appointee approved by the Senate? (See Sec. 307.2 and 217.2)

"2. If a successor is not legally appointed to succeed an existing member of the Board or Commission, whose term expires on July 1, does not such member continue to hold office under the provisions of Chapter 69 of the Code until his successor is legally appointed?

"3. Do not the statutes providing for the appointment of members to the Board of Control and Highway Commission require, where a successor or successors are appointed for members whose terms are expiring on July

1, following, that such appointments be made while the General Assembly is in session and if not so made there would be no vacancy because the incumbent would hold over? (See Sec. 69.1 and 69.2)

"4. If the governor can circumvent the provisions of the law requiring Senate approval of such appointments by renaming those who were disapproved by the Senate, *or even others, whose names were not submitted for Senate approval,* after the legislature has adjourned, then what, if any, is the legal force and effect of the statutory provisions requiring Senate approval and confirmation of such appointees?"

In addition to the statutes quoted in your letter, the pertinent portions of §69.2 provide as follows:

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

"1. A failure to elect at the proper election, *or to appoint within the time fixed by law, unless the incumbent holds over.*

"2. A failure of the incumbent or holdover officer to qualify within the time prescribed by law." (See §63.7, Code of Iowa, 1962)

The power of the Governor to make the appointments contemplated is dependent upon whether a "vacancy" exists in the offices. Under the provisions of §69.1 and §69.2 there will be no automatic "vacancy" in these offices at the expiration of the fixed term but only upon failure of the incumbent or holdover officer to qualify under the provisions of §63.7, Code of Iowa, 1962.

Authority for the above proposition is found in *Downing vs. Cree,* 195 Iowa 57, 190 N.W. 36 (1922). It was held in that case that a vacancy in an office does not result from the mere failure to elect a successor at the time designated by law. The court stated that, since there was no convention assembled to elect a successor for the county superintendent of schools as provided for by statute, there was no vacancy authorizing the calling of a special convention, after the superintendent qualified as a holdover officer. It should be pointed out, however, that the term of office of a superintendent was for "three years *and until his successor is elected and qualified*".

The statutes setting the term of office of members at the Board of Control and Highway Commission do not contain the underlined provision. Nevertheless, the court quoted §69.1 and §69.2, stating:

"The above quoted statutes appear to constitute all the legislative enactment in this state pertaining to the question here involved, and it seems to be too comprehensive and explicit to call for construction, and appears to provide for every circumstance which could reasonably be anticipated to create a vacancy.

"There can be no vacancy in an office as long as there is anyone lawfully in possession of the same, with authority to discharge its duties. A vacancy does not ipso facto result from mere failure to elect, where the incumbent, by law and in fact, holds over."

Perhaps the most pertinent cases are those of *State vs. Watson,* 132 Conn. 518, 45 A. 2d 716, 164 A.L.R. 1238 (1946) and *State vs. Bailey,* 133 Conn. 40, 48 A. 2d 229 (1946).

In *State vs. Watson,* the statute in question read as follows:

"The governor shall nominate and, with the advice and consent of the senate, appoint, on or before May 1, 1933, . . . a commissioner of motor vehicles, who shall hold office for a term of four years from the first day of June in the year of his appointment and until his successor

shall have been appointed and qualified. If any vacancy shall occur in the office when the general assembly shall not be in regular session, it shall be filled by appointment by the governor, . . ."

On June 1, 1941 the plaintiff was duly appointed commissioner. On April 25, 1945, during a regular session of the General Assembly, the governor sent to the senate the name of the defendant for approval as successor to the plaintiff. No action was taken by the senate either to confirm or reject the appointment. On June 7, 1945, upon adjournment, the governor issued two commissions to the defendant, one appointing him for a term of four years from June 1, 1945, and the other from June 7, 1956, until the next General Assembly. The court stated the question thusly:

"As the senate did not consent to the appointment of the defendant, the only way in which, in compliance with the terms of the statutes, an appointment could be made by the governor would be in order to fill a vacancy in the office. The primary question, then is: Was there a vacancy in the office on June 7, 1945, which the governor was authorized to fill?"

The court, in answering the question in the negative, stated the law as follows:

"If, by constitutional provision or valid statute, a definite term is established for an office without provision that the incumbent shall continue in office after its expiration, he will, in holding over, be a de facto and not a de jure officer, and a vacancy will result which may be filled by the appointment, under proper authority, of a successor. If, however, the term of office is not only for a definite time but until a successor is appointed and qualified, an incumbent holding over is a de jure officer and unless, from the particular language of the statute or the particular circumstances of the case, a different legislative intent appears, there is no vacancy in the office within a provision authorizing an appointment in such a contingency."

The court further cites *People vs. Tilton*, 37 Cal. 614; *State vs. Bowden*, 92 S.C. 393, 75 S.E. 866; *State ex rel vs. Wright*, 56 Ohio St. 540. 47 N.W. 569, for the proposition that there is no vacancy in office when in addition to a specified term there is a provision that an officer is to hold office until a successor has been appointed and qualified. The court goes on to say:

"In the following cases, it was definitely held that one continuing in office under such a provision occupies it de jure and not de facto." (Citing authorities)

"That the overwhelming weight of authority in other jurisdictions supports the conclusion that, unless there are peculiar circumstances distinguishing the situation, one holding over under such a provision does so as a de jure and not a de facto officer and there is no vacancy. . ." (Citing authorities)

The annotation following the report of *State vs. Watson* appearing in 164 A.L.R. at page 1249 states:

"The greater number of cases have held that during the period in which a public officer holds over after the expiration of his term, under constitutional or statutory authority entitling him to do so until the election and qualification of a successor, there is no vacancy in office which may be filled by interim appointment."

Cited for authority in this annotation for the above proposition are cases from 34 jurisdictions, including Iowa. Only three jurisdictions have held otherwise.

In the case of *State vs. Bailey* (cited above), the statute in question read as follows:

"The governor shall on or before the first day of May, 1933, and quadrennially thereafter, nominate and, with the advice and consent of the senate, appoint a statute revision commission, who shall hold office *for four years from the first day in July in the year of his appointment.* The governor shall fill any vacancy occurring in said term for the unexpired portion thereof." (Emphasis supplied)

In addition, there was a statutory provision similar in effect to that of §69.1, Code of Iowa, 1962. The defendant was appointed and duly qualified for a term of four years from July 1, 1941. On April 26, 1945, while the legislature was in session, the governor sent the name of the plaintiff to the senate for approval. The senate took no action upon nomination before the final adjournment of the General Assembly on June 6, 1945. On June 21, 1945, the governor appointed the plaintiff to the office to fill the purported vacancy for the unexpired portion of the term ending June 30, 1949. The court stated:

"Upon the foregoing facts, these questions are propounded:

1. Was there a vacancy on July 1, 1945, in the office of the statute revision commissioner which could lawfully be filled by the governor without the advice and consent of the senate? 2. Was the defendant Bailey, on July 2, 1945, a de jure statute revision commissioner? 3. Is the plaintiff Ryan legally entitled to succeed the defendant as statute revision commissioner?

". . .

"Our answer to the first question reserved is 'No'; to the second, 'Yes'; and to the third, 'No'."

The court held that the statute similar to §69.1, providing that the appointed officer shall hold office "for the term prescribed by law and until his successor shall be appointed and shall have qualified", extended the four-year term of appointment provided in the section quoted above until the appointee's successor was appointed and qualified. The court stated:

". . . the defendant was a de jure commissioner on July 2, 1945 and there was no vacancy which could be lawfully filled by the governor without the advice and consent of the senate."

In the case of *State vs. Bird,* 120 Fla. 780, 163 S. 248 (1935), the court stated the question before it as:

"Does a judge of a judicial circuit, who . . . had been appointed by the governor and confirmed by the senate for a term of six years, continue in office. . . after the expiration of his official term, until his successor as judge of the judicial circuit is appointed by the governor and confirmed by the senate, and is duly qualified thereunder, or does the mere expiration of the official term . . ., where a successor has not been duly appointed and confirmed, create a vacancy in the office . . . which the governor is by law authorized to fill by appointment without confirmation by the senate, the senate not being in session when the term ended, though the senate was in regular biennial session during the month before the term expired?"

Section 14 of Article XVI of the Constitution provided that an incumbent "shall continue in office . . . until . . ." a successor is "duly qualified." Section 7 of Article IV of the Constitution gives the governor authority to fill vacancies in office. In this action of ouster by the attorney general, the court said in denying the ouster:

"and as Judge Bird's term of office ended in June, 1935, and as a successor to him in that office has not been appointed *and confirmed,* and therefore cannot become 'duly qualified' as a successor to Judge Bird,

he as incumbent, may continue in office until his successor is duly qualified." (Emphasis supplied)

In answer to your question, it is our opinion that from the above authorities the only conclusion that can be reached is that there will be no vacancy on the Board of Control or the Highway Commission at the expiration of the fixed term of the member, since they will hold office if they requalify as provided in §63.8 until their successor is duly qualified by appointment by the Governor with approval of two-thirds of the members of the Senate.

18.14

STATE OFFICERS AND DEPARTMENTS: Executive clemency—Art. IV, §16, Iowa Const. Governor has power to restore citizenship to person convicted of crime in another state but now residing in Iowa.

June 9, 1964

Honorable Harold E. Hughes
Governor of Iowa
State House
Des Moines, Iowa

My dear Governor:

This will acknowledge receipt of your recent request regarding the power of the Governor to restore a person now living in Iowa to full rights of citizenship in the state when that person has been convicted of a crime in another state.

Section 16 of Article IV of the Constitution of the State of Iowa reads as follows:

"Pardons—reprieves—commutations. Sec. 16. The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offences except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the General Assembly at its next meeting, when the General Assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the General Assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted."

The Iowa Supreme Court in the case of *State v. Haubrich* (1957) 248 Iowa 978, 985, 83 N.W. 2d 451 quoted 39 Am. Jur., *Pardon,* etc., section 24 which states:

". . in the exercise of the pardoning power, the chief executive of a state may grant executive clemency, effectively restoring rights of citizenship in the state to one who has been disqualified for public office or has lost other civil rights, such as a right to vote, to act as juror, to testify as a witness, etc., as a result of a conviction of crime in a Federal court or in the courts of another state for which no pardon has been granted."

To the same effect is *Arnett v. Stumbo* (1944) 287 Ky. 433, 153 S.W. 2d 889, 135 A.L.R. 1488. An annotation on the case at 135 A.L.R. 1493 provides:

"The court therein, construing a constitutional provision providing that 'all persons shall be excluded from office who have been, or shall here-

after be, convicted of a felony, or of such high misdemeanor as may be prescribed by law, but such disability may be removed by pardon of the governor,' held that such constitutional provision was applicable in the case of a conviction in a Federal court for violation of a Federal statute amounting to a felony, and that the governor's certificate of restoration of the rights of citizenship issued to one so convicted was effective to restore his rights of citizenship in the state so as to qualify him to run for and hold a county office for which he was seeking nomination, notwithstanding that such person had not been pardoned or restored to the rights of citizenship by the President of the United States, and as against the contention that the governor was without the power to exercise his executive clemency in the premises. In so deciding, the court pointed out that the disqualification in question resulted from the state Constitution and not from the laws of the convicting sovereignty and that the governor's act in restoring the convict's rights of suffrage and to hold office in the state, thus pertaining to purely local questions over which a foreign sovereignty, in the absence of local law so providing, could have no authority."

Restoration to citizenship by the governor restores the right to vote. 23-24 *O.A.G.* 325.

In view of the above decisions and express constitutional provision, it is my opinion that the Governor of Iowa has the power to restore the rights of state citizenship to an Iowa resident who has been convicted of a crime in another state, provided he has not been pardoned in such other state.

18.15

STATE OFFICERS AND DEPARTMENTS: Executive use of Great Seal of Iowa—§20, Art. IV, Iowa Const.; §32.1, 1962 Code. Great Seal of State of Iowa is symbol of sovereignty and may be displayed only by Governor. The several subdivisions of government have no authority to use Great Seal or representation thereof on letters, letterhead and like articles.

February 28, 1963

Honorable Harold E. Hughes
Governor of the State of Iowa
L O C A L

My dear Governor:

Reference is herein made to your letter in which you submitted the following:

"This office constantly receives requests for permission to use the Great Seal of Iowa for various purposes.

"I understand that this seal is generally regarded to be only for the use of the governor for official acts. I do know that it is used on certain state publications, such as the Code and Session Laws, the Iowa Official Register and some others. I also am informed that none of the state departments, except the governor's office, use the seal on their letterheads.

"Would you please answer the following questions for me:

"(1) What specifically are the restrictions legally on the use of the seal and how much discretion does the governor have in granting permission for its use?

"(2) Is there any legal prohibition against the use of the seal by other departments on their letterhead and on news letters and departmental publications, or is it merely a matter of long standing policy?"

The Great Seal of the State is committed by the Constitution to use of the Governor in the performance of official duties. The Constitution neither expressly nor impliedly confers power upon the Governor to extend to anyone else the power thus conferred upon you. The express terms of the Constitution, Article IV, §20, provide as follows:

"Seal of state. Sec. 20. There shall be a seal of this State, which shall be kept by the Governor, and used by him officially, and shall be called the Great Seal of the State of Iowa."

You will note this restriction upon the use of the seal therein in the following language: "used by him officially".

This is the view of this Department, as is shown by opinion appearing in 1934 *O.A.G.* 272, in which it was stated:

"I have your letter of June 30, wherein you request an opinion from the Department of Justice concerning the following proposition:

" 'In printing bonds of Polk County, it has been suggested by the engravers that we have a distinguishing feature a reproduction of the Great Seal of Iowa on the filing and face of the bonds, we would like to have your opinion as to whether or not there is any legal objection to this use of the seal?'

"The Great Seal of the State of Iowa should not be used in the furtherance of any local county situation. Section 20 of Article Four of the Constitution of Iowa specifically provides that the governor shall be the custodian of the state seal and that it shall be used by him officially. It is then clearly the intent of this section of the state constitution that the Great Seal of the State of Iowa shall be used only by the governor in his official capacity and on official business pertaining to the duties of his office.

"Sections 472 to 477 inclusive of the 1931 Code of Iowa provide that the Great Seal of the State of Iowa shall not be used indiscriminately. Section 472 of the 1931 Code is sufficiently broad to cover this situation and to prohibit the use of the seal of the great State of Iowa on county bonds.

"It is, therefore, the opinion of this department that a reproduction of the Great Seal of the State of Iowa should not be placed upon the face of the bonds of Polk County."

Comparable observation is made in 47 *Am. Jur.,* Seals, §2, Definition and History, at page 488 in these words:

". . . One of the most important and long-standing uses of the seal has been as a symbol of sovereignty, and they are used generally by civilized states in this significance. The dignity of great seals, symbolizing supreme authority, has been guarded in many of the states of this country through legislation prohibiting their use for advertisement or commercial purposes, and such laws have generally been upheld. . . ."

This concept of the Great Seal prevails in Iowa, as is evidenced by the provisions of §32.1, Code of 1962, which makes it a misdemeanor punishable by fine or imprisonment for any person to desecrate the Great Seal of Iowa, make any mark or advertisement upon it or to expose it to public view upon which shall have been printed or attached or marked an advertisement, or to expose it to public view, manufacture, sell, give away or have in his possession any article of merchandise or receptacle of merchandise upon which shall have been printed or otherwise placed a representation of such seal to advertise or distinguish the article upon which it is placed.

1, therefore, conclude:

(1) In answer to your question 1, the Great Seal of Iowa is a "symbol of sovereignty" which may be displayed only by the Governor of Iowa.

(2) Other departments or subdivisions of government have no authority to use the Great Seal or a representation thereof on letters, departmental publications, letterheads and like articles. However, where the public interest is involved, the right to use the seal by the Governor of Iowa is unrestricted.

18.16

STATE OFFICERS AND DEPARTMENTS: Executive Council—§18.2, 1962 Code. Outside janitorial service may not be used for the new office building of Employment Security Commission since this building is included within jurisdiction of Superintendent of Buildings and Grounds as set forth in §18.2.

May 29, 1963

Mr. W. C. Wellman
Executive Council
L O C A L

Dear Mr. Wellman:

Reference is herein made to your letter requesting an opinion as to whether the Employment Security Commission can hire outside janitorial service for its new office building.

The Employment Security Building is a state building upon state-owned land at the seat of government, and therefore is one of the buildings and grounds included within the jurisdiction of the Superintendent of Public Buildings as set forth in §18.2, Code of 1962. Consequently, we find no exception ". . . provided by law . . ." to this duty imposed that would authorize the use of outside services.

18.17

STATE OFFICERS AND DEPARTMENTS: Executive Council, contracts—§§19.20, 19.21, 1962 Code. Executive Council, in performing its power or duty in letting contract to "lowest responsible bidder,' is not required to let contract to lowest money bidder; said contract may be awarded to another bidder where there is reasonable basis for rejecting such bid.

September 25, 1963

Mr. W. C. Wellman, Secretary
Executive Council of Iowa
L O C A L

Dear Mr. Wellman:

Reference is herein made to yours of the 16th inst., in which you submitted the following:

"In the Executive Council meeting held this date, it was determined that I should seek your opinion as to whether other than the low bid submitted for the purchase of a twin-engine aircraft to be assigned to the Military Department for the support of Administrative flights of the Governor and other state officials, can be accepted.

"Appearing at the Council meeting this date, were Adjutant General Miller, General Frank Berlin of the Aeronautics Commission and Colonel

Juhl of General Miller's staff. All of these people, at great length, detailed to the Council the features and technicalities involved that definitely point to one bid supplying the safety features most applicable for Iowa flights where it is necessary to get in and out of small airfields."

The power of the Executive Council in furnishing supplies to the agencies of the state is provided by §19.20, 1962 Code, directing the Council to secure such supplies by advertising or by sealed bids. To furnish such supplies, §19.21, 1962 Code, provides that the Council is directed to proceed in the following manner:

"All bids shall be opened at the time and place specified. Contracts shall be let to the lowest responsible bidder, but the council may reject all bids and readvertise. Successful bidders shall give security, to be approved by the council, for the faithful performance of all contracts."

Note that the power as well as the duty of the Council is "to let a contract to the lowest responsible bidder, but the council may reject all bids and readvertise". Such duty and authority includes a discretion in reaching a conclusion as to who is the "lowest responsible bidder". This discretion in the performance of this duty has been expressed in the case of *Miller v. City of Des Moines*, 143 Iowa 410, 122 N. W. 226, where a city ordinance directed that a contract be made with the lowest responsible bidder. Here it was stated:

"For the purposes of this action it may be freely conceded that the council and its members acted in perfect good faith, influenced by the belief that in giving the contract to the lowest union bidder they were in some way serving the best interests of the city, but the question here presented is not one of good faith, but of power and jurisdiction. Undoubtedly there is good authority for the proposition that in selecting or ascertaining the 'lowest responsible bidder' the council may take into consideration the comparative ability and qualification of the several bidders for the proposed work, and that the lowest price bid is not in every instance a controlling factor. But this rule, if adopted, presupposes that all bidders are given an equal opportunity, and that there is applied to them no arbitrary classification by which those of one class are to receive no consideration so long as a satisfactory bidder can be found in the other class. An award so made is not the result of the exercise of legal discretion. It is manifest abuse of discretion. *Holden v. Alton*, supra; *Atlanta v. Stein*, 111 Ga. 789 (36 S.E. 932, 51 L.R.A. 335); *Attorney General v. Detroit*, 26 Mich. 263; *Avery v. Job*, 25 Or. 512 (36 Pac. 293); *Faist v. Mayor*, 72 N.J. Law, 361 (60 Atl. 1120); *State v. Board*, 57 N.J. Law, 580 (31 Atl. 613), *State v. Toole*, 26 Mont. 22 (66 Pac. 496, 55 L.R.A. 644, 91 Am. St. Rep. 386), *People v. Gleason*, 121 N.Y. 631 (25 N. E. 4); *Lewis v. Board*, 139 Mich. 306 (102 N.W. 756); *Inge v. Board*, 135 Ala. 187 (33 South, 678, 93 Am. St. Rep. 20); *Goddard v. Lowell*, 179 Mass. 496 (61 N. E. 53).

Thus, the lowest money bid is not alone the test of the lowest responsible bidder.

The Executive Council may take into consideration the abilities and qualifications of the bidder and situations bearing upon the competition set up by the offering, whether it is part of the offering or not, and that the lowest price bid is not in every instance a controlling factor. See *A.L.R.*, p. 920, which has treated this question in the following manner:

"So it has been widely held that public authorities in awarding a public contract may take into consideration the differences or variations in the quality or character of the materials, articles, or work proposed to be furnished by the respective bidders, under a constitutional or legislative provision requiring that the contract be awarded to the 'lowest responsible

bidder', the 'lowest and best bidder', or a similarly designated bidder, the courts generally taking the position that the terms, 'lowest responsible bidder', and 'lowest and best bidder', or their equivalent, do not mean that the awarding officials are required to let the contract to the lowest money bidder, even though he is financially responsible, but may award the contract to a higher bidder if in their honest judgment the materials, articles, or work which he proposes to furnish are better in quality or more suitable to the intended purpose than the lower bidders."

The extent of this discretion has been considered by the Ohio courts. In *Yaryan v. Toledo,* 80 Ohio C.C.N.S. 1, 28 Ohio C.C. 259, aff'd. 76 Ohio St. 584, 81 N. E. 1199, at page 275 of 28 Ohio C.C., the Court stated the following:

"The statute under consideration here—sec. 143—provides that the board of public service shall make a written contract with the 'lowest and best bidder,' and further provides that the board may reject any and all bids. We think this permits the board to take into consideration more than the price and more than the character of the bidder; we think it allows the consideration of three elements at least, and that the competition provided for in this statute is in three lines, at least. The awarding tribunal may consider—

1. The quality of the thing, the feasibility of the plan, the efficiency of the thing that is to be furnished, etc.

2. The quality of the bidder, his qualifications, responsibility, etc.

3. The price, in view of the other considerations.

"So that in determining which is the 'lowest and best' bidder, the board in its discretion determines, substantially, which is the best proposition, all things considered."

This department previously has considered this matter in an opinion appearing in 1934 *O.A.G.* 372, where in answering a question concerning advertising for bids for supplies or materials, whether it is mandatory that the lowest bid be accepted provided the low bid is a reliable concern, it was stated:

". . . It is not mandatory that the low bid in each case be accepted, provided the low bidder is a reliable concern. It would be the duty of the city council or purchasing authority to accept the low bid, all other things being equal, providing Chapter 62-B1 of the Code is not violated. That chapter requires a preference to be given Iowa products, material, supplies and provisions when they are found in marketable quantities in this state and are of a quality reasonably reasonably suited to the purpose intended and can be secured without additional cost over foreign products or products of other states. It cannot be laid down as a mandatory rule, however, that the low bid in each case must be accepted, providing the low bidder is a reliable concern for the reason that Iowa-made goods must be given a preference where possible under the chapter above referred to, and the purchasing committee must also take into consideration the quality of the goods or material to be furnished. Considerable is left to the discretion of the buying authority as to the quality of the article to be purchased. If the low bidder were a reliable concern but its product would not be comparable to that of other bidders, its bid should not be accepted."

This question has had the consideration of the *Drake Law Review,* Vol. 10, No. 1, where it was said at page 60:

"The most frequent test of qualification is the 'lowest responsible bidder', with the 'lowest bidder' next in frequency. In determining the element of 'responsibility' of the bidder the decision cannot be purely

arbitrary. The lowest price is not in every instance a controlling factor and, in the absence of a controlling standard as to whom the contract is to be awarded, the contract doesn't have to be let to the 'lowest bidder' or even to a bidder; however there must be some reasonable basis for rejecting the lowest bidder."

citing in support thereof the following cases: *Miller v. City of Des Moines*, 143 Iowa 409, 122 N. W. 226; *Interstate Power Co. v. Town of McGregor*, 230 Iowa 42, 296 N. W. 770; *Johnson v. Town of Remsen*, 215 Iowa 1033, 247 N. W. 552; *Miller v. City of Oelwein*, 155 Iowa 706, 136 N. W. 1045.

I am of the opinion that the Executive Council, in performing its power or duty in letting a contract to the "lowest responsible bidder", is not required to let the contract to the lowest money bidder. They may award said contract to another bidder where there is a reasonable basis for rejecting such bid.

18.18

STATE OFFICERS AND DEPARTMENTS: Executive Council, leases—§8.33, 1962 Code. Executive Council may properly approve a lease made by an agency lessee for term extending beyond tenure of presently elected or appointed commissioner or department head, or for period terminating beyond availability of biennial appropriation.

September 19, 1963

Mr. W. C. Wellman, Secretary
Executive Council of Iowa
L O C A L

Dear Mr. Wellman:

This is in response to your letter of August 14th in which you submitted the following:

"The question has arisen in the minds of the members of the Executive Council as to the legality of their approving a lease as lessee which will run for a longer period of time than the tenure in office of a presently elected or appointive Commissioner or Department Head.

"We would appreciate an opinion in regard to the above matter."

To answer your question, two aspects deserve consideration. They are (1) whether a long term lease is illegal because it binds successors in office, and (2) whether a long term lease is illegal because the legislature has not appropriated money to pay rent longer than the biennial fiscal term in which the lease is contracted.

1. The power of a governmental agency to make contracts extending beyond the term of its offices and thus binding successors in office was carefully annotated in 70 *A.L.R.* 794 and 149 *A.L.R.* 336. In the case of the ordinary contract, the existence of that power was said to depend on the nature of the contract. More specifically, in 149 *A.L.R.* at page 336 supplementing 70 *A.L.R.* 794, it was stated as follows:

"As stated in the original annotation, in the exercise of its governmental or legislative powers a board cannot, without statutory authorization, make a contract extending beyond its own term; but in the exercise of business or proprietary power, a board may, unless restrained by statute, contract as freely as if it were an individual."

However, in the case of leases, a different rule was propounded at page 341 of the same volume, as follows:

"Whether a board gives, as lessor, a lease on public property, or accepts, as lessee, a lease on property from private persons, the validity of such a lease as against subsequent boards is usually dependent upon the reasonableness of the transaction."

The Iowa rule appears to be the same as that stated in 149 *A.L.R.* at page 341, relevant to leases, stated immediately above. The Iowa rule was stated in 40 *O.A.G.* 458, where it appeared as follows:

"The general rule as laid down by the courts with reference to the proposition of law here involved is that a governmental agency or body may execute a binding contract covering a reasonable period of time. This period of time is not necessarily limited to the time covered by their term of office, or any fixed period. The reasonableness of this, of course, depends upon all the surrounding circumstances. It follows that no general rule could be laid down whereby the foregoing question could be answered unequivocally as applicable to any and all contracts."

2. Section 8.33, Code 1962, in pertinent part provides as follows:

"Limit of expenditures—reversions. No obligation of any kind whatsoever shall be incurred or created subsequent to the last day of the biennial fiscal term for which an appropriation for administration, operation, support, and maintenance is made against any said appropriation, except when specific provision otherwise is made in the act making the appropriation."

The purpose of §8.33 is to preserve the appropriation to the biennial fiscal term, and to effectuate this it is provided that no obligation shall be incurred or created subsequent to the last day of the biennial fiscal term. However, this in no way precludes the incurring or creating of an obligation during the biennial fiscal term. In 1948 *O.A.G.* 76, where several institutions under the supervision of the State Board of Control had unpaid claims for supplies ordered prior to July 1, 1947, aggregating more than the balance in their respective appropriations as of June 30, 1947, it was stated as follows:

"It being the intention of the legislature that the appropriations made by it shall be used in the maintenance of the institutions during the biennial term, we are of the opinion that a purchase of reasonable and necessary supplies made within the biennial period but unused and unallocated in that period is not an obligation within the provisions of section 8.33 and therefore such supplies may be paid for out of the appropriation for the succeeding biennial term."

Attention is further directed to 49 *Am. Jur.* 275, States, Territories, and Dependencies, §62, which in pertinent part states as follows:

". . . there is another essential and far-reaching difference between the contracts of citizens and those of sovereigns, not indeed, as to the meaning and effect of the contract itself, but as to the capacity of the sovereign to defeat the enforcement of its contract. The one may defeat enforcement, but the other cannot. This result flows from the established principle that a state cannot be sued. The legislature has the ability to avoid payment of the obligations of the state by a failure or refusal to make the necessary appropriation, although that body cannot impair the obligation of the contract, and creditors accepting obligations of the state are bound to know that they cannot enforce their claims against the state directly, nor against its officers, when no appropriation has been made for their payment. Unless there is an appropriation, courts have no power to enforce a contract of a state, even though they do not doubt its validity."

The preceding would be applicable in Iowa. The State of Iowa and its agencies enjoy sovereign immunity. 11 *Drake L. Rev.* 79. Where the legis-

lature subsequent to the lease fails to appropriate money for that purpose, the obligation to pay rent, while still existing, may not be enforced due to the protection provided by sovereign immunity. In that case, if the lessor desires payment of rent, his only remedy is through the legislature. The foregoing principle has the approval of the Supreme Court of Iowa in the case of *J. D. Hollingshead v. Board of Control,* 196 Iowa 481:

> "The contract was entered into professedly on behalf of the state, and the promise to pay thereunder was the promise of the state. Assuming, therefore, that the plaintiff has a just claim upon the conscience of the sovereign state, it still remains that it can realize such claim only through such conscience of the sovereign and by its voluntary action. If it cannot realize thereon by appropriate negotiations with the board of control, its only remedy for the alleged wrong is legislative, and not judicial. The legislative department has the revenue power and the control of the funds of the state, and in that sense is the keeper of the conscience of the sovereign. Through it the state may recognize the justice of the plaintiff's claim, either in whole or in part, and not only may make, but presumably will make just restitution."

In conclusion, it is the opinion of this office that, where reasonable, the Executive Council may properly approve a lease which will run for a longer period of time than the tenure in office of a presently elected or appointed commissioner or department head, or a lease for a period terminating beyond the availability of a biennial appropriation.

18.19

STATE OFFICERS AND DEPARTMENTS: Incompatibility—Art. III, §22, Iowa Const. Member of General Assembly is disqualified from holding office of United States Commissioner at the same time.

January 3, 1963

Honorable Charles O. Frazier
State Representative Elect
609 Blondeau Street
Keokuk, Iowa

My dear Mr. Frazier:

Reference is herein made to your recent letter in which you advise that you now hold the office of United States Commissioner in the Federal District Court, Southern Division, and that you are also an elected member of the House of Representatives, and you are desirous of knowing whether there are any conflicts of interest between the two offices which would require your resignation as Commissioner.

In answer thereto, I would advise you that the office of United States Commissioner is a lucrative office, and you are, therefore, disqualified from holding that office and also member of the General Assembly. Section 22, Art. III, of the Iowa Constitution provides the following:

> "Disqualification. SEC. 22. No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

18.20

STATE OFFICERS AND DEPARTMENTS: Civil Defense, interim emergency officers—§§38A.7, 38A.8, 1962 Code. Sections 38A.7 and 38A.8 expressly authorize legislative bodies of states, towns, townships, counties and school districts to designate the manner in which vacancies may be filled for offices of the same in the event of an emergency.

June 10, 1963

Mr. Ray C. Stiles, State Director
Iowa Civil Defense Administration
State Office Building
L O C A L

Dear Mr. Stiles:

This is to acknowledge your request for an opinion on the following:

"Chapter 38A, Emergency Executive and Judicial Succession, was passed by the 58th General Assembly to provide for continuity of government in the event of an enemy attack or major disaster.

"The Iowa Civil Defense Administration has been requested by the Federal Office of Emergency Planning, Region 6, Denver, Colorado, to determine whether or not certain Iowa counties have passed enabling resolutions or ordinances pursuant to the above referenced chapter.

"Your opinion is requested as to whether Sections 38A.7 and 38A.8, Code of Iowa 1962, is valid permissive authority for legislative bodies of cities, towns, townships, counties, and school districts to designate the manner in which vacancies may be filled or temporary appointments made for emergency interim order of succession to offices of cities, towns, townships, counties and school districts."

Section 38A.7, Code of Iowa, 1962, provides in pertinent part:

"With respect to local offices for which the legislative bodies of cities, towns, townships, and counties may enact resolutions or ordinances relative to the manner in which vacancies will be filled or temporary appointments to office made, *such legislative bodies are hereby authorized to enact resolutions or ordinances providing for emergency interim successors to offices of the aforementioned governmental units. . .*" (Emphasis supplied)

Section 38A.8, Code of Iowa, 1962, provides in pertinent part:

"The provisions of this section shall be applicable to officers of political subdivisions (including, but not limited to, *cities, towns, townships, and counties, as well as school districts*) not included in section 38A.7. Such officers, subject to such regulations as the executive head of the political subdivision may issue, *shall designate by title (if feasible) or by named person, emergency interim successors and specify their order of succession. . . .*" (Emphasis ours)

"In the event that any officer of any political subdivision (or his deputy provided for pursuant to law) is unavailable, the powers of the office shall be exercised and duties shall be discharged by his designated emergency interim successors in the order specified. . . ."

Examination of the language in the above statutes leads us to the conclusion that the same expressly authorizes legislative bodies of cities, towns, townships, counties and school districts to designate the manner in which vacancies may be filled or temporary appointments made for the emergency interim order of succession to the offices of cities, towns, townships, counties and school districts.

18.21

STATE OFFICERS AND DEPARTMENTS: Iowa Development Commission, authority re contracts with municipalities—§28.10, 1962 Code. Iowa Development Commission is authorized to enter into contracts with municipalities for planning projects under provisions of §701, Federal Housing Act of 1954, as amended, and make direct payments of state and federal funds within limits of appropriated funds.

January 18, 1963

Mr. Walter P. Williams
Acting Director
Iowa Development Commission
200 Jewett Building
Des Moines 9, Iowa

Attention: W. M. McLaughlin

Dear Mr. Williams:

Reference is made to your letter requesting opinion as follows:

"The question has arisen in our office regarding payment to a municipality for work completed under the auspices of the 701 Urban Planning Assistance Program. We are checking to see if there is anything to prevent the Iowa Development Commission from sending a Treasurer's check to the community of Ames for work performed by the Ames planning staff on the planning program? The difference between the Ames contract and any other contract is the City of Ames will do the work instead of hiring a private consultant.

"Background information—the City of Ames has two fulltime staff members. In the contract between the Iowa Development Commission and the City of Ames there will be a clause included that Ames will have to employ staff to handle the additional work. Time sheets will be required for the Ames planning staff. The City of Ames will have 701 general disbursement account that will be used to pay the employees working directly on the planning program. In this manner there will be a separate account maintained for all 701 expenditures.

"In the planning programs, funds are provided by 2/3 Federal Government, 1/12 State of Iowa and 1/4 the community. The Federal Government encourages the community to do their own work. The only one not stated as such is the State of Iowa and the legislature made the funds available to further planning programs in Iowa. I'm enclosing as much information as I can find pertaining to the enabling legislation for the planning program.

"The staff does not feel that there is any question involved prohibiting the City of Ames from doing their own planning and receiving federal assistance. However, we would appreciate it if you would check to see if the same is true for state funds and inform us whether or not this is possible."

Section 28.10, 1962 Code, provides:

"Planning assistance. To insure the economic and orderly development of the state through the encouragement of sound community planning, the Iowa development commission is authorized to (a) provide planning assistance to cities, towns, counties, groups of adjacent communities, incorporated or unincorporated, other cities, towns and counties which have suffered substantial damage as a result of a catastrophe, areas where rapid urbanization has resulted or is expected to result from the establishment or rapid and substantial expansion of a federal installation, and

metropolitan and regional areas; (b) apply for, receive, contract for, and expend federal funds under Section 701 of the Federal Housing Act of 1954, as amended, or under any other federal Act for local and regional planning and administer the funds in accordance with any such federal law."

We note that the statute reads "(a) provide planning assistance to cities, towns, counties . . .", etc., and that to aid in this endeavor the commission is authorized to "(b) apply for, receive, contract for and expend federal funds under Section 701 of the federal Housing Act of 1954, as amended, * * *".

Said federal law, 701(a), *inter alia* provides "* * * and to encourage such governments (*sic* state and local governments), *to establish and improve planning staffs,* * * *". (Emphasis ours) And said federal Act further provides: "(d) It is the further intent of this section to encourage comprehensive planning, * * * for states, cities, etc. * * * and the establishment and development of the organizational units needed therefor. * * *"

Section 28.10 further provides authority to "administer the (federal) funds in accordance with any such federal law."

The Housing and Home Finance Agency, which administers the federal law, on October 9, 1956 issued Planning Agency Letter No. 1, which authorizes the Planning Agency (Iowa Development Commission) to enter into Third Party Contracts of four types, as follows:

"B. *TYPES OF CONTRACTS*

"Third Party Contracts of a Planning Agency generally will fall into one of the four following categories:

"1. A contract with a private party in which it agrees for a monetary consideration to render technical, professional, administrative, supervisory or consultative services, including, perhaps, the publication or reproduction of reports or studies.

"2. A contract with a public body, such as a municipality, in which:

"(a) The public body agrees for a monetary consideration to render similar services and in addition, perhaps, to furnish facilities, supplies, equipment, and clerical assistance; and/or

"(b) The Planning Agency agrees to provide certain planning assistance or work to the public body.

"3. A contract, more generally with a public body, in which the contracting party agrees only to make money available to the Planning Agency as a contribution to the Project, or to that portion of the Project within or for the benefit of such public body.

"4. A contract which is a combination of the types of contracts described in 2 and 3 above."

One type of contract that may be entered into is with a municipality, in which the Planning Agency (Commission) agrees to provide certain planning assistance. Such assistance we can assume includes financial assistance. The contract in question requires the rendering of technical, professional, administrative, supervisory, or consultative services. The Fifty-Ninth General Assembly, by §42 of Chapter 1, appropriated the sum of $37,500.00 for municipal planning assistance.

According to your letter, any funds used under the proposed contract with the City of Ames are to be earmarked under a 701 general disbursement account and can be expended only in conformity with the object and purpose of the planning contract.

Such a contract, we feel, is within the letter and spirit of §28.10 of the Code and §701 of the Housing Act of 1954 as amended, and therefore the Planning Agency (Iowa Development Commission) is authorized to enter into such a contract with the City of Ames or other municipalities within the limits of the appropriated funds.

18.22

STATE OFFICERS AND DEPARTMENTS: National Guard, exemption from arrest—§29.41, 1962 Code. Members of the National Guard, while going to, attending, or returning from weekly drill periods, are exempt from arrest, service of summons, orders, warrants or other civil processes, except where any member commits a felony or breach of the peace while not actually performing his duty.

January 21, 1963

Mr. William C. Ball
Black Hawk County Attorney
Suite 201, First National Bldg.
Waterloo, Iowa

Attention: Charles F. Hinton
Assistant County Attorney

Dear Mr. Ball:

This will acknowledge receipt of your letter wherein you raise the following question:

"Section 29.41 of the 1962 Code of Iowa provides that every officer and enlisted man of the National Guard shall be exempt from jury duty. It further provides that no member of the National Guard shall be arrested or served with any summons, order, warrant or other civil process after having been ordered to active duty or *while going to, attending, or returning from any place to which he is required to go for military duty.* 'On duty' is defined in Section 29.1(7) as including drill periods and the necessary travel in connection therewith.

". . . Would the term *military* duty mean only active duty or would the routine weekly drill periods be considered as such, and if so, it would appear that these men would be exempt from arrest and not subject to the issuance of summons during such duty."

Section 29.1, Code of Iowa, 1962, provides in pertinent part:

"Definitions. The following words, terms, and phrases when used in this chapter shall have the respective meanings herein set forth:

"* * *

"7. 'On duty' shall mean and include drill periods, all other training, and service which may be required under state or federal law, regulations, or orders, and the necessary travel of an officer or enlisted man to the place of performance of such duty and return home after performance of such duty, but shall not include federal service."

and §29.41 provides in pertinent part:

". . . No member of the national guard shall be arrested or served with any summons, order, warrant, or other civil process after having been ordered to any duty, or while going to, attending, or returning from, any place to which he is required to go for military duty. Nothing herein shall prevent his arrest by order of a military officer or for a

felony or breach of the peace committed while not in the actual preformance of his duty. . . ."

The present §29.41 was §461 in the Code of 1931, and provided in pertinent part:

"Every officer and soldier of the guard shall be exempt from jury duty and labor on the road on account of poll tax during his term of service, and, *except in cases of treason, felony, or breach of the peace, be privileged from arrest during his attendance at drill, parades, encampments, active service, election of officers, and in going to and returning from the same . . .*" (Emphasis ours)

In 1933, the 45th G. A. repealed the prior military code appearing in the Code of 1931, and revised and modernized the military laws of the state. The language found in §29.24, Code of 1948, was enacted at that time. When the 55th G. A. repealed the military code appearing in the Code of 1948, the provisions of §29.24 were not changed, only renumbered to our present §29.41.

Webster's International Dictionary, Second Edition, defines the word "military" as: "of or pertaining to soldiers, arms, or war; according to the methods and customs of war or of armies . . . performed by soldiers."

Webster defines the word "duty" as: "That which is required by one's station or occupation; and assigned service or business; as, the *duties* of a soldier . . ."

It is the opinion of this office that the words *"military duty"* would necessarily include the weekly drill periods, since all members of the National Guard are required to attend these drills as part of their national guard duty. A member of the national guard would, therefore, be exempt from arrest, or service of any summons, orders, warrants, or other civil processes while going to, attending, or returning from weekly drill periods, except where such member commits a felony or breach of the peace while not actually performing his duty.

18.23

STATE OFFICERS AND DEPARTMENTS: Public Safety Commissioner, term of office—§§80.2, 80.3, 1962 Code. Term of office of "vacancy appointee" of office of Commissioner of Public Safety expires June 30, 1963, notwithstanding journal entries of the termination date as July 30, 1963.

May 8, 1963

Mr. Carl H. Pesch, Commissioner
Department of Public Safety
L O C A L

Dear Mr. Pesch:

This will acknowledge receipt of your letter in which you submitted the following:

"Your attention is first directed to the journal of the Senate of the Fifty-ninth General Assembly wherein, on page 99 it is stated: 'The Senate in executive session confirmed the appointment of Carl H. Pesch, Des Moines, Polk County, Iowa, as Commissioner of Public Safety for the unexpired term ending *July* 30, 1963.' (Emphasis supplied).

"The journal to be kept by both houses is a record required by the Constitution of the State of Iowa (Art. III, Secs. 9, 17). See also *Dayton v. Pacific Mut. Life Ins. Co.*, 202 Iowa 753, 210 N.W. 945.

"In review of the above and the appointing statutes (80.2, 80.3), I

respectfully request your opinion on the following question: 'When does my appointment as Commissioner of Public Safety expire or terminate; June 30, 1963 or July 30, 1963?' "

The journal entries plainly fix the expiration of the term of your service as commissioner but the journals are not a final and determinative record of the proceedings of the legislature. Where there is a conflict between such journal entries and the enrolled bill, the enrolled bill will prevail. As early as the case of *Clare vs. State*, 5 Iowa 508A, 509, our Supreme Court committed itself to the conclusiveness of the enrolled bill as it appears in the office of the Secretary of State or as published in the session laws as proof of the law. In *State vs. Lynch*, 169 Iowa 148, 159, this committment is stated in the following terms:

"The expression contained in the opinions of this court are in harmony with the authorities declaring the enrolled bill conclusive. In *Clare vs. State*, 5 Iowa 508A, 509, the question was as to whether the enrolled bill in the office of the secretary of state or as published in the session laws was controlling and the court said: 'The original act in the secretary's office is the ultimate proof of the law, whatever errors there may be in what purports to be copy thereof; and the court will inform itself and take cognizance of the true reading of the statute.' "

This has been the rule hereto as stated in the case of *State vs. Lynch*, supra in the following:

"From this review it is quite apparent that there is no link missing in the legislative chain, and the enrolled bill is the exclusive and conclusive evidence, and ultimate proof of the legislative will. *State ex rel. Hammond vs. Lynch*, 169 Iowa 148."

On the other hand the weakness involved in making the journal the final determination of the law is stated in the Lynch case, as follows, page 158:

"It is also to be observed that the manner of keeping the journal by either the house or senate is not prescribed in the Constitution. Nor does it require that the acts as finally passed shall be preserved in any form or place other than as enrolled bills, authenticated as exacted therein, deposited with the secretary of state. In *State vs. Jones*, supra, the Court in reverting to this matter, said: 'The enrolled acts are prepared with some care, and, under the rules of our legislature and of every legislative body of which we have any knowledge, some committee is charged with the responsibility of seeing that such enrolled bills are compared with the one which actually passed the legislature before they are presented to the presiding officer for signature. There is, therefore, some protection thrown around these enrolled acts, and it would be a difficult matter for anyone through carelessness or fraud to prevent the will of the legislature, as expressed in the bill actually passed, being embodied in the enrollment thereof."

Also see *Carlton vs. Grimes*, 237 Iowa 912, 928; 1960 *O.A.G.* 40.

With this in mind, resort to the session laws relating to the beginning and termination of the term of the Commissioner is pertinent. §80.2 provides:

"The commissioner of public safety shall devote his entire time to the duties of his office and shall serve for a period of four (4) years from July 1 of the year of his appointment. . ."

As you are filling a vacancy, §80.3, is pertinent part, provides as follows:

". . . A vacancy occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session, and for the unexpired portion of the regular term."

Thus, you will serve as vacancy appointee for the unexpired portion of the regular term, which will terminate June 30, 1963.

18.24

STATE OFFICERS AND DEPARTMENTS: Rules and regulations, Legislature, amendments—§17A.2, 1962 Code, "Enact" as used in relation to legislative changes in administrative rules and regulations, requires changes be made by passing of a bill and not by resolution.

January 25, 1963

Honorable A. V. Doran
State Senator
Senate Chamber
L O C A L

Dear Senator Doran:

This is in response to your opinion request, in which you state:

"Your attention is called to Chapter 60, Page 96, of the actions of the 59th General Assembly, a portion of which reads as follows:

'Whenever in the statute any administrative agency is empowered to make rules and regulations such rules and regulations or amendments thereto hereinafter promulgated shall be operative but such rules and regulations shall be reported to the general assembly within thirty days after the commencement of a regular session and shall become the permanent rules and regulations of such agency July 4th following the adjournment of such session with such changes, if any as may have been enacted at such session.'

"The question that has arisen is simply this. May the legislature make changes in the departmental rules and regulations by resolution if changes are deemed advisable, or must the legislature make changes if deemed advisable by the introduction and passing of a bill making such changes?"

Black's Law Dictionary, 4th ed., 1951, defines "enact" in the following manner: "to establish by law; to perform or effect; to decree. The usual introductory in making laws is 'Be it enacted'." The term "enact" ordinarily applies to the passage of bills rather than the adopting of a resolution. See *In re Senate File No.* 31, 25 Neb. 864, 41 N. W. 981.

The legislature, when formally passing the bill amending §17A.2, used the language "Be it *Enacted*" and "(§17A.2) is hereby repealed and the following *enacted* in lieu thereof." (Emphasis supplied). See Ch. 60, 59th G. A. Thus, it seems logical that the legislature, in using the term "enacted" in the body of the amendment itself, was fully apprised of its meaning and intended that this term should require the passage of a bill to effectuate changes in administrative rules and regulations.

18.25

STATE OFFICERS AND DEPARTMENTS: Rules and regulations, reporting to General Assembly—§17A.2, 1962 Code. Agency promulgating rules and regulations has duty to report them to both houses of General Assembly within 30 days after commencement of the session.

February 8, 1963

Honorable David Stanley
State Representative
L O C A L

Dear Mr. Stanley:

Reference is herein made to your oral request for opinion as to the rule

under §17A.2, Code of 1962, regarding the duty of reporting rules and regulations made and promulgated by certain administrative agencies to the General Assembly.

I am of the opinion that such section plainly implies that such duty to report proposed rules and regulations within thirty days after commencement of the 60th General Assembly, as provided for in §17A.2, is bestowed upon the administrative agency that makes and promulgates the rules and regulations. No other method for reporting such rules and regulations may be implied from the terms of the statute. The only other official or agency named in the statute in the mechanics of promulgating such rules and regulations is the Secretary of State, and his only duty arises after such rule or regulation is adopted. The report to the General Assembly should be made to both the Lieutenant Governor as presiding officer of the Senate and the Speaker of the House as presiding officer of the House of Representatives.

18.26

STATE OFFICERS AND DEPARTMENTS: Rules and regulations, temporary rules, promulgation—Ch. 17A, 1962 Code; §§1, 5, 6, 7 and 8, Ch. 66, Acts 60th G.A. 'Temporary rules' are effective immediately on filing with the Secretary of State, and procedure prescribed for promulgation of 'other rules' need not be followed.

June 28, 1963

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Reference is made to your request for an official opinion of the Attorney General upon the following question:

> "Under the provisions of House File 17, Acts of the 60th G.A., is it required that 'temporary rules' be submitted in conformance with the procedure for the adoption of 'other rules', as set forth in Section 8 of that Act?"

Subparagraph 4 of §1 of House File 17 provides as follows:

> " 'Temporary rules' means a rule which has a duration of no longer than six months."

Under the provisions of §5 and 6 of House File 17, any agency empowered by law to make rules shall submit a copy of the same to the Attorney General, and six copies of the same to the Departmental Rules Review Committee. Within sixty (60) days after receiving such copy of the proposed rules the Attorney General shall give his advisory opinion on the form and legality of the proposed rules. If he fails to render an opinion within sixty (60) days, the agency may proceed as if the opinion had been given. Section 7 of House File 17 sets forth the procedure required of the Departmental Rules Review Committee.

Depending, of course, upon the time at which the proposed rules are submitted to the Attorney General and/or the Departmental Rules Review Committee, the time involved in this procedure could run from a minimum of sixty (60) days to a maximum of one hundred twenty (120) days. Then, after said rules have been processed as provided therein and are filed with the Secretary of State, they shall not become effective until thirty (30) days after such filing, and a later effective date may be specified in the rules.

On the other hand, §8 of House File 17 provides:

"Temporary rules shall become effective upon filing."

In the construing of a statute, it is necessary, that the statute be read as a whole, and all parts thereof harmonized, in order to give effect to the object and purpose of the law.

It must be noted that a temporary rule is effective for a period of no longer than six (6) months, and therefore, if the procedure required to be followed in promulgating permanent rules is followed, a period of one hundred fifty (150) days could conceivably elapse before the rules would become effective; or in other words, five (5) months of the six (6) months' effective period of a temporary rule would have elapsed.

The purpose of temporary rules, while not so expressed, it to control some situations requiring immediate action. Therefore, when the statute provides that "temporary rules shall become effective upon filing", it is evident that it was the intent of the legislature that temporary rules should become effective immediately upon filing, without the necessity of following the lengthy procedure prescribed for "other rules". To follow the other procedure would render nugatory the effect of a temporary rule.

We call your attention, further, to the language of §8, which reads: "Other rules, *unless otherwise provided for,* shall not become effective until thirty (30) days after such filing." This is further evidence of the intent of the legislature that temporary rules shall become effective upon filing, because it is a different provision than prescribed for "other rules".

Therefore, it is the opinion of this office that in the promulgation of temporary rules, they may be promulgated and filed without conforming to the procedure prescribed for the adoption of permanent rules or rules other than "temporary rules".

18.27

Appropriations, certainty in amount, reimbursements—Ch. 8, 1962 Code. Certainty of amount is essential in appropriation of state money and therefore appropriation of fixed amount of state money "amplified by estimated reimbursement"—amount of estimated reimbursement is not subject of appropriation. (Strauss to Selden, St. Comp., 5/27/64) #64-5-3

18.28

Appropriations, discrepancies, specific, aggregate sums—Ch. 17, Acts 60th G. A. Where specific individual appropriations aggregate amount greater than total stated in Act, said total stated is amount appropriated. (Strauss to Selden, St. Compt., 7/16/63) #63-7-3

18.29

Appropriations, discrepancies, written, numerical sums,—Where discrepancy appears in enrolled bill between written sum and numerical sum, journals or evidence extrinsic to journals may be consulted to determine intent. Where no aid is there afforded, written sum controls. (Strauss to Seldon, St. Compt., 7/16/63) #63-7-4

18.30

Board of Control; federal funds for mental health—§§218.1, 218.96, 227.1, 1962 Code. Board of Control, having jurisdiction of State mental health institutions and county and private hospitals for mentally ill and having statutory authorization to accept federal funds for work related to such insitutions, is appropriate "single state agency" for carrying out purposes of

Public Law 88-156, the "Maternal and Child Health and Mental Retardation Planning Amendments of 1963". (Byers to Hughes, Governor of Iowa, 1/17/64) #64-17-1

18.31

Board of Control, legal settlement, inmates—§252.16, 1962 Code. Involuntary incarceration in penal institution does not operate to interrupt residency for the purposes of legal settlement. (Yost to Board of Control, 3/18/64) #64-3-1

18.32

Board of Engineering Examiners, examination fee—§114.13, 1962 Code. Examination fee for each branch of engineering is $15.00. Examination for land surveying is $15.00, which is separately assessable fee from fee charged for examination in engineering. (Snell to Wallace, Bd. Engin. Exam's 6/25/63) #63-6-6.

18.33

Budget and Financial Control Committee, funds—§8.33, 1962 Code; S.F. 460 (Ch. 55, 60th G.A.). Unencumbered balances of allocations made to Budget and Financial Control Committee from general contingent fund of State shall revert to general fund of State. (Strauss to Selden, St. Compt., 8/23/63) #63-8-5

18.34

Comptroller, Inter-office financial agreements—Ch. 8, §§13.5, 13.6, 1962 Code. Where agency or department of state pays from its fund a statutory obligation of another department or agency, the relationship of debtor and creditor arises and payment from one agency to the other is in order. (Strauss to Selden, to Selden, St. Comp., 5/27/64) #64-5-4

18.35

Conservation Commission, fishing licenses, boating requirements—§§106.2, 110.1, 110.17, 1962 Code. Privately-owned lakes are not subject to water navigation requirements, boating registration or equipment requirements. Owners of lake and their children may fish upon such lake without securing fishing license. (Yost to Ryan, Poweshiek Co. Atty., 10/30/63) #63-10-6

18.36

Executive Council, contingent fund—Ch. 55, Acts, 60th G.A.; §§19.7, 19.29, 1962 Code. 60th G. A. restored power in Executive Council to provide funds for its use as set out in §19.7 from the contingent revenue fund. (Strauss to Wellman, Ex. Council, 7/30/63) #63-7-7

18.37

Executive Council, fire loss, state owned property—§19.7, 1962 Code. Insofar as fire loss at the Woodward State Hospital and School is concerned, the contingent fund provided for by §19.7, 1962 Code, is available for the payment of losses of state-owned property. Such fund is not available for payment of property not owned by the State. (Strauss to Wellman, Sec., Ex Council, 10/25/63) #63-10-4

18.38

Executive Council, sale of armory—§29.57, 1962 Code. Power of sale of State-

owned armory property is in Executive Council upon recommendation of Armory Board, such sale to be made when property is no longer needed for purpose for which it was acquired. (Strauss to Johnson, Asst. Adj. Gen., 10/30/63) #63-10-9

18.39

Executive Council, supplies—§19.25, 1962 Code. Obligation of Executive Council to furnish articles and supplies to offices and departments as required by §19.25, Code of 1962, is limited to articles and supplies as are used and usable in normal conduct of offices and departments. (Strauss to Wellman, Executive Council, 8/14/64) #64-8-9

18.40

Highway Commission, budget law—Ch. 8, 1962 Code. Highway Commission, by reason of Ch. 57, 59th G.A., including Highway Commission within provisions of §8.2, 1962 Code, became subject to budget law contained in Ch. 8 of the Code. (Strauss to Selden, Compt., 2/6/63) #63-2-3

18.41

Incompatibility, federal mailcarrier, conservation commission—§107.1, 1962 Code. The Federal rural mail carrier is federal officer and, therefore, ineligible to hold office on the State Conservation Commission. (Strauss to Casey, St. Repr., 3/22/63) #63-3-2

18.42

Iowa Development Commission—§28.8, 1962 Code; Ch's. 110, 235, Acts 60th G. A. Cities and towns may become members of a joint planning commission under Ch. 110, but may not enter into contracts between themselves as distinct entities for joint planning purposes. Iowa Development Commission does have authority under §28.8, 1962 Code, to enter into contracts with public bodies of other states for joint planning. (Bump to Worlan, Dir., Iowa Development Comm., 9/11/63) #63-9-1

18.43

Joint Advisory Committee, void—S.J.R. 2, 60th G. A. Act creating committee, is void since it is neither Senate Concurrent nor Senate Joint Resolution, but is an attempt to create committee to function in respect to legislative matters without concurrence of the House. (Strauss to Reyhons, Legis. Research, 7/17/63) #63-7-5

18.44

Legislative Research Bureau, funds—§2.62, 1962 Code; Ch. 1, Ch. 55, S.J.R. 29, Act, 60th G. A. Ch. 55 amended §2.62 with result that both Legislative ResearchCommittee and Legislative Research Bureau are financed by appropiation of $60,000 made by 60th G.A. and not by funds of Budget and Financcial Control Committee. §2.62 as thus amended prevails over S.C.R. 29. (Strauss to Reyhons, Legis. Research 7/17/63) #63-7-6

18.45

License fee refunds, W.W. II service—Ch. 45, Acts 52nd G.A. Claims for refunds of license fees, not filed in time for service in World War II between the dates of September 16, 1940 and December 31, 1946, are now barred. (Bianco to Heeren, Comm. of Public Health, 12/20/63) #63-12-3

18.46

Salaries, time of payments—§79.1, 1962 Code. Section 79.1 is concerned with the amount of statutory salary payments to state officers and employees, and not with the time of payment of such salary payments. Salary can be paid in equal monthly or semi-monthly payments, at such time as may be determined by the Comptroller. (Strauss to Selden, St. Comp., 1/10/63) #63-1-2

18.47

State Appeal Board,—Ch. 69, Acts 60th G.A. Language used in H.F. 588 constitutes an appropriation and claims made thereunder may be paid therefrom. (Strauss to Selden, St. Compt., 8/22/63) #63-8-4

18.48

Vacancies, Commerce Commission—§474.2, 1962 Code. There being no statutory authority for filling vacancy in extended term of members of Commerce Commission, resort is had, for purpose of filling a vacancy in that period, to §474.2 of Code of 1962, and such appointees are subject to confirmation by Senate. (Strauss to Lane, Secy. of Senate, 1/24/63) #63-1-6

18.49

Vacancies, legislator, marriage and change of residence—§§69.2(3), 69.4(2), 1962 Code. (1) Vacancy created by marriage of lady legislator to non-resident of county from which elected, and removal to another county. (2) Legislator's resignation to be submitted to Governor. (Strauss to Zastrow, State Representative, 12/30/63) #63-12-4

18.50

Vacation—§79.1, 1962 Code. After one complete year of employment an employee may take two weeks' vacation at any time prior to his second anniversary date if authorized by head of department or agency of government. Employees who work full day year around, although classified as temporary, are entitled to vacation. Employees who only devote one-fourth or one-half of their time to State work are not entitled to vacation. (Strauss to Conner, Personnel Dir., 5/31/63) #63-7-1

18.51

Veterinary inspectors, not state officers—§§163.3, 211.3, 1962 Code. Veterinary inspectors as provided by §211.3 are not state officers or employees, nor veterinary assistants under §163.3. (Strauss to Libby, Secretary of Agriculture, 10/28/64) #64-10-5

CHAPTER 19

TAXATION

STAFF OPINIONS

LETTER OPINIONS

19.1

TAXATION: Appeal Board, jurisdiction—Ch. 23, 1962 Code, as amended by S.F. 454, Acts 60th G.A. The Appeal Board will not have jurisdiction of either appeals involving improvements or bonds payable out of special assessment. Appeal Board will have jurisdiction of any appeal where cost of improvement initiated by any municipality is to be paid for in whole or in part by use of taxable funds and of appeals involving issuance of bonds payable from taxation.

June 26, 1963

Mr. Marvin R. Selden, Jr.
Comptroller
L O C A L

Dear Mr. Selden:

Reference is herein made to your letter in which you submitted the following:

"We anticipate some requests for appeals where special assessments are involved under Chapter 23, Code 1962. When the above bill was originally filed, it provided that Chapter 391, 391A and 417 would not come under Chapter 23.

"Section 1 of the original bill was eliminated, and the same question now arises as to whether Section 2 of Senate File 454, by including the words 'payable from taxation' will exempt the Appeal Board from hearing appeals from special assessments under Chapter 23. We respectfully request an opinion regarding this question."

The bill to which you refer, Senate File 454, amended Chapter 23, Code of 1962, in the following manner:

"23.4 Appeal. Interested objectors in any municipality equal in number of one percent of those voting for the office of governor at the last general election in said municipality, but in no event less than twenty-five, may appeal from the decision to the appeal board by serving notice thereof on the clerk or secretary of such municipality within ten days after such decision is entered of record.

"The notice shall be in writing and shall set forth the objections to

such decision and the grounds for such objections; provided that at least three of the persons signing said notice shall have appeared at the hearing and made objection, either general or specific, to the adoption of the proposed plans, specifications or contract for, or cost of such improvement."

"23.12 Issuance of bonds—notice. Before any municipality shall institute proceedings for the issuance of any bonds or other evidence of indebtedness payable from taxation, excepting such bonds or other evidence of indebtedness as have been authorized by a vote of the people of such municipality, and except such bonds or obligations as it may be by law compelled to issue, a notice of such action, including a statement of the amount and purpose of said bonds or other evidence of indebtedness shall be published at least once in a newspaper of general circulation within such municipality at which it is proposed to issue such bonds."

"23.13 At any time before the date fixed for the issuance of such bonds or other evidence of indebtedness interested objectors in any municipality equal in number to one (1) per cent of those voting for the office of governor at the last general election in said municipality but in no event less than twenty-five (25) may file a petition in the office of the clerk or secretary of the municipality setting forth their objections thereto."

As a result of the foregoing amendments,

1. The Appeal Board will not have jurisdiction of either appeals involving improvements or bonds payable out of special assessment.

2. The Appeal Board will have jurisdiction of any appeal where the cost of any improvement initiated by any municipality is to be paid for in whole or in part by the use of taxable funds.

3. The Appeal Board will have jurisdiction of the appeals involving issuance of bonds payable from taxation.

19.2

TAXATION: Assessments, disclosure of stockholders—§§430.3, 430.1, 430.5, 431.2, 431.7, 441.26, 1962 Code. List of bank stockholders furnished to assessor may be disclosed to citizen and taxpayer with bona fide public interest. Statements required of banks, loan companies, and corporations shall ultimately rest with county auditor.

June 26, 1963

Mr. Richard G. Davidson
Page County Attorney
Clarinda, Iowa

Dear Mr. Davidson:

We have your recent request for an opinion on the following matters:

"Chapter 430 (Sections 430.2, 430.5, and 430.7) provides for the taxation of banks and for a statement, accompanied by a list of stockholders and the number of shares of each. After the Board of Review has finished its work the Assessor turns these Bank statements over to the County Auditor, who files and preserves them.

"Will you kindly give us an opinion as to whether this list of stockholders shown in the above statement is confidential?

"Will you also please state whether in your opinion these statements and like statements of Loan Companies and Corporations, should be

filed with the Auditor or retained in the custody of the County Assessor?"

Your inquiry, asking whether or not a list of stockholders and the number of shares held by each as required by Section 430.3 is confidential, necessitates a close look at the said statute which provides:

"430.3 *List of stockholders and their holdings.* At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies furnish the assessor with lists of all the stockholders by the number of shares owned by each."

Obviously, no mention of privilege is made in the statute itself, nor have we been able to find any Iowa decision making a determination of this issue which appears to be one of the first impression in this state. Thus, we find ourselves confronted with a situation similar to that which challenged the New York Supreme Court in *America District Telegraph Co. vs. Woodbury,* 112 N.Y.S. 165, 166, 126 App. Div. 455, (1908):

"The tax law itself does not contain any provision either authorizing or prohibiting the publicity of any reports requested to be made. There is no provision in the law that the reports shall be private or confidential, nor is there any provision that they shall be public or open to the inspection of anyone who deserves to see them. The subject-matter has not been covered in the statute in one way or another."

This case goes on to say that the tax reports referred to could be examined by an individual with a legitimate interest, Further, the legitimacy of such interest is a matter to be determined by the official in charge of the said reports:

"The defendants are public officers, charged with important public duties, yet I cannot believe that the reports which are required to be made to them under the tax law are public records in the sense that documents which are required by law to be filed or recorded in public offices. They could I think, properly exhibit these reports to anyone who could convince them that he had a legitimate interest in inspecting them. So, too, I think they could and should deny inspection of them to persons desiring to see them for the purpose of *prying into the business secrets of a rival,* or for *idle curiosity,* or for *any other improper purpose.* The matter is left wholly within their control. The statute being silent on the question, the defendants who are responsible for due administration of their office, may and in the exercise of a wise discretion either withhold or permit the inspection or disclosure of these reports, depending upon whether they can be convinced that such inspection or disclosure is for a legitimate purpose or not." (emphasis supplied)

The statute in question in this case required that:

"Every person, copartnership, association or corporation, subject to taxation on a special franchise shall * * * make a written report to the state board of tax commissioners containing a full description of every special franchise possessed or enjoyed by such person, copartnership, association or corporation, * * * together with any other information relating to the value of such special franchise required by the state board * * * (which) may from time to time, require a further or supplemental report * * * containing information and data upon such matters as it may specify."

It is apparent this Court does not consider such reports and information as *public records,* and therefore, at least, any privilege or confidential nature which might attach to public records under common law would not have any applicability in this instance.

In a situation involving a taxpayer's giving to a tax official an unsworn

statement as to his untaxable property, the Supreme Court of Appeals of Virginia held:

> "In brief, the summary of the law, as applicable to the case before us is this * * * a person's own statement of his own taxable property * * * to the proper official * * * is not a privileged communication at common law. 4 Wigmore on Ev. Section 2374, subsection 4, page 3334. The state may make such communication privileged by 'express statute', otherwise, they are not privileged. Id."

Peden vs. Penden's Admr. (1918) 121 Va. 147, 92 S.E. 984, 2 A.L.R. 1414. Obviously, statements of taxable property such as this are also not regarded as public records subject to immunity from disclosure.

However, in the event that the list of stockholders in the case at bar might be considered as a public record by a court of Iowa, it would be wise at this point to review the common law dealing with this subject.

Under English common law, any person with a litigatory interest was entitled to inspect a public record either in person or through his agent. 45 *Am. Jur.* 427 citing *Fayette County vs. Martin,* 279 Ky. 387, 130 S.W. (2d) 838, citing R.C.L.; *Nowack vs. Auditor Gen.,* 243 Mich., 200, 219 N.W. 749, 60 A.L.R. 1351; *North vs. Foley,* 238 App. Div. 731, 265 N.Y.S. 780, citing R.C.L.; *Re Caswell,* 18 R.I. 835, 29 A. 259, 27 L.R.A. 82, 49 Am. St. Rep. 814; *Shelby County vs. Memphis Abstract Co.,* 140 Tenn. 74, 203 S.W. 339, L.R.A. 1918 E. 939.

However in the United States, the said litigatory interest is not required. Under American common law, the person desiring inspection must show an interest only as a citizen or as a taxpayer. However, the purpose or intent of the inspection must be legitimate. An examination is not permitted where motivated by curiosity, *speculation,* scandal or *any other improper reason.* 45 Am. Jur. 428 citing *Brewer vs. Watson,* 71 Ala. 299, 46 Am. Rep. 318; State ex rel *Ferry vs. Williams,* 41 N.J.L. 332, 32 Am. Rep. 219; *Payne vs. Staunton,* 55 W. Va. 202, 46 S.E. 927, 2 Ann. Cas. 74, 27 L.R.A. 82, 49 Am. St. Rep. 814: Anno. 60 A.L.R. 1372; 49 Am. St. Rep. 815.

The Superior Court of New Jersey in the case of *Taxpayers Assn. of Cape May vs. City of Cape May,* (1949) held:

> "The Common law right of an interested citizen and taxpayer to an inspection of public records has been discussed by other courts on several occasions. In the leading case of *Ferry vs. Williams,* Sup. 1879, 41 N.J.L. 332, 32 Am. Rep. 219, the court, after reviewing the English authorities and disavowing suggested limitations, sustained the right of a taxpayer to an inspection of application for liquor licenses for the purpose of ascertaining whether they had been granted in accordance with law. The court expressly stated that the taxpayer's interest was sufficient even though he had none except that common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells. The Ferry case was applied in *Higgins v. Lockwood,* Sup. 1906, 74 N.J.L. 158, 64 A. 184, where an application that citizens be permitted to inspect and copy registry lists was granted and in *State ex rel. Fagan vs. State Board of Assessors,* Sup. 1910, 80 N.J.L. 516, 77 A. 1023, where an application to inspect railroad returns filed with the State Board of Assessors was likewise granted. See *Lum vs. McCarty, Err.* & App. 1877, 39 N.J.L. 287, 289; *Barber vs. West Jersey Title & Guaranty Co.,* Err. App. 1895, 53 N.J. Eq. 158, 32 A. 222. In the Fagan case, Justice Garrison said (80 N.J.L. 156, 77 A. 1024): As a citizen and a taxpayer he has that abiding interest in the administration of his government and of every department of it that affects him or his fellows that marks the difference between a citizen and a subject. It is to the failure of the citizen to assert these rights that we must look for those evils that are incident to our (form of) government rather than to

a superabundant zeal in this respect. It would be unfortunate in the extreme for the courts of a republic to erect technical barriers by which these duties of citizenship were discouraged or denied; and no more effectual barrier could be set up than the rule that records required by public law for the performance of their public duties by public servants are possessed of a privacy into which the mere citizen, however, patriotic his purposes, may not inquire. * * * * In other jurisdictions recognizing the common-law right of interested citizens and taxpayers to an examination of public records it has been applied to permit general inspections, subject to restrictions for safekeeping and non-interference with the public business. See *State ex rel. Colescott v. King,* 1900 154 Ind. 621, 57 N. E. 535; *State ex rel. Colescott v. King,* 1900 154 Ind. 621, 57 N. E. 535; State ex *rel. Wellford v. Williams,* 1903, 110 Tenn 549, 75 S.W. 948, 64 L.R.A. 418; *Nowack v. Fuller,* 1928, 243 Mich. 200 219 N.W. 749, 60 A.L.R. 1351; *Clement v. Graham,* 1906, 78 Vt. 290, 63 A. 146, Ann. Cas 191 E. 1208. See also 2 McQuillin, Municipal Corporations (2d Ed. 1939) Sec. 660."

It would appear that a legitimate interest would fall under one of two classifications: (1) A desire to learn whether or not public funds are being properly used, and (2) the intent to publicly uncover irregularities in the filing office so that legislative or judicial corrections can be affected. 45 Am. Jur. 429 citing *Nowack vs. Auditor Gen.,* 243 Mich. 200, 219 N.W. 749 60 A.L.R. 1351, 1356, 23 R.C.L. 160, 169 A.L.R. 653; *Clement vs. Graham,* 78 Vt. 290, 63 A. 146.

In conclusion, it is our opinion that the list of stockholders called for in Section 430.3, Code of Iowa, 1962, is not confidential per se, but neither may the said information be wantonly disclosed. Whether or not the said list of stockholders is regarded as a public record, it would seem that either the county assessor or the county auditor in their positions of discretion shall determine whether or not the petitioner as a citizen and a taxpayer also possesses the proper purpose of wanting to further the public interest as opposed to any personal, private or selfish consideration. This enables the said assessor and/or said auditor to control the dissemination of the said information in the first instance and holds them amenable to a possible writ of mandamus if their exercise of discretion is later contested.

We wish to modify a letter opinion dated May 2, 1957 *O.A.G.* 1957-54. Our research has disclosed that a "private beneficial interest" is not sufficient to entitle one to an inspection of the said list as was indicated in said opinion. The requisite interest must be *public* in nature. However, we do affirm that the time and place of the desired examination shall be reasonable by being restricted to the regular office hours and official situs of the custodial office.

Your second query poses the question as to whether or not bank statements such as those described in Section 430.5 and similar statements from loan companies and corporations should be left in the possession of the county assessor or the county auditor. The pertinent sections of the code are as follows:

"430.1 *Private Banks.* Private banks or bankers * * * shall prepare and furnish to the assessor a sworn *statement* showing the assets, aside from real estate, and liabilities of such bank or banker on January 1 of the current year * * *, (emphasis supplied)

"430.5 *Statement furnished.* To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified *statement* of all the matter provided in Section 430.1, which shall also show separately the amount of the capital stock and the surplus and undivided earnings. (emphasis supplied)

"431. *Statement to assessor.* Every such corporation annually, on or before the twenty-fifth day of January, shall furnish to the assessor of the assessment district in which its principal place of business is located, a

verified *statement* showing specifically, with reference to the year next proceeding the first day of January then last past * * *. (emphasis supplied)

"413.7 *Sworn statement required.* On or before the first day of February of each year every mutual building and loan or savings and loan association shall furnish to the assessor a sworn *statement* showing the total amount to the credit of the shareholders at the close of business of the preceding December 31 * * *." (emphasis added)

It is significant that all four types of statements referred to in the above quoted sections of the Code of Iowa, 1962, are to be given to the *assessor* at the outset. Obviously, the said statements facilitate proper assessment of the given bank, loan company, or corporation. As pointed out in *Security Trust & Savings Bank v. Mitts,* (1935), 220 Iowa 271, 273, 276; 261 N.W. 625.

"* * * Blanks were furnished by the assessors to the plaintiff banks * * * for use of the assessor in making his assessments of the capital stock, surplus, and undivided profits of banks * * * and were properly executed, signed and sworn to by the banks * * * * Said bank statements * * * were read over to the board of review and considered by said board * * *. Thereafter, said bank statements with the assessment rolls, duly verified by the assessors as complete assessments of their assessing districts, were returned with their assessor's books to the county auditor * * *. The county auditor testified that she received said bank statements with assessment rolls and the assessor's books, and that she made up the official tax list from the assessment rolls and the bank statements and the assessor's books, and that the sworn statements by the banks, returned with the assessment rolls were used and considered by her as a part of the assessment records in her office, along with the assessment rolls and the assessor's books, and from all of these she prepared the permanent tax list * * * *. Thereafter * * * the tax list * * * (was) delivered * * * to the treasurer of the county * * * *" (emphasis supplied)

A similar routine was followed in the case of *Iowa National Bank vs. Stewart* (1930), 214 Iowa 1229, 1256, 1257, 232 N.W. 458, 467, which dealt with banks and "competitive corporations." This procedure is basically that which is set forth in Section 441.26 of the Code of Iowa, 1962. However, the last sentence in the said section should be carefully noted:

"* * * The assessor shall return all assessment rolls and any schedules therewith to the county *auditor* along with the completed assessment book, as provided in this chapter, and the county *auditor* shall carefully keep and preserve all such rolls, schedules and books for a period of five years from time of filing of the same in his office." (emphasis supplied)

This statute is clear and unambiguous on its face, and there can be no question that the ultimate depositor, for the records, is with the auditor.

19.3

TAXATION: Banks, automobiles—§§430.1, 321.130, 1962 Code. For purposes of Chapter 430, Taxation of Banks, a bank may deduct from the sum of its surplus and undivided profits value of automobile which bank owns and licensed under Chapter 321.

July 13, 1964

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Mr. Mather:

This is in response to your recent request for this office's opinion on the following:

"I would like to have your opinion on the taxability under Chapter 430 of the Code of Iowa, of an automobile owned by a bank. It is the desire of the bank to deduct from the sum of its surplus and undivided profits, an amount representing the bank's book value of the automobile, for purposes of Chapter 430.

"The automobile is currently licensed as a passenger vehicle. . ."

Chapter 430, Taxation of Banks, requires of private banks or bankers in Section 430.1, a sworn statement, furnished to the assessor, showing the assets of such bank including all property pertaining to the business, and further that "The aggregate actual value of moneys and credits less the amount of deposits, the aggregate actual value of bonds and stocks less the portion thereof otherwise taxed in this state, and other property, except real estate, pertaining to the business, shall be assessed and taxed on the same basis as bank stock. . ."

At first glance, an automobile owned and licensed by a bank would seem to be necessarily an item of other property to be included in the bank's statement, and assessed and taxed as bank stock. No specific exemption being made therefor as in the case of stock otherwise taxed in this state or real estate. However, an automobile owned and licensed by a bank would also fall within the provision of Section 321.130, Code of Iowa:

"The registration fees imposed by this chapter upon private passenger motor vehicles . . . *shall be in lieu of all taxes, general or local,* to which motor vehicle . . . may be subject, and 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* unless such motor vehicle . . . shall have been in storage continuously as an unregistered motor vehicle . . . during the preceding registration year." (Emphasis added)

It is the opinion of this office that Section 321.130 is clearly controlling. The automobile, having been licensed under Chapter 321, "shall not thereafter be subject to a personal property tax," therefore it is not to be included as other taxable property under Chapter 430.

19.4

TAXATION: Cigarettes, tax increase—§98.6, 1962 Code. Ch. 5, Acts 60th G.A. Tax increase on cigarettes effective July 4, 1963. Increased tax is due only on cigarettes in possession of licensed distributors who make "first sale."

July 3, 1963

Mr. X. T. Prentis, Chairman
Mr. A. L. George, Vice Chairman
Mr. Lynn Potter, Commissioner
Iowa State Tax Commission
L O C A L

Dear Mr. Prentis:

This will acknowledge your request for opinion dated June 10, 1963, wherein you inquire as follows:

The Iowa State Legislature recently passed Senate File 474, Section 6, amending Section 98.6, Code 1962, by increasing the tax imposed upon cigarettes weighing not more than three pounds per thousand, from two

mills to two and one-half mills, such increase to become effective July 4, 1963.

When on July 4, 1963, this act becomes effective, cigarettes weighing not more than three pounds per thousand will be in the possession of licensed distributors, and other permit holders, such as wholesalers, retailers, and the newly created licensee, the "cigarette vendor".

Our question, then, is whether permitees, other than licensed distributors, having these cigarettes in their possession on July 4, 1963, will be liable for the additional one-half mill tax.

The following statutory provisions are pertinent to your inquiry:

Senate File 474, Section 6:

Section ninety-eight point six (98.6), Code of 1962, is hereby amended by striking from line seven (7) of subsection one (1) the word "two" and inserting in lieu thereof the words "two and one-half (2½)".

Chapter 98, Code 1962 98.1 (8):

"First sale" shall mean and include the first sale or distribution of cigarettes in intrastate commerce, or the first use or consumption of cigarettes within this state."

Chapter 98, Code 1962 98.1 (12):

"Distributor" shall mean and include every person in this state who manufactures or produces cigarettes or who ships, transports, or imports into this state or in any manner acquires or possesses cigarettes without stamps affixed for the purposes of making a 'first sale' of the same within the state."

Chapter 98, Code 1962 Chapter 98.6 (2):

"The said tax shall be paid only once by the person making the 'first sale' in this state, and shall become due and payable as soon as such cigarettes are subject to a first sale in Iowa, it being intended to impose the tax as soon as such cigarettes are received by any person in Iowa for the purpose of making a 'first sale' of same. If the person making the 'first sale' did not pay such tax, it shall be paid by any person into whose possession such cigarettes come until said tax has been paid in full * * *".

Subsection (13) and (14) of Section 98.1 and paragraph 2, Section 1, of Senate File 126, 60 G.A., 1963, define "wholesaler", "retailer", and "cigarette vendor", respectively. Nowhere in the definition of those terms does it appear that any person other than a distributor is qualified to make a "first sale" of cigarettes as defined in Section 98.1 (8), supra.

It is clear from an examination of Section 98.6(2) that the tax is imposed only once, and then upon the cigarette distributor. Cigarettes in the possession of a retailer, wholesaler, or cigarette vendor on July 4, 1963 purchased from a licensed distributor have already been subject to the "first sale" in intrastate commerce, and the tax has been paid by the distributor. Therefore, the provisions of Section 98.6(2) have been complied with, i.e., the "first sale" has been made, and to tax such cigarettes after July 4, 1963, would be clearly inconsistent with the statute, which in plain and unambiguous terms states that the tax shall be paid *"only once* by the person making the 'first sale' in this state . . .". In other words, since the tax has been paid once, these cigarettes are no longer susceptible to a "first sale", that "first sale" having already been made on the particular cigarettes prior to the effective date of the law. Section 98.6 (2) provides ". . . if the person making the 'first sale' did not pay such tax, it shall be paid by any person into whose possession such cigarettes come until said tax has been paid in

full." In the situation you describe, the distributor has made the "first sale" as defined by Section 98.1(8). The revenue requirements imposed by the statute in effect at that time have been fully complied with. The tax has been paid in full and subsequent permitees in possession of these cigarettes are not liable for the additional one-half mill tax. On July 4, and thereafter, however, all "first sales" by a licensed distributor will be subject to the additional one-half mill tax.

19.5

TAXATION: Corporate shares of stock—§§431.1, 491.13, 496A.11, 1962 Code. Shares of corporate stock are taxable at principal place of business for corporations organized under both Chapters 491 and 496A.

January 15, 1963

Mr. X. T. Prentis, Chairman
Mr. A. L. George, Vice Chairman
Mr. Fred H. Quiner, Member
Iowa State Tax Commission
L O C A L

Gentlemen:

This is to acknowledge your inquiry of recent date wherein you requested an opinion of this office stated in substance as follows:

"It is provided in Section 431.1, Code of Iowa, 1962, that the shares of stock of any corporation organized under the laws of this state, with certain exceptions, shall be assessed to the owners thereof as moneys and credits at the place where its principal business is transacted.

Section 491.13, Code of Iowa, 1962, provides that any corporation organized under the laws of this state shall fix upon and designate in its articles of incorporation its principal place of business which must be in this state, and if outside the limits of a city or town then its post office address must be given.

"Chapter 321, Laws of the 58th G. A., as amended by Chapter 249, Laws of the 59th G.A. (now Chapter 496A, Code of Iowa, 1962, and will hereafter be referred to as such) relates to 'Iowa Business Corporation Act.' Section 496A.11 (1), Code of Iowa, 1962, provides that each corporation shall have and continuously maintain in this state: '(1) A registered office which may be but need not be, the same as its place of business.'

"Chapter 496A only requires the articles of incorporation to state the location of the registered office which may be but need not be the same as the place of business of the corporation.

"The common question that city and county assessors in the state have in the matter is as to where the shares of stock of any corporation originating under Chapter 496A shall be assessed. Is the assessment to be made at the place where the corporation maintains a registered office in Iowa, or is the assessment to be made at the place where the corporation's principal business is transacted, and if the corporation has more than one place of business in the State of Iowa, what shall determine where its 'principal business' is transacted?"

It is our opinion that the controlling statute for assessment of stock is §431.1, whether or not the corporation is organized under Chapter 491 or Ch. 496A. The requirements found in these chapters are to establish a record with the Secretary of State for purposes of organizing and incorporating a business activity. However, the place of assessment of the shares of stock

of these incorporated business activities is a different problem than their registration under either section of the Code. This problem is met by §431.1, requiring the shares to be assessed and taxed at the principal place of business. For corporations organized under Ch. 491, the principal place of business is that which is stated in its articles of incorporation (*Koochiching Co. v. Mitchell,* 186 Iowa 1216; *Iowa Limestone Co. v. Cook,* 211 Iowa 534), and for corporations organized under Ch. 496A, the principal place of business is that place which is in fact the principal place of business and which must be determined by the assessor, depending on the nature of the business subject to assessment. Reference to the articles of incorporation of a Ch. 496A company will not disclose its principal place of business since this information is not required by the statute.

Several factors are material to the question of what is a principal place of business. Where the plant is located and its business transacted may supersede the factor of where the books are kept. *Iowa Limestone v. Cook,* supra. The place of business and the location of a registered agent may not be the same, in which case the location of the business would control. *Murphy v. Washington American League Baseball Club, Inc.,* 167 F. Supp. 215.

A corporation's principal place of business is a question of fact to be determined in each particular case by considering such factors as character of the corporation, its purposes, the kind of business in which it is engaged and the situs of its operation. *Colorado Interstate Gas Company vs. Federal Power Commission,* 144 F. 2d 1943; Affirm. 65 Supreme Court 829, 324 U.S. 581.

Other factors to be considered in determining a corporation's principal place of business are the location of the majority of its personnel, the location of the major portion of its tangible property and the location of the majority of its production capacity. 28 U.S.C.A. 1332, *Kelly vs. U.S. Steel Corp.,* 284 F. 2d 850.

In summary, the assessor should look first to the articles of incorporation to determine the location of a corporation's principal place of business or its registered office. Due to §496A.11 (1), this registered office may be, but need not be, the same as its principal place of business. Whether or not such registered office in fact is the corporation's principal place of business is for the assessor's determination.

19.6

TAXATION: Exemptions, conveyance to state—§427.2, 1962 Code. Land conveyed to state and dedicated to public use for highway purposes before levied date is exempt from taxation.

October 1, 1963

Mr. Richard H. Wright
County Attorney
Bloomfield, Iowa

Dear Mr. Wright:

In your recent letter you submitted the following facts and question which arises under Section 427.2, Code of Iowa 1962, wherein you state as follows:

"On January 1, 1963, Mr. X owned certain real estate adjacent to a public highway. On April 1, 1963, an easement to the State Highway Commission was signed in which additional real estate was by said easement dedicated to the public use. Early in the summer of 1963 there was in fact use of this land for public purposes.

"My question is whether or not the land granted in this easement for

public road purposes shall be removed from the tax rolls for 1963 on taxes which would be due and payable in 1964?"

We assume from the above stated facts that the property involved was assessed to Mr. X, the owner thereof on January 1, 1963 under the provisions of Section 428.4, 1962 Code of Iowa and that this same land was later conveyed to the State Highway Commission on or before September of 1963. Under the provisions of Section 444.9 ownership was transferred before the taxes were levied.

A similar question was litigated in Iowa Loan and Trust Company vs. the Board of Supervisors of Polk County, 187 Iowa 160, 174 N.W. 97 and the Court stated as follows:

"True, the dedication by plat does not convey the fee title to the streets to the buyers of lots. But it does convey to them and the general public as easement—the right to use the platted streets as streets. *That is a sufficient alienation to invoke exemption from taxation.* There is such exemption as to confessed highways, and yet such highways do not convey fee title to adjacent lot owners, and not more than the right to use as highways."

The above cited case is authority for the proposition that land conveyed for the purpose of a public use for street purposes is exempt from property taxation.

A similar question was litigated in *Iowa Wesleyan College vs. Knight,* 207 Iowa 1238, 224 N.W. 502 concerning Section 6944, which is now Section 427.1(11)—Property of Educational Institutions. There the Supreme Court considered the question:

"When did the exemption statute become operative in favor of the plaintiff?"

And in answer thereto stated:

"We can conceive of no reason why it should not be deemed operative from the date of acquisition of the property and the filing of its deed for record. The property was that of plaintiff, an 'educational institution,' on September 8th. In levying the tax, therefore, the supervisors acted in violation of Section 6944. Its levy was illegal. If plaintiff had known of such levy at the time it could properly and successfully have resisted the same. It has an equal right to resist the collection thereof. It is entitled, therefore, to a quieting of its title and to a perpetual injunction as prayed."

This decision clearly states that the act of *assessing* land to the individual owner thereof does not deprive an educational institution of its statutory exemption from taxation when the title subsequently passed to the educational institution prior to the *levy* of any tax on the land.

We are, therefore, of the opinion under the facts as stated by you that the land in question "dedicated to the public use," prior to the levy of any tax, must be removed from the tax rolls for 1963 for taxes due and payable in 1964.

19.7

TAXATION: Exemptions, failure to enter claim—§427.5, 1962 Code. Failure to enter a claim for soldier's exemption in the records of the County Assessor or County Auditor is not a bar to its allowance when the omitted property is a homestead and the omission may be corrected by the appropriate County officer.

June 11, 1963

Mr. A. E. Jensen
County Attorney
Taylor County
Bedford, Iowa

Dear Mr. Jensen:

This will acknowledge your recent communication wherein you make the following inquiries:

"Where for some reason of administrative handling a claim for a soldier's exemption for the 1961 taxes was not entered in either the assessor's or auditor's records on real estate but was entered on the personal property assessment (it appearing that a failure was made in not writing in the legal description of the real estate on the soldier's exemption claim form) can a county officer now correct the tax rolls in such a way as to allow the claim for soldier's exemption on real estate, the taxes presently being unpaid."

For purposes of clarification you supplied at a later date the following information:

"The application for military exemption was filed for the 1961 tax year and the applicant had received such exemption for every year since acquisition by the veteran in 1957. The real property was not listed on the application for the 1961 tax year although the application was in the same form when signed by the applicant as it had been in previous years but there appears to have been an administrative failure to later put the real property on such application as had been done in the prior years. The applicant has a homestead on the premises and has had for each tax year since acquisition. The 1961 tax has not been paid as of this time."

Section 427.5 Code of Iowa, 1962, provides as follows:

". . . no person may claim a reduction or exemption in more than one county of the state, and if no designation is made the exemption shall apply to the homestead, if any."

In 50 *O.A.G.* 165 we have held that:

"Failure to designate sufficient property in value from which the exemption may be allowed is a bar to its allowance from other property owned by the veteran but not designated to bear the exemption, unless the same be a homestead."

Assuming that the property in question is, as you have indicated, the veteran's homestead, it would be proper to correct the county records to include that property, and failure to designate that homestead would not be a bar to its allowance.

19.8

TAXATION: Homestead tax credit—§425.11(2). Where all other qualifications are met, persons occupying homestead are "owners" when related to title holder by blood or marriage within meaning of statute.

April 2, 1963

Mr. Henry L. Elwood
Howard County Attorney
P.O. Box 377
Cresco, Iowa

Dear Mr. Elwood:

You have requested our opinion concerning the following fact situation. You asked whether or not Section 425.11 (2) had been complied with on the basis of the following facts: A and B who are husband and wife, purchased the remaining five-sixths interest in a farm on which they had been residing from the husband's father. However, several years previous to this transaction, the wife had been deeded an undivided one-sixth interest which she held at the time of the deed purchase. The payment for the five-sixths interest was accomplished by assuming a mortgage for approximately one-half the amount, the balance to be paid over a period of years. Your inquiry was directed to whether or not Section 425.11 (2) had been satisfied to qualify the purchaser for homestead exemption. Section 425.11 (2) states:

"425.11 Definitions—for the purpose of this chapter and wherever used in this chapter:

"* * *

"2. The word 'owner' shall mean the person who holds the fee-simple title to the homestead, and in addition shall mean * * * the person occupying the homestead under devise * * * or where the divided interest be shared only by persons related or formerly related to each other by blood, marriage, or adoption, or the person occupying the homestead under a deed which conveys a divided interest where the divided interest is shared only by persons related or formerly related to each other by blood, marriage or adoption."

Since the wife was deeded a one-sixth interest from the owner who was also her father-in-law, then, as the statute clearly indicates, the husband and wife's purchase of the remaining five-sixths interest would qualify them as an owner regardless of the terms of the purchase agreement. This statute was passed upon by the Supreme Court in *Eysink vs. Board of Supervisors of Jasper County,* 1941, 229 Iowa 1240, wherein the court said, in citing another case:

"It will be observed that in addition to a fee-simple titleholder, the term 'owner' also includes, according to the statute * * * (5) grantee of a deed of a fractional interest where the other interests are owned by blood relatives of adopted children."

From your statement of the relationship of the parties, it is apparent that the necessary qualifications have been met. The husband is an "owner" by blood, and the wife is an "owner" by marriage, hence the terms of the purchase agreement are not controlling.

19.9

TAXATION: Inheritance tax, liens—§450.7, 1962 Code. There is no tax lien on property passing in estates of deceased persons on or before July 4, 1941, but property passing on or before July 4, 1951, must be reported in order to take advantage of time limitation for relief from lien.

March 6, 1963

Mr. Garry D. Woodward
Muscatine County Attorney
112½ East Second Street
Muscatine, Iowa

Dear Mr. Woodward:

This is to acknowledge receipt of your letter wherein the question submitted was whether there is a lien on property passing in an estate wherein the

decedent died June 10, 1933, considering the time limitation that is set forth in Section 450.7 Code of Iowa, 1958, and Section 450.7 Code of Iowa, 1962.

Section 450.7 Code of Iowa, 1962, states:

"450.7 Lien of tax. The tax shall be and remain a legal charge against and a lien upon such estate, and any and all the property thereof from the death of the decedent owner until paid subject to the limitation that inheritance taxes owing with respect to any passing of property *which has been reported for taxation in the estates of deceased persons who died on or before July* 4, 1951 under any inheritance tax laws of this state shall no longer be a lien against such property except to the extent such taxes are attributable to remainder or deferred interests therein which did not finally vest in possession on or before such date. The filing in the office of the clerk of the receipt in full, or certificate of nonliability, of the state tax commission or an order of court specifically finding that the estate is exempt from tax shall release said lien as to all property reported in the estate." (emphasis added)

Section 450.7 Code of Iowa, 1958, states:

"450.7 Lien of tax. The tax shall be and remain a legal charge against and a lien upon such estate, and any and all the property thereof from the death of the decedent owner until paid subject to the limitation that inheritance taxes owing with respect to any passing of property *includable in the estates of deceased persons who died on or before July* 4, 1941 under any inheritance tax laws of this state shall no longer be a lien against such property except to the extent such taxes are attributable to remainder or deferred interests therein which did not finally vest in possession on or before such date. The filing in the office of the clerk of the receipt in full, or certificate of nonliability, of the state tax commission or an order of court specifically finding that the estate is exempt from tax shall release said lien as to all property reported in the estate." (emphasis added)

Section 450.7 Code of Iowa, 1958, set the limitation on or before July 4, 1941, as to any property passing includable in the estates of deceased persons. Section 450.7 Code of Iowa, 1962, set the limitation on or before July 4, 1951, with respect to property passing which has been reported for taxation in the estates of deceased persons.

Considering the above statutes if a person died on or before July 4, 1941, there is no lien on his estate. But if a person dies after that date and before July 4, 1951, the property passing in the estate must be reported before the lien is discharged by the statute.

Section 450.7 Code of Iowa, 1958 and 1962, only place a limitation upon the lien on a particular estate. The tax itself has no limitation. If the property were still in the name of the original decedent or beneficiary the state could legally claim that the tax is still owing and could collect the tax from the property. It is, therefore, possible that a lien on the property itself would not exist, but the tax owing could still be collected from the property.

19.10

TAXATION: Liens, merger—§427.1(2), 1962 Code. Property tax liens upon real estate which is subsequently acquired by County are merged and cease to be lien upon property. Lien is not revived by subsequent conveyance by County.

September 11, 1963

Mr. James W. McGrath
Van Buren County Attorney
Keosauqua, Iowa

Dear Mr. McGrath:

By letter directed to this office you inquire as follows:

"Prior to May 1961, a resident of this county has accumulated substantial bill for care in the Van Buren County Memorial Hospital where she died and on her death there was a substantial unpaid balance. Her entire estate consisted of the real estate that was her home in the town of Boneparte. There were no formal administration proceedings in the estate but the heirs, by agreement with the hospital board of trustees, conveyed the real estate to the hospital board by deed dated in May, 1961, in satisfaction of their claim. It was accepted subject to taxes then imposed upon it. In the deed the name of the grantee was left blank.

The trustees never recorded said deed. As a result the premises now stand subject to taxes for the year 1960, 1961 and 1962.

July 31st, the hospital board contracted for the sale of the property and proposed to transfer the same by simply inserting the name of the new purchaser of the deed.

They have asked the board to cancel the taxes for the years 1960 and 1961 and remove the property from assessment for 1962. Do you find any authority to procedure for so doing?

Quaere No. 2. If then the name of the hospital was inserted in the deed and the deed recorded could the taxes then properly be cancelled?"

The Van Buren County Memorial Hospital is a county hospital, and therefore must fall within the exemption granted under Section 427.1(2) which provides:

"427.1 Exemptions. The following classes of property shall not be taxed.

* * *

"427.1(2) Municipal and military property. The property of a county, township, city, towns, school district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit."

The first question to be considered, then, is whether real estate conveyed to a county hospital in payment of a bill for care given a patient is "devoted to public use and not held for pecuniary profit." In *City of Osceola vs. Board of Equalization,* 188 Iowa 278, 176 N.W. 274, the city brought an action against the local board of equalization to determine the question of whether some seventy-five (75) acres surrounding the municipal reservoir and owned by the city was taxable under the statute exempting" . . . the property of a . . . City . . ., when devoted entirely to public use and not held for pecuniary profit; * * *." Some of the land was rented as pasture and the board contended that the collection of rents removed these lands from the purview of the exemption statute. The Court held that the fact that:

"A charge is made for the use of the property which is consistent with and incidental to the public use does not change the exemption character of such property. The public use of municipal property frequently, if not usually, involves the collection of rents and rates from customers; tuition from school children; reasonable value of support from inmates in poor farm and asylum. These things are all incident to the just and economic administration of a public institution. We think that the collection by the City of the rental in question was a *mere incident of the public use* and of the maintenance of public property; that it was necessarily

absorbed in the expense of maintenance, and in that sense reduced such expense. It was the clear duty of the officers of the municipality to avail itself of all reasonable methods to reduce such expense of maintenance. The collection of such rent, therefore, as an incident to the maintenance, did not imply a pecuniary profit, but only a just and economized way of meeting, to that extent, the current expense of operation and maintenance of the institution." (emphasis ours)

By the same process of reasoning, then, we deem this philosophy applicable to the present situation, and the acceptance of real estate in satisfaction of a bill for care by a county institution constitutes that property as "devoted to public use and not for pecuniary profit." Such a transaction must, in the course of its activities, be regarded as "a mere incident of the public use" to which the institution is devoted.

Since the particular property in question would be tax exempt in the hands of the county, the question arises as to the years for which the county is entitled to the exemption. The conveyance was made in May of 1961, Section 444.9, Code of Iowa, 1962 provides that the board of supervisors shall, at its September session, levy taxes upon the taxable property in the county. At its annual September session in 1961, the property herein question was not taxable since it had become exempt upon its acquisition by the county. In *Iowa Wesleyan College vs. Knight,* 207 Iowa 1238, 224 N.W. 502, the Court held that where title to realty passed to an educational institution subsequent to its assessment, but prior to the levy date, the institution was entitled to the statutory exemption. The Court said:

"When did the statute become operative in favor of the plaintiff? We can conceive of no reason why it should not be deemed operative from the date of acquisition of the property and filing of its deed for record. The property was that of the plaintiff, and 'educational institution,' on September 8th. In levying the tax, therefore, the Supervisors acted in violation of Section 6944. Its levy was illegal. If plaintiff had known of such levy at the time, it could properly and successfully resisted the same. It has an equal right to resist the collection thereof."

We are not aware of any statute or opinion which would require recording of its deed by the county and failure to so record would have no bearing on the question of execption as passed here.

Since the property was acquired by the county in May, 1961, prior to the date of levy in September, 1961, we are of the opinion that the tax levies for the years 1961, and 1962 were illegal under the *Iowa Wesleyan College Case,* supra, and that they should be cancelled by resolution of the Board of Supervisors. The taxes for the year 1960 were a lien upon the property when acquired by the county in May, 1961, those taxes having become payable in January of that year. Although there is no direct authority in Iowa on this point, it is the common practice in the counties to follow the majority view that the acquisition of the title to land by a state or other governmental body acts to extinguish prior tax liens against the property. We believe this view to be correctly expressed in State ex rel. *Peterson vs. Maricopa County,* 38 Ariz. 347, 300 P. 175 wherein the Court held that any tax lien existing upon property acquired by the state merges with the legal title thus acquired, whereupon the prior taxes cease to be a lien upon the property.

As applied to the contemplated transfer by the Van Buren County Trustees, the Idaho Court, in State ex rel. *Hoover vs. Minidoka County,* 50 Idaho 419, 298 P. 366, held that the state obtained complete unconditional title to such land, and that the title was freed from past taxes, and that all such liens on the tax records become nil and subject to concellation, and therefore, may not revive and attach upon a subsequent reconveyance by the state.

Also see *Childreas County vs. State,* 127 Tex. 343, 92 S. W. 2d 1011, wherein the Court said:

"We think the great weight of authority sustains the rule that when the title to this land reverted to the County, the tax lien for state purposes became merged with the ownership of the land by the County. This property, dedicated to a County exclusively for a public purpose. . . cannot be burdened with taxes due the state during the time it was privately owned."

It is my opinion then, that upon acquisition of real property by a County, subsequent levies upon the property are illegal and must be cancelled; and tax liens in existence against that property at the time of acquisition of that property by the County are merged with the title in the County and are not revived by subsequent conveyance by the County.

I believe the proper procedure for effecting the cancellation of these taxes, would be by an order from the Board of Supervisors directed to the County Treasurer.

You make reference to the fact that the deed as delivered to the hospital board of trustees was in blank as to the grantee, and inform us that the board of trustees contemplates the insertion of the name of the new purchaser in the blank. Under the cases of *Augustine vs. Schmitz,* 145 Iowa 591, 124 N.W. 930, the intended grantee may fill in his own name or the name of his grantee or purchaser. Filling in the name of the new purchaser, then, will vest title in that person. However, to assure the new purchaser a clear and unclouded title, it would probably serve his best interest to fill the hospital's name in the blank deed, record, and execute a new deed to him.

19.11

TAXATION: Exemptions, military service—§427.5, 1962 Code. Sale by contract of property prior to date of approval of Board of Supervisors will not disqualify claim of Military Service Tax exemption.

June 7, 1963

Mr. Gordon L. Winkel
Kossuth County Attorney
Box 405
Algona, Iowa

Dear Mr. Winkel:

We have your recent request concerning military service tax exemptions. The facts you present are as follows:

"Mr. N. held the fee simple title to a certain real property in the year 1961. He was a World War II veteran and on June 1, 1961 applied for a military service tax exemption for 1961 taxes payable in 1962, designating such real estate to receive the exemption. On or about July 10, 1961, he sold the designated property to Mr. K. under a real estate contract. The county board of supervisors of the county in which Mr. N. resided and in which the designated property was situated approved the 1961 military tax claim on July 26, 1961. As of the date July 26, 1961, Mr. N. held the legal title to the designated property and Mr. K. held the equitable title to such property. Final settlement on the contract including possession was accomplished on November 20, 1961. Is Mr. N. as the legal title holder, entitled to receive the 1961 military tax exemption on the designated property irrespective of his having sold property under contract to Mr. K. prior to the date the county board of supervisors approved and allowed the 1961 military tax claim filed in the county where the designated property was situated?"

In the first consideration of your question, there is an opinion in this area at 1958 *O.A.G.* 255 which would, if this sale was complete, dictate the result

that Mr. N. would not be entitled to receive the 1961 military tax exemption. However, since Mr. N. sold the property under contract to Mr. K., he remains the legal title holder as of the date the county board of supervisors will pass on his claim. Before deciding whether or not Mr. N. is entitled to receive his exemption, it may be stated that it is clear Mr. K. would be unable to apply any exemption to this property for the reason that as of July 1, 1961 he would not be an owner of the designated property in either a legal or equitable sense.

In answer to the question whether or not Mr. N. would be entitled to receive his military tax exemption on the basis of his purely legal ownership, you are advised that he would qualify for the exemption. There has been a ruling by this office which is noted at 1942 *O.A.G.* 44 on the particular statute with which we are concerned. This statute, Section 427.5, reads in part that the claimant "may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein." In this opinion of the Attorney General, it states that "equitable and legal" is to read as "equitable or legal." Therefore, if a legal owner of a piece of property such as Mr. N. desires to place his military tax exemption on this property he would be granted this exemption, thereby reducing the taxable valuation thereof. He is an owner on or before July 1, 1961, he is a veteran and has filed his claim. It is clear from the language of Section 427.5 that the military service tax exemption is granted to the person and not to the property.

19.12

TAXATION: Moneys and credits, credit unions – §§429.4, 429.2, 533.17, 533.22, 441.18, 1962 Code. Upon proper showing by credit union legal reserves, other reserves and undivided earnings which are invested in nontaxable moneys and credits or noninterest-bearing items are not considered as taxable moneys and credits.

November 1, 1963

Mr. Ballard Tipton
Property Tax Division
Iowa State Tax Commission

Dear Mr. Tipton:

The question has been asked whether the legal reserve and earnings of a credit union are taxable in full regardless of whether the assets of the credit union include U.S. Government securities and noninterest-bearing items among the assets of the credit union on the statutory assessment date.

Section 429.4, Code of Iowa, 1962, states:

"Deductions from moneys and credits. In making up the amount of moneys and credits, corporation shares or stocks which any person is required to list, to have listed or assessed, including actual value of building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, and in addition thereto an amount of five thousand dollars.

"All noninterest-bearing moneys and credits and accounts receivable shall be tax exempt, but the five thousand dollar exemption as set out in this section shall not apply in the event such noninterest-bearing moneys and credits and accounts receivable exempted herein shall exceed five thousand dollars and if less than five thousand dollars then only so much thereof as shall amount to five thousand dollars when added to such noninterest-bearing moneys and credits and accounts receivable."

This section clearly states that the $5,000 exemption does not apply if the noninterest-bearing moneys and credits and accounts receivable exempted, exceed $5,000. The section further states that if less than $5,000 of noninterest-bearing moneys and credits and accounts receivable then only so much as amounts to $5,000. To illustrate this, Company A has $6,000 of noninterest-bearing moneys and credits and $10,000 of other taxable moneys and credits. Company A would pay tax on $10,000, the $5,000 exemption not being applicable due to the fact that the amount is greater than $5,000. To illustrate the other situation, Company B has $2,000 of noninterest-bearing moneys and credits and accounts receivable and $10,000 of other taxable moneys and credits. Company B would pay tax on $7,000 worth of moneys and credits. Company B receiving $5,000 worth of exemption credits, but including $2,000 of the noninterest-bearing moneys and credits and accounts receivable.

Investments by a credit union in U.S. Government securities should be regarded by the Assessor as nontaxable and are not considered as noninterest-bearing moneys and credits or accounts receivable. Section 429.2, Code of Iowa, 1962.

The Assessor in making a determination must give consideration to what the legal reserve, undivided earnings, or other reserve might consist.

Section 533.22, Code of Iowa, 1962, states:

"Taxation. A credit union shall be deemed an institution for savings and shall be subject to taxation only as to its real estate, moneys, and credits. The shares shall not be taxed."

Section 533.17, Code of Iowa, 1962 subsection 1 states:

"Legal reserve. All fees and fines shall, after the payment of organization expenses, be added to the legal reserve of the corporation.

"In addition thereto, at the end of each fiscal year until such time as said legal reserve equals ten per cent of the sum of the share and deposit account balances of the corporation, there shall be transferred to said reserve not less than ten per cent of the corporation's gross income for the year. Thereafter there shall annually be added to said reserve at the end of each fiscal year such per cent of the gross earnings, but not exceeding ten per cent, as shall be required to maintain said reserve at ten per cent of the sum of the said share and deposit account balances.

The legal reserve, including any excess which may be in said reserve at the time this amendment becoms effective, shall belong to the corporation, and shall not be distributed except on dissolution of the credit union. Said legal reserve shall be used to meet losses, except those resulting from an excess of expenses over income."

A credit union is subject to taxation only as to its real estate, and moneys and credits as is set forth in Section 533.22, Code of Iowa, 1962. Furniture and fixtures are exempt 1960 *O.A.G.* 262, and dividends payable are not assessable. 1960 *O.A.G.* 262. Share credits represent a deductible item. 1940 *O.A.G.* 527.

Under Section 533.17, Code of Iowa, 1962 the reserve of a credit union is to be maintained at 10% of the sum of the share and deposit account balance. Legal reserves belong to the corporation.

Credit unions are taxable on that part of their legal reserve, other reserves and undivided earnings, that are not invested in nontaxable moneys and credits or noninterest-bearing items.

Under Section 441.18, Code of Iowa, 1962, the taxpayer has a duty to assist the Assessor when an assessment is made. Credit unions should be taxed as a separate entity, such as an individual, corporation or partnership.

Thus, when an assessment is made the credit union should make a showing to the Assessor how and where money is invested so proper determination of taxable moneys and credits can be made.

Thus, upon proper showing by a credit union, its legal reserves, other reserves and undivided earnings, which are invested in nontaxable moneys and credits or noninterest-bearing items, are not considered as taxable moneys and credits.

19.13

TAXATION: Moneys and credits, U.S. bonds—§429.2, 1962 Code. U.S. bonds in the hands of an employee credit union are exempt from moneys and credits.

February 15, 1963

Mr. Samuel O. Erhardt
Wapello County Attorney
Court House
Ottumwa, Iowa

Dear Mr. Erhardt:

This is in answer to your request for an opinion regarding taxation of employees credit unions which can be summed up as follows: Assessment was made on a reserve account of an employees credit union which is made up of $115,000.00 in U.S. Government bonds. The assessment of credit unions is spelled out very indefinitely in the Code and we desire to know whether or not these bonds when they are held as a reserve are included in the assessment.

It is our opinion that Section 429.2, Code of Iowa, 1962, covers the situation. This section contains language that ". . . bonds other than those of the United States . . . shall be assessed and, . . . shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides." From the facts as you state them, it appears that these U.S. Government bonds in the credit union are not to be taxed for moneys and credits and that any assessment so made is incorrect. The fact that these bonds are owned by a credit union does not remove them from this exemption.

19.14

TAXATION: Real estate assessment rolls — §§421.17(10), 428.4, 441.17(6), 441.17(7), 441.23, 441.26, 443.2, 1962 Code. It will be necessary for assessors to make and issue real estate assessment rolls in 1965, a real estate assessment year, and in 1966 showing new realty valuation established as result of revaluation, although foregoing requirements of statute are directory, rather than mandatory and breach of this requirement does not render an assessment void, in absence of actual prejudice or tax which has been erroneously or illegally exacted or paid.

December 23, 1963

Mr. Ballard B. Tipton
Property Tax
L O C A L

Dear Mr. Tipton:

In response to your request, the problem was presented that some counties in the State have voluntarily approved the revaluation of reality by a pro-

fessional appraisal company, but in so doing, have been aware that the revaluation work will not be completed in time for the new valuations to be spread as of January 1, 1965, but the new valuations will be most likely available to be spread as of January 1, 1966, a non-real estate assessment year. The assessors in these jurisdictions are concerned as to, if the new valuations are permitted to be spread as of January 1, 1966, by the State Tax Commission, will it be necessary for such assessors to make and issue real estate assessment rolls in the year 1965, a regular real estate assessment year, and in turn issue assessment rolls in 1966 showing the new realty valuation established as a result of the revaluation.

Section 428.4, Code of Iowa, 1962 states:

"Personal Property—real estate—buildings. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and *valued in* 1933 *and every four years thereafter, and in each year in which real estate is not regularly assessed, the assessor shall list and assess any real property not included in the previous assessment . . .*"

Section 441.17 (6) and 441.17 (7), Code of Iowa, 1962 states certain duties of the assessor:

"Make up all assessor's books and records as prescribed by the state tax commission, turn the completed assessor's books and records required for the preparation of the tax list over to the county auditor when the board of review has concluded its hearings and co-operate with the auditor in the preparation of the tax lists."

Section 441.17 (7), Code of Iowa, 1962 states:

"Submit on or before May 1 of each year completed assessment rolls to the board of review."

Section 441.23, Code of Iowa, 1962 states:

"Notice of valuation. The assessor shall, at the time of making the assessment, inform the person assessed, in writing, of the valuation put upon his property, and notify him, if he feels aggrieved, to appear before the board of review and show why the assessment should be changed."
Section 441.26, Code of Iowa, 1962 states:

"Assessment rolls and books. The state tax commission shall each year prescribe the form of assessment roll to be used by all assessors in assessing real and personal property, including moneys and credits, in this state, also the form of pages of the assessor's assessment book. Such assessment rolls shall be in such form as will permit entering thereon, separately, the names of all persons, partnerships, corporations, or associations assessed; shall contain a form of oath or affirmation to be administered to each person assessed, and shall also contain a notice in the following form:

'If you are not satisfied that the foregoing assessment is correct, you may file a protest against such assessment with the board of review on or after May 1, to and including May 20, of the year of the assessment, such protest to be confined to the grounds specified in Section 441.37. Dated _____ day of _____, 19_____, _____, County/City Assessor.'

"Such assessment rolls shall be used in listing the property and showing the values affixed to such property of all persons, partnerships, corporations, or associations assessed, which rolls shall be made in duplicate. Said duplicate roll shall be signed by the assessor, detached from the original and delivered to the person assessed. It shall be lawful to com-

bine the affidavit or form of oath or affirmation with reference to real and personal property, and the affidavit or form of oath or affirmation as to moneys and credits, into one affidavit or form of oath or affirmation, and only the one such affidavit or form of oath or affirmation shall be sufficient on the assessment roll. The pages of the assessor's assessment book shall contain columns ruled and headed for the information required by this chapter and that which the state tax commission may deem essential in the equalization work of the state board of review. The assessor shall return all assessment rolls and any schedules therewith to the county auditor, along with the completed assessment book, as provided in this chapter, and the county auditor shall carefully keep and preserve all such rolls, schedules and book for a period of five years from time of filing the same in this office."

Section 443.2, Code of Iowa, 1962 states:

"Tax list. Before the first day of January in each year, the county auditor shall transcribe the assessments of the several townships, towns, or cities into a book or record, separate columns, in which shall be entered the names of the taxpayers, descriptions of lands, number of acres and value, numbers of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by entering the amount due on each installment, separately, and carrying out the total of both installments. . . ."

From the preceding statutory provisions, real estate shall be listed and assessed in 1933 and every four years thereafter, making the next real estate assessment year, 1965. The assessor has the duty to help prepare the tax lists and submit the completed assessment rolls to the board of review before May 1 of each year. The assessor is further directed by statute to inform the person assessed in writing, of the valuation placed upon his property.

Section 421.17 (10), Code of Iowa, 1962 states:

". . . The state tax commission shall have the power to order made effective reassessments or revaluations in any taxing district as to taxes levied during the current year for collection the following year, and it may in any year order uniform increases or decreases in valuation of all property or upon any class of property within any taxing district, such orders to be effective as to taxes levied during the current year for collection during the following year."

The State Tax Commission has the authority to make effective reassessments or revaluations in any taxing district. The State Tax Commission prescribes each year, the form of assessment roll to be used, conforming to certain statutory requirements as to form and including the taxpayer's name and values affixed to said property. Before the first day of January, such values must be transcribed to the tax list.

The taxpayer should be informed of any change in valuation of his property, although the foregoing requirements of the statute are directory, rather than mandatory and a breach of this requirement does not render an assessment void, in the absence of actual prejudice or a tax which has been erroneously or illegally exacted or paid. *McDonald vs. Clarke County* 196 Iowa 646, 195 N.W. 189. In Re *Kauffman's Estate,* 104 Iowa 639, 74 N.W. 8. 40 O.A.G. 89.

19.15

TAXATION: Remittance, casualty loss—§445.62, 1962 Code. Taxes subject to remittance by Board of Supervisors as result of casualty occurring to prop-

erty of taxpayer must bear definite relationship to physical asset itself and no remittance may be made based upon loss of intangible value.

April 3, 1963

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa

Dear Mr. Samore:

This will acknowledge receipt of your letter wherein you make the following inquiry:

"Sec. 445.62 of the Code of Iowa authorizes the board of supervisors to remit the taxes of any person whose building * * * or other property has been destroyed by fire * * *. What relief is the board authorized to allow to a building owner whose building loss was covered by insurance but which insurance proceeds contained no adjustment for current real estate taxes notwithstanding the additional loss of rental income to the building owner because of the destruction and unavailability of the building during a major portion of the tax year, assuming other conditions of Sec. 445.62 are met?"

Section 445.62, Code of Iowa, 1962, provides as follows:

"445.62 Remission in case of loss. The board of supervisors shall have power to remit in whole or in part the taxes of any person whose buildings, crops, stock, or other property has been destroyed by fire, tornado, or other unavoilable casulty, if said property has not been sold for taxes, or if said taxes have not been deliquent for thirty days at the time of the destruction. The loss for which such remission is allowed shall be such only as is not covered by insurance. The loss of capital stock in a bank operated within the state and the making and paying of a stock assessment for the year such stock was assessed for taxation shall be a destruction within the meaning of this section."

In answer to your inquiry, I refer you to 1956 *O.A.G.* 38, dated March 25, 1955, wherein we said: "Property covered by the statute must be of such a character that it may be physically destroyed in some manner * * *" (Citing 1926 Report of the Attorney General at page 334). That opinion went on to say:

"While the loss that the owner realized was the result of destruction of his building, it was not a direct loss but was only a consequential injury. Statutes exempting or relieving one from liability for taxes generally imposed should be strictly construed, and this statute so construed does not cover consequential injuries. The actual loss to the value of the property destroyed was covered by insurance; the object of the statute has been fulfilled; and your Board of Supervisors has no power to remit any portion of the property taxes of the owner of this building."

Therefore, it is my opinion that the Board of Supervisors is not authorized to remit any taxes which are not directly attributable to the loss of the physical building and the uninsured losses arising from loss of rental income and current real estate taxes are only consequential injuries and not to be considered by the Board in determining the taxpayer's loss.

19.16

TAXATION: Township levy, limitations – §359.43, 1962 Code. Authority granted by electors to township trustees to levy tax to purchase fire equipment gives no authority to take into account levy of current year until levy

is made. Township may not be divided into fire districts and separate millage rates be adopted.

April 12, 1963

Mr. Frank R. Thompson
Guthrie County Attorney
Guthrie Center, Iowa

Dear Mr. Thompson:

This is in response to your recent letter in which you ask:

"In April of 1962 the residents of Jackson Township in Guthrie County, Iowa, voted to levy a tax to furnish fire protection for the township as provided by Section 359.43 of the Code of Iowa. The proposition carried by more than sixty percent.

"The fire protection will actually be furnished by three different towns; namely, Panora, Linden and Redfield. The trustees neglected to provide for the levy of this tax in their askings for the year of 1963, so there will be no tax coming in for this purpose until 1964.

"Can the trustees provide for immediate fire protection by issuing warrants at this time and stamped 'Not paid for want of funds' and have them payable from the anticipated taxes?

"Since the trustees will have to contract with three different towns for this fire protection, and since the cost of fire protection will be different with each of these towns, can the township be districted or must the millage rate be the same for the whole township?"

In regard to your first question, your attention is referred to 1958 *O.A.G.* 315 in which it was provided:

"We are therefore of the opinion that your township trustees can issue warrants after the 1957 levy payable in 1958 dated at the time of issuance and stamped not paid for want of funds payable from anticipated taxes under such levy."

However, it is to be noted that in that opinion the warrants were issuable after the 1957 levy.

Your attention is further directed to *Clark v. Lancaster,* 69 Neb. 717, 96 N.W. 593 (1903), where it was held that a tax cannot be said to be levied when it is only estimated, and the time for levying had not arrived. Thus the limitation on the power of the county board to contract for bridge building, to cost a sum not greater than the amount of money on hand in the county bridge fund derived from a levy of previous years and two-thirds of the levy of the current year, gives no authority to the board to take into account the levy of the current calendar year prior to the making of such levy. Until this is made, there is no levy of the current year.

Thus, in answer to question one we must conclude that where the 1962 vote did not authorize a tax levy until 1963, the 1958 *O.A.G.* must be distinguished, for here the levy has not been made and thus the "no fund" warrants may not be issued until that time.

Your second question may be disposed of by the fact that no statutory authority exists for the contemplated districts and therefore such divisions cannot be made.

19.17

Corporate stock, valuation—§§431.1, 431.2, 431.3, 1962 Code. Value of corporate stock for purpose of moneys and credits taxation is determined by

deducting assessed value of real estate and tangible personal property from actual value of captial stock as determined on January 1st. (Murray to Jensen, Taylor Co. Atty., 4/11/63) #63-4-4

19.18

Exemptions, charitable organization–§427.1(9), 1962 Code. Real property under construction in the hands of a charitable organization is not exempt from property taxation. (Murray to Van Ginkel, Cass Co. Atty., 4/3/63) #63-4-2

19.19

Exemptions, educational properties–§427.1(9), §427.1(10), 1962 Code. Properties in trust, which are to be or are being used solely for educational purposes, are exempt from moneys and credits tax. (Murray to Richardson, Greene Co. Attorney, 10/27/64) #64-10-4

19.20

Exemptions, leased property–§§427.1(9) (24), 1962 Code. Property owned by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies which is leased, let or rented to another party or individual or that is used by such for a fee or contribution, and not used by the society for the purposes of that society, is not exempt from taxation. (Murray to Milani, Appanoose Co. Atty., 8/7/64) #64-8-10

19.21

Exemptions, religious institutions–§427.1(9), 1962 Code. A former parsonage, used to store church records, but otherwise vacant, and not used for pecuniary profit, is exempt from taxation as property of religious institution. (Murray to Hudson, Pocahontas Co. Atty., 7/1/64) #64-7-1

19.22

Exemptions, time for filing–§§427.1(6), 427.1(24), 427.1(25), 1962 Code. Where statutory provisions have not been followed regarding time to file an application for exemption, the board of supervisors has no authority to excuse or forgive any previous taxes paid or allow an exemption that has not been timely filed. (Gleason to Ryan, Poweshiek Co. Atty., 10/3/63) #63-10-1

19.23

Moneys and Credits, deductions and exemptions–§§429.4, 429.11, 1962 Code. Federal estate taxes not deductible as debts, and notes and debentures owned in a "Morris Plan Company" are not exempt from assessment as moneys and credits. (Murray to Tierney, Webster Co. Atty., 11/1/63) #63-11-2.

19.24

Moneys and credits, treasurers certificate, estates,–§443.12, 1962 Code. Treasurer's certificate must be issued to estate for moneys and credits tax not assessed within five-year time limit. (Murray to Stoebe, Humboldt Co. Atty., 2/15/63) #63-2-4

19.25

Pension trust funds–§427.1(23), 1962 Code. Property held pursuant to any pension, profit sharing, unemployment compensation, stock bonus or other retirement, deferred benefit or employee welfare plan as set out in §427.1(23) refers to both real and personal, both tangible and intangible property. Exemption effective on July 4 of any given year is not applicable until following year and the exemption would apply only to taxes assessed in the succeeding year. (Murray to Tax Comm., 1/15/63) #63-1-4

CHAPTER 20

TOWNSHIPS

STAFF OPINIONS

LETTER OPINIONS

20.1

TOWNSHIPS: Purchases, abandoned schoolhouse from school district – §§360.1, 360.2, 360.8, 1962 Code. Township trustees, with sanction of electors, have authority to purchase abandoned school building for use as community hall and money for purchase is available under §§360.1 and 360.2.

January 16, 1963

Mr. Paul D. Strand
Winneshiek County Attorney
Decorah, Iowa

Dear Mr. Strand:

This is to acknowledge your letter of recent date, in which you ask:

". . . It appears that a school district, through the reorganization, has abandoned a rural schoolhouse and that said schoolhouse will soon be put up for private or public sale. The Township Trustees wish to purchase same and make a community building from it. The Township Trustees are wondering whether they have the right to purchase same and if they do have that right will they have the right to assess a millage against the township property owners for the purchase and maintenance of said building which would at the time they purchase same becomes a community building."

(1) Section 360.1, 1962 Code, provides:

"Election. The trustees, on a petition of a majority of the resident freeholders of any civil township, shall submit the question of building or acquiring by purchase, a public hall to the electors thereof, by posting notices of such election in four conspicuous places in the township, thirty days before election, and the form of the proposition shall be: 'Shall the proposition to levy a tax of . . . . . .mills on the dollar for the erection of a public hall be adopted?' "

However, in the 1954 Code, §360.1 appeared as follows:

"Election. The trustees, on a petition of a majority of the resident freeholders of any civil township, shall submit the question of building a public hall to the electors thereof, by posting notices of such election in four conspicuous places in the township, thirty days before election, and the form of the proposition shall be: 'Shall the proposition to levy a tax of . . . . . mills on the dollar for the erection of a public hall be adopted?' "

The change was a result of the Acts of the 57th G.A., Chapter 179, §1, whereby it was provided:

"Section 1. Section three hundred sixty point one (360.1), Code 1954, is

hereby amended by inserting after the word 'building' in line four (4) thereof the following: 'or acquiring by purchase'."

The purpose of this Amendment appeared in the explanation of House File 74, where it was stated:

"Where school districts are being reorganized and the small county schools closed and disposed of, many townships are acquiring a centrally located school building for a town hall at very little cost for township elections and other public meeting. This bill will allow the acquisition thereof and the repair and maintenance by levying up to a one-half mill levy. Under the present law the one-eighth mill levy for maintenance has been found inadequate by township. This bill will not affect any township unless they desire to use it."

(2) If the question as provided for in §360.1 is passed upon by the voters, then a tax shall be levied as provided for in §360.2:

"Tax. If a majority of the votes cast are in favor of the tax, the trustees shall certify such fact to the board of supervisors, and they shall thereupon levy a tax not to exceed the rate voted and not to exceed three-fourths mill on the dollar each year for a period not exceeding five years on the taxable property of the township; and when such tax is collected by the treasurer, it shall be paid to the township clerk; but said clerk shall not receive to exceed one percent for handling said money."

(3) Further, a tax levy for the maintenance of the town hall is provided for in §360.8 as follows:

"Tax for repairs. The trustees of any township where such building has been erected or acquired by purchase or by gift are hereby authorized to certify to the board of supervisors that a tax of not exceeding in any one year, one-half mill on the dollar, on the taxable property of the township, should be levied, to be used in keeping such building in repair, to furnish same with necessary furniture, and provide for the care thereof. Provided, that in counties with a population of seventeen thousand to seventeen thousand two hundred fifty census 1960, where such buildings are of brick construction with at least one hundred thousand cubic feet of space, such tax may be one mill on the dollar. When such certificate is filed in the auditor's office, the board of supervisors shall levy such tax."

Therefore, it is the opinion of this office that the board of township trustees may purchase the abandoned school building if the voters so approve. If their approval is obtained, funds for such a purchase may be obtained by way of a tax levy as also is the case in maintaining the purchased building.

20.2

Fire districts—§§357A.9, 368.12, 1962 Code. Cities may join with other cities, towns, or townships for fire protection, but are precluded from joining fire districts established under Chap. 357A. (Strauss to Saur, Fayette Co. Att., 6/20/63) #63-6-4

20.3

Fire districts, powers—§§357A.11, 359.42, 1962 Code. Trustees for benefited fire district do not have same power as township trustees acting under §359.42. Benefited fire district may enter into agreement with adjoining township or townships, but it may not enter into agreement with other cities, towns or other benefited fire districts. (Strauss to Mossman, Benton Co. Atty., 10/3/63) #63-10-2

20.4

Fire equipment, indebtedness—§§359.42, 359.43, 359.44, 359.45, 1962 Code. Township trustees may not borrow money directly from lending institution to purchase fire apparatus or equipment. (Knoke to Bainter, Henry Co. Attorney, 10/26/64) #64-10-2

20.5

Fire equipment, partial levy—Ch. 359, 1962 Code. No authority to levy tax upon taxable property of township in order to provide fire equipment for part of township. No authority under said chapter to divide township and levy tax on property in that division in order to provide fire equipment for it. (Strauss to Elwood, Howard Co. Atty., 1/15/63) #63-1-3

CHAPTER 21

WELFARE

STAFF OPINIONS

LETTER OPINIONS

21.1

WELFARE: ADC, eligibility—§239.2(2), 1962 Code. Temporary absence from State one year immediately preceding date of application does not preclude eligibility for assistance, provided said person is resident of State.

June 11, 1963

Mr. Noran L. Davis
Pottawattamie County Attorney
Council Bluffs, Iowa

Dear Mr. Davis:

This is to acknowledge receipt of your request for an opinion wherein you state as follows:

"The question involved is whether or not the failure to reside continuously within the State of Iowa for a period of one year is in fact a bar to receiving ADC payments from the local department of Social Welfare. You will note * * * the three situations involved indicate that the children in one instance were absent from March 1962 until October, 1962, while in Norfolk, Nebraska; secondly, that the children were absent from the State of Iowa from June 20, 1962 until July 26, 1962 while in Leadville, Colorado; and in the third situation were absent from the State of Iowa from February, 1962 until September 1962 while in the State of California.

"It has been the policy of this office in the past and the undersigned is taking the same position, that such residence, when broken, and when the children have not been residents for the period of one year prior to the application for ADC payments, necessitates the rejection of said application.

"You will note, I feel, from the communication enclosed that upon referral to the Iowa Departmental Rules of 1962, Page 490, that the interpretation made by the State Department of Social Welfare has held that 'absence from the State for a period of less than 12 months shall not be considered as interrupting residence.' * * *

"It is the position of the undersigned that 239.2 would be controlling and that in turn the Iowa Departmental Rules cannot interpret the meaning of a statute. It is further our contention that residency follows that of

children's parents and in each of the three instances the children were actually with their parents while outside the State of Iowa for an interrupted period of time and that by accepting the interpretation placed in the Iowa Departmental Rules on page 490 would be allowing the State Department of Social Welfare to interpret residency and domicile contrary to the undersigned's previous conception of some."

The matter of which you inquire is primarily a fact question which must be determined at the time application is made for assistance under the provisions of Chapter 239, Code 1962. Your attention is directed to Section 239.2, which provides in pertinent part:

"Assistance shall be granted under this chapter to any needy dependent child who:

1. * * *

2. Has resided in the state for one year immediately preceding the application for such assistance; * * *

3. * * * "

It will be noted that it is the duty of the State Board to determine eligibility for persons for assistance, which are administrative duties under the statute and are not generally subject to judicial inquiry in the absence of fraud or abuse of discretion. *Schneberger v. State Board of Social Welfare,* 228 Iowa 399, 291 N.W. 859 (1940). The determination of whether or not an applicant qualifies under the statute lies solely with the State Board of Social Welfare based upon the reasonable interpretation of the statute in the application of the statute to individual cases. Thus the rules as promulgated by the Department are used as mere guides to the local departments in determining whether or not a person would be qualified under the above quoted statute.

Title 4 of the Social Security Act as amended by the Second Session of the Fifty-seventh Congress of the United States, now appearing as Title 42, United States Code, Section 602, provides in pertinent part as follows:

"The Administrator (Secretary of Health, Education and Welfare) 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 families with 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, * * *"

Under the Federal Act, the State Code must comply with the Federal Code in order to be eligible for assistance under this program. The Federal interpretation, as determined by the Secretary of Health, Education, and Welfare, dated May 1, 1946, held that no individual who is, in fact, a bona fide resident of a state may be denied assistance under Aid to Dependent Children. This is clearly stated in the federal statutes and places the burden upon the local boards to give aid in those instances even though the applicant is not, in fact, a bona fide resident of the state.

It is conceded the term "resident" generally refers to the actual presence within an area rather than a legal or voting residence. *In re National Discount Corp.* 196 Fed. Supp. By the same token, however, it has also been held that "reside" should be given a broad construction in order to accomplish the purported end when relating to general welfare problems. *In re Crouse's Adoption,* 379 PA 353; 108 AT 2d 763. This office has already ruled previously that temporary absence from the state would not necessarily disqualify an individual from receiving assistance when legal residence has not been established elsewhere, even though the absence exceeded that period which is set out by statute. 1934 *O.A.G.* 589.

Your attention is directed to Section 35.9, Code 1962, which in pertinent part states:

"Said bonus board is authorized to expend not to exceed three hundred dollars per year for any one child *who shall have lived in the state* of Iowa for two years preceding application for aid hereunder, * * *" (Emphasis added)

The Legislature in Section 35.9 made the physical presence of the child in the state for two years immediately preceding application a requirement before the board had authority to act. By analogy, while it is required under Section 239.2 that an individual reside in the state for one year immediately preceding the date of application for assistance, this does not mean physical presence within the state is a necessary prerequisite for assistance under the provisions of Chapter 239. In one instance the Legislature required physical presence within the state and in the latter instance they are silent. Any attempt to restrict eligibility for assistance under Aid to Dependent Children by interpreting the statute which would reduce eligibility for welfare would be violative of the heretofore mentioned Federal Social Security Act. *State Board of Social Welfare v. City of Newburgh,* 220 NYS 2d 54; 28 Misc. 2d 539.

The matter of which you inquire resolves itself down to a factual determination to be made by the local board in regard to eligibility for assistance under the provisions of Chapter 239. Insofar as the Departmental Rules are concerned, it is our considered opinion that where a certain set of facts exist so as to make a rule applicable, it would not be violative of the provisions of Chapter 239, Code 1962.

It is our considered opinion that if an applicant is physically absent from the state during the one year period immediately preceding the date of application, it will be necessary to determine whether or not the person in question at the time of application was a resident of the state and, if so, whether or not it was his true intent to live in the state, which could be determined by the local board in the terms of his conduct, action, or other relationship with the community.

21.2

WELFARE: Certificate of purchase, pensioners' homes—Ch. 274, Acts 60th G.A.; Ch. 446, §447.9, 1962 Code. The 90-day notice of right of redemption required by §447.9 cannot be served until after two years and nine months from the date the certificate is issued to the county auditor.

October 4, 1963

Mr. Robert W. Burdette
Decatur County Attorney
Box 61
Leon, Iowa

Dear Mr. Burdette:

Your letter of August 14, 1963, requests the opinion of this office as to whether the certificate of purchase issued to the County Auditor pursuant to House File 110, approved April 22, 1963, should be considered as a certificate issued at a regular tax sale so that a 90-day notice could not be served until nine months after the certificate was issued, "or can the 90-day notice be served immediately upon issuance of the certificate?"

House File 110 provides as follows:

"Chapter four hundred forty-six (446), Code 1962, is hereby amended by adding thereto the following new section:

" 'In cases where taxes have been suspended four years or more upon the property of a deceased old age assistance recipient and no estate was opened within ninety(90) days after the death of the recipient and the surviving spouse of the recipient is not occupying the property, the county treasurer shall issue a public bidder tax certificate to the county auditor.' "

It is clear that the certificate referred to in House File 110 may be issued immediately upon the expiration of the 90 days after the death of the recipient of old age assistance. The issuance of the certificate is not dependent upon an offer and sale "on the day of the regular tax sale each year or any adjournment thereof" as provided in Section 446.18 of the Code. The issuance of the certificate to the County Auditor pursuant to House File 110 is not a "scavenger sale".

There is no language in House File 110 that shortens in any way the usual period of redemption. It is, therefore, the opinion of this office that the 90-day notice required by Section 447.9 cannot be served until after two years and nine months from the date the certificate provided for in House File 110 is issued to the County Auditor.

21.3

WELFARE: County hospital—§347.16, 1962 Code. Any resident of county sick or injured is entitled to hospitalization in county hospital. Determination of indigency to be made by board of trustees of county hospital.

August 30, 1963

Mr. Robert W. Burdette
Decatur County Attorney
Box 61
Leon, Iowa

Dear Mr. Burdette:

Your letter states that your county has had considerable difficulty with questions concerning payment of bills incurred at your County Hospital by what you term "indigent persons". You cite the case where the father in a family drawing ADC benefits, was a war veteran who was told by your County Welfare Office that he should look to the Soldiers Relief Commission for assistance, etc. You request answer to the following seven questions:

1. Does the County Hospital have the right to refuse treatment of any person who is a resident of our County? (We have always proceeded on the assumption that our County Hospital is obligated to give hospital services to any resident of our county.)

2. Would not a recipient of ADC be considered an indigent person- If you grant that the ADC recipient is an indigent person, then would not the County Welfare be automatically required to pay the medical expenses including the bills incurred to our Decatur County Hospital for such an indigent person?

3. Does our County Welfare Department have the right to refer this bill to the Soldiers Relief Commission and state that it is their policy that they will not pay the bill where the recipient is a veteran?

4. Does the Soldier's Relief Commission have to pay this bill? In other words, does the Soldier's Relief Commission have a choice in these matters or are they automatically required to pay certain expenses including medical expenses of Veterans who are already on relief?

5. Does the fact that the County Poor Fund is "in the red" make any

difference as to the County's obligation to pay medical expenses for indigent persons?

6. Is there any way that the County Welfare Department can avoid its obligation to pay the hospital expenses of indigent persons and force our County Hospital to give treatment to indigent persons without receiving compensation, therefore from our County Welfare Department?

7. Assuming that your answers would be that the County Welfare Department is obligated to pay the hospital bills incurred by the indigent persons and to pay the County Hospital, and the County Welfare people refuse to make such payment, what action, if any, should I take as County Attorney? In other words, is it my duty to file an action in behalf of our County Hospital against our County Welfare Department to force them to pay this hospital bill?

Section 347.16, Code of Iowa, 1962, provides in part as follows:

"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 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. * * *

"Free care and treatment in such county public hospital in all other counties * * * 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 and have found by the board of hospital trustees to be indigent and entitled to such 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. * * *"

Section 252.35 provides:

"All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they shall be paid out of the county treasury."

Section 347.17 provides:

"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."

In interpreting Section 347.17, it was said in 1954 O.A.G. 146 that:

"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 hopsital trustees are empowered to employ attorneys to institute the proceeding and pursue the litigation to conclusion. * * *"

There is a full discussion of the legislative history of Section 347.16 in 1954 O.A.G. 69. That opinion quotes the first sentence of the third paragraph of Section 347.16, to-wit:

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

and then proceeds to state as follows:

"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 tereatment 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."

The answer to your seven questions are as follows:

1. The plain and unambiguous language of Section 347.16 states that "*Any* resident of the county who is sick or injured *shall* be entitled to the benefits of such hospital. * * *" (Underscoring supplied)

2. Section 239.2 provides that ADC benefits shall be granted "to any needy dependent child". A "needy" child is not necessarily an "indigent" child. The determination as to qualification as an "indigent" person pursuant to Section 347.16 is made by the board of hospital trustees, or in an integrated county by the Overseer of the Poor or Director of Social Welfare under the supervision of the Board of Hospital Trustees. Section 347.16 specifically provides for free care and treatment for certain categories of "indigent persons".

3 and 4. As stated in a letter of the Attorney General to Stanley R. Simpson, Boone County Attorney, (copy attached hereto) "only those charges for veterans' children that are approved by the Soldiers Relief Commission can be made against the Soldiers and Sailors Relief Fund."

5. The fact that the County Poor Fund is "in the red" does not affect the county obligation to pay medical expense for indigent persons pursuant to the provisions of Section 252.35.

6.(a) The obligation for care and treatment of *any* resident of the county by county public hospital is mandatory and after determination of indigency has been made pursuant to Section 347.16, the costs of such care and treatment is a mandatory liability of the county and payment of the claim made by the hospital trustees is an obligation of the Board of Supervisors pursuant to the provisions of Section 252.35.

(b) A "County Welfare Department" cannot "force" the County Public Hospital to furnish care and treatment to an indigent person without receiving compensation therefor pursuant to the provisions of Section 347.16.

7. In view of the provisions of Section 347.17 providing for the employment of counsel by the trustees of a county public hospital, you, as County Attorney, would have no duty under Section 347.17 to file an action in behalf of the County Hospital against your County Welfare Department or your Board of County Supervisors to force them to pay the bill of a county public hospital for care and treatment of an indigent person.

21.4

WELFARE: Indigency, determination—§347.16, 1962 Code. Final authority to determine indigency in integrated county pursuant to Section 347.16 rests with the Board of Hospital Trustees.

February 26, 1964

Mr. James W. McGrath
County Attorney
Keosauqua, Iowa

Dear Mr. McGrath:

Your letter requests a clarification of our answer to the second question as contained in our opinion to Robert W. Burdette, Decatur County Attorney, dated August 30, 1963. That answer states in part that:

"* * * The determination as to qualification as an 'indigent' person pursuant to Section 347.16 is made by the Board of Hospital Trustees or in an integrated county by the Oversees of the Poor or Director of Social Welfare *under the supervision* of the Board of Hospital Trustees * * *" (Underscoring supplied)

Your specific inquiry is

"When the Director of Social Welfare under the supervision of the Board of Hospital Trustees reports to the Hospital Trustees that in the opinion of the Director of Social Welfare the patient does not qualify as an 'indigent person,' but the Board of Trustees of the hospital firmly believes and determines that the patient is an 'indigent person,' whose decision is final and paramount?"

In *State v. Chicago, Milwaukee & St. Paul Railway Company,* (152 Iowa at page 321), the Supreme Court of Iowa said:

"To supervise is to superintend, to direct, to have charge over, with the power of direction. Webster's International Dictionary. The Secretary of the Interior, being charged by the United States statutes with the supervision of the office relating to the public lands, was held to have the power to review all the acts of the local officers, and to correct and direct a correction of any error committed by them."

In Hutchins v. City of Des Moines, (176 Iowa at page 216) the Supreme Court of Iowa, in defining "supervise" said:

"To supervise is ' to oversee for direction; to superintend; to inspect with authority"

and in *State v. Manning,* (220 Iowa at page 539), the Supreme Court of Iowa said:

"To supervise' is to have general oversight over— to superintend or to inspect—and a director is one who directs. He is an executive, administra-

tive official clothed with *some discretionary powers,* judicial in character, so that his duties partake of all three branches of government in a limited sense." (Underscoring supplied)

Section 347.16, Code of Iowa 1962 specifically provides that

"* * * 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." (Underscoring supplied)

It is, therefore, our considered opinion that while the Director of Social Welfare or Overseer of the Poor in an integrated county does have limited power under the direction and "general oversight" of the Board of Hospital Trustees to determine "indigency" within the meaning of Section 347.16, neverthless, it is the Board of Hospital Trustees who have final authority to make that determination.

21.5

WELFARE: Juvenile courts, jurisdiction—Ch. 252A, 1962 Code. Juvenile court has jurisdiction as to neglected, dependent or delinquent children under §232.25 and to act as initiating court pursuant to provisions of Ch. 252A in such matters.

August 23, 1963

Mr. George R. Larson
Story County Attorney
Nevada, Iowa

Dear Mr. Larson:

Your letter states that for some time it has been customary in your county to docket all cases arising under Chapter 252A of the Code in the Municipal Court of the City of Ames, Iowa. You further state that under Section 231.2 of the Code, the Judge of the Municipal Court of the City of Ames, Iowa, has been designated as Judge of the Juvenile Court for Story County. You request an informal opinion as to whether the Iowa statutes as applied to the Court setup in Story County are broad enough to give the Municipal Court of the City of Ames, Iowa, jurisdiction over cases arising under Chapter 252A.

The purpose of Chapter 252A, as stated in 252A.1, is "to secure support in civil proceedings for dependent wives, children and poor relatives from persons legally responsible for their support." and Section 252A.2(2), as you indicate in your letter, provides that:

" 'Court' shall mean and include a family court, domestic relations court, children's court, municipal court and any other court, by whatever name know, * * * *upon which jurisdiction has been conferred* to determine the liability of persons for the support of dependents within and without such state." (Underscoring supplied)

Section 232.21 specifically confers jurisdiction on a juvenile court as stated in the subparagraphs thereof "in the case of any neglected, dependent, or delinquent child." It seems clear that the "court" referred to in Section 232.25 is the juvenile court referred to in Section 232.21, and Section 232.25 specifically states that such court "shall have jurisdiction, on reasonable notice to the parents of said child, to inquire into the ability of said parents to support said child and make all proper orders in reference thereto.* * * If it finds that the parent is able to support such child in any reasonable degree, it may require such parent to pay a reasonable amount of money into court * * *."

It is my opinion that the Municipal Court of Ames, Iowa, acting as a juvenile court does have jurisdiction under Section 232.25 to enter orders requiring parents to support a neglected, dependent, or delinquent child, and to act as the initiating court in such cases pursuant to the provisions of Chapter 252A.

21.6

WELFARE: Legal settlement, adopted minors—Ch. 230, §252.16(5), 1962 Code. When annullment of adoption decree has removed adoptive parents as factor in determining legal settlement of minor and the natural parents of minor have never had legal settlement in Iowa and minor is admitted to State Mental Health Institute, minor child's legal settlement at time of such admission under such circumstances must be classified as unknown and minor becomes ward of the state subject to jurisdiction of the Board of Control.

April 24, 1964

Mr. Ira Skinner
Buena Vista County Attorney
Fritcher Building
Storm Lake, Iowa

Dear Mr. Skinner:

Your letter of March 4, 1964, requests an opinion concerning the legal settlement of a person whose adoption has been annulled under the provisions of Chapter 600.7 of the 1962 Code of Iowa.

Your letter states that:

"It appears that the natural parents of 'A' had no legal settlement in Webster County at the time 'A' was taken from them and placed in the Lutheran Home Finding Society but rather were simply a transient family passing through Webster County and were given financial aid as transients through Webster County Soldiers Relief." and that:

"In this case I don't think it can be determined that the natural parents had legal settlement in any county in Iowa."

Any opinion of this office as to the request as you have stated it must, therefore, be based on your assumption that the natural parents of "A" have not in fact had legal settlement in Iowa at any time or place. Even if facts should be adduced to show that the natural father and mother of "A" did have a legal residence in Iowa, it would appear that the action of the juvenile court on May 15, 1952, giving permanent legal custody of "A" to the Lutheran Home Finding Society of Fort Dodge, Webster County, Iowa, to which you refer in the second paragraph of your letter, would produce a factual situation the same as that existing in *State, ex rel, Rankin v. Peisen,* 233 Iowa 865. In that case our Supreme Court said:

"The rule of section 3828.088, paragraph 5, that minors take the settlement of their father had its origin in the accepted theory of the family relation. Polk County v. Clarke County, 171 Iowa 558, 560, 561, 151 N.W. 489. Where, as here, the family ties are broken and the father is deprived by court order of the right to custody and control of the children, the reason for the rule no longer exists. * * * Breaking the family unity destroys the premise that the settlement of the father or husband controls that of members of the family who have been legally separated from him."

The language of Section 3828.088, paragraph 5, Code of Iowa 1939, is identical to that contained in Section 252.16(5), Code of Iowa 1962, which provides that:

"Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother."

Your letter also states that:

"'A' had, prior to July 11, 1960, been admitted to the Mental Health Institute at Cherokee and subsequently transferred from Cherokee to the Mental Health Institute at Independence."

We must again assume the "A" was admitted to the Mental Health Institute at Cherokee pursuant to the provisions of Chapter 229, Code of Iowa 1962.

Based on the assumptions that the natural parents of "A" had never had, and do not now have, legal settlement in Iowa and that "A" was regularly admitted to the Mental Health Institute at Cherokee pursuant to the provisions of Chapter 229, Code of Iowa 1962, it is our opinion that,

(1) The legal settlement of "A" was "unknown" at the time of her admission to the Mental Health Institute at Cherokee;

(2) "A" became a ward of the state when admitted to the Mental Health Institute at Cherokee subject to the jurisdiction of the State Board of Control and the provisions of Chapter 230, Code of Iowa 1962;

(3) Unless the Board of Control should determine, pursuant to the provisions of Chapter 230.9, that "A" did in fact have a county of legal settlement, then Buena Vista County may recover costs from the state as provided in Section 230.11 of the Code of Iowa 1962.

21.7

WELFARE: Legal settlement, blind persons—§§241.22, 252.16(8), 1962 Code. Six months' residence in county and not legal settlement is all required under §241.22; §252.16(8) reduces the period of residence in any county necessary to acquire legal settlement to six months in case of recipients of Aid to Blind.

January 23, 1963

Mr. James Van Ginkel
Cass County Attorney
Atlantic, Iowa

Dear Mr. Van Ginkel:

Your letter requests an opinion in the following factual situation:

"A recipient under the above reference Chapter who is totally blind and totally disabled and who had lived in Adair County for several years and had received this aid as administered through Adair County Social Welfare Department. Early in the year 1959 this recipient was hospitalized and at that time it was not possible for his wife to care for him in their home any longer. Arrangements were made by the Adair County Social Welfare Department to place this recipient in a private nursing home in Cass County and this was done on April 3, 1959 and this recipient has remained there since that time."

You have submitted two questions: 1. Does this recipient, after he has been in the nursing home for a period of six months, become a charge against Cass County under the provisions of §241.22 of the 1962 Code of Iowa? 2. Is Adair County or Cass County responsible for the supplementation of this recipient's aid in order to pay for his care and keep in the nursing home?

Section 241.22 provides:

"When any recipient moves to another county he shall be entitled to continue to receive assistance which shall be chargeable to the county

from which he has removed until such recipient has resided in another county in the state for a period of six consecutive months, at which time assistance shall be charged to the county in which he then resides." Section 252.16(8) states that:

"The provisions of subsections 1, 2 and 3 of this section shall not apply to any blind person who is receiving assistance under the laws of this state. Any such person who has resided in any one county of this state for a period of six months shall have acquired legal settlement for support as provided in this chapter."

1938 *O.A.G.* 667, as it relates to §241.22, states:

"* * * that the words 'residing' and 'residence' as included in the sections under Senate File 375, Acts of the Forty-seventh General Assembly, do not mean legal settlement as set out in the Poor Act and that an applicant, in order to file for blind assistance from a county in the state, does not need to show legal settlement in said county in order to file from said county and in order that said county may be charged with one-fourth of administration and assistance granted under said Blind Act in said county. We further are of the opinion that if a recipient moves from one county to another, then the latter county is chargeable with the costs as set out in said act after six months of residence by said recipient in said latter county. To hold otherwise would be to defeat the very purpose of the act. Regardless of legal settlement, a blind person, because of his special physical condition, is entitled to care and protection under said act and make application from whatever county he resides within. The humane purpose of the legislature might even be defeated if legal settlement were held to be necessary."

1958 *O.A.G.* 329 states that Aid for the Blind provided in Chapter 241 does not include provision for emergencies in the nature of illness, accident, or other unforeseen circumstances and that, in such case, relief under Chapter 252 may be necessary. In the case which you have submitted, it has apparently been determined that such additional relief under Chapter 252 is necessary, so that your second question is as to the county that is responsible for providing such aid under Chapter 252. 1958 *O.A.G.* 329 specifically states that:

"As to blind persons, the language of the Act eliminated the restrictive provisions for acquiring legal settlement in the old law, substituting residence only for a period of six months. This was the evil to be remedied under the previous statute as it applies to blind persons. The manner by which persons acquire legal settlement is merely precedural and can be changed at any time by an act of the legislature."

In answer to your first question, it is not necessary that the recipient of Aid to the Blind acquire a legal settlement in Cass County, as the more than six months' residence in Cass County clearly brings the recipient within the provisions of §241.22 and the Aid to the Blind which recipient receives becomes a charge against Cass County. As to your second question 1958 *O.A.G.* 329, referred to above states that a blind person who has resided in any one county for a period of six months and thereafter applies to such county for aid under Chapter 252 of the Code acquires a legal settlement for the purposes of Chapter 252 and qualifies for aid to the poor, so that Cass County becomes responsible for supplementing aid to pay for care and keep in the nursing home of the recipient referred to in your letter.

21.8

WELFARE: Legal settlement, blind person, married woman – §§241.22, 252.16(4), 1962 Code. Married woman receiving aid to blind who lives apart from her husband may acquire residence to qualify under §241.22 and legal settlement to qualify under §252.16(4).

May 31, 1963

Mr. Grant E. McMartin
Shelby County Attorney
Box 150
Harlan, Iowa

Dear Mr. McMartin:

Your letter requests a formal opinion as to the following factual situation:

"Shelby County has a married woman whose husband still resides in Shelby County. This woman is blind and now resides in a nursing home in Pottawattamie County. This woman is receiving aid for the blind under Chapter 241 of the 1962 Code of Iowa. She has now been in Pottawattamie County in excess of six months. A dispute has arisen between Shelby County and Pottawattamie County with Shelby County contending that Section 241.22 is controlling as to who shall be responsible for the County's share of this care; however, Pottawattamie County has contended on their part that Section 252.16 controls inasmuch as this woman is married, with her husband still residing in Shelby County."

The factual situation in the submission from Cass County to which the Attorney General's letter of January 23, 1963 to Mr. James Van Ginkle, County Attorney, Cass County, responded, is similar to the factual situation given in your submission with the exception that your recipient of Aid to the Blind is a married woman whose husband has legal settlement in Shelby County, and your recipient has resided in a nursing home in Pottawattamie County for more than six months.

Section 252.16(4) of the Code is as follows:

"A married woman has the settlement of her husband, if he has one in this state; if not, *or if she lives apart from* or is abandoned by him, she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state." (Underscoring supplied)

As stated in 1938 *O.A.G.* 667:

"* * * that the words 'residing' and 'residence' as included in the sections under Senate File 375, Acts of the Forty-seventh General Assembly, do not mean legal settlement as set out in the Poor Act and that an applicant, in order to file for blind assistance from a county in the state, does not need to show legal settlement in said county in order to file from said county and in order that said county may be charged with the one-fourth of administration and assistance granted under said Blind Act in said county, we further are of the opinion that if a recipient moves from one county to another, then the latter county is chargeable with the costs as set out in said act after six months of residence by said recipient in said latter county. To hold otherwise would be to defeat the very purpose of the act. Regardless of legal settlement, a blind person, because of his special physical condition, is entitled to care and protection under said act and may make application from whatever county he resides within. The humane purpose of the legislature might even be defeated if legal settlement were held to be necessary."

In 1940 *O.A.G.* 189, in construing Section 5311(4), Code 1935, which is identical with the language used in Section 252.16(4) quoted above, the Attorney General in a letter dated April 20, 1939 to County Attorney, Cherokee County, said:

"In our opinion the italicized phrases answer the question propounded

by you. A married woman, if she lives apart from her husband, may acquire a settlement as if she were unmarried. * * * The statute seems very clear that a married woman, if she *lives apart from her husband,* may acquire a settlement as if she were unmarried. In the instant case she has lived apart from her husband. This seems to be all that is required in order for a married woman to obtain a legal settlement in the county of her residence."

The facts as you have submitted them show that the recipient, a married woman, is living apart from her husband, and that she has had actual residence for more than six months in Pottawattamie County. Therefore, in answer to your specific request, a married woman receiving aid to the blind who lives apart from her husband, may acquire residence to bring her within the provisions of Section 241.22, and legal settlement to bring her within the provisions of Chapter 252. Therefore, Pottawattamie County becomes responsible for furnishing aid to the blind, and for supplying aid to pay for care and keep to the recipient in the nursing home in Pottawattamie County.

21.9

WELFARE: Legal settlement, children of committed mother—§252.16, 1962 Code. Legal settlement of mother of four children committed to State Mental Health Institute remains same as at the time of her commitment until she is discharged as cured. Father of four children may acquire legal settlement by continuous residence after July 4, 1959.

August 28, 1963

Mr. Sewell E. Allen
Monona County Attorney
Onawa, Iowa

Dear Mr. Allen:

Your letter requests an opinion relative to the acquisition and determination of legal settlement pursuant to Sections 230.1 through 230.14 and Section 252.16 of the 1962 Code of Iowa. You state the factual situation as follows:

"A family of four children and their parents lived in Monona County from 1941 to April of 1952 when they moved to Ida County. On February 18, 1953, upon the order of the Ida County supervisors, a notice to depart was served upon them.

"On October 28, 1958, the Ida County Commission of Insanity committed the mother of said children to the Cherokee Mental Health Institute and determined and certified to the county auditor of Monona County that her legal settlement was in Monona County. The costs and expenses of her care, commitment and support have, since her commitment to the Cherokee hospital, been paid by Monona County as the county having her legal settlement.

"Said four children and their father have resided continuously in Ida County since April of 1952 and are now such residents.

"On May 1, 1963, the mother of said children was transferred, by the Cherokee hospital, to Schaller Rest Home in Buena Vista County. The costs and expenses of her care and support at said rest home are being paid by Monona County as the county of her legal settlement."

You have requested answers to the following five questions:

1. Where was the mother's legal settlement on October 14, 1958, when she was committed to the Cherokee Mental Health Institute?

2. Did her husband thereafter acquire legal settlement in Ida County,

under amended Section 252.16(1), of the 1962 Code of Iowa, effective July 4, 1959, by continuously residing in Ida County from 1952? It so, when?

3. If he acquired legal settlement in Ida County, after July 4, 1959, and she acquired none in Cherokee County, under amended Section 252.16(3) of the Code, effective July 4, 1961, did she have the legal settlement in Ida County of her husband?

4. Under Section 252.16(4) of the Code, has she been living apart from her husband in Cherokee County so as to acquire legal settlement as if she were unmarried?

5. Is her legal settlement now Ida, Monona, Cherokee, or Buena Vista County?

With reference to your first question, it must be assumed from your submission that after the notice to depart was served on February 18, 1953, no affidavit such as required by Section 252.16(1) of the statute then in effect to acquire legal settlement after a notice to depart had been served was ever filed prior to October 28, 1958. It must be further assumed from your submission that after the certification to the county auditor of Monona County the determination of the Board of Supervisors of Ida County was never disputed by Monona County. Section 252.16(1) of the Code of Iowa, 1950, provided:

> "Any person continuously residing in any one county of this state for a period of two years without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement con only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of two years from and after such time as such person shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county."

and this section remained substantially the same until the present Section 252.16 became effective on July 4, 1959.

As to your second question, the clear and unambiguous provisions of Section 252.16(1), Code of Iowa, 1962, are as follows:

> "Any person continuously residing in any county in this state for a period of one year acquires a settlement in that county."

In 1960 *O.A.G.* 276, it was stated to be the considered opinion of this office that:

> "(1) In the case of those persons who have been served with 'notice to depart' and who are residing in such county, such person cannot acquire legal settlement therein until they have resided continuously in said county for at least one year after July 4, 1959, irrespective of the time such person has lived in said county prior to July 4, 1959. (See Opinions, A.G., 1940, pp. 316, 605; A.G., 1938, p. 869)
>
> "(2) The fact that an individual has had 'Notice to Depart' prior to the enactment of Senate File 34, Acts of the 58th G.A., will not prevent such person from acquiring a legal settlement in that county after July 4, 1959."

The wording in Section 230.1, Code of Iowa, 1962, that

> "The residence of any person found mentally ill who is a patient of any state institution shall be that existing at the time of admission thereto."

is the same as that found in the 1931 Code and all subsequent Iowa Codes.

In *State v. Clay County,* 226 Iowa 885, at page 893, the Supreme Court of Iowa said:

> "However, since the addition to the statute of the provision that the residence of an insane inmate of a state institution shall be that existing at the time of admission, it is no longer necessary to follow the line of reasoning theretofore adopted. The statute does not except married women and they are within its scope the same as single persons and the heads of families. The same result is reached whether it be based upon the statute or upon the fiction that the destruction of the unity of the home takes from the husband the power to change the wife's residence or settlement by any affirmative act on his part."

In 1946 *O.A.G.* 121, it was said, citing *Scott County v. Polk County,* 61 Iowa 616, that:

> "The county liability for one's care at a state hospital is based upon legal settlement, and is the same as a legal settlement for a poor person under our statutory law."

and that:

> "The mere fact that one is in an asylum in another county does not change his residence during the period of commitment. *Scott County v. Frank C. Townsley,* 174 Iowa 192."

In an opinion to Mr. Donald E. Skiver, Osceola County Attorney, dated December 18, 1962, it was pointed out that subsection 3 of section 252.16, specifically precludes certain persons from acquiring legal settlement even though there has been residency for one year. Subsection 3 of Section 252.16, Code of Iowa, 1962, is as follows:

> "Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county."

1946 *O.A.G.* 121, referred to above, at page 122, said that:

> "It must, therefore be clear that while the inmate is on parole, the presumption of insanity remains. Upon full discharge, which is a discharge as cured, the presumption that sanity has returned is also clear. However, where the discharge is a dischage as not cured, there is no such presumption of the return of sanity for the contrary is apparent in the discharge."

The answers to your five questions are, therefore, as follsw:

1. The mother's legal settlement on October 14, 1958, was Monona County.

2. The husband acquired legal settlement in Ida County on July 4, 1960, by continuous residency in Ida County pursuant to the provisions of Section 252.16(1) that became effective July 4, 1959.

3 and 4. Assuming that the mother has never been discharged from her commitment as cured, her legal settlement remains the same as that at the time of commitment and cannot change until she has been discharged from the insanity commitment as cured.

5. Assuming again as set out in the answer to 3 and 4 above, that the mother has never been discharged as cured, the mother's present legal settlement is in Monona County.

21.10

WELFARE: Legal settlement, legitimate children—§252.16(5), 1962 Code. Legal settlement of legitimate minor children take legal settlement of mother where parents are divorced and mother is given care, custody and control of children.

August 29, 1963

Mr. E. L. Carroll
Union County Attorney
Creston, Iowa

Dear Mr. Carroll:

The letter from Mr. Harry Green Director of the Union County Department of Social Welfare, to you gives the following factual situation:

> "The Union County Welfare Board met on June 12, 1963. The matter of legal settlement concerning Effie Downey's children was discussed and a referral was requested regarding who would be responsible for payment of child care on behalf of the Downey children. Mrs. Downey is divorced from Raymond Downey. She was committed to Oakdale Sanatorium with her legal settlement in Union County. At the time of her commitment to Oakdale the children were in her home in Union County; Raymond Downey, the father of the children, lives in Newton, Iowa, and has legal settlement in Jasper County. Mr. Downey came to Creston voluntarily and received the children from Mrs. Downey voluntarily. He set up a home for the children in Jasper County.
>
> "Difficulty has arisen in the care of the children. They now are dependent and neglected and in need of foster care. The question is, are the children legal wards of Union County as they were awarded to the mother in the divorce action or are they wards of Jasper County as they are under control of the father, who has legal settlement in Jasper County."

and the Union County Welfare Board requests an Attorney General's Opinion as to the legal settlement of the children.

Section 252.16(5) of the Code of Iowa, 1962, provides as follows:

> "Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother."

and this is the identical wording contained in Section 3828.088(5) Code of Iowa, 1939. In *State ex rel Rankin v. Peisen,* 233 Iowa 865, decided in 1943, the Supreme Court of Iowa said, referring to Section 3828.088(5):

> "Where, as here, the family ties are broken and the father is deprived by court order of the right to custody and control of the children, the reason for the rule no longer exists. The settlement of the children is then not affected by a subsequent act of the father which might change his own settlement.
>
> "Our holding that a father who has been legally deprived of the custody of his children can no longer control their settlement finds support in decisions that the settlement of a wife who has been confined in an asylum or abandoned by her husband remains unchanged by any subsequent act of the husband. Breaking the family unity destroys the premise that the settlement of the father or husband controls that of members of the family who have been legally separated from him. (Cases cited)"

In 1942 O.A.G. 54, it was stated that while the general rule is that the legal settlement of a minor child follows his father, such settlement may be changed

by order of Court in divorce proceedings wherein the mother is granted the custody of the minor children so that the legal settlement of the minor children becomes that of the mother and not that of the natural father. In 1946 O.A.G. 5, again referring to subsection 5, it is stated:

"Since 'A' and 'B' are divorced, it is apparent that subsection 5, supra, does not apply. There is no other statutory provision with reference to minors. On July 3, 1943, the office of Attorney General held that where the parents of minor children are divorced and the mother is given the care, custody and control of the children, they take the legal settlement of the mother. Therefore, immediately after the divorce decree effective, the children took the legal settlement of 'B', which was Cass County.* * *

"Minor children are unable to obtain a settlement in their own right but obtain one only by derivation, which in this case, would be through the mother. See opinion of Attorney General dated July 3, 1943. Since 'B's' legal settlement is in Cass County, then it follows that thte legal settlement of the children is also in Cass County."

In answer to the specific question as to legal settlement, it is our opinion that the legal settlement of the minor children referred to in Mr. Green's letter of June 12, 1963, is in Union County.

21.11

WELFARE: Legal settlement, institutionalized—§252.16(3), 1962 Code. Any home or facility licensed pursuant to provisions of the Iowa Code is an "institution" within the meaning of Section 252.16(3), and time spent in such institution cannot be counted towards establishing the year of residence necessary for legal settlement.

April 2, 1963

Senator Lawrence Putney, Chairman
State Board of Social Welfare
LOCAL

Dear Senator Putney:

We have received your request for an opinion. The factual situation that you have submitted is:

"A woman who was not receiving old age assistance or county aid at the time in question, was residing with a daughter in Benton County. In 1958, the person in question was moved by her children to a licensed custodial home in Dubuque County and paid toward her care and keep. In the Spring of 1959, the woman applied for and received old age assistance to supplement her care while residing in the custodial home."

And your question is:

"Is a custodial home an institution within the meaning of Section 252.16, Subsection 3?"

In 1962 *O.A.G.* 505 we held that legal settlement is a status which is strictly statutory and that there are two requirements under Section 252.16; namely, (1) residency, and (2) for one year. In 1962 *O.A.G.* 504 it was pointed out that subsection (3) of Section 252.16 specifically precludes certain persons from acquiring legal settlement even though there had been residency for one year. Subsection (3) of Section 252.16 is as follows:

"Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state shall not acquire a settlement in said county unless such person before becoming

an inmate thereof or being supported thereby has a settlement in said county."

Webster's New International Dictionary (2d Ed.) defines "institution" as:

"An established society or corporation; an establishment, esp. one of a public character; a foundation; as, a literary or charitable institution."

In *Samuelson v. Horn,* 221 Iowa 208, the Supreme Court of Iowa said that such an institution "may be private in character, designed for profit for those comprising the organization, or public and charitable in its purpose." Bouvier's Law Dictionary, in referring to the word "institution", states that, "in legal parlance it implies foundation by law, by enactment or prescription."

Chapter 153C, Code of Iowa, 1962, provides for the licensing of nursing homes and custodial homes by the State Department of Health upon receipt of proper application and appropriate inspection. The State Department of Health also has authority under this Chapter to suspend or revoke a license issued to such homes. Other chapters of the Iowa Code provide for licensing various kinds of homes and facilities.

There can be little question, therefore, but that any home or similar facility that is licensed by governmental authority is based upon foundation by law. In answer to your specific question, it is, therefore, our considered opinion that any home or similar facility licensed pursuant to a specific provision of the Iowa Code is an institution within the meaning of the term as used in Section 252.16(3) and that the time a person spends in such an institution cannot be counted in determining the one year of residence necessary to establish legal settlement.

21.12

WELFARE: **Property, transfers to State**—§249.20, 1962 Code. State Board is entitled to take tax deed in derogation of rights of holder of legal title.

March 12, 1963

Mr. Carl Peterson
Marshall County Attorney
Marshalltown, Iowa

Dear Mr. Peterson:

This is to acknowledge receipt of your request for an opinion in which you state as follows:

"Mr. and Mrs. Gilbert A. Maxfield owned a piece of real estate as tenants in common. Mrs. Maxfield died in Sept. 1953. In Sept. 1957 Gilbert Maxfield gave a first mortage to the Evangelical hospital of Marshalltown, Iowa. One November 6, 1957 the State Board filed an old age assistance lien against Gilbert A. Maxfield or the Martha P. Maxfield estate. On December 5, 1960 the real estate was sold at scavenger sale. On October 4, 1961 the purchaser filed an affidavit of the Service of Notice of the Expiration of the Right of Redemption, which indicated that the proper notice had been given to all interested persons, including the Evangelical Hospital and the State Board of Social Welfare.

"On Dec. 30, 1961 the State Board took an Assignment of the Tax Sale Certificate and subsequently acquired a tax deed. The State Board is now selling the property and must give a merchantable title. The attorney for the purchaser is raising objection to the title of the State Board under the tax deed.

"The question raised by his objection is as follows:

Does Sec. 249.20 as amended permit the State Board to receive an assignment of the tax sale certificate and a tax deed, thus cutting out the rights of the former title holder, or is the State Board still in a position of a redemptioner, as was held in the case of *In Re Estate of Hoyt,* 246 Iowa 292?"

Section 249.20, Code 1962, provides in pertinent part as follows:

* * *

"The state board and state department shall be entitled to an assignment of the certificate of tax sale of said property upon tender to the holder or to the county auditor of the amount to which the holder of the tax sale certificate would be entitled in case of redemption and shall be entitled to receive a tax deed.

"* * *"

The statute was originally enacted by the Forty-sixth General Assembly in 1935. For a number of years, there was some confusion whether or not the State Board had the authority to take a tax deed which would be superior to all claims. The State Board assumed, because they were entitled to an assignment of a tax sale certificate as provided in Section 446.31, they could take a tax deed the same as any other holder of a tax sale certificate. This assumption, though not universally accepted by title examiners throughout the State, was in general acceptance by the majority of title examiners for a number of years.

In 1954 the Supreme Court of the State of Iowa, in the case of *In Re Estate of Hoyt,* 246 Iowa 292, 67 NW 2d 528, was called upon to interpret whether or not the assignment of the tax sale certificate to the State Board of Social Welfare also entitled them to a tax deed. The Court held in the Hoyt case on pages 296 and 297 of the Iowa Reports in pertinent part as follows:

"Few rules are more firmly settled in the law than that which holds a mortgagee or other lienholder may not acquire a tax title in derogation of the result of the holder of the legal title or of holders of superior liens.

* * *

"There is nothing in the facts before us in the instant case which takes it out of the general rule prohibiting the taking of a tax title by a lienholder in derogation of the rgihts of the owner of realty * * * If it was the intent of the legislature to abrogate the salutary rule which forbids a lienholder to acquire a tax title as against the lienor, we must assume *it would have said so.*" (Emphasis added)

In 1959, the Fifty-Eighth General Assembly amended the statute by adding the words, "and shall be entitled to receive a tax deed." The explanation which was attached to the bill is rather significant as the bill passed both Houses without a dissenting vote. The explanation was as follows:

"The law as it appears in Code 1958 provides that the state board and the state department shall be entitled to an assignment of the certificate of tax sale. The state board has operated under the assumption that the legislature intended that the certificate of tax sale be delivered to the county treasurer for a tax deed in accordance with the provisions of Chapters 446, 447 and 448. Otherwise the legislature would merely have given the state board the right to pay the taxes or make redemption from tax sale.

"Section 446.31, Code 1958, provides that a tax sale certificate is assignable and that all of the rights and title of the assignor shall vest in the assignee.

"The state board has acquired and holds many tax deeds since the inception of the program. Title examiners often question the right of the

state board to a tax deed because the law does not specifically make provision for disposition of the tax sale certificate after it is in the possession of the state board. This bill is proposed to clear up the authority of the board to take a tax deed and eliminate title problems."

It is our considered opinion that Section 249.20, Code 1962, subsequent to the amendment by the Fifty-eighth General Assembly, does permit the State Board to receive an assignment of a tax sale certificate and to take a tax deed in derogation of the rights of the holder of the legal title.

Therefore, we respectfully submit that the decision reached in the case of *In Re Estate of Hoyt,* supra, is a nullity, subsequent to the amendment, to the extent that the State Board cannot be considered in the position of a mere redeemer from tax sale.

21.13

WELFARE: Recovery for poor relief—§252.16, 1962 Code. County cannot require person to convey residence to county as a condition precedent to receiving assistance under Chapter 252, Code 1962.

August 26, 1963

Mr. Robert S. Bruner
Carroll County Attorney
126 East Fifth Street
Carroll, Iowa

Dear Mr. Bruner:

Your letter requests the opinion of this office as to the following situation:

"A, B, C and D are unmarried brothers and sisters who own and occupy a residence of the value of approximately $7,000.00. None qualify for Social Security or old age pension and all are feeble minded to the point where they cannot secure employment. There are no legally responsible relatives.

"Until recently, these people have been living off of their shares of a parent's estate. These shares and all other property excepting the home are exhausted and they are indebted for groceries, utilities and other necessities in the approximate of $2,000.00. All are under legal guardianship and the guardian proposes to secure Court authorization to convey their residence to the county, retaining in all of them or the last survivor thereof the life use and income therefrom. In return, the county would be required to assume and pay the $2,000.00 indebtedness and to thereafter furnish such support as they might require."

You further state that there is no question as to the right and duty of the county to furnish support, and that your specific question is whether the county may legally enter into the proposed agreement whereby it would assume and pay the $2,000.00 indebtedness which has already been incurred.

As you indicated in your submission, *In re Estate of Frentress,* 249 Iowa 783, at page 788, holds that Section 252.13, Code of Iowa, 1962, is the only statutory authority for recovery by a county of assistance furnished pursuant to Chapter 252. That opinion states:

"The county being a quasi corporation with its duties and powers being those specifically enumerated by statute or being necessarily implied therefrom, the care of the poor being purely a statutory obligation, and the only statutory provision existing whereby the county may reimburse itself for funds expended being section 252.13, supra, we are constained to hold that section 252.13 is exclusive * * *"

In 1956 *O.A.G.* 101, referring to 1938 *O.A.G.* 327, it was said:

"In that opinion, it was determined that a County Board of Supervisors could not demand an assignment of future wages from an applicant for poor relief as a condition precedent to the granting of such relief. It was therein pointed out that in the absence of specific statutory provision authorizing the county to recover for aid furnished to needy and poor persons '* * * that it would be against good morals and public policy for any county to withhold aid from its poor, indigent and needy people until they had assigned away a wage to be earned in the future which under the statute of Iowa, would be exempt to them.'"

and concluded by again referring to 1938 *O.A.G.* 327 as follows:

"As was pointed out in 1938 Report of Attorney General 327, 328, the legislature provided that the relief to be granted under Chapter 252 is a burden placed upon the county to be taken care of by taxation, and such relief becomes a burden upon all of the taxpayers of the county. Aid to the indigent, poor and needy under Chapter 252 is a charity. As in the prior opinion, we conclude that charities are not to be bartered or sold, and should not be withheld until the recipient or applicant makes, or is able to make an advance payment, whether an assignment of wages as in the prior opinion, or State assistance grants as in this instance."

It is our considered opinion that there is no statutory authority at present that would permit a county to enter into the proposed agreement as a condition precedent to furnishing support of the poor pursuant to Chapter 252 of the Code of Iowa, 1962.

21.14

WELFARE: Soldiers Relief, eligibility—§§250.1, 250.2, 1962 Code. Determination of eligibility for assistance from Soldiers and Sailors Relief Fund is made by Soldiers Relief Commission; benefits pursuant to Chapters 250 and 252, Code 1962, are not interchangeable.

July 12, 1963

Mr. Stanley R. Simpson
Boone County Attorney
Boone, Iowa

Dear Mr. Simpson:

Your letter states that your Juvenile Court has entered several Court Orders for the foster care of juveniles and that some of these juveniles are children of veterans. You state the question for determination as follows:

"Should the charges for the care of Veterans' children be made against the Soldiers and Sailors Relief Fund or the County Poor Fund?"

Section 250.1 of the Code of Iowa, 1962 provides as follows:

"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."

A similar provision was in Section 5385 of the Iowa Code of 1927, and referring to this section, it was said in 1930 *O.A.G.* 234 that

"It is the opinion of this Department that the word 'relief' as found in Section 5385 of the Code of 1927 was primarily intended to mean temporary relief from distress of soldiers, sailors and marines, nurses and their wives, widows and minor children, and that the same was not intended to act as a pension fund, but only to assist from financial distress that might be temporary."

Referring to the proposal for cooperation between the Iowa Emergency Relief Administration and the Soldiers Relief Commissions of the various counties under the plan proposed by the Iowa Emergency Relief Administration where that plan provided in part "the same procedure used to determine eligibility for relief and the amount of relief needed for other relief cases will be used for veterans". It was stated in 1936 *O.A.G.* 355 that

"* * * the rule of eligibility for relief granted by the Soldiers' Relief Commission under the provisions of Chapter 273 is not the same as the rule of eligibility prescribed by the poor laws of the state."

and that

"The question then is whether or not the Soldiers' Relief Commissions of the various counties can lawfully delegate their powers and duties to determine the persons entitled to relief and the amount to which each is entitled, to the Iowa Emergency Relief Administration or to a Director of Relief acting under the supervision of the administration. The Soldiers' Relief Commissions certainly cannot delegate this authority."

Referring to Section 5385, Code of Iowa, 1935, which was similar to Section 250.1 of the Code of Iowa, 1960, it was said in 1940 *O.A.G.* 206 that

"It was undoubtedly the purpose of the framers of this legislation to place the soldier and his dependents in a privileged class because of the service which such soldier has rendered to his country, and we cannot believe that it was the intention of the legislature that a soldier suffering from disease should seek relief from the overseer of the poor and thereby put him in the classification of a pauper."

As recently as 1960, it was recognized in 1960 *O.A.G.* 281 that

"It must be recognized that the determination of eligibility for assistance from the soldiers relief fund is made by the soldiers relief commission. * * * there is no right to relief from this office, and if it is the determination of the commission that the applicant is not eligible under their standards of need, the person, although he is an honorably discharged veteran, has no alternative but to apply to the overseer of the poor for poor relief."

Section 250.2 of the Code of Iowa provides relative to the Soldiers and Sailors Relief Fund that

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

It is, therefore, apparent that any charge against the Soldiers and Sailors Relief Fund must at least have the concurrence of the Soldiers Relief Commission. It is further evident that the Soldiers and Sailors Relief Fund are the County Poor Fund are not interchangeable funds. The specific answer to your submission is therefore, that only those charges for veterans' children that are approved by the Soldiers Relief Commission can be made against the Soldiers and Saliors Relief Fund.

21.15

Multi-county administration units,—§§234.6, 234.9, 234.12, 1962 Code. State Board of Social Welfare has no authority to abolish or combine statutory county boards of social welfare or administration units. (Snell to Smith, Board of Social Welfare, 8/17/64) #64-8-11

21.16

Payment, hospital services rendered in another county—§§252.24, 252.28, 347.16, 347.21, 1962 Code. When county board of supervisors enters into contract for care of indigents with hospital in another county, contract itself should contain schedule of fees if desired. If there is no schedule of fees, county shall pay fair and reasonable cost for the care. (Hard to Jones, Taylor Co. Atty., 8/19/63) #63-8-2

21.17

Reimbursement, county for expenses of birth, Welfare Department for ADC payments—§§239.17, 252.13, 675.4, 1962 Code. County can bring separate action for expenses incurred in birth of child, but such order may not be entered in paternity action itself; action for reimbursement of ADC available only if fraud or misrepresentation is present. (Hard to Crookham, Mahaska Co. Atty., 8/19/63) #63-8-1

21.18

Soldier's relief, bigamous child—§§595.18, 595.19, 598.23, 1962 Code. Child of veteran born bigamously becomes legitimate and entitled to Soldier's Relief where first marriage of veteran is dissolved and he is married by common low to mother of the child. (Strauss to Patterson, Bonus Bd., 6/27/63) #63-6-7.

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TEACHERS

TOWNSHIPS

TREASURER, COUNTY

VETERINARY

WELFARE

WORDS AND PHRASES

ZONING