State of Iowa

1966

THIRTY-SIXTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1966

LAWRENCE F. SCALISE
Attorney General

Published by
THE STATE OF IOWA
Des Moines
C4801

ATTORNEYS GENERAL OF IOWA

1853-1966

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1956
Norman A. Erbe	Boone	1956-1960
Evan Hultman	Black Hawk	1960-1964
Lawrence F. Scalise	Warren	1964-1966

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B. Sept. 23, 1876, Des Moines, Iowa, Ph.B., U. of Mich., L.L.B., S.U.I.; married, appt. Asst. Atty. Gen. 1944-57; appt. First Asst. 1958, 1959, 1961, 1963, 1965.

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NANCI LONG ..... Secretary
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KAY MURPHY ..... Secretary
KATHLEEN RYAN ..... Secretary
MARY STOLMEIR ..... Secretary

* As of December 31, 1966

LAWRENCE F. SCALISE

Attorney General

REPORT OF THE ATTORNEY GENERAL

The Honorable Harold E. Hughes
Governor of State of Iowa
State House
LOCAL

Dear Governor Hughes:

Section 17.6 of the 1966 Code of Iowa places upon the Attorney General the duty of furnishing to you a biennial report. It has been the practice of the Attorney General to publish the important opinions of his office in a bound report. In 1965 my office issued 235 official opinions and a somewhat lesser number during the year 1966.

The Sixty-first General Assembly passed more legislation than any previous legislature. Its session was the longest regular session in history. The legislature's large work product multiplied the demands on the Attorney General's office.

My office successfully defended before the Iowa Supreme Court the constitutionality of the Iowa Tort Claims Act and legislation which regulated hours for county courthouses. We were unsuccessful in defense of the Agricultural Land Tax Credit amendment.

Apportionment litigation during the biennium required considerable time. The matter was heard several times in the District Court. There were two Iowa District Court cases and two Iowa Supreme Court cases as well. A petition for Writ of Certiorari was filed in the Supreme Court of the United States, which United States refused to grant the Writ.

One area of considerable litigation concerns the State Conservation Commission. Cases are pending in district courts of the state involving real property rights, damages for the loss of caused by water pollution, property lines at West Okoboji Lake and Missouri River lands and waters. Considerable staff time has been devoted to the United States Supreme Court case of Nebraska v. Iowa, which is before a Special Master appointed by that Court.

You are no doubt aware of the many developments in the area of criminal law. My office is responsible for all criminal appeals in state courts. During the last two years we have handled 217 appeals to conclusion before the court. Of these, 170 were affirmed, 28 were dismissed and 19 were reversed. This office handled all habeas corpus cases in the federal district courts and all appeals from state district courts. Forty-six of these cases were tried before the Iowa Supreme Court and 26 in the U. S. District Court. Four of these were appealed to the United States Circuit Court and nine were

appealed to the United States Supreme Court. In addition to the criminal appeals work, this office has conducted many seminars and appeared throughout the state to instruct peace officers. In September of 1966, I conducted the first state-wide school of instruction for peace officers.

One of the fruitful areas of legislation of the Sixty-first General Assembly was in the field of education. The school problems have taken practically the full time of one of our staff members and we have issued a considerable number of opinions in this area.

The Tax Commission pressed its efforts to achieve state-wide property valuation equalization. As a result, staff members spent considerable time in court. The most significant piece of litigation involved the assessment of railroad real property which was challenged by the Chicago and North Western Railroad Company. In an opinion rendered on October 19, 1966, the Polk County District Court rejected contentions raised by North Western and upheld the assessments in issue. The District Court's decision is presently pending appeal before the Iowa Supreme Court. If the lower court's decision is upheld, it will have the effect of saving taxpayers several millions of dollars. The Attorney General wishes to express his appreciation to special counsel, Marion Hirschburg and Don Smith, for the high quality of the services they rendered to the counties and to the State of Iowa in this litigation.

The Highway Commission staff has been increased. Members of the Attorney General's staff assigned to the Highway Commission have tried a considerable number of cases with excellent results.

During the fall of 1966 we embarked on an intensive campaign in handling drivers' license suspension appeals for the Department of Public Safety. Recently fifty cases were heard and tried in one week.

This office commenced anti-trust prosecutions on behalf of the State Highway Commission and governmental instrumentalities of the state in the field of asphalt purchases and salt purchases. We obtained settlements in the salt cases in the amount of $164,500 which benefitted state agencies and municipalities.

The Sixty-first General Assembly, at the request of this office, passed the Consumer Protection Act. We assigned two men to administer this act. We have handled numerous complaints. We initiated legal action in Black Hawk County in regard to an insurance fraud. We held widely-publicized hearings in regard to automobile safety which received national attention and which we believe assisted greatly in the ultimate passage of Federal legislation in this area.

The State Board of Social Welfare was represented by this office in actions involving statutory liens and claims connected with the property of decreased recipients of public assistance benefits. These actions included 11 foreclosure actions, 27 partition actions, six quiet title actions, 25 objections to final report of fiduciary, nine petitions to require fiduciary to file final reports, three actions involving priority of liens and claims, 10 hearings on claims in deceased recipients' estates, two petitions for removal of fiduciary, one petition to set aside deed, one petition to require fiduciary to file bond, one petition to require fiduciary to file inventory, one resistance to motion, one action involving conveyance of real estate, one motion to consolidate actions, one answer to application for order approving sale and declaratory judgment as to distribution of proceeds of sale. In addition, this office has participated in six appeals from the decision of the State Board of Social Welfare to the District Courts, and has represented the State Board of Social Welfare in four appeals to the Supreme Court of Iowa. Six hundred thirty-seven formal answers to applications to sell real estate of deceased recipients of public assistance benefits were filed and our Special Assistant Attorney General assigned to the Board of Social Welfare assisted in cases involving Uniform Reciprocal Enforcement of Support in cooperation with all of the county attorneys of Iowa.

My office aggressively assisted the Iowa Natural Resources Council in implementing its authority in respect to flood control by instituting a number of actions to cause compliance with the statutes. In *Benbow v. Iowa,* Natural Resources Council, the Decatur County District Court upheld the Council's acts under Chapter 455A of the Code in an action defended by my staff.

The Sixty-first General Assembly enacted what is commonly known as the State Tort Claims Act, which abrogated the state's sovereign immunity from suit and liability for the negligent actions of its agents, officers and employees. After its enactment in March 1965, suit was filed in May of 1965, challenging the constitutionality of the Tort Claims Act. In November of 1966 the case was argued before the Iowa Supreme Court after the act was upheld by the Polk County District Court, and in *J. Wesley Graham v. Lorne Worthington, et al.* the Supreme Court held the Tort Claims Act constitutional. Processing and payment of tort claims was forestalled from the date on which the suit was filed until the Supreme Court handed down its decision November 15, 1966. At present, nineteen suits against the state are on file in the district courts.

In November of 1965, the Supreme Court handed down its decision in *Consolidated Freightways Corporation of Delaware v. Nicholas,* ruling that the Reciprocity Board had in-

correctly construed the statute on the determination of license fees and had illegally collected excessive fees. As the Polk County District Court had done on the trial of this case, the Supreme Court ordered the Reciprocity Board to refund $27,027 to the trucking firm. Subsequent to this decision 11 cases were filed in district courts in which trucking firms seek refunds for excessive fees based on the *Consolidated Freightways* case. In one of these cases, the Polk County District Court upheld the special appearance filed by this office, and this ruling of the Court is now on appeal to the Iowa Supreme Court. Action on the other refund suits has been forestalled pending the outcome of this appeal. In July 1965, some 13 trucking firms filed suit in the Polk County District Court asking said court to decree Chapter 326, as amended by the Sixty-first General Assembly, unconstitutional. Trial is still pending in Polk County District Court due to the fact that the court has been required to dispose of several motions filed by both parties to this law suit and the court's consideration of these motions has consumed a considerable period of time. (The court's rulings on one of the aforesaid motions has been appealed to the Iowa Supreme Court.)

In the following pages of this report I have directed that the important opinions of the office during the past two years be published in full. I have also included headnotes of other opinions. All this has been placed according to subject matter.

Respectfully submitted,
LAWRENCE F. SCALISE
Attorney General
State of Iowa

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1966

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* As of December 31, 1966

LAWRENCE F. SCALISE

Attorney General

THE
OFFICIAL OPINIONS
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1965-1966

CONTENTS

CHAPTER 1

BANKS AND BANKING

STAFF OPINIONS

LETTER OPINIONS

1.1

BANKS AND BANKING: Legal Depositories; State Sinking Fund— §§453.1, as amended, 454.1, 534.2, 534.15, 1962 Code of Iowa. A savings and loan association is not a "bank" engaged in a general banking business under §453.1, as amended, and is not a proper depository under that section. A savings and loan association is not a depository secured by the State Sinking Fund authorized by §454.1.

October 28, 1965

Mr. Paul Franzenburg
Treasurer of State
State House
LOCAL

Dear Mr. Franzenburg:

You have submitted to this office a question as to whether funds deposited by a county, city, town or school district in a savings and loan association would meet the requirements of Section 453.1 of the 1962 Code of Iowa, as amended by Chapter 278, Section 1, Acts of the 60th General Assembly. This section reads as follows:

> "The treasurer of state, and of each county, city, town and school corporation, and each township clerk and each county recorder, auditor, sheriff, each clerk and bailiff of the municipal court, and clerk of the district court, and each secretary of a school board shall deposit all funds in their hands in such banks as are first approved by the executive council, board of supervisors, city or town council, board of school directors, or township trustees, respectively. However, any county, city, town or school corporation may invest funds not immediately needed for current operating expenses in time certificates of deposit or savings accounts in banks approved as depositories as in this chapter provided. This authority shall be in addition to that granted by sections 453.9 and 453.10. The treasurer of state shall invest or deposit as provided in section 452.10 any of the public funds not currently needed for operating expenses. The list of public depositories and the amounts severally deposited therein shall be in a matter of public record. *The term 'bank' shall embrace any corporation, firm, or individual engaged in a general banking business.*" (Emphasis supplied)

The question you present is whether a savings and loan association in the state of Iowa would be considered to be a "bank" engaged in a general banking business. The Supreme Court of the United States in *Merchandise National Bank v. City of New York*, 121 U. S. 138, 7 S. Ct. 826, 30 L.Ed. 895 (1886), at page 156 of the U. S. Reports made the following statement in regard to what the banking business was considered to be at that time:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital'."

That case held that a trust company was not a bank in the commercial sense of the word.

Inasmuch as banks and savings and loan associations are concerned with the public interest, they are subject to legislative control. An Iowa savings and loan association is subject to Chapter 534 of the 1962 Code of Iowa and the definitions therein. Section 534.2 defines "association" as follows:

"1. 'Association' shall mean a corporation organized under the provisions of this chapter to promote thrift and home ownership by providing for its members a cooperative and mutual plan for saving money and investing money so saved in home loans to its members. These 'associations' shall be known as building and loan loan associations or savings and loan associations or savings associations. 'Foreign companies' shall be any other savings and loan association or building and loan association or organization, incorporated for the purposes specified herein under the laws of another state or country."

Another section under the Iowa savings and loan chapter which applies and is most persuasive is Section 534.15 which states as follows:

"It shall be unlawful for any association to receive investments of money from members without issuing evidence of savings liability for the same, or to transact a banking business."

This is a clear expression of the Iowa Legislature wherein they direct savings and loan associations not to transact banking business.

We find various provisions in the 1962 Code of Iowa in regard to the functions of banks as contemplated in that Code. Banking is the topic of Title XXI in the 1962 Code of Iowa which includes Chapters 524 through 533B. The provisions of the type of functions that the Iowa Code intends to regulate in these chapters are pointed out by the following sections:

"526.2 Banking powers. Savings banks may receive on deposit the savings and funds of others, preserve and invest the same, pay interest or dividends thereon, and transact the usual business of such institutions, but shall not have power to issue bank notes, bills, or other evidences of debt for circulation as money."

"527.2 Other use of name prohibited. No partnership, individual, or unincorporated association engaged in buying or selling exchange, receiving deposits, discounting notes and bills, or other banking business shall incorporate or embrace the word 'state' in its name, but this section shall not apply to associations organized under the laws of the United States."

"530.2 General powers. Any banking institution now or hereafter organized under the laws of this state is hereby empowered, on the authority of its board of directors, or a majority thereof, with the approval of the superintendent of banking, to enter into

such contracts, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights, or privileges, which may at any time be available or inure to banking institutions or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section 8 of the federal 'Banking Act of 1933' (sec. 12B of the Federal Reserve Act, as amended.) (48 Stat. L. ch. 89) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or of any other Act or resolution of Congress to aid, regulate, or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds, or other types of securities of the Federal Deposit Insurance Corporation."

The reference books generally point out that building and loan associations are much different than banks. The following quote is from 13 American Jurisprudence 2d, Building and Loan Associations, Section 3 at page 145:

"Building and loan associations are not ordinarily 'banks' or 'banking institutions,' and they do not fall within the class of 'savings banks' or 'institutions for savings'."

We also find the following language in Volume 1, Zollman, Banks & Banking, Section 66, Pages 43 and 44:

"A building and loan association in its purpose differs radically from a bank. The bank is a financial institution; the building and loan association has other primary purposes. The depositors of the bank are its creditors. Those who furnish the necessary money for a building and loan association are members. Banks do business generally with the public. Building and loan associations deal with their members only. Banks loan money. Building and loan associations improve property. The administrative expenses of banks are paid from their earnings. Those of building and loan associations are paid from dues. The receipt of monthly installments from members therefor is not doing a banking business."

The Attorney General has in the past ruled that "town and city funds may be deposited in either a private bank, or state or national bank." 26 OAG 94. Also, 62 OAG 12, the Attorney General indicated that "an office established by any banking institution is not a bank" and when a depository does not meet the requirements of Section 453.1, it is not eligible to be designated as a depository within the State Sinking Fund as provided by Chapter 454.

It is my opinion that a savings and loan association in the state of Iowa does not meet the requirements of Section 453.1 and cannot be considered to be a bank or an entity engaged in the general banking business and is not a depository secured by the State Sinking Fund. Whenever your office or the office of the State Auditor notices this situation, they should advise the official that such deposits are contrary to law and are unprotected by the State Sinking Fund.

1.2

BANKS AND BANKING: Supervision of Credit Unions—Chapter 533, Iowa Code of 1962. The Iowa Department of Banking has no jurisdiction over Credit Union organized under Iowa law which has moved its place of business out of the State.

April 6, 1965

Mr. D. C. Bell, Consultant
Department of Banking
500 Central National Building
Des Moines, Iowa 50309

Dear Sir:

In a recent letter you asked the opinion of this office on the question raised by the following facts:

> "The Rock Island Arsenal Employees Credit Union was organized in 1935 and chartered by the State of Iowa, with offices at that time in Davenport, Iowa. It serves both civilian employees and military personnel at the arsenal, which is located on an island in the Mississippi River within the State of Illinois. The Credit Union is now 'physically located' in Illinois; that is, its place of business was moved to Illinois subsequent to its organization in Iowa. However, the Iowa Banking Department has continued to exercise jurisdiction over the Credit Union as provided in Chapter 533, Iowa Code of 1962. The Credit Union itself sees no reason for changing its Charter or submitting to another jurisdiction, but asks: Must it do so?"

"Jurisdiction," as applied to a state, signifies the authority to declare and enforce laws as well as the territory within which such authority and power may be exercised. *Sanders v. St. Louis & N. O. Anchor Line*, 10 S.W. 595, 597, 97 Mo. 26, 3 L.R.A. 390. Each state is sovereign, and generally has exclusive jurisdiction within its borders. *Lynch v. N. P. Severin*, 281 Mass. 454, 183 N.E. 834, 86 ALR 285. Conversely, the jurisdiction of a state is restricted to its own territorial limits and does not extend beyond its boundaries. 81 C.J.S. 860 and cases cited.

These principles are embraced in the statutory law of Iowa. Sec. 1.2, Code of Iowa, 1962, declares that "The state possesses sovereignty coextensive with the boundaries referred to in section 1.1 . . ."

It is clear that the Iowa Banking Department, an agency of the State of Iowa, has no authority to regulate a credit union which no longer has a place of business within Iowa and does not carry on business within the State. Whether the Arsenal Credit Union should be chartered by the federal government or by the State of Illinois depends on whether the federal government's jurisdiction over the arsenal is exclusive or, for some purposes, concurrent with that of the State of Illinois. This question must be answered in Illinois.

It is my opinion that the Iowa Banking Department has no authority to audit the accounts of or otherwise regulate the Arsenal Credit Union.

1.3

BANKS AND BANKING: Interest on savings accounts or time deposits—§528.11, 1962 Code of Iowa. No banking institution may pay more than 4% interest on savings accounts or time deposits. If a bank disregards this prohibition, §528.11 requires that if any savings accounts or time deposits bear more than 4% interest, such accounts are still deposits but must be reported to the Superintendent of Banking as "borrowed money."

February 2, 1966

Mr. Paul Franzenburg
State Treasurer
State House
LOCAL

Dear Mr. Franzenburg:

In regard to your request for an opinion on the ambiguity of Section 528.11 of the 1962 Code of Iowa, as amended, please be advised as follows:

Section 528.11 provides:

"528.11. Interest on time deposits. No banking institution or trust company under the jurisdiction of the banking department shall pay interest on savings accounts or certificates of deposit or on any other time deposit at a rate greater than four percent per annum, payable semiannually. No interest in any event shall be paid upon such time deposits for any period less than three months. Any savings accounts or time deposits bearing interest at a rate greater than four percent per annum shall be considered borrowed money and shall be so reported to the superintendent of banking."

As you can see, the first sentence of the Code section is a limitation on banking institutions and trust companies. They may not "pay interest on savings accounts or certificates of deposit or on any other time deposit at a rate greater than four percent per annum. . . ."

However, the last sentence seems to indicate that more than four percent interest can be paid on savings accounts and *time deposits* so long as it is reported to the Superintendent of Banking as borrowed money.

We must construe an Act of the legislature so as to give meaning to the entire statute. *City of Ottumwa v. Taylor*, 251 Iowa 618, 102 N.W. 2d 376 (1960). Following this rule of statutory construction, we are of the opinion that the last sentence of Section 528.11 is a penalty section, for any other construction would render the language of the statute into absurdity and ambiguity.

Consequently, we are of the opinion that:

(a) No banking institution or trust company under the jurisdiction of the banking department may pay more than four percent interest per annum on savings accounts, certificates of deposit, or on any other time deposit.

However,

(b) If any banking institution or trust company disregards this prohibition and in fact does pay more than four percent interest per annum on the *savings accounts* or *time deposits*, they must report it to the Superintendent of Banking as borrowed money.

(c) Insofar as the related question of whether the funds bearing interest greater than four percent per annum are deposits, please be advised that Section 528.11, 1962 Code of Iowa, as amended, indicates that these funds are deposits.

1.4

Out of state banks doing fiduciary business in the State of Iowa—§§496A.103, 496A.104, 532.1, 532.5, 633.63, and 633.64, 1966 Code of Iowa. The Iowa law does not prohibit an Illinois state or national bank from qualifying as a fiduciary under §633.63, 1966 Code of Iowa, provided that such state or national bank procures a certificate of authority as required by Chapter 496A, 1966 Code of Iowa. (McCarthy to Cameron, Secretary of State, 8/10/66) #66-8-7

CHAPTER 2

CITIES AND TOWNS

STAFF OPINIONS

LETTER OPINIONS

2.1

CITIES AND TOWNS: Municipal Corporation—Conflict of Interest—Members of City Planning Commissions, established under provisions of Chapter 373, Code of 1962, are officers and subject to the conflict of interest prohibitions of Chapter 368A.22, Code of Iowa, 1962.

February 15, 1965

Honorable Jake B. Mincks
The Senate
LOCAL

Dear Senator Mincks:

This is in response to your request for an opinion submitted to this office January 6, 1965, similar to a request submitted by Representative Gene W. Glenn, January 12, 1965. The following is presented:

"Is a member of a city plan commission, established as provided in Chapter 373 of the Code of Iowa, prohibited from entering into contracts with the city which would create conflicts between the member's public duty and private interest?"

Chapter 368A.22 of the 1962 Code of Iowa as amended, states:

"No officer, including members of the city council shall be interested, directly or indirectly, in any contract or job for work or

material or the profits thereof or services to be furnished or performed for the city or town. Nothing in this section shall prohibit the fulfillment of any contract lawfully entered into by the city or town and the contracting party before the party's election to the council, but such contract may not be amended or altered during such party's term of office."

We would be remiss if we did not remind you Senator, of the hardship that this section of our law will cause many smaller communities of our State. Often times, those who are most qualified to serve on our city councils, and commissions are prohibited by this section for it means that those who do serve must have, generally, no dealings with a city or town and thus those who do, many times serve their cities and towns at a financial sacrifice, or at the risk of criticism whether justified or not. But this is an age old problem. Our Federal servants usually divest themselves of holdings in a company that does business with the Government, and for those who do not, at times, criticism is levelled. But we do not pass upon the wisdom of this law. What we must determine is the question of whether a member of a City Plan Commission is an "officer" as contemplated by 368A.22.

I am of the opinion that they are officers. Chapter 373 of the 1962 Code of Iowa as amended so defines them by implication.

373.1 states:

"The council of each city and town may by ordinance provide for the establishment of a city plan commission for such municipality, consisting of not less than seven members, who shall be citizens of such municipality and who shall be qualified by knowledge or experience to act in matters pertaining to development of a city plan and who shall not hold any elective office in the municipal government and who shall be appointed by the mayor, subject to the approval of the council.

Whenever the city council provides for a city plan commission, it may, by ordinance, abolish it and the commission shall stand abolished sixty days from the date of the ordinance and the powers and duties of the commission shall revert to the city council."

and 373.2 provides as follows:

"The term *of office* of said members shall be five years, except that the members first named *shall hold office* for such terms, not exceeding five years, that the terms of not more than one-third of the membership shall expire in any one year."

We are mindful that members of City Plan Commissions serve without salary, Chapter 373.4, 1962 Code of Iowa. But this does not prevent their being defined as "officers." An officer has the right to exercise generally, and in all proper cases, the functions of a public trust or employment, to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for a lawful tenure. The duty of acting for and in behalf of a public body, with or without salary, constitutes an office. *Marxer v. City of Saginaw*, 270 Mich. 256, 258 N.W. 627.

The purpose of the Chapter creating these commissions is to provide the city councils with advice and recommendations on municipal improvements. Chapters 373.9, 373.10, 373.12, 373.13, and 373.20. In spite of the fact that the Commission's findings are primarily advisory (except see Chapter 373.20), the council is entitled to recommendations that are both informed and disinterested. However, you should be aware of an exception contained in the law with reference to contracts between an officer and a city.

Chapter 240, Acts of the 60th General Assembly, states:

"Nothing in this section (referring to 368A.22) shall prohibit the fulfillment of any contract lawfully entered into by the city or town and the contracting party before the party's election to the council, but such contract may not be amended or altered during such party's term of office."

You should also be aware that the common law rule renders contracts void, however decent and reasonable, that create in a public servant a conflict between a public duty and his private interest. *James v. City of Hamburg, et al,* 174 Iowa 301, 156 N.W. 394.

With reference to statutory construction, insofar as the meaning of the word "officer" is concerned, it is said in Section 4702, Sutherland Statutory Construction, 3rd Edition, that:

"It is not allowable to interpret what has no need of interpretation.

There is no safer nor better settled canon or interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses.

These rules are, of course, appropriate when the words of a statute are plainly expressive of an intent not rendered dubious by the context of the act. The court in interpreting the act must declare it according to the words of the act for they are in fact expressive of the sense and intent of the act and any other interpretation."

The members of such planning commission, therefore, being officers are bound by the provisions of Section 368A.22, Code of 1962, quoted above, and, therefore, in answer to your query, members of the City Planning Commission are prohibited by reason of statutory conflict of interest from entering into contracts with the city.

2.2

CITIES AND TOWNS: Daylight Savings Time—Art. VII, Sec. 5, Art. X, Sec. 1 of the Constitution of the State of Iowa and Sec. 6.2 of the 1962 Code. Daylight Saving time, not being a constitutional question of public measure requiring submission to the voters of Iowa for ratification, it is not possible for the people of Iowa to have the final privilege of ratifying by election any law passed by the General Assembly pertaining to it.

March 12, 1965

Hon. Charles F. Strothman
Henry County Representative
State House
LOCAL

Dear Mr. Strothman:

You have submitted the following question for an opinion from this office:

"I request an opinion as to whether it is possible and constitutional for the people of Iowa to have the final privilege of ratifying by election any law passed by the General Assembly pertaining to the establishment of daylight saving time,"

A review of the sections indexed in the Code of Iowa Index 1962 under "Elections-Questions submitted to voters" and "Elections-Special Elections" has been made by this writer. No statutory authority has been found to permit the submission of this to the voters of the State for ratification.

Chapter 6 of the 1962 Code of Iowa, entitled "Constitutional Amendments And Public Measures," specifically §6.2 recites:

> "6.2 Publication of proposed public measures. Whenever any public measure has passed the general assembly *which under the constitution must be published and submitted to a vote of the entire people of the state,* the secretary of state shall cause the same to be published, once each month, in at least one newspaper of general circulation in each county in the state, for the time required by the constitution." (Emphasis supplied)

In a recent case concerning the Korean Bonus annotated in the Iowa Code Annotated under this section, the Supreme Court of Iowa stated in part:

> "The legislature is supreme in the field of legislation in the absence of clear *constitutional prohibition* with all reasonable presumptions being in favor thereof;" *Faber v. Loveless,* (1958) 249 Iowa 593, 597, 88 N.W. 2d, 112. (Emphasis supplied)

Measure has been defined in 82 C.J.S. 18, Sec. 1 of the topic entitled "statutes" note 26 as a legislative enactment proposed or adopted.

It is clear that the proposed legislation concerning daylight saving time is not a "public measure" requiring its submission to the people of Iowa under Sec. 6.2 of the 1962 Code of Iowa. The above cited Faber case presented a "public measure" requiring the submission of the question to the people under Article VII of the Constitution of the State of Iowa entitled "State Debts," specifically Section 5, thereof:

> "Contracting debt—submission to the people. Sec. 5. Except the debts herein before specified in this article, no debt shall be hereafter contracted by, or on behalf of this State, unless such debt shall be authorized by some law for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax, sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal of such debt, within twenty years from the time of the contracting thereof; but no such law shall take effect until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; and such law shall be published in at least one newspaper in each County, if one is published therein, throughout the State, for three months preceding the election at which it is submitted to the people."

It is noteworthy that the Code Editor after this section of the Constitution (Art. VII, Sec. 5), specifically refers to the statutory provisions Sec. 6.2, 6.4. Article X, Sec. 1 provides for the submission of a constitutional amendment to the voters for ratification reads as follows:

> "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."

A careful review of the Constitution has also been made, and it would appear that there is no other constitutional provision covering the situation you raised.

Your question specifically concerns the possibility and constitutionality of the people of Iowa to have the final privilege of ratifying by election any law pertaining to the enactment of daylight saving time. It was said in *Santo v. State* 2 Iowa 165, 2 Clark 63, Am. Dec. 487, affirmed, 8 Iowa, Cole Ed., 563, (1855):

"The General Assembly cannot legally submit to the people the proposition whether an act shall become a law or not."

It was also stated in the *Santo* case that the people have no power in their primary or individual capacity, to make laws.

This principle was reiterated in *Eckerson v. City of Des Moines*, 137 Iowa 452, 478, (1908) wherein the Court stated:

"We may concede that the lawmaking body of the State *is not authorized to submit to a popular vote of the State the question whether or not an act proposed by it shall become a law.*" (Emphasis supplied)

For the foregoing reasons then, it would be this writer's opinion that the people of Iowa do not have the final privilege of ratification of any law passed by the General Assembly pertaining to the establishment of daylight saving time.

2.3

CITIES AND TOWNS: County and County Officers—Daylight Savings Time Legislation—Art. III, Sec. 1, Iowa Constitution; §63.10, 332.1, 332.16, 368.1 and 368.2, 1962 Code of Iowa. Cities and counties have no power to act in contravention of a constitutionally proper statutory enactment of the legislature establishing time for the State of Iowa on a uniform basis. Any existing ordinances in conflict with such a statute are of no force and effect. Any attempt to act contrary to such legislation is void and illegal. The act does not need a penalty clause to be valid or enforceable.

April 21, 1965

Honorable Charles P. Miller
House of Representatives
State House
LOCAL

Dear Mr. Miller:

You have submitted the following questions in regard to Senate File 157, an Act of the 61st General Assembly which has been recently signed into law:

"Question 1. Will local governmental subdivisions be allowed to establish their own time standards prior to or following the effective dates of the Daylight Savings Time as outlined in S.F. 157?

"Question 2. Can City Councils in sessions order municipal time changes which would contravene action by the state legislature?

"Question 3. If this is law, does it need a penalty clause for enforcement?"

In order to answer the first two questions that you have submitted, it is necessary to consider the power of the legislature of the state of Iowa and the powers of cities and counties.

I.

The power of the legislature is derived in part from the Constitution at Article III, Section 1, which states as follows:

"The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives: and the style of every law shall be, 'Be it enacted by the General Assembly of the State of Iowa'."

It is generally conceded that the legislature has the power to enact any kind of legislation it sees fit, provided it is not clearly and plainly prohibited by the State or Federal Constitution. *Carleton v. Grimes*, 237 Iowa 912, 23 N.W. 2d 883 (1946). An early statement of the Iowa Supreme Court in the case of *Boyd v. Ellis*, 11 Iowa 97 (1860), is as follows:

"While Congress possesses only such powers as are specifically granted or necessary to carry out a unit power, the legislature possesses sovereign legislative power over all subjects, except as prohibited in the State Constitution."

Recent language of the Iowa Supreme Court in this regard is found in 1961 Iowa case of *Bulova Watch Co. v. Robinson Wholesale Co.*, 252 Iowa 740, 108 N.W. 2d 365 (1961), to the effect that the legislature has the power to enact any kind of legislation it sees fit, if not prohibited by some provision of State or Federal Constitution.

Therefore, it is clear that the supreme legislative power of the State of Iowa is with the state legislature.

It is also clear that the statute in question is constitutional as its purpose is not prohibited by the Constitution and it is a proper exercise of police power. In the case of *Jones v. The German Insurance Company*, 110 Iowa 75, 81 N.W. 188 (1899), the Iowa Supreme Court was faced with the problem as to whether the time involved in a contract was railroad time, true solar time, mean solar time, sun time, or central standard time. Another reason that Senate File 157 is constitutional is that it is within the grant of legislative power as indicated above.

II.

The legislative powers of the cities must next be considered. Abbott in his text, "Municipal Corporations" in Volume 1, page 184, states that:

"A public corporation is an agency of government created by the sovereign when such action seems most conducive to the public good, for the purpose of aiding in the exercise and administration of governmental functions. The corporation, either public or private, is a creature of limited powers. Such powers as it possesses are to be found in the charter of its creation, which has been held to

include not only the acts of incorporation, whether a special or general law, but constitutional provisions and also decisions of the highest court construing and applying these acts and provisions."

The main statutes in regard to powers of cities are Sections 368.1 and 368.2, as amended by Chapter 235 of the Acts of the 60th General Assembly. They read as follows:

"368.1 Applicability. This chapter is applicable to all municipal corporations and to all forms of government thereof.

"368.2 Bodies corporate—name—statutory powers—rule of construction. Cities and towns are bodies politic and corporate, under such name and style as may be selected at the time of their organization, with the authority vested in the mayor and a common council, together with such officers as are in this title mentioned or may be created under its authority, and shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, *not inconsistent with the statutes of the state,* for the protection of their property and inhabitants, and the preservation of peace and good order therein, and they may sue and be sued, contract and be contracted with, acquire, lease, and hold real and personal property, and have a common seal.

"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 rule 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 or procedure for exercising a conferred power shall not prevent its exercise. Notwithstanding 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. Cities and towns shall not have power to license construction contractors." (Emphasis supplied)

Chapter 235 of the Acts of the 60th General Assembly adds the second paragraph to Section 368.2. The constitutionality of this section was at issue in the case of *Guy G. Richardson v. City of Jefferson, Iowa,* which was decided by the Iowa Supreme Court on April 6, 1965. The Supreme Court held as follows:

"Our holding is Chapter 265 is a rule of construction and as such is not unconstitutional. It does not grant power as contended by defendant city."

The effect of the recent Supreme Court case was to change the rule of construction of municipal powers. However, this case does not effect the plain language of Section 368.2 which states that cities are pos-

sessed only of such powers which are "not inconsistent with the statutes of the state." Nor does this recent Supreme Court ruling change the doctrine as indicated in the case of *Rogers v. City of Burlington*, 70 U.S. 654, 3 Wall. 654, 18 L.Ed. 79 (1865), where it was stated that the powers of a municipal corporation in absence of constitution prohibition, may be enlarged or diminished, extended or curtailed, or withdrawn altogether as the legislature may determine; and that the powers of municipal corporations are at all times subject to the control of the legislature.

III.

Counties are generally considered by textbook writers to be quasi corporations as branches of state government. The difference between a county and municipal corporation is that generally a county is set down according to a geographical area irregardless of the people's wishes and a municipal corporation is usually sought by the people within a given area and they are given greater latitude in their self government. Section 332.1 of the 1962 Code of Iowa sets out the nature of a county as follows:

> "Body corporate. Each county is a body corporate for civil and political purposes, may sue and be sued, must have a seal, may acquire and hold property, make all contracts necessary for the control, management, and improvement or disposition thereof, and do such other acts and exercise such other powers as are authorized by law."

The nature of a county is set out by the Iowa Supreme Court in the case of Henry Frentress Estate, 249 Iowa 783, 89 N.W. 2d 367 (1958) at page 786 of the Iowa Reports as follows:

> "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."

It is also to be noted that the language in the case of *McSurely v. McGrew* 140 Iowa 163, 118 N.W. 2d 415 (1908), at page 170, is as follows:

> "That the Legislature has plenary power over all municipal corporations and their officers is too well settled to admit argument. * * * But the municipality itself cannot complain of any act of the Legislature diminishing its revenues, amending its charter, or even dissolving it entirely. * * *"

After analyzing the powers of the state legislature, cities and counties, we then must consider the legislation at hand. The first two sections of Senate File 157 are as follows:

> "Section 1. The standard time in this state shall be the solar time of the ninetieth (90th) meridian of longitude west of Greenwich, commonly known as central standard time, except from two (2) o'clock ante meridiem of Memorial Day in every year and until two (2) o'clock ante meridiem of the day following Labor Day in the same year, standard time shall be advanced one (1) hour. The period of time so advanced shall be known as 'daylight saving time.'
>
> "In the event Memorial Day should fall on a Sunday, the effective time of the one (1) hour advance will be at two (2) o'clock ante meridiem the preceding day.
>
> "Sec. 2. *In all laws, statutes, orders, decrees, rules, and regulations relating to the time of performance of any act by any officer or department of this state,* including the legislative, executive, and

judicial branches of the state government, *or any county, city, town or district thereof, relating to the time in which any rights shall accrue or determine, or within which any act shall or shall not be performed by any person* subject to the jurisdiction of this state and in all the public schools and institutions of this state, or *of any county, city, town or district thereof, and in all contracts and choses in action made or to be performed in this state,* the time shall be the *time established* in section one (1) of this Act." (Emphasis supplied)

IV.

In regard to your questions No. 1 and 2, our answer must be that cities and towns have no power to act contrary to a constitutionally proper daylight savings act of the Iowa Legislature. Any action by local government subdivisions which will defeat the purposes of Section 2 of Senate File 157 will be improper. Any existing ordinances which are in conflict of Senate File 157 when Senate File 157 became enacted would be of no force and effect. Any action taken by a city council in their official capacity to set time would appear to be in conflict with Section 2 of Senate File 157 which only provides for official time. Any attempt to contravene the action of the legislature is void. The Iowa Supreme Court in *McPherson v. Foster Bros.* 43 Iowa 48, (1876), in the Iowa Reports at pages 57 and 58 stated as follows:

"The city, as all other municipal corporations, can exercise no power not conferred by law; upon the law, from which its existence is derived, it depends for all authority. It is a creative and positive enactment, and all the city's powers flow therefrom. Of course we will not be understood as intimating that the means and manner of the exercise of power must be prescribed by express enactment, but that the power itself depends thereon. . . . (Cases cited) . . . .

"An act of a municipal corporation, done in an attempt to exercise power not possessed by it, is void. This is a corollary of the doctrine just announced. If it were not so, power should be exercised which is not possessed, and the corporation would possess authority independent of the legislature—a proposition contrary to the doctrine above stated, which is well supported by principle and the cases."

V.

In regard to your question No. 3, it would appear that Senate File 157 does not need a penalty clause for enforcement. From the above it should be noted that the supremacy of the legislature over governmental subdivisions is to be noted and any attempt to contravene the action of the legislature is void as indicated in the case of *McPherson v. Foster Bros.*, supra.

Of course, a penalty is not necessary for legislation to be good legislation or effective legislation. Congress or the legislature may make a perfectly valid statute a rule of action without providing any penalty or sanction, and constitutional provisions, which are the highest forms of law, generally have no sanction or penalty and no one has heretofore suggested that any is required, even when prohibitions are contained therein. *State v. Express Co.*, 164 Iowa 112, 145 N.W. 451 (1914).

It is difficult to believe that when the law is clear that the state statute controls, that an official who takes an oath as required under Section 63.10 of the 1962 Code of Iowa, would not uphold a law of the state of Iowa. That section reads as follows:

"All other civil officers, elected by the people or appointed to any civil office, unless otherwise provided, shall take and subscribe an oath substantially as follows: 'I, ..., do solemnly swear that I will support the constitution of the United States and the constitution of the state of Iowa, and that I will faithfully and impartially, to the best of my ability, discharge all the duties of the office of ..... (naming it) in (naming the township, town, city, county, district, or state, as the case may be), as now or hereafter required by law.'"

It has been held as indicated in 42 American Jurisprudence, page 74, as follows:

"Irrespective of the exact form in which it is to be taken, an official oath is interpreted as obligating the affiant to discharge the duties of office not only as they may at the time be prescribed by law, but as they may from time to time be fixed and regulated by the law making power."

In addition, it is to be noted that Boards of Supervisors are specifically required to obey the laws of Iowa under Section 332.16 of the 1962 Code of Iowa, which reads as follows:

"If any supervisor shall neglect or refuse to perform any of the duties which are or shall be required of him *by law* as a member of the board of supervisors, without just cause therefor, he shall, for each offense, forfeit one hundred dollars." (Emphasis supplied)

CONCLUSION

To conclude our remarks in regard to whether Senate File 157 needs a penalty clause for enforcement, it only should be noted that the stated purpose of the act is to provide uniform official time for the state of Iowa. Any local government subdivision which attempts to change the official time in their area would be in direct contravention of the law and the town officers would be in violation of their duties to the state of Iowa and would be violative of the oath which is required of them. Boards of Supervisors would be in violation of Section 332.16.

An act of the legislature, properly drawn, constitutional in form, exercising the power to the legislature on behalf of all the people in Iowa is controlling over every city council and board of supervisor member in the state of Iowa. Any action that they may take to set up any official time in their governmental subdivisions is void and of no force and effect.

2.4

CITIES AND TOWNS: Playground and Recreation Areas: Cooperation between cities and school districts—§§297.22, 300.1, 300.7, 377.1, 377.3, 1962 Code of Iowa. A school district may not assume the sole responsibility for maintenance of a playground constructed by a city for public use.

May 3, 1965

Mr. David A. Fitzgibbons
Emmet County Attorney
602 Central Avenue
Estherville, Iowa

Dear Mr. Fitzgibbons:

This is in response to your request for an opinion in respect to the following:

"The City of Estherville has suggested to the Estherville Community School District that the City construct tennis courts on the school land within the City of Estherville and the School District will maintain said tennis courts. In connection with this proposal, would you please advise me as follows:

1. Can the City and School District enter into such an agreement?

2. Will the school be required to lease the land to the City, and if it does, can it charge a 'nominal' annual rent?"

The following provisions of the 1962 Code of Iowa are relevant:

"297.22 Power to sell or lease. The board of directors of an independent or community district composed wholly or in part of a city acting under a special charter and having a population of fifty thousand or more may lease, or by a unanimous vote pass a resolution to sell any schoolhouse, school site, or other property acquired for school purposes when in the opinion of said board such sale is for the benefit of the district.

"The board of directors of other school corporations may sell, lease, or dispose of, in whole or in part, any schoolhouse or site or other property belonging to the corporation of a value not to exceed the following amounts:

"1. Twenty-five hundred dollars in school districts which maintain a high school and in which the average daily attendance in the preceding year was two hundred or less.

"2. Five thousand dollars in school districts which maintain a high school and in which the average daily attendance in the preceding year was more than two hundred but less than five hundred.

"3. Ten thousand dollars in school districts which maintain a high school and in which the average daily attendance in the preceding year was five hundred or more.

"4. Five hundred dollars in any school district which does not maintain a high school.

"Proceeds from the sale, lease or disposition of real property shall be placed in the schoolhouse fund and proceeds from the sale, lease or disposition of property other than real property shall be placed in the general fund.

"Before the board of directors may sell, lease or dispose of any property belonging to the school corporation it shall comply with the requirements set forth in sections 297.15 to 297.20, inclusive and sections 297.23 and 297.24. Any real estate proposed to be sold shall be appraised by three disinterested freeholders residing in the school district and appointed by the county superintendent of schools of the county in which said real estate is located."

"300.1 Establishment-maintenance-supervision. Boards of school directors in school districts containing or contained in any city are hereby authorized to establish and maintain for children in the public school buildings and on the public school grounds under the custody and management of such boards, public recreation places and playgrounds and necessary accommodations for same, without charge to the residents of said school district; also to co-operate with the commissioners or boards having the custody and management in such cities of public parks and public buildings and

grounds of whatever sort, and, by making arrangements satisfactory to such boards controlling public parks and grounds, to provide for the supervision, instruction, and oversight necessary to carry on public educational and recreational activities, as described in this section in buildings and upon grounds in the custody and under the management of such commissioners or boards having charge of public parks and public buildings on grounds of whatever sort, in such cities."

"300.7 Appropriation by city. The board of school directors in any district governed by sections 300.1 to 300.6, inclusive, of this chapter is also empowered to receive and expend for the purpose thereof any sums of money appropriated and turned over to them by the city council or commissioners of such city for such purposes; and the city council, or commissioners of such city, shall have authority to appropriate and turn over to the board of school directors of the school district containing or contained in such city any reasonable sums of money which the said council or commissioners may desire to apppropriate out of the recreation fund of such city and turn over to the said board of school directors for the purposes herein set forth."

"377.1 Authorization. Cities may, when authorized by the voters, provide one or more playgrounds and recreation centers, and may construct and equip a recreation building either on lands to be acquired, or on lands already owned or to be leased by the city. The number and location thereof shall be determined by the city council."

"377.3 Joint maintenance. Cities shall, so far as possible, cooperate with the school boards, park boards and park departments within said cities in providing for joint operation and maintenance of all public playgrounds and recreation centers within said cities."

Section 297.22 authorizes the board of directors of a school corporation to sell or lease property owned by it, within specified limitations based on school attendance and the value of the property. Sec. 377.1 authorized cities to lease land wanted for playgrounds and recreation centers. Sec. 377.3 instructs cities to cooperate with school boards in the joint operation and maintenance of public playgrounds and recreation centers within the geographical confines of the city. Where statutes clearly express the intent of the legislature, there is no room for construction; or is it necessary to go beyond the language of the statutes to determine their meaning. *Olson Enterprises v. Citizens Ins. Co.*, 255 Iowa 141, 121 N.W. 2d 510 (1963).

The city of Estherville may lease land for a playground (tennis courts) from the Estherville Community School District, *unless* the School District is proscribed from leasing it by the limitations on its power as spelled out in Sec. 297.22. Supposing that the school district does have the power, it must charge rent. The authority to charge rent is implied from the power to lease, but in what the school district may do it also is negatively inhibited: It has no authority to make a gift of the usage of its land. Therefore it not only may but it must charge rent.

To establish a playground under the authority of Sec. 377.1, a city must have the authorization of voters. Moreover, under the statutes considered to this point, the primary burden of maintaining a playground remains with the city that establishes it. That is the clear meaning of Sec. 377.1. The city is constrained, however, to obtain the school district's cooperation in the joint operation and maintenance of such a playground. No authority is present for the school district to assume the maintenance unilaterally.

The agreement contemplated is not spelled out in detail. But it appears that what Estherville and the School District propose is not permissible under the foregoing authority. What is permissible is this:

1. The city obtains authorization of its voters to lease land from the school district and to construct tennis courts on it.

2. The school district may lease the land by Board decision, if it can do so within the limitations of Sec. 297.22. If the limitations preclude this, then the district can lease the property only with the approval of the voters at a regular election as required by Sec. 278.1.

3. The city may obtain the school district's cooperation in the joint maintenance and operation of the tennis courts. The school district may cooperate, if it wishes, by making the rental nominal.

It is apparent that an arrangement under the foregoing may require a vote on two questions. Is it possible under authority found elsewhere to achieve the same end in a less burdensome manner?

Section 300.1, set out above, authorizes school districts "to establish and maintain *for children* in the public school buildings and on the public school grounds . . . public recreation places and playgrounds and necessary accommodations for same, without charge to the residents of said school district . . ." (Emphasis Added). Sec. 300.7 authorizes the school district to "receive and expend" money for "such purposes" which is turned over to the district by the city.

We believe that what Chapter 300, Iowa Code of 1962, and Sections 300.1 and 300.7 in particular, contemplate is providing recreational facilities for school children. The specific language controls the general. *Olson Enterprises v. Citizens Ins. Co., supra.* We do not believe it is intended to provide for the establishment of facilities for the public at large. The General Assembly has not expressly placed that burden on the school districts; on the contrary, it has expressly authorized cities to establish recreational facilities for the general public. (Chapter 377, 1962 Code of Iowa).

It is the opinion of this office, therefore, that only the city may establish tennis courts for use by the general public, but that the school district may join in their operation and maintenance; and that this must be done in accordance with the procedure set out in the numbered paragraphs of this opinion.

2.5

CITIES AND TOWNS: Contract of Husband of City Clerk With Architectural Firm Which Was Awarded Municipal Project—§§403A.2(9), 403A.4, 403A.22, 1962 Code of Iowa. An architect husband of a city clerk is not disqualified from entering a contract to act as inspector on the job for outside of town architectural firm who was awarded municipal housing project, when the wife-city clerk possessed no power of decision as to the original contract award.

July 19, 1965

The Honorable Jake B. Mincks
State Senator
Wapello County
Route 1
Ottumwa, Iowa

Dear Senator Mincks:

You have requested an opinion of this office on the following set of facts:

"As you know the City of Ottumwa is now engaged in a project for low rent housing for senior citizens.

"An out of town architectural firm has been awarded the architectural work for this project. They would like to hire a local architect as an inspector on the project. They would also like a clarification of the Iowa law regarding who is eligibile to take part in this contract and also the Federal law which contains the following language. 'No member, officer, or employee of the local Authority during his tenure or for one year thereafter shall have any interest, direct or indirect in this contract or the proceeds thereof'.

"Since this local architect's wife is the city clerk for the city of Ottumwa, would this tend to disqualify a local architect because of the indirect connection due to the fact that his wife is city clerk?"

It is assumed in this opinion, based on the facts as propounded in the request and the insertion of the federal "prohibitive interest" language that this inquiry would be covered by what is known as the Low-Rent Housing Law, Chapter 403A of the 1962 Code of Iowa as amended. This chapter was enacted into law by the 59th General Assembly, Acts 1961, Chapter 215. Analysis must be had to the applicable sections and subsections of this chapter to determine the legality or illegality of the arrangement referred to:

"403A.2(9) 'Housing project' or 'project' means any work or undertaking: (b) to provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income. . . ."

"403A.4 Aid from federal government

". . . a municipality is empowered to borrow money or accept contributions, grants or other financial assistance from the federal government for or in aid of any housing project within its area of operation, to take over, lease or manage any project or undertaking constructed or owned by the federal government, and to these ends, *to comply with such conditions and enter into such contracts*, covenants, mortgages, trust indentures, leases or agreements *as may be necessary, convenient or desirable.*" (Emphasis supplied)

"403A.22 Personal interest prohibited

"*No public official* or *employee* of a municipality or board or commission thereof *shall voluntarily acquire* any *personal interest direct* or *indirect*, in any municipality, or *in any contract*, or proposed contract in connection *with such municipal housing project.*" (Emphasis supplied)

The general duties of a clerk are set forth in Section 368A.3 of the 1962 Code of Iowa. Section 368A.3(1) states as follows:

"(1) Attend all meetings of the council, *but in no event have the right to vote on any question before it.*" (Emphasis Added)

Other subsections of 368A.3 have been reviewed and deal specifically with ministerial tasks of the city clerk. It is abundantly clear from the above quoted subsection that the city clerk is forbidden by statute from exercising any power of decision.

Iowa cases dealing with the "prohibitive interest contracts" assume the prohibition when a public official, with the power of decision, gains a personal, pecuniary advantage while in a position of public trust. This principle stated by Judge Dillion in his work on Municipal Corporations, Section 444 was quoted with approval by the Iowa Supreme Court in the case of *Bay v. Davidson,* 133 Iowa 688, 691, 111 N.W. 25 (1907):

> "One *who has power,* owing to the frailty of human nature will be too readily seized with the inclination to use the opportunity for securing his own interest at the expense of that for which he is entrusted . . . The law will in no case permit persons who have undertaken a character or a charge to change or invert that character by leaving it and acting for themselves in a business in which their character binds them to act for others." (Emphasis supplied)

Additionally, the prohibited interest statute previously alluded to bespeaks of a public official's or employee's personal interest direct or indirect in any contract in connection with such municipal housing project. The architect is not a "public official or employee;" the architect is not contracting with the city. We have here two separate contracts to hire, one the city with the outside architectural firm, and the other, the architectural firm with the local architect. I assume the contract of the first instance was not conditioned in any way on their hiring of the local architect to act as inspector. The legality of this two separate contracts theory has been stated before by this office.

34 OAG 443.

Also helpful to the situation you have raised, is language found in 10 Drake Law Review starting at page 64:

> "A series of overlapping statutes provide that those who have the *power of decision* shall not be directly or indirectly interested in certain specified contracts or other indicated business transactions with the individual governmental units they represent. Although an indirect interest would be sufficient under these statutes, there is a point at which an interest can be too remote and incidental to be within the contemplation of such statutes. Even though these statutes do not limit the forbidden interest to a financial one, all the reported cases arising under these statutes have been concerned with a personal financial interest. In applying these statutes not only must the interest be sufficient, *but the interested party must be connected in the required manner with the particular political subdivision* contemplated by the statute, and the contract must be of the type prohibited by the state." (Emphasis supplied)

Relying on the foregoing then, I am disposed to answer your question: "Is the local architect disqualified from contracting his services to an outside architectural firm due to the fact his wife is city clerk?" in the negative.

2.6

CITIES AND TOWNS: Retirement systems for policemen and firemen —§§411.1 (4), 411.1 (17), 411.6 (13), 1962 Code of Iowa as amended. Under §411.6 (13) (a) the spouse, so long as she remains unmarried, should receive one-half the sum of the annuity payment and pension which the husband was receiving each month. (Scalise to Glenn, State Representative 9/23/65) 65-9-11

September 24, 1965

Mr. Gene W. Glenn
State Representative
R. R. 7
Ottumwa, Iowa

Dear Mr. Glenn:

I am in receipt of your letter of September 16, 1965, in which you request my opinion in regard to the following question:

"In interpreting a widow's benefits under Section 411.6(13), 1962 Code of Iowa, as amended, is the annuity to be included as part of the total retirement allowance?"

Section 411.6(13) states:

"Pension to spouse and children of deceased pensioned member. In the event of the death of any member receiving a retirement allowance under the provisions of subsections 2, 4, and/or 6 of this section there shall be paid a pension:

"a. To the spouse to continue so long as said partner remains unmarried, equal to one-half the amount received by such deceased beneficiary, but in no instance less than seventy-five dollars per month, and in addition thereto the sum of twenty dollars per month for each child under eighteen years of age; or

"b. In the event of the death of the spouse either prior or subsequent to the death of the member, to the guardian of each surviving child under eighteen years of age, in the sum of twenty dollars per month for the support of such child."

Subsections 2, 4, and 6 mentioned in the statute just quoted refer to the members' allowance on service retirement, allowance on ordinary disability retirement, and allowance for retirement after accident, respectively. Each of those subsections states that the specific allowance to be made is for a member, and each states that part of the allowance to be made shall consist of:

"An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; . . ."

The remainder of the allowance consists of a pension, the amount of which is computed upon a different basis for each specific type of allowance.

Section 411.1(4) defines member as follows:

" 'Member' shall mean a member of either the police or fire retirement systems as defined by section 411.3."

Section 411.1(17) defines annuity as follows:

" 'Annuity' shall mean annual payments for life derived from the accumulated contributions of a member. All annuities shall be payable in monthly installments."

Because the initial language of section 411.6(13) speaks of the members' "retirement allowance" and because section 411.6(13) (a) refers to "the amount received by such deceased beneficiary" it appears that the legislative intent was to have the monthly annuity payment included when computing the amount of the spouse's pension. That is, the language just mentioned is broad enough to encompass both the annuity and the pension which was being paid to the husband. The sum of the annuity payments and the pension clearly constitutes a sufficient-

ly reasonable base for use in computing the pension benefits available to a spouse.

Consequently under section 411.6(13) (a) the spouse, so long as she remains unmarried, should receive one-half the sum of the annuity payment and pension which the husband was receiving each month.

2.7

CITIES AND TOWNS: Group Insurance—H.F. 133, Acts of the 61st G. A., Chapter 232, Acts of the 60th G. A., and Chapter 365A, 1962 Code of Iowa. H.F. 133, Acts of the 61st G. A. authorizes cities and towns to pay the entire cost of life, health and accident insurance for an employee, but not his dependents. Cities and towns may not establish plans financed solely by employee contributions, but all other governing bodies named in the Act may do so. If cities and towns establish a plan under subsections 1 and 2 of §365A.2—that is, other than from their own funds alone— then they must contribute a sum equal to not more than two percent of the participating employees' earnings; what they require employees to contribute may not exceed two percent. The formula for government-employee contributions may be fixed by other governing bodies (that is, all but cities and towns) as they see fit. (Staff to Frommelt, State Senator, 10/26/65) S65-10-2

October 26, 1965

The Honorable Andrew G. Frommelt
State Senator
802 Roshek Building
Dubuque, Iowa

Dear Senator:

This is in reference to your recent request for an opinion on the following question, the portions of which are grouped in the order of our response thereto:

> In view of the recent enactment of House File 133, 61st General Assembly, can a city pay the entire cost of life, health and accident insurance (1) for an employee and his dependents, or (2) for an employee?

I

Relevant to a portion of the legislation to be presently considered, the Attorney General, in 1957, briefly indicated that a city or town lacked authority to establish group insurance programs covering dependents of city or town employees (1958 OAG 32). Chapter 232, Acts of the 60th General Assembly, and House File 133, 61st General Assembly, contain nothing which would change the statutory language as to whether a city can pay for the employee and his dependents.

The language of Section 509.15 of the 1962 Code of Iowa, as amended by Chapter 232, Acts of the 60th General Assembly, controls and reads as follows:

> "The governing body of the state, county, school district, city, town, or any institution supported in whole or in part by public funds may establish plans for and procure group insurance, health or medical service for the *employees* of the state, county, school district, city, town or tax-supported institution." (Emphasis supplied)

The only purpose of statutory construction is to ascertain the legislative intent. When the language is so clear, certain and free from ambiguity and obscurity that its meaning is evidenced from reading the statute, there is no need for construction. *Clarion Ready Mixed Concrete Co. v. Iowa State Tax Commission,* 252 Iowa 500, 107 N.W. 2d 553 (1961).

It is my opinion that the statute is clear that the authorized plans are for employees. However, it should be noted that there should be no difficulty in working out the mechanics so that the employee could purchase further coverage for his dependents.

II

In order to give a satisfactory answer as to the effect of House File 133, 61st General Assembly, relative to the second portion of your question, it is necessary to consider in some detail the legislative foundation which House File 133 builds. The logical starting point is Chapter 365A of the 1962 Code of Iowa prior to its amendment by Chapter 232 of the 60th General Assembly.

A

Chapter 365A, in its first section (365A.1), authorized the council of a city or town to "establish plans for and procure [designated kinds of] group insurance . . . for the employees of such city or town." Section 365A.2 provided that the funds for any such plan were to be created from the following sources:

> "1. Contributions from the employees who elect to participate in any such plan; and
>
> 2. Contributions authorized by the city council from the general fund of said city in amounts *not exceeding the aggregate amounts assessed against and collected from employees* who elect to participate in any such plan. . . .
>
> 3. If the policy is an accident and health insurance policy, in lieu of compliance with subsections 1 and 2 of this section the funds for the plan may be created solely from contributions from employees. . . ." (Emphasis supplied)

With regard to a plan, the fund of which was to be created under subsections 1 and 2 of Section 365A.2, the italicized portions of subsection 2 clearly limited the amount which a city or town council was authorized to expend from the general fund, to wit, an amount not exceeding the aggregate amount assessed against and collected from participating employees. Moreover, Section 365A.3 in regard to a "plan the fund of which was to be created under the provisions of subsections 1 and 2 of Section 365A.2", provided that the participating employees "shall be assessed and required to pay an amount to be fixed by the city council *not to exceed the two percent which shall be contributed by the city.*" (Emphasis supplied) The effect of the italicized portions of this provision was to limit to two percent of earnings the maximum contribution of both the city and its employees (58 OAG 32).

With relation to the above quoted portions of Chapter 365A and in regard to its other sections, Section 365A.11, the definition section, defined "city" to mean "city or town" and "city council" to mean "city or town council."

B

Chapter 365A, which applied only to designated employees of cities and towns, was amended by Chapter 232, 60th General Assembly, to extend its group insurance coverage to include employees of the state,

county, school district, etc. Chapter 365A, as thus amended, was designated by the Code Editor for *further* inclusion in Chapter 509 of the Iowa Code as Sections 509.15 through 509.26 (Iowa Code Annotated, 1964 Cum. Pocket Supp.).

Like prior Section 365A.1, Chapter 232, Section 1, 60th General Assembly (Section 509.15), authorizes "the governing body" of the state and of a county, city, town, etc., to "establish plans for and procure [designated kinds of] group insurance" for their employees. To facilitate the transition in terminology made necessary by the inclusion of employees other than of a city or town, Section 10 of Chapter 232, 60th General Assembly (Section 509.25), repealed the old definition provision of Chapter 365A, defining "city" and "city council" and added a definition of "governing body" to mean "the executive council of the state, the board of supervisors of counties . . . the city or town council of cities or towns . . ."

Section 365A.2, the prior "sources of funds" provision, was amended by Section 2 of Chapter 232, 60th General Assembly (Section 509.16), to provide that the funds to finance an insurance program under the amended law were to be created from the following sources:

> "1. Contributions from employees who elect to participate in any such plan; and
>
> 2. Contributions authorized by the city council from the general fund of said city in amounts not exceeding the aggregate amounts assessed against and collected from employees who elect to participate in any such plan. . . .
>
> 3. Solely from the contributions of employees, except as provided in subsections one (1) and two (2) above, for any plan established after July 4, 1963."

The first two subsections of the amended funding provision continued unchanged that portion of Section 365A.2 which, prior to amendment, authorized cities to expend monies from its general fund in an amount not to exceed that expended by its employees participating in a group insurance plan. In this respect, the funding source of the first two subsections was necessarily limited in use to cities and towns because of the language, "contributions authorized by the *city council* from the *general fund of said city.*" (Emphasis supplied) Moreover, Section 3 of Chapter 232, 60th General Assembly (Section 509.17), in amending Section 365A.3, left intact the requirement that both the city and its employees were limited to two percent of earnings as the maximum contribution toward group insurance.

The only alternate funding source authorized under amended Section 365A.2 was a source to be created "solely from the contributions of employees, *except as provided in subsections one (1) and two (2) above*, for any plan established after July 4, 1963." In view of the italicized proviso clause and since state, county, school district and other designated employees were eligible to participate for the first time after July 4, 1963, the effective date of the amendment, it is clear that the legislature, contributionwise, established an unequal dichotomy between employees of a city or town and the other employees eligible to participate in a group insurance plan under the amended law. As to the latter group, any such plan had to be funded solely by the employees.

C

Section 365A.2, as amended by Section 2 of Chapter 232, Acts of the 60th General Assembly (Section 509.16), was further amended by House File 133 enacted by the 61st General Assembly. The present "sources of funds" provision, with the amending language of House

File 133 italicized, reads:

> "The funds for such plans shall be created from the following sources:
>
> 1. Contributions from employees who elect to participate in any such plan; and
>
> 2. Contributions authorized by the city council from the general fund of said city in amounts not exceeding the aggregate amounts assessed against and collected from employees who elect to participate in any such plan . . . .
>
> 3. Solely from the contributions of employees, except as provided in subsections one (1) and two (2), for any plan established after July 4, 1963, *or from contributions wholly or in part by the governing body.*"

It is arguable that the italicized language, creating a third funding source, can be interpreted to mean that a city or town may now pay the total cost of designated group insurance services for its employees. The argument finds support in that the amendment states that the "governing body" may so contribute. In this respect, the "governing body" is defined by law to include the "city or town council of cities and towns," Section 10 of Chapter 232, Acts of the 60th General Assembly (Section 509.25).

Why, then, was subsection 2 not amended to substitute "governing body" for "city council"? This alone would not have exorcised ambiguity since the language "from the general fund of said city" would have remained. Had "city council" been amended to read "governing body," the language "from the general fund of said city" must also have been amended or eliminated, since no governing body other than a city could look to a city's general fund for financing. This is self-evident. But certainty that the legislature intended to leave the language of subsection 2 as it was wavers when we consider what amendments were made in 1963 to the group insurance statutes as a whole: In every place but two where the words "city council" appeared, those words were struck and the words "governing body" substituted. The two sections in which the words "city council" were left intact were in subsection 2 of Section 365A.2 and Section 365A.4. Section 365A.4 now reads:

> "Participating in any such plan shall be optional with all employees eligible to the benefits thereof as provided by the rules and regulations adopted by the *governing body* pursuant thereto. Election to participate therein shall be in writing signed by the employee and filed with the *city council.*" (Emphasis supplied)

One of the rules of construction often enunciated by the court is that absurd results are to be avoided. In construing Section 365A.4, absurdity obviously can be avoided only by concluding that where it says "city council" what is meant is "governing body." Otherwise, employees of the state and other governing bodies would have to signify to a city council (what city council?) their election to participate in a group insurance plan proposed not by the governing body which employs them, but by a city council which neither employs, nor knows, nor has any legal relation to them. Failure to amend the words "city council" in Section 365A.4 *a fortiori* must have been an oversight. We appreciate that another basic rule of construction requires ascertainment of the legislature's intent from what the legislature said, not what it should or might have said. But we submit that this rule must bow to the rule requiring a construction not absurd. This, then, leaves the words "city council" in only one place in the group insurance chapter where their presence does not patently compel an absurd result.

This is in subsection 2 of Section 365A.2 referred to above. We are obligated to assume that even though the words were left in Section 365A.4 by oversight, they were left in Section 365A.2 by intent. How can Section 365A.2 be construed then to avoid absurdity and avoid rendering any part of it superfluous?

We suggest that these conclusions are dictated:

1. Subsections 1 and 2 of Section 365A.2 because they are linked by the conjunction "and" must be considered as inseparable parts of a whole and to constitute a limitation in conjunction with Section 365A.3 on plans adopted by city councils which contemplate contributions from employees as well as from the city's general fund. Cities can contribute no more than participating employees. The limitation on each is two percent of employees' earnings.

2. Subsection 3 provides an alternative funding plan. It may not be invoked by cities to establish plans financed solely by employees, however, since subsections 1 and 2, in conjunction with Section 365A.3, are expressly made a limitation. This limitation does not apply to other governing bodies.

3. Subsection 3 permits governing bodies *other than cities* to fund plans solely from employee contributions. But the last clause ("or from contributions wholly or in part by the governing body") permits governing bodies, *including cities*, to fund plans solely from government contributions.

We appreciate that these conclusions are not without strain. We submit, however, that they give meaning to all of the statutory language while avoiding absurdity. We can only conclude that the intent of the legislature was to single out cities (and towns) and to restrict them in what they may require in employee contributions.

It is the opinion of this office, therefore, that:

1. Cities and towns and all governing bodies named in the Act may establish insurance plans solely from funds contributed by them.

2. Cities and towns may not establish plans financed solely by employee contributions, but all other governing bodies (named in the Act) may do so.

3. If cities and towns establish a plan under subsections 1 and 2 of Section 365A.2—that is, other than from their own funds alone—then they must contribute a sum equal to not more than two percent of the participating employees' earnings. What they require employees to contribute may not exceed two percent.

4. The formula for government-employee contributions may be fixed by other governing bodies (that is, all but cities and towns) as they see fit.

2.8

CITIES AND TOWNS: Plumbing Regulations—§368.17, 1962 Code of Iowa. Cities with a population of six thousand or more are required to adopt plumbing regulations.

January 27, 1966

Honorable Eldon M. Morgan
Mahaska County Representative
805 North A
Oskaloosa, Iowa

Dear Mr. Morgan:

This is in response to your recent letter wherein you ask:

"Is it mandatory that the City of Oskaloosa have a plumbing code?"

Section 368.17, the relevant code provision reads in part as follows:

"All cities having a population of six thousand or more *shall*, and other cities and towns *may*, by ordinance, adopt a set of plumbing regulations not inconsistent with state law or state administrative regulations, and provide for the inspection of plumbing installations." (Emphasis added)

The answer to your question depends on the meaning the Legislature intended to attach to the words "shall" and "may" as used in the above section. In the construction of statutes words should be construed according to their approved usage. *Section 4.1(2), 1962 Code of Iowa.* Generally, the word "shall" as used in a statute, is construed in a mandatory or imperative sense rather than in a directory or discretionary sense, unless it clearly appears from the context of the statute that a permissive construction should be given the word. *Hansen v. Henderson,* 244 Iowa 650; 56 N.W.2d 59 (1953); *Blackburn v. Koehler,* 127 Ind. App. 397; 140 N.E.2d 763 (1957). On the other hand, the word "may" is generally construed in a permissive sense unless the context of the act clearly indicates that a mandatory construction is required. *Bechtel v. Board of Supervisors of Winnebago County,* 216 Iowa 251, 251 N.W. 633 (1934).

When the words "shall" and "may" are used in the same "sentence of a statute, it is a fair inference that the Legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings." *3 Sutherland Statutory Construction,* (3rd Ed.) 116 § 5821.

In *Morrison v. State ex rel Indianapolis Free Kindergarten,* 181 Ind. 544, 105 N.E. 113 (1914), the Supreme Court of Indiana decided the question of the relative meaning to affix to the words "may" and "shall" when the two are used in the same statute. In the above case the Court was confronted by a statute that provided in part in Section 1:

"Any city having a population * * * of over six thousand, the board of school commissioners, or school trustees *may* in fixing the annual levy of taxes for school purposes include therein two cents on each one hundred dollars of valuation * * * for the support of free kindergarten schools in said city." §1 *Indiana Acts* 1911, p. 112. (Emphasis added)

However, the second section provided in part:

"Provided, That in cities having a population of more than one hundred thousand according to the last preceding United States census. SUCH TAX *SHALL* BE LEVIED . . . ." Section 2, *Indiana Acts* 1911, p. 112. (Emphasis added)

In the Morrison case the appellants claimed that by virtue of the use of the word "may" in Section 1 the power to levy the tax was intended to be discretionary with the school boards of all cities having a population in excess of six thousand. The appellee contended, however, that the use of the word "shall" made the levy mandatory on cities with a population in excess of 100,000. The Indiana Supreme Court stated:

"We are of the opinion that it was the Legislative intent, * * * to make and (sic) levy discretionary in all school cities with a population under 100,000, and mandatory in those of a greater population. Such construction does not require the wrenching of the words "may" and "shall" from their plain, ordinary meaning, and gives effect to the manifest purpose of the Senate in adopting

the last amendment to the bill by inserting the phrase 'such tax shall be levied and.'" *Morrison v. State ex rel Indianapolis Free Kindergarten,* supra, at page 115 of the Northeastern Reporter.

In the case of *Smith v. School District No. 6 Fractional, Amber Township, Mason County,* 241 Mich. 366; 217 N.W. 15 (1928), the Supreme Court of Michigan construed a statute containing the words "may" and "shall." The high court of Michigan stated at page 15 of the Northwestern Reporter:

"It will be noted that the permissive word 'may' is used in the first sentence of this section. In many of the other provisions of the act the mandatory word 'shall' is used and it is urged by plaintiff that, by reason of the mandatory provisions of the act running through its entire structure, we should construe all the first section to be mandatory. Courts have not infrequently construed the word 'may' to mean 'shall' and vice versa. But this has been done to effectuate the legislative intent. It should not be done to stifle that intent. Here the Legislature has used both the word 'may' and the word 'shall,' and we should give them their ordinary and accepted meaning, unless so to do would frustrate the legislative intent. We are satisfied that a proper construction of the act requires the giving of the words their ordinary and accepted meaning. By the use of the word 'may' in the first section, the Legislature authorized and permitted the board of education to come under the provisions of the act, if it so desired. By the use of the word 'shall' in the other portions of the act, it was the legislative intent that, if the board of education adopted the act, then such other provisions became mandatory and the board of education became bound to follow and enforce them. In other words, districts 'may' come under the provisions of the act. If they do, its provisions 'shall' be followed. This construction, we think, is the logical one."

In one phrase of Section 368.17 the Legislature used the mandatory word "shall" as follows:

"All cities having a population of six thousand or more 'shall', * * *, by ordinance, adopt a set of plumbing regulations. . . ."

In another phrase of the same sentence the Legislature made the the adoption of plumbing regulations discretionary in cities having a population of less than six thousand. Applying the principles found in Sutherland and in the Smith and Morrison cases to the language of Section 368.17, I am of the opinion that the words "shall" and "may" should be given their ordinary and accepted meaning. By use of the phrase "[a]ll cities having a population of six thousand or more 'shall'" it was the legislative intent to require all cities in that group to adopt plumbing regulations. By use of the phrase "other cities and towns 'may'" the Legislature intended to allow cities and towns with populations less than six thousand to adopt plumbing regulations if they so desired.

Oskaloosa has a population in excess of 11,000, according to the 1960 census. Therefore, it is my opinion that it is mandatory for the city to adopt plumbing regulations.

2.9

CITIES AND TOWNS: Urban Mass Transportation Act of 1964—§404.10, 1962 Code of Iowa, as amended by Chapter 337, Acts of the 61st G. A., Chapter 83, Acts of the 61st G. A., allows cities and towns to enter into agreements with the federal government under the Urban Mass Transportation Act of 1964.

February 18, 1966

The Honorable Robert D. Fulton
Lieutenant Governor of Iowa
703 First National Building
Waterloo, Iowa

Dear Governor Fulton:

Pursuant to your request as to whether or not municipalities of the State of Iowa may participate in the federal "Urban Mass Transportation Act of 1964" please be advised as follows:

The "Urban Mass Transportation Act of 1964" provides Federal assistance to local governments in financing urban mass transportation systems, which may be "operated by public or private mass transportation companies as determined by local needs."

Section 3 (a) of the Act provides as follows:

"In accordance with the provisions of this Act, *the Administrator is authorized to make grants or loans* (directly, through the purchase of securities or equipment trust certificates or otherwise) *to assist* States and *local public bodies* and agencies thereof *in financing the acquisition, construction, reconstruction, and improvement of facilities and equipment for use by operation or lease or otherwise, in mass transportation service in urban areas and in coordinating such service with highway, and other transportation in such areas.* Eligible facilities and equipment may include land (but not public highways), buses and other rolling stock, and other real or personal property needed for an efficient and coordinated mass transportation system. *No grant or loan shall be provided under this section unless the Administrator determines that the applicant has or will have* (1) *the legal,* financial, and technical *capacity to carry out the proposed project,* and (2) satisfactory continuing control, through operation or lease or otherwise, over the use of the facilities and equipment. No such funds shall be used for payment of ordinary governmental or non-profit operating expenses." (Emphasis added)

Section 3 (c) of the Act provides:

"No financial assistance shall be provided under this Act to any * * * local public body * * * for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless * * *".

Your real inquiry as to whether or not a municipal corporation may accept federal funds to carry out a proposed project as required by Section 3 (a) of the Act quoted above, Section 404.10 of the 1962 Code of Iowa as amended by Chapter 337, Acts of the 61st General Assembly, provides:

"404.10 Municipal enterprises. Municipal corporations shall have power to annually cause to be levied for a fund to be known as the municipal enterprises fund an annual tax not to exceed ten mills on the dollar on all taxable property within the corporate limits and allocate the proceeds thereof to be spent for the following purposes:

* * *

14. To contract for a period not in excess of five (5) years with any privately owned and operated intercity transit company or

urban transit system for the purpose of obtaining regularly scheduled intercity bus service for inhabitants of the municipal corporation or the continuation or establishment of intracity routes of an urban transit system or to operate and maintain an urban transit system and to create a reserve fund therefor."

As you can see, this allows a municipality to operate and maintain an urban transportation system, and, in fact, gives municipalities the power to enter into contracts for a period not to exceed five years with a privately owned and operated urban transportation system for the following purposes:

1. To continue or establish intracity routes of an urban transit system.

2. To operate and maintain an urban transit system.

3. To create a reserve fund therefor.

It is also clear that cities have the right to use their tax revenue for the purpose of paying subsidies to such transit companies under such contracts in order to accomplish the foregoing purposes.

I would also call your attention to Chapter 83 of the Acts of the 61st General Assembly which provides as follows:

"Sec. 2. For the purposes of this Act, the term 'public agency' shall mean any political subdivision[1] of this state; any agency of the state government or of the United States; and any political subdivision of another state. The term 'state' shall mean a state of the United States and the District of Columbia. The term 'private agency' shall mean an individual and any form of business organization authorized under the laws of this or any other state.

"Sec. 4. Any public agency of this state may enter into an agreement with one (1) or more public or private agencies for joint or cooperative action pursuant to the provisions of this Act, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force."

As you can see, a city or town by virtue of Section 4, may enter into an agreement with an agency of the federal government to carry out the purpose as set out in the Urban Mass Transportation Act of 1964.

You should be aware of Sections 5, 6, 8 and 9 and generally the other sections of Chapter 83, Acts of the 61st General Assembly.

Therefore, it is the opinion of this office that cities and towns may accept federal funds available under the Urban Mass Transportation Act of 1964, so long as the above quoted sections are complied with.

2.10

CITIES AND TOWNS: Financial Consultants as Fiscal Agents—§§75.6, 368.2, 1962 Code of Iowa, as amended by Chapter 235, Acts of the 60th G. A., and §368A.22, 1962 Code of Iowa, as amended by Chapter 326, Acts of the 61st G. A. Municipal corporations have the

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[1]". . . municipal corporations are wholly creatures of the legislature . . ." *City of Mason City v. Zerble*, 250 Iowa 102, 93 N.W. 2d 94 (1959) and as such are political subdivisions of the state.

power to hire financial consultants who are independent contractors. §75.6 does not prohibit the employment of a financial consultant whose services may include the sale of bonds, provided that there is no direct or indirect commission arrangement. When a financial consultant is an independent contractor, there is no common law or statutory prohibition which will prevent him from competitively bidding for the purchase of the bonds being offered.

March 15, 1966

Mr. Paul Franzenburg
Treasurer of State
State House
LOCAL

Dear Mr. Franzenburg:

This is in reply to your recent request for an opinion as follows:

"There is a problem as to whether Iowa municipal corporations have the authority to hire financial specialists. Many cities do not have employee personnel who have the expertness to advantageously market the 18 plus bonds which they have the power to issue. A vast majority of public bonds throughout the United States are issued under the guidance of financial consultants or fiscal agents. The nature of the employment is financial consultation and advice. The consultant analyzes the financial needs and financing ability of the city and presents his recommendations to the city council. Methods of timing of financing are proposed. The financial consultant assists in the election and the sale of bonds.

"Generally, financial consultants contract with the cities on a job basis and will work for several cities as governmental subdivisions at one time.

"I would appreciate your office reviewing the following questions:

1. May an Iowa municipal corporation contract with a so-called financial consultant to assist the governing bodies of the State of Iowa or the political subdivisions thereof in the financing and marketing of public bonds?

2. May the specialist who contracts with an Iowa municipal corporation bid in his own name as principal on any and all public bonds offered for sale by the State of Iowa or any of the political subdivisions thereof?"

1

It has long been held to be a principle of law that a municipal corporation is purely a creature of the legislature with only such powers as are conferred by statute. Such a creature possesses and may exercise only the powers that are: (1) expressly granted by the legislature; (2) necessarily or fairly implied as incident to the powers expressly granted; and (3) those indispensably essential—not merely convenient—to the declared objects and purposes of the municipality. *Gritton v. City of Des Moines*, 247 Iowa 326, 73 N.W. 2d 813 (1955).

The Iowa Supreme Court recently decided the landmark case of *Richardson v. City of Jefferson*, . . . Iowa . . ., 134 N.W. 2d 528 (1965), in which they interpreted Chapter 235 of the Acts of the 60th General Assembly. The Court quoted Section 368.2 and the addition of Chapter 235 as follows:

"Section 368.2, in pertinent part, provides:

" 'Cities and towns * * * shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein, * * *.'

"Chapter 235 adds thereto the following, we will number the sentences for easy reference:

" '[1.] 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. [2.] The rule that cities and towns have only those powers expressly conferred by statute has no application to this Code. [3.] 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. [4.] 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. [5.] 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 or procedure for exercising a conferred power shall not prevent its exercise. [6.] Notwithstanding 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."

The Iowa court held that Chapter 235, as a rule of construction, was not unconstitutional and that Chapter 235 was not an unconstitutional delegation of legislative power. The court stated the following:

"To give effect to this rule of construction we should now in addition to those matters necessarily implied or necessarily incident to the powers expressly granted, consider as implied powers those matters that are naturally and fairly incident, involved or included in the area of the expressed power, e.g., such as have the same effect though not within the exact literal meaning of the language used."

In addition to the powers and rules of construction as contained in Section 368.2, Section 368A.1, subsection 7, contains the express authority to hire assistants for the necessary conduct of affairs of the municipal corporation. That section reads as follows:

"368A.1 The council. In all municipal corporations, except when otherwise provided by laws relating to a specific form of municipal government, the council shall: * * *

7. Appointments. *Have power to appoint* an attorney, city clerk, engineer, health officer, and such other *officers, assistants and employees,* as are provided by ordinance and are necessary for the proper and efficient conduct of the affairs of the municipal corporation, and fix the terms of employment which may include vacations, retirement plans and sick leave." (Emphasis supplied)

Hence, the legislature has expressly granted municipal corporations the right to employ persons as employees as are necessary for the efficient conduct of its affairs. This office held at 60 OAG 13 that a fiscal agent employed as a city officer or employee under Section 368A.1(7) could not enter into a contract for the purchase of the city's bonds because the provision of what was then Section 368A.22 prohibited an officer from transacting business with the city.

However, most arrangements with financial consultants or fiscal agents do not arise out of the creation of the office by ordinance and employment as an officer or employee of the city as provided by Section 368A.1(7). Most arrangements are contractual. These financial consultants work for many cities and only work a short time for each one. Section 368A.1(7) is cited only to show that the legislature has recognized that a city may hire those employees necessary to properly conduct its affairs.

1A.

The question then is whether the municipal corporation has the implied power, or whether it has power which is indispensably essential to the declared object and purposes of the municipality to hire financial consultants as independent contractors and if, in fact, the financial consultants are independent contractors.

The existence of the implied power following from an existing grant has long been recognized concerning municipal corporations. In relation to this specific area of issuance and sale of bonds, Judge Dillon, in his treatise on Municipal Corporations at Section 895, states:

> "Express statutory authority to issue bonds implies the power to issue them in the ordinary and usual manner; and the municipality may, by virtue thereof, sell the bonds and use the proceeds for the purposes intended, that being the mode most generally adopted in similar cases. . . . *Power of a municipality to issue and sell bonds carries with it the implied power to secure such reasonable and necessary assistance as may be requisite to bring about an advantageous sale,* and to this end, the municipality, acting in good faith, may employ a broker regularly engaged in this business. And its power is not confined to the employment of brokers only. It may employ any person, although not a regular broker, that the municipality may in good faith consider able to assist it in selling and disposing of the bonds." (Emphasis supplied)

Another place where the Iowa legislature has specifically granted the municipal powers the right to sell bonds is Chapter 75 of the 1962 Code of Iowa. This is an express grant of power. The Iowa court has held that the power to do an act is often conferred on municipal corporations, in general terms, without being accompanied by any prescribed mode of exercising it. In such cases the council or governing body must necessarily have a discretionary power as to the manner in which the power shall be used. *Des Moines Gas Co. v. The City of Des Moines,* 44 Iowa 505 (1876). Similarly, 1 McQuillan, Municipal Corp., 2d Ed., page 925, states the rule to be:

> "When the authority to exercise the power appears, wide latitude is allowed in its exercise, and, unless some abuse of power or a violation or organic or fundamental right results, it will be upheld. A municipal corporation, when exercising its functions for the general good, is not to be shorn of its power by mere implication. The intention to restrict the exercise of its powers must be manifest by words so clear as not to admit of two different or inconsistent meanings."

Therefore, because cities have the power to sell bonds for many purposes under the Iowa Code and because cities may find the services of a

financial consultant necessary to efficiently market its bonds, it is my opinion under the rule of construction, and not as a grant of power, as now found in Section 368.2, as amended by Chapter 235, Acts of the 60th General Assembly, that cities have the implied power to contract with a financial consultant or fiscal agent when they deem it necessary.

In addition, there also is authority for the hiring of fiscal agents under the third rule of the *Gritton* case which refers to those powers which are indispensably essential—not merely convenient—to the declared objects and purposes of the municipality. This rule could also be applied because of the expertness of the service rendered by the fiscal agent, particularly where the city has no employee who has the qualifications and experience necessary to accomplish the necessary services of a fiscal agent. The Iowa Supreme Court in the case of *Lyon v. Civil Service Commission,* 203 Iowa 1203, 212 N.W. 579 (1927), at page 1209 of the Iowa Reports stated:

> "It is elementary that, unless expressly or impliedly restrained by statute, a municipal corporation may, in its discretion, determine for itself the means and method of exercising the powers conferred thereon."

Therefore, unless the legislature has particularly restricted the right of the municipalities to hire fiscal agents, the municipality must be considered to have wide latitude in its discretionary powers under Section 368.2.

A possible restriction on such an employment would be found in Section 75.6 which states:

> "No commission shall be paid directly or indirectly, in connection with the sale of a public bond. No expense shall be contracted or paid in connection with such sale other than the expenses incurred in advertising such bonds for sale."

Section 75.6 grew out of Chapter 14, Acts of the 40th General Assembly, which read as follows:

> "An Act making it unlawful for officers of counties, cities, towns, townships and school corporations to sell bonds issued by such county, city, town, township or school corporation for less than par or to pay any commission for the sale of the same and providing a penalty for its violation.
>
> "Be it enacted by the General Assembly of the State of Iowa:
>
> "Section 1. Sale for less than par—commissions. It shall be unlawful for any county, city or town, including cities acting under special charter, or any township or school corporation to sell any of its bonds for less than par plus accrued interest or to pay any commission, either directly or indirectly, in connection with the sale of such bonds or to pay any expense in connection with such sale other than the expenses incurred in advertising such bonds for sale.
>
> "Any officer of the county, city, town, township or school corporation who becomes a party to the sale of bonds in violation of this act shall be guilty of a misdemeanor and, upon conviction, shall be punished accordingly."

Shortly thereafter this section was editorialized and is now in the 1962 Code of Iowa as Sections 75.5, 75.6 and 75.7. This is a penal provision and under the general rules of statutory interpretation of the State of Iowa, penal statutes are strictly construed and doubts resolved in favor of the individual. *Lever Bros. v. Erbe,* 249 Iowa 454, 87 N.W. 2d 469 (1958).

It should be noted from the above quoted Acts of the 40th General Assembly that the intent of the law was to prohibit violations of the "par law" and to prohibit commissions which would defeat the purpose of the "par law." The provisions of this law were patently intended to prohibit commissions, direct or indirect, to be paid to commission men and brokers for finding purchasers.

I call your attention to the fact that two chapters of the 60th General Assembly specifically provide payment for expenses in sale of bonds. One is Chapter 247, Acts of the 60th General Assembly, which is concerned with the issuance of bonds having to do with municipal support of industrial projects. Chapter 166 deals with self-liquidating stock facilities under the Board of Regents and specifically provides in Section 4 for the "compensation of a fiscal agent or advisor" in addition to the payment of engineering, administrative and legal expenses.

You have further advised that some of the services which a financial consultant provides are as follows:

1. Obtaining certified statements of indebtedness and property valuations.

2. Making a detailed survey of the present financial condition.

3. Advising as to the best method of financing.

4. Preparing a printed brochure to advise the electors.

5. Assisting at the election.

6. Advising of the best time for offering of the bonds, and working out a schedule of maturities for eventually marketing the proposed bonds.

7. Preparing information brochures for prospective bond buyers and furnishing lithographed bonds.

8. Obtaining prospective customers.

9. Working with legal counsel for preparing proceedings authorizing the issuance of bonds.

Section 75.6 must be strictly construed and it also must be construed to avoid unreasonable results and results which it was not intended to accomplish. *Pieper v. Patterson*, 246 Iowa 1129, 70 N.W. 2d 838 (1955). This law's purpose was, and is, to prevent the direct or indirect payment of commission on the sale of bonds. Its purpose is not to prevent the use of financial consultants who perform many services besides assisting in the selling of bonds.

Therefore, it is my opinion that Section 75.6 does not prohibit the employment of a financial consultant for his services which may include the actual sale of the bonds, provided that the financial agent is not paid a commission, either directly or indirectly.

II.

Both at common law and under statutory provisions, it has been recognized that the municipal contracts in which officers of the municipality have a pecuniary interest are void. The inhibition applies when the contract is of such a character that, as the Iowa court has stated, ". . . in the very contract and in the making of it, a temptation to dereliction of duty is created. The law intends that these public officers should, like Caesar's wife, be above suspicion and temptation." *James v. City of Hamburg*, 174 Iowa 301, 156 N.W. 394 (1916).

In Dillon on Municipal Corporations, 2d Vol., 5th Ed., Section 722, it is stated:

> "The principle generally applicable to all officers and directors of a corporation is that they cannot enter into contracts with such corporation to do any work for it, nor can they subsequently derive any benefit personally from such contract. To deny the application of the rule to municipal bodies would . . . be to deprive the rule of much of its value; for the well working of the municipal system, through which a large portion of the affairs of the country are administered, must depend very much upon the freedom from abuse with which they are conducted. Nothing can more tend to correct the tendency to abuse than to make abuses unprofitable to those who engage in them, and to have them stamped as abuses in courts of justice. . . . It is contrary to good morals and public policy to permit a municipal officer to enter into contractual relations with the municipality of which he is an officer. The principles of the common law and of equity are generally supplemented and made more emphatic by statutory enactments prohibiting any municipal officer from being interested, directly or indirectly, in any municipal contract, or in the rendition of services for the municipality outside of those required from him by virtue of his office."

However, the term "public policy" is indefinite and of uncertain definition. Generally, there is no absolute test or rule by which it can always be determined whether a contract contravenes the public policy of the state. It was stated in *Liggett v. Shriver*, 181 Iowa 260 (1917):

> ". . . each case must be determined according to the terms of the instrument under consideration and the circumstances peculiar thereto. In general however, it may be said that any contract which conflicts with the morals of the time or contravenes any established interest of society is contrary to public policy. It is the public policy of the government, state and national, to require all public officials in performance of the duties of their office, to subordinate every private interest to the public welfare and to avoid transactions of every kind which may place private interests in antagonism to public duty."

In adherence to these doctrines and the common law, the legislature enacted what is presently Section 368A.22, which was amended by Chapter 326, Acts of the 61st General Assembly. That provision now states in part:

> "No *municipal officer* or *employee* shall have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for his municipality. . . ." (Emphasis supplied)

However, the common law doctrine and Section 368A.22 apply only to officers and employees of a municipality. There is no prohibition against an independent contractor hired by the municipality, which the fiscal agent is.

Generally, the test which is usually resorted to in order to determine whether one is an employee or an independent contractor is to ascertain whether the employee represents the master as to the result of the work or only as to the means. As the Iowa court stated in *Arne v. Western Silo Co.*, 214 Iowa 511, 242 N.W. 539 (1932): "The relationship of master-servant does not exist unless there be the right to exercise control over methods and details—to direct how the result is to be obtained. . . . If the employer has control of what is to be done as well as the material details as to how the work is to be done, then clearly the laborer is an employee or servant of his employer." To the same effect

is *Meredith Publishing Co. v. Iowa Employment Security Commission*, 232 Iowa 666, 6 N.W. 2d 6 (1942); *Moorman Mfg. Co. v. Iowa Unemployment Compensation Comm.*, 230 Iowa 123, 296 N.W. 791 (1941); *McDonald v. Dodge*, 231 Iowa 325, 1 N.W. 2d 280 (1941); *Reynolds v. Skelly Oil Co.*, 227 Iowa 163, 287 N.W. 823 (1939).

Also, the Iowa court has set out several guidelines for the determination of whether an independent contractor relationship existed and, although not necessarily concurrent nor each in itself controlling, they are:

"1. The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;

"2. Independent nature of his business or of his distinct calling;

"3. His employment of assistants with the right to supervise their activities;

"4. His obligation to furnish necessary tools, supplies and materials;

"5. His right to control the progress of the work, except as to final results;

"6. The time for which the workman is employed;

"7. The method of payment, whether by time or by job;

"8. Whether the work is part of the regular business of the employer." *Burns v. Eno*, 213 Iowa 881, 240 N.W. 209 (1932).

Applying these tests to the principle case, it appears that a fiscal agent may be considered as an independent contractor.

I am advised that the usual contract arrangement in use in Iowa for fiscal consultants is as follows:

1. The nature of employment is financial consultation and advice.

2. The working facts would change with each separate issue of bonds and the work would be guided by the type of municipal improvement involved.

3. The intent of the contracting parties is to provide financial know-how to the efforts of non-professional public officials in a highly complex field of financing.

4. The closest analogous situation would be the employment of consulting engineers.

5. No fiduciary relationship is intended but merely the parties have provided for a good faith performance of an express contract for consulting services.

6. It is obvious that the parties have never intended an employment situation for a period of time other than that related to a particular issue of bonds and compensation is solely determined by the size of the bond issue. Nothing could be further from the contracting parties' minds than vacations, retirement plans and sick leave.

From the terms of this contract, several things are offered as a matter of fact. First, there is a contract for performance by the financial consultant of consultation of a fixed price; second, that the fiscal agent is within his distinct calling and his independent nature of business; third, he must use his assistants, supplies and materials and he super-

vises the work, as well as the progress of the work, except for the final result, namely the sale of the bonds; fourth, there is a fixed time —one bond issue—and for a consideration at the end of the contract period. Finally, the work—namely financial consultation—is not part of the regular business of the municipality—the employer.

On this basis it is evident that the employment of a financial consultant would be one *for* service and not *of* service, which would designate an independent contractor and not the relationship of master-servant. *Burns v. Eno,* supra.

It is my opinion that a fiscal agent is an independent contractor and hence not within the prohibitions of Section 368A.22, 1962 Code of Iowa, nor the common law prohibition. This office's opinion, cited as 60 OAG 13 and mentioned above, was in regard to a situation where a financial consultant was considered to be an employee.

Further, it is my opinion that a fiscal agent who is an independent contractor may competitively bid for the purchase of bonds.

2.11

CITIES AND TOWNS: Conflict of Interest—wife-aldermen and husband-manager and principal stockholder of automobile dealership— Section 2, Chapter 326, Acts of the 61st G.A. A wife-alderman, who owns no part or has no legal interest in an automobile dealership of which her husband is the manager and a principal stockholder and which dealership sells and repairs automobiles on competitive bids to the city, has no relationship constituting an indirect interest barred by Section 2, Chapter 326, Acts of the 61st G. A.

March 23, 1966

Mr. Harvey G. Allbee, Jr.
Muscatine County Attorney
Muscatine County Court House
Muscatine, Iowa

Dear Mr. Allbee:

Reference is herein made to yours of the 24th inst., in which you submitted the following:

> "One of the aldermen of the City Council of the City of Muscatine, Iowa is a school teacher who is married to the manager and one of the principal stockholders of an automobile dealership and garage in Muscatine. She (the alderman) is not a stockholder and has her own individual income as a school teacher. Therefore, her only connection with said automobile dealership and garage is the fact that the manager and one of the principal stockholders is her husband.
>
> "The City has in the past purchased on competitive bids motor vehicles from this dealership (prior to this alderman becoming an alderman) and said garage has rendered services for repairs.
>
> "Question: Is the interest of said alderman in contracts with this dealership and garage of a nature to be prohibited under the terms of Section 368A.22 as amended by Chapter 326 of the acts of the 61st General Assembly and therefore, the City would be prohibited from accepting bids submitted by said dealership for the purchase of new motor vehicles and services."

It would appear from the foregoing that the only bar to the husband of a member of the City Council selling motor vehicles to the city or

making repairs to its automobiles is the fact that he is the husband of the councilwoman. Neither Section 368.22, 1962 Code of Iowa as amended by the Acts of the 60th General Assembly, or Chapter 326, Acts of the 61st General Assembly which is the substitute for the foregoing numbered section, made specific provision that any relationship between a city officer and a contractor is a disqualifying interest making it unlawful for the making of contracts between such council member and the contractor. Chapter 326, Acts of the 61st General Assembly provides:

"2. No municipal officer or employee shall have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for his municipality."

With respect to the question of a disqualifying relationship, 43 American Jurisprudence, Section 302 entitled Public Officers, states the rule as follows:

"In the cases in which the question has been presented, it has ordinarily been held that relationship is not a disqualifying interest within a statute making it unlawful for an officer to be interested in a public contract. Thus, an officer is not regarded as disqualified from entering into and passing on contracts merely because he bears to the other contracting party the relationship of father, father-in-law, brother, husband, or the like. There are, however, decisions to the contrary, particularly where the relationship is that of husband and wife. In some jurisdictions, statutes expressly provide that no person related within a specified degree to a member of a public board shall be directly or indirectly interested in a contract of such board."

An annotation appearing in 74 A.L.R. at page 792 states:

"The question whether relationship is a disqualifying interest within the statutes making it unlawful for an officer to be interested in a public contract has been directly presented in comparatively few cases. In almost every instance, relationship has been held to have no disqualifying effect."

There are cases cited from a number of jurisdictions and it is stated additionally on page 795 as follows:

"There are, however, decisions contrary to the general rule which either held or implied the relationship between a public officer and a contractor with the public is a disqualifying interest, particularly if this relationship is that of a husband and wife."

With respect to Chapter 326, this statute requires that no municipal officer shall have an interest, direct or indirect, in any contract or profits thereof executed with the municipality. Thus, two questions arise:

1. Does the wife have a direct interest in the contracts involved?

2. If not a direct interest, is her interest as wife such an indirect interest as to be violative of Chapter 326?

With respect to the first question, it seems clear that the wife-alderman is not a party to the contract and therefore not directly interested.

With respect to the second question, it must be determined whether the relationship of husband and wife is such an indirect interest so as to be violative of Chapter 326. In the case of *Thompson v. District Board of School District No. 1 or Moorland Township*, 252 Mich,

629, 233 N.W. 439 (1930), the Michigan Supreme Court was faced with the question at hand. There, under a similar statute, the question was whether a teacher's contract could be entered into with the wife of an officer of the school district. At 252 Mich. 632, the court said:

> "We do not overlook the fact that the purpose of the provision of the school law under consideration is expressed in broad terms. The words 'directly or indirectly' were obviously used in this statute to make it broad enough to prevent an officer who might be so disposed from circumventing and defeating this provision of the law. The most common violations are those incident to contracts with corporations in which the school officer is a shareholder or with partnerships in which he is a member. In such instances there is clearly an 'indirect' interest. Cases of this character are reported in *Consolidated Coal Co. v. Board of Trustees,* 164 Mich. 235, 129 N.W. 193, and *Ferle v. City of Lansing,* 189 Mich. 501, 155 N.W. 591 (L.R.A. 1917C, 1096). These decisions are not applicable to the case at bar. We are of the opinion that the instant contract should not be held to be in violation of the quoted provisions of the school law, nor do we know of any good reason why it should be held to be contrary to public policy. This contract is not of such nature that it cannot be fulfilled without reaching beyond the parties and working, or tending to work, an injury to the community at large, hence it is not contrary to public policy."

Iowa has not passed upon this question, however, I find the Michigan case above to be persuasive authority.

Additionally, in discussing indirect interest in 10 Drake Law Review it was stated as follows at page 64:

> ". . . Although an indirect interest would be sufficient under these statutes, there is a point at which an interest can be too remote and incidental to be within the contemplation of such statutes. Even though these statutes do not limit the forbidden interest to a financial one, all the reported cases arising under these statutes have been concerned with a personal financial interest . . ."

Chapter 597, 1962 Code of Iowa indicates last that the contracts, debts, rights and liabilities of each husband and wife are to be considered as separate and independent. Therefore, since the wife-alderman has no ownership in the company or legal interest in the contracts, other than the fact that the contract is between the municipality and her husband, I am of the opinion that such a relationship does not constitute an indirect interest in violation of Chapter 326, Acts of the 61st General Assembly.

2.12

CITIES AND TOWNS: City Council meetings—§368A.1(2), 1962 Code of Iowa. A city council in the exercise of its discretion may bar news media personnel from recording public meetings of the council on electronic tape.

June 21, 1966

Honorable Franklin S. Main
State Senator
Lamoni, Iowa

Dear Senator Main:

This is in response to your request for an opinion on whether a city council may bar news media personnel from recording on electronic tape the proceedings of the council during its public meetings.

Section 368A.1(2), 1962 Code of Iowa, provides:

"368A.1 The Council. In all municipal corporations, except when otherwise provided by laws relating to a specific form of municipal government, the council shall:

* * *

"2. Meetings. Determine the time and place of holding their meetings, which at all times shall be open to the public. . . ."

City council meetings "shall be open to the public." Every citizen has a statutory right to attend the meetings and to witness the proceedings. News media personnel possess a right under this statute indistinguishable from the right possessed by the public generally: They may attend, they may listen, they may report to others what transpires.

In *United Press Association v. Valente*, 308 N.Y. 71, 123 N.E. 2d 777 (1954), the plaintiff news-gathering organization sought to restrain a judge from excluding news media personnel from a trial. By order, the judge had barred both public and press. At 123 N.E. 2d 783, the Court of Appeals held:

"The fact that petitioners are in the business of disseminating news gives them no special right or privilege, not possessed by other members of the public. Since the only rights they assert are those supposedly given 'every citizen' to attend court sessions. Judiciary Law, §4, they are in no position to claim any right or privilege not common to 'every [other] citizen'."

It is clear that refusing to permit news media personnel to "tape" council proceedings deprives them of no statutory right. Nor does it insult the Constitution. In *Estes v. Texas*, 281 U. S. 532, the United States Supreme Court ruled that barring television cameras from a court trial open to the public did not abridge the Constitutionally-protected freedoms of speech and press, since the television industry's representatives were not barred from attending in person or from reporting what they heard and saw. The court said:

"The right of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process. . . ."

By the same token, the right of news media personnel to attend city council meeting as members of the public does not license them to use tape recorders. Since they may see and hear and report as fully as they choose, and since they may comment freely on what transpires, freedom of the press and freedom of speech are not abridged.

It is my opinion, therefore, that since neither statute nor Constitution is abridged by barring the "taping" of city council proceedings, a city council in its discretion may prohibit it.

2.13

CITIES AND TOWNS: Firemen's and Policemen's Retirement Pension Benefits—§411.8, 1962 Code of Iowa. Under Section 411.8(3), 1962 Code of Iowa, a city must levy a tax sufficient in amount to meet the requirement that a city annually pay an amount into the pension accumulation fund, which is not less than the rate percent known as the normal contribution rate of the compensation earnable by all members during the year. The pension accumulation fund established by Section 411.8(3), 1962 Code of Iowa, should, in those instances where it is not now the case, be brought up to date in a manner suf-

ficient to meet the requirements for minimum funding. The manner in which the proper funding of the pension accumulation fund should be insured will necessarily depend upon the facts, circumstances, and financial conditions existent in the particular city.

August 24, 1966

Hon. Lorne R. Worthington
State Auditor
State House
L O C A L
Attention: LaVerne E. Heithoff

Dear Mr. Heithoff:

I am in receipt of your recent letter in which you ask for the opinion of this office upon the following enumerated questions:

I

Under section 411.8(3), 1962 Code of Iowa, must a city levy a tax sufficient in amount to meet the requirement that a city annually pay an amount into the pension accumulation fund which is not less than the rate percent known as the normal contribution rate of the total compensation earnable by all members during the year?

Section 411.8(3) states, in part, as follows:

"3. *Pension accumulation fund.* The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contributions made by the said cities and from which shall be paid the lump sum death benefits for all members payable from the said contributions. . . .

* * *

"b. On the basis of regular interest and of such mortality and other tables as shall be adopted by the boards of trustees, the actuary engaged by the said boards to make each valuation required by this chapter, shall immediately after making such valuation, determine the uniform and constant percentage of the earnable compensation of the average new entrant, which, if contributed throughout his entire period of active service, would be sufficient to provide for the payment of any death benefit or pension payable on this account. The rate percent so determined shall be known as the 'normal contribution rate'. The normal contribution rate shall be the rate percent of the earnable compensation of all members obtained by deducting from the total liabilities of the fund the amount of the funds in hand to the credit of the fund and dividing the remainder by one percent of the present value of the prospective future compensation of all members as computed on the basis of mortality and service tables adopted by the boards of trustees and regular interest. The normal rate of contribution shall be determined by the actuary after each valuation.

"c. *The total amount payable in each year to the pension accumulation fund shall be not less than the rate percent known as the normal contribution rate of the total compensation earnable by all members during the year,* provided, however, that the aggregate payment by the said cities shall be sufficient when combined with the amount in the fund to provide the pensions and other benefits payable out of the fund during the then current year." (Emphasis added)

The above quoted language is clear and unambiguous. Under Section 411.8(3), 1962 Code of Iowa, a city must levy a tax sufficient in amount to meet the requirement that a city annually pay an amount into the

pension accumulation fund which is not less than the rate percent known as the normal contribution rate of the total compensation earnable by all members during the year.

II

If municipalities have not funded the normal contribution rate what action or steps does the law allow to establish an adequate "pension accumulation fund" and to protect both the retired people covered by such pensions and the policemen and firemen currently employed by a city.

Before discussing the specific question which you have raised, it will be helpful to discuss some basic notions which the courts have considered in dealing with public pension laws. The constitutionality of such laws has usually been based upon the ground that pensions are in the nature of compensation for services previously rendered and for which pay was withheld to induce long continued and faithful service. See McQuillin, *Municipal Corporations*, §12:142 (1963). The constitutionality of the Iowa pension statutes has been upheld upon substantially this same basis. *Lage v. City of Marshalltown*, 212 Iowa 53, 235 N.W. 761 (1931); *Campbell v. Marshalltown*, 235 N.W. 764 (1931); *Talbott v. Independent School District of Des Moines*, 230 Iowa 949, 299 N.W. 553 (1941). Consequently, the proper funding of the policemen and firemen's pension plan involves very basic and fundamental rights of the affected parties—rights which relate to the affected parties' present employment relationship as well as to their future security. And the proper funding of the pension plan also involves municipal financing in which public officers are placed under high obligations of trust and observation. The legal basis and purpose of Chapter 411 as well as the language of Section 411.8 make it clear that the pension accumulation fund should, in those instances where it is not now the case, be brought up to date in a manner sufficient to meet the statutory requirements for minimum funding. The funding requirements were enacted by the legislature to make the pension program actuarially sound; these requirements cannot be ignored, and past improper funding cannot be allowed to remain or continue.

The manner in which the proper refunding of a pension accumulation fund should be insured will necessarily depend upon the facts, circumstances, and financial condition existent in the particular city. So far as civil relief is concerned, it is clear that a writ of mandamus may be obtained by parties with an interest in the relief granted to compel a municipality to make an appropriation where there is a clear legal duty requiring the appropriation. McQuillin, *Municipal Corporations*, §39.70 (1963). Such writs have been granted by the courts against municipalities to insure payments which were required to be made by a municipality during a past period of time. Thus in a suit brought by a number of firemen, it was held that a city council was required to appropriate funds sufficient to pay firemen minimum wages provided by ordinance, even though no provision for such funds had been made in the previous budget. *Parrack v. Phoenix*, 86 Ariz 88, 340 P.2d 997 (1959). Both the *Parrack* case and the situation with which we are here concerned involve obligations which municipalities must meet in administering statutes dealing with the salaries of firemen.

So far as a violation of the criminal laws is concerned, Section 336.2(1), 1962 Code of Iowa, provides that it shall be the duty of the county attorney to:

"Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted in the name of the state of Iowa, or by him as county attorney, except as otherwise specially provided."

Section 411.14, 1962 Code of Iowa, sets out fraud provisions specifically applicable to Chapter 411, and Section 740.19 sets out provisions relating to neglect of duty of a public official. In a particular instance these provisions could be applicable to the situation with which your question is concerned.

In conclusion, under Section 411.8(3), 1962 Code of Iowa, a city must levy a tax sufficient in amount to meet the requirement that a city annually pay an amount into the pension accumulation fund, which is not less than the rate percent known as the normal contribution rate of the compensation earnable by all members during the year. The pension accumulation fund established by Section 411.8(3), 1962 Code of Iowa, should, in those instances where it is not now the case, be brought up to date in a manner sufficient to meet the requirements for minimum funding. The manner in which the proper funding of the pension accumulation fund should be insured will necessarily depend upon the facts, circumstances, and financial conditions existent in the particular city.

2.14

CITIES AND TOWNS: Public Utility Plants—§§397.1, 397.5, 1966 Code of Iowa. A municipality which is presently operating a heating plant under the provisions of Chapter 397, 1966 Code of Iowa, has the authority to cease providing steam heat to customers after affording reasonable notice of its intention to terminate the service. An election meeting the requirements of Section 397.5, 1966 Code of Iowa, should be held to authorize the cessation of the service. The municipality is not obligated to install heating equipment for customers whose service is discontinued. However, if a municipality has agreed by contract with various customers to furnish heat for a specified period in the future it may be required to meet those obligations or be liable for breach of contract.

August 31, 1966

Mr. Richard E. Lee
Hamilton County Attorney
628 Second Street
Webster City, Iowa

Dear Mr. Lee:

I am in receipt of your recent letter in which you request the opinion of this office upon the following questions relating to the discontinuance of the operation of the Webster City Heating Plant:

I

Is a city which is presently operating a heating plant under the provisions of Chapter 397, 1966 Code of Iowa, authorized to cease providing steam heat for its customers after providing reasonable notice of its intention to terminate the service?

Section 397.1, 1966 Code of Iowa, states:

"*Cities and towns may purchase.* Cities and towns shall have the power to purchase, establish, erect, maintain, and operate within or without their corporate limits, heating plants, waterworks, gasworks, or electric light or power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants, and lease or sell the same."

A municipal corporation possesses such powers as are expressly conferred upon it by the legislature, those additional powers necessarily or fairly implied in or incident to the powers expressly conferred, and those powers necessarily essential to the identical objects and purposes of the corporation as by statute provided. *Cowin v. City of Waterloo,* 237 Iowa 202, 21 N.W. 2d 705, 163 A.L.R. 1327 (1946). *Huff v. City of Des Moines,* 244 Iowa 89, 56 N.W. 2d 54 (1952). Statutes should be construed, if possible, to avoid injustice, unreasonableness or absurdity. *France v. Benter,* 256 Iowa 534, 128 N.W. 2d 268 (1964). If a statute is susceptible to more than one reasonable interpretation or application, courts must give to it an interpretation or application which leads to logical rather than illogical results. *Hardwick v. Bublitz,* 253 Iowa 44, 111 N.W. 2d 309 (1962).

Because cities and towns have the express power under Section 397.1, 1966 Code of Iowa, to purchase, establish, erect, maintain, operate, and sell a heating plant, it appears to be clear that they also have the implied power, under the same statute, to cease operating such a plant. To determine otherwise would be to reach an illogical result. This conclusion is in addition reinforced somewhat by Section 366.1, 1966 Code of Iowa, which gives to municipal corporations the broad power to make such ordinances as seem necessary to provide for the safety and promote the prosperity of the corporation and the inhabitants thereof.

A utility may discontinue an unprofitable branch of its service if such action would not be discriminatory and would provide all customers with equal protection under the law. Article 1, Section 6, Constitution of the State of Iowa. *Laughlin et al v. Public Utilities Commission of Ohio,* 6 Ohio St. 2d 110, 216 N.E. 2d 60 (1966); *Mount Carmel Public Utility & Service Co. v. Public Utilities Comm.,* 297 111 303, 130 N.E. 693 (1921).

Section 397.1, 1966 Code of Iowa, must be interpreted in light of and together with Section 397.5, 1966 Code of Iowa. *Central States Electric Co. v. Incorporated Town of Randall,* 230 Iowa 376, 297 N.W. 804 (1941). Because Section 397.5 requires an election in instances where determinative action is taken under Section 397.1, it appears that an election would be necessary to authorize cessation of heating service by a municipal heating plant.

Thus, a city which is presently operating a heating plant under the provisions of Chapter 397, 1966 Code of Iowa, is authorized to cease providing steam heat for customers after providing reasonable notice. An election meeting the requirements of Section 397.5, 1966 Code of Iowa, should be held to authorize the cessation of the services.

II

If the city is authorized to discontinue the service, is it further obligated to install steam boilers or other heating equipment for the customers that are presently subscribers to the steam heating system?

There are no statutory provisions or cases indicating that a municipality is required to furnish heating equipment to customers upon cessation of the operation of a municipal heating plant. However, if a municipality has agreed by contract with various customers to furnish heat for a specified period in the future it may be required to meet those obligations or be liable for breach of contract. *Mount Carmel Public Utility & Service Co., v. Public Utility Commission,* 297 111 303, 130 N.E. 693 (1921); *Burkitt Motor Company et al v. City of Stuart et al,* 190 Iowa 1354, 181 N.W. 762 (1921); *Sturgeon v. City of Paris,* 58 Cir 102, 122 S.W. 967 (1909). O.A.G. Minn. Sept. 19, 1962.

In conclusion, a municipality which is presently operating a heating plant under the provisions of Chapter 397, 1966 Code of Iowa, has the authority to cease providing steam heat to customers after affording reasonable notice of its intention to terminate the service. An election meeting the requirements of Section 397.5, 1966 Code of Iowa, should be held to authorize the cessation of the service. The municipality is not obligated to install heating equipment for customers whose service is discontinued. However, if a municipality has agreed by contract with various customers to furnish heat for a specified period in the future it may be required to meet those obligations or be liable for breach of contract.

2.15

CITIES AND TOWNS: Whether an assistant chief of police is exempt from Civil Service—§§365.1, 365.6, 365.13 and 365.14, 1966 Code of Iowa. The Iowa statutes are specific in providing that, in cities over 8,000 population, only the chief of police is excepted from the provisions of the Civil Service law. An assistant chief of police is subject to the Civil Service law.

October 4, 1966

Honorable Tom Riley
State Senator
1215 Merchants National Bank Building
Cedar Rapids, Iowa

Dear Senator Riley:

You have forwarded to us, with an opinion request, an ordinance from the City of Marshalltown whereby they have created the position of assistant chief of the Marshalltown Police Department. He is to be appointed in writing by the mayor and is not to be subject to competitive tests or examinations under the Civil Service Commission. He is to hold his position at the pleasure of the mayor, could be removed by the mayor, and is to be second in rank and position in the Marshalltown Police Department. The concluding paragraph of your accompanying letter of September 28 sets out the following question for the consideration of this office:

> "Since this question is one of common interest for all city law enforcement personnel, I would respectfully request your opinion as to whether the ordinance attached hereto as 'Exhibit A' is in violation of Iowa law. In other words, does a city having a population of 8,000 or over have the power to create the position of assistant chief of police, which position is to be filled by appointment in writing by the mayor and without the appointee being subject to competitive tests or examinations under the Civil Service Commission, which appointee shall hold his position at the pleasure of the mayor and may be removed at any time by written order. Putting it more simply, can any city having a population of 8,000 or over create the position of assistant chief of police without said position being subject to the Civil Service laws of the State of Iowa?"

Chapter 365 of the 1966 Code of Iowa is the Civil Service chapter. Section 365.1 requires the city council to appoint Civil Service commissioners in all cities having a population of over 8,000.

Section 365.6 states to whom the chapter shall apply, points out that the chief of police is an excepted position. This section reads as follows:

"365.6 Applicability—exceptions.

1. The provisions of this chapter shall apply to all appointive officers and employees, including deputy clerks and deputy bailiffs

of the municipal court, in cities under any form of government having a population of more than fifteen thousand except:

a. City clerk, city solicitor, assistant solicitor, assessor, treasurer, auditor, civil engineer, health physician, chief of police, market master, city manager and administrative assistants to the manager.

b. Laborers whose occupations requires no special skill or fitness.

c. Election officials.

d. Secretary to the mayor or to any commissioner.

e. Commissioners of any kind.

f. Casual employees.

2. In all other cities under any form of government, the provisions of this chapter shall apply only to members of the police and fire departments, except the following persons connected with such departments:

a. Chiefs of police.

b. Janitors, clerks, stenographers, secretaries.

c. Casual employees."

An examination of the rest of Chapter 365 gives no indication of any other exceptions and the chief of police and the chief of the fire department are further discussed in Sections 365.13 and 365.14.

The statute is clear and there is very little room for construction. The standard rule of statutory construction in Iowa is that where the statute is plain and unambiguous, there is no room for interpretation by the courts. *Horner v. State Board of Engineering Examiners,* 253 Iowa 1, 110 N.W. 2d 371 (1961).

If there were room for construction, the rule that the express mention in the statute of one thing necessarily implies the exclusion of another thing, would apply so that where Section 365.6 indicates that the chief of police is to be an exception, the statute certainly did not contemplate the exception of the assistant chief of police. *North Iowa Steel Company v. Staley,* 253 Iowa 355, 112 N.W. 2d 364 (1961).

A further examination of Section 365.6 indicates that the assistant chief of police position would not fit into any of the other stated exceptions.

Therefore, it is my opinion that the statutes of the State of Iowa are clear and unequivocal in providing that an assistant chief of police is subject to the Civil Service laws of the State of Iowa. An ordinance purporting to exempt an assistant chief of police which is in direct conflict with the laws of the State of Iowa is void as municipal corporations are creatures of the legislature and may only exercise those powers delegated to them by the legislature and must further exercise these powers in conformance with the legislature. *Gritton v. City of Des Moines, et al.,* 247 Iowa 326, 73 N.W. 2d 813 (1955).

2.16

CITIES AND TOWNS: Citizenship requirement for police officers— §§363.23, 365.17, 1966 Code of Iowa. While police officers in communities governed by civil service are required to be United States Citizens, no such requirement exists for a police office in a community whose police department is not governed by civil service.

October 6, 1966

Mr. C. F. Greenfield
Guthrie County Attorney
Bayard, Iowa

Dear Mr. Greenfield:

This will acknowledge receipt of your recent letter wherein you submit the following:

"Does a policeman under Iowa Law need to be a citizen of the United States in order to legally make arrests and perform the functions of a policeman?"

It should initially be noted that Section 365.17, 1966 Code of Iowa, provides, inter alia, that:

". . . In no case shall any person be appointed or employed in any capacity in the fire or police department, or any department which is governed by civil service, unless such person:

"1. Is a citizen of the United States and has been a resident of the State of Iowa for at least one year and meets such other and further residence requirements as the council may by ordinance provide."

It is thus manifest that by express mandate the General Assembly has established the requirement that no person may be appointed to a police department governed by civil service unless such person is a citizen of the United States. As it is our opinion that the majority of police departments in this State are governed by civil service, the general rule would, therefore, evolve that United States citizenship is a prerequisite to appointment as a police officer.

However, in those communities whose police departments are not governed by civil service, an exception to the general rule requiring police officers to be United States Citizens is presented.

Section 363.23, 1966 Code of Iowa, appears to specifically relate to your inquiry, and that section provides as follows:

"Qualifications of officers. Every official *elected* by a municipality shall be a qualified voter thereof, and every official *elected* by the voters of any ward of a municipal corporation shall reside within the corporate limits of said ward." (Italics supplied)

The above-quoted section was enacted to supplant Section 363.8, 1950 Code of Iowa, which, in pertinent part, had stated:

"Every officer *elected* or *appointed* in a city or town shall be a qualified voter . . ." (Italics supplied)

Thus, it becomes manifest that the General Assembly has specifically undertaken to remove the requirement that an appointed officer of a city or town be a qualified elector of such city or town. An elector is defined by Article II, Section 1, Constitution of Iowa, as follows:

"Every . . . male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State six months next preceding the election and, of the county in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

Should the prospective policeman seek employment in a department governed by civil service, Section 365.17, 1966 Code of Iowa, would specifically require that such a candidate be a citizen of the United

States at the time of his appointment. However, the laws of this State appear to be silent as to any further requirement that a policeman in a non-civil service department be a citizen of the United States.

In those communities whose police departments are not governed by civil service, and whose appointed policemen need not be qualified electors of this State, the requirement remains that members of the appointed police department must, under Article XI, Section 5, of the Constitution of Iowa, pledge to support the Constitution of Iowa and of the United States. Article XI, Section 5, provides:

> "Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the Constitution of the United States, and of this State, and also an oath of office."

It is, therefore, the opinion of this office that, as the General Assembly of Iowa has specifically undertaken to omit the requirement that an appointed official of a city or town be a qualified elector, an appointed policeman, in any department not governed by civil service, would not be required to be a United States Citizen at the time of his appointment.

2.17

Municipal Revenue—§404.10(14), Code of Iowa, 1962. Is not limited by the ⅜ mill limitation set out in Section 386A.1 of the 1962 Code of Iowa. (Gentry to Representative Gallagher, 1/29/65) #65-2-2

2.18

Cities and Towns—§368A.22, Code of 1962—A member of City Council is barred from performing services for the City for which compensation is paid him. (Strauss to Representative Fullmer, 2/15/65) #65-2-10

2.19

Waterworks Trustees—Budget reporting—§§24.2, 24.3, 368A.5, 368A.6, 368A.7, 398.1, 398.9, 398.10 and 398.11 of the 1962 Code of Iowa. It is the ultimate duty of the city to file a budget each year under Chapter 24 in regard to the waterworks fund. Chapter 398 requires the waterworks trustees to furnish most of the budget information to the City Clerk. (McCarthy to Hon. Lorne Worthington, State Auditor, 2/24/65) #65-2-19

2.20

TOWNSHIPS: Town Halls—Chapter 360 of the 1962 Code of Iowa. A township cannot enter into an arrangement to improve, equip and maintain an existing town hall without having an ownership interest: (McCarthy to Barlow, 3/17/65) #65-3-15

2.21

Civil Service Commission—§§365.11, 365.8, 365.9, 29.28, 1962 Code of Iowa. Persons on the certified eligible list for promotion in Civil Service who are questioning the promotion of another on said list through the appeal procedure provided, are required to take an additional promotional examination to maintain their eligibility under §356.11. (McCauley to Mincks, State Senator, 3/19/65) #65-3-14

2.22

Civil Service—"leave of absence" to run for public office—§§365.12, 365.29, 365.2, 1962 Code of Iowa. There is no statutory authority for allowing policemen under civil service a "leave of absence" to run for public office. (Brick to Resnick, State Representative 3/29/65) #65-3-19

2.23

Cities and Towns—Park Boards and Commission forms of Government —§§363.3, 363.38, 363B.1, 363B.4, 363C.15, 368.30, 370.1, 370.11, 370.12, 370.13 and 370.20, 1962 Code of Iowa. Park Boards and councilman in charge of the department of parks and public property both have statutory authority over parks as as set out in §§363.38, 370.11, 370.12, 370.13 and 370.20. (McCarthy to Worthington, 5/27/65) #65-4-9

2.24

Township Dumps—§§332.31, 332.32, 332.33, 332.34 and 359.29. The only statutory authority for the operation, maintenance, tax levy and funding of a township dump is with the county boards of supervisors. (McCarthy to Saur, 6/11/65) #65-6-4

2.25

Reports of the Fire Chief—§100.3, 1962 Code of Iowa. Without statutory authority the Mayor cannot compel the Fire Chief to report daily on fire calls. (Gentry to Allbee, Jr., Muscatine County Attorney, 6/29/65) #65-6-11

2.26

Civil Service—§§365.28, 416.43 and 419.56, 1962 Code of Iowa. The ultimate authority to establish different civil service salary positions or grades within a fire department resides in the city council. (Brick to Hon. Jake B. Mincks, 7/8/65) #65-7-9

2.27

Boards of Trustees—§§363.3, 397.1, 397.8, 397.29, 397.34, 398.1, 398.9, 398.10, 399.5, 1962 Code of Iowa. The boards of trustees have full authority over the placement of street lights, the wattage and design of such lights, the placement of water levies, the size of water pipes, and the placement of fire hydrants, so long as that authority is not exercised illegally or unreasonably in light of other city policies or programs. The costs of replacements and improvements of water system are met by levies by the city council and the rentals or rates charged by the water board of trustees. The costs of replacements and improvements of electric systems are to be met by the rentals or rates charged by the light trustees. The trustees have full and absolute control over the application and disbursement of their funds. (Brick to Hon. Adrian Brinck, 7/15/65) #65-7-16

2.28

Townships: Justice of the Peace and Constable; meaning of the term, "Civil Officers"—§§602.1, 748.1, 748.3 and 748.5, 1962 Code of Iowa; Chapter 601, 1962 Code of Iowa; Senate File 77, Acts of the 61st G.A. Townships Justice of the Peace and Constable are "civil officers" as contemplated by Senate File 77. (McCarthy to Bremmer, 8/19/65) #65-8-8

2.29

Mayor-Council government—§363A.4, 1962 Code of Iowa. Whether a mayor in a mayor-council form of government is a full or part-time position must be determined from the facts of each individual case. Important factors are: (1) The amount of time per week which the mayor devotes to his official duties or the business of his office; (2) the number of employments pursued by the mayor; (3) the special agreements between the mayor and council stipulating the nature of the position. (Brick to Longnecker, Iowa Public Employees Retirement System, 8/27/65) #65-8-9

2.30

Water Works Trustees; Pledge Warrants—§§397.9, 397.10 and 397.11, 1962 Code of Iowa. Trustees of a municipally owned water works, established by election, have the statutory authority (1) to enter into contracts for the extension and improvement of a plant without an election; and (2) to finance such contracts from the future net earning of the plant by the issuance of "pledge warrants". (McCarthy to Mincks, State Senator from Wapello County 9/10/65) #65-9-4

2.31

Civil Service—§365.17, 1962 Code of Iowa, as amended. Amendment to §365.17 became effective July 4, 1963, and operated prospectively; after that date the language changed by the amendment had no prospective legal effect. (Clarke to Simpson, Boone County Attorney, 10/4/65) #65-10-4

2.32

Local Registrar—§§144.6, 144.8(2), 144.8(3), 144.9 and 144.35, 1962 Code of Iowa. The Local Registrar is an employee of the State of Iowa and not an employee of the city or county. (Thornton to Fenton, Polk County Attorney, 10/8/65) #65-10-6

2.33

Public Officers; Incompatibility; Board of Adjustment—§368A.22 and Chapter 414, 1962 Code of Iowa; S. F. 105, Acts of the 61st G. A. Member of the municipal board of adjustment provided for in Chapter 414 of the 1962 Code of Iowa is an officer of the municipality and subject to the provisions of §368A.22, as amended, and the penalties therein provided. (Strauss to McNamara, 10/26/65) #65-10-4

2.34

Contracting Procedure—§23.18 and Chapter 397, 1962 Code of Iowa. The requirements of §23.18 as to bid security are not available for contracting procedures under Chapter 397. (Strauss to Mossman, Benton County Attorney, 11/24/65) #65-11-7

2.35

City Attorney Appearing Before City Council—As a matter of public policy, the City Attorney or any Assistant City Attorney is denied the right to appear before the City Council on behalf of others asking

Council action, and a Council member, who is an attorney at law, may not, for the same reason, appear for the defendant before the Mayor holding Mayor's Court. (Strauss to Yarham, Cass County Attorney, 12/3/65) #65-12-3

2.36

Joint County-Municipal Civil Defense Administration—§28A.7, 1962 Code of Iowa; Chapter 81, §10, Acts of the 61st G. A. Each political subdivision within a county, i.e., county, city or town, is directed to appoint a director of civil defense and emergency planning. The appropriation of funds for the salaries and expenses of such organizations is permissive and if not otherwise restricted. Vacancies are filled as in Chapter 69 of the 1962 Code of Iowa. If the political subdivisions refuse to appoint a director, mandamus is the proper action to enforce this duty. Removal of officer may be had as provided in Chapter 66. (McCauley to Bedell, Dickinson County Attorney, 12/8/65) #65-12-11

2.37

Firemen's and Policemen's Retirement Pension Benefits—§§410.6, and 411.6, 1962 Code of Iowa; Chapter 340, §§2 and 3; Chapter 341, §2, Acts of the 61st G. A. The amendment to 410.6 that "at no time shall the monthly pension or payment to the member be less than one hundred fifty-dollars ($150.00)" applies to all members on pension or receiving payment under Chapter 410 of the Code. "Holiday pay" is included in recomputing all members' pension, and "Longevity pay" is included and based on the number of years of service the member had at the time of his retirement, in recomputing all members' pensions. (McCauley to Frommelt, State Senator, 12/23/65) #65-12-16

2.38

Effect of repeal of statute authorizing a housing commission—§403A.5, 1962 Code of Iowa; Chapter 334, Acts of the 61st G. A. Repeal of §403A.5, 1962 Code of Iowa, which authorized the establishment of a municipal housing commission, operated ipso facto to repeal any municipal ordinance creating such commission and to abolish any offices provided for. Such repeal and re-enactment thereof as Chapter 334, Acts of the 61st G. A., results in the requirement for election as provided in Chapter 334. (Strauss to Glenn, State Representative, 12/30/65) #66-1-2

2.39

Legal publication—§§366.7(1) and 618.14, 1962 Code of Iowa. Publication of municipal ordinances is accomplished by posting where there is no newspaper published in the city or town. Publication of other municipal activities where no newspaper is published may be satisfied by use of §618.14. (Strauss to Denato, State Representative, 1/27/66) #66-1-11

2.40

Police and Fire Retirement Benefits—Chapters 410 and 411, 1962 Code of Iowa, as amended. After January 1, 1966, firemen employed in the departments of cities of ten thousand population or more, or under civil service, shall not be required to remain on duty for periods aggregated in each month more than fifty-six hours per week except that

there is no such restriction applicable to the chief, or other persons when in command of a fire department, or to firemen who are employed subject to call only, and no such restriction applicable in case of serious emergencies. To be eligible for the full pension amount provided for by §410.6 of the 1962 Code of Iowa, as amended, a fireman is not required to serve the necessary 22 years subsequent to the date upon which the retirement program was adopted in a specific community. (Clarke to Denato, State Representative, 2/2/66) #66-2-1

2.41

Firemen's and Policemen's Retirement System—§411.8(1)(a), 1962 Code of Iowa; Section 3, Chapter 341, Acts of the 61st G.A. Increases in the contribution rates provided by Section 3, Chapter 341, and payable by members of the retirement program provided for in Chapter 411, 1962 Code of Iowa, as amended, should not be applied retroactively under the language of Section 411.8(1)(a) of the Code. (Clarke to Doderer, State Representative, 2/18/66) #66-2-4

2.42

Compatibility of office between Urban Renewal Director and Low-Rent Housing Law Director—§§403.15, 403.16, 403.17 and 403A.22, as amended, 1962 Code of Iowa; Chapter 334, Acts of 61st G.A. The directors of Urban Renewal law and Low-Rent Housing law are not public officers and the common law rule of compatibility of office does not apply. There are statutory limitations under §403A.22, as amended, which restrict actions of employees under the Low-Rent Housing law. There is no incompatibility of office between the positions of relocation officer under Urban Renewal and secretary of the River Front Commission. (McCarthy to Carnahan, State Representative, 3/8/66) #66-3-2

2.43

Private use of public funds is prohibited—§§24.22, 24.24, 66.1, 368.26, 397.38, 397.39, 397.40 and 404.23, 1962 Code of Iowa. Private or unauthorized use of public funds is forbidden. Taxpayers may bring legal action and the form of the action is certiorari. The action of the city council in diverting public funds to an unauthorized use constitutes willful maladministration. This action is grounds for removal from office. Unauthorized expenditures of public money create a personal liability upon the city council members who caused the expenditure. (McCarthy to Buren, State Senator, 3/11/66) #66-3-7

2.44

Power of city to levy taxes for cemeteries—§§359.29 through 359.41, 368.28, 404.1, 404.2, as amended, and 404.10(1)(2), as amended, 1962 Code of Iowa. §368.28 does not authorize a city to extend its tax levy to property outside the city's corporate limits. (McCarthy to Vanderbur, Story County Attorney, 4/4/66) #66-4-1

2.45

Low-rent housing law amendment—Chapter 403A, 1962 Code of Iowa, as amended; Chapter 334, Acts of the 61st G.A. Low-rent housing proceedings commenced under Chapter 403A but not completed by July 4, 1965, the effective date of Chapter 334, Acts of the 61st G.A., are not affected by the amending provisions of Chapter 334 and are controlled

until concluded by Chapter 403A. (Brick to McGill, State Senator, 4/8/66) #66-4-2

2.46

Off-street parking—§332.3 and Chapter 390, 1962 Code of Iowa; Chapter 83 and Chapter 329, Acts of the 61st G.A. City and county may enter into joint venture to establish "off-street parking." (Clarke to Simpson, Boone County Attorney, 6/29/66) #66-6-3

2.47

Indebtedness for long term rental leases—§§407.1, 407.2, 407.3, and 407.12, 1962 Code of Iowa. Long term rental lease agreements of equipment by a city or town create an indebtedness, the creation of which must be authorized by §407.3 of the 1962 Code of Iowa. (McCarthy to Worthington, Auditor of State, 7/5/66) #66-7-2

2.48

Practice of architecture and engineering regarding certain structures —§§114.12, 114.16, 118.16, 118.18, 1962 Code of Iowa, as amended. Persons not registered as architects under Chapter 118, 1962 Code of Iowa, as amended, may perform architectural services in connection with the excepted structures under Section 118.18, 1962 Code of Iowa, as amended, but persons not registered as professional engineers under Chapter 114, 1962 Code of Iowa, as amended, may not perform engineering services in connection with these structures. (Brick to Samore, 7/22/66) #66-7-7

2.49

Annexation—§362.30, 1966 Code of Iowa. A voluntary annexation is invalid where all owners of territory within the perimeter of the territory to be annexed fail to join in the application and where all the territory sought to be annexed does not adjoin the city or town. (McKay to Cutting, Winneshiek County Attorney, 8/2/66) #66-8-2

2.50

Authority to lease—§368.18, 1966 Code of Iowa. A city or town has no statutory authority to execute a contract for the lease of a town hall and fire department building to be built by private parties on municipally owned land. (McCarthy to Worthington, State Auditor, 8/2/66) #66-8-1

2.51

Voting rights during annexation proceedings—§§362.26 and 362.33, 1966 Code of Iowa. Where the annexation procedures of Section 362.26 are followed and where there are objectors whose rights have not been determined by the court, a decree of the court defaulting those residents who have not objected is not a final action of the court which should be certified by the Clerk of the District Court to the County Recorder. This has not been annexed and the residents of this area are not required to register and vote in the city, but have the right to vote in their township until the court takes final action and the action is certified by the Clerk to the Recorder. (McCarthy to Tierney, Webster County Attorney, 9/29/66) #66-9-6

CHAPTER 3

CONSERVATION

STAFF OPINIONS

LETTER OPINIONS

3.1

CONSERVATION: Condemnation proceeding guardianship—§§472.15, 472.33, 472.34, 107.24, Code of Iowa, 1962. The State Conservation Commission, in the exercise of its authority to condemn private property, may itself pay a reasonable fee to a guardian of an incompetent condemnee, where the incompetent is indigent and his share of the assessment is not sufficient to sustain the costs of the guardianship.

March 5, 1965

Mr. E. B. Speaker, Director
State Conservation Commission
East 7th and Court Avenue
Des Moines, Iowa

Dear Mr. Speaker:

In your recent letter you requested an opinion from this office based on the following facts:

The State of Iowa instituted condemnation proceedings to acquire ten acres in Monroe County for the Conservation Commission's Miami Lake project. Title apparently lies in some forty heirs of the deceased owners of record. One heir is indigent and incompetent. The statutes require that a guardian be appointed for him. His—the incompetent's—share of the prospective award will be a negligible sum, smaller in all probability than a reasonable guardian's fee. The question, therefore, is:

"In a condemnation action brought by the State of Iowa may the State pay the guardianship fees of an indigent condemnee whose assets would not be sufficient to sustain the costs of a guardianship required by Statute?"

We think the pertinent sections of the 1962 Code of Iowa are:

"472.15 Guardianship. In all cases where any interest in lands sought to be condemned is owned by a person who is under legal disability and has no guardian of his property, the applicant shall, prior to the filing of the application with the sheriff, apply to the district court for the appointment of a guardian of the property of such person."

"472.33 Costs and attorney fees. The applicant shall pay all costs of the assessment made by the commissioners. The applicant

shall also pay all costs occasioned by the appeal, including reasonable attorney fees to be taxed by the court, unless on the trial thereof the same or a less amount of damages is awarded than was allowed by the tribunal from which the appeal was taken."

"472.34 Refusal to pay final award. Should the applicant decline, at any time after an appeal is taken as provided in section 472.18, to take the property and pay the damages awarded, he shall pay, in addition to the costs and damages actually suffered by the landowner, reasonable attorney fees to be taxed by the court."

Section 472.15 establishes the requirement that a condemnor apply for the appointment of a guardian of the property of a disabled condemnee. Section 472.33 and 472.34 provide for the taxing of certain costs to the applicant—the condemnor—in condemnation proceedings. Neither of these last two sections can be construed to permit the payment of guardianship fees, nor is there express authority elsewhere in the Code. But we need not be concluded by these observations.

Chapter 471, Code of Iowa, 1962, vests power in the State to condemn private property necessary for any public improvement authorized by the General Assembly. The Executive Council institutes such proceedings where authority is not otherwise delegated. Authority to condemn is delegated to the State Conservation Commission for specified purposes. One specific purpose is to provide public fishing areas. (Section 107.24). Miami Lake will be such an area.

Section 107.24 also authorizes the Commission to "expend any and all moneys accruing to the fish and game protection fund from any and all sources in carrying out the purposes of this chapter . . ." The General Assembly has stated that provisions of the Code of Iowa "shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice." (Section 4.2). To find that the State Conservation Commission does not have the power to pay guardianship fees from its fish and game fund to implement its statutory purposes would be to frustrate those purposes and do violence to the two Code sections last quoted.

Furthermore, the Iowa Supreme Court has said, in *Stoner-McCray System v. Des Moines*, 247 Iowa 1313, 1322, 78 N.W. 2d 843 (1950):

"Powers granted by the Legislature must be granted in express words, and implied powers must be more than simply convenient—they must be indispensable to the exercise of express powers."

If the State Conservation Commission is to exercise its power of condemnation in compliance with the statutory requirement of appointment of a guardian in this case, a power to pay guardian fees is indispensable. Failure to obtain a guardian for a disabled condemnee would put the whole proceeding under a cloud.

It is the opinion of this office, therefore, that the State Conservation Commission, in the exercise of its authority to condemn private property for specified purposes, may itself pay a reasonable fee to a guardian of an incompetent condemnee, where the incompetent is indigent and his share of the assessment is not sufficient to sustain the costs of the guardianship.

3.2

CONSERVATION: Right in use of streams—Farmers may not fence across streams except where not meandered, since meandered streams are navigable streams, and the public has an easement of passage way in navigable streams.

August 3, 1965

Mr. Henry L. Elwood
Howard County Attorney
P.O. Box 377
Cresco, Iowa

Dear Mr. Elwood:

This is in response to your request for an opinion on questions prompted by the following factual situation:

> Farmers whose lands abut the Upper Iowa and Turkey Rivers in Howard County have fenced across those rivers. Canoeists repeatedly cut or tear down the fences. You ask:
>
> 1. Do the farmers have the right to construct a barbed wire or woven wire fence or a combination of the two across these rivers to restrain cattle from trespassing onto adjoining lands?
>
> 2. Do they have the right to bar canoeists and boaters from the use of these rivers?

If the Upper Iowa and Turkey Rivers are navigable streams, the answer to both questions is: No. It has been a settled question since *McManus v. Carmichael*, 3 Iowa 1 (1856), that riparian owners own only to the high water mark of navigable streams and that the State owns the bed of navigable streams in trust for its citizens. Riparian owners cannot obstruct the "paramount right of navigation." *Musser v. Hershey*, 42 Iowa 356, 361 (1875).

The difficulty is in determining what is a navigable stream. The question historically has caused confusion, although it is universally conceded that what the law was in England is not what the law is in this country. In *The Montello*, 78 U.S. 411 (1870), the United States Supreme Court stated that "a river is a navigable water of the United States when it forms, by itself or by its connection with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." The Court added: "If such river is only navigable between points in the same state and does not connect with a stream or lake bearing commerce between different states, it is not a navigable river of the United States but of the state where located."

Although both the Upper Iowa and Turkey Rivers flow into the Mississippi River—concededly a navigable stream of the United States under the first definition in the *Montello* case—they are not necessarily themselves navigable rivers of the United States. Are they segments of a "continued highway over which commerce is or may be carried on?" It is submitted that in all probability they are not in fact or in potentiality highways of commerce. And it is submitted further that there is no merit in attempting to make determinations by invoking this criterion, which itself requires definition.

The criterion applied by the Iowa Supreme Court as to Iowa streams and rivers seems to be that they are navigable if they were meandered in the original government surveys of the last century. The State of Iowa owns the beds of navigable streams. (See, for example, *Rood* v. *Wallace*, 109 Iowa 5, 79 N.W. 449 (1899)). Since a meander line was made only for the purpose of ascertaining the quantity of land in a tract bordering on a lake or stream (*Kraut* v. *Crawford*, 18 Iowa 549, 553 [1865]), the relationship between navigability and what was meandered isn't immediately clear. It is true that instructions to the government surveyors were not to meander insignificant waters. But there is no merit in establishing what considerations were involved.

The point is that different states, as to streams within their boundaries, have adopted varying definitions of navigability. Some have said that if streams can float logs, they're usable for commerce and thus navigable, even though small rowboats can't descend them without repeatedly grounding. Public policy explains such a definition in a logging outdoors state.

The guidelines laid down by the Iowa Court seem to be clear, without respect to the reasons for them or the conflicts which infest this whole area. They are:

1. All streams within the State of Iowa are navigable streams to the extent meandered in the original government surveys.

2. The State of Iowa owns the beds of meandered streams to the extent meandered.

3. No riparian owner can fence across or otherwise interfere with the public's easement in the use of the surface waters of streams to the extent they are meandered.

The Turkey River was meandered from where it flows into the Mississippi River upstream to a point on the West line of Township 95 North, Range 7 West, Northwest of Clermont in Fayette County, Iowa.

The Upper Iowa River was meandered from where it flows into the Mississippi River to a point on the West line of Section 28, Township 100 North, Range 4 West, in Allamakee County. This point is about 2½ miles upstream from the river's mouth.

You should be guided by the foregoing descriptions. Above the points named on the Turkey and Upper Iowa Rivers, farmers may fence across the streams. Below those points they may not fence, nor may they interfere with canoeists.

We are aware of the definition of a navigable stream which appears in 106.2(8), 1962 Code of Iowa, which is as follows:

> "8. 'Navigable waters' means all lakes, rivers and streams, which can support a vessel capable of carrying one or more persons during a total of six months period in one out of every ten years."

This definition was placed in the Code of 1961. It is within the chapter labeled "Water Navigation Regulations." That chapter defines the powers and duties of the State Conservation Commission in coercing safety in the use of the state's waters for boating. For this police power purpose, navigable waters are defined in language broad enough to permit enforcement of safety requirements wherever there is water that will float a vessel with a man in it. We are of the opinion that this definition, in the absence of guidance from the Supreme Court, should be confined to the context in which it is asserted.

It is the opinion of this office, therefore, that the right to canoe rivers in Iowa should be asserted only to the extent that they are meandered. Where not meandered, the riparian landowners may fence as they see fit.

3.3

CONSERVATION: §§306.3, 313.2, 471.8, 1962 Code of Iowa. The State Conservation Commission acted properly in seeking to cause the removal of privately owned cottages from Rights of Ways on lands owned by the State in fee in Clayton and Allamakee Counties.

December 7, 1965

Honorable Adolph Elvers
Elkader, Iowa

Dear Senator Elvers:

This is in response to your request for an opinion in which you recite the following:

"I am sure you are aware that the State Conservation Commission is involved in a case of property rights with a group of people who have cottages located in my Senatorial District of Allamakee and Clayton counties. In view of this I am requesting from you a written opinion on the following information.

"The cottages in Allamakee county are located on a county road between State Highway No. 13 and Harpers Ferry, Iowa. The Conservation Commission claims they have equal jurisdiction with Allamakee county because they own everything under the road and because this particular piece of road was part of the State Highway system until relocation changed the route in 1939 and 1940. I maintain that §§306.3 and 313.2 of the 1962 Code of Iowa would rule contrary to their thinking. What is your ruling?

"The cottages in Clayton county are located north of Marquette, Iowa. They are between the Milwaukee railroad right-of-way and the Mississippi river. The Milwaukee railroad claims a 100 foot right-of-way and they leased the ground in question to their employees for cottages in order to keep the weeds and brush under control thus eliminating a fire hazard. Also, the cottage owners keep watch over the tracks and help prevent vandalism. The Conservation Commission claims the ground was taken by condemnation in 1941 and the Milwaukee railroad has a right to only the ground the railroad claims must be used solely for railroad purposes. I maintain that §471.8 of the 1962 Code of Iowa and certain court cases in the past would definitely be contrary to the Conservation Commission's claims. What is your opinion of this?"

Answering the questions as you pose them will not necessarily answer the basic question implicit here, which is one of the rights of the State of Iowa as opposed to the rights of cottage owners along the Mississippi River in Clayton and Allamakee counties. That in turn requires a determination of the interests each possesses in the land on which the cottages and other structures rest. Both you and the State Conservation Commission have provided this office with information—leases, abstracts of titles to property, maps, charts, statements—helpful in assessing the rights at issue.

You do not contend that the cottage owners own the land on which they sit, and the evidence is that they do not, that the fee interest lies in the State of Iowa. You do contend that the cottages lie within rights of way granted for railroad and highway purposes. You state, in fact, that the Milwaukee Railroad leased some of the land to some of those who put up cottages. You state that others lie within a county road right of way in respect to which, you say, the Conservation Commission can assert no jurisdiction.

The sections of the 1962 Code of Iowa which you cite are as follows:

"306.3. Jurisdiction-control. Jurisdiction and control over the highways of the state are hereby vested in and imposed on (1) the state highway commission as to primary roads; (2) the county board of supervisors as to secondary roads within their respective counties; and (3) 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. Provided however, that 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, 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, reconstruction and repair 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. 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."

"§313.2 'Road systems' defined—roadside parks. The highways of the state are, for the purposes of this chapter, divided into two systems, to wit: the primary road system and the secondary road system. The primary road system shall embrace those main roads, not including roads within cities and towns, which connect all county-seat towns, cities, and main market and industrial centers and which have already been designated as primary roads in chapter 241, Code of 1924; provided that the said designation of roads shall be, with the consent of the federal bureau of public roads, subject to revision by the state highway commission.

"Any portion of said primary road system eliminated by reconstruction or relocation shall revert to and become part of the local secondary road system, provided, however, that the highway commission shall, during a period of not to exceed one year from the date a county has been so notified that the road has reverted to the secondary system, maintain said road and conduct periodic traffic checks. If, at the end of one year the traffic on the section in question exceeds four hundred vehicles per day, it shall remain in the primary system. If, at the end of one year, the traffic on said section does not exceed four hundred vehicles per day, it shall revert to and become a part of the secondary system, provided, however, that the state highway commission shall first allocate sufficient funds to place the road in good repair sufficient for the traffic thereon.

"The state highway commission may, for the purpose of affording access to cities, towns or state parks, or for the purpose of shortening the direct line of travel on important routes, or to effect connections with interstate roads at the state line, add such road or roads to the primary system.

"The state highway commission shall have the authority to utilize any land acquired incidental to the acquisition of land for highway right of way and to also accept by gift, lands not exceeding two acres in area for roadside parks and parking areas, provided, however, that the upkeep and maintenance of said roadside parks and parking areas shall involve only minor maintenance expense. The commission shall also have authority to accept by gift, equipment or other installations incidental to the use of said parks and parking areas. Said parks and parking areas shall be a part of the primary

road system and the commission may at its discretion sell or otherwise dispose of said lands."

"471.8 Limitation on right of way. Land taken for railway right of way, otherwise than by consent of the owner, shall not exceed one hundred feet in width unless greater width is necessary for excavation, embankment, or depositing waste earth."

The specific section under which the Conservation Commission ordered the cottages removed is:

"111.5 Obstruction removed. The commission shall have full power and authority to order the removal of any pier, wharf, sluice, piling, wall, fence, obstruction, erection or building of any kind upon or over any stateowned lands or waters under their supervision and direction, when in their judgment it would be for the best interests of the public, the same to be removed within thirty days after written notice thereof by the commission. Should any person, firm, association or corporation fail to comply with said order of the commission within the time provided, the commission shall then have full power and authority to remove the same."

All of Chapter 111, 1962 Code of Iowa, is germane.

The cottages, trailers or other structures are located as follows:

Area A: 33 on Government Lots 3 and 4 in Section 34, Township 97, Range 3 West, in Allamakee County.

Area B: 3 on Government Lot 3 in Section 34, Township 96 north, Range 3 west, in Allamakee County.

Area C: 32 on Government Lots 3 and 4 in Section 3, Township 95 north, Range 3 west, in Clayton County.

We will assume that all of the cottages lie within rights of way granted either for highway or railroad purposes. Apparently they do. But it is unnecessary to determine this with exactitude, because the State of Iowa owns the fee interest in all of the lands burdened with the rights of way.

The lands in Area A were acquired by the state by warranty deed in 1937. The lands in Area B were acquired by the state by warranty deed in 1942. The lands in Area C were acquired by warranty deed in 1937 and condemnation in 1941. These conclusions were arrived at independently, from a consideration of certified abstracts of title.

All of these state lands are lands in respect to which the Conservation Commission has jurisdiction under Chapters 107 and 111, Iowa Code of 1962. The commission, in other words, is the state's agent in respect to their use and management.

Neither Sec. 306.3 nor 313.2 is helpful. Sec. 306.3 vests jurisdiction and control of primary roads in the State Highway Commission, and of secondary roads in county boards of supervisors. It vests jurisdiction and control of state park and state institution roads in state boards and commissions. Sec. 313.2 defines the road systems of the state. Both sections would be germane if the dispute were purely jurisdictional. It isn't. The question, we say again, is whether the presence of the cottages can be defended as within rights of way which constitute a servitude on lands owned in fee by the State, and, concommitantly, whether the state is inhibited from acting in respect to the misuse of those rights of way.

Sec. 471.8, which you also cite, will not answer the question. That section limits the exercise of the power of eminent domain in the ac-

quisition of property for a railroad right of way. The right of way taken shall not exceed 100 feet in width except where topographical conditions require a greater width. Where the right of way is acquired with the consent of the owner—that is, without invoking condemnation —a railroad may acquire a wider right of way. What Sec. 471.8 says is what the last two sentences say.

The width of the rights of way on which the cottages rest is irrelevant to the problem. We have made the assumption that all are within the rights of way. The preliminary question is: What is a right of way?

A right of way is an easement. *Kurz v. Blume,* 407, 111. 383, 95 N.E. 2d 338 (1950). An easement in land is a liberty, advantage, or privilege without profit existing distinct from ownership in the soil. *Cook v. C., B. & Q.R. Co.,* 40 Iowa 451, 456 (1874); *Stokes v. Maxson,* 113 Iowa 122, 124, 84 N.W. 949 (1901); *Walker v. Dwelle,* 187 Iowa 1384, 1387, 175 N.W. 957 (1920); *Dawson v. McKinnon,* 226 Iowa 756, 766, 285 N.W. 258 (1939); *McKeon v. Brammer,* 238 Iowa 1113, 1117, 29 N.W. 2d 518, 174 A.L.R. 1229 (1947); *Independent School District of Ionia v. DeWilde,* 243 Iowa 685, 692, 53 N.W. 2d 256 (1952); *Webb v. Arterburn,* 246 Iowa 363, 378, 67 N.W. 2d 504, 513 (1954).

The interest possessed by the owner of a right of way is the same however that right of way is acquired—whether by condemnation or grant. *Brown v. Young,* 69 Iowa 625 (1886).

Rights of way cannot be diverted to private use inconsistent with the purposes for which they were acquired, nor can they be used for foreign purposes. *Hohl v. Iowa Central Railway Company,* 162 Iowa 66, 143 N.W. 850 (1913). In *Hohl,* the Iowa court held it was not a misuse of the right of way to permit a stranger to the land to haul sand from a river by access which lay under the railroad's trestle, where the sand was brought to the railroad station for shipment. The use "facilitated shipments."

The result is questionable, because "while it is well settled that all rights expressly granted or necessarily incident to the enjoyment of the easement pass with it, this is the absolute limit of what passes." 28 C.J.S. 751 and cases cited. Permitting the sand to be removed was not necessary, on the facts in *Hohl, supra,* to the enjoyment by the railroad of its right of way, but incidental only to the railroad's prosperity: or so it seems to us. But the question of misuse of an easement is a fact question. *Unverzagt v. Miller,* 306 Mich. 260, 10 N.W. 2d 849, 851, 852 (1943); *McDonnell v. Sheets,* 234 Iowa 1148, 15 N.W. 2d 252, 156 A.L.R. 1043 (1944); *Cantieny v. Friebe,* 341 Mich. 143, 67 N.W. 2d 102, 103 (1954); *Williams v. Northern Natural Gas Co.,* 136 F. Supp. 514 (Iowa, 1955); *Pitsenbarger v. Northern Natural Gas Co.,* 198 F. Supp. 665 (Iowa, 1961).

In *Hohl,* the sand was not being taken from the right of way but from a sand bar in a river. Defendant was bringing the sand from the river across plaintiff's land but within the railroad's right of way—that is, under the trestle.

In *Vermilya v. The Chicago, Milwaukee & St. Paul R. Co.,* 66 Iowa 606 (1885), it was held that the Railroad's right of way "for all purposes connected with the construction, use and occupation of said railway" did not give it the right to remove sand for use in the construction of a roundhouse. The right to remove sand from within the right of way remained in the plaintiff, the owner of the fee, the Court said, and plaintiff could exercise this right as long as he did not interfere with the use of the easement.

A general discussion of the rights of the owner of the fee as opposed to the interest possessed by the owner of the right of way appears in *Langazo v. San Joaquin Light & Power Corporation*, 32 Cal. App. 2d, 678, 690, 90 P. 2d 825 (1939), an action for damages for the death of a minor who, while walking across a field, was electrocuted by a sagging, abandoned telephone wire. At Page 829, the court said:

> "We must first determine what the rights of the company were in respect to the land where the accident occurred. If the rights of the latter were not invaded by decedent in being upon the real property involved, there obviously could be no trespass committed as against the power company. The record shows that the owner of the real property granted a 'right of way' to the power company over a strip of land 20 feet in width, with the right to erect a single line of towers or poles thereon and wire suspended thereon. 'The rights of any person having an easement in the land of another are measured and defined by the purpose and character of that easement; and the right to use the land remains in the owner of the fee so far as such right is consistent with the purpose and character of the easement.' 17 Am. Jur. 993. Appellant had no right to fence the right of way, nor did it have any right in the use or possession thereof, except for limited purposes, such as repair, maintenance and construction, as set forth in the grant. Thus, except for the reservations made in the grant, the owner had the same complete dominion and control over this 20 foot strip as he had over the remainder of his property."

You state that employees of the Milwaukee Railroad who occupy cottages on the railroad's right of way in Clayton County "keep the weeds and brush under control, thus eliminating a fire hazard," and that they "keep watch over the tracks and help prevent vandalism."

More than 30 cottages and trailers are in existence along this right of way. There is no great distance between them. The whole of the area occupied is not large. The presence of one watcher might conceivably be justified as a proper use of the right of way (we doubt it), but the presence of a string of cottages and a gaggle of firewatchers surely cannot.

What we have said applies to rights of way for road purposes as well as railroad. "When highways outside of cities or towns are established across property owned by others, the fee title usually remains in the adjoining landowners. The effect of such establishment is to give the public the privilege of travel thereon. The ownership of such easement is in the state, for the benefit of the general public." *State v. F. M. Fitch Co.*, 236 Iowa 208, 211, 17 N.W. 2d 380 (1945).

It is immaterial whether the ownership of an easement for a county highway lies in the county or the state (authority, however, is to the effect it lies in the state, whether the county acquired it, controls it, manages it, and maintains it or not). The fee to lands involved here lies in the state, and it can protect the fee against a use of easements foreign to their purpose. The easement and the fee, where both are held by the state, do not merge. They exist independently of one another. (See 39 C.J.S. 1073 and cases cited).

The general rule—as stated in *Hohl, supra*—that an easement may not be used for foreign purposes, may also be stated in terms of the servitude to which the fee is made liable. This servitude may not be increased by an enlargement of the easement. *Williams v. Northern Natural Gas Co., supra; Loughman v. Couchman*, 242 Iowa 885, 890, 891, 47 N.W. 2d 152, 155 (1951); *Halsrud v. Brodale*, 247 Iowa 273, 278,

72 N.W. 2d 94 (1955); *S. S. Kresge Co., of Michigan v. Winkelman Realty Co.*, 260 Wis. 372, 50 N.W. 2d 290 (1952).

One question remains. There is always the possibility that what was obtained was not a right of way, although called that, but in fact as well as law a fee interest. Where the right of way is obtained by grant, the language of the grant must be considered. Where acquired by condemnation, what is acquired is defined by statute. We are unaware of any statute which in the past or at present permits or defines what is acquired for a highway or railroad as more than a right of way.

In respect to the Milwaukee Railroad, the evidence in the abstracts is that what the railroad's predecessor acquired in Clayton and Allamakee counties was a right of way. In respect to the lands in Area A, no abstract of a record of the grant of a right of way appears. In respect to the lands in Area B, an abstract entry records the conveyance of a 50-foot right of way to the Milwaukee's predecessor in 1871. In respect to the lands in Area C, an abstract entry notes the conveyance of a right of way to the predecessor railroad, the Chicago, Dubuque & Minnesota Railroad Co., in 1871, reserving all riparian rights east of the right of way, and granting to the railroad full privileges to survey, lay out, construct and maintain the railroad. That language limits the grant. The same language appears in the granting clause, as abstracted, in respect to Area B.

In the abstract of title to lands in Area C, the Clayton County lands, appears a record of an assignment by the Chicago, Clinton, Dubuque & Minnesota Railroad Company (sic) to the Chicago, Milwaukee and St. Paul Railway Company, of its road bed, grade, and right of way, through Clayton, Allamakee, Dubuque, Clinton and Jackson counties. The date is 1880. The assignment appears of record in Book 50, L.D., Pages 485-488, in the Clayton County recorder's office. This clearly was an assignment of the physical property of the railroad within the right of way as well as of the right of way itself. It cannot be construed—at least from the abstracted record—as purporting to alienate a fee interest. Nor do the abstracts indicate that a railroad ever possessed a fee interest in the lands in question: the evidence is to the contrary.

Nor can any of the cottage owners have acquired these lands by adverse possession against the state. *Sioux City v. Betz*, 232 Iowa 84, 85, 4 N.W. 2d 872 (1942).

Superficially the state may appear to be acting harshly in compelling these cottage owners to move, since some of them have been permitted to reside on the land for a number of years during which they have put time and money into their properties. But the equities are not all on one side. These cottage owners have for that same number of years escaped many of the burdens that go with home ownership, including that of paying for the land on which they live, while others elsewhere have had to meet their full obligations to society. Their presence, too, has deprived and continues to deprive the public at large of the use of these lands. It is in the public's name that the State acquired them. Nor can the state extend to a few of its citizens special privileges: its obligation is to all. The cottage owners took a risk, and it cannot be said, even though they are caused to depart at this point, that they have not reaped rewards from doing so.

It is the opinion of this office, therefore, that in accordance with the foregoing, the State of Iowa, as owner of the fee interest in the lands on which the 68 cottages or other structures rest, can act, under authority of Sec. 111.5, to remove them from the rights of way, since their presence constitutes a misuse of easements inimicable to the interests of the fee owner, the State.

3.4

Alienation of Real Property Interests. §467A.7, Code of Iowa, 1962. A county Soil Conservation District may not grant an easement in its easement for a dam, when such a diminition in its property interest does not further statutory Soil Conservation purposes. (Scism to Greiner, Exec. Sec., Soil Comm., 2/19/65) #65-2-17

3.5

Management agreements with municipalities. §19.23, 111.27, Code of Iowa, 1962, as amended by Acts of the 60th G.A. The State Conservation Commission in the context of an agreement under which a county, city or town undertakes to maintain lands over which the commission has jurisdiction, may transfer picnic tables, etc., to the participating municipality in accordance with the strictures noted herein. (Scism to Speaker, Director, State Conservation Commission, 3/8/65) #65-3-5

3.6

Soil Conservation Districts, Coverage of Certain Employees under Workmen's Compensation Act. §§85.61 and 467A.3, 1962 Code of Iowa. A soil conservation district which has the power to hire and fire, and control the work of such persons, even though the wages of such persons are paid from funds other than state appropriated, are employees of the soil conservation district for purposes of the Iowa Workmen's Compensation Law. (McCauley to Greiner, Dir., State Soil Conservation Committee, 8/12/65) #65-8-7

3.7

Hunting on Highways. §§109.54, 110.17, 714.25, 714.27, 1962 Code of Iowa. Shooting of a rifle on or over any public highways of the State is prohibited. However, the hunting of game with shotguns on and along public highways within the easements of passageway possessed by governmental units is not prohibited. (Scism to Gillette, State Rep., 11/12/65) #65-11-5

3.8

Dissolution of a drainage district; when a Board of Supervisors must meet—§§331.15, 331.16, 331.22, 1962 Code of Iowa, as amended, 331.23 as amended and 455.35. Next meeting of Board of Supervisors for the purpose of examining and disposing of a petition for dissolution of a drainage district is the next session or regular meeting of the Board of Supervisors and the performance of such duty by the Board is mandatory. (Strauss to Glenn, State Representative, 5/11/66) #66-5-6

CHAPTER 4

CONSTITUTIONAL LAW

STAFF OPINIONS

4.1

CONSTITUTIONAL LAW: Lotteries—Art. III, Sec. 23, Constitution of the State of Iowa, Pari-mutuel betting on horse races does not constitute a lottery, and no constitutional amendment would be necessary to permit it.

April 12, 1965

Hon. Eugene M. Hill
Senate Chambers
L O C A L

Dear Senator Hill:

You recently requested an opinion from this office in respect to the following:

> "Request is made herewith for an opinion by the attorney general as to whether or not an amendment to the State Constitution would be necessary to make pari-mutuel gambling legal in Iowa. It would appear to the undersigned that the 'no lottery' provision of the Constitution could be, perhaps has been, interpreted as to require such an amendment."

The following from Article 111 of the Iowa Constitution is pertinent:

> "Lotteries. Sec. 28. No lottery shall be authorized by this state: nor shall the sale of lottery tickets be allowed."

The pari-mutuel system is a form of wagering on horse (or dog) races in which those who bet on the winner share the total sum bet less a percentage to the management. *Rohan v. Detroit Racing Assn.*, 314 Mich. 326, 22 N.W. 2d 433, 438. Every lottery is a gaming device, but not every gaming device is a lottery. *State v. Hudson*, 128 W. Va. 655, 37 S.E. 2d 553. In 1916, the Attorney General advised all county attorneys that Art. 111, Sec. 28, of the Iowa Constitution prohibited all forms of gambling. (1916 OAG 243). No authority was cited for this view, which was tantamount to an assertion that where there was gambling there was a lottery. This was not and is not the law. "Gaming, betting, and lotteries are separate and distinct things in law and fact, and have been recognized consistently as calling for different treatment and varying penalties. The distinctions are well developed, clearly marked, and most instances rigidly maintained." *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S.W. 2d 987, 994 (1931).

The term "lottery" has been variously defined by the courts as a scheme for the division or distribution of property or money by chance or any game of hazard, or a species of game participated in by persons who have paid or agreed to pay a consideration for the chance to win a prize. The three elements necessary to constitute a lottery are consideration, chance, and a prize. *Brenard Mfg. Co. v. Jessup & Barrett Co.*, 186 Iowa 872, 173 N.W. 101.

A number of courts have had to answer the question presented here. The decisions have pivoted on determinations as to what constitutes "chance," and the degree to which it is present in pari-mutuel wagering on races. Concededly two of the elements of a lottery are present. Consideration is paid by those who purchase pari-mutuel tickets. The prize is "what the horse pays." What the horse pays is indefinite until after the race has been run. This indefiniteness as to the prize has been found not to inject chance. "While the amount of money to be divided is indefinite as to dollars and cents, it is definite in that the amount of money to be divided is the total stakes on the winning horse, less a given percentage to management." *People v. Monroe,* 349 111. 270, 182 N.E. 439 (1932). The Illinois court accepted a dictionary definition of chance as "something that befalls as the result of unknown or unconsidered forces; the issue of uncertain conditions; a fortuity."

In 1843 the territorial Supreme Court of Iowa decided that an indictment for betting on a horse race could not be sustained under a statute which prohibited gambling. The court construed the statute as preventing gambling only on games of chance. Horse racing, the court said, is not a game of chance. *Harless v. The United States,* 1 Morris 225, 229. The court said:

> "The word game does not embrace all uncertain events, nor does the expression 'game of chance' embrace all games. As generally understood, games are of two kinds, games of chance and games of skill. Besides, there are trials of strength, trials of speed, and various other uncertainties which are perhaps not games at all, certainly they are not games of chance. Among this class may be ranked a horse race. It is as much a game for two persons to strive which can raise the heaviest weight, or live the longest under water, as it is to test the speed of two horses. It is said that a horse race is not only uncertain in its result, but is often dependent upon accident. So is almost every transaction of human life, but this does not render them games of chance. There is a wide difference between chance and accident."

Of course a mere determination that chance does not dictate which horse wins a race is not a determination that chance is not present in pari-mutuel wagering on races. Breeding in the horse and skill in the jockey may cause a specific horse to win a race. But it is not the horse which collects at the pari-mutuel window: It is the bettor. Whether chance was present in the winning of the prize awarded the winning horse is one question. Whether chance was present in the winning of a bet by the bettor is another. The courts, however, have been inclined to find that horse races are not games of chance as to the horses and therefore not games of chance as to bettors.

The 1843 Iowa decision was of course rendered before Iowa as a state adopted its first constitution. But we find no decision of the Iowa Supreme Court since that either discusses or repudiates this determination. We may consider, then, that the race itself does not interject the element of chance necessarily implicit in a lottery.

In *Utah State Fair Assn. v. Green,* 68 Utah 25, 249 P. 1016 (1926), Straup, J., said at P. 1030:

> "As I conceive the proposition, it is: Is horse racing a game of chance or a game of skill? If it is a game of chance, that is the end of the inquiry. If it is a game of skill, is it rendered a game of chance by permitting betting or wagering, whether by the pari-mutuel system or by any other method, on the result of the race? Since betting or wagering on the race does not determine or affect the result of it, I think the conclusion inevitable that wagering or betting on the result of a game of skill does not convert the game

into one of chance. As well say that, while football is a game of skill, yet if wagering or betting on the result of the game is permitted, it becomes a game of chance."

Utah's Constitution prohibited games of chance as well as lotteries. *In Utah State Fair Assn.*, having decided that horse racing was not a game of chance, the court dismissed, in these words, consideration of whether betting on horse races constituted a lottery:

"We are of opinion there is no merit to these contentions, and deem it unnecessary to discuss the question in detail."

In *Ginsberg v. Centennial Turf Club*, 126 Colo. 471, 251 P. 2d 929 (1952), the Court did consider the bettor:

"While an element of chance no doubt enters into horse and dog races, it does not control them. The bettor makes his own choice of the animal he believes will finish the race in first, second, or third place. In making that selection he has available the previous records of the animal and the jockey, and various other facts . . ."

In *Longstreth v. Cook*, 215 Ark. 72, 220 S.W. 2d 433 (1949), the court considered with awe the machinery itself:

"The use of the pari-mutuel machine does not make the betting a lottery, if it is not otherwise so, as it makes no determination of what horses are winners. It is merely a wonderful machine which expedites calculations which could laboriously be made without its use."

Underlying the question of whether and where chance is present is the question of how much. A majority of courts make their decisions turn on this latter question where the presence or absence of chance is determinative of the existence of a lottery. The Illinois court, in *People v. Monroe, supra,* conceded that no activity is uninfluenced by chance:

"Every event in life and the fulfillment of every lawful contract entered into between parties is contingent to at least some slight extent upon chance. No one would contend, however, that a contract knowingly and understandingly entered into between two parties is a gambling contract merely because its fulfillment was prevented as the result of the befalling of unknown or unconsidered forces, or by the issue of uncertain conditions, or by the result of fortuity. The pari-mutuel system of betting does not come within the definitions given above . . . The persons among whom the money is to be divided are not uncertain, as they are those who bet on the winning horse. The winning horse is not determined by chance alone, but the condition, speed and endurance of the horse, aided by the skill and management of the rider or driver, enter into the result. The amount to be paid by a principal to an agent under a contract to be paid 10 per cent commission on all sales is dependent in some degree on chance and the happening of many uncertain and contingent events, but the defense that such contract was for such reason a gambling contract could not be maintained. In our opinion the pari-mutuel system does not come within the Constitutional inhibition as to lotteries."

Note that the Illinois Court said the winning horse is not determined "by chance alone." In this isolated context the inference must be that Ilinois holds that if who wins is not decided by "pure chance," there is no lottery. Some authorities support this view. In denying a rehearing in *Oneida County Fair Board v. Smylie*, 86 Idaho 341, 286 P 2d 374 (1963), the Court said:

"We have by the original opinion concluded that 'lottery' as used in our Constitution applied only to distributions of money or things of value by chance, and in which process of distribution the element of skill plays no part. If skill plays any part in determining the distribution, there is no lottery . . ."

Generally, however, "where elements both of skill and of chance enter into a contest, the determination of its character as a lottery or not is generally held to depend on which is the dominating element." 54 C. J. S. 847. It would be idle to attempt to define with precision what the Iowa viewpoint is on this, or what it might be determined to be. No controlling pronouncement is available from the Iowa cases, and we are confronted with a number of decisions by the highest courts of other States which, in holding that pari-mutuel wagering on horse or dog races is not a lottery within a Constitutional prohibition of lotteries, have not indulged in quantitative analysis of the elements of chance and skill. Most have been content to say only that skill determines all facets of the question where uncertainty is present.

Twelve states have ruled on the question asked here. All have, or had at the time, a constitutional prohibition of lotteries, often broader than Iowa's. Yet the highest courts of 10 of these states found the prohibition unaffronted by legalized wagering on races. Only two found the contrary.

The ten states which have decided wagering on races does not violate a constitutional prohibition of lotteries are:

ARKANSAS: *Longstreth v. Cook,* 215 Ark. 72, 220 S.W. 2d 433 (1949). Form of wagering: Pari-mutuel. Constitutional prohibition—Art. 19, Sec. 14: "No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed."

COLORADO: *Ginsberg v. Centennial Turf Club,* 126 Colo. 471, 251 P. 2d 926 (1952). Form of wagering: Pari-mutuel. Constitutional prohibition—Art. 28, Sec. 2: "The general assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state."

IDAHO: *Oneida County Fair Board v. Smylie,* 86 Idaho 341, 386 P. 2d 374 (1963). Form of wagering: Pari-mutuel. Constitutional prohibition—Art. 3, Sec. 20: "The legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose."

ILLINOIS: *People v. Monroe,* 349 111. 270, 182 N.E. 439 (1932). Form of wagering: Pari-mutuel. Constitutional prohibition—Art. 4, Sec. 27: "The general assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state."

KENTUCKY: *Commonwealth v. Kentucky Jockey Club,* 238 Ky. 739, 38 S.W. 2d 987 (1931). Form of wagering: Pari-mutuel. Constitutional prohibition—Sec. 226: "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The general assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."

LOUISIANA: *Gandolfo v. Louisiana State Racing Comm.,* 227 La. 45, 78 So. 2d 504 (1954). Form of wagering: Pari-mutuel. Constitutional prohibition—Art. 19, Sec. 8: "Lotteries and the sale of lottery tickets are prohibited in this state."

MICHIGAN: *Rohan v. Detroit Racing Assn.*, 314 Mich. 326, 22 N.W. 2d 433 (1946). Form of wagering: Pari-mutuel. Constitutional prohibition—Art. 5, Sec. 33: "The legislature shall not authorize any lottery nor permit the sale of lottery tickets."

OREGON: *Multnomah County Fair Assn. v. Langley*, 140 Or. 172, 13 P. 2d 354 (1932). Form of wagering: By "contributions" to prize money. Constitutional prohibition—Art. 15, Sec. 4: "Lotteries, and the sale of lottery tickets, for any purpose whatever, are prohibited, and the legislative assembly shall prevent the same by penal laws."

TEXAS: *Panas v. Texas Breeders and Racing Assn., Inc.*, Tex. Civ. App., 80 S.W. 2d 1020 (1935). Form of wagering: "Certificate" system, similar to pari-mutuel. Constitutional prohibition—Art. 3, Sec. 47, prohibits "the establishment of lotteries . . . or other evasions involving the lottery principle, established or existing in other states."

UTAH: *Utah State Fair Assn. v. Green*, 68 Utah 25, 249 P. 1016 (1926). Form of wagering: Pari-mutuel. Constitutional prohibition—Art. 6, Sec. 28: "The legislature shall not authorize any game of chance, lottery, or gift enterprise under any pretense or for any purpose."

The two states which have decided that wagering on races is a lottery in violation of a constitutional prohibition are:

NEBRASKA: *State ex rel Sorensen v. Ak-Sar-Ben Exposition Co.*, 18 Neb. 851, 226 N.W. 705 (1929). Form of wagering: Pari-mutuel. Constitutional prohibition—Art. 3, Sec. 24: "The legislature shall not authorize any games of chance, lottery or gift enterprises under any pretense or for any purpose whatever."

KANSAS: *State ex rel Moore v. Bissing*, 178 Kan. 111, 283 P. 2d 418 (1955). Form of wagering: Pari-mutuel. Constitutional prohibition—Art. 15, Sec. 3: "Lotteries and the sale of lottery tickets are forever prohibited."

The Nebraska case held that the essential ingredients of a lottery—consideration, chance, prize—were embraced in the pari-mutuel system. But the distinction between a lottery and a method of gambling was not discussed, because both were prohibited by the Constitution. Subsequently, Nebraska amended its Constitution.

The Kansas court, in *State ex rel Moore v. Bissing*, dismissed the decisions of other courts on the constitutional question as "not in harmony" and looked only to Kansas law. A Kansas statute defined a lottery as follows:

> "The term 'lottery', as used in this act, includes schemes for the distribution of money or property among persons who have given or agreed to give a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise or by some other name."

What, the Court asked, is the chance involved in betting on dog races? It answered:

> "The answer is very simple . . . In placing a wager, the bettor takes a chance that he is picking the right dog. In the second place, under the pari-mutuel system, every bettor takes a chance on the amount he will win . . ."

Other authority is present on both sides of the question, although not invocable precisely on point.

Arizona, in *Eagle v. State*, 53 Ariz. 458, 90 P. 2d 988 (1939), considered charges brought under a statute against bookmakers for main-

taining a public nuisance—a place in which they accepted wagers on races run in other states. The court, in finding the defendants guilty of maintaining a nuisance as charged, first considered whether they should not have been informed against under another statute. At. P. 991, the court said:

"The real question is whether the prosecution should have been brought under some specific statute rather than the general nuisance statute. A statute provides a penalty for the conducting of 'any lottery, or lottery scheme or device, or raffle'."

The court proceeded to discuss (at P. 993) that question:

"The first two elements (of a lottery) may be said to be present in defendant's business but does the third appear therein? This comes down to the question of whether horse racing is a game of chance or one of skill, either of man or horse. A game of chance may be defined as any sport or amusement involving physical contest, whether of man or beast, determined entirely, or in the main part, by mere luck, and in which judgment, skill or adroitness have no place or else are thwarted by chance. (Cases cited). It is the character of the game and not the skill or want of skill of the individual player which determines whether the game is one of chance or skill. The test is not whether it contains an element of chance or element of skill, but is chance the dominating element which determines the result of the game."

The court held that what it was confronted with was not a game of chance, and concluded that:

"We are decidedly of the opinion that the business conducted by defendants was in no manner a lottery or raffle, although of course it was gambling."

California, in *People v. Postma*, 69 Cal. App. 2d Supp. 814, 160 P. 2d 221 (1945), a decision by the Appellate Department of the Superior Court of the County of Los Angeles, also decided that bookmakers taking bets off-track were not conducting a lottery. It was said they were offering no prize.

Alabama's Supreme Court twice has considered the question asked here. In 1957 and 1961 it was asked by the legislature to say whether a bill authorizing pari-mutuel betting on races would be constitutional. Sec. 65 of Alabama's constitution provides:

"The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided."

In 1947, five justices said a pari-mutuel bill would not be constitutional. Three said it would. See Opinion of the Justices 249 Ala. 516, 31 So. 2d 753, where the majority said at P. 755:

". . . We conclude that the element of chance is so present in the form of pari-mutuel betting as to make that system with its paraphernalia, etc., a 'lottery' within the meaning of the Constitution of this state."

The court said further:

"In *Tollett v. Thomas*, L.R., 6 Q.B. 514 (an 1871 English case), . . . the court clearly shows the presence of the element of chance.

"We quote from that decision as follows:

"'In the present instance, an element of chance is introduced, which though not having any reference to the main event—namely, the result of the race in the winning of a particular horse—is yet essential to making the wager laid upon the winning horse profitable to the bettor. The winning of the horse betted upon is of course the primary condition of the wager being won; but whether the winning of the wager shall be productive of any profit to the winner, and more especially what the amount of that profit shall be, depends on the state of the betting with reference to the number of bets laid on or against the winning horse—a state of things fluctuating from one minute to another throughout the duration of the betting. Now this being something wholly independent of the issue of the race, as well as of the will and judgment of the winner, depending as it does, on the will or caprice of the other persons betting, is a matter obviously of uncertainty and chance to the individual bettor, more especially, in the early stages of the betting. There being, then, this element of chance in the transaction among the parties betting, we think it may properly be termed, as amongst them, a game of chance'."

For the minority view, Lawson, J., observed that in this country, *Tollett v. Thomas* apparently had been followed only in one case: *State v. Lovell,* 39 N.J.L. 458 (1877). New Jersey subsequently (1939) incorporated into her Constitution a provision which permitted the legislature to legalize pari-mutuel betting.

In 1961, when the question was again submitted to the Alabama court, three justices adopted the view of the majority in the 1947 opinion; three said pari-mutuel betting on races wasn't violative of the constitutional prohibition, and one refused to answer, absent more facts.

Florida, in *Pompano Horse Club v. State,* 98 Fla. 415, 111 So. 801 (1927)—a suit to enjoin wagering on horse races as a nuisance—held wagering on horse racing by the "certificate" system to be gambling on a game of chance. At P. 812 the Court discussed chance:

"Regardless of whether horse racing, within itself, is a 'game' or a 'sport,' or, if a game, whether it be one of 'skill' or of 'chance' —when a group of persons, each of whom has contributed money to a common fund and received a ticket or certificate representing such contribution, adopt a horse race, the result of which is uncertain, as a means of determining, by chance, which members of the group have won and which have lost upon a redivision of that fund, each contributor having selected a stated horse to win such race, the redeemable value of the certificates so obtained and held by the contributors to such fund being varied or affected by the result of such race, so that the value of some is enhanced, while that of others is reduced or destroyed, the original purchase price of all having been the same, those who chose the winning horses being paid from the sum so accumulated more than they contributed thereto, by dividing amongst them the money contributed by those who chose losing horses and who therefore receive nothing, that process becomes a 'game of chance,' and those who buy, sell, or redeem such certificates, for the purposes and in the manner hereinabove stated, are 'engaged' in such game (as is prohibited by statute)."

Although Florida had, and does have, Constitutional prohibition of lotteries (Art. 3, Sec. 23: "Lotteries are hereby prohibited in this state.) the issue wasn't raised. In 1931, two years after the decision in *Pompano Horse Club v. State,* Florida's legislature created a state racing commission and authorized pari-mutuel betting on horses and

dogs. We find no decision wherein this was found to constitute a lottery.

The dissent in the Arkansas case, *Longstreth*, mentions what other courts seem not to have considered: That horses are "handicapped" by assigning weights to them in an effort to make the slowest horse the equal to the fastest. A perfectly handicapped race presumably is one in which all horses cross the finish line at the same instant: Skill is neutralized. The dissent, by Chief Justice Griffin Smith, represents an exhaustive treatment of the minority position. It says, in part:

> "The opinion in the Michigan case (the *Rohan* case, supra) assumes and argues that the 'skill and judgment' of the patrons in the selection of horses is sufficient to take pari-mutuel out of the lottery class. If this be true, the question might be asked, why is it that no patron is ever able to exercise enough 'skill and judgment' to make a success of playing the races? . . . As a matter of fact, whatever skill there is in this form of gambling is only a thin veneer to mislead legislatures and courts. The overwhelming majority of those who are induced to patronize pari-mutuels make their selections as in a guessing game."

Or, as Mr. Justice Holmes said in *Dillingham v. McLaughlin*, 264 U.S. 370, 373, 44 S. Ct. 362, 363:

> "What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law."

Michigan, in *Rohan v. Detroit Racing Assn.*, held not only that pari-mutuel wagering didn't violate its constitution but that it was not contrary to public policy. "Betting on horse races is not *malum in se*, but is only *malum prohibitum*. It is not prohibited by the constitution," the court said, and added:

> "The public policy of a state, when not fixed by the Constitution, is not unalterable but varies upon any given question with changing legislation thereon, and any action which by legislation, or in the absence of legislation thereon, by the decision of the court, has been contrary to the public policy of the state, is no longer contrary to such public policy when such action is expressly authorized by subsequent legislative enactment."

In Alabama's *Opinion of the Justices* (1947), Lawson, J., in the context of arguing that the court should not advise the legislature a pari-mutuel bill was unconstitutional, commented:

> "It should be remembered that the discretion of the legislature is very large in the exercise of the police power in determining what the interests of the public require and what measures and means are necessary for the protection of such interests. . . . The evils of gambling have long been known and recognized by the people of this state. But I think it is for the legislature to determine whether or not it is to the best interests of this state that betting on horse races under the pari-mutuel system be permitted . . . That is a legislative function pure and simple."

In the past, this office has considered a number of specific schemes as lotteries or not, and issued opinions on them. None dealt with the specific question presented here, but we have taken them into consideration in writing this opinion, in reaching a conclusion, however, we have been guided primarily by the following:

1. An 1843 Iowa opinion, never repudiated, holds that horse racing is not a game of chance.

2. Ten of the twelve states which have considered the precise question—many of them with broader constitutional prohibitions than Iowa's —have ruled that pari-mutuel wagering on horse or dog races does not constitute a lottery. In doing so, they necessarily have found the element of "chance" necessary to constitute a lottery absent from all aspects of the proceeding—the horse race itself, the determination of what the horse "pays" to the bettor, the pari-mutuel machinery, and the obscure process by which a bettor selects a horse. Only two states have ruled to the contrary.

3. Public policy is for the General Assembly to enunciate, since the weight of legal authority in this country is clear, any opinion by this office contrary to that authority would be an intrusion on the General Assembly's prerogative as well as presumptuous.

It is the opinion of this office, therefore, that a statute authorizing pari-mutuel betting on horse races would not violate Art. 111, Sec. 28, of the Iowa Constitution, which prohibits authorization of lotteries, and no amendment to the Constitution is required as a preface to enacting such a statute.

4.2

CONSTITUTIONAL LAW: Schools—Religious services in school classrooms—U. S. Constitution, First Amendment; Iowa Constitution, Art. 1, Sec. 3. A school district is constitutionally prohibited from permitting the use of school classrooms for religious instruction of pupils.

April 30, 1965

Mr. Richard G. Davidson
Page County Attorney
P. O. Box 114
Clarinda, Iowa

Dear Mr. Davidson:

This is in response to your request for an opinion in respect to the following:

"We have had a request from a school district within Page County as to whether or not they can dismiss classes and have a voluntary chapel service within the high school building, at which ministers and priests from different churches moderate the services during succeeding weeks. The moderation includes a short oral presentation by the particular minister or priest.

"No money or consideration is paid to the school for the use of its facility and those not participating usually go to a study hall.

"The school district is primarily interested in the constitutionality of such an arrangement."

The following are pertinent:

First Amendment, U. S. Constitution.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article 1, Sec. 3, Iowa Constitution.

"Religion. Sec. 3. The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free ex-

ercise 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."

The United States Supreme Court has answered this question. In *McCollum v. Board of Education,* 333 U. S. 203 (1947), it ruled that releasing pupils periodically from regular classwork for religious instruction, in their classrooms, by sectarian teachers, was prohibited by the First Amendment to the United States Constitution. The First Amendment limits the governments of states in what they may decree or permit, as well as limiting the United States government. *Hamilton v. Regents of the University of California,* 293 U. S. 245 (1934).

In the McCollum case, the facts were that a voluntary association of interested members of the Jewish, Roman Catholic and Protestant faiths in Champaign, Ill., obtained permission from the Board of Education to offer classes in religious instruction to public school pupils. Classes were made up of those whose parents signed printed cards requesting their children be permitted to attend. They were conducted periodically in the regular classrooms by Protestants, Catholic priests, and a Jewish rabbi. Pupils released from secular study for religious instruction were required to attend. Roll was taken. Those who chose not to attend were required to go elsewhere in the school building to study secular subjects.

The court said, at P. 209:

"The foregoing facts . . . show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."

In a concurring opinion, Mr. Justice Frankfurter traced the development of the "released time" concept, implicit in the Champaign program, from its inception in 1914. At P. 225, he commented:

"Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judician concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close pudicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court."

We believe that *McCollum, supra,* clearly proscribes what Page County proposes. No chapel service is possible which is not also instruc-

tive. It is the use of tax-supported property for religious instruction which is prohibited.

Were it possible to reach a conclusion founded only on the Iowa Constitution and Iowa laws, the conclusion would be the same. "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 . . . shall not be used directly or indirectly for religious instruction . . ." *Knowlton v. Baumhofer,* 182 Iowa 691, 704, 166 N.W. 202 (1917).

Pupils may be released for religious instruction off the school premises. *Zorach v. Clauson,* 343 U. S. 306 (1952). That is not contemplated here.

Consistent with the foregoing, and on a consideration of the facts as stated, it is the opinion of this office that the "released time" program proposed by Page County is proscribed by the Constitution of Iowa and the United States.

4.3

CONSTITUTIONAL LAW: Reapportionment of General Assembly— What *Selzer v. Synhorst* says is permissible.

May 5, 1965

Hon. William F. Denman
Senate Chambers
L O C A L

Dear Senator Denman:

This is in response to your request for an opinion on the question prompted by these facts:

> The U. S. District Court, in *Davis v. Cameron,* et al, Civil No. 5-1289, rendered an opinion Feb. 11 which held that as to future elections to the General Assembly of the State of Iowa, Senate File 1—the apportionment plan adopted at a special session in 1964—is prospectively invalid and inoperative as to elections in 1966. The elections in that year must produce a 1967 Senate composed of senators whose districts have been approximately equalized as to population. In adopting a plan to achieve this, and to insure at the same time four-year terms to senators elected to four-year terms in 1964 under the Senate File 1 plan, may the General Assembly be guided by the principles laid down by the Iowa Supreme Court in *Selzer v. Synhorst?*

The language in the memorandum opinion and judgment entry in *Davis v. Cameron* must be examined. The judgment entry is as follows:

> "IT IS ORDERED AND ADJUDGED:
>
> "1. That this statutory three-judge court has been duly constituted and that this court has jurisdiction of the parties and subject matter of this action; that a justiciable cause of action is stated; that the plaintiffs have standing to challenge the Iowa constitutional and statutory provisions for the apportionment of members of branches of the Iowa General Assembly, and that this court has the power to decide the controversy presented.
>
> "2. That the statutory plan of apportionment, 60th General Assembly of Iowa, Special Session, Senate File 1, is hereby declared

prospectively null and void, and inoperative for all future elections to the General Assembly of the State of Iowa, except elections to fill vacancies in the present General Assembly.

"3. That the present General Assembly has the power to and is the appropriate body to provide for reapportionment which meets Federal constitutional standards, and action should be taken in time to make new apportionment provisions operative with respect to the 1966 election for members of the General Assembly which meets in regular session in 1967.

"4. That this Court will abstain from attempting to impose an apportionment plan provided the General Assembly of the State of Iowa takes appropriate action.

"5. That jurisdiction is reserved to conduct such further hearings and make such further orders as may be appropriate or necessary upon the Court's own motion or upon motion of either party."

The Court's order addresses itself to the election process. *It does not say that the 1967 General Assembly must be composed of members all of whom have been elected under a redistricting plan which meets the Constitutional standard.* (Emphasis Added) It says that an election conducted in 1966 under the present plan is prospectively null and void.

The opinion spells out the reason: Under the Senate File 1 plan, 38.9% of the state's population can elect a majority of the members of the Senate. (The maximum disparity in populations of senatorial districts is approximately 3.20 to 1: one vote in one district has the weight of as many as 3.2 votes cast in another district.) In future elections to the Senate, all votes must have approximately the same weight: That is, the districts from which senators are elected must be composed of populations nearly equal in size.

As the U. S. Supreme Court said in *Reynolds v. Sims*, 377 U. S. 533 (1964), as quoted in *Davis v. Cameron:*

"We hold that, as a basic constitutional standard, the equal protection clause requires that the seats in *both houses* of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the vote of citizens living in other parts of the State."

It is clear that reapportioning the Senate without causing all members to run for re-election in 1966 under a constitutionally-valid plan is possible within the context of the entry in *Davis v. Cameron,* if the consequences of the plan for doing so do not violate the Iowa Constitution.

In *Selzer v. Synhorst,* 253 Iowa 936, 113 N.W. 2d 724 (1962), the Iowa Supreme Court found that Chapter 69, Acts of the 59th G.A., providing for reapportioning the Senate, did not violate the Iowa Constitution, even though it:

1. Provided for electing some senators to two-year terms. The Iowa Constitution requires four-year terms. But it also requires that an equal, or nearly equal, number of senators be elected at each election. Two-year terms were held necessary to re-establish the balance required, and it was said that no candidate in advance of his election has a right to be elected to a specified term of years.

2. Provided for the representation of some citizens by more than one senator. Some voters who voted for a four-year senator in 1960

voted again for a four-year senator in 1962, having been placed in a new district.

3. Provided that some citizens who voted for a two-year senator lost, two years later, the opportunity to vote for a senator because placed in a four-year senator's district. The right to vote is only a right to vote at all authorized elections. A corollary of this provision is that some citizens were to be represented by senators for whom they had no opportunity to vote, and conversely, that some senators represented citizens who had no opportunity to vote for them.

The conclusion is that a reapportionment plan which has any of the consequences enumerated will not violate the Iowa Constitution. As we understand it no temporary plan for reapportionment contemplates cutting short terms of senators now serving. Nor is any authority for doing so found in *Selzer v. Synhorst.*

The guideline for reapportioning to satisfy the U. S. Constitutional requirement of equalized districts are found in *Reynolds v. Sims, supra; Lucas v. Forty-ninth Gen. Assem. of Colorado,* 84A S. Ct. 1459; *Roman v. Sincock,* 84A S. Ct. 1449; *Davis v. Mann,* 84A S. Ct. 1441; *Maryland Com. for Fair Rep. v. Tawes,* 84A S. Ct. 1429; and *W.M.C.A., Inc., v. Lorenzo,* 84A S. Ct. 1418, all decided in 1964.

In *Reynolds v. Sims,* the Supreme Court indicated that the proposed Alabama House, under which 43% of the population resided in districts which could elect a majority of members, would not be constitutionally apportioned.

In *W.M.C.A., Inc., v. Lorenzo,* the Court held to the same effect in respect to a New York plan whereby 37.5% of the population could elect a majority of the lower house and 38.1% the senate. The most populous lower house district had 12.7 times the population of the least populous. The senate disparity was 2.6 to 1.

In *Davis v. Mann,* the Court held to the same effect in respect to a Virginia plan whereby 41.1% could elect a majority of the senate and 40.5 the house. The maximum population disparity in senate districts was 2.65 to 1 and in house districts 4.36 to 1.

In *Lucas,* the Court indicated Colorado's senate was inadequately apportioned where 33.2% of the population could elect a majority. The maximum population disparity was 3.6 to 1. *However, the Court did not pass on the constitutionality of the House apportionment under which 45.1% could elect a majority and the maximum disparity was 1.7 to 1.* The Court observed that the House "is at least arguably *apportioned on a population basis.*" (Emphasis Added)

In *Roman,* the Court struck a Maryland plan which provided for apportioning the upper house on a geographical basis and the lower on a population basis.

Language from *Reynolds,* (P. 1391) should be quoted:

> "Some deviations from the equal population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature . . . so long as the divergences from a strict population standard are based on legitimate consideration incident to the effectuation of a rational state policy."

History, economic and group interest considerations are not "legitimate," the Court said. "Citizens, not history or economic interests, cast votes."

It is the opinion of this office that exactitude is not possible, but that any Senate apportionment plan which is in accord with the foregoing is prospectively constitutional under the Constitution of Iowa and the United States.

4.4

CONSTITUTIONAL LAW: Voting rights of military personnel housed on a military reservation in Iowa—Art. II, §§1 and 4, Iowa Constitution; §1.4, 1962 Code of Iowa. Persons in military service, residing on or off of a federal military reservation, can become Iowa electors if they meet the standards of, (1) having abandoned their former domicile, (2) actual removal to Iowa, and (3) a bona fide intention to change and to remain in the new domicile permanently and indefinitely. They are not a class to be excluded from Iowa elections for lack of state sovereignty over the place where they live. "The uniform of our country must not be the badge of disfranchisement for the man or woman who wears it." *Carrington v. Rash*, 85 S. Ct. 775 (1965).

April 12, 1966

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa

Dear Mr. Samore:

You have asked for an opinion from this office in regard to the voting rights of military personnel housed on or off of a military base located in Iowa. Specifically, you are concerned with the question of whether military personnel housed on a military reservation can acquire a residence in Iowa so that they can vote in Iowa elections.

We believe that your question must be answered in the affirmative.

Article II, Section 1, of the Iowa Constitution provides as follows:

> "Every male citizen of the United States, of the age of twenty one years, *who shall have been a resident* of this State six months next preceding the election, and of the County in which he claims *his vote sixty days shall* be entitled *to vote* at *all elections* which are now or hereafter may be authorized by law." (Emphasis supplied)

It should be pointed out that in Iowa a person's sex is no longer a limitation upon that person's right to vote. See 19th Amendment to United States Constitution.

A qualified voter under the Iowa Constitution is one who:

1. Is a citizen of the United States;
2. Is twenty-one years of age;
3. Has been a resident of Iowa six months prior to the election;
4. Has been a resident of the county sixty days prior to the election.

See *Edmonds v. Banbury*, 28 Iowa 267, 271 (1869), and *Piuser v. City of Sioux City*, 220 Iowa 308, 314, 315, 262 N.W. 551 (1935).

The Iowa court has interpreted the word "resident," as used in the State Constitution limiting the right to vote, *to mean* a person *domiciled* in the state. The reason for this is clear. "The state naturally desires that a voter . . . have the best interest of the commonwealth at heart. To insure a ballot which points to this end, only those who consider the state their home should be allowed to vote. . . . Also, to insure one

and only one vote a person's right to vote must be limited to one place, and as a person may have several residences, but only one domicile, the latter provides a convenient and satisfactory basis for fixing that place." 20 Iowa Law Review 484. See also *Love v. Cherry*, 24 Iowa 204 (1868); *Dodd v. Lorenz*, 210 Iowa 513, 517, 231 N.W. 422 (1930), and cases cited therein.

Domicile has been many times defined. In *Anderson v. Blakesly*, 155 Iowa 430, 136 N.W. 210 (1912), it is stated:

> "The domicile of a person is the place where he has his true fixed, permanent home and principal establishment to which when he is absent he has the intention of returning."

It is largely a matter of intention which must be freely and voluntarily exercised.

In *Julson v. Julson*, 255 Iowa 301, 122 N.W. 2d 329 (1963), at page 305, the Iowa Supreme Court stated:

> "The change of a person's domicile is considered a serious matter. A domicile once acquired continues until a new one is perfected by the concurrence of three essential elements: (1) A definite abandonment of the former domicile; (2) actual removal to, and physical presence in, the new domicile; (3) a bona fide intention to change and to remain in the new domicile permanently and indefinitely. [Citing cases]."

See also 21 ALR 2d 1163 which is an excellent note discussing this entire problem.

It is clear that anyone who meets the test set out above as to residency is not prohibited from exercising his franchise by Article II, Section 1, of the Iowa Constitution.

We now turn to the question of whether a serviceman, living on a military reservation in Iowa, is precluded from becoming an Iowa resident.

Article 11, Section 4, of the Iowa Constitution provides as follows:

> "No person in the military, naval, or marine service of the United States shall be considered a resident of this State by being stationed in any garrison, barrack, or military or naval place, or station within this State."

This section of our Iowa Constitution has been before this office in the past. See 38 OAG 748; also 34 OAG 720 and 48 OAG 152.

In 1938 the Attorney General held this section of our Iowa Constitution to mean that: "A soldier, be he commissioned or non-commissioned, cannot by virtue of his residence within an army post or reservation . . . acquire a residence for the purpose of exercising his elective franchise." 38 OAG 758. See also *Harris v. Harris*, 205 Iowa 108, 216 N.W. 651 (1928).

However, a recent United States Supreme Court decision is pertinent here. *Carrington v. Rash*, 85 S. Ct. 775 (1965), is a case arising from the State of Texas. That state had a constitutional provision similar to our Article 11, Section 4. It prohibited any member of the armed forces of the United States, who moved his home to Texas during the course of his military duty, from ever voting in any election in that state "so long as he or she is a member of the armed forces." (Texas Constitution, Article VI, Section 2.) The Texas Supreme Court, in 378 S.W. 2d 305, stated:

"The self-evident purpose of the amendment to the Constitution was to prevent a person entering military service as a resident citizen of a county in Texas from acquiring a different voting residence in Texas during the period of his military service, *and to prevent a person entering military service as a resident citizen of another state from acquiring a voting residence in Texas during the period of military service.*" (Emphasis supplied)

In the *Carrington* case, supra, the state raised two arguments to uphold the constitutionality of its provision. They are:

1. The state has a legitimate interest in immunizing its elections from concentrated balloting of military personnel, whose collective voice may overwhelm a civilian community;

2. The state has a valid interest in protecting the franchise from infiltration by transients and servicemen who fall within the constitutional exclusion.

The United States Supreme Court answered those two arguments in this manner in the *Carrington* case, supra, at pages 779 and 780 of the Supreme Court Reporter:

"We stress—and this a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote are bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation. Cf *Gray v. Sanders* 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821. 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. 'The exercise of rights so vital to the maintenance of democratic institutions,' *Schneider v. State of New Jersey*, 808 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents. Yet, that is what Texas claims to have done here.

"The State's second argument is that its voting ban is justified because of the transient nature of service in the Armed Forces. As the Supreme Court of Texas stated: 'Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence. * * * they do not elect to be where they are. Their reasons for being where they are, and their interest in the political life of where they are, cannot be the same as [those of] the permanent residents.' 378 S.W. 2d 306. The Texas Constitution provides that a United States citizen can become a qualified elector if he has 'resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote.' Article 6, §2, Texas Constitution. It is the integrity of this qualification of residence which Texas contends is protected by the voting ban on members of the Armed Forces.

"But only where military personnel are involved has Texas been unwilling to develop more precise tests to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote. The State's law reports disclose that there have been many cases where the local election officials have determined the issue of bona fide residence. These officials and the courts reviewing their actions have required a 'freely exercised intention' of remaining within the State, *Harrison v. Chesshir*, Tex. Civ. App., 316 S.W. 2d 909, 915. The declarations of voters concerning their intent to reside in the State and in a particular county

is often not conclusive; the election officials may look to the actual facts and circumstances. *Stratton v. Hall,* Tex. Civ. App., 90 S.W. 2d 865, 866.

* * *

"The Texas courts have held that merely being stationed within the State may be insufficient to show residence, even though the statutory period is fulfilled. Even a declared intention to establish a residence may be not enough. 'However, the fact that one is a soldier or sailor does not deprive him of the right to change his residence or domicile and acquire a new one.' *Robinson v. Robinson,* Tex. Civ. App., 235 S.W. 2d 228, 230.

"We deal here with matters close to the core of our constitutional system. 'The right to choose,' *United States v. Classic,* 313 U. S. 299, 314, 61 S. Ct. 1031, 1037, 85 L. Ed. 1368, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Oyama v. State of California,* 332 U. S. 633, 68 S. Ct. 269, 92 L. Ed. 249. By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment. There is no indication in the Constitution that * * * occupation affords a permissible basis for disguising between qualified voters within the State.' *Gray v. Sanders,* 372 U. S. 368, 380, 83 S. Ct. 801, 808.

"We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other states, to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But this constitutional provision goes beyond such rules. 'The presumption here created is * * * definitely conclusive —incapable of being overcome by proof of the most positive character.' *Heiner v. Donnan,* 285 U. S. 312, 324, 52 S. Ct. 358, 360, 76 L. Ed. 772. All servicemen not residents of Texas before induction come within the provision's sweep. Not one of them can ever vote in Texas, no matter how long Texas may have been his true home. *'The uniform of our country * * * [must not] be the badge of disfranchisement for the man or woman who wears it.'*"

However, we are not disposed to a holding that Article II, Section 4, of the Iowa Constitution violates the Federal Constitution and must therefore fail. We are disposed to a holding that a serviceman cannot become a resident of Iowa simply because he has been transferred by the Military Department to Iowa. He must do something more. He must comply with the criterion enunciated in *Julson v. Julson,* supra. If that is done, he will become a resident of Iowa for voting purposes.

We now turn to the final question to be considered in this matter. Are inhabitants of federal reservations as a class, excluded from Iowa elections for lack of state sovereignty over the place where they live?

This question has been presented in years past to the Attorney General (see 48 OAG 152), and the opinions have been based upon an act approved April 4, 1900, page 133, which was amended by the Code revision of 1924 and by Chapter 41, Acts of the 50th General Assembly (1943).

In 1943 the statute was amended in a manner that is critical to this question. The phrase "exclusive jurisdiction over its holding" in the first paragraph was stricken and replaced with the phrase "jurisdiction

thereover but not to the extent of limiting the laws of this state." Chapter 41, Section 1, Acts of the 50th General Assembly (1943).

Thus, the pertinent section now cited as Section 1.4, 1962 Code of Iowa, reads:

"The United States of America may acquire by condemnation or otherwise for any of its uses or purposes any real estate in this state, and *may exercise jurisdiction thereover but not to the extent of limiting the provisions of the laws of this state.*

"This state reserves, when not in conflict with the constitution of the United States or any law enacted in pursuance thereof, the right of service on real estate held by the United States of any notice or process authorized by its laws; and reserves jurisdiction, except when used for naval or military purposes, over all offenses committed thereon against its laws and regulations and ordinances adopted in pursuance thereof.

"Such real estate shall be exempt from all taxation, including special assessments, while held by the United States except when taxation of such property is authorized by the United States." (Emphasis supplied)

Federal jurisdiction over realty held by the United States is founded upon the federal constitution:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings. . . ." Article 1, Section 8, Clause 17, U. S. Constitution.

In matters not affecting the operation of the national government, there is no sound reason why federal area residents should not have the same rights, immunities, and responsibilities as residents of the surrounding states. 58 Yale Law Journal, 1402, 1406. In many instances the federal government expressly declines jurisdiction over certain transactions on federal reservations. 4 U.S.C.A., 104, 105 and 106. The "Buck Act" allows states to impose gasoline, sales and use, and income taxes on federal reservations. In the National Defense Housing Act the federal government has expressly declined any sovereignty which would impair the "civil rights under the State or local law of the inhabitants" of federal land procured under the act. 42 U.S.C.A. 1547. When the federal government expressly declines jurisdiction, the state sovereignty obtains to the extent of the declination. *State v. Corcoran* (Kansas 1942) 128 P. 2d 999; *Royer v. Board of Election Supervisors* (Maryland 1963) 191 A. 2d 446.

Kansas allows residents of land held by the United States pursuant to 42 U.S.C.A. 1501, et seq., to vote because of 42 U.S.C.A. 1547, in spite of the fact that its statute comparable to Section 1.4, 1962 Code of Iowa, reserves only jurisdiction to serve process. *State v. Corcoran*, supra. Maryland has a similar statute, but did not grant voting privileges, rejecting an argument that the power to impose taxes under the "Buck Act" (4 U.S.C.A. 104, 105 and 106), reserved sufficient jurisdiction to the State to make the land a part of Maryland.

Section 1.4, supra, would seem to reserve more jurisdiction than the statutes of either Kansas or Maryland, and the prior Iowa statutes by limiting the cession to jurisdiction "not limiting the laws of Iowa." We

are convinced that a dual, concurrent sovereignty exists over lands owned by the United States which are geographically located within our State. The reasons for excluding State jurisdiction completely from such areas, if they ever existed, are now removed by the federal government's statutory deference to the state's power to tax (4 U.S.C.A. 104, 105, 106), and the federal judiciary's decisions excluding state jurisdiction only when inconsistent with the purpose for which the federal requisition was made. *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155 (1937); *Paul v. United States*, 371 U. S. 245, 83 S. Ct. 426 (1963); *Howard v. Commissioners*, 344 U. S. 624, 73 S. Ct. 465, 97 L. Ed. 617 (1952); 58 Yale Law Journal 1402.

The Utah Supreme Court applied this dual sovereignty principle, and the state's power to determine its election laws, to allow a civilian resident of a federal military reservation to register as an elector. *Rothfels v. Southworth* (Utah 1960), 356 P. 2d 612. The West Virginia Supreme Court reached the same result—allowed a resident of a naval base to be a candidate for mayor and an elector—with the following language:

> "The reasoning usually followed in the cases was that the ceding of land to the United States ousted the State as a sovereign and constituted the United States the sole sovereign as to such territory, following by analogy, the ceding of territory by one nation to another nation, whereby the laws of the ceding nation were superseded entirely by the laws of the nation to which the territory was ceded. (Citations) Is not the analogy inept? Our American form of government is not two separate and distinct sovereigns. It is, in fact, as all recognize, a single sovereign, of dual aspect. Within its own field the Federal government is absolutely sovereign. It is just as true, however, that a State within its own field is absolutely sovereign.
>
> "It is also true that the sovereign power of the United States and of the different States, respectively, is concurrently exercised over all the territory of the several States. These facts are demonstrated almost daily when the Federal Courts refuse to hear matters of litigation where no Federal question is involved, or where a State Court refuses to hear questions cognizable only under Federal laws. The State and the United States constitute one, and only, sovereign. This being true, is there any reason or necessity for holding that the Federal Government must necessarily oust the State of its sovereignty as to those matters constituting no impediment or interference with the use by the Federal Government of the land for the purpose or purposes for which it is acquired pursuant to the provisions of Clause 17? The question is not new. It has been considered often and, except in some of the older cases, usually answered in the negative." *Adams v. Londeree*, 83 S.E. 2d 127 (W. Va. 1954).

The concept of dual sovereignty, as explained in the *Dravo*, *Paul*, and *Howard* cases, as applied in the *Rothfels* and *Adams* cases, and as advocated in 58 Yale Law Journal, is not new. Hamilton wrote:

> "But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another Prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant." The Federalist No. 32.

From cases cited, it can be seen that California, Utah, New Mexico and West Virginia, some with statutes more restrictive than Section 1.4, 1962 Code of Iowa, allow residents of federal reservations within their states to vote. As the Utah court pointed out in the *Rothfels* case, supra, the qualification of electors is a matter of state prerogative. The right to vote is most basic and ought not be lightly denied any citizen—least of all those in full time service to their country, and a presumption exists against such a denial.

It is the opinion of this office then that persons in the military service, residing on or off of a federal [military] reservation, can become electors if they meet the standards as enunciated in *Julson v. Julson,* supra, and they are not as a class excluded from Iowa elections for lack of state sovereignty over the place where they live. "The uniform of our country must not be the badge of disfranchisement for the man or woman who wears it." *Carrington vs. Rash,* supra.

CHAPTER 5

COUNTIES AND COUNTY OFFICERS

STAFF OPINIONS

LETTER OPINIONS

5.1

COUNTIES AND COUNTY OFFICERS: Medical Examiner—Requirements of recommendations for appointment of Medical Examiner— Code Sections 339.1 and 339.2, 1962 Code of Iowa. When the Board of Supervisors has not submitted two or more names for positions of County Medical Examiners, a submission letter is not binding on the Board of Supervisors.

January 19, 1965

Mr. Thomas E. Tucker
Lee County Deputy County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Tucker:

I have your letter in which you request an opinion in regard to a list which was submitted to the Board of Supervisors by the Lee County Medical Association for the appointment of a Medical Examiner for a two year period beginning January 1, 1965.

The submission letter of the Lee County Medical secretary read as follows:

"I wish to notify you in behalf of Lee County Medical Society that Dr. George McGinnis's name, of Ford Madison, Iowa, was submitted for the position of medical examiner for Lee County and that Dr. B. J. Williamson's name, of Keokuk, Iowa, was submitted for deputy medical examiner.

Yours truly,
/s/ Sebastian Ambery M.D.
Lee County Medical Society
Secretary"

The question is whether the Board of Supervisors had the authority to appoint someone other than the names on the list.

Code Section 339.1 and 339.2, which were effective January 1, 1961, apply and read as follows:

"339.1. Appointment. The board of supervisors of each county of the state shall appoint a medical examiner for its respective county who shall take office on the second secular day of January, 1961, and each two years thereafter, to hold office for a term of two years and until his successor has been appointed and qualifies. Vacancies for any unexpired term shall be filled by the appropriate board of supervisors.

"339.2 Qualifications—lists submitted. Each county medical examiner shall be licensed in Iowa as a doctor of medicine and surgery, or licensed in Iowa as an osteopathic physician or osteopathic physician and surgeon as defined by law. He shall be appointed by the board of supervisors from lists of two or more names submitted by the component medical society and the osteopathic society of the county in which he is a resident. If no list of names is submitted by either society, the board of supervisors shall appoint a county medical examiner from the licensed doctors of medicine, or licensed osteopathic physicians or osteopathic physicians and surgeons of the county. If no qualified appointee can be found in the county, the board of supervisors shall appoint the medical examiner from another county.

"If, for good cause, a county medical examiner is unable to serve in any particular case or for any period of time, he shall promptly notify the chairman of the board of supervisors who shall then designate some other qualified person to serve in his place."

It is my opinion that the direct language of Section 339.2 and the plain meaning of that section require the list to contain two or more names for the position of County Medical Examiner. The apparent purpose of the statute was to give the Board of Supervisors the final choice.

Because the Medical Association letter did not follow the mandatory language of the statute, it would appear that the Board of Supervisors were free to appoint someone other than the names contained in the submission letter. The submission has no legal effect and was not binding on the Board of Supervisors, as it did not conform to the statute.

5.2

COUNTIES AND COUNTY OFFICERS: County Employees—Liability Insurance—Sections 79.9, 79.10, 332.3(20) and 517A.1, 1962 Code of Iowa. While county employees using private cars on county business

are "employees" under Section 517A.1, Sections 79.9 and 79.10 limit the Board of Supervisors to paying seven cents per mile for auto expense.

January 28, 1965

Mr. Phil Gross
Bremer County Attorney
Court House
Waverly, Iowa

Dear Mr. Gross:

You requested an opinion in regard to the following question:

"Is a Board of Supervisors authorized and empowered to purchase and pay the premiums on the liability, personal injury, and property damage insurance covering all persons who are compensated in the form of wages or per diem from County funds and who in the performance of their official duties drive their personal automobiles on County business and are reimbursed by the County at 7c per mile for such driving? For which such persons, if any, may such insurance, not be paid by the County?"

The following Code sections from the 1962 Code of Iowa apply:

"79.9 Charge for use of automobile. When a public officer or employee, other than a state officer or employee, is entitled to be paid for expenses in performing a public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of seven cents per mile of actual and necessary travel except as otherwise provided."

"79.10 Mileage and expenses—prohibition. No law shall be construed to give to a public officer or employee both mileage and expenses for the same transaction."

"332.3(20). To purchase and pay the premiums on liability and property damage insurance covering and insuring county employees while in the performance of their duties and operating an automobile, truck, road grader, machinery, or other vehicles owned by the county, which insurance shall insure, cover and protect against individual personal liability the county employees or employee may incur. The amount of insurance a county may purchase shall not exceed ten thousand dollars for personal injury or death of one person or one hundred thousand dollars for personal injury or death of more than one person arising out of a single accident."

"517A.1 Authority to purchase. All state commissions, departments, boards and agencies and all commissions, departments, boards, districts, municipal corporations and agencies of all political subdivisions of the state of Iowa not otherwise authorized are hereby authorized and empowered to purchase and pay the premiums on liability, personal injury and property damage insurance covering all officers, proprietary functions and employees of such public bodies, including volunteer firemen, while in the performance of any or all of their duties including operating an automobile, truck, tractor, machinery or other vehicles owned or used by said public bodies, which insurance shall insure, cover and protect against individual personal, corporate or quasi corporate liability that said bodies or their officers or employees may incur."

This office has held that Section 517.1 applies to County Boards of Supervisors, allowing them to purchase liability insurance under authority of that section when they are not otherwise authorized to do so. 1958 O.A.G. 74. Section 332.3(20) applies to County employees while

in performance of their duties while employing county-owned vehicles against their own personal liability. However, broader coverage is allowable under 517A.1. Informal opinion of this office to Ball, Black Hawk County Attorney, dated May 3, 1962.

However, Section 517A.1 must be read in the light of the restrictions of Sections 79.9 and 79.10 which indicate that there is a strict statutory limitation of compensation for driving a personal vehicle, which is seven cents per mile. Liability insurance is any expense of operating an automobile. Had the legislature meant to exclude this specific expense from the prohibition of 79.10, it could have said so. Since no such proviso exists, we have no choice but to assume the legislators intended the clear and unambiguous meaning of their words. *Hindman v. Reaser,* 246 Iowa 1375, 72 N.W. 2d, 559, 562. 82 C.J.S. 328, p. 635.

It is the opinion of this office that while the county employees are using their personal cars on county business, they are "employees" under Section 517A.1, but because of the restrictions of Sections 79.9 and 79.10, the employee is limited to the payment of seven cents per mile and the Board of Supervisors would be exceeding that amount by purchasing an insurance policy on the vehicle for the operator.

5.3

COUNTIES AND COUNTY OFFICERS: **Board of Supervisors**—Legalizing Act validating void contracts of Board of Supervisors, is constitutional even after Supreme Court had held Board of Supervisor's action void.

February 11, 1965

Hon. Donald E. Baker
House of Representatives
LOCAL

Dear Sir:

You have requested an opinion in regard to whether a legalizing act to legalize the proceedings of the Board of Supervisors in regard to their contracts of February 20, 1961, with the Madrid Lumber Company and other suppliers would be a valid statute inasmuch as the Supreme Court of Iowa had indicated in the case of *Madrid Lumber Company vs. Boone County,* 255 Iowa 380, 121 N.W. 2d 523 (1963) that the Board's contract with the Madrid Lumber Company was void.

In this case, the Board of Supervisors had the power to contract, but was required by the Legislature to follow certain statutory procedures. The reason the Court held that no recovery was allowable was the fact that the requirements laid down by the Legislature were not followed.

It is a common rule of Iowa law that the essential statutory requirements must be followed or the contract is void and the Iowa Court was merely interpreting the law.

Your particular question was discussed by the Supreme Court of Iowa in the case of *Iowa Electric Light and Power Company v. Town of Grand Junction,* 221 Iowa 441, 264 N.W. 84 (1935). At page 444, the Court stated as follows, as to what the issue was:

> "May the legislature, under the limitations of the state and federal constitutions, pass a special act legalizing a contract made by a municipality and the proceedings thereunder, which have previously been declared by this court void as being in excess of and beyond statutory authority granted to the municipality, as in the in-

stant case? And in attempting to so do by the act in question, has the legislature trespassed upon established constitutional limitations?"

The holding of the Iowa Supreme Court was that the Legislature had the constitutional power to pass a valid legalizing act. Note the Court's language at page 446:

"If the thing wanting, or which failed to be done, and which constitutes the defects in the proceedings, is something, the necessity for which the legislature might have dispensed with by prior statute (in the instant case, competitive bidding), then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to have made the same immaterial by subsequent law." Cooley, Constitutional Limitations cited in *Ferguson v. Williams*, 58 Iowa 717, 13 N.W. 49.

We also quote at page 454:

"What the legalizing act undertook to accomplish was to validate the very thing which the Supreme Court, by its decision, had held invalid, not from its inception, but to make it legal and valid and binding as and of the date that the act went into effect. It was not an invasion by the legislature of the powers vested in the judiciary and in violation of section 1 of article III of the State Constitution. It is not in any degree an attempt on the part of the legislature to recall the decision of the Supreme Court; on the other hand, it is a valid exercise of its constitutional prerogative and sovereign power over one of its agencies of local government of its own creation. It is a wholesome rule, in that it stops endless litigation and quiets property rights and is in the interest of the public good."

These holdings are the present law of the State of Iowa, and it is to be noted that its factual basis is very similar to the question you pose to us. It is, therefore, the opinion of this office that the legalizing statute would be valid and would not be an interference of the judicial function.

5.4

COUNTIES AND COUNTY OFFICERS: Welfare—Uniform Support of Dependents Law—§252A.5(1), 252A.6(1)(2), 1962 Code. Where petitioner and respondent both are residents of Iowa, the Rules of Civil Procedure must be followed by petitioner; the rules prescribed where respondent resides in a foreign state may not be invoked.

March 5, 1965

Mr. John E. Vasey
Assistant Story County Attorney
Court House
Nevada, Iowa

Dear Mr. Vasey:

In a recent letter you asked for an opinion from this office on the following factual situation and the consequent question:

Petitioner, the former wife of respondent and mother of his two children, lives in Story County. Respondent lives in Humboldt County. The problem is to compel respondent to support his family. You chose to proceed under Chapter 252A. 1962 Code, The "Uniform Support of Dependents Law". You were satisfied by the

language of the statute and the Davis case that such a proceeding could be maintained even though both petitioner and respondent reside in Iowa. You therefore followed the procedure laid down in Section 252A.6 for commencing the action. This provides that after a court of this state (the "initiating state" because it is the state in which petitioner resides has determined that respondent has a duty of support, it may certify the petition to the "responding state" (the state in which respondent resides) for proceedings there pursuant to Chapter 252A. By analogy, you considered your county the "initiating county" and Humboldt County the "responding county" and certified the petition to the Humboldt County Attorney for proceedings against respondent in Humboldt County. He declined to proceed. Your question, therefore is:

> "In an action brought under Chapter 252A, may a court of the county in which the petition is filed, having determined that the respondent owes a duty of support, send the petition to a court in another county of this state, where respondent resides, for action in accord with the procedure prescribed where petitioner and respondent reside in different states?"

These sections appear pertinent:

"252A.5 When proceeding may be maintained. A proceeding to compel support of a dependent may be maintained under this chapter in any of the following cases:

> '1. Where the petitioner and the respondent are residents of or domiciled or found in the same state'."

"252A.6 How commenced—trial.

> '1. A proceeding under this chapter shall be commenced by a petitioner, or a petitioner's representative, by filing a verified petition in the court in equity in the county of the *state wherein he resides* or is domiciled, showing the name, age, residence and circumstances of the petitioner, alleging that he is in need of and is entitled to support from the respondent, giving his name, age, residence, and circumstances, and praying that the respondent be compelled to furnish such support. ***. (Emphasis added)
>
> '2. If the respondent be a resident of or domiciled in *such state* and the court has or can acquire jurisdiction of the person of the respondent under existing laws in effect in *such state*, such laws shall govern and control the procedure to be followed in such proceedings'." (Emphasis added)

The remainder of Section 252A.6 is not extracted here but has been considered in the writing of this opinion. It sets out in detail the procedure to follow:

You point out that in *Davis v. Davis*, 246 Iowa 262, 67 N.W. 2d 566, the Supreme Court ended any confusion over whether Chapter 252A can be invoked where both petitioner and respondent are residents of Iowa. The court answered yes. Respondent's argument in that case was that Chapter 252A was not available, that Chapter 252, "Support of the Poor", was meant to provide the remedy. The court ruled that Chapter 252 was not the exclusive remedy, however, and that to so hold would require nullifying many of the provisions of Chapter 252A, including the explicit language of Section 252A.5(1): "A proceeding to compel support of a dependent may be maintained under this chapter in any of the following cases: 1. Where the petitioner and respondent are residents . . . of the same state." So the ambit of the statute comprehends more than the single problem involved in reaching and

holding liable fathers or other responsible persons who flee into other states.

In *Davis v. Davis* apparently both petitioner and respondent were residents of the same county. The Davis case, therefore, does not tell us that the procedure prescribed for reaching such persons when they flee the state may be invoked to reach them while they remain within it but in another county. Nor does it tell us that in Section 256A.6 the words "initiating county" may be substituted for "initiating state", or that the words "responding county" may be substituted for "responding state".

Moreover, we think what controls is the language of Paragraphs one (1) and two (2) of Section 252A.6.

We read the words "such state" as employed twice in Paragraph Two to refer clearly to the "state" signified in Paragraph One—"the state wherein he (the petitioner) resides or is domiciled." Where the respondent resides in the same state as petitioner "and the court has or can acquire jurisdiction of the respondent under existing laws in effect in such state, such laws shall govern and control the procedure to be followed . . ." What laws? The "existing laws in effect." What laws are those? They are the laws which govern and control procedure in civil cases, the laws under which "the court has or can acquire jurisdiction of the respondent." The conclusion is that although Chapter 252A.6 offers a new remedy, it does not, in cases between residents of this state, establish new rules of civil procedure or provide special rules for use in this single proceeding. You should *not* certify your cause to Humboldt County but should proceed in your own courts.

In 1955 the Iowa Legislature amended Chapter 252A "to permit actions to be commenced by an agency granting support, to simplify procedures, and to bring the Iowa law in closer uniformity with statutes of other states." Acts 56 G.A. Chapter 129. What the Legislature did was replace a number of sections of the Uniform Support of Dependents Law as enacted in 1949 with pertinent provisions of the Uniform Reciprocal Enforcement of Support Act as amended in 1952. See 9C Uniform Laws Annotated 7. Apparently it was believed that this latter act did not permit the doing of what you seek to do, because in a subsequent draft (1958) this optional clause was included:

> "32. Inter-county application. This act is applicable where both the petitioner and the respondent are in this state but in different counties. If the court of the county in which this petition is filed finds that the petition sets forth facts from which it may be determined that the respondent owes a duty of support and finds that a court of another county in this state may obtain jurisdiction of the respondent or his property, the clerk of the court shall send three copies of the petition and a certification of the findings to the court of the county in which the respondent or his property is found. The clerk of the court of the county receiving these copies shall notify the county attorney of their receipt. The county attorney and the court in the county to which the copies are forwarded shall then have duties corresponding to those imposed upon them when acting for the state as a responding state."

The above optional section is *not* a part of the Iowa law. Its presence in the most recent draft of the model act—from which states may borrow as they see fit—confirms that the drafters originally had not contemplated the inter-county application of the act, and felt it necessary that such use be expressly provided for. If Iowa wants to so provide, language similar to that above would have to be inserted in Chapter 252A by the General Assembly.

It is the opinion of this office, therefore, that in a Chapter 252A proceeding where both petitioner and respondent are residents of Iowa, petitioner must follow the Rules of Civil Procedure as in any other civil action, and cannot employ the procedure provided where the parties reside in different states as enunciated in Section 252A.6.

5.5

COUNTIES AND COUNTY OFFICERS: **Board of Supervisors—Investment Powers**—Sections 8.2, 334.1, 333.1(4), 453.1, and 453.5, Code 1962. Chapter 278 of the Acts of the 60th General Assembly. Under the provisions of Chapter 278, Acts of the 60th General Assembly, counties are authorized to invest their monies not needed for current operating expenses in time certificates of deposit or savings accounts in banks. Investments of such monies of counties in the foregoing manner is not authorized unless such monies are accepted for such investments by approved banks.

March 8, 1965

Mr. Walter J. Willett
Tama County Attorney
215 West Third Street
Tama, Iowa

Dear Mr. Willett:

Reference is herein made to yours of the 20th ult., in which you submitted the following:

"I have been asked by the Board of Supervisors of Tama County, Iowa, for an opinion in regards to investing county public funds as provided for by Chapter 278 of the Acts of the Regular Session, 60 General Assembly. All the lawful depository banks have agreed to accept funds except one. One of the questions I would like to ask is there any limitation on what funds can be accepted?

"Is there any prohibition in this statute for investment of these funds in our lawful depository banks, in savings accounts, or short-term time deposits. I enclose the statement received by me showing our statutory depository allowance, amount on hand, and amount to be invested in each bank. Does this meet the requirement of the statute?"

In reply thereto, I advise as follows:

1. The acts under which your question arises are Sections 1 and 2, Chapter 278, Acts of the Sixtieth General Assembly which are here exhibited:

"Section 1. Section four hundred fifty-three point one (453.1), Code 1962, is hereby amended by striking from line twelve (12) the word 'the' and inserting in lieu thereof the following:

'any county, city, town or school corporation may invest funds not immediately needed for current operating expenses in time certificates of deposit or savings accounts in banks approved as depositories as in this chapter provided. This authority shall be in addition to that granted by sections four hundred and fifty-three point nine (453.9) and four hundred fifty-three point ten (453.10) of the Code. ***' "

"Sec. 2. Section four hundred fifty-three point five (453.5), Code 1962, is hereby amended by adding at the end of said section the following:

'If a governmental unit secures resolutions duly adopted by the board of directors of two or more lawful depository banks to which a bona fide proffer to deposit public funds either in a savings acaccount or in a time certificate of deposit, for some period extending from ninety (90) days to one year with the privilege of renewal if mutually desired, and which resolutions are dated within ten (10) days of the proffer and decline such public deposit, then and only then may such governmental unit invest such funds so declined in interest-bearing notes, certificates or bonds of the United States'."

Section 1 thereof confers upon counties, cities, towns, or school corporations the power to invest funds not immediately needed for operating expenses in time certificates of deposit or savings accounts in banks when approved as depositories. This statute does not designate any specific funds of the counties, cities, etc., to be so invested, but such power is limited to any funds, without designation of specific funds, that have available immediate money not needed for current operating expenses. Public funds according to 42 Am. Jur., Para. 2, Page 718, are:

"Public funds are moneys belonging to the United States or a corporate agency of the Federal Government, a state or subdivision thereof, or a municipal corporation. They represent moneys raised by the operation of law for the support of the government or for the discharge of its obligations."

This is the meaning attached to the words "state funds" by Section 8.2(2) in words as follows:

"2. 'State funds' means any and all monies appropriated by the legislature, or money collected by or for the state, or an agency thereof, pursuant to authority granted by any of its laws."
This is implied to be the meaning of the same term insofar as county funds are concerned.

Section 334.1, Code of 1962, provides as follows:

"The treasurer shall receive all money payable to the county, and disburse the same on warrants drawn and signed by the county auditor and sealed with the county seal, and not otherwise, and shall keep a true account of all receipts and disbursements, and hold the same at all times ready for the inspection of the board of supervisors."

Section 333.1(4) provides the county auditor shall:

"Sign all orders issued by the board for the payment of money, and record, in a book provided for the purpose, the reports of the county treasurer of the receipts and disbursements of the county."

Thus, as county funds mean county money, the county would have authority to invest its money to the extent of such money not needed for current operating expenses, in time certificates of deposit or savings accounts in banks approved as depositories.

2. Insofar as your question as to whether there is any prohibition in the foregoing Chapter 278 of investing the funds there described in the manner provided, I am of the opinion that there is such a prohibition. This exists by reason of the terms of Section 278.2 heretofore exhibited. Under this section the county is authorized to invest its funds not needed for current operating expenses in savings bank deposits or time certificates conditioned upon the acceptance of such deposits for those purposes. In the event of a refusal by the approved bank to accept such proposed deposits for these purposes, then the county is restricted to

investment of such funds in interest bearing notes, certificates, or bonds of the United States. The rule of law applicable to such investment situation is stated in 42 Am. Jur., Section 10, at page 724, entitled "Public Funds" as follows:

> "Boards or officials having public funds in their control are without power to depart from the literal statutory requirements as to loans and investments of such funds."

A like rule is stated in 104 A.L.R. at page 628, entitled "Annotations" as follows:

> "In a number of cases it has been held that boards or officials having public funds in their control were without power to depart from the literal statutory requirements as to loans and investments of such funds."

In view of the foregoing, I advise:

1. That any county, city, town or school corporation money not needed for current operating expenses may be invested in savings accounts in banks approved as depositories or in time certificates of deposit in such banks.

2. Investment of any such money not needed for current operating expenses may be made in savings deposits in banks or time certificates of deposit conditioned upon acceptance of such money for such investment purposes by approved banks.

5.6

COUNTIES AND COUNTY OFFICERS: Board of Supervisors—Sections 331.8, 331.9, 331.10, 331.11, 1962 Code of Iowa. A situation where a five member Board of Supervisors with one man from a supervisor district including 85,000 people and four men from four supervisor districts representing a total of 18,000 people does not meet the U.S. and Iowa Constitutional requirements that voting be primarily based on population standards. Iowa County Boards of Supervisors set up by supervisor voting districts are required to meet constitutional requirements.

March 15, 1965

Mr. Edward F. Samore
Woodbury County Attorney
Woodbury County Courthouse
Sioux City, Iowa

Dear Mr. Samore:

After citing Code Sections 331.8, 331.9, 331.10 and 331.11, you have submitted the following question:

> "The Board of Supervisors of Woodbury County, Iowa, as it is presently constituted, consists of five members. Woodbury County is divided into five supervisory districts corresponding to the number of supervisors in Woodbury County. One district is the City of Sioux City. The remainder of the county is divided into four supervisory districts, thereby resulting in one supervisor representing Sioux City, which consists of a population of approximately 89,000, and four supervisors representing the remainder of the county, which has a total population of approximately 18,000.
>
> "In your examination of section 331.9, please be informed that Woodbury County is comprised of 24 Townships.

"Your opinion is respectfully requested as to whether or not the representation of districts presently constituted is constitutional under the existing laws of the State of Iowa, and of the United States."

The constitutional provisions and statutes which apply are as follows:

1. U. S. Constitution, Article VI, paragraph 2:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. U. S. Constitution, 14th Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Constitution of the State of Iowa, Article I, Sections 1 and 2:

"All men are by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

"All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it."

4. Sections 331.8, 331.9, 331.10 and 331.11:

"331.8 Supervisor districts. The board of supervisors may, or shall, when petitioned by ten percent of the number of qualified electors having voted in the last previous general election for governor, at its regular meeting in January in any even-numbered year, divide its county by townships into a number of supervisor districts corresponding to the number of supervisors in such county; or, at such regular meeting, it may abolish such supervisor districts, and provide for electing supervisors for the county at large, except that when districted following petition the districts cannot be abolished except by petition of one-tenth of the qualified electors of the said county and submission of the question to the qualified electors of the county at the next general election."

"331.9. How formed. Such districts shall be as nearly equal in population as possible, except that after the year 1950, in the division of counties now having five supervisors, and made up originally of sixteen Congressional townships with a county seat having a population over six thousand shall be divided into four districts containing four Congressional townships each the borders of which are continguous except the area within the limits of the county seat, which shall comprise a fifth district, and shall each embrace townships as nearly continguous as practicable, each of which said districts shall be entitled to one member of such board, to be elected by the electors of said district."

"331.10 One member for each district. In case such division or any subsequent division shall be found to leave any district or

districts without a member of such board of supervisors, then, at the next ensuing general election, a supervisor shall be elected by and from such district having no member of such board; and if there be two such districts or more, then the new member or members of said board shall be elected by and from the district or districts having the greater population according to the last federal census, and so on, until each of said districts shall have one member of such board."

"331.11 Redistricting-term of office. Any county may be redistricted, as provided by sections 331.8 to 331.10, inclusive, once in every two years, and not oftener, and nothing herein contained shall be so construed as to have the effect of lengthening or diminishing the term of office of any member of such board."

5. Sections 332.1, 332.3(2), 332.3(4) and 332.3(14):

"332.1 Body corporate. Each county is a body corporate for civil and poltical purposes, may sue and be sued, must have a seal, may acquire and hold property, make all contracts necessary for the control, management, and improvement or disposition thereof, and do such other acts and exercise such other powers as are authorized by law."

"332.3 General powers. The board of supervisors at any regular meeting shall have power:

(2) To make such rules not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order.

(4) To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent with law.

(14) To make appropriations not exceeding three hundred dollars in one year for the growing, under the direction of the board, of experimental crops on land owned by the county."

6. Section 359.1:

"The board of supervisors shall divide the county into townships, as convenience may require, defining the boundaries thereof, and may, from time to time, make such alterations in the number and boundaries of the townships as it may deem proper."

Using the figures submitted in your letter as to the population variances, it would appear that the resident voters of the city of Sioux City have approximately one-twentieth of the vote as the population in the four supervisor districts outside of Sioux City.

The following is intended to be a chronology of the developments in this country which leads me to state my opinion of your situation as follows:

Where there is a five-member board of supervisors with one man from a supervisor district including 89,000 people and four men from four supervisor districts representing a total of 18,000 people, this is a situation which must, and does not, meet the U. S. and Iowa Constitutional requirements that voting be primarily based on population standards.

I.

The case of *Gomillion v. Lightfoot* (1960) 364 U. S. 339, struck down a state's change in municipal boundaries designed to prevent negroes from casting a majority of votes. The Court stated as follows:

"While in form this is merely an act redefining metes and bounds (of a municipality), if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens . . . of their theretofore enjoyed voting rights . . . When a State exercises power wholly within the domain of state interests, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

In regard to the Gomillion case, Jack B. Weinstein stated in his article in 65 Columbia Law Review, page 28, entitled Effect of the Federal Reapportionment Decision on Counties and Other Forms of Municipal Governments, as follows:

"Gomillion thus clearly supports the proposition that a state's power to control municipal corporations must be exercised in conformity with the federal constitution."

II.

One of the next developments occurred in your very county on December 19, 1962, in the case of *Jackson v. Board of Supervisors*, Woodbury County. Your District Court held that it could not grant an injunction to prohibit the Board of Supervisors from further governmental action. At that time the Court said:

"It is equally true that historical recourse to such reapportionment formulae cannot be justified if it results in indivious discrimination. The division of the vote of a majority of electors to one-nineteenth of that enjoyed by others is so unjust as to be invidiously discriminatory."

III.

The landmark case is *Reynolds v. Sims* (1964), 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, in which the Supreme Court of the United States declared the basic principle of equality among voters within a state is the fundamental principle that representative government is one of equal representation for equal numbers of people without regard to race, sex, economic status, or place of residence. The Supreme Court held that the right to vote, whether statutory or constitutional, to mean anything in a representative government, must mean the right to secure equal representation.

The decision of *Reynolds v. Sims* was preceded by three Supreme Court cases which are as follows:

1. *Baker v. Carr* (1962), 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, which held that legislative reapportionment was a justiciable issue.

2. The case of *Gray v. Sanders* (1963), 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821, held that the requirements of the 14th amendment of the U. S. Constitution were not met in a statewide primary election because the system diluted the weight of votes in certain Georgia areas merely because the voters happened to reside in a certain area.

3. In the case of *Westbury v. Sanders* (1964), 376 U. S. 1, 84 S. Ct., 526, 11 L. Ed. 2d 481, the U. S. Supreme Court determined that the constitutional tests for the validity of congressional districting schemes is one of substantial equality of population among the various districts. This was the last pronouncement of the "one man-one vote" rule prior to the case of *Reynolds v. Sims.*

IV.

On September 11, 1964, the Circuit Court for the County of Kent, Michigan, decided the case of *Brouwer v. Bronkema.* In the law review article cited above from 65 Columbia Law Review the following resume is noted at pages 26 and 27:

"The first post-Reynolds case requiring application of federal rules for equal representation at the county level was *Brouwer v. Bronkema.* That litigation, challenging the constitutionality of the Board of Supervisors of Kent County, Michigan, was commenced on June 23, 1964, only eight days after the Supreme Court's ruling in Reynolds. Kent County, containing twenty-two townships and eight cities, including Grand Rapids, had a large Board of Supervisors of seventy-three members. Per capita representation, governed by state constitutional and statutory provisions dating from 1827, varied from one representative for each 925 citizens of Cedar Springs City to one for 15,000 in Plainfield Township. The City of Grand Rapids, with twenty-four representatives, had one for each 8,429 in population. Each township was entitled to at least one member on the board. City representatives were not elected, but were either appointed by city authorities or served ex officio.

"Rejecting the position that there is a fundamental difference between state and municipal legislative bodies for purposes of equal protection of the laws, the state court held Michigan's system unconstitutional as applied in Kent County. It reasoned:

"1. The Fourteenth Amendment applies to the State and to every governmental agency or instrumentality of the State which exercises powers delegated to it by the State.

"2. The County is a governmental instrumentality or division of the State and the board of supervisors is the legislative body of the County. The board exercises legislative powers delegated to it by the State.

"3. The State may exercise its legislative powers only in a legislative body apportioned on a population basis and if it delegates a part of those powers, it must do so to a legislative body apportioned to the same 'basic constitutional standard.'

"The court granted time for corrective action by the legislature before ordering a coercive remedy."

V.

On October 20, 1964, the case of *Ellis v. the Mayor and City Council of Baltimore, et al,* (D.C. Md., 1964), 234 F. Supp. 945, was decided. The Ellis case involved the city charter which provided voting districts should be apportioned on the basis of registered voters rather than population. It was held the districts composing the City of Baltimore were disproportionate in population and under the 14th Amendment of the U. S. Constitution as construed by the case of *Reynolds v. Sims* and the companion cases, the plaintiff in that case was entitled to equal protection in its representation on the City Council.

VI.

The latest case is that of *State v. Sylvester,* a Wisconsin Supreme Court case decided January 5, 1965, and cited as 132 N.W. 2d, 249, which held that the "one man-one vote" principle of representation applied to County Boards of Supervisors in certain counties in the state of Wisconsin and that the statute setting up said Boards of Supervisors

violated the equal protection clause of the 14th Amendment of the Federal Constitution and the equivalent section of the State Constitution.

This case involved seventy counties and in forty-two of these counties the disparity of voter representation was over ten to one and in one county there was a disparity of sixty-nine to one.

The composition of the County Boards of Supervisors involved a chairman of each town board, a supervisor from each city ward or part thereof in that county and a supervisor from each village or a part thereof in the county. Representation on the county board was based entirely on political units without regard to the number of people therein. The Wisconsin court stated:

> "Since the composition of the Legislature must conform to the principle of equal representation, it is logical that the arm of political subdivision of such Legislature enacting legislation should be governed by the same principle of equal representation."

Section 332.1, 1962 Code of Iowa, defines a county and reads as follows:

> "Each county is a body corporate for civil and political purposes, may sue and be sued, must have a seal, may acquire and hold property, make all contracts necessary for the control, management, and improvement or disposition thereof, and do such other acts and exercise such other powers as are authorized by law."

The Wisconsin court held that a principle of equal representation applied and applies to County Boards of Supervisors where the board is given legislative power and is composed of legislative members. This would apply to our Iowa situation.

To support our statement that the County Boards of Supervisors in the State of Iowa have legislative power, I would first like to cite the landmark case in Iowa of *Eckerson v. City of Des Moines*, 137 Iowa 452, (1908), which contains the following statement at pages 465 and 466:

> "And all the authorities agree that, in the absence of any constitutional restriction, it is within the province of the Legislature to clothe an officer or agency created by it with functions involving the exercise of powers executive, legislative, and judicial in character—one or all. *State v. Barker*, 116 Iowa 109. So, also, the universal practice has been that way. *As it is well known, the county courts of this State, when they existed, were not only authorized to perform judicial duties, but executive and legislative, as well.* Under the general statutes now existing, mayors of cities and towns have conferred upon them powers and duties both executive and judicial, and, particularly in towns, the mayor, in virtue of his right to vote on all questions coming before the council, constitutes in all strictness a part of the corporate legislative body. *Boards of supervisors, city and town councils, boards of school directors, township trustees, and various individual officers are directly charged with and are in the performance of powers and duties, now, administrative in character, and again judicial, etc.*" (Emphasis supplied)

Further statements in regard to the legislative power of the Board of Supervisors are found in the Iowa case of *Gannett v. Cook*, 245 Iowa 750, 61 N.W. 2d 703, at pages 755 and 756 of the Iowa Report as follows:

> "The general rule as stated in 62 C.J.S., Municipal Corporations, section 143, page 293, is: '* * * a municipal regulation which is

merely additional to that of the state law does not create a conflict therewith. Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation may make such additional reasonable regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality. The fact that an ordinance enlarges on the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirements for all cases to its own prescriptions.' See also 37 Am. Jur., Municipal Corporations, section 165, and *Western Pennsylvania Restaurant Assn. v. City of Pittsburgh,* 366 Pa. 374, 77 A.2d 616.

"Although a county is distinguishable from a municipal corporation, it is treated the same in such legislation as is here involved and the same rules that would govern the legislative authority of a municipal corporation under a zoning law would govern a county. The requirement of recordation was clearly not unreasonable. This was an instrument affecting real estate and it was important that the time of its going into effect be capable of exact determination."

An examination of the Iowa Constitution is noteworthy in the following respect:

1. It is to be noted that Article III, Section 30, restricts the General Assembly from passing local or special laws in the following cases:

"For the assessment and collection of taxes for State, County, or road purposes;

For laying out, opening and working roads or highways;

For changing the names of persons;

For the incorporation of cities and towns;

For vacating roads, town plats, streets, alleys, or public squares;

For locating or changing county seats."

2. It is also to be noted that legislative authority is expressly delegated to school districts in Article IX, Section 8.

3. The Constitution of the State of Iowa was adopted in 1857. What is now Section 332.1, which is cited above at page 9, was adopted in 1851 when Iowa was a territory.

4. The Constitution of the State of Iowa recognized the existence of counties which were in existence prior to the Constitution and in Article XI there is restriction placed on the size of counties and their indebtedness. It can be noted that the framers of our Constitution reserved some rights in Article III, Section 30, and did not make a legislative grant as in the case of school boards because the counties already existed.

The case of *State v. Parker,* 147 Iowa 69, 125 N.W. 856 at pages 85, 86 and 87 of the Iowa Reports states as follows:

"As the board of supervisors had undoubted power to district the county after the primaries were held, and did so in this case, the nomination of plaintiff, at the primary election, for member of the board at large and not for his district, which was thereafter created, is not to be regarded as a nomination for the district subsequently created, and it is manifest that there was a vacancy

to be filled by the proper authority after the districting of the county.

"The proceedings of the board of supervisors in redistricting or districting Mills County for supervisor purposes, was largely, if not wholly, legislative in character."

In addition we have the following instances where various governmental subdivisions were considered to be legislative bodies:

1. County Council. *Casper v. Hetlage,* Mo., 359 S.W. 2d 781, 788.

2. Board of Education, *Andeel v. Woods,* 258 P.2d 285, 288, 174 Kan. 556.

3. A City and County Board of Supervisors. *Edward Brown & Sons v. City and County of San Francisco, Cal. App.,* 212 P.2d 562, 565.

4. Interstate Commerce Commission. *Fort Worth & Denver City Ry. Co. v. Childress Cotton Oil Co.,* D.C. Tex., 48 F. Supp. 937, 940.

5. A City Board Commission. *City of Oakland v. Hogan,* 106 P.2d 987, 993, 41 Cal. App. 2d 333; *City of Oakland v. Eldorado Terminal Co.,* 106 P.2d 1000, 1002, 41 Cal. App. 2d 320.

6. A Town Board of Trustees. *Jungels v. Town of Hennessey,* 217 P.2d 167, 170, 202 Okl. 619; *U.S. v. Certain Parcels of Land in Los Angeles County,* D.C. Cal., 63 F. Supp. 175, 184.

7. A County Board of Supervisors. *People ex rel Allen v. Board of Sup'rs of Westchester County,* 99 N.Y.S. 348, 349, 113 App. Div. 733, citing *People v. Board of Sup'rs of Queens County,* 30 N.E. 488, 131 N.Y. 468; *People ex rel. O'Connor v. Board of Sup'rs of Queens County,* 47 N.E. 790, 153 N.Y. 370.

8. A County Board of Commissioners. *Witter v. Cook County Com'rs,* 100 N.E. 148, 149, 256 111. 616.

The general rule is stated at 14 Am. Jur., page 199, under the topic "Counties" in the following language:

"The county board, otherwise known as the board of supervisors, board of commissioners, and county court, occupies a unique but very important position in organized county government. In its status as the representative or agent of the county, it exercises executive, legislative, and limited judical powers."

In conclusion, the statement in 65 Columbia Law Review, which has been cited above at page 23, should be noted:

"There is strong reason to believe that the apportionment standards which apply to states also apply to those municipalities that (1) exercise general governmental functions and (2) are designed to be controlled by the voters of the geographic area over which the municipality has jurisdiction. Counties, towns, cities and villages meet these tests. They are fundamental and important organs of government within the state; they exercise a large measure of the state's power and, because of the nature of the services rendered, are the medium of government most often in direct contact with the people."

The Wisconsin Supreme Court held that the Wisconsin statutes denied the citizens of Wisconsin equal protection of the laws and were in conflict with the 14th Amendment of the U.S. Constitution and Article 1, Section 1 of the Wisconsin Constitution. Article 1, Section 1, of the

Wisconsin Constitution is substantially the same as Article 1, Sections 1 and 2 of the Iowa Constitution. It is to be noted that the declaration of the Wisconsin Court was to have prospective effect only and that the validity of the acts of the Boards of Supervisors so elected was not to be challenged on the basis of the Wisconsin Court's decision.

CONCLUSION

In view of the persuasive case authorities cited above, it is my opinion that the principles of equal representation involved in these cases applies to County Boards of Supervisors in the State of Iowa inasmuch as these boards of local government are given legislative power and are composed of elected members. Therefore, I must conclude that in a situation such as we have in Woodbury County, where we have a five-member board of supervisors who are elected from supervisor districts and one of such districts electing one supervisor contains 89,000 people and the other four districts elect four men and only contain a population of approximately 18,000 people, there is a denial of the fundamental constitutional principle that representative government is one of equal presentation for equal numbers of people. Your question must be answered that the representation of these supervisor districts as presently constituted, is not constitutional under the existing laws of the State of Iowa and of the United States.

5.7

COUNTIES AND COUNTY OFFICERS: County Auditor—§447.1, 1962 Code of Iowa. The interest contemplated by §447.1 is simple interest, rather than compound interest.

April 20, 1965

Mr. Thomas E. Tucker
Deputy Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Tucker:

You have made a formal request to this office for an opinion as to whether Section 447.1 of the 1962 Code of Iowa calls for the payment of compound or simple interest.

Section 447.1 reads as follows:

> "Redemption—terms. Real estate sold under the provisions of this chapter and chapter 446 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and four percent of such amount added as a penalty, *with six percent interest per annum* on the whole amount thus made from the day of sale, and the *amount of all taxes, interest,* and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and *six percent per annum* on the whole of such amount or amounts from the day or days of payment." (Emphasis supplied)

This statute has been virtually unchanged since it was published in the 1851 Code. There was an early Iowa case of *Roberts v. Merrill,* 60

Iowa 166, 14 NW 235 (1882), which contained the following language at page 167-168:

"The defendants have paid certain taxes the plaintiff was legally bound to pay, and the latter should pay such sum, with six per cent interest, because the money was paid for the use and benefit of the plaintiff. There is no principle of law or equity which will entitle the defendants to more than this."

This case involved the redemption of real estate under a similar statute and the Court did not consider that the interest was compounded.

A more recent Iowa decision concerning the Iowa law in regard to interest is the case of *In the Estate of Mann*, 212 Iowa 17, 235 NW 733. In that case the Supreme Court of Iowa reversed a District Court which allowed interest on interest. The Court cited an earlier Iowa case as follows:

"In *Aspinwall v. Blake*, 25 Iowa 319, this court said:

"While the debtor's obligation to pay the interest at the maturity of the principal debt may be as great as to pay the principal itself, yet he has contracted to pay interest upon the principal only, and the law will not raise an implied contract binding him to pay interest upon interest after the principal becomes due."

As to the general rule in regard to taxation, in 85 Corpus Juris Secundum, Taxation, Section 874a, page 279, we find the following language:

". . . where land was sold at a void tax sale, the owner is not required to pay the statutory interest allowed to the purchaser in case of redemption, legal interest being all that is required."

A review of 47 Corpus Juris Secundum, Interest, at Sections 3b, 63 and 65, reveals the following language:

"The law does not favor compound interest or interest on interest, and the general rule, subject to some exceptions, is that in the absence of contract or statute authorizing it, compound interest is not allowed to be computed on a debt."

"Interest is generally to be so computed as to avoid the payment of compound interest and to secure a calculation of interest on the actual amount due and for the actual period during which interest should run."

"Computing interest with periodical rests to ascertain the balance due, the accrued interest becoming part of the new principal, generally is not permitted, except where contract, custom, or peculiar circumstances so require."

The writer is forced to conclude from the Iowa cases and the general rules of law that, unless the statute clearly spells out that the interest is to be compounded, the interest must be simple.

5.8

COUNTIES AND COUNTY OFFICERS: Insane Persons—Cost of investigation—county obligation—§§230.10, 230.15, 1962 Code of Iowa. The cost attending the investigation and hearing before the Commissioners of Hospitalization concerning mental illness, whether the person is committed or not committed cannot be construed to mean "support" and is the obligation of the county of legal settlement.

April 30, 1965

Mr. Keith A. McKinley
Mitchell County Attorney
Osage, Iowa

Dear Mr. McKinley:

You have requested an opinion of this office on the following questions:

"Can the county recover the costs of a hearing before the Commissioners of Hospitalization concerning mental illness, from the person (or his family) who is the subject of such hearing under the provisions of Chapter 230 of the Code of Iowa, 1962 when the Commission does not commit said person?"

and

"Are the costs of such hearings considered a part of the support furnished by the County when a person is committed for mental illness?

We enclose a copy of an Attorney General's opinion found in 1948 A.G.O. 189 which answers your second question in the negative. We concur with this result.

Concerning your first question, we set out the two applicable provisions:

"230.10 PRELIMINARY PAYMENT OF COSTS. *All legal costs and expenses attending the taking into custody, care, investigation,* and admission or commitment of a person to a state hospital for the mentally ill under a finding that such person has a legal settlement in another county of this state, *shall,* in the first instance, *be paid* by the county of admission or commitment. The county of such legal settlement shall reimburse the county so paying *for all such payments with interest.*" (Emphasis supplied)

If this provision was meant to apply only to those situations where the person under investigation was admitted or committed, this would read "*of* admission or commitment" and not as it is "*and* admission or commitment." We feel that this provision as written is equally applicable to the first situation you have raised, i.e. when the commission *does not commit* said person.

Section 230.15 entitled "Personal Liability" is as follows:

"Personal Liability. Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally ill or mentally retarded person shall include the spouse, father, mother, and adult children of such mentally ill or mentally retarded person, and any person, firm or corporation bound by contract hereafter made for support. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county."

Reading these statutes together then, we are not disposed to say that the costs of a hearing before the Commissioners of Hospitalization can in any way be construed to mean "support" within this section declaring the persons legally liable for the support of a mentally ill person. Additionally, this section talks of support of a "mentally ill person" and we do not feel it contemplates to cover the situation where the commission *does not commit* the person under investigation.

Specifically then, we also answer your first question in the negative.

5.9

COUNTIES AND COUNTY OFFICERS: Clerk of the District Court— §606.15(29) as amended by Senate File 112, 61st G.A. The fees of the Clerk of the District Court in probate matters does not include the value of property both real and personal of a decedent held in joint tenancy with the right of survivorship.

May 24, 1965

Mr. Ray Yarham
Cass County Attorney
Savery-Weir Building
Atlantic, Iowa 50022

Dear Sir:

Reference is herein made to yours of the 29th ult., in which you stated:

> "The Clerk of the District Court of Cass County, Iowa, has raised a question in regard to Senate File 112 which is an act relating to fees taxed by the Clerk of the District Court in probate matters. The question is whether or not the Clerk should tax as fees in probate matters the value of real estate as shown in estates on Schedule IV which was owned by the decedent in joint tenancy with full rights of survivorship with another person.
>
> "In the past our Clerk has not made any charge for property shown on Schedule IV of the Inventory where the property was personal and owned in joint tenancy.
>
> "I have been unable to determine from the statute whether joint tenancy property with full rights of survivorship should be included in determining the fees taxed by the Clerk."

In reply thereto, I advise as follows:

That fees allowable to the Clerk of the District Court for services performed in the settlement of the estate of any decedent are determind by the provisions of Section 606.15(29) as amended by Senate File 112, Acts of the 61st G.A.

1. Insofar as the foregoing numbered statute is concerned by way of taxing fees upon real estate owned by the deceased, it is said in the case of *In Re Estate of Pitt*, 153 Iowa 269, 133 N.W. 660, as follows:

> ". . . descends to the heirs eo instante upon the death of the ancestor with the quantity of each definitely ascertained. From that instant, subject to the right of the administratrix to resort thereto for the payment of the debts of the deceased, they may dispose of the particular property as owners as they choose and are entitled to possession and to the rents and profits. . . ."

and concludes as reason for the nontaxability of fees upon the real estate as follows:

> "Enough has been said to make it clear that ordinarily no services are rendered by the clerk in connection with real property in the administration of an estate of a deceased person, and that none were or might reasonably be expected to be rendered in connection with the homestead or land in Idaho left by Pitt. This statute and all others relating to the payment of fees proceed on the theory that such payment is exacted for something actually done by the officer for the benefit of the litigant, and we are of opinion that the

word 'estate', as employed in the paragraph of the statute quoted, means the estate administered in court.

" 'The services for which compensation is allowed are those rendered 'in the settlement of the estate,' and 'the value of the estate' by which the amount of the clerk's fee is to be determined is of that being settled in court. Primarily, the administration is of personal property only.' "

2. For the rule that a joint tenant in real estate does not die seized of any inheritable interest in the property, *Wood, Admr. v. Logue,* 167 Iowa 436, 148 N.W. 1035, states this rule as follows:

"Sarah Logue was the first of the tenants to die, and if the terms of the deed by which she acquired right in the property are valid, as we are disposed to hold, the brother and sister surviving may assert their title to the property as against her creditors. The survivors do not acquire title through the deceased, but by virtue of the deed. Before her death there was an equality and unity of right and title in the three tenants. Her death extinguished her right of survivorship, but left the unity of right and title unchanged in the other two tenants, and when one of them shall die, all rights of survivorship provided for by the deed having become effective and having accomplished the intent of their creation, the joint tenancy will cease to exist, and the last survivor will be the sole and unqualified owner. As we have already suggested, neither of the successive survivors takes or receives anything from or through the deceased tenant for the title is derived directly from the grantor through the deed which created the tenancy."

Real estate property thus held jointly with right of survivorship is therefore not the basis of the taxation of clerk's fees.

3. Insofar as the taxing of court fees upon personal property of the deceased held in joint tenancy with the right of survivorship, it is stated in the case of *Seneff v. Kelleher,* 155 Iowa 87, 135 N.W. 27, to-wit:

"Under our statutes joint tenancies with right of survivorship are not favored, and, although there may be joint ownership or ownership in common of personalty, it makes little difference which we call it in this case, the property does not go to the survivors in case of the death of one or more of the joint owners."

The authority of the clerk to tax fees upon personal property held in joint tenancy is controlled by the reasoning of the cited cases. While there may exist a joint tenancy in personal property as well as real estate, *Hyland v. Stantiford,* 253 Iowa 294, 300, 111 N.W.2d 260, such property with full right of survivorship not becoming part of the deceased's estate is likewise not the basis for the taxation of clerk's fees. I am of the opinion (1) the interest of the decedent as a joint tenant in a joint tenancy of real estate with a survivorship provision is not the basis for assessing clerk's fees and (2) the interest of the decedent as a joint tenant in a joint tenancy of personal property with a survivorship provision is not the basis for assessing clerk's fees.

5.10

COUNTIES AND COUNTY OFFICERS: Saturday Openings—House File 349, 61st G.A. Each county courthouse must remain open 5½ days including the hours from 8:00 A.M. to 12:00 noon on Saturdays excepting legal holidays.

June 25, 1965

Honorable Walter L. McNamara
State Representative
502 American Building
Cedar Rapids, Iowa

Dear Sir:

Reference is herein made to yours with respect to enrolled House File 349, 61st G.A., and you state:

"Enrolled House File 349 an act relating to the compensation of county officers, deputies and clerks was signed into law by the Honorable Harold E. Hughes on the 8th day of April 1965. The enacted measure provided for an increase in the compensation of county officers, deputies and clerks. Further there was also enacted a provision in regard to the hours of operation of the court house, i.e., Section 10: 'It is hereby declared to be the policy of this state that all court houses shall be open for the transaction of business five and one-half (5½) days per week. Such period shall include Saturdays from 8:00 a.m. to 12 Noon, excepting legal holidays.'

". . . It is therefore, respectfully requested that your office render an attorney general's opinion in regard to Section 10 of Enrolled House File 349 so as to clear up a discrepancy that presently exists and also to determine whether Section 10 is mandatory or permissive. . . ."

In reply thereto, I advise as follows:

Section 10 of the foregoing designated House File 349 is a declaration of the public policy of the state. Such declaration of public policy has the force of law. "We must look to the constitution, statutes, and judicial decisions of the state to determine its public policy." See *Andrew v. Brenon*, 208 Iowa 386, 226 N.W. 7, and see 35 Words and Phrases, title Public Policy, page 480. Section 10 of House File 349, 61st G.A., is a part of that law adopted by the general assembly and approved by the governor. It is in form and substance a law of the state of Iowa and by its terms and authority it is mandatory. In *Slutts v. Dana*, 138 Iowa 244, 115 N.W. 1115, it is said a county is a public corporation subject to legislative control. *Rogers Locomative Mach. Works v. American Emigrant Co.*, 164 U.S. 559, said:

"The state makes a county and can, in its discretion, unmake it and administer its property and revenue through other instrumentalities.

"A county is a mere political subdivision of the state created for the state's convenience and to aid in carrying out within a limited territory the policy of the state. Its local government can have no will contrary to the will of the state, and it is subject to the paramount authority of the state in respect as well of its acts as of its property and revenue held for public purposes."

Our Supreme Court confirms the foregoing principle in *Herrick v. Cherokee County*, 199 Iowa 510, 202 N.W. 252, where it is said "a county is, in reality, an arm of the state, to aid in its governmental functions only, and being such it and its property are wholly under the control of the legislature." *Scott County v. Johnson*, 209 Iowa 213, 222 N.W. 378, in confirmation thereof, states:

"While a county is a body corporate vehicle under statutory authority may sue or be sued as such, it is a subdivision of the state, and is subject at all times to legislative control, and it may not invoke the constitutional inhibition against legislative impair-

ment of vested rights, because it has no vested rights within the meaning of the constitution."

In view of the foregoing, I am of the opinion that Section 10 of House File 349, 61st G.A., is clear, plain and unambiguous in its language, and that the only legal construction of this language is that each court house must remain open 5½ days, including the hours from 8:00 a.m. to 12:00 noon on Saturdays, excepting legal holidays. It is my further opinion that the language does not mean that each court house must have its full staff present on Saturday mornings, but each office must be open for business.

5.11

COUNTIES AND COUNTY OFFICERS: Compensation of Deputy Sheriffs—§§340.8(1) and (2), 1962 Code of Iowa; Senate File 136, Acts of the 61st G.A. Deputy Sheriffs are to receive up to eighty-five (85) per cent of the sheriff's salary and do not receive any percentage at all of the residence allowance.

July 12, 1965

Mr. Ira F. Morrison
County Attorney of Washington County
P. O. Box 67
Washington, Iowa

Dear Mr. Morrison:

I have your letter of July 6, 1965 in which you ask the following question:

"The question, of course, is whether or not this language (referring to Senate File 136, Sheriff's pay raise) limits the deputy sheriffs to strictly eighty-five per cent (85%) of the sheriff's salary, or can they also draw eighty-five per cent (85%) of the residence allowance."

Please be advised that Senate File 136, Section 1, Subsection 11, states as follows:

"11. In counties where the sheriff is not furnished a residence by the county, an additional sum of seven hundred and fifty (750) dollars per annum in addition to the foregoing schedule. The foregoing additional allowance for residence shall not be considered as salary in computing the salary of deputies as provided in section three hundred forty point eight (340.8) of the Code."

Section 340.8(1) and (2) of the Code, state in effect that deputy sheriffs are to receive up to eighty-five (85) per cent of the salary of the sheriff.

It is my opinion that deputy sheriffs are to receive eighty-five (85) per cent of the sheriff's salary and do not receive any percentage at all of the residence allowance.

The language of Subsection 11 of Section 1 of Senate File 136, Acts of the 61st G.A. is plain and unambiguous and admits of no construction.

"The only legitimate purpose of statutory construction is to ascertain legislative intent, and when language of statute is so clear, certain and free from ambiguity and obscurity that its meaning is evident from mere reading thereof, canons of statutory construction are unnecessary as there is no need of construction and court need not search beyond wording of statute. *Hindman v. Reaser,* (1956), 246 Iowa 1375, 72 N.W. 2d 559."

5.12

COUNTIES AND COUNTY OFFICERS: Compensation of deputy officers—House File 349, Acts of the 61st G.A. The compensation of the deputy county auditors, treasurers and the deputy in charge of registration and title department, deputy clerks of court and deputy county recorders is set by the county officer elected to the respective office within the amount authorized by H.F. 349. The Board of Supervisors is required to certify authorized amount to the auditor.

July 15, 1965

Mr. F. E. Sharp
Clayton County Attorney
Elkader, Iowa

Dear Mr. Sharp:

In response to your question of whether the Boards of Supervisors have any discretion as to the salaries of deputy county officers, please be advised that Section 6 of House File 349, Acts of the 61st General Assembly, provides as follows:

"The first and second deputies and the deputy in charge of the motor vehicle registration and title department, may be paid an amount not to exceed eighty percent of the amount of the annual salary of his or her principal. In counties where more than two deputies are required, deputies in excess of two may be paid an amount not to exceed seventy-five percent of the annual salary of his or her principal. Upon certification to the board of supervisors by the elected official concerned, the amount of the annual salary for each deputy as above provided, the board of supervisors shall certify to the county auditor of any such county the annual salary certified by the elected officials, but in no event shall said board of supervisors be required to certify to the auditor of any such county an amount in excess of the amounts authorized above. The board of supervisors shall fix all compensation for extra help and clerks."

I think that the plain meaning of this statute is clear. First and second deputies and the deputy in charge of motor vehicle registration may be paid 80% of the amount of the county officer's salary. The county officer sets the salary and the Board of Supervisors must certify said salary to the county auditor so long as it does not exceed the amounts authorized. However, the Board of Supervisors does have the authority to fix compensation for extra help and for clerks.

Whenever the plain meaning of the language of the statute is clear and unambiguous, construction of the statute is unnecessary. See *Hindman v. Reaser*, 1956, 246 Iowa 1375, 72 N.W. 2d 559 wherein the court stated at page 1379 through 1380:

" 'The only legitimate purpose of statutory construction * * * is to ascertain the legislative intent. And when the language of the statute is so clear, certain and free from ambiguity and obscurity that its meaning is evident from a mere reading, then the canons of statutory construction are unnecessary, because there is no need of construction * * *. We need not search beyond the wording of the statute.'

"Many decisions are cited to support the language just quoted. *Michel v. State Board of Social Welfare* (Thompson, J.), 245 Iowa 961, 964, 65 N.W. 2d 89, 90, has this to say:

'Nor may we resort to rules of statutory interpretation to aid the plaintiffs. The statutes are clear and admit of only one mean-

ing. Under such circumstances it is said there is no room for interpretation; or, perhaps, more logically, there is only one possible interpretation that may be made.* * *.

'* * * The matter is entirely statutory, and the courts must follow the plain meaning of the legislative enactments.' "

In answer to your question, then, it is the opinion of this office that the county officer has the authority to set the salary of deputies but is limited by the percentages as provided in Section 6 of House File 349 as cited above, and the Board of Supervisors have no discretion except to prevent payment in excess of the amounts authorized and except as to the compensation for extra help and clerks.

5.13

COUNTIES AND COUNTY OFFICERS: Welfare — Unborn Child — §§239.1(4), 239.2(2), 1962 Code of Iowa. The unborn child does not come within the statutory definition of dependent child.

July 19, 1965

Mrs. Irene M. Smith, Chairman
State Board of Social Welfare
State Office Building
LOCAL

Dear Mrs. Smith:

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

1. Does the definition of "dependent child" in Section 239.1 extend to an unborn child?

2. Would the provision of Section 234.14, covering the use of federal grants, allow us to meet the needs of the unborn child in ADC without restriction, inasmuch as federal policy provides for this?

Dependent child is defined by Section 239.1(4) of the 1962 Code of Iowa as follows:

"A 'dependent child' means *a needy child under the age of sixteen years . . . who has been deprived of parental support and care* by reason of death, continued absence from home, or physical or mental incapacity or unfitness of either parent, and *who is living with* his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, in a place of residence maintained by one or more of such relatives as his or their home." (Emphasis added.)

From the reading of the above, it seems that the clear legislative intent was to include children only after birth. For instance, the statute uses the phrase "parental support and care." This would seem to indicate that a separate existence is contemplated before the ADC laws become applicable. Prior to birth, the child's support and care is provided biologically by the mother and the support is not influenced by the death, continued absence from the home, or physical or mental incapacity of the father in the manner contemplated in the above section.

In defining "Parental Care" the Supreme Court of Oregon has said:

"The 'parental care' of which the statute speaks is the kind of care to be expected of a good father and mother. Without attempt-

ing a comprehensive definition, it may be said that the phrase includes, of course, providing for material needs of their children in accordance with the family's station in life, seeing to it that they receive at least a minimum of schooling, and by example and proper measures of discipline, so ordering their lives that they may grow up to become good citizens and useful members of society." *In Re Murphy,* 218 Or. 514,521; 346 P. 2d 367,370 (1959).

Admittedly, the above is not a comprehensive definition; however, it is significant that the judicial definition of "parental care" mentioned only care owing to a child after birth.

The phrase "who is living with his . . . mother", as used in the above subsection, should not be interpreted to mean a child in fetal status, because such an interpretation would contradict the rule that statutory language must be given its plain and ordinary meaning. *Byers v. Iowa Employment Security Commission,* 247 Iowa 830; 76 N.W. 2d 892 (1956): *In Re Klug's Estate,* 251 Iowa 1128; 104 N.W. 2d 600 (1960). It is evident that the legislature intended the quoted phrase to mean "residing with" as it evidenced by the inclusion of the mother in the referred to group of other individuals with whom the child's living in a fetal sense is not possible; but with whom the child, once born, may reside and comply with the subsection. The Iowa Supreme Court interpreted the phrase "living with" to mean "residing with" in *Collins v. State Board of Social Welfare,* 248 Iowa 369, 81 N.W. 2d 4 (1957), where it said the following at page 376;

"We think it clear that under the provisions of said chapter the classification adopted by the legislature is the needy child which is diversified from all needy children by limiting it (aid) to the needy child who is *residing* in the home of a relative . . . (Emphasis added.)

For the above reasons, it is my opinion that dependent child as it is now defined in Section 239.1 does not cover an unborn child.

The legislative intent of this section is plain; therefore, this office cannot speculate, but must give the statute effect according to its plain and obvious meaning. *Home Owners Loan Corp. v. District Court of Woodbury County,* 223 Iowa 269, 272 N.W. 416 (1937).

In conclusion, I would like to direct your attention to Section 239.2(2) of the 1962 Code of Iowa which provides the residence requirements for eligibility and reads as follows:

"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; or was born within the state within one year immediately preceding the application, if the mother has resided in the state for one year immediately preceding the birth of said child, without regard to the residence of the person or persons with whom said child is living."

Neither subsection 1 or 3 of Section 239.2 would be applicable to the unborn child. Therefore, even if my answer to your first question had been in the affirmative, the unborn child still would not be eligible for assistance under Section 239.2(2), because express mention of the dependent children (who by reason of their residence or birth are eligible) implies the exclusion of all other dependent children. *North Iowa Steel Co. v. Staley,* 253 Iowa 355, 112 N.W. 2d 364 (1961); *Archer v. Board of Education in and for Fremont County,* 251 Iowa 1077, 104 N.W. 2d

621 (1960); *Dotson v. City of Ames*, 251 Iowa 467, 101 N.W. 2d 711 (1960).

In view of my answer to your first question, it is unnecessary to answer your second question at this time.

5.14

COUNTIES AND COUNTY OFFICERS: **Mental Health Funds**—§230.24, 1962 Code of Iowa annotated, as amended. A county board of supervisors does have the authority to authorize the use of the proceeds of a levy under Section 230.24 for the evaluation and treatment of the mentally retarded by a private charitable corporation. Such use must be made pursuant to an agreement which meets the requirements set out in Sections 5, 6, 8 and 10 of H.F. 188.

August 10, 1965

Mr. D. Quinn Martin
Black Hawk County Attorney
309 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Martin:

I have received your letter of June 22, 1965, in which you request an opinion on the following question:

> Does a County Board of Supervisors have the legal authority to authorize the use of the proceeds of a levy made under section 230.24 of the 1962 Code of Iowa, as consideration for a contract with a private charitable institution for the evaluation and treatment of the mentally retarded?

Your question may be broken down into two parts: whether the funds are available for this use and whether such a contract can be made. The first two paragraphs of section 230.24 are as follows:

> "The board of supervisors shall, annually, levy a tax of one mill or less, as may be necessary, for the purpose of raising a fund for the support of such mentally ill persons as are cared for and supported by the county in the county home, or elsewhere outside of any state hospital for the mentally ill, which shall be known as the county fund for mental health, and shall be used for no other purpose than the support of such mentally ill persons and for the purpose of making such additions and improvements as may be necessary to properly care for such patients as are ordered committed to the county home.
>
> "The county board of supervisors are authorized to expend from the county fund for mental health as provided in this section funds for psychiatric examination and treatment of persons in need thereof or for professional evaluation, treatment, and habilitation of mentally retarded persons. In each county where they have facilities available for such treatment, and any county not having such facilities may contract through its board of supervisors with any other county, which has facilities for psychiatric examination and treatment or for professional evaluation, treatment, and habilitation of mentally retarded persons for the use thereof. 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 one-half mill."

Because paragraph one of section 230.24 states that the fund for mental health should be used "for no other purpose" than support of mentally ill persons and the making of such additions and improvements as may be necessary to properly care for patients, there is on the fact of the matter some possibility of a conflict between this paragraph and the second paragraph of the statute. That is, there is some possibility of a conflict between this language of paragraph one and the language of paragraph two allowing the supervisors "to expend from the county fund for mental health as provided in this section, funds for the professional evaluation, treatment, and habilitation of mentally retarded persons." But unless statutes are in direct conflict, they will be read together and, if possible, harmonized. *Hardwick v. Bublitz*, 253 Iowa 49, 111 N.W. 2d 309 (1962).

The primary rule in construction of a statute is to ascertain and give effect to the legislative intent. *Olson Enterprises, Inc. v. Citizens Ins. Co. of N. J.*, 255 Iowa 141, 121 N.W. 2d 510 (1963). Legislation's history may properly be considered in the case of ambiguity, and legislative policy may be deduced from a history of successive legislative enactments. *Builders Land Co. v. Martens*, 255 Iowa 231, 122 N.W. 2d 189 (1963); City of *Emmetsburg v. Gunn*, 249 Iowa 297, 86 N.W 2d 829 (1958). As originally enacted, section 230.24 was made up only of what is now substantially paragraph one. Acts 1951 (54 G.A.) Ch. 86 §2 amended this section by adding the second paragraph. By making authorization in paragraph two for expenditures "from the county fund for mental health as provided in this section," it seems apparent that the legislature intended to allow these expenditures to be made from the original fund.

It would appear that these expenditures could come within the language of paragraph one allowing expenditures "for the purpose of making such additions and improvements as may be necessary to properly care for such patients." In light of the rule that statutes will be read together and harmonized if possible and in light of the legislative history of the act, it would seem that the language of paragarph two should be read as coming within the provisions of paragraph one. Thus, it would appear that the proceeds of a levy under these sections would be available for use for the evaluation and treatment of the mentally retarded.

The next determination to be made is whether a contract can properly be made with a private charitable institution in this instance. Paragraph two of section 230.24 allows the expenditure of funds for such treatment, and any county not having such facilities may contract through its board of supervisors with any other county, which has facilities . . ." On its face this language could possibly be interpreted as referring only to "county facilities", that is, to public facilities owned and operated by the county. In that case, the statute would then seem to exclude the possibility of contracting with a private corporation. The 61st General Assembly, however, passed new legislation covering this matter in H. F. 188. Sections 1, 4 and 13 of this legislation state as follows:

> "Section 1. The purpose of this Act is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to cooperate in other ways of mutual advantage. This Act shall be liberally construed to that end."
>
> "Sec. 4. Any public agency of this state may enter into an agreement with one (1) or more public or private agencies for joint or cooperative action pursuant to the provisions of this Act, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force."

"Sec. 13. The powers granted by this Act shall be in addition to any specific grant for intergovernmental agreements and contracts."

Sections 5, 6, 8 and 10 of H.F. 188 specify requirements which must be met concerning the agreement allowed under section 4.

The language of section 4 of H.F. 188, particularly in light of the broad purposes of the act as set out in section 1, would clearly seem to permit an agreement between the Board of Supervisors and a private charitable corporation. Such an agreement would be "joint or cooperative action" pursuant to the provisions of the act. Section 13 makes it clear that the contractual powers given by the new act are powers given in addition to those given by section 230.24 of the Code. Consequently, there is no conflict between the contractual powers given by the new act and the more limited contractual powers perhaps given under section 230.24 of the Code.

In conclusion, a County Board of Supervisors does have the authority to authorize the use of the proceeds of a levy under section 230.24 for the valuation and treatment of the mentally retarded by a private charitable corporation. Such use must be made pursuant to an agreement which meets the requirements set out in sections 5, 6, 8, and 10 of H.F. 188, however.

5.15

COUNTIES AND COUNTY OFFICERS: County Attorney—Incompatibility of Office—§336.5, 1962 Code of Iowa. The offices of county attorney and city attorney are incompatible. In a situation where the county attorney prosecuted the tavern owner on a charge of selling beer to a minor, where the city now wishes the county attorney to represent the city in a beer bond forfeiture action, the prohibition of §336.5 which restricts the county attorney from representing any party other than the state or county, will keep the county attorney from representing the city as the city is not the state but only an agency thereof.

November 29, 1965

Mr. Richard F. Branco
Ida County Attorney
Ida County Court House
Ida Grove, Iowa

Dear Mr. Branco:

Reference is herein made to yours of the 18th inst. in which you submitted first the question as to whether the offices of City Attorney and County Attorney are incompatible, and second, whether, as County Attorney you could act for the town of Holstein as City Attorney in a matter of defense by the City of its cancellation of a beer permit.

Insofar as your first question is concerned, I would advise that it has long been the view of the department that the offices of County Attorney and City Attorney are incompatible. 40 OAG 162 so stated in the following terms:

". . . We are of the opinion that when a city attorney is elected county attorney a vacancy occurs in the office of city attorney, as the duties of the two offices are incompatible."

Also, see letter opinion of November 20, 1953, to Tucker, Johnson County; letter opinion of February 5, 1960, to Tucker, Lee County; and case of *State v. Anderson,* 155 Iowa 271.

This remains the view of the department.

Insofar as your second question is concerned growing out of your proposed representation of the town of Holstein as City Attorney and your contention that a City Attorney would be representing the State and be within the exception to Section 336.5, 1962 Code of Iowa, and would be available for making this defense, I would call your attention to the status of the city as between it and the state as set forth in Section 4 of 37 American Jurisprudence, titled Municipal Corporations, as follows:

> "Municipal corporations are bodies politic and corporate, created not only as local units of local self-government, but as governmental agencies of the state. They are involuntary political or civil subdivisions of the state created as agents of the state to aid in the administration of government. A municipal corporation has been described as the creature, the instrumentality, the agent, the auxiliary, a department, an arm of, or a mere emanation from, the state, or by such terms as otherwise express the idea of a subordinate branch of the state government having neither existence nor power apart from its creator, the legislature. It is subject to virtually absolute control of the state legislature as to the exercise of its powers, the organization of its government, and as to its corporate existence, except as the legislature may be restricted by the state Constitution. Its territory or its powers may be enlarged or diminished, and its corporate existence is created and may be terminated at the will of the state legislature. In other words, the agency of the municipality for governmental purposes is a revocable agency. As a governmental agency, a municipality has no vested rights which it may assert as against the state; nor has it any privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator. The legislature, by establishing a municipal corporation, does not divest the state of any of its sovereignty, absolve itself from its right and duty to administer the public affairs of the entire state, or divest itself of any power over the inhabitants of the district which it possessed before the charter was granted."

It is obvious that while the City may be an agency of the State, it is not the State itself. I think the foregoing numbered statute would deny you the right to appear for the City.

5.16

COUNTIES AND COUNTY OFFICERS: Public Officers—County Board of Supervisors—Mentally Retarded Persons—Chapter 207, §§3, 8, 14, 15 and 79, Acts of the 61st G.A.; §§226.1, 226.8 and 226.9, 1962 Code of Iowa. The directions of §14 of Chapter 207, Acts of the 61st G.A., are mandatory upon the Board of Supervisors.

December 16, 1965

Mr. Robert R. Rigler
State Senator
New Hampton, Iowa

Dear Mr. Rigler:

This is in response to your letter wherein you request an opinion as to Chapter 207, Acts of the 61st G.A., and reads as follows:

> "I am writing to request the interpretation of the procedure prescribed by Sections 14 and 15 of Senate File 444 passed by the last General Assembly with reference to mentally retarded persons."

You then ask the following enumerated questions:

I

"Are the directions of Section 14 mandatory on the Board of Supervisors?"

Section 14 of Chapter 207 reads as follows:

"Sec. 14. The parent, guardian, or other persons responsible for any person believed to be mentally retarded within the meaning of this Act may on behalf of such person request the county board of supervisors or their designated agent to apply to the superintendent of any state hospital-school for the voluntary admission of such person either as an inpatient or an outpatient of the hospital-school. After determining the legal settlement of such person as provided by this Act, *the board of supervisors shall,* on forms prescribed by the board, *apply to the superintendent of the hospital-school* in the district for the admission of such person to the hospital-school. The superintendent shall accept the application providing a preadmission diagnostic evaluation confirms or establishes the need for admission, except that no application may be accepted if the hospital-school does not have adequate facilities available or if the acceptance will result in an overcrowded condition." (Emphasis Supplied)

The word "shall" as used in a statute is generally construed to be mandatory. *State v. Hanson,* 210 Iowa 773, 231 N.W. 428 (1930). If there is a proper request made for a voluntary admission of a person believed to be mentally retarded, then it is mandatory upon the Board of Supervisors to apply to the Superintendent of the appropriate hospital-school.

II

"Is it an absolute requirement that the application of the Board of Supervisors be on forms supplied by the Board? If so, has the Board of Control prescribed such forms?"

Section 14 of Chapter 207 requires the Board of Control of State Institutions to "prescribe" forms for the use of the Board of Supervisors. There is no requirement that the Board of Control in addition supply said forms.

The word "prescribe" has been defined as "to lay down authority as a *guide, direction,* or rule of action." *Smith-Brooks Printing Co. v. Young,* 103 Colo. 199, 85 P. 2d 39, (1938).

Application forms for admission to the hospital-schools of Glenwood and Woodward are presently being supplied by such hospital-school respectively. These forms have been prepared and approved under the direction of the Board of Control of State Institutions.

III

"Some retarded persons have been receiving treatment at the Independence Mental Health Institute. Are the procedures required by Sections 14 and 15 required if the parent is to be freed of the liability under Section 79 of the Act? If such procedure is required, must the Institute at Independence first release the patient?"

Section 3(5) of Chapter 207, Acts of the 61st G.A., defines the term "mentally retarded" as follows:

"5. 'Mental retardation' or 'mentally retarded' means a term or terms to describe children and adults who as a result of inadequate-

ly developed intelligence are significantly impaired in ability to learn or to adapt to the demands of society."

Section 226.1 of the 1962 Code of Iowa, designates the Mental Health Institute at Independence as one of the "hospitals for the mentally ill."

Section 226.8 of the 1962 Code of Iowa reads as follows:

"Mental retardates not receivable. No mental retardate shall be admitted to a state hospital for the mentally ill. The term 'mental retardate' is restricted to persons foolish from birth, supposed to be naturally without mind."

It would appear that a person admitted and receiving treatment at a state hospital for the mentally ill would be classified as "mentally ill" and not a "mental retardate."

Section 79 of Chapter 207 pertains to the parents of a person admitted or committed to a "hospital-school." Section 79 in part provides:

"The *father* and *mother* of any person *admitted* or *committed to a hospital-school* as either an inpatient or an outpatient, and any person, firm, or corporation bound by contract hereafter made for support of such person shall be and remain liable for the support of such person . . ." (Emphasis Supplied)

Section 3(1) of Chapter 207 defines "hospital-school" as follows:

"Sec. 3. When used in this Act, unless the context otherwise requires:

"1. 'Hospital-schools' means the Glenwood state hospital-school and the Woodward state hospital-school."

Therefore for Section 79 to be applicable a person must be admitted or committed to either the Glenwood or Woodward hospital-school.

In addition to the provisions of Section 14 and 15, a person may be admitted or committed to a hospital-school pursuant to Sec. 8 of Chapter 207, Acts of the 61st G.A.

Sec. 8 provides for the transfer of a patient from a hospital for the mentally ill to a hospital-school. Sec. 8 reads as follows:

"Sec. 8. The board or the director with the approval of the board may transfer patients from one (1) state hospital-school to the other and may at any time transfer any patient from the hospital-schools to the hospitals for the mentally ill, or from the latter to the former, or make such transfers as are permitted in section two hundred eighteen point ninety-two (218.92) of the Code."

The effect of the aforesaid transfer would be an admittance or commitment to a hospital-school within the meaning of Sec. 79 of Chapter 207.

The custody of a person admitted to a hospital for the mentally ill is governed by Sec. 226.9 of the 1962 Code of Iowa. Sec. 226.9 reads:

"Custody of patient. The superintendent, upon the receipt of a duly executed order of admission of a patient into the hospital for the mentally ill, accompanied by the physician's certificate provided by law, shall take such patient into custody and restrain him as provided by law and the rules of the board of control, without liability on the part of such superintendent and all other officers of the hospital to prosecution of any kind on account thereof, but no person shall be detained in the hospital who is found by the superintendent to be in good mental health."

If a patient's commitment to the Mental Health Institute at Independence is valid in accordance with Sections 226.8 and 226.9 of the 1962 Code of Iowa, it would appear that Sec. 14 of Chapter 207 would not be appropriate until such time when said patient is either released or discharged from Independence.

However, as mentioned above, a person detained in Independence may be transferred pursuant to Sec. 8 of Chapter 207, which would cause Sec. 79 to apply to the parent of said patient.

5.17

COUNTIES AND COUNTY OFFICERS: **Social Welfare—County and County Officers—County Home—Care and support of the poor and mentally ill**—§§227.1, 230.18, 230.24, 230.25, 230.26, 252.1, 252.2, 252.6, 252.7, 252.11, 253.5, 253.6, 253.7 and 606.7(5), 1962 Code of Iowa. Sums expended by a county in support of the poor are not a lien against the recipient. A statutory lien may arise against certain relatives if statutory procedures are followed. The Clerk of the District Court has the duty to maintain the encumbrance book mentioned in §252.11.

§230.25 provides a lien for county expenditures for care at the county home of mentally ill transfers from state mental health institutes.

§253.7 is a mandatory requirement that the Board of Supervisors discharge "poor" inmates of the county home when such inmates are able to support themselves.

The conditions for the admission of an indigent to the county home is that he be determined to be a poor person unable to support himself and that the proper written order be obtained for the steward.

December 30, 1965

Mr. Frank Krohn
Jasper County Attorney
301 Court House
Newton, Iowa

Dear Mr. Krohn:

This will acknowledge your recent letters in which you submitted the following questions for answer:

1. Do the sums expended by the county under Chapter 252 become a statutory lien against the recipient and his parents and children?
2. Who has the responsibility for maintaining the "Encumbrance Book" referred to in Section 252.11 and by whose authority (legal position) are entries made in this book?
3. Is a lien to be entered in the Institutional Lien Book (created by Section 230.26) for those inmates who were committed to the State Mental Health Institute and have been transferred from the State Mental Health Institute (accepted under Section 226.18) to the County Home?
4. If the Board of Supervisors fails or refuses to discharge an Inmate at the County Home who can support himself, is the inmate or the members of his family liable for the lien that is filed for the period after the time when the inmate can support himself?
5. Is the Board of Supervisors vested with authority under Section 253.6 to admit an indigent person to the County Home for a temporary period to regain strength following illness when such care is not available elsewhere in the county, or must the Board

of Supervisors comply with Section 252.6 before the admission can be accomplished?

I.

Your first question is as to whether a statutory lien rises out of Chapters 252, 252A or 253 of the 1962 Code of Iowa, which are the general chapters providing for indigents. An examination of Chapter 252 indicates that the only lien that may attach is against the persons specified in Sections 252.2, 252.7 and 252.11, which sections read as follows:

"252.2 Parents and children liable. The father, mother, and children of any poor person, who is unable to maintain himself or herself by labor, shall jointly or severally relieve or maintain such person in such manner as, upon application to the township trustees of the township where such person has a residence or may be, they may direct."

"252.7 Notice—hearing. At least ten days notice in writing of the application shall be given to the parties sought to be charged, service thereof to be made as of an original notice, in which proceedings the county shall be plaintiff and the parties served defendants. No order shall be made affecting a person not served, but, as to such, notice may be given at any stage of the proceedings. The court may proceed in a summary manner to hear all the allegations and proofs of the parties, and order any one or more of the relatives who shall be able, to relieve or maintain him or her, charging them as far as practicable in the order above named, and for that purpose may bring in new parties when necessary."

"252.11 Preservation and release of lien. Statement of the issuance of the order and a description of any real estate sought to be affected thereby, shall be entered in the encumbrance book, and from the date thereof shall be superior in right to any conveyance or lien created by the owner thereafter, and return shall be made of said order to the proper court, where the order of seizure, upon investigation, may be discharged or continued; if continued, the entire matter shall be subject to the control of the court, and it shall from time to time make such orders as to the disposition of the personal property seized, and the application of it of the proceeds thereof, as it may deem proper, and of the disposition of the rents and profits of the real estate. Should the party against whom the order issued thereafter resume his or her support of the person abandoned, or give bond with sureties, to be approved by the clerk, conditioned that such person shall not become chargeable to the county, the order shall be by the clerk discharged and the property remaining restored."

Furthermore, the lien may only attach by court order upon action of the county which is provided for in Section 252.6, which reads as follows:

"252.6 Enforcement of liability. Upon failure of such relatives so to relieve or maintain a poor person who has made application for relief, the township trustees, county social welfare board, or state division of old-age assistance may apply to the district court of the county where such poor person resides or may be, for an order to compel the same."

The basic right of the county for reimbursement is under Section 252.13 which reads as follows:

"252.13 Recovery by county. Any county having expended any money for the relief or support of a poor person, under the pro-

visions of this chapter, may recover the same from any of his kindred mentioned herein, from such poor person should he become able, or from his estate; from relatives by action brought within two years from the payments of such expenses, from such poor person by action brought within two years after becoming able, and from such person's estate by filing the claim as provided by law."

This section creates a choice in action which is reducible to a judgment lien, but it does not of itself create a statutory lien. The Iowa Supreme Court in the case of *In Re Estate of Frentress*, 249 Iowa 793, 89 N.W. 2d 367 (1958), set out some of the rules of law in Iowa in regard to the duties of the county to the poor and made the following statement at page 786 of the Iowa Reports:

"It is also well established that the obligation of a county to support the poor is statutory, not common-law; that aid furnished is deemed a charity to which the recipient is entitled and for which the county is obligated. (Cases cited)."

The court also quoted another Iowa Court decision at page 787 indicating that the only liability under Chapter 252 is statutory, as follows:

"In *State v. Colligan*, 128 Iowa 536, 537, 104 N.W. 905, we said that 'the uniform rule seems to be that there is no liability on the part of the person who receives such benefit, or on the part of his relatives, to make compensation save as such compensation may be expressly required and provided for by statute.' Both the obligation to provide care and the liability to reimburse therefor are statutory, not common-law."

At page 790, in conclusion, the Iowa Supreme Court made the following statement interpreting Section 252.13:

"As before stated, section 252.13 provides the sole basis for recovery by the county. The fact that the homestead is made liable for the liability created by said section does not in any sense of the word create a lien upon the homestead or any other property until such liability has been placed in judgment or approved as a claim in an estate. See *In re Estate of Wagner*, 226 Iowa 667, 284 N.W. 485."

A further statement in this regard is found in 56 OAG 102 where the Attorney General of Iowa made the following statement:

"We conclude as to your first question by stating it is our opinion the legislature did not intend that the county might recover for relief furnished to dependent or needy persons of little or no means who are unable to reasonably provide for their needs without aid or relief from the State. We fail to find a specific provision of the statute authorizing such recovery by the County."

Therefore, our answer to your first question is that the sums expended by the county are not a lien against the recipient and are only a lien against his relatives if the proper court orders are obtained and entries made in the encumbrance book pursuant to the pertinent provisions of Chapter 252.

II.

In regard to your question as to who has the responsibility for maintaining the encumbrance book as referred to in Section 252.11, it should be noted that this particular section refers several times to the clerk. Section 606.7(5) reads as follows:

"606.7 Records and books. The records of said court shall consist of the original papers filed in all proceedings, and the books to be kept by the clerk thereof as follows:

* * *

"5. Encumbrance book. One to be called the 'encumbrance book', in which the sheriff shall enter a statement of the levy of every attachment on real estate."

The title of Chapter 606 is Clerk of the District Court and this particular section discusses those books which the Clerk is to keep. Since the Clerk has the statutory duty to keep this book, it would appear that the reference in Section 252.11 where it states "*the* encumbrance book" is an obvious reference to the book described in the above quoted statute. Section 252.11 is set out in this opinion under Part I and you will note that this section refers to "clerk" twice in connection with functions of the Clerk of the District Court.

It is my opinion that the Clerk of the District Court is clearly responsible for maintaining the encumbrance book referred to in Sections 252.11 and 606.7(5).

III.

In answer to your third question, it is my opinion that the lien created by Section 230.26 is intended to apply where a person is transferred to a county home from the state mental health institute as a mental patient. The first paragraph of Section 230.24 reads as follows:

"230.24 County fund for mental health—psychiatric treatment. The board of supervisors shall, annually, levy a tax of one mill or less, as may be necessary, for the purpose of raising a fund for the support of such mentally ill persons as are cared for and supported by the county in the county home, or elsewhere outside of any state hospital for the mentally ill, which shall be known as the county fund for mental health, and shall be used for no other purpose than the support of such mentally ill persons and for the purpose of making such additions and improvements as may be necessary to properly care for such patients as are ordered committed to the county home. . . ."

This authorizes the payment for care of patients as are ordered committed to the county home. Section 230.18 provides for liability to the county for care in the county home. Sections 230.25 and 230.26 provide for the lien of assistance and that the auditor shall keep a record. Section 230.25 states in part as follows:

"*Any assistance furnished under this chapter* shall be and constitute a lien on any real estate owned by the person committed to *such institution* or owned by either the husband or the wife of such person . . ." (Emphasis supplied)

This office issued an opinion in February of 1941 which is noted as 42 OAG 27. That opinion stated as follows:

"We take up first a discussion of whether or not this section applies to insane in county homes or county asylums, wherein are treated or confined insane or idiotic persons. We are of the opinion that as to this class of patients the above section creates a lien in favor of the county and against the owner of real estate therein enumerated. We reach this conclusion in view of Section 3598 [now Section 230.8] which provides:

" 'The estates of insane or idiotic persons who may be treated or confined in any county asylum or home, or in any private hospital

or sanatorium, and the estates of persons legally bound for their support, shall be liable to the county for the reasonable cost of such support.'

". . . we hold that when an insane or idiotic person is treated or confined in any county asylum or home, or in a private hospital or sanatorium, assistance is furnished such persons under Chapter 178. It follows, therefore, that a lien is created against the real estate of the person confined or against his or her spouse, under the ex press provisions of Section 3604.1 [now Section 230.25]."

Section 3598 is substantially the same as the present day Section 230.18 and what was Section 3604.1 is now Section 230.25. Section 3604.1 contained the exact language as set out above in this opinion as a quote from Section 230.25. The prior Attorney Geenral's opinion is persuasive. The only doubt is whether the word "institution", as it appears in Section 230.25 and as it appeared in Section 3604.1, includes a county home. It is my opinion that it does. Please note Section 227.1 which reads as follows:

"227.1 Supervision. All county and private institutions wherein mentally ill persons are kept shall be under the supervision of the board of control of state institutions."

From this it appears that the legislature has taken notice that there are county institutions and private institutions, as well as state institutions.

"Institution" has been defined by Webster to be "an establishment, especially of a public character." The Arizona Supreme Court in the case of *Prescott Courier v. Board of Supervisors of Yayapai County*, 49 Ariz. 423, 67 P. 2 483 (1937), at page 486 of the Pacific Reporter stated:

"We have been unable to find any precise definition of the words 'county institution.' We think, however, that a county institution bears the same relation to the county that a state institution bears to the state. There are many instances of the latter class of institutions, i.e., in Arizona the state hospital for the insane. . . . We think the common definition of a state institution is one of the organizations through which the state acts as distinct from the state in its sovereign capacity, and under the same reasoning, a county institution would be one of the organizations through which a county acts, as distinct from that political subdivision of the state known as a county. . . ."

In addition, it should be noted that the statutory framework in regard to the mentally ill is as follows:

Chapter 226—State Mental Health Institutes
Chapter 227—County and Private Hospitals for Mentally ill
Chapter 228—Commission of Hospitalization
Chapter 229—Commitment and Discharge of Mentally Ill Persons
Chapter 230—Support of the Mentally Ill

Therefore, Section 230.25 creates a lien for mentally ill transferees from state institutions and an accounting should be kept as provided by Section 230.26. A county home can be a county institution where mentally ill persons can be kept as provided by Section 227.1 and the county home can be an "Institution" as the word is used in Section 230.25. If, however, a person is discharged as cured under Section 226.18, such person would not be a proper person to be committed as a "mentally ill" person to the county home. There is no lien for a "poor person" under Section 230.25. The proper procedure is to transfer the person under Section 227.11.

IV.

In regard to your fourth question, it should be noted that an indigent at the county home can never have a lien placed against him. However, the question you submit for answer is whether responsible relatives can be made liable for that period of time after which an inmate of the county home can support himself. It should be pointed out that we are discussing "poor" patients in county homes rather than mentally ill patients which situation was discussed in the above paragraph.

The section we must analyze is Section 253.7 providing as follows:

"When any inmate of the county home becomes *able to support himself,* the board *must* order his discharge." (Emphasis supplied)

In Iowa the word "must" or the word "shall" when used in statutes and directed to a public officer is considered mandatory upon that officer. *Hanson v. Henderson,* 244 Iowa 650, 56 N.W. 2d 59 (1953).

It is clear that the language used in Section 253.7 provides the only course of action. It requires the board to discharge patients who are, in effect, no longer indigent. If poor support expense should not be incurred by the Board of Supervisors, it would not appear that the county would have a right to recover for money and support from relatives of the poor person which it should not have incurred to begin with and which amounts to an illegal expenditure of funds. This is in accord with a prior opinion of this office cited as 46 OAG 79.

V.

In regard to your last question the following Code sections apply:

"252.1 'Poor person' defined. The words 'poor' and 'poor person' as used in this chapter shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; *but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public.*" (Emphasis supplied)

"252.6 Enforcement of liability. Upon the failure of such relatives so to relieve or maintain a poor person who has made application for relief, the township trustees, county social welfare board, or state division of old-age assistance may apply to the district court of the county where such poor person resides or may be, for an order to compel the same."

"253.5 Admission—labor required. The steward shall receive into the county home any person producing an order as hereafter provided, and enter in a book to be kept for that purpose, the name, age, and date of his reception, and may require of persons so admitted such reasonable and moderate labor as may be suited to their ages and bodily strength, the proceeds of which, together with the receipts of the poor farm, shall be appropriated to the use of the county home in such manner as the board may determine."

"253.6 Order for admission. No person shall be admitted to the county home except upon the written order of a township trustee or member of the board of supervisors, and relief shall be furnished in the county home only, when the person is able to be taken there, except as hereinbefore otherwise provided."

"253.7 Discharge. When any inmate of the county home becomes able to support himself, the board must order his discharge."

The conditions for admission to a county home are: (1) That the person be a poor person, unable to support himself as the provisions of Sections 252.1 and 253.7 contemplate; and (2) That an order be obtained as required by Section 253.6 which requires the steward to receive the person.

Therefore, my answer to your question is that there is no requirement that any action be taken under Section 252.6 as a condition precedent to admission to the county home, if the person otherwise qualifies as a "poor person."

5.18

COUNTIES AND COUNTY OFFICERS: **Bridge—Secondary road, town, county, secondary road fund**—§§309.3, 309.9, 309.73, 363.4, 1962 Code of Iowa. County can construct and pay out of the secondary road fund the full cost of a bridge located at an approximate right angle to the corporate limits of a town, such bridge being part of an improvement of a secondary road.

March 10, 1966

Mr. F. J. Kraschel
Pottawattamie County Attorney
Pottawattamie County Court House
Council Bluffs, Iowa

Dear Mr. Kraschel:

In your letter to this office dated February 7, 1966, you requested that an opinion be rendered on the following question:

"Oakland, Iowa, is a municipal corporation lying within Pottawattamie County having a population of less than two thousand (2,000), thus classifying it as a 'town' under Section 363.4, 1962 Code of Iowa. Improvement of an existing secondary road will involve relocation of a bridge thereon to a point where the bridge will lie partially within and partially without the town of Oakland, the long axis of the bridge being at approximately right angles to the town limits. The question arises as to whether Pottawattamie County can construct the proposed bridge and pay its full cost notwithstanding the provisions of Section 309.73, 1962 Code of Iowa."

Section 309.73, 1962 Code of Iowa, as amended, provides in part:

"Bridges and culverts on highways or on parts thereof, which are located along the corporate limits of cities which control their own bridge funds and which are partly within and partly without such limits and which highways are in whole or in part secondary roads, shall be constructed under plans and specifications, jointly agreed on by the city council and board of supervisors, and approved by the highway commission. The city and county shall share equally in the cost. All matters in dispute between such city and county relative to such bridges and culverts shall be referred to the highway commission and its decision shall be final and binding on both the city and the county."

This section pertains only to "cities which control their own bridge funds" and only to those highways which are located "along" the corporate limits of such cities and "which are partly within and partly without" such limits.

Section 363.4, 1962 Code of Iowa, classifies municipal corporations into cities and towns and provides:

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

"2. Any municipal corporation which has a population less than two thousand is a town."

Oakland, Iowa, has a population of less than two thousand (2,000) thus its classification is that of a town under Section 363.4, supra, and therefore, it is exempt from the provisions of Section 309.73, which is relative only to "cities".

Section 381.2, Code 1950, as it stood before amendment by Chapter 145, Section 91, Acts of the 54th G.A. and repeal by Chapter 159, Section 54, Acts of the 54th G.A., was entitled, "Cities controlling bridge fund". This section provided that only "cities of the second class having a population of two thousand or over . . . and cities of the first class" would have full control of the city bridge fund collected therein. This was amended by Chapter 145, Section 91, Acts of the 54th G.A., which provided for the striking of the words "the second class" and inserting in lieu thereof the words "less than fifteen thousand population." Chapter 159, Section 54, Acts of the 54th G.A., repealed Section 309.73, supra, is seemingly referring to repealed Section 381.2, Code 1950, when using the words "cities controlling their own bridge funds". Oakland would not have been within the provisions of said Section 381.2 due to the fact that its population was and is under the statutory two thousand (2,000) minimum which existed in 1950. Therefore, Section 309.73, supra, did not apply to municipal corporations of less than two thousand (2,000) population in 1950, and does not, by the express wording of the statute, do so now.

Also, Section 309.73, supra, applies only to bridges on secondary highways or parts thereof which are "located along the corporate limits of cities . . . and which are partly within and partly without such limits". In reading this in relation to the facts presented as a part of your inquiry, it is this office's opinion that said bridge is not on a secondary highway or part thereof which is "along" the corporate limits. The long axis of the bridge is at approximately right angles to the town limits and is part of a secondary road. Such secondary road is not located "along" the corporate limits but enters at an approximate right angle thereto which would put it outside of those "secondary highways or parts thereof" as are provided for by Section 309.73.

Section 309.3, 1962 Code of Iowa, provides:

"The secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county except on primary roads and on highways within cities which control their own bridge levies, except that culverts which are thirty-six inches or less in diameter shall be constructed and maintained by the city or town in which they are located."

As Oakland, Iowa, is classified as a town under Section 363.4, supra, it is not excluded from Section 309.3 which excepts only "cities which control their own bridge levies". Therefore, the improvement of the secondary road which involves the relocation of a bridge thereon which will lie partially within and partially without the Town of Oakland, is a part of the county's secondary bridge system, as defined in Section 309.3.

Section 309.9, 1962 Code of Iowa, provides:

"The secondary road fund is hereby pledged to and shall be used for any or all of the following purposes at the option of the board of supervisors:

* * *

"3. Payment of all or part of the cost of construction and maintenance of bridges in cities and towns having a population of eight thousand, or less and all or part of the cost of construction of roads located within an incorporated town, of less than four hundred, population, which lead to state parks."

The Town of Oakland, having a population of less than two thousand (2,000) would fall within the requirements of Section 309.9, supra. Pottawattamie County can construct the proposed bridge and pay its full costs out of the secondary road fund pursuant to Sections 309.3 and 309.9, 1962 Code of Iowa; Section 309.73, 1962 Code of Iowa, not being applicable.

5.19

COUNTIES AND COUNTY OFFICERS: Mentally Retarded Persons— §§4.1(1), 223.16, 230.15 and 230.25, 1962 Code of Iowa; §79 of Chapter 207, Acts of the 61st G.A. The parents of a mentally retarded person who has attained the age of 21 years of age are no longer liable for the support of said person.

March 10, 1966

Mr. Lee J. Farnsworth
Crawford County Attorney
Denison, Iowa

Dear Mr. Farnsworth:

You have requested an opinion concerning the effect of Chapter 207, Acts of the 61st General Assembly, upon liens which have accrued to the county for support of a mentally retarded patient under Section 223.16, 1962 Code of Iowa. Therein you ask:

1. "Does Crawford County still hold a lien against the real estate" of the father of a mentally retarded person when said lien arose by virtue of Section 223.16, 1962 Code of Iowa.

2. "Do I correctly understand Chapter 207 to mean that there will be no further lien accrue in the future against any property of the father or mother of a mentally retarded child because said child has reached the age of 21 years?"

In response thereto, prior to its repeal, Section 223.16, 1962 Code of Iowa, provided:

"Support statues applicable. All laws now existing, or hereafter made, creating liability, pertaining to liens and providing for the collection of amounts paid by counties from patients in the hospital for the mentally ill and those legally bound for support, shall apply to this chapter. A patient in these hospitals 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 of a hospital for the mentally ill, provided that no charge or lien shall be imposed upon the property of any patient under twenty-one years or age or upon the property of persons legally bound for the support of any such minor patient, for the cost of his support and treatment in these institutions."

It is pursuant to this section that Crawford County's rights arise for reimbursement of funds expended for the care of the mentally retarded. The extent of these rights are controlled by the provisions of Section 230.15 and 230.25, 1962 Code of Iowa.

Section 230.15 provides in part:

"Personal Liability. Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. *Persons legally liable for the support* of a mentally ill person *shall include* the spouse, *father, mother,* and adult children of such mentally ill . . . ." (Emphasis supplied)

Section 230.25 provides in part:

"Lien of Assistance. Any assistance furnished under this chapter shall be and constitute a lien on any real estate *owned by the person committed* to such institution *or owned by either the husband or the wife of such person.* Such lien shall be effective against the real estate owned by the husband or wife of such person only in the event that the name of the husband or the wife of such person is indexed by the auditor . . . ." (Emphasis supplied)

The facts as stated in your request show that the mentally retarded person is the daughter of the parents against whom Crawford County has a claim. In this situation Section 230.15 would apply rather than Section 230.25 and that *legal liability* on the part of the parents would arise rather than a lien, since Section 230.25 applies only to the patient and his or her spouse.

Thus, we come to the question of what effect does the repeal of Chapter 223 have upon this liability? Section 4.1(1), 1962 Code of Iowa, is controlling and provides.

"Repeal—effect of. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed."

This section was dealt with in the case of *Azeltine v. Lutterman,* 218 Iowa 675, 254 N.W. 854 (1934) where a statute gave rise to a legal right under which the plaintiff was claiming. The statute was thereafter repealed and the defendant claimed this destroyed the plaintiff's right. In response to this argument the court said at page 684 of the Iowa Reports:

"Section 63, [now Sec. 4.1(1)] which we have quoted, constitutes a standing saving clause which, in effect, accompanies all repealing statutes. Such was the holding of this court in *State ex rel, v. Shepherd,* 202 Iowa 437, 210 N.W. 476. In this case we said, speaking through Justice Evans, and referring to the identical question at issue here:

" 'Its very purpose was to save the necessity of the burdensome formality of attaching an identical saving clause to all repealing legislation. This repealing statute, therefore, is not wanting in a saving clause.'

"In that case we held that if any rights had accrued to any person under the repealed statute and prior to the enactment of the substitute, that such right was fully preserved by section 63, chapter 4 of the Code. We further held that such right having accrued, it was enforceable at any time, and that the accrual of the right was not dependent upon its enforcement; that the accrued right remained though its enforcement was delayed; and that such right was in no manner affected by the repeal of the statute."

It is therefore apparent that in response to question one, Crawford County has a claim for $5,874.49 since the liability of the parents was

not destroyed by the repeal of Section 223.16. This claim against the parents is in the form of "Legal liability" rather than a lien. It therefore should be noted that the statute of limitations still has relevance in this situation. See 62 OAG 151.

In response to your second question, Chapter 207, Section 79 provides in part:

"Provided further that the father and mother of such person shall not be liable for the support of such person after such person attains the age of twenty-one (21) years . . . ."

Thus, since the retarded person is over twenty-one years of age, the parents are no longer liable for her support.

5.20

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; power to pay additional newspaper claim—§§331.21, 332.3(5), 349.17 and 618.11, 1966 Code of Iowa. The County Board of Supervisors has the authority to pay additional claims for fees of an official newspaper where less than the statutory fee was mistakenly charged and it was the intent of the parties to contract on the basis of the statutory fees.

August 10, 1966

Honorable Andrew G. Frommelt
802 Roshek Building
Dubuque, Iowa

Dear Senator Frommelt:

You have submitted the following question:

"The problem involves official printing billed in error at rate listed in 1954 Code as published in Compilation of Publishing Laws of Iowa 1956. Rate should have been taken from Iowa Laws Pertaining to Public Notices, 1961, and effective on July 1, 1961.

"A Dubuque newspaper publisher tells me that on Aug. 20, 1965, he submitted a revised claim for the period from July 1, 1961 to Dec. 31, 1963 to the County Supervisors. During this period the newspaper was one of the Official Newspapers for Dubuque County. The Supervisors are said to have approved the claim, subject to an opinion from the County Attorney."

The particular section in regard to the costs of the official printing by a county in official newspapers is contained in Sections 349.17 and 618.11 of the 1966 Code of Iowa which provide as follows:

"349.17 Cost. The cost of official publications provided for in section 349.16 shall not exceed one-half the legal fee provided by statute for the publication of legal notices. No such official publication shall be printed in type smaller than five point."

"618.11 Fees for publication. The compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation, or other publication required or allowed by law, shall not exceed twenty cents for one insertion, and thirteen and one-third cents for each subsequent insertion, for each line of eight-point type two inches in length, or the equivalent thereof. In case of controversy or doubt regarding measurements, style, manner or form, said controversy shall be referred to the state printing board, and its decision shall be final."

It should be noted that both of these Code sections only set the maximum prices. It should be further noted that Section 618.11 was amended in 1957 and 1959.

I have reviewed Chapters 331, 332, 333 and 343 of the 1966 Code of Iowa and find no restriction on the Board of Supervisors as to paying a bill which is authorized by statute and for which they are legally liable if the bill is presented within the years prescribed by the statute of limitations. Sections 331.21 and 332.3(5) read as follows:

"331.21 Unliquidated claims. All unliquidated claims against counties and all claims for fees or compensation in excess of twenty-five dollars, 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."

"332.3 General powers. The board of supervisors at any regular meeting shall have power: * * *

5. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law."

The question which you present is whether the Board of Supervisors has authority to approve this additional claim. Of course, I am limited by the fact that I do not know the contractual arrangement that there was between the newspaper and the Board of Supervisors. If the intent was that the Board of Supervisors would pay the maximum allowed by statute, then it is my opinion that there is no statutory provision which would prohibit the Dubuque County Board of Supervisors from allowing the additional claim. Further, Sections 331.21 and 332.3 empower the Board of Supervisors to approve these claims. This was also the opinion of the Attorney General in a 1957 letter opinion, now cited as 58 OAG 87.

5.21

COUNTIES AND COUNTY OFFICERS: Board of Supervisor Authority to purchase an errors and omissions policy—§§515.48(5)(b) and 517A.1, 1966 Code of Iowa. §517A.1, 1966 Code of Iowa, provides authority for the Board of Supervisors to purchase out of county funds an errors and omissions policy for the County Recorder as provided for by §515.48(5)(b).

August 10, 1966

Mr. D. Quinn Martin
Black Hawk County Attorney
309 Court House Building
Waterloo, Iowa 50703

Dear Mr. Martin:

You have submitted the following question:

"I have been asked by the President of the Iowa County Recorders' Association to request an opinion from your office as to whether or not it is legal for the County Board of Supervisors to

authorize the payment of a premium for errors and omissions insurance to cover the County Recorder and his staff, such payment to be made out of county funds. The recorders around the State have evidently gotten varied opinions from their respective county attorneys, and the question seems to be whether the payment of such an insurance premium would constitute compensation to the recorder in excess of the salary authorized for that officer by the statute.

"If in the opinion of your staff, it would not be permissible to pay such a premium out of county funds, would it be possible to pay the premium for errors and omissions insurance which would have the county itself as the named insured and which would cover the recorder and his staff as employees of the insured."

The basic power for the state and its subdivisions to purchase insurance is found in Chapter 517A of the 1966 Code of Iowa. This Code chapter has one section and that section reads as follows:

"517A.1 Authority to purchase. All state commissions, departments, boards and agencies and all commissions, departments, boards, districts, municipal corporations and agencies of all political subdivisions of the state of Iowa not otherwise authorized are hereby authorized and empowered to purchase and pay the premiums on liability, personal injury and property damage insurance covering all officers, proprietary functions and employees of such public bodies, including volunteer firemen, while in the performance of any or all of their duties including operating an automobile, truck, tractor, machinery or other vehicles owned or used by said public bodies, which insurance shall insure, cover and protect against individual personal, corporate or quasi corporate liability that said bodies or their officers or employees may incur.

"The form and liability limits of any such liability insurance policy purchased by any commission, department, board, or agency of the state of Iowa shall be subject to the approval of the attorney general."

It should be noted that this section authorizes: ". . . all political subdivisions to purchase . . . personal injury and property damage insurance covering all officers, proprietary functions and employees of such public bodies . . . while in the performance of any or all of their duties . . . which insurance shall insure, cover and protect against . . . liability. . . ."

The effect of this language is to authorize a county to purchase personal injury, as well as property damage, insurance covering those liabilities deemed necessary to protect the officers and employees of the county while engaged in the business of the county.

The words in the statute, "including operating an automobile", do not, by their plain meaning, restrict the purview of Section 517A.1. Where the language of a statute is clear, the intent of the legislature will be drawn from such language and there is no need for construction by the courts. *Kruck v. Needles*, 257 Iowa - - -, 143 N.W. 2d - - - (July 1966).

The issue that you present is whether an error or omissions policy is a policy which provides for "personal injury and property damage insurance . . . which insurance shall insure against . . . liability . . .", and would, therefore, be authorized by Section 517A.1.

Chapter 515 of the 1966 Code of Iowa is entitled "Insurance other than Life." Section 515.48 provides for "Kinds of Insurance." Section 515.48(5)(b) provides as follows:

"515.48 Kinds of insurance. Any company organized under this chapter or authorized to do business in this state may: * * *

5. * * *

b. Insure against legal liability, and against loss, damage, or expense incident to a claim of such liability, arising out of the death or injury of any person, or arising out of injury to the economic interests of any person as the result of error or negligence in rendering expert, fiduciary or professional service."

The Commissioner of Insurance who administers Chapter 515 advises that the usual "errors and omissions" policy is written under this subsection. It is readily apparent that the coverage contemplated by Section 515.48(5)(b) meets the requirements of Section 517A.1 as it provides for personal injury or property damage insurance.

Therefore, it is my opinion that Section 517A.1 of the 1966 Code of Iowa provides authority for the Board of Supervisors to purchase out of county funds an errors and omissions policy for the County Recorder as provided for by Section 515.48(5)(b).

5.22

COUNTIES AND COUNTY OFFICERS: Participation in Community Action Programs—Chap. 83, Acts of the 61st G.A. §§4 and 11. §366.1, §279.11, §252.1, 252.25, 252.26, 1962 Code of Iowa. Cities, counties, and county boards of education have authority to cooperate with and participate in Community Action Programs upon authorization having been effected by the governing body of said city, county, or board of education.

August 30, 1966

Honorable Harold O. Fischer
State Representative, Grundy County
Wellsburg, Iowa

Dear Representative Fischer:

This will acknowledge receipt of your recent request for the opinion of this office regarding substantially the following:

Under what legal authority are various tax supported governmental bodies authorized to participate through the use of public funds in the Community Action Programs, absent specific enabling legislation?

In reply to your inquiry, I enclose a copy of an opinion issued by this office on April 26, 1966, which deals at length with the question you present, and effects resolution insofar as your question relates to the authority of a city to participate in Community Action Programs.

Chapter 83, Acts of the 61st General Assembly, specifically Sections 4 and 11, authorize any public agency of this State to participate in Community Action Programs where the governing body of such public agency is acting pursuant to the law of the governing body involved or undertakes to make appropriate ordinances or resolutions allowing such participation.

Chapter 83, Acts of the 61st General Assembly, Sections 4 and 11, provide as follows:

"Sec. 4. Any public agency of this state may enter into an agreement with one (1) or more public or private agencies for joint or

cooperative action pursuant to the provisions of this Act, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force.

"Sec. II. Any public agency entering into an agreement pursuant to this Act may appropriate funds and may sell, lease, give, or otherwise supply the administrative joint board or other legal or administrative entity created to operate the joint or cooperative undertaking by providing such personnel or services therefor as may be within its legal power to furnish."

Section 252.25, 1962 Code of Iowa, provides for assistance to the poor of a particular township as follows:

"Relief by trustees. 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."

Section 252.26, 1962 Code of Iowa, dictates that boards of supervisors in any county in this State may appoint an overseer to have the same duties and powers as are possessed by township trustees. "Poor person" is defined by Section 252.1, 1962 Code, to be:

". . . those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public."

We would conclude that the above referred to statutory authority allows counties to participate in Community Action Programs subject to the provisions of said statutes.

Specific authority has been granted to county boards of education to participate in federal programs by Chapter 239, Section 2(11), Acts of the 61st General Assembly.

"II. The joint board or county boards are hereby authorized to make application for, accept, and spend state and federal funds that are available for programs of educational benefit approved by the state board, or might become available."

Under provisions of Section 279.11, 1962 Code of Iowa, the board of directors of a school district of this State may designate, *inter alia*, that period during which each school shall be held beyond that period required by law. On the basis that a school district has statutory authority to extend the period in which school programs shall be held beyond that minimum period specified, acceptance of funds from a federally constituted agency to make such an extended period of operation feasible would not require additional legislative authority. Thus, as the board of directors could compel additional schooling, necessitating participation of certain board of education employees, additional authority would not be required merely because primary funding of an additional program, such as a "Head Start" project, is to be obtained through or in conjunction with a Community Action Program.

An opinion issued by this office on April 14, 1966, together with the supplemental opinion of May 9, 1966, is included with the instant opinion as additional information regarding participation by local boards of education in federally financed "Head Start" projects.

It is our conclusion that Chapter 83, Acts of the 61st General Assembly, Section 4 and 11 and Section 279.11, 1962 Code of Iowa, constitute specific enabling legislation which authorizes participation by a county board of education of this State in Community Action Programs.

5.23

COUNTIES AND COUNTY OFFICERS: Highways—Joint maintenance of a boundary road—Chapter 28E, §§306.3, 309.9, 391.2(1) and 391A.2, 1966 Code of Iowa. Chapter 28E of the 1966 Code of Iowa does allow the city of Marshalltown and Marshall County to jointly exercise governmental power and these public agencies have the statutory authority to improve a road which is on the boundary of the city and the county and is one-half in the city and one-half in the county.

September 22, 1966

Mr. Carl E. Peterson
Marshall County Attorney
12½ East Main Street
Marshalltown, Iowa 50158

Dear Mr. Peterson:

You have submitted the following question:

"The City of Marshalltown and the County of Marshall desire to improve a road which is on the boundary between the two political entities and is one-half in the city and one-half in the county. The City of Marshalltown has a population in excess of 5,000.

"Does Chapter 83 of the Laws of the 61st General Assembly allow these political subdivisions to enter into a joint contract for the improvement of the road, or are they limited by the provisions of Section 391.2(1) of the 1962 Code of Iowa?"

Section 391.2(1) of the 1966 Code of Iowa, to which you refer, reads as follows:

"391.2 Street improvements. Cities shall have power:
1. To improve any street by grading, parking, curbing, paving, oiling, oiling and graveling, chloriding, graveling, macadamizing, use of shale or other surfacing material, or guttering the same or any part thereof, or by constructing electric light fixtures along same, or by constructing or reconstructing permanent sidewalks upon any street, highway, avenue, public ground, wharf, landing or market place within the limits of said city, and to repair such improvements and cities of less than five thousand population may contract with adjoining cities or with counties in which they are located for such street construction and maintenance, at cost to be paid by the municipalities for which the work is done."

Sections 391.2 and 391A.2 are grants of power to municipalities to do construction and repair work. The above quoted section is clear authority for municipalities to do construction work. There is additional authority under Section 391.2(1) for certain cities to contract with adjoining cities and counties.

Comparable statutory authority for counties to construct and maintain roads under their jurisdiction is found at Sections 306.3 and 309.9.

The above cited sections are statutory authority for cities and counties to maintain roads, and Section 391.2(1) also contains a grant of authority by which certain cities may contract with adjoining governmental subdivisions for construction or maintenance.

Prior to the enactment of Chapter 83, Acts of the 61st General Assembly, Section 391.2(1) was the only authority for road construction or maintenance agreements between cities and counties. The issue which your question presents is whether the enactment of Chapter 83, Acts of the 61st General Assembly, will allow a joint contract.

Chapter 83 is now entitled Chapter 28E of the 1966 Code of Iowa. Pertinent sections are as follows:

"28E.1 Purpose. The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage. This chapter shall be liberally construed to that end."

"28E.3 Joint exercise of powers. Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency."

"28E.12 Contract with other agencies. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties."

"28E.13 Powers are additional to others. The powers granted by this chapter shall be in addition to any specific grant for intergovernmental agreements and contracts."

Section 1 is a statement of purpose. The legislative purpose is to authorize the joint exercise of governmental powers by public agencies and to provide for liberal construction to that end. The title of Chapter 83 further states that purpose and reads as follows:

"AN ACT to authorize joint exercise of governmental powers by public agencies."

Section 3 is the specific grant of statutory authority whereby "any power . . . may be exercised and enjoyed jointly. . . ." This is a clear and unambiguous grant of power. The legislative intent is derived from what the legislature said and where there is no ambiguity, there is no need for statutory construction. *Kruck v. Needles*, ... Iowa . . . . , 144 N.W. 2d 296 (July 1966).

Section 12 is clear legislative authority for contracting with other public agencies. ". . . to perform any governmental service . . . which any of the public agencies entering into the contract is authorized by law to perform . . ." I have already set out the existing statutory power of cities and counties to construct and maintain roads. Section 12 is clear authority for cities and towns to jointly exercise those powers which they already had. Prior to the enactment of Chapter 28E, a city could not generally perform work on roads not under the jurisdiction of the city and a county generally would not work on roads not under the jurisdiction of the county. It may be argued that if a city has no

jurisdiction in a county area, it cannot enter into a cooperation agreement. This argument in effect states that the authority granted by Chapter 28E can only be effective if all powers are already possessed by the governmental subdivisions. However, this approach would indeed nullify Chapter 28E if there were a requirement that there be previous express grants to act in expanded areas caused by the governmental cooperation. Statutes are to be construed to avoid unreasonable or absurd consequences. *Pieper v. Patterson,* 246 Iowa 1129, 70 N.W. 2d 838 (1955). This concept would also be contrary to the express statutory authority found in Chapter 28E which provides for the "joint exercise of governmental powers" (title); "Any power . . . may be exercised and enjoyed jointly (Section 2); and "public agencies may contract . . . to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform. . . ." (Section 12).

Section 13 provides that any grants of authority to cooperate under Chapter 28E "shall be in addition to any specific grant for intergovernmental agreements. . . ." Because of this section, the previous limited grant of power under Section 391.2(1) cannot be interpreted to be a limitation upon the power to exercise joint governmental power.

It is my opinion that Chapter 28E of the 1966 Code of Iowa does allow the city of Marshalltown and Marshall County to jointly exercise governmental power and these public agencies have the statutory authority to improve a road which is on the boundary of the city and the county and one-half in the city and one-half in the county.

5.24

COUNTIES AND COUNTY OFFICERS: Contracts beyond the terms of the members of the Board of Supervisors—§§332.3(12) and 332.9, 1966 Code of Iowa. When a Board of Supervisors is required to furnish offices to various county officials and the best arrangement is that of a ten year lease, the Board of Supervisors may enter into such a transaction even though the length of the lease may extend beyond the terms of the members of the Board of Supervisors.

October 6, 1966

Mr. Charles H. Barlow
Palo Alto County Attorney
Palo Alto County Court House
Emmetsburg, Iowa

Dear Mr. Barlow:

You have advised that Palo Alto County is interested in renting a soon to be vacated bank building for a period of ten years in order to house several county offices. You have pointed out that the county can obtain an advantageous rental agreement and that, in your opinion, the transaction appears to be a desirable one in view of the other available rentals in the area. You have requested our opinion as to whether such a proposed lease arrangement would be valid or invalid.

The powers and duties of a County Board of Supervisors in this matter are set forth at Sections 332.3(12) and 332.9. Section 332.3(12) empowers the Board of Supervisors to purchase or lease property for necessary county purposes. Section 332.9 places a duty upon the Board of Supervisors to house various county offices. These sections read as follows:

"332.3 General powers. The board of supervisors at any regular meeting shall have power: * * *

12. To purchase or acquire title or possession by lease or otherwise, for the use of the county, any real estate necessary for county purposes; to change the site of, or designate a new site for any building required to be at the county seat, when such site shall not be beyond the limits of the city or town at which the county seat is located at the time of such change; and to change the sight of and designate a new site for the erection of any building for the care and support of the poor."

"332.9 Offices furnished. The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney, county superintendent, county surveyor or engineer, and county assessor, with offices at the county seat, but in no case shall any such officer, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney."

Section 332.3(12) did not always contain the statutory power to lease. Subsection 12 was amended by Chapter 173, Acts of the 57th General Assembly in 1957. The title of this Act, which added after the word "purchase" in the first line, the words "or acquire title or possession by lease or otherwise", was as follows:

"AN ACT to allow county supervisors to acquire the use of real estate for county purposes by means other than purchase."

While Boards of Supervisors have the right to contract as an arm of the state, there have been instances where contracts beyond the terms of the existing board may be void as beyond public policy when they are entered into in the absence of necessity and good faith.

In the case of *State v. Platner*, 43 Iowa 140 (1876), the Iowa court disapproved of a long term contract for the employment of a poor farm steward. The Attorney General in an opinion cited as 02 OAG 142 disapproved of a ten-year contract made by a Board of Supervisors with a private hospital for care of the insane. Both of these situations appear to involve those types of matters which an individual Board should only enter into on a short term basis and there does not appear to be any necessity for long term employment contracts or long term contracts for the care of the insane in a private hospital.

The most recent Iowa case is *Palo Alto County v. Ulrich*, 199 Iowa 1, 201 N.W. 132 (1924). There the Iowa court did not hold void the prior Board of Supervisors' approval of a bank depository which had existed beyond the term of the members of the Board of Supervisors. The court stated that this type of exercise of authority existed until the future board expressly or impliedly withdrew the power.

The question presented in this case is different than the one which you now present as your question amounts to whether a future board may be bound by the lease contract of your present board. My research has indicated that the rule most commonly and most effectively applied is that when contracts are entered into by the Board which are in the performance of their statutory duties and which necessarily extend beyond the term of their office, such contracts are valid. The reason for this rule is that the Board of Supervisors is a continuous body and this type of necessary transaction, which is in the exercise of a statutory duty, should not be effected by changes in personnel. This rule is aptly set out in the case of *Board of County Commissioners of Edward County v. Simmons*, 159 Kan. 41, 151 P. 2d 960, 969 (1944), where it is stated:

"Decisions in other jurisdictions may show some conflict of authority, but each case must be viewed in the light of the specific provisions of the statutes there involved. And the test generally ap-

plied is whether the contract at issue, extending beyond the term, is an attempt to bind successors in matters incident to their own administration and responsibilities or whether it is a commitment of a sort reasonably necessary to protection of the public property, interests or affairs being administered. In the former case the contract is generally held to be invalid, and in the latter case valid. 14 Am. Jur. 210; 7 R.C.L. 945, 946, 46 C.J. 1032, §289."

This rule was cited with approval in a more recent Kansas case which specifically held valid a long term lease beyond the terms of the members of a Board of Supervisors. *State v. Board of County Commissioners of Lyon County,* 176 Kan. 544, 250 P. 2d 556 (1952).

Therefore, it is my opinion that when a Board of Supervisors is required to furnish offices to various county officials and the best arrangement is that of a ten year lease, the Board of Supervisors may enter into such a transaction even though the length of the lease may extend beyond the terms of the members of the Board of Supervisors.

5.25

COUNTIES AND COUNTY OFFICERS: Welfare—County liability for court commitments—Chapters 226, 229, 230 and 783, 1966 Code of Iowa; §§228.8, 229.12, 230.1 and 775.5, 1966 Code of Iowa. Where a district court in a criminal proceeding for evaluation purposes commits a criminal defendant to a mental health institute, this is a part of the criminal court costs which should be paid for by the county where the criminal proceeding is being held. Where a district court commits a criminal defendant to a mental health institute as a mentally ill person, then support is charged under §230.1.

November 18, 1966

Mr. Gary Anderson
Union County Attorney
Court House
Creston, Iowa

Dear Gary:

Your request for an opinion has been reassigned to me. This request set out the following facts:

"We have a case in Union County in which a defendant accused of the crime of uttering a forged instrument entered a plea of guilty to the charge and then was sent to the Mental Health Institute at Clarinda for psychiatric evaluation and treatment prior to sentencing under order of court. The court felt that the psychiatric evaluation and treatment would be beneficial in the future treatment of the subject as well as informative to the court in passing sentence. After remaining at the Mental Health Institute for several months during which time the subject was given various tests and treated for a mental disorder, he was returned to Union County and sentenced. This subject at all times had legal settlement in another county, and his only contact with Union County was that he committed the crime in the county."

The pertinent sections of the Iowa code in addition to the entire portions of Chapter 226, 229, 230 and 783 are sections 228.8, 229.12, 230.1 and 775.5. These sections read as follows:

"228.8 Jurisdiction—holding under criminal charge. Said commission shall, except as otherwise provided, have jurisdiction of all

applications for the commitment to the state hospitals for the mentally ill, or for the otherwise safekeeping, of mentally ill persons within its county, unless the application is filed with the commission at a time when the alleged mentally ill person is being held in custody under an indictment returned by the grand jury or under a trial information filed by the county attorney."

"229.12 Record and commitment of one accused. If, after the commission has acquired jurisdiction over a person under a charge of mental illness, the district court also acquires jurisdiction over such person under a formal charge of crime, the findings of the commission and the order of commitment, if any, shall state the fact of jurisdiction in the district court, and the name of the criminal charge."

"230.1 Liability of county and state. The necessary and legal costs and expenses attending the taking into custody, care, investigation, admission, commitment, and support of a mentally ill person admitted or 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 legal settlement of any person found mentally ill who is a patient of any state institution shall be that existing at the time of admission thereto."

"775.5 Fee for attorney defending. An attorney appointed by the court to defend any person charged with a crime in this state shall be entitled to a reasonable compensation to be decided in each case by the court, including such sum or sums as the court may determine are necessary for investigation in the interests of justice and in the event of appeal the cost of obtaining the transcript of the trial and the briefs in behalf of the defendant. Such attorney need not follow the case into another county or into the supreme court unless so directed by the court at the request of the defendant, where grounds for further litigation are not capricious or unreasonable, but if he does so his fee shall be determined accordingly. Only one attorney fee shall be so awarded in any one case."

It should be noted that section 228.8 contemplates commitment of mentally ill persons. It is to be further noted that under section 229.12 that the commission of hospitalization has jurisdiction of a person under a charge of mental illness while the district court has jurisdiction over such persons under a definite charge which the court describes as a formal charge of crime.

Section 230.1 presupposes that the person involved is a mentally ill person.

The courts of the state have the power to commit criminal defendants who become insane under Chapter 783. Under Section 775.5, the court appointed attorneys may incur investigation expenses. It is common practice in this state for courts to order the commitment of criminal defendants for psychiatric treatment prior to trial and especially prior to sentencing. These usually are temporary commitments and their purpose is not to determine the mental condition of the party so as to establish their need for institutional care, but the purpose is to assist the court in obtaining facts and assisting the defense where court appointed counsel is involved and obtaining information for sentencing purposes.

Historically, this type of commitment has been to assist the court in the handling of a criminal matter. This type of court cost is to be paid without question if the person received a psychiatric examination from a private physician.

It has been generally held that after arrest and indictment, the district court has jurisdiction over the criminal defendant. *State v. Conrad,* 105 Iowa 21, 74 N.W. 910 (1898). It is also the general rule that the courts have the inherent right to have their necessary expenses paid. 21 Corpus Juris Secundum, Courts, Section 15.

Therefore, it is my opinion that where a district court, in a criminal proceeding for evaluation purposes, commits a criminal defendant to a mental health institute, this is a part of the criminal court costs which should be paid for by the county where the criminal proceeding is being held. However, if the court does, in fact, commit the criminal defendant to a mental health institute after finding the criminal defendant is insane, this is a matter of support of a mentally ill person and the cost and expenses should be paid as provided for in Section 230.1.

5.26

COUNTIES AND COUNTY OFFICERS: Welfare—Care and burial of paupers—§§252.33, 252.34 and 368.28, 1966 Code of Iowa. A transient pauper at the discretion of the Board of Supervisors may obtain temporary care at county expense provided application therefor is made under the terms of Section 252.33, Code of 1966 and the approval thereof by the Board of Supervisors. There is no authority in the county over the body of a transient pauper. County funds may not be used in connection therewith. There is no authority in a charter city to expend city funds as poor relief for a transient pauper. The authority of such city over a body of such pauper is contained in Section 368.28, Code of 1966.

December 6, 1966

Mr. David P. Miller
Scott County Attorney
416 West 4th Street
Davenport, Iowa

Dear Mr. Miller:

Reference is herein made to your recent letter in which you submitted the following.

"Is the use of County Poor Funds in behalf of a non resident (transient) permitted under state law? Outlined below are several of the problems followed by the specific questions we would like answered.

(A) Transient here means non resident. County or State of legal settlement cannot be determined.

1. A transient passing through is injured or becomes ill. He is taken to a local hospital by the Davenport Police Department. In the case of an accident or when the transient is wounded by the Police while in the commission of a crime, the Police may place a hold order on the transient. Under normal circumstances, a County case is transferred as soon as possible to the University State Hospital in Iowa City, but with the hold order in effect this transfer can not be arranged. The local hospital and attending physician's charges can run into a considerable sum. This County has not in the past paid for this care. QUESTIONS: Can Scott County Poor Funds be used for expenses incurred by the transient in a local

hospital? Is this elective with the County Board? Can a charter city (Davenport) pay this expense?

2. A transient is found dead and is ordered to a local mortuary by the medical examiner. Relatives are either unknown or do not assume responsibility for the body. In the past this County has paid $150.00 for a transient burial. QUESTIONS: Can Scott County Poor Funds be used for the burial of a transient? Is this elective with the County Board? Can a charter city (Davenport) pay this expense?"

In reply thereto, I advise that at common law there is no obligation in the county or any instrumentality of government to furnish the needs to the poor and relief and that obligation must be based upon some statute entitling such poor person to such relief. In the case of *Wood v. Boone County,* 153 Iowa 92, 99-100, 133 N.W. 377, a transient pauper brought suit against Boone County and Keigley, a member of the Board of Supervisors, charging that he came into Boone County with badly frozen feet for which he applied for relief to the proper persons and was, in a measure granted, but that the authorities negligibly and unlawfully withheld adequate or proper relief and as a result thereof, he suffered the loss of both feet for which he claims damages from Boone County and the Supervisors. After disposing of the claim for damages as it affected Keigley, the Supervisor, the Court stated:

"So that we are brought at last to the controlling proposition: Is the county liable in damages for failure to furnish adequate and timely medical aid and assistance to a foreign pauper who may transiently be within its borders? A county is an instrumentality of government, and the furnishing of aid to the poor is a governmental function. The necessity for and the extent of such relief is largely, if not wholly, a matter of discretion, and is quasi judicial in character. The relief which may be granted a foreign pauper is temporary in character, and such persons may be prevented from acquiring a settlement in the county where found. Before one is entitled to relief under section 2234 of the Code he must satisfy the overseer of the poor within a city that he is in such a state of want as requires relief at public expense, and even then this section does not require that such relief be furnished. Moreover, not only the overseer of the poor must be satisfied, but the board of supervisors are also to look into the matter, and inquire as to the necessities of the case."

Section 2234 of the Code of 1897 referred to provided as follows:

"Sec. 2234. Application for relief—action of supervisors. The poor must make application for relief to the trustee of the township where they may be, and, if the trustees are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may afford such relief, subject to the approval of the board of supervisors, as the necessities of the person require, and shall report the case forthwith to the board of supervisors, who may continue or deny relief, as they find cause."

Portions of this section are now designated as Section 252.34, Code of 1966. So much of Section 2234, Code of 1897, as authorized the relief now appears as Section 252.33, Code of 1966, which provides:

"252.33 Application for relief. The poor may make application for relief to a member of the board of supervisors, or to the overseer of the poor, or to the trustees of the township where they may be. If application be made to the township trustees and they are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may afford such temporary relief, subject

to the approval of the board of supervisors, as the necessities of the person require and shall report the case forthwith to the board of supervisors, who may continue or deny relief, as they find cause."

In answer to your Question No. 1, I am of the opinion under the authority of the *Woods* case and Section 252.33, Code of 1966, that the granting and continuance of temporary relief is a matter within the discretion of the Board of Supervisors and that the county poor funds may be used therefor.

In answer to your Question No. 2, insofar as the poor fund as a source of payment for burial of a transient, Section 252.27, Code of 1966, prescribed the form of relief that may be dispensed, to-wit:

"252.27 Form of relief—condition. The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money. 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."

There is no express provision for expense of burial of any resident or nonresident, transient or otherwise. As far as such relief is available to a nonresident, it was said in the case of *Brock v. Jones County,* 145 Iowa 397, 407, the following:

"If the poor person is a nonresident of the state—and whether he be a resident of another state or county is immaterial—it is the duty of the county where he is found to take care of him as a poor person under the statutes hitherto quoted. The medical society undertook to take care of the poor practice in the county, and to this agreement plaintiff should be held. When the board has employed physicians to do the work, the trustees can not employ another or others to do the work, and they certainly can not employ one who is bound to do it and give him an enlarged compensation. *Gawley v. Jones County,* 60 Iowa, 159; *Mansfield v. Sac County,* 59 Iowa, 694. If a poor person has no settlement, he must be deemed to belong to the county where the relief is furnished. *City of Clinton v. Clinton County,* 61 Iowa, 205."

However, I do not find that this rule has been extended to the burial of such paupers.

In answer to Question No. 3, insofar as the charter city having any duty or authority in the foregoing situation, informally I would advise you that I find no statutory authority or direction with respect to granting relief of this kind. Generally, the city has authority for regulating burial of the dead. Section 368.28, Code of 1966, provides the following:

"368.28 Burials, cemeteries—crematories. They shall have power to regulate the burial of the dead; to provide places for the interment of the dead; to cause any body interred contrary to such regulations to be taken up and buried in accordance therewith; to exercise over all cemeteries within their limits, and those without their limits established by their authority, the powers conferred upon township trustees with reference to cemeteries; or they may, by ordinance, transfer such duties and the general management of such cemeteries to a board of trustees; and to authorize the establishment of crematories for the cremation of the dead, within or without the limits of such corporation and regulate the same."

In connection with this opinion, attention is directed to an opinion of this department, McCarthy to Krohn dated December 30, 1965, considering several questions related to the support of the poor including a definition of poor persons, wherein it is likewise stated that the conditions for the admission of an indigent to the county home is that (1) he be determined to be a poor person and that (2) the proper order be obtained.

5.27

COUNTIES AND COUNTY OFFICERS: Duties of the County Attorney relating to county hospitals—§§336.2, 336.5 and 347.17, 1966 Code of Iowa. The statutory duties of the county attorney include representing the county hospital trustee in suits and giving them opinions in writing. County Attorneys are not required to give opinions in writing to the hospital administrator. County Attorneys are not required to collect accounts for the county hospital, but if they do, they cannot receive compensation.

December 7, 1966

Mr. William W. Don Carlos
Adair County Attorney
113 West Iowa Street
Greenfield, Iowa

Dear Mr. Don Carlos

In your letter of October 25 you have requested advice from this office in regard to the dealings of the County Attorney with the county hospital trustees as constituted under Chapter 347 of the 1966 Code of Iowa. In my opinion I have divided your letter into three parts, setting out the general areas of your problem.

I.

Your first question is in regard to what extent you should represent the hospital as County Attorney. In effect, your question is really as to what duties you have in representing the hospital as County Attorney.

These duties are statutory. Your statutory duties as County Attorney are set out under Section 336.2 and Section 347.17 refers to the County Attorney in regard to collection of debts for the hospital. Section 347.17 reads as follows:

"347.17 Accounts—collection. 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."

The provisions of Section 336.2 which may apply are paragraphs 2, 5, 6 and 7. These read as follows:

"336.2. Duties. It shall be the duty of the county attorney to:

* * *

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

5. Enforce all forfeited bonds and recognizances, and to prosecute all proceedings necessary for the recovery of debts, revenues, moneys, fines, penalties, and forfeitures accruing to the state or his county, or to any school district or road district in his county; also to prosecute all suits in his county against public service corporations, which are brought in the name of the State of Iowa.

6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party.

7. Give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers and to school and township officers, when requested so to do by such board or officer, upon all matters in which the state, county, school, or township is interested, or relating to the duty of the board or officer in which the state, county, school, or township may have an interest; but he shall not appear before the board of supervisors upon any hearing in which the state or county is not interested."

It would appear that under your statutory duties you are required to advise the county board of trustees as they are county officers. They are public officers who are elected on a county-wide basis and this would appear to constitute them as county officers. See 40 OAG 530. It would appear that you would have to represent them in suits affecting them as county officers. You have to give them opinions in writing, but it does not appear to be mandatory that you attend their meetings, or do any other function than what is required by law.

II.

You advise that the hospital administrator has called upon you to give her advice regarding a possible malpractice suit which may be instigated against them. The hospital administrator is the executive officer of the trustees who are county officers. It is doubtful that the administrative officer is a county officer and, therefore, you do not have to give advice to that person. You are required to give advice to the board and you are required to defend suits against the board. I specifically refer to Section 336.2(6).

As part of the second question, you advise that your father, who is apparently associated with you in the practice of law, represents the plaintiff in this case and you ask whether he will have to refer this to another attorney. It appears that Section 336.5 may apply. However, this statute does not appear to contemplate this exact situation. It reads as follows:

"336.5 County attorney—prohibitions—disqualified assistants. No county attorney shall accept any fee or reward from or on behalf of anyone for services rendered in any prosecution or the conduct of any official business, nor shall he, or any member of a firm with which he may be connected, be directly or indirectly engaged as an attorney or otherwise for any party other than the state or county in any action or proceeding pending or arising in his county, based

upon substantially the same facts upon which a prosecution or proceeding has been commenced or prosecuted by him in the name of the county or state; nor shall any attorney be allowed to assist the county attorney in any criminal action, where such attorney is interested in any civil action brought or to be commenced, in which a recovery is or may be asked upon the matters and things involved in such criminal prosecution."

This statute should be read in conjunction with the Cannons of Professional Ethics of the American Bar Association wherein it is provided that it is unprofessional for a lawyer to represent conflicting interests. I do not believe it proper for this office to advise your father as to what his duties are in this instance.

III.

You have additionally asked as to what extent you should represent the hospital as County Attorney and as to what extent you may bill them as private counsel.

The basic problem that occurs concerns County Attorneys' duties in regard to collection of accounts. This problem specifically requires an interpretation of Section 347.17 which is quoted above. This section does not require the County Attorney to collect these accounts but, if he does, he receives no compensation. See 64 OAG 444.

If your office renders duties to a county agency which are in addition to your statutory duties, it has been the long standing opinion of this office that you may bill for such services. See 62 OAG 131.

5.28

Domestic Animal Fund: Sections 352.1, of the 1962 Code of Iowa. Only damages caused by wolves or by dogs not owned by the owner of the damaged property, give rise to a claim under Code Section 352.1. (McCarthy to Holmes, State Representative, 1/21/65) #65-1-1

5.29

Deputy-Sheriff County Municipal Civil Defense Director. Section 341.1, 1962 Code of Iowa, 28A.7 60th G.A., 4.1 (19). The duties of a duly acting and qualified Deputy Sheriff and part time salaried County-Municipal Civil Defense Director appointed pursuant to Code Section 28A.7 as amended are incompatible. (McCauley to Gross, Bremer Co. Atty., 2/8/65) #65-2-5

5.30

Legal Settlement of Minor—A minor, adjudicated to be dependent and neglected under Chapter 232 and ordered to an institution under 232.21(3) in different county than that of committing court, assumes the legal settlement of the committing court inasmuch as this court retains final jurisdiction over the minor whose derivative settlement of the parents is terminated by the court's action under Chapter 232, 232.21(3), 232.21(5), 232.23, 1962 Code of Iowa. (McCauley to Gilchrist, Franklin Co. Atty. 2/12/65) #65-2-9

5.31

Legal Settlement Not Controlling As To County Liability But Rather Residence—One who is "residing" in a county at the time of making application under this chapter, does not need to show legal settlement in that county, but the fact he "resides" there is controlling as to which county is liable for assistance under §241.20 of the 1962 Code of Iowa

as amended. §241.1, 241.6, 241.20 and 241.22 (McCauley to Skinner, Buena Vista Co. Atty. 2/17/65) #65-2-12

5.32

Trial by Jury on Obligation and Ability to Pay Support in Action Brought Under Chapter 230—The jury trial provision of 252.12 "Support of the Poor" can be availed of by a person in an action brought under 230.15 of the 1962 Code of Iowa and this provision is not restricted to Chapter 252. Under 230.15 there is a five year Statute of Limitations 252.1, 252.12, 230.15 (McCauley to Hoover, Clay Co. Atty. 2/19/65) #65-2-16

5.33

County and County Officers—Township Trustees—Sections 359.37 and 113.1 of the 1962 Code of Iowa. Township Trustees have power under Section 359.37 to fence in a township cemetery. Township land used as a cemetery would be under Section 113.1 as the township can be under that statute as a "respective owner of adjoining tract of land." (McCarthy to McKinley, Mitchell Co. Atty., 2/23/65) #65-2-22.

5.34

Legal Residence—§250.1, 1962 Code of Iowa. The removal of the soldier and his family to a county with the good faith intention of making that his home is all that is necessary to entitle the soldier to relief. (Gentry to Guest, Cherokee Co. Auditor, 3/3/65) #65-3-1

5.35

County Hospitals—Employee Benefits: Unliquidated Claims—§331.21, 347.13, 347.14(9)(10), 1962 Code of Iowa. These statutes permit trustees of county hospitals to compensate their employees with accident and health retirement annuity, and death benefit insurance policies. County hospital boards of trustees are not required to require verified affidavits of unliquidated claims because Sec. 331.21 applies only to claims processed by the board of supervisors or the county auditor, whose participation is not required in the payment of hospital claims provided in Sec. 347.12 as amended by the 58th General Assembly. (Johnston to McKinley, Mitchell Co. Atty., 3/8/65) #65-3-7

5.36

Wife Living Apart From Husband—§252.16 (4), 1962 Code of Iowa. A wife living apart from her husband does not derive her settlement from him, but may acquire a settlement as if she were unmarried. The fact that she has "constructively deserted" him or he has abandoned her need not be answered when they are in fact living apart. (McCauley to Ralph D. Beal, Corporation Counsel, Scott Co. Atty., 4/1/65 #65-4-2

5.37

Iowa Public Employee's Retirement System—§97B.9(2) and 97B.9(3), 1962 Code of Iowa as amended. A political subdivision may not levy a tax to establish a separate fund from which to pay employer's contribution to the Iowa Public Employee's Retirement System. (Brick to Farnsworth, Crawford Co. Atty., 5/11/65) #65-5-8

5.38

Highways:Accumulation of funds for bridge-building—§§309.3, 310.20, 210.27, 1962 Code of Iowa. County Board of Supervisors may accumulate

road funds for bridge construction. (Martin to Werling, Cedar Co. Atty., 5/21/65) #65-5-14

5.39

Drainage District—§455.201, 1962 Code of Iowa. The Board of Supervisors has the duty to employ an engineer; however, the Agricultural Soil Conservation Commission is ineligible for such appointment. (Strauss to Knoshaug, Wright Co. Atty., 6/1/65) #65-6-2

5.40

County Boards of Supervisors—Direct or indirect interest in contracts —§314.2, 1962 Code of Iowa. When a contract for materials to be used in the improvement or maintenance of a county road is entered into by the county board of supervisors and the lessee of one of the supervisors, said lessee being a charitable corporation and said lease actually being a gift to said group, if the contracting supervisor could deduct the moneys paid by the county to the charitable corporation as a Federal and Iowa income tax deduction, said contract involves a direct or indirect interest to the contracting supervisor as contemplated by Section 314.2 of the 1962 Code of Iowa. (McCarthy to Simpson, Boone Co. Atty., 6/22/65) #65-6-5

5.41

County Treasurer: Investment Powers—§§452.10 as amended, 453.1 as amended, 453.5 as amended, 453.9 as amended, 453.10 and 682.45, 1962 Code of Iowa. A County Treasurer may invest (1) in special funds as provided in §§453.5 as amended, 453.9 as amended, and 453.10; (2) in time certificates of deposit or savings accounts in certain banks those certain funds as provided in §453.1; and (3) in certain securities, including those issued and insured by the Federal Housing Administration, those funds eligible for investment as provided in §682.45. (McCarthy to Franzenburg, State Treasurer, 7/12/65) #65-7-10

5.42

Additional compensation of County Treasurer—§340.3(14) as amended by House File 349, Acts of the 61st G.A. The County Treasurer of a county having a population of 40,000 or over and a city of 75,000 or over is entitled to such additional compensation only as is allowed by the Board of Supervisors in an amount not less than $25.00 nor more than $50.00 for each 5,000 population in excess of 75,000 but in no case shall such allowance exceed $500.00 (Strauss to Samore, Woodbury Co. Atty. 7/20/65) #65-8-4

5.43

County Sheriff; County Jails—§§356.5, as amended, and 356.15, 1962 Code of Iowa; Senate Files 136 and 394, Acts of the 61st G.A. Section 8 of Senate File 394 places a mandatory duty upon the keeper of a jail (1) to provide a matron whenever a female is incarcerated, and (2) to make night-time inspections whether the prisoners are male or female. The Board of Supervisors must pay the matron, after setting her compensation. If this compensation is not budgeted, the Board of Supervisors must amend the budget to provide for payment of a statutory duty. (McCarthy to Dillon, Louisa Co. Atty., 8/23/65) #65-8-12

5.44

County Hospital enlargement and improvements—§347A.7, 1962 Code of Iowa. Section 347A.7 is not applicable to a county hospital organized

under chapter 347 of the 1962 Code of Iowa. (Gentry to Burns, Dubuque Co. Atty. 8/5/65) #65-8-5

5.45

Clerk of the District Court—§606.15 (29), 1962 Code of Iowa, as amended by Senate File 112, Acts of the 61st G.A. The Fees of the Clerk of the District Court in probate matters include only the proceeds of life insurance which are subject to administration. (McKay to Schoeneman, Butler Co. Atty., 8/5/65) #65-8-3

5.46

Welfare: Customary and usual fees—Section 3, Senate File 567. The State Board of Social Welfare has the power to determine whether or not the fees charged by nursing and custodial homes are customary and usual; the cost of care in any one such home not being the sole determining factor. (Gentry to Downing, State Board of Social Welfare, 8/9/65) #65-8-6

5.47

Clerk of the District Court—§606.15 (29), 1962 Code of Iowa, as amended by Senate File 112, Acts of the 61st G.A. The value of real estate owned by a ward or held in trust for the beneficiary of a testamentary trust is included in the basis used for computing probate fees. (McKay to Klay, Sioux County Attorney, 8/31/65) #65-8-10

5.48

Clerk of the District Court—§606.15 (29), 1962 Code of Iowa, as amended by Senate File 112, Acts of the 61st G.A. The Clerk of the District Court is not entitled to make an additional charge for the recording of orders in estates, guardianships, and conservatorships where the fee is based on the value of the estate. (McKay to Lee, Hamilton Co. Atty., 8/31/65) #65-8-11

5.49

Special Census Affecting Salaries—§4.1, 1962 Code of Iowa; S.F. 111, S.F. 136, H.F. 349, Acts of the 61st G.A. The special census taken under S.F. 111, relating to the taking of such census in cities and towns is not available for computing salaries authorized under H.F. 349 and S.F. 136. (Strauss to Vanderbur, Story County Attorney, 10/15/65) #65-10-9

5.50

Board of Supervisors; Powers and Duties—Section 332.3, 1962 Code of Iowa. County Supervisors have no authority to cause the county surveyor to resurvey and replat sections. The original corners and lines fixed by the government survey must be taken as true and cannot be changed by resurvey. The County Auditor can act under Section 409.31, 1962 Code of Iowa, to order a resurvey for purposes of taxation. (McKay to Johnson, Asst. Fayette Co. Atty., 12/9/65) #65-12-4

5.51

Clerk District Court, County Recorder. Power to lease a photocopy machine—§§332.1, 332.9 and 332.10, 1962 Code of Iowa. If the Board of Supervisors determines that it is essential to the functioning of the

office of the Clerk of Court and of the Recorder, they may lease a Xerox machine and pay a monthly rental for the use of the same for those offices. (McCarthy to Greenfield, Guthrie County Attorney, 12/13/65) #65-12-6

5.52

County Board of Supervisors. Liability of person admitted to a hospital-school for the mentally retarded—§§4.1(1), 223.16, 230.15, 230.25, 1962 Code of Iowa; Chapter 207, §79, Acts of the 61st G.A. (1) Repeal of Chapter 223 does not destroy liability for the amounts expended by the county for the support of a mentally retarded child. (2) Lien arising under Section 230.25 attaches to real estate owned by patient only. (Bernstein to Riehm, Hancock County Atorney, 12/17/65) #65-12-12

5.53

Investigator for County Attorney's Office—§§336.2(1), 239.14, 341.1, 1962 Code of Iowa, Chapter 309, §2, Acts of the 61st G.A. A county attorney may, with the approval of the County Board of Supervisors, maintain an investigator to supplement his staff for the purpose of investigating applicants and recipients of the various State Welfare programs. (Koster to Fenton, Polk County Attorney, 1/19/66) #66-1-5

5.54

County Boards of Supervisors—Admission of a person to a Hospital-School for Mentally Retarded. Chapter 252A, 1962 Code of Iowa; §§3, 14, 15, 61, 78, 79, and 81; Chapter 207, Acts of the 61st G.A. (1) Until a person is able to be received in a hospital-school, the responsibility and proper placement for said person is mandated to the county Board of Supervisors. (2) The parents of a child who is placed in a foster home until he may be received by a hospital-school pursuant to Sec. 15 of Chapter 207, would not be liable for any of the "costs" of the "care" of said child. (Bernstein to Fenton, Polk County Attorney, 1/25/66) #66-1-7

5.55

Attorneys Fees—§§455.2 and 455.166, 1962 Code of Iowa. Attorneys fees arising out of legal services performed by way of litigation for a joint drainage district are payable from the joint drainage district fund. (Strauss to Winnebago County Board of Supervisors. 1/26/66) #66-1-8

5.56

Rabies vaccination of dogs—§§351.1, 351.3, 351.4 and 351.9, 1962 code of Iowa; Chapter 311, Acts of the 61st G.A. The effective date of a dog license under Chapter 311 is January 1, unless there is a subsequent application under §351.4. The Department of Agriculture has by rule approved a vaccine and has indicated a two-year effective period for it. The certificate of vaccination signed by the veterinarian shall show that the vaccine given to the dog will have an effective period of six months or more from the effective date of the dog license. (McCarthy to Davidson, Page County Attorney. 2/16/66) #66-2-3

5.57

Group insurance programs—Chapter 365A, as amended, and §332.3, 1962 Code of Iowa; Chapter 232, Acts of 60th G.A., and Chapter 394, Acts of 61st G.A. There is no authority for the establishment of health

insurance plans under Chapter 365A, as amended, for county boards of supervisors who are not county employees. There is no authority for the contribution of a flat sum in addition to ordinary compensation to county employees whereby said employees would purchase individual health insurance plans. (Strauss to Shafer, Allamakee County Attorney, 3/24/66) #66-3-15

5.58

Group insurance programs—Chapter 365A, as amended, (now designated as §509.15, et seq.); and §332.3, 1962 Code of Iowa; Chapter 232, Acts of the 60th G.A.; and Chapter 394, Acts of the 61st G.A. Deputy county officers are employees and, as such, are eligible for benefits of health insurance plans under Chapter 365A, as amended, (now designated as §509.15, et seq.). Members of boards of supervisors and the elective county officials are not employees and are not entitled to such benefits. (Strauss to Martin, Black Hawk County Attorney. 4/22/66) #66-4-10

5.59

Medical Fees—Notwithstanding the employment contract entered into between the College of Osteopathy and Surgery, full time and part time professors are eligible for authorization and payment for the care of their College Clinic patients by the State Board of Social Welfare so long as they fulfill the same requirements and Qualifications for such authorization and payment as do related private practitioners. (Koster to Fenton, Polk County Attorney. 4/22/66) #66-4-9

5.60

Justice of the Peace compensation—§§601.131, and 740.19, 1962 Code of Iowa. That which is provided in §601.131 as compensation for justices of the peace is a salary and is not predicated on the handling of criminal cases. (McCauley to Dunn, Cerro Gordo County Attorney. 4/29/66) #66-4-15

5.61

Board of Supervisors; Repair of county buildings—§§332.7, 332.8, 345.1 and 345.3, 1962 Code of Iowa. The maximum amount the Board of Supervisors can expend, without election, for remodeling or reconstruction of a building other than the courthouse, jail or county home, where funds are available in the General Fund, is $20,000. There is no money limitation upon repairs to buildings other than the bidding, advertising and specification requirements of §§332.7 and 332.8. (McCarthy to Fenton, Polk County Attorney, 5/11/66) #66-5-5

5.62

Claims For Medical Attendance—§§252.28, 252.34, 252.35, 347.16 and 347.21, 1962 Code of Iowa. The County Board of Supervisors may reject or diminish an indigent medical attendance claim only when the charge is more than is usually charged for like services in the neighborhood where such services were rendered. (Gentry to Walker, State Senator, 5/26/66) #66-5-11

5.63

County Boards of Supervisors and their power to appropriate funds for a Pre-Trial Release Project—§§332.3 and 763.3, 1962 Code of Iowa. County Boards of Supervisors have the authority to appropriate funds

in order to furnish to the District Court Judge of that county sufficient information for the purposes of determining the amount of bail, if any, that would be necessary in a particular criminal case. (Scalise to Fenton, Polk County Attorney. 7/26/66) #66-7-8

5.64

Maintenance of graves of service men—§250.17, 1966 Code of Iowa. A cemetery within the terms of §250.17, is a place legally laid out and kept for the purposes of interment. Therefore, a plot of ground, privately-owned, which is a place of burial for a service man and other non-service personnel does not qualify for maintenance out of county funds. (Strauss to Smith, O'Brien County Attorney. 8/10/66) #66-8-9

5.65

Veterans' Graves; Cemetery Lot; Abandonment—The unoccupied portion of a cemetery lot in which a deceased veteran is interred is within the scope of the abandonment provisions of Chapter 566 of the Code, notwithstanding Section 250.17 of the Code which provides for the care and maintenance of cemetery lots in which such deceased veteran is interred. (Koster to Vanderbur, Story County Attorney, 9/2/66) #66-9-3

CHAPTER 6

COURTS

STAFF OPINIONS

6.1

COURTS: District judges nominating commission—Person holding membership in the District Judicial Nominating Commission is ineligible to hold office as City Solicitor. Chapt. 343, Acts of the 59th G.A.

January 21, 1965

Mr. Charles Vanderbur
Story County Attorney
Ames, Iowa

Dear Mr. Vanderbur:

Reference is herein made to a letter dated January 14 from Mr. Donald Nelson, an attorney at Nevada, Iowa, in which he advised that he had been appointed City Attorney for the City of Nevada and that he was also serving as a member of the Eleventh Judicial District Nominating Committee under our new statutes with respect to the selection of judges. He called attention to the acts of the regular session of the 59th General Assembly and specifically to lines 49 and 50 on page 34, as follows: "Shall hold no office of profit of the United States or of the State during their terms." He asked whether this law prohibits a lawyer from holding the office of City Solicitor.

In reply thereto, I would advise that one of the qualifications of members on the Judicial District Commission is that such members "shall hold no office of profit of the United States or of the State during their term." Undoubtedly, the office of City Solicitor for the City of Nevada is an office of profit and, therefore, would be a bar both to eligibility and to the holding of membership on the District Judicial Nominating Commission. This quoted provision is a constitutional provision appearing in Chapter 343, Acts of the 59th General Assembly, and is now part of the Constitution and is controlling. Chapter 80, Acts of the 60th General Assembly, is an elaboration by statute of the method of electing judges.

In this situation, I am of the opinion that Mr. Nelson cannot hold both offices, City Solicitor for the City of Nevada and member of the Eleventh Judicial District Nominating Committee.

6.2

COURTS: Prior service as a municipal court judge—§§605A.3, 605A.4 and 605A.5, 1962 Code of Iowa. When the statutory requirements of notice and payment are met, a municipal court judge, who is presently a district court judge, may: (1) qualify for credit for all his prior service on the municipal court bench; and (2) the maximum amount he is required to contribute is governed by the highest standard placed upon any one of the several courts with which he has served.

May 20, 1965

Mr. Marvin R. Selden, Jr.
State Comptroller
State House
LOCAL

Dear Mr. Selden:

This letter is in reply to your question which is as follows:

"A District Court Judge who took office for the first time on January 1, 1959, filed his Notice of Intention to come under the Judicial Retirement System in January, 1959. On October 15, 1959, this judge filed a new Notice of Intention to come under the Judicial Retirement System, in which he claims credit for prior service as a judge of the Municipal Court of Sioux City, such service being from December 3, 1940, to December 31, 1958.

"Provision for Municipal and Superior Court Judges to be covered by the Judicial Retirement System was made by Chapter 356, Acts of the 58th General Assembly.

"* * *

"I request an opinion as to the following:

"1. Is this judge entitled to credit for his prior service as a Municipal Court Judge?

"2. In the event you rule in the affirmative regarding question No. 1, what is the maximum amount this judge shall be required to contribute for past service?

"3. What is the maximum amount a judge shall be required to contribute if his prior service shall be on more than one court?"

Chapter 605A of the 1962 Code of Iowa is entitled the Judicial Retirement System. Pertinent sections are as follows:

"605A.3 Notice by judge in writing. This chapter shall not apply to any judge of the municipal, superior, district or supreme court until he gives notice in writing, while serving as a judge, to the state comptroller and treasurer of the state, of his purpose to come within its purview. Judges of the municipal and superior courts shall at the same time give a copy of such notice to the city treasurer and county auditor within the district of such court. Such notice shall be given within one year after the effective date hereof or within one year after any date on which he takes oath of office as such judge."

"605A.4 Deposit by judge—deductions—contributions by governing body. Each judge coming within the purview of this chapter shall, on or before retirement, pay to the state comptroller for deposit with the state treasurer to the credit of a fund to be known as the 'judicial retirement fund', hereinafter called the 'fund', a sum equal to four per cent of his basic salary for services as such judge for the total period of service as a judge of a municipal, superior, district or supreme court before the date of said notice, and after the date of the notice there shall be deducted and withheld from the basic salary of each judge coming within the purview of this chapter a sum equal to four per cent of such basic salary. Provided that the maximum amount which any judge shall be required to contribute for past service shall not exceed for municipal or superior judges thirty-five hundred dollars, for district judges four thousand dollars and for supreme court judges five thousand dollars. 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 the 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 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. The judges of the municipal, superior, district and supreme court coming within the provisions of this chapter shall be deemed to consent and agree to the deductions from basic salary as provided herein, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services rendered by such judges during the period covered by such payment, except the right to the benefits to which they shall be entitled under the provisions of this chapter. The state shall contribute a sum not exceeding three per cent 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.

"The city and county within each municipal and superior court district shall contribute to the fund a sum equal to three per cent of the salary paid by them to each judge of such courts who qualify to come within the provisions of this chapter. Each such city and county shall also contribute a proportionate share of any sum which may, from time to time, be necessary to finance any deficiency in that part of the fund applicable to the payment of the annuities, refunds, and allowances to all municipal and superior court judges so qualified in the state. The amount of any such additional contribution by each city and county shall be determined by the ratio which the salary of each judge bears to the current combined salaries of all acting municipal and superior court judges who are qualified under this chapter."

"605A.5 Qualification conditions. No person shall be entitled to receive an annuity under this chapter unless he shall have contributed, as herein provided, to the judicial retirement fund for the entire period of his service as a judge of one or more courts included in this chapter."

I.

The answer to your first question is that the judge is entitled to a credit for his prior service as a municipal court judge. The statutory requirement of notice is met as the notice is timely. The statutory requirement is under Section 605A.3 in the last sentence which reads as follows:

"Such notice shall be given within one year after the effective date hereof or within one year after any date on which he takes oath of office as such judge."

The above answer is conditioned that the municipal court judge make payments as required by Section 605A.4. The first sentence of that section contemplates a payment "for the total period of service as a judge of a municipal, superior, district or supreme court before the date of said notice. . . ."

There does not appear to be any ambiguity in the above language.

It is to be noted that Chapter 605A was amended by the Acts of the 58th General Assembly to provide for not only the judges of the district and supreme courts, but also to provide for judges of inferior courts. All of the above statutes have been amended by the Acts of the 58th General Assembly so that all sections would apply to the inferior courts.

Section 605A.5 is entitled "Qualification conditions" and the language now used is "as a judge of one or more courts included in this chapter." That section provides that before an annuity can be received, a contribution must be made for the entire period of service as a judge of one or more courts.

To summarize the answer to your first question, the judge is entitled to credit because he has given timely notice, but he must make the payments as requested in Sections 605A.4 and 605A.5.

II.

To answer your second question, we must interpret the language in the second sentence contained in Section 605A.4 which reads as follows:

> "Provided that the maximum amount which any judge shall be required to contribute for past service shall not exceed for municipal or superior judges thirty-five hundred dollars, for district judges four thousand dollars and for supreme court judges five thousand dollars."

One of the rules of construction as announced by the Supreme Court of Iowa was that the statutes will, if fairly possible, be construed so that unreasonable or absurd consequences will be avoided. State ex rel *Pieper v. Patterson*, 246 Iowa 1129, 70 N.W. 2nd 838 (1955). To provide for prorating or any other scheme would seem to be somewhat complicated and possibly unreasonable. Very likely, this would not be the legislative intent. In your case, the maximum that would most reasonably be applied to a judge who had served in the municipal court and is now a district court judge, would be the amount set for district court judges. If this judge went on to the supreme court, our answer would be that the maximum amount that would apply would be the amount listed for supreme court justices. It is usually the case that when the maximum requirement is approached, the judge is sitting in the higher court which has the higher maximum amount.

Our answer to your second question is that the maximum for the judge in your question would be the amount set for district court judges which is $4,000.00.

III.

It appears that we have answered your third question in our discussion of the second question. The maximum amount a judge should be required to contribute, if he has served in more than one court, would be the amount required of the highest court with which he has served, as the statute now provides that the higher the court, the higher the maximum.

6.3

COURTS: District judicial nominating commission—§228.9 (1), 1962 Code of Iowa, Article III, Section 22, Iowa Constitution, Chapter 343, Acts of the 59th G.A. Members of District Judicial Nominating Commission are ineligible to hold the office of City Attorney, County Sanity Commission and any federal office of profit. The acts of those holding such offices as de facto officers are valid.

June 24, 1965

Honorable Gene W. Glenn
State Representative
Rural Route 7
Ottumwa, Iowa

Dear Sir:

Reference is herein made to yours of the 3rd inst., in which you stated:

"I request an Attorney General's opinion in the following matters:

(1) Can a city attorney legally be a member of the District Judicial Nominating Commission?

"(2) Can a member of a county sanity commission legally be a member of a District Judicial Nominating Commission?

"(3) Is a Notary Public holder of an office of profit?

"It is my understanding that the Attorney General's office rendered an opinion September 19, 1963 that a District Court reporter was ineligible to be a member on a District Judicial Nominating Commission. I am informed that a member of the 2nd Judicial Nominating Commission is a City Attorney, another is a member of a County Sanity Commission, another has a position with the Federal Government and another is a Notary Public. If any of these offices makes a member ineligible to hold membership on the Commission, are the acts of the Commission valid?"

In reply thereto, I advise as follows:

(1) Insofar as your question concerns the eligibility of a member of the Judicial Nominating Commission to hold the office of City Attorney, I would advise you that according to opinion of this Department issued January 21, 1965, a copy of which opinion is hereto attached, the office of City Attorney was held to be one of profit and ineligibility resulted.

(2) Insofar as such member of the Judicial Nominating Commission being eligible to membership upon the County Sanitary Commission (known as the Commision on Hospitalization) I am of the opinion that he is ineligible to hold such office, it being an office of profit. Section 228.9 (1), 1962 Code of Iowa, provides:

"Compensation and expenses. Compensation and expenses shall be allowed as follows:

"1. The compensation and expenses of the commissioners of hospitalization shall be as follows: To the member of the commission serving as physician, seven dollars and fifty cents for each admission or release of any person brought before said commission for each actual hearing, and to the member of the commission serving as attorney, seven dollars and fifty cents for each admission or release of any person brought before said commission for each actual hearing."

(3) Insofar as your question involves eligibility of such member of Judicial Nominating Commission to be a Notary Public, it is to be said that such person as Notary Public holds a public office. According to Article III, Section 22 of the Iowa Constitution, the office of Notary Public is deemed not lucrative. That section provides as follows:

"No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

I am of the opinion therefore that the office of Notary Public is compatible with holding the office of a member of the Judicial Nominating Commission.

(4) Insofar as such member of Judicial Nominating Commission is eligible to hold a federal office, it is to be said that if such office is an office of profit, he is ineligible to hold such federal office. Chapter 343, Acts of the 59th G.A., Proposed Constitutional Amendment in Re Judges now Section 16 of Article V of the Iowa Constitution, provides:

"Appointive and elective members of Judicial Nominating Commission shall serve for six year term on the same commissions shall hold no office of profit of the United States or of the state during their terms, ..."

(5) In sofar as your question as to whether any of these offices makes a member ineligible to hold membership on the Commission, are the acts of the Commission valid, I am of the opinion that if the foregoing designated officers are not de jure then they are de facto and as such their acts are not subject to collateral attack and are valid until in a direct proceeding such officers are denied the right to act. This same claim was made with respect to the office of Notary Public in *Keeney vs. Leas and Lyon* 14 Iowa 464, at page 469, where this claim was answered as follows:

"Thus regarding the office, we are of the opinion that if he is an officer de facto, though not de jure, his acts cannot be collaterally assailed. . . .

"Our statute does not declare that the acts of the notary who fails to comply with the provisions above cited, shall be null and void, but provides for a penalty. Under such a statute no case has come under our observation which holds invalid the acts of the officer de facto. And the provision of our statute, that when certain things are done, he shall be 'deemed commissioned and not before', means no more than that then he will be an officer de jure. And it is because officers have failed to comply with similar directory provisions, and while acting in good faith in the discharge of their official duties, have transacted business materially affecting the public and third persons, that public policy has dictated the distinction between an officer de facto and one de jure, and given validity to the acts of the former, until his right to discharge the duties is by some direct proceeding denied. . . ."

The acts of the Judicial Nominating Commission not being questioned otherwise than herein considered their acts are legal and binding.

6.4

COURTS: Judge of district court compensation—Art. V, §§16 and 17, Constitution of Iowa; §§63.6 and 605.1, as amended, 1962 Code of Iowa; Ch. 80, §§16, 17, and 26, Acts of the 60th G.A. The compensation of a judge of the district court is payable from the date of his qualification for the office and not from the date he assumes performance of his duties.

July 28, 1966

Mr. Marvin R. Selden, Jr.
State Comptroller
State Capitol
L O C A L
ATTN: Mr. William L. Krahl

Gentlemen:

Reference is herein made to your request for advice in determining the date on which a district court judge, recently appointed, should be placed on the payroll.

In the case at hand, it appears that the appointed judge filed his oath of office in the office of the Secretary of State on June 1, 1966. It further appears that the appointed judge served notice of his intentions to commence his service on June 10, 1966. It appears further from your request that a temporary judge was appointed by the Supreme Court to serve temporarily and perform the duties of the permanent judge until June 20, 1966. I advise as follows:

Judicial elections shall be held at the time of general elections. Section 17, Chapter 80, Acts of the 60th G.A. Nominations for district judges are made by nominating commissions, including nominations for vacancies therein. Art. V., Sec. 16, Constitution of Iowa. Their tenure is provided for in Art. V, Sec. 17 of the Constitution to the effect that such tenure shall be fixed by law but that terms of the Supreme Judges shall not exceed eight years and terms of District Judges shall not exceed six years. Statutory terms of judges is provided by Section 16, Chapter 80, Acts of the 60th G.A. In accordance with the directions of Art. V, Sec. 17 of the Constitution, the State has provided compensation for District Judges by the terms of Section 605.1, Code of 1962, as amended by Chapter 1, Section 61, Acts of the 61st G.A., as follows:

> "605.1 Salary of judges. The salary of each judge of the district court shall be eighteen thousand dollars per year."

Qualification of such District Judges is provided by Section 63.6, as amended by Chapter 97, Subsection 6, Acts of the 61st G.A., as follows:

> "63.6 All judges of courts of record shall qualify before taking office following appointment by taking and subscribing an oath to the effect that they will support the constitution of the United States and that the state of Iowa, and that, without fear, favor, affection, or hope of reward, they will, to the best of their knowledge and ability, administer justice according to the law, equally to the rich and the poor."

Based upon the foregoing record, I am of the opinion that the described duly appointed district judge would be placed on the state payroll as of June 1, 1966, the date upon which it appears he qualified for the office. The fact that he did not commence his service until June 10, 1966, has no bearing upon his right to his compensation dating from the time that he filed his oath of office. Performance of the duties of his office is not a condition of payment of compensation to a public officer to a duly elected or appointed public office. The general rule is stated in 43 Am. Jur., §342, entitled Public Officers, as follows:

> "When an office with a fixed salary has been created, and a person duly elected or appointed to it has qualified and enters upon the discharge of his duties, he is entitled, during his incumbency, to be paid the salary, fees, or emoluments prescribed by law. The public body cannot by any direct or indirect course of action deprive

such incumbent of the right to receive the emoluments and perquisites which the law attaches to the office, . . ."

Citing in support of the foregoing rule, another authority is the case of *McCue v. The County of Wapello,* 56 Iowa 698, 10 N.W. 248, 41 AR 134. There, McCue, a deputy sheriff, performed the duties of the sheriff while the elected sheriff was suspended from office and sought to claim the sheriff's salary from the county. The District Court found for the plaintiff and, on appeal, the Supreme Court stated the following:

"Here is the decisive error of the learned judge of the District Court. The doctrines of the law applicable to officers *de facto* do not extend so far as to confer upon them all the rights and protection to which an officer *de jure* is entitled. The doctrines operate only for the protection of the public. They cannot be invoked to give him the emoluments of the office as against the officer *de jure.* Upon this very point we used the following language in *McCue v. The Circuit Court of Wapello County,* 51 Iowa, 60 (67), 'It will be remembered that one exercising the power of an officer without lawful authority is regarded as an officer *de facto,* not for his own protection or advantage, but for the protection of the public and those who are doing business with him. When his right to the possession of the office is to be determined he cannot be declared an officer *de jure* on the ground that he has been an officer *de facto.*' We may add that the right to the possession of an office carries with it the right to emoluments pertaining to the place. When an officer seeks to recover these emoluments he must show his right to the possession of the office."

The foregoing rule is reaffirmed on Page 704 in this language:

"V. The principle upon which our conclusion is based, viz, that an officer *de jure* is entitled to the emoluments of the office, is recognized by the statute of this State providing for contesting the election of a county officer."

In addition, on Page 705, the following is stated:

"We reach the very satisfactory conclusion that plaintiff is not entitled as an officer *de facto* to recover the emoluments of the office; that Stewart, the officer *de jure,* is entitled to all of them, and that defendant is not liable in this action."

The fact that the judge in question did not undertake the performance of his duties until June 10, 1966, does not deprive him of his statutory compensation. In *Bryan v. Cattell,* Auditor of State, 15 Iowa 538, the plaintiff, having been elected to the office of district attorney, began the discharge of his duties in 1859. In 1861, he was commissioned an officer in the army and continued therein until this cause of action was instituted. During that time he was paid regularly until January 1, 1862. During a large part of that time he was absent from the state in the military service and did not during the time discharge the duties of the office to which he was elected. Suit was instituted to recover the salary due and owed him during the first days of April, July, and October, 1862. With respect to absence or failure to discharge the duty of the office as operating to deny compensation, the court said:

"But it is suggested that plaintiff, during the whole time for which this entry is claimed was absent from the State, and failed and neglected to discharge any of the duties of his office. And this has presented the greatest obstacle to the allowance of plaintiff's claim for the time covered by the months of January, February and March, 1862. It seems to us, the dictate of reason and good conscience, that the State should not be required to pay for services

never rendered; that public officers should be paid their salaries when and only when they discharged the duties imposed upon them by law; that the same rule should apply to the State as to individuals, and that no Court ought to consent to the auditing of a demand against the State where it was admitted that the claimant made no pretense of having rendered the services for which he claims. It must be remembered, however, that we are dealing with a practical, and not an abstract, question. And practically, the difficulty in the view suggested is, that it would be impossible to tell where the true line should be drawn. That is to say, how long an absence from official duties—how great delinquency shall work a forfeiture of salary. In the absence of statute, shall it be one day, or one week, or one month, or one year? Where shall faithfulness end, and delinquency begin? Add to these considerations the fact that it is frequently impossible to tell to what extent the services of the officers were necessary, at the time covered by the supposed delinquency, and the propriety of the rule which entitles the officer to his salary so long as he remains in office, becomes reasonably manifest. The better and safer rule doubtless is, that if he is in point of law actually in office, he has a legal right to the salary pertaining to it. His conduct may be such as to render him liable to removal, but when the statute makes no deduction for absence or neglect of duty, and the State takes no step as a consequence of such absence or delinquency, we suppose it is the legal right of the officer to demand the full salary allowed him by law."

I am of the opinion, therefore, that the recently appointed judge is entitled to annual salary from the date that he qualified by filing his oath of office on June 1, 1966. The fact that a temporary judge had been appointed and entitled to compensation has no bearing upon the right of the district judge to the statutory compensation. Such temporary judge is appointed under the authority of Chapter 80, Section 26, laws of the 60th General Assembly.

CHAPTER 7

CRIMINAL LAW

STAFF OPINIONS

LETTER OPINIONS

7.1

CRIMINAL LAW: Prosecution of minors under 18 years of age for violation of House File 27, Acts of the 61st G.A.; House File 27, Acts of the 61st G.A.; Senate File 95, Acts of the 61st G.A.—Section 1 of House File 27, Acts of the 61st G.A. makes it a misdemeanor for a minor, with certain exceptions, to have possession of beer or liquor; but a minor under 18 years of age when so charged in a justice of the peace or a police court must, under Section 62 of Senate File 95, be transferred to the juvenile court. (Scalise to Burris, 9/16/65) S65-9-1

September 16, 1965

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

Dear Mr. Burris:

This is in reference to your letter of July 12, 1965, wherein you pose several questions regarding the proper disposition of situations where juveniles have been brought before a justice of the peace or a police court because of the alleged commission of designated nonindictable public offenses. It will not be necessary to state or answer each specific question raised by you since our opinion on the following question, which is substantially one of those posed in your letter, is dispositive of all:

> Where a person under the age of twenty-one (21) is believed to be criminally liable for having in his or her possession beer or liquor in violation of House File 27, 61st G.A., may such a person be tried in a justice of the peace or police court or must he be referred to the juvenile court?

Statutes Involved

The following statutes are material and will aid the discussion which follows:

(1) House File 27, 61st G.A., in pertinent part provides:

> "Any person . . . under the age of twenty-one years who shall . . . have in his . . . possession or control beer . . . or liquor shall be subject to a fine of not more than one hundred dollars or im-

prisonment in the county jail for not more than thirty days . . ."
(2) Senate File 95, 61st G.A., in part provides:

"Sec. 3. When used in this Act . . .

* * *

"(3) 'child' means a person less than eighteen years of age.
"(4) 'minor' means a person less than twenty-one (21) years of age.

* * *

"(13) 'Delinquent child' means a child: "(a) Who has violated any state law . . . except any offense which is exempted from this Act by law.

* * *

"Sec. 62. Any child taken before any justice of the peace or police court charged with a public offense shall . . . be at once transferred by said court to the juvenile court.

* * *

"Sec. 67. The criminal court shall have concurrent jurisdiction with the juvenile court over children less than eighteen years of age who commit a criminal offense."

(3) Chapter 124.37, Iowa Code 1962, as amended, with respect to criminal responsibility for violation thereunder provides:

* * *

"124.37 . . . Any minor who violates any of the provisions of this chapter or commits any other offense listed in this section shall be fined not to exceed one hundred dollars or imprisoned in the county jail, not to exceed thirty days . . ."

Though not stating so in terms, House File 27, *supra*, the beer or liquor "possession" law proscribes conduct the commission of which is a *public offense*. Public offenses are defined in Chapter 687 of the Code, with the particular offense under the "possession" law being a misdemeanor. Since the punishment provided for in House File 27 does not exceed a fine of one hundred dollars or imprisonment for thirty days, this offense is of the kind commonly referred to as "nonindictable" misdemeanors over which justices of the peace ordinarily have jurisdiction, Section 762.1, Iowa Code, 1962.

Section 62 of Senate File 95, *supra*, the new juvenile law, provides, however, that "any child taken before a justice of the peace . . . charged with a public offense shall . . . be at once transferred . . . to the juvenile court." The substance of this provision has been law at least since 1935 (Section 3634, Iowa Code, 1935) and in 1939 the Attorney General ruled that the precursor to Section 62 of Senate File 95 denied a justice of the peace or police court jurisdiction to proceed with a case in which one under 18 years of age had been charged with a public offense (1940 O.A.G. 156).

Subsequent to the enactment of House File 27, the argument was pressed upon us that since the new law imposed its penalties only on a specific class of persons, i.e. minors, the General Assembly did not intend that violations of the "possession" law should fall within the jurisdiction of the juvenile court. Assuming such was the intent of the legislature, other provisions of law, some of which bear prior interpretation, obscure that intent.

In this connection, Section 3 (13) (a) of Senate File 95, defines a "delinquent child" as, among others, a child "who has violated any state

law . . . *except any offense which is exempted from this Act by law*" (emphasis added). By definition a person under 18 years of age who has violated the new beer and liquor "possession" law is a "delinquent child" unless such violation is an offense exempted from the new juvenile act by law. There is, however, nothing in House File 27 which purports to exempt the offense there established from coming under the language of Section 3 (13) (a) of Senate File 95.

Moreover, when the General Assembly has intended that persons under 18 who commit specific public offenses shall be exempted from treatment under our juvenile court procedures, such intent has been clearly expressed. To illustrate, Section 321.482, touching on criminal responsibility for violations of the Motor Vehicle law, specifically stated that Chapter 232 of the Code (the precursor to Senate File 95) "shall have no application in the prosecution of offenses [under] this chapter which are punishable by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days." In a similar vein, Chapter 232 in its first Section provided that a "child accused of an offense which [was] punishable by life imprisonment or death" was exempted from the provisions of that chapter.

Section 124.37, Iowa Code, 1962, makes it a misdemeanor for a minor to violate any of the provisions of the Beer and Malt Liquor law, one such violation being that of a minor attempting to secure beer (see Section 124.20). In 1962, this office was presented with an argument similar to the one noted above that the General Assembly intended to give justices of the peace jurisdiction of violations involving minors under Section 124.37. Nothing that Section 232.18 provided that a child taken before a justice of the peace or police court for a public offense must be transferred to the juvenile court, the Attorney General ruled that any minor under 18 years of age charged with violating the Beer and Malt Liquor provisions must be transferred to the juvenile court (1962 O.A.G. 190).

For all of the above reasons, it is our opinion that except where specifically stated otherwise by law a justice of the peace or a police court lacks jurisdiction to try a child under 18 years of age who has been charged with a public offense over which the justice of the peace would ordinarily have jurisdiction. If such a child is brought before a justice of the peace or a police court Section 62 of Senate File 95 requires that he be immediately transferred to the juvenile court. Accordingly, in answer to your specific question a child under 18 years of age charged with the possession of beer or liquor can not be tried in a justice of the peace court. A minor, 18 years of age or over, charged with such an offense may be tried there.

In view of Section 67 of Senate File 95 which provides that the "criminal court" shall have concurrent jurisdiction with the juvenile court we add the following footnote. The term "criminal court" does not refer to a justice of the peace court but rather to the criminal division of the district court or the municipal court. cf. *Ethridge v. Hildreth,* 253 Iowa 855, 857, 114 N.W. 2d 311.

7.2

CRIMINAL LAW: Prosecution of persons under eighteen (18) years of age who have allegedly committed a public offense—Senate File 95, Acts of the 61st G.A. Under Section 67 of Senate File 95, a person less than eighteen (18) years of age may be proceeded against criminally in the criminal court in the same manner and with the same effect as though such person were eighteen (18) years of age or over.

November 2, 1965

Mr. W. E. Don Carlos
Adair County Attorney
113 West Iowa Street
Greenfield, Iowa

Dear Mr. Don Carlos:

This is in reference to your letter of September 2, 1965, wherein you state that you are considering filing criminal charges against two girls, each of whom are under 18 years of age. You request an opinion on substantially the following question:

Where a person under 18 years of age allegedly committed a public offense, may he or she be proceeded against criminally in the criminal court in the same manner and with the same effect as though he or she were 18 years of age or over or must such person be initially referred to the juvenile court for its disposition of the matter?

Statute Involved

Senate File 95, Acts of the 61st G.A., in pertinent part provides:

"Sec. 3. When used in this Act . . .

"1. 'Court' means the juvenile court . . .

"2. 'Judge' means the judge of the juvenile court.

"3. 'Child' means a person less than eighteen (18) years of age.

* * *

"13. 'Delinquent child' means a child:
"a. Who has violated any state law . . .

* * *

"Sec. 16. No child may be taken into immediate custody except:

* * *

"2. In accordance with the laws relating to arrests.

* * *

"Sec. 17. When a child is taken into custody as provided in section sixteen (16) of this Act, the parents, guardian, or custodian of the child shall be notified as soon as possible by the person taking the child into custody. Except where the immediate welfare of the child or the protection of the community requires that the child shall be detained, the child shall be released to the custody of the parents, guardian, custodian, or other suitable person on the promise of such person to bring the child to the court, if necessary, at such time as the court may direct.

"Sec. 18. If a child is not released as provided in section seventeen (17) of this Act, the person taking the child into custody shall notify the court as soon as possible of the detention of the child and the reasons for the detention. The child shall be taken immediately to a place of detention specified in section nineteen (19) of this Act and may be held for not longer than twenty-four (24) hours after the taking into custody unless an order for detention specifying the reason for the detention is signed by the judge. No child may be held longer than forty-eight (48) hours after the taking into custody unless a petition has been filed and the judge determines that the child shall remain in custody or unless the court refers the matter to the prosecuting authority for proper action in the criminal court. The parents, guardian, or custodian of the child shall be notified of the place of detention as soon as

possible. If continued detention is not ordered, the court or designated officer shall release the child in the manner provided in section seventeen (17) of this Act.

* * *

"Sec. 21. The sheriff, warden, or other official in charge of a jail or other facility for the detention of adult offenders or persons charged with crimes shall inform the juvenile court immediately when a child who is or appears to be under eighteen (18) years of age is received at the facility.

* * *

"Sec. 67. The criminal court shall have concurrent jurisdiction with the juvenile court over children less than eighteen years of age who commit a criminal offense."

Discussion

The basic proposition to be examined is whether in enacting juvenile legislation pertaining to persons under 18 years of age the General Assembly intended to modify the usual rules governing one's criminal liability for the commission of a public offense. The problem arises not so much from what the legislature didn't say but rather from what it did say. Senate File 95, Acts of the 61st G.A., in repealing the prior "Juvenile Act" (Chapter 232 of the 1962 Code of Iowa), made some rather significant changes in the procedure relating to the detention, care and treatment of dependent, neglected and delinquent children. We are here concerned only with the child under 18 years of age who by definition is "delinquent" in that he or she has violated a state law or habitually violated local laws or ordinances (Senate File 95, Sec. 3 (13) (a).)

Various provisions of the new Act relating to custody and detention of the kind of delinquent child with which we are concerned seem to be mandatory and to require that the juvenile court have significant contacts with a child under 18 years of age who has allegedly committed a crime. Thus, Section 16 of Senate File 95 provides that no child, i.e. a person under 18 years of age, "may be taken into immediate custody except [among other ways] . . . in accordance with the laws relating to arrests." Where a child has been taken into immediate custody in conformity with the laws relating to arrests, Section 17 of the new Act requires that "the parents, guardian or custodian of the child . . . be notified as soon as possible" of such custody and except where the welfare of the child or the protection of the community requires further detention "the child shall be released to the custody of the parents, guardian, custodian, or other suitable person on the promise of such person to bring the child to the [juvenile] court, if necessary, at such time as the court may direct." In this connection, Section 21 of Senate File 95 directs that the sheriff, warden, or other official in charge of a facility for the detention of persons charged with crime "shall inform the juvenile court immediately when a child who is or appears to be under eighteen (18) years of age is received at the facility."

If the child is not released to the parents, guardian, etc., Section 18 of the New Act provides that the person having custody shall notify the juvenile court as soon as possible of the detention and the reason therefor. That Section further provides that the child shall be taken immediately to a place of detention as specified in the Act and that no child *"may be detained longer than forty-eight (48) hours after the taking into custody unless a petition has been filed and the [juvenile] judge determines that the child can remain in custody or unless the court refers the matter to the prosecuting authority for proper action in the criminal court"* (emphasis supplied).

The provisions of the new law thus far considered, particularly the italicized portions of the last mentioned Section, would seem to indicate that it was the intention of the legislature that boys and girls under 18 should be dealt with initially in the juvenile court instead of by prosecution in the criminal court, cf. *Knutson v. Jackson,* 249 Minn. 246, 82 N.W. 2d 234 (1957), where the Minnesota Court in passing on similar provisions of law so held. This is not to say that the General Assembly intended to preclude criminal prosecution of persons under 18 years of age, because as we have noted Section 18 of Senate File 95 provides that the juvenile court may refer a child "to the prosecuting authority for proper action in the criminal court." The crucial question, however, is not whether the juvenile court may cause a child to be proceeded against criminally but whether the child may be so proceeded against apart from any action or inaction on behalf of the juvenile court. We think the question is to be resolved by ascertaining the correct meaning of Section 67 of Senate File 95.

Section 67 provides that: "The criminal court shall have concurrent jurisdiction with the juvenile court over children less than eighteen years of age who commit a criminal offense." The important thing to determine is what the legislature intended by its use of the words "concurrent jurisdiction" in this provision. In view of the other provisions of the new Act which we have discussed and which we have said seem to be mandatory and required that the juvenile court have significant contacts with a child under 18 years of age who has allegedly committed a crime, it is arguable that the criminal court's "concurrent jurisdiction" is a jurisdiction that can be exercised only after the juvenile court determines that the child can be referred to the criminal court for prosecution, cf. *Knutson v. Jackson, supra.* The problem with the argument, however, is that if such was the intended meaning of the language "concurrent jurisdiction" then Section 67 of the new Act was totally unnecessary. As we have already noted, Section 18 of Senate File 95 authorizes the juvenile court to refer a child to the prosecuting authority for action on the matter in the criminal court. In this connection, it is a well established rule of statutory construction that every word, sentence or provision was intended for some useful purpose, has some effect, and also that no superfluous words or provisions were used, *Hartz v. Truckenmiller,* 228 Iowa 819, 824, 293 N.W. 568 (1940); *Board of Directors v. Blakesley,* 240 Iowa 910, 917-918, 36 N.W. 2d 751 (1949); 82 C.J.S. Statutes § 316. Accordingly, the proper meaning to be attributed to the language of Section 67 or the new Act warrants further consideration.

The specific "concurrent jurisdiction" provision was not a part of the old Juvenile Act which Senate File 95 repealed. The Iowa Court, however, in passing upon the precursor to Senate File 95 consistently ruled that the criminal court had concurrent jurisdiction with the juvenile court over a child under 18 charged with a crime in the sense that the child could initially be proceeded against criminally in the criminal court without a reference of the matter from the juvenile court, *Ethridge v. Hildreth,* 253 Iowa 855, 858-859, 114 N.W. 2d 311 (1962); *State v. Reed,* 207 Iowa 557, 218 N.W. 609 (1929). Moreover, these rulings established that the criminal court's concurrent jurisdiction, i.e. its exercise, was not predicated on any matter of priority of attachment but rather on the fact of the alleged commission of crime, *Ethridge v. Hildreth,* 253 Iowa at 857, 859.

Section 67 of Senate File 95 substantially states the proposition to be deduced from the *Ethridge* and *Reed* decisions. In this respect, it is fair to assume that at the time of enactment of the "concurrent jurisdiction" provision the legislature was advised of the prior holdings of the Iowa Court on the subject, and that in enacting substantially the language comprizing those holdings the legislature intended to

adopt the prior judicial construction regarding the concurrent jurisdiction of the criminal court over persons under 18 years of age who commit crime, *Hale vs. Board of Assessment & Review*, 223 Iowa 321, 332, 271 N.W. 168 (1937); *Farmers Drang. Dist. vs. Monona-Harrison*, 246 Iowa 285, 289-290, 67 N.W. 2d 455 (1954); *Bergeson vs. Pesch*, 254 Iowa 223, 228, 117 N.W. 2d 431 (1962); 82 C.J.S. Statutes §316 (see in particular the cases collected in note 90, p. 543). We think such was the intent of the General Assembly. If the General Assembly intended that the juvenile court should have original annd exclusive jurisdiction over persons under 18 who commit crime and further intended that such persons could be criminally prosecuted only if the juvenile court would allow it, then we cannot justify the presence in the new Act of Section 67 which effectively restates the legal proposition as to concurrent jurisdiction under the prior law.

It is, of course, arguable that to read Section 67 to mean that a person under 18 may be initially proceeded against criminally as though such person were an adult would effectively nullify the other provisions of the new Act which relate to the custody, detention, care and treatment of persons under 18 years of age. This is, however, not true since those provisions would still be applicable to dependent and neglected children and to those children which are by definition delinquent for reasons other than commission of crime. Furthermore, those provisions would be applicable even in the case of a child who has allegedly committed a crime except in the situation where the criminal court has, in accordance with the appropriate provisions of law, accepted and obtained jurisdiction to try the child criminally.

Accordingly, it is our opinion that Section 67 of Senate File 95 authorizes the appropriate prosecuting authority to file a criminal charge against a person under 18 years of age who has allegedly committed a criminal offense. In this connection, once the criminal court has, in accordance with law, obtained jurisdiction over such person the matter may be prosecuted to finality in the same manner and with the same effect as though the child were 18 years of age or over.

In view of Section 62 of Senate File 95, which provides that any child taken before a justice of the peace or a police court "shall . . . be at once transferred to . . . the juvenile court," we add the following footnote. The term "criminal court" does not refer to a justice of the peace or police court but rather to the criminal division of the district court or the municipal court, (1966 O.A.G. ——, Scalise to Burris under date of September 16, 1965); cf. *Ethridge v. Hildreth*, 253 Iowa 855, 857, 114 N.W. 2d 311 (1962).

7.3

CRIMINAL LAW: Peace officers' records of persons under eighteen years of age—Chapter 215, Acts of the 61st General Assembly. Under Section 57, Chapter 215, peace officers' records of persons under eighteen (18) years of age are to be public records.

February 17, 1966

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa

Dear Mr. Samore:

This is in reply to your recent letter requesting the opinion of this office regarding the meaning of Section 57, Chapter 215, Acts of the 61st General Assembly.

Section 57, Chapter 215, Acts of the 61st General Assembly, provides as follows:

> "Peace officers' records of children except for offenses exempted from this Act by law shall be kept separate from the records of persons eighteen (18) years of age or older. These records shall be public records."

Your inquiries, specifically directed to the last sentence of the above section, are substantially as follows:

1. Does the last sentence of Section 57, Chapter 215, Acts of the 61st General Assembly apply to peace officers' records of children except for offenses exempt from this Act by law?

2. Does the last sentence of the concerned Section apply only to peace officers' records of persons eighteen (18) years of age or older, regardless of the offense?

3. If the response to the above inquiry is in the affirmative, is it necessary to make a person's juvenile records public upon that person reaching the age of eighteen (18)?

4. Are peace officers' records of juvenile offenses which are not exempted from the concerned Act, such as offenses under Chapter 321, 1962 Code of Iowa, to be considered as public records?

The language as employed by the General Assembly in Section 57, Chapter 215, Acts of the 61st General Assembly, stating that:

> ". . . These records shall be public records."

must be deemed to refer to the peace officers' records enumerated in the preceding sentence of Section 57, to wit:

> *"Peace officers' records of children* except for offenses exempted from this Act by law shall be kept separate from *the records of persons eighteeen (18) years of age or older. . . ."* (Emphasis supplied)

Construing the language of the statute according to its plain or ordinary meaning it follows that peace officers' records of offenses of children, as well as peace officers' records of the offenses of persons eighteen years or age or older, while they are to be kept separately, are to be public records. *In re Klug's Estate,* 251 Iowa 1028, 104 N.W. 2d 600 (1960). The language employed by the General Assembly in Section 57, given its plain meaning, evidences the legislative intention. *Byers v. Iowa Employment Sec. Commission,* 247 Iowa 830, 76 N.W. 2d 892 (1956).

The provision excepting peace officers' records for offenses specifically exempted from Chapter 215, Acts of the 61st General Assembly, relates to the requirement that the records of children be kept separate from those peace officers' records of persons eighteen years of age or older for offenses not exempted from the Act. In other words, peace officers' records of offenses "exempted from this Act by law" are not required by this Act to be separately maintained, regardless of the age of the concerned offender.

The above response, directed to your first inquiry, appears to effectively respond to your second and third enumerated inquiries. It is, therefore, our conclusion that response to your first and fourth inquiries is affirmative while response to your second inquiry is negative. Reply to your third question becomes unnecessary by the negative response to your second question.

Peace officers' records of offenses not exempt from the concerned Act, committed by children are to be considered public records. They are to be kept separate, apparently for statistical purposes, but are to be otherwise accorded the same status as peace officers' records of the offenses of minors or adults.

7.4

CRIMINAL LAW Chapter 215, Acts of the 61st G.A., an allegedly delinquent child may be held at a place of detention for not longer than twenty-four (24) hours unless: (1) the juvenile court orders additional detention, specifying the reason therefor; (2) where a petition has been filed and the juvenile court orders additional detention; (3) or in an instance where the juvenile court refers the matter to the prosecuting authority for action in the criminal court. Where a child, after having been taken into custody, is subsequently released to his parents, guardian, etc. as provided in Chapter 215, Sec. 17, Acts of the 61st G.A., the question of a child being released on bond would not be presented. A child referred to the criminal court for action would be subject to release on bail in the same manner and to the same degree as an adult. If the juvenile court has determined, that either for the child's welfare or for the protection of the community he should be detained; it is not intended that the child be released on bond.

March 10, 1966

Mr. David P. Miller
Scott County Attorney
416 West Fourth Street
Davenport, Iowa

Dear Mr. Miller:

This is in reply to your recent request for the opinion of this office regarding substantially the following:

> What length of time may a juvenile be held following his arrest for (1) a felony, or (2) a misdemeanor; and is a juvenile bondable?

Chapter 215, Acts of the 61st General Assembly, in pertinent part provides:

> "Sec. 3. When used in this Act . . .
>
> "1. 'Court' means the juvenile court. . . .
>
> "2. 'Judge' means the judge of the juvenile court.
>
> "3. 'Child' means a person less than eighteen (18) years of age.
>
> * * *
>
> "13. 'Delinquent child' means a child:
>
> "a. Who has violated any state law or habitually violated local laws or ordinances except any offense which is exempted from this Act by law.
>
> "b. Who has violated a federal law or a law of another state and whose case has been referred to the juvenile court.
>
> * * *
>
> "Sec. 17. When a child is taken into custody as provided in section sixteen (16) of this Act, the parents, guardian, or custodian

of the child shall be notified as soon as possible by the person taking the child into custody. Except where the immediate welfare of the child or the protection of the community requires that the child shall be detained, the child shall be released to the custody of the parents, guardian, custodian, or other suitable person on the promise of such person to bring the child to the court, if necessary, at such time as the court may direct.

"Sec. 18. If a child is not released as provided in section seventeen (17) of this Act, the person taking the child into custody shall notify the court as soon as possible of the detention of the child and the reasons for the detention. The child shall be taken immediately to a place of detention specified in section nineteen (19) of this Act and may be held for not longer than twenty-four (24) hours after the taking into custody unless an order for detention specifying the reason for the detention is signed by the judge. No child may be held longer than forty-eight (48) hours after the taking into custody unless a petition has been filed and the judge determines that the child shall remain in custody or unless the court refers the matter to the prosecuting authority for proper action in the criminal court. The parents, guardian, or custodian of the child shall be notified of the place of detention as soon as possible. If continued detention is not ordered, the court or designated officer shall release the child in the manner provided in section seventeen (17) of this Act.

"Sec. 19. A child may be detained as provided in section eighteen (18) of this Act in one of the following places:

"1. A juvenile home.

"2. A licensed facility for foster care in accordance with the laws relating to facilities for foster care.

"3. A suitable place designated by the court.

"4. A room entirely separate from adults in a jail, lockup, police station, or other adult detention facility as provided in section twenty (20) of this Act.

"Sec. 2. No child shall at any time be confined in a police station, lockup, jail, or prison except that a child may be detained for the purpose of protective custody for a period not to exceed twelve (12) hours or a child fourteen (14) years of age or older may upon the order of the judge be temporarily confined in a room entirely separate from adults in an adult detention facility. A child may be detained in an adult detention facility upon order of the judge only if the child is alleged to be delinquent and has shown by his habits, conduct, or conditions that he constitutes a menace to himself or society to the extent that he cannot be released or cannot be detained in a place designated in subsections one (1), two (2), or three (3), of section nineteen (19) of this Act."

Your inquiry is specifically directed to an instance of a seventeen year old boy being taken into custody accused of a felony or misdemeanor. This response shall be accordingly directed to the child under eighteen (18) years of age who is alleged to be delinquent.

It should initially be noted that Section 20, Chapter 215, Acts of the 61st General Assembly requires that no child may be confined in a police station, lockup, jail, or prison except for the purpose of protective custody and then not to exceed a period of twelve hours. Section 20 additionally provides that if the child is alleged to be delinquent and has shown by his habits, conduct, or conditions that he constitutes a

menace to himself or society to the extent that he cannot be released or detained in a place designated in the first three subsections of Section 19 of the Act, he may then be detained in an adult detention facility upon order of the judge [of the juvenile court].

Once a child, alleged to be delinquent, has been taken into custody in accordance with the provisions of Section 16, Chapter 215, Acts of the 61st General Assembly, Section 17 of this Act requires that the parents, guardian, or custodian of the child be notified of such action as soon as possible by the person taking the child into custody. Section 17 further dictates that a child taken into custody should be released to the custody of the parents, guardian or custodian, "except where the immediate welfare of the child or the protection of the community requires that the child shall be detained." If the child is not released to the parents, guardian, etc., Section 18, Chapter 215, provides that the person having custody shall notify the juvenile court as soon as possible of the detention and the reasons therefor. That Section further provides that if the child is not released as provided in Section 17, then he shall be taken immediately to a place of detention as specified in the Act and held there for not longer than twenty-four (24) hours *unless an order for detention specifying the reason therefor is signed by the judge* [of the juvenile court]. Section 18 provides in part, that:

> *". . . no child may be held longer than forty-eight (48) hours after taking into custody unless a petition has been filed and the judge* [of the juvenile court] *determines that the child shall remain in custody or unless the* [juvenile] *court refers the matter to the prosecuting authority for proper action in the criminal court."* (emphasis supplied)

If continued detention is not ordered, the [juvenile] court or designated officer must release the child in the manner as provided in Section 17 of the Act.

Therefore, subsequent to a delinquent child having been taken into custody, the person taking the child into custody must notify the child's parents, guardian, or custodian as soon as possible and the child shall then be released to the parents, guardian, etc. However, in an instance where the immediate welfare of the child or the protection of the community requires further detention, the juvenile court may order that a child be detained for up to forty-eight hours, unless the juvenile court, after a petition has been filed, shall determine that the child should remain in custody or refers the matter to the criminal court. If a child is not released to his parents, guardian, etc., as provided in Section 17, nor held under order of the juvenile court, nor referred to the criminal court, then he shall be held at a place of detention not longer than twenty-four hours.

It is our opinion that response to your second inquiry, as to whether a child is bondable after having been taken into custody, must be founded on our response to your initial question.

Chapter 215, Section 17, Acts of the 61st General Assembly, provides, inter alia, that a child shall be released to the custody of his parents, guardian, etc., except where the determination is made that the immediate welfare of the child or the protection of the community requires that the child be detained. Additionally, Section 18 provides that the juvenile court may refer the matter to prosecuting authority for action in the criminal court. The legislative intention, regarding the question of whether a juvenile is bondable, becomes manifestly clear when considered in conjunction with the specific provisions of the Act. The Act provides that a child shall be released to his parents, guardian, etc., after being taken into custody and thus the question

as to his being bondable would not arise. Should the juvenile court determine that, either for the child's welfare or the protection of the community, the child should be detained; it is not intended that the child be released on bond. If the child is referred to the criminal court for action, he would under this circumstance be bondable to the same degree and manner as would be an adult.

7.5

CRIMINAL LAW: Defense counsel may interview prosecution witnesses before trial—§§781.10 and 769.19, 1966 Code of Iowa. Although §781.10 does not make the Rules of Civil Procedure governing discovery depositions applicable to criminal cases, in situations where the defense merely wants an interview with a prosecution witness for the purpose of discovery and not for use in evidence, it may be had under this section if the witness voluntarily assents to it either after preliminary information, indictment or information. Further, if the county attorney subpoenas any witnesses to appear before him at a specified time and place pursuant to §769.19, the defendant has a right to be present and cross-examine such witnesses.

September 28, 1966

Mr. Maynard Hayden
Warren County Attorney
Indianola, Iowa

Dear Mr. Hayden:

This is in reference to your recent letter in which you ask the following question:

> "Is it constitutional, legal or proper for counsel representing a person charged or accused of a crime, to interview witnesses who have been designated as state's witnesses for the prosecution, either by appearance at a preliminary hearing, or before the Grand Jury or by way of Minutes of Testimony in a County Attorney's Information; and if so, at what stage in the proceedings may such interview be had?"

Section 781.10 is relevant and is set out as follows:

> "Depositions. A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on notice or commission, in the same manner and with like effect as in civil actions."

Taken literally, the statute provides that a defendant in a criminal case may take depositions in accordance with the applicable rules of procedure in civil cases. However, in the recent case of *State v. District Court*, 253 Iowa 903, 114 N.W. 2d 317 (1962), the Iowa Supreme Court held that the last phrase of the instant statute means by the same technical procedures and their use in evidence as in civil cases, but it does not make the Rules of Civil Procedure governing discovery depositions applicable to criminal cases. *State v. Tharp*,——Iowa——, 138 N.W. 2d 78 (1965) upheld this finding that the discovery rules are confined to civil cases, and further stated that there is no denial of due process where the defendant is refused the use of discovery techniques.

However, the statute expressly provides that the defendant "may examine witnesses *conditionally* or on notice or commission." Although this state has no holdings on the meaning of the word "conditionally," Missouri has a statute which should be relevant:

"492.080. Any part to a suit pending in any court in this state may obtain the deposition of any witness, to be used in such suit *conditionally.*"

Woelfle v. Connecticut Mutual Life Ins. Co., 234 Mo. App. 135, 112 S.W. 2d 865 (1938) construed the word "conditionally' as follows:

". . . 'Conditionally,' which means that their [the deposition's] competency is to be determined as of the time when use is sought to be made of them . . ."

State ex rel Methudy v. Killoren, 229 S.W. 1097 (1921) further stated:

"The word 'conditionally' in the statue does not relate to or limit the right to take but the right to use the deposition."

This interpretation is in line with the general rule as to defense counsel interviews of prosecution witnesses that is stated in 23 C.J.S. Criminal Law, §958:

"Accused and his counsel have the right to interview witnesses before the trial; and the state has no right to deny them access to a witness material to the defense, but a witness cannot be compelled to submit to such interview, and it is not the duty of the arresting officer or of the custodian to procure witnesses for him."

It cannot be over-emphasized that witnesses to a transaction are not per se "state's witnesses" or "defendant's witnesses." They are simply witnesses as to what they observed and since both the prosecution and defense should be interested in the ascertainment of the truth, both sides should be allowed to interview all witnesses. As was stated in

State v. Papa, 32 R.I. 453, 80 A. 12 (1911):

"Witnesses are not parties, and should not be partisans. They do not belong to either side of the controversy. They may be summoned by one or the other or both, but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be most advantageous."

The interview always must be entirely voluntary on the part of the witness. In *State v. Wallack*, 193 Iowa 941, 188 N.W. 1311 (1922) a motion was made by defendant's counsel for an order requiring certain prosecution witnesses to submit to a private interview with him, and the refusal to sustain such motion was alleged as error. The Supreme Court, in overruling the allegation, held that it was beyond the power of the court to require such witnesses to submit to any examination except in open court.

In further regard to the present question, Section 769.18 of the 1966 Code of Iowa is relevant and states as follows:

"The clerk of the district court, on application of the county attorney, shall issue subpoenas for such witnesses as the county attorney may require, and in such subpoenas shall direct the appearance of said witnesses before the county attorney at a specified time and place . . . After preliminary information, indictment, or information the defendant shall be present and *have the opportunity to cross-examine* any witnesses whose appearance before the county attorney is required by this section." (Emphasis added.)

It is, therefore, the opinion of this office, that since the Iowa Rules of Civil Procedure have been held not to be applicable to criminal cases, a witness may not be compelled by the court to submit to the taking of a deposition. However, if both parties to the matter agree, an evidentiary deposition may be taken, using the same technical procedures as in civil cases. If the county attorney subpoenas any witnesses to appear before him at a specified time and place pursuant to Section 769.19 of the Code, the defendant has a right to be present and cross-examine such witnesses.

It is the further opinion of this office that in situations where the defense merely desires an interview with a prosecution witness for the purpose of discovery and not for use in evidence, it may be had under Section 781.10 of the Code if the witness voluntarily assents to it either after preliminary information, indictment or information. Witnesses do not belong to either side of the controversy and therefore neither should be allowed to monopolize them to the other's disadvantage. There are cases that have held that when the prospective witness is within the custody of the state, the court in its discretion, because of certain special circumstances, may deny the defense access to that witness, but these are quite few in number (see *State v. Clark*, 125 Kan. 791, 796, 266 P. 37 (1938) and *State v. Storrs*, 112 Wash. 675, 677-679, 192 P. 984 affirmed on rehearing 197 P. 17 (1920)). In no case may the court require such witness to submit to such examination.

7.6

CRIMINAL LAW: Imprisonment may not satisfy a sentence of a fine—§789.17, 1966 Code of Iowa. Where the trial court orders a fine "and in default thereof" pursuant to §789.17 directs imprisonment "until the fine be satisfied" at a certain rate, the serving of the necessary prison time will allow the defendant to be released, but will not satisfy the court's judgment entry.

September 28, 1966

Mr. Frank M. Krohn
County Attorney
301 Court House
Newton, Iowa

Dear Mr. Krohn:

Reference is made to your recent letter in which you present substantially the following:

> The facts relating to this request are briefly that approximately ten years ago the defendant was convicted of second offense OMVI in Jasper County, Iowa, where the following judgment was entered by the trial court:
>
> ". . . the defendant pay a fine of $500 and costs of prosecution and that in default of payment of fine, he be imprisoned in the County jail of Jasper County, Iowa, at hard labor until such fine is paid, such imprisonment, however, not to exceed one day for each three and one-third dollars of the fine imposed."

The defendant elected not to pay the fine, but rather served time in the Jasper County jail at the rate of one day's incarceration for each three and one-third dollars of the fine. He subsequently was released and early this year inherited a small amount of money. He was informed

that the fine had been entered as a judgment against him, that his jail service had not satisfied it, and that, therefore, he was still obligated to pay it. The principal inquiries then are, first, whether a defendant, after serving a specific number of days imprisonment in accordance with Section 789.17 of the 1966 Code of Iowa for failure to pay a fine, has in all instances satisfied the judgment against him by such imprisonment, and second, if the answer to the first issue is in the negative, whether in the specific situation at hand, the judgment of the court was satisfied by the time the defendant served in jail?

Section 789.17, 1966 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."

It is apparent that a fine may be assessed by a court either in conjunction with a jail sentence (i.e. there is a fine which has to be paid and if it is not also a jail sentence which has to be served before the judgment is satisfied) or in lieu of a jail sentence (i.e. there is a choice to be made of a fine or a jail sentence either of which will satisfy the judgment). Under the plain meaning of this statute, which is to govern unless a contrary intent is shown, it is our opinion that either type of judgment may fall under the statute. If a fine is assessed in lieu of a jail sentence, there is an alternative judgment which may be satisfied in full by serving the jail sentence. *Wills v. Neilan,* 88 Iowa 548 (1893); *State v. Oliver,* 203 Iowa 458 (1927). And, if the fine is in conjunction with a jail sentence, the words can also be read to mean that the defendant may be imprisoned until the fine is paid, but the power of the court to direct imprisonment is limited to one day for every three and one-third dollars of the fine. *State v. Jordan,* 39 Iowa 387 (1874); *State v. Anwerda,* 40 Iowa 151 (1874). Whether a judgment is satisfied by the serving of jail time then, is contingent upon the construction given the judgment in each case.

The general rule pertaining to judgments assessing fines in conjunction with jail sentences was first promulgated in *State v. Jordan,* 39 Iowa 387 (1874). There the defendant was indicted for keeping a nuisance. He pleaded guilty and was fined five hundred dollars ($500.00) and ordered confined at hard labor until the fine and costs were paid. On appeal, the Iowa Supreme Court held that one committed under Sections 657.3 and 697.5 of the Iowa Code may be imprisoned until the fine is paid, but the power of the court to direct imprisonment is limited under Section 789.17 to one day for every three and one-third dollars of the fine, and the defendant is not entitled to credit on the judgment therefor.

Probably the rule is most explicitly stated in the case of *State v. Meier,* 96 Iowa 375 (1895) at page 377:

> "It is true in this case that the imprisonment is the means provided by the statute for coercing payment of the fine, but it is settled by a long line of authorities that the undergoing of imprisonment in such a case by the defendant would not release him from the payment of the fine. *State v. Jordan,* 39 Iowa 387; *State v. Anwerda,* 40 Iowa 151; *City of Keokuk v. Dressell,* 47 Iowa 597; *Albertson v. Kreichbaum,* 65 Iowa 18 (21 N.W. 178)."

In determining whether the fine imposed in the instant case was in conjunction with or in lieu of the jail sentence, the construction of the words "and in default of" must be ascertained. *City of Keokuk v. Dressell,* 47 Iowa 597 (1877) concerned a defendant who was convicted of

violating a city ordinance and sentenced to pay a fine of twenty-five dollars ($25.00), *and in default of* payment to be committed to the city prison at hard labor at the rate of one dollar and fifty cents per day until the fine be paid. The Supreme Court held that although the defendant could be confined at hard labor, the term of his imprisonment could not exceed one day for every three and one-third dollars of the fine, and that although the jail time in itself did not satisfy the fine, he was entitled to a credit of one dollar and a half upon the judgment for each day's labor.

And in *Albertson v. Kreichbaum,* 65 Iowa 11, 21 N.W. 178 (1884), the defendant was sentenced to pay a fine and costs, and it was ordered that, *in default of* immediate payment of the same, he stand committed to the county jail for forty-five days, unless they be sooner paid or satisfied according to law. It was said, although the question was not before the court, that the imprisonment, however long it might be continued, would not operate to satisfy the fine and costs. Further, 48 O.A.G. 169, states that "one sentenced to pay a fine *and in default thereof* to serve a term in jail does not have the fine absolved by serving the term in jail." The sentence is not in the alternative and the fine imposed is still collectible.

It must be made quite clear, however, that the above rule applies only to situations where a fine is imposed in conjunction with a jail sentence. If a fine is assessed in lieu of a jail sentence then there is an alternative judgment which may be satisfied in full by serving the jail sentence. *State v. Oliver,* 203 Iowa 458 (1927) held that a judgment that an accused in a prosecution for contempt in violating an intoxicating liquor injunction "pay a fine of $300, or in lieu of payment . . . be committed to jail for three months," is satisfied in toto by serving the term of imprisonment. This office in 60 O.A.G. 93 in construing this holding set forth the following guideline at page 95:

> "When the judgment imposes a fine, or in lieu thereof, a jail sentence, as warranted by statute, there is an alternative judgment which may be satisfied in full by serving the jail sentence."

In the instant case the judgment read "the defendant pay a fine of $500 and costs of prosecution *and that in default* of payment of fine he be imprisoned . . ." It is the opinion of this office that the above materials hold that the words "and in default of" render the fine assessed in conjunction with the jail sentence and not in lieu of it. Therefore, the sentence was not in the alternative and the fine imposed is still collectible, even though the defendant has served the specified number of days.

Although this opinion will perhaps result in inequitable ramifications under the circumstances of the present factual situation, this is the law as this office ascertains it. We would advise the defendant in question, of the remission power of the Governor of this state under Chapter 248 of the 1966 Code of Iowa and suggest that this circumstance is possibly a proper care for a remission application.

7.7

CRIMINAL LAW: Institutions: Lien for treatment—§§230.15, 230.25, 271.15, 271.16, 271.17 and 321.281, 1966 Code of Iowa. A defendant convicted of OMVI and subsequently committed for treatment of alcoholism is not subject to a lien or to legal liability for the cost of said treatment. This applies to treatment at either a mental health institute or at the Oakdale sanatorium.

October 3, 1966

Mr. L. D. Carstensen
Clinton County Attorney
Clinton County Court House
Clinton, Iowa 52732

Dear Mr. Carstensen:

Reference is made to your letter requesting an opinion on the following question:

"When a defendant is convicted of operating a motor vehicle while intoxicated, 2nd or more offense, and the court commits the defendant for treatment of alcoholism to a mental health institute such as at Mt. Pleasant, do the costs of such treatment become a lien on the real estate of the defendant? Is it a lien if he is committed to the hospital at Oakdale?"

It is the opinion of this writer that both questions are answered negatively. Section 321.281, 1966 Code of Iowa, provides in part as follows:

"In lieu of, or prior to imposition of, the punishment above described for second offense, third offense and each offense thereafter, *the court upon hearing may commit the defendant for treatment of alcoholism to any hospital or institution in Iowa providing such treatment.* The court may prescribe the length of time for such treatment or it may be left to the discretion of the hospital to which the person is committed. *A person commited under this section shall be considered a state patient.*" (Emphasis supplied)

This section is in the Motor Vehicle section of the Code and not under Title XI of the Code which is entitled "Social Welfare and Rehabilitation." Contained in Title XI are the provisions for the commitment and recovery of costs of the mentally ill under Chapter 230, and for the commitment and maintenance of those addicted to the excessive use of intoxicating liquors as provided in Chapter 224. Chapters 224 and 230 apply only to persons committed under those chapters and they are entirely distinct and separate from any commitment under Section 321.281. Therefore, no statutory liability, as provided in Section 230.15, and no statutory lien, as provided in Section 230.25, apply to a commitment as a state patient under Section 321.281.

The Attorney General at 42 OAG 28 clearly set out the general rules of law as to when liens exist as follows:

"We must bear in mind that statutes creating liens must be strictly construed. Liberal construction is not permitted. The following cases support this contention:

"*Lyster v. Munck's Estate*, 54 Mich. 325; 20 N.W. 83.

"This decision is to the effect that courts cannot create liens, but can only declare and enforce them.

"In *Frost v. Atwood*, 73 Mich. 67, 41 N.W. 96, it was held, in effect, that liens can only be created by agreement, or by some fixed rule of law, and it is not one of the functions of courts to create them.

"In *Howard v. Burke*, 176 Iowa 123; 157 N.W. 744, it was held, in effect, that where the legislature intends to create a lien subject to prior liens of record, the statement is explicit to that effect, and when the lien is not to be subject to prior liens of record there is no provision made therefor."

It is clear that, inasmuch as the legislature did not create a statutory lien and the statutory liens for commitment of the mentally ill do not apply, no lien exists by virtue of commitment to a mental health institute under Section 321.281.

Chapter 271 is entitled "State Sanatorium" and deals with the commitment of tuberculosis and other patients to the Oakdale Sanatorium. There is no provision for a lien in Chapter 271. There is a provision in regard to liability of tuberculosis patients at Sections 271.15 and 271.16.

The provision for the admission of patients, other than tuberculosis patients, which applies to commitments under Section 321.281 is found at Section 271.17, subsections 2 and 3. This was enacted by Chapter 238, Acts of the 61st General Assembly, and reads as follows:

> "271.17 Additional patients. In addition to patients afflicted with tuberculosis, other patients who may be admitted to the sanatorium are as follows: * * *
>
> 2. Selected chronic patients and patients for rehabilitation referred from other state hospitals or institutions, the state department of vocational rehabilitation, or federal hospitals or agencies upon such terms of payment for the reasonable costs of hospital care, medical treatment, and training as may be determined by the sanatorium authorities and negotiated with such other agencies.
>
> 3. Such other patients as the sanitorium authorities may at their discretion deem advisable and for which facilities are available. The sanatorium shall collect from said patients or the person or persons liable for their support, such reasonable charges for hospital care, service, and treatment as fixed by the sanatorium authorities. Earnings from such patients shall be deposited with the treasurer of the State University of Iowa for the use and benefit of the sanatorium and to supplement its legislative appropriations, collections, and other sources of income."

It is to be noted that neither one of these sections provides for a commitment from the court, but it would appear that the referrals may be made from other state hospitals and that the courts may request admission of those to be committed under Section 321.281.

Section 271.17(3) provides that the sanatorium may collect from patients or the person or persons liable for their support. Inasmuch as Section 321.281 provides that persons committed shall be state patients, the sanatorium must bill the state. These sections do not authorize the state to collect money from the person who may be committed to Oakdale. It has long been held in the state of Iowa that the right of the state to recover compensation from one cared for in a state hospital for the insane is purely statutory. *State v. Colligan,* 128 Iowa 536, 104. N.W. 905 (1905). The Iowa court stated at page 537 of the Iowa Reports:

> ". . . we find no authority for holding that the State, having established hospitals for the insane, which are largely charities, and provided, in the interest of humanity and for the protection of society, that insane persons shall be confined therein, has any common-law right of recovery against those who receive the benefits of such public charities . . ."

It is my opinion that this case may be applied to any care given at the Oakdale hospital where there is no authority for reimbursement for commitments or involuntary care which is of a penal nature. There is no known Iowa authority for collection of a claim, or a lien, against a person for penal care.

Therefore, the answer to your first question is that there is no lien or claim against a person committed under Section 321.281, 1966 Code of Iowa, for the cost of treatment at a mental health institute, nor is there any liability or lien created for care at the Oakdale Sanatorium.

7.8

CRIMINAL LAW: Counsel for indigent defendants—§§232.52, 775.5, 1966 Code of Iowa. Counsel must be appointed for indigent defendant accused of a felony or indictable misdemeanor and such counsel must be paid reasonable compensation by county responsible for maintaining proceeding. Counsel appointed to represent juvenile entitled to reasonable compensation, to a charge upon county where proceedings held. Court may appoint counsel for indigent accused of non-indictable misdemeanor, with such counsel entitled to reasonable compensation by governmental body concerned. Indigent person accused of violation of city traffic ordinance not statutorily nor constitutionally entitled to have counsel appointed to assist him, but if Court determines that seriousness of consequences dictates that counsel be appointed, Court may so direct, and city should arrange to pay such counsel a reasonable fee.

October 20, 1966

Mr. Charles E. Vanderbur
Story County Attorney
Story County Court House
Nevada, Iowa

Dear Mr. Vanderbur:

This will acknowledge receipt of your recent letter to this office wherein you set forth the following questions:

"1. When an indigent defendant is charged on preliminary information in municipal court with a felony, the municipal judge appoints an attorney for defendant, the county attorney comes in and reduces the charge and files a county attorney's information charging an indictable misdemeanor, the defendant pleads guilty and is sentenced in municipal court, and no new case is filed in district court, can the district court allow defendant's attorney compensation? Can the municipal court allow defendant's attorney compensation? If either question is answered yes, what governmental body pays the compensation?

"2. Same case, but defendant is initially charged in municipal court on a county attorney's information with an indictable misdemeanor. Same questions.

"3. Same case, but defendant is charged in municipal court with a nonindictable misdemeanor only—violation of state law. Same questions.

"4. Same case, but defendant is charged in municipal court with violation of a city ordinance only. Same questions.

"5. After juvenile court functions have been placed in municipal court by the district judges, the child of indigent parents is charged with delinquency in municipal court. The municipal judge appoints an attorney for them, hearing is had, and the child is found delinquent and committed. No case is filed in district court. Same questions."

Two statutory provisions must be considered in effecting response to your inquiries: Section 775.5, 1966 Code of Iowa, which provides:

"An attorney appointed by the court to defend any person charged with a crime in this state shall be entitled to a reasonable compensation to be decided in each case by the court, including such sum or sums as the court may determine are necessary for investigation in the interests of justice and in the event of appeal the cost of obtaining the transcript of the trial and the printing of the trial record and necessary briefs in behalf of the defendant. Such attorney need not follow the case into another county or into the supreme court unless so directed by the court at the request of the defendant, where grounds for further litigation are not capricious or unreasonable, but if he does so his fee shall be determined accordingly. Only one attorney fee shall be so awarded in any one case.",

and Section 232.52, 1966 Code of Iowa, providing:

"The following expenses upon certification of the judge or upon such other authorization as provided by law are a charge upon the county in which the proceedings are held.

* * *

4. Reasonable compensation for an attorney appointed by the court to serve as counsel or guardian ad litem."

A circumstance wherein authority existed for appointment of counsel for indigent person, but not for compensation of counsel so appointed, was considered by the Iowa Supreme Court in *Ferguson v. Pottawattamie County, et al*, 244 Iowa 516, 278 N.W. 223 (1938). This was an action brought by certain attorneys who had been appointed to represent juvenile delinquents in the Municipal Court of Council Bluffs, Iowa. The Supreme Court of Iowa determined that the services had not been rendered voluntarily, but rather, had been in compliance to a statute and that under such circumstances an obligation arose on the part of the *county* to pay a reasonable compensation for such services. The leading Iowa case in this area is *Hall v. Washington County*, 2 G. Greene 473, in which an attorney had been appointed to defend an indigent prisoner without any statutory authority for compensation. The Court, in that case, 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 the 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."

This office has previously considered in detail the question of appointment and compensation of counsel for indigent persons accused of public offenses in 1964 O.A.G. 160, wherein it was concluded at 1964 O.A.G. 160, 162, that:

"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."

Where counsel has been appointed to assist a person who is without funds, accused of a felony or an indictable misdemeanor, the compensation allowed such counsel under the provisions of Section 775.5, 1966 Code of Iowa, shall come from the county responsible for maintaining the action. The county which maintains the proceeding also has the liability for the compensation allowed counsel appointed in a juvenile proceeding, as clearly stated in Section 232.52, 1966 Code of Iowa.

The magistrate who appoints counsel should certify the expenses of said counsel as reasonable to the district court of the county concerned, who in turn effects payment, through the appropriate county official.

Your questions regarding payment of appointment of counsel for an indigent person accused of a non-indictable misdemeanor appear to be ones of first impression in our State. It appears that federal courts have taken the position that counsel may be appointed in such cases. In *Evans v. Rives*, 75 U.S. App. D.C. 242, 126 F.2d 633, 638 (D.C. Cir. 1942), a case involving a federal misdemeanor, the court stated:

"It is . . . suggested . . . that the constitutional guaranty of the right to the assistance of counsel in a criminal case does not apply except in the event of 'serious offenses.' No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. . . . And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."

The position taken by the court in *Evans, supra,* was cited with approval in *Harvey v. State of Mississippi*, 340 F.2d 263 (5th Cir. 1965), wherein the court concluded at 340 F.2d 263, 269:

"One accused of crime has the right to the assistance of counsel before entering a plea because of the disadvantageous position of an unassisted layman in a court of law and because of the serious consequences which may attend a guilty plea. Such disadvantages and consequences may weigh as heavily on an accused misdemeanant as on an accused felon."

Further, it often has been proposed that the principle of affording counsel has been made expressly applicable to all classes of offenses by the Supreme Court in *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963).

We would thus conclude that it is within the province of a court to appoint counsel for an indigent person accused of a non-indictable misdemeanor. However, there are no provisions of which we are aware to effect payment of such counsel for services rendered from the funds of any governmental body. Under such circumstances, the rationale as employed by the Iowa Supreme Court in the cases of *Ferguson v. Pottawattamie County, supra,* and *Hall v. Washington County, supra,* to the effect that an obligation is created on the part of the appropriate governmental body to pay a reasonable compensation for such services, would dictate that the governmental body concerned, i.e. city or town, arrange to pay an appointed attorney a reasonable fee.

There exists a class of misdemeanors, designated generally as "traffic violations," which appear not to compel appointment of counsel for one so accused, and for which payment of appointed counsel would ob-

viously create an impractical, chaotic state. The Federal Courts have equally recognized the possibility of a rule limiting the implementation of the right to counsel in the prosecution of petty offenses. *McDonald v. Moore,* 353 F.2d 106 (5th Cir. 1965).

In the recent case of *People v. Letterio,* 16 N.Y.2d 307, 213 N.E.2d 670, it was asserted that the basic concept of the traffic infraction is that a traffic violation is not a crime and the violator not a criminal. This is perhaps historically a transgression which admits to summary disposition. The Court in *People v. Letterio, supra,* at 213 N.E.2d 670, 672, concluded:

> ". . . a traffic court need but assure the defendant a fair forum in which to be heard. As a practical matter, the traffic court Judge often sits as prosecutor, defense counsel, and Judge. Neither the triune function, nor the failure of a traffic court Judge to advise the defendant that he may have counsel, is so unfair as to require the result urged by the dissenters."

Accordingly, we would conclude that in the instance of an alleged violation of a city ordinance of the class designated as a traffic offense, appointment of counsel would not be either constitutionally or statutorily dictated. Should, however, the instance involve multiple traffic offenses with potentially serious consequences, the Court may very well determine that, due to the complexity and seriousness of the charges, the accused should not proceed without counsel. See *In re Johnson,* 42 Cal. Rptr. 228, 62 Cal.2d 325, 398 P.2d 420, 427 (1965). Should counsel be appointed in such a circumstance, an obligation would arise on the part of the appropriate governmental body, in this case the city, to allow reasonable atorneys fees to appointed counsel.

7.9

CRIMINAL LAW: National Guard: Powers of arrest—§§29A.1, 29A.7, 29A.8, 29A.50, 748.3, 755.4, 755.5, 1966 Code of Iowa. National Guardsmen when activated to assist civil authorities do not have authority to make arrests under §755.4 unless they were specifically designated as "peace officers" by proclamation thus satisfying the requirement of §748.3(6).

October 26, 1966

Mr. L. D. Carstensen
Clinton County Attorney
306 Clinton County Court House
Clinton, Iowa 52732

Dear Mr. Carstensen:

This is in reference to your recent letter of September 6 in which you asked the following question:

> "When the National Guard is properly called to active service for the purpose of assisting in the maintenance of law and order, do the guardsmen have powers to arrest as provided in Section 755.4 of the Code?"

Section 755.4 of the 1966 Code of Iowa is set out as follows:

> "755.4 Arrests by peace officers. A peace officer may make an arrest in obedience to a warrant delivered to him; and without a warrant:
>
> "1. For a public offense committed or attempted in his presence.

"2. Where a public offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it.

"3. Where he has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it.

"4. Where he has received from the department of public safety or from any other peace officer of this state or any other state or the United States an official communication by bulletin, radio, telegraph, telephone or otherwise, informing him that a warrant has been issued and is being held for the arrest of the person to be arrested on a designated charge."

The term "peace officer" is defined in Section 748.3 of the 1966 Code of Iowa:

"748.3 'Peace Officer' defined. The following are 'peace officers':

"1. Sheriffs and their deputies.

"2. Constables.

"3. Marshalls and policemen of cities and towns.

"4. All special agents appointed by the commissioner of public safety and all members of the state department of public safety excepting members of the clerical force.

"5. All agents appointed by the secretary of the board of pharmacy examiners.

"6. Such persons as may be otherwise so designated by law."

It is apparent that if National Guardsmen are to have the powers of arrest provided in Section 755.4, they must be determined to be "peace officers." And it is equally apparent that if they are to have that designation, it must come from the operation of paragraph six of Section 748.3.

Sections 29A.7 and 29A.8 of the Code confer power in the governor to call the National Guard into "active state service," either on the request of the civil authorities of any political subdivision of the State for the purpose of *aiding* them in maintaining law and order in such subdivision in cases of breaches of the peace or imminent danger thereof (29A.8), or on his own volition for the defense or relief of the State, the enforcement of its laws and the protection of life and property therein (29A.7). Section 29A.1 in defining "active state service" further recognizes that this activation may be in aid of the civil authorities or under martial law.

The Iowa Supreme Court has held in *State ex rel O'Connor v. District Court*, 219 Iowa 1165, 1185, 260 N.W. 78 (1935) that the militia has authority to arrest when this authority is specifically conferred by proclamation of the governor and when the militia is acting under martial law. However, it is well-settled that where the Guardsmen are acting under martial law, any arresting power that they may have emanates from military law rather than civil law as the latter is necessarily suspended, and Section 755.4 would not be operative. Unfortunately there are no Iowa decisions specifically as to whether the militia has this authority to arrest when the civil authority is functioning.

Section 29A.50 of the Code gives an immunity in certain enumerated situations to members of the National Guard. This immunity is spe-

cifically made the same as that of peace officers acting under the same circumstances, but the Guardsmen are not classified as *being* peace officers. Indeed, I can find nowhere in the Iowa law where National Guardsmen are in any way designated as "peace officers," thus coming within the language of Section 748.3(6).

It is also relevant in answering the instant question that it is generally held that where there is no martial law and the civil power is functioning, the military power is subordinate to the civil power, and any aid by the military to the civil authorities must be within and in accordance with the civil law. *Bishop v. Vandercook,* 228 Mich. 299, 200 N.W. 278 (1924), *Allen v. Gardner,* 182 N. C. 425, 109 S. E. 260 (1928).

Therefore, it is my opinion that when National Guardsmen are activated to *assist* civil authorities, they would not have authority to make arrests under Section 755.4 unless they were specifically designated as "peace officers" by proclamation thus satisfying the requirement of Section 748.3(6). And even in that situation, their power would still be subordinate to civil authority. Of course, this would not preclude the Guardsmen from making arrests as private citizens under Section 755.5.

7.10

Counties, towns, and cities, power to enter into agreements for the operation and maintenance of supplmental police communications systems—750.6, 1962 Code. A county and cities and towns may by agreement constitute one of their number agent for the collection of pro-rated costs and for the payment, out of the special fund thus created, of the costs of maintaining the supplemental police communications system provided for in the foregoing statute. (Scism to Kliebenstein, 2/18/65) #65-2-14

7.11

Contacting condemnation commission prior to appraisal hearing—§§472.8-472.14, 1962 Code of Iowa. Condemnee is not subject to criminal liability for contacting the commission prior to the appraisal hearing to inform it what other land under similar conditions had previously been purchased for. (Bennett to Elton A. Johnston, City Atty., 4/5/65) #65-4-4

7.12

Trespass by fisherman—§714.25, 1962 Code of Iowa. The owner of inclosed lands may cause the prosecution of trespassing fishermen even though the owner has stocked his ponds with fish provided by the State Conservation Commission. (Scism to McGee, Mills Co. Atty., 5/10/65) #65-5-5

7.13

Public offenses, classification, felony or misdemeanor according to permissible punishment—§695.3, 1962 Code of Iowa. Under this Section, one convicted of a first offense concealed weapons charge stands convicted of a felony since upon such conviction the offender may be imprisoned in the state penitentiary. (Bennett to Burdette, Decatur County Atty., 11/30/65) #65-11-10

7.14

Privacy of a preliminary hearing—§761.13, 1966 Code of Iowa. When requested by Defendant, a preliminary hearing must be private and with the exception of the magistrate, his clerk, the peace officer who has custody of the Defendant, the attorney representing the state and the Defendant and his counsel. (Strauss to Miller, Scott County Attorney 8/8/66) #66-8-4

7.15

OMVI conviction sentencing—§321.281, 1962 Code of Iowa, as amended by Chapter 278, Acts of the 61st G.A. A defendant who pleaded guilty to OMVI may be committed to a private hospital as well as a public institution. (Bernstein to Root, Assistant County Attorney. 4/25/66) #66-4-13

7.16

Restrictions on disclosures of defendant's prior record to the grand jury —Chapter 444, Acts of the 61st G.A., §§3, 4, and 5. Statutory restrictions relating to disclosures of a defendant's previous criminal record applicable to a petit jury under Chapter 444, Acts of the 61st G.A., are not applicable to presentations to a Grand jury. (Riley to Kearney, 8/26/66) #66-8-11

CHAPTER 8

ELECTIONS

STAFF OPINIONS

LETTER OPINIONS

8.1

ELECTIONS: Precinct caucus—H.F. 541, §36, Acts of the 61st G.A. Procedure for the conduct of precinct caucus is confirmed.

September 14, 1965

Honorable J. P. Denato
542 Insurance Exchange Building
Des Moines, Iowa

Dear Mr. Denato:

Reference is herein made to your request for an opinion concerning the Maley amendment to House File 541, Acts of the 61st General Assembly. As you recall, before the amendment was added, Section 36 of House File 541 read as follows:

"Any person voting at a precinct caucus must be an eligible voter and resident of the precinct."

To this language the Maley amendment added the following:

"1. A list of the names and addresses of each person to whom a ballot was delivered or who was allowed to vote in each precinct caucus shall be prepared by the caucus chairman and secretary who shall certify such list to the county auditor at the same time as the names of those elected as delegates and party committeemen are so certified."

The foregoing statute is the subject of the following comment appearing in the supplement to the brochure entitled "Voting in Iowa", in which comment I concur:

"The law now states that any person who is allowed to vote at a precinct caucus must be an eligible voter and a resident of the precinct. (HF 541, sec. 36)

"The caucus first selects a chairman and a secretary. Then it proceeds to elect the precinct committeeman and committeewoman and the delegates to the county convention. It may consider resolutions to be presented to the county convention. It may select a member of the resolutions committee for the county convention.

"The chairman and secretary prepare a list of the persons elected as members of the county central committee and as delegates to the

county convention. They also prepare lists of the names and addresses of the persons who were allowed to vote at the caucus. Copies of both of these lists are given to the county auditor and to the party's county chairman. (HF 541, secs. 34, 36 (1))."

8.2

ELECTIONS: Voting registration—Chapter 93, Acts of the 61st G.A. (S.F. 341). All the required registration information, including party affiliation or lack of party affiliation, must be entered upon a registration card before registration is properly or fully completed, but though a voting registrant may not be properly registered because his party affiliation or lack thereof has not been noted by the registration officer, such a registrant may nevertheless have his vote counted as valid unless there is some reason to feel that the absence of the designated party affiliation or lack thereof effects the merits of the election. Mobile deputy registrars may receive pay from sources other than municipalities for the legitimate performance of their duties. Mobile deputy registrars may be appointed by the commissioner of registration for the 1966 general election at any time after July 4, 1965, provided that lists have been supplied to him for this purpose from the county chairmen of the two political parties polling the highest vote in the jurisdiction in the last preceding general election. If the first list required by Section 3 of S.F. 341 (Ch. 93) is prepared and made available on the July first preceding a general election, that list must include the information relating to all newly registered voters since the close of registrations.

January 18, 1966

Mr. Carl E. Peterson
Marshall County Attorney
12½ East Main Street
Marshalltown, Iowa 50158

Dear Mr. Peterson:

I am in receipt of your recent letter in which you solicit the opinion of this office in regard to the folloing enumerated questions concerning the proper interpretation of S.F. 341.

I

"Is an applicant for voter registration properly registered if the registrar, at the time of taking the application, does not request that the applicant designate his party affiliation or signify his lack of party affiliation?"

Section 48.6, 1962 Code of Iowa as amended, states in part:

"Form of records. For the purpose of expediting the work of the commissioner of registration, for uniformity, and for preparation of abstracts and other forms in use by the election boards, the registration records shall be substantially as follows:

"Suitable card index devices shall be provided. There shall also be provided suitable index cards of sufficient facial area to contain in plain writing and figures and the data required thereon. The following information concerning each applicant for registry shall be entered on the card:"

That section, in four subsections, then lists the information which shall be entered on the card: ward, election precinct, categories of information with regard to male registrants and categories of information with regard to female registrants.

Section 4 of S.F. 341 states:

"Section forty-eight point six (48.6), Code 1962, is hereby amended by adding thereto the following new subsection: 'Party affiliation. No party if preferred.)'"

It is to be noted that the word "shall" appears three times in the above quoted original language of section 48.6. The word "shall", when used in a statute directing a public official to do certain acts, is generally construed as mandatory. That is, it generally excludes the idea of discretion. *Hansen v. Henderson,* 244 Iowa 650, 56 N.W. 2d 59 (1953); *Wisdom v. Board of Supervisors of Polk County,* 236 Iowa 669, 19 N.W. 2d 602 (1945); *School Twp. of Muscatine County v. Nicholson,* 227 Iowa 290, 288 N.W. 123 (1939). Consequently, all of the information required in each subsection of section 48.6 must be obtained if a person is to be properly registered. Proper registration turns upon the question of whether the required information has been entered into the card and verified by the applicant's signature, rather than upon whether a request has been made by the registrar. If all of the required information, including party affiliation or lack of party affiliation, has been entered upon the card and verified by the applicant's signature, the registration is properly completed; otherwise it is not.

It should be noted, however, that there is a significant difference between an improper or irregular registration, and a total absence of registration. Thus in 29 C.J.S., Elections §51, it is stated:

"There is a vast difference between an irregular registration and a total absence of registration. It is a general rule that statutes prescribing the power and duties of registration officers should not be so construed as to make the right to vote by registered voters dependent on a strict observance by such officers of minute directions of the statute, thereby rendering the constitutional right of suffrage liable to be defeated through the fraud, caprice, ignorance, or negligence of the registrars. Thus an elector will not be deprived of his right to vote merely because of the incorrect spelling or listing of his name on the registry, or on the registry list, or because he was registered by a third person with whom the registrar had left his books, or because of the failure of the registrar to post a list of the electors, or because the registration was made at a place other than that named by the registrar in his notice.

". . . Again, where the constitution or statute provides that no one shall be entitled to register without first taking an oath to support the constitution of the United States, a voter who is entitled to register cannot be deprived of his right to vote because of irregularities, in administering such oath; or even because of the negligence of the registrar in failing to administer it to those applying for registration, and a failure to administer the oath will not render the vote void after it has been cast."

And in 18 Am. Jur., Elections, §206 it is stated:

"Acting pursuant to the power and duty conferred upon them to provide instrumentalities by which elections are to be accomplished, the legislatures of the various states have established elaborate and rigid rules and regulations for the conduct of elections. Before an election, such provisions are generally regarded as mandatory and their observance may be insisted upon and enforced, but after an election, they are regarded in a somewhat different light, and the general rule in such case is that a departure from the mode of holding an election as prescribed by statute, which does not deprive legal voters of their right to vote or permit illegal voters to participate in the election or cast uncertainty on the result, does not

affect the validity of the election, unless the statute expressly declares that the particular act is essential to the validity of an election or that its omission shall render the election void or unless there is a violation of a constitutional requirement. A statute which merely provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, will be regarded as mandatory if the acts in question affect the merits of the election, and as directory if they do not affect its merits."

In *Younker v. Susong,* 173 Iowa 663, 156 N.W. 24 (1916), the Iowa court, in holding that the failure to furnish voting booths, as required by law did not affect validity or outcome of an election, quoted with approval the language of *Hayes v. Kirkwood,* 136 Cal 396, 69 Pac 30 (1902), which stated:

"'But in the case at bar it sufficiently appears that nothing prejudicial to the rights of anyone resulted from the irregularities and omissions complained of, and there is nothing to warrant the court in defeating the will of innocent voters. It must be remembered that neither the voters nor those voted for have any control over the officers of election, and to upset an election because such officers have failed to strictly comply with the law, where it appears that no harm was done thereby, would be to encourage irregularities committed for the very purpose of invalidating elections.'"

From the above it appears to be clear that though a voting registrant may not be properly registered because his party affiliation or lack thereof has not been noted by the registration official, such a registrant may nevertheless have his vote counted as valid, unless there is some reason to feel that the absence of the designated party affiliations or lack thereof affects the merits of the particular election.

II

"Are the mobile deputy registrars prohibited from receiving pay from sources other than municipalities?"

The last sentence of subsection 2 of section 1 of S.F. 341 states: "Mobile deputy registrars shall serve without pay from the municipality."

Where the language of a statute is plain and unambiguous, construction and interpretation is not called for. *City of Cedar Rapids v. Cox,* 250 Iowa 457, 93 N.W. 2d 216, appeal dismissed 79 S. Ct., 1118, 359 U.S. 498, 3 L. Ed. 2d 976 (1959). It has been often held that express mention of one thing in a statute implies exclusion of other things. *North Iowa Steel Co. v. Staley,* 253 Iowa 355, 112 N.W. 2d 364 (1962); *Archer v. Board of Ed. in and for Fremont County,* 251 Iowa 1077, 104 N.W. 2d 621 (1960). Since the statute only purports to regulate payment by the municipalities, and since I do not find any other Iowa statutes regulating the salaries of mobile deputy registrars, it appears that such registrars may receive pay from sources other than municipalities for the legitimate performance of their duties.

III

"When is the earliest time the mobile deputy registrars may be appointed for the 1966 general election pursuant to sub-section 2 of section 1 of S.F. 341?"

The subsection to which you refer states in part:

"The commissioner of registration shall appoint at least six (6) persons for each ten thousand (10,000) inhabitants, or major fraction thereof, within his jurisdiction as mobile deputy registrars. An equal number of these appointees shall be appointed from lists supplied for the purpose from the county chairman of the two (2) political parties polling the highest vote in the jurisdiction in the last preceding general election . . . Mobile deputy registrars shall be appointed before the first (1st) of August preceding any general election and the appointments shall expire when registration closes for that election. Mobile deputy registrars shall serve without pay from the municipality."

General elections are held upon the Tuesday after the first Monday in November of each even numbered year. Section 39.1, 1962 Code of Iowa as amended. S.F. 341 became effective upon July 4, 1965. Section 3.7, 1962 Code of Iowa as amended.

Though the General Assembly by this subsection has made it mandatory that the mobile deputy registrars be appointed before the first of August preceding any general election, they have not legislated as to whether such registrars may be appointed earlier. Consequently, the appointment of the registrars may be made at an earlier date provided the lists have been supplied to the commissioner for that purpose from the county chairmen of the two political parties polling the highest vote in the jurisdiction in the last preceding general election, as the statute requires. Once these lists have been furnished to the commissioner, the question of whether such earlier appointments are to be made or not is a matter left to the discretion of the commissioner. Because the terms of the previous registrars end upon the date registration closes for a general election, the act implies that new registrars may be appointed at any time after that date. In this connection it has been held that an office is "vacant" when it is without an incumbent who has the right to exercise the function of the office and take its emoluments. *Gibbons v. Sioux City*, 242 Iowa 160, 45 N.W. 2d 842 (1951), 42 Am. Jur., Public Officers, §131.

Because S.F. 341 did not become law until July 4, 1965, no mobile deputy registrars could be appointed prior to that date. Such registrars may be appointed at any time after that date, however provided that the proper lists have been supplied to the commissioner, since the period after that date falls within the time period in which such appointments are allowed.

IV

"Section 3 of S.F. 341, providing for lists of newly registered voters, provides that the same shall be prepared weekly from July 1 until Sept. 15. Must the first such list, prepared in the first week of July of a given year, include all newly registered voters since the close of registrations preceding the last general election when the last prior list would have been prepared?"

Section 3 of S.F. 341 states in part:

"The commissioner of registration shall also prepare lists of newly registered voters, indicating the name, address, precinct number and party affiliation of such voters. The lists shall be prepared weekly from July first (1st) until September fifteen (15) and daily thereafter except Saturdays and Sundays during the calendar months preceding any general election until registrations are closed. The lists shall be available to public inspection at all reasonable

times and duplicate lists shall be prepared upon request for the county chairman of any political party polling in excess of two (2) per cent of the popular vote in the jurisdiction in the last preceding general election."

The first sentence of the last-quoted statutory language refers to "lists of newly registered voters." That phrase does not exclude any particular group of such voters and thus appears to encompass all such voters. The second and third sentences refer back to the lists mentioned in the first sentence. Statutory language should be construed so as to give intelligent purpose to its provisions. *In re Klug's Estate,* 251 Iowa 1128, 104 N.W. 2d 600 (1960). The intent of the legislature must be determined from the statutory language and the purpose of the legislation. *Board of Education in and for Franklin County v. Board of Education in and for Hardin County,* 250 Iowa 672, 95 N.W. 2d 709 (1959). Because of the broad language of the first sentence of section 3 and because of the language of this section as a whole appears to indicate that more than just a partial list should be made available to those parties entitled to such information, it appears clear that the intent of the legislature was to require that complete lists, containing the names of all newly registered voters, be prepared and made available. At the time the lists are prepared they must be made available as required by the statute.

If the first such list made since the close of registrations is prepared and made available on the July first preceding a general election, that list must include the information relating to all newly registered voters since the close of registrations.

CONCLUSION

In conclusion, all the required registration information, including party affiliation or lack of party affiliation must be entered upon a registration card before registration is properly or fully completed, but though a voting registrant may not be properly registered because his party affiliation or lack thereof has not been noted by the registration officer, such a registrant may nevertheless have his vote counted as valid unless there is some reason to feel that the absence of the designated party affiliation or lack thereof effects the merits of the election. Mobile deputy registrars may receive pay from sources other than municipalities for the legitimate performance of their duties. Mobile deputy registrars may be appointed by the commissioner of registration for the 1966 general election at any time after July 4, 1965, provided that lists have been supplied to him for this purpose from the county chairmen of the two political parties polling the highest vote in the jurisdiction in the last preceding general election. If the first list required by Section 3 of S.F. 341 is prepared and made available on the July first preceding a general election, that list must include the information relating to all newly registered voters since the close of registrations.

8.3

ELECTIONS: Date of filing nomination papers for U.S. Senator, U.S. Representative, and elected state officials or members of the General Assembly—§43.11, 1962 Code of Iowa, as amended. The last day for filing nomination papers for a primary to be held on September 6, 1966, is 65 days prior to that date, and such last day is Sunday, July 3, 1966. The fact that Sunday is such last day does not vary the mandatory time limit and Monday, July 4, or Tuesday, July 5, may not be used.

June 9, 1966

Mr. Gary Cameron
Secretary of State
State House
L O C A L
Attn: Keith Schulz, Deputy Secretary of State

Gentlemen:

Reference is herein made to your recent letter in which you ask for an opinion designating the last day upon which nomination papers for the 1966 Primary Election may be filed in your office under the provisions of Section 43.11, Code of 1962.

The date of the primary election was fixed by Chapter 89, Acts of the 61st General Assembly, as the first Tuesday after the first Monday of September in each even-numbered year. In the year 1966 such date is September 6.

The date for filing the nomination papers in your office for the offices of U.S. Senator or any elective state office or representative in Congress and for members of the General Assembly is to be not more than 85 days, nor less than 65 days, prior to the date fixed for holding the primary election. Thus, the statutory time for filing of such nomination papers is not less than 65 days, nor more than 85 days, prior to the date of the primary. See Section 43.11, Code of 1962.

As a general rule, statutory provisions requiring a petition, certificate or application of nomination to be filed with a specified officer within a stipulated period of time are mandatory. 18 American Jurisprudence, page 262, entitled Elections.

In *State ex rel. Anderson v. Falley*, 9 N.D. 464, 83 N.W. 913, 914 (1900), it was said that the statute provided: " 'Certificates of nomination to be filed with the Secretary of State shall be filed not less than thirty days before the day fixed by law for the election . . . .' " In this regard the court stated: "This time limit has been held mandatory by every court that has ever passed upon a similar statute, so far as we can ascertain."

Ordinarily, the computation of days is made by counting consecutive days backward. Applying such rule to this statute and excluding the primary day, there remain 5 days in September, 31 days in August, and 29 days in July. Upon such computation the 65th day is Sunday, July 3, and in my opinion, therefore, such day is the last day upon which such nomination papers may be filed in your office.

The fact that this last day is Sunday does not vary the mandatory rule. Filing of such papers in your office on any date later than July 3 would result in computation of 64, 63, 62, or as many days as the case may be, and would be a clear disregard of the provisions of Section 43.11, Code of 1962. There is a prior holding of this department to this effect in an opinion cited as 16 OAG 172 which reads as follows:

> ". . . Replying to yours of the 17th instant, addressed to the attorney general, will say that in my judgment a nomination paper filed on Sunday, the 12th of March should be printed upon the ballot with the same force and effect as though filed on the previous day. The 12th instant would be the fifteenth day prior to the holding of the election and if a filing may lawfully be made on that day then it would be sufficient. The act of the clerk in filing a nomination paper is purely a ministerial act and our supreme court has held that a ministerial act may be performed on Sunday.

"It has been held that a four days' notice of introduction of additional witnesses against a defendant under indictment may be served on Sunday. *State v. Lyon,* 113 Iowa, 536.

"And where the publication of notice is required for a given number of weeks that one or more of such publications may be made on Sunday. *Nixon v. Burlington,* 141 Iowa, 316.

"And even that a judgment of the court may be entered upon the record on Sunday. *Puckett v. Guenther,* 142 Iowa, 35."

In *Seawell v. Gifford,* 22 Idaho 202, 125 Pac. 182, 183 (1912), reference is made to the case of *State ex rel. Anderson v. Falley,* supra, as follows:

". . . it was held that, where a certificate of nomination was to be filed by the secretary of state not less than 30 days before the election, if filed 29 days before the election, it was too late, and that the statute in that regard is mandatory, and the fact that the 30th day before the election fell on Sunday would not change this rule, and that that section of the North Dakota statute (corresponding to section 11 of our Rev. Codes, above quoted), relating to excluding holidays, has no application to an election case."

The provisions of Section 4.1(23), Code of 1962, with respect to time computations falling on Sunday, have no application here because filing on a later day than Sunday would be 64 or 63 days prior to the date of the primary and would be contrary to the statute.

8.4

ELECTIONS: County courthouses open on primary election day—§340.6, 1966 Code of Iowa. Time for holding Primary Elections is the first Tuesday after the first Monday in September of even numbered years and such primary day not being a legal holiday, all courthouses will be open.

August 26, 1966

Mr. Francis Hughes
Auditor of Palo Alto County
Emmetsburg, Iowa

Dear Sir:

Your recent letter addressed to the Auditor of State has been handed to me for answer. You stated:

"It has been the policy of our County that County Offices be closed on Primary Election day.

"Most Counties do not close. Some do. According to Courthouse opening hours passed by State Legislature that Courthouses be open five days each week plus Saturday mornings, I feel that uniformity on Courthouses openings on Primary Election is important.

"Please advise by letter so offices outside of ours can be advised."

In reply thereto, I quote to you the provisions of Section 10, Chapter 307 of the Acts of the 61st General Assembly, now designated as Section 340.6, Code of 1966, in terms as follows:

"SECTION 10. It is hereby declared to be the policy of this state that all courthouses shall be open for the transaction of business five and one-half (5½) days per week. Such period shall include Saturdays from 8 a.m. to 12 noon, excepting legal holidays."

This statute by its terms fixes the times the courthouses of the State shall be opened. This Act specifically provides that the county courthouses shall be open 5½ days of the week, such period including Saturdays from 8 a.m. until noon excepting holidays. By this terminology the Legislature has directed that the courthouses be open on the first five days of the week, beginning with Monday and one-half day on Saturday. The only exception to this legislative direction which the statutes expressly provide is "legal holidays".

Legal holidays are prescribed by Section 4.1, Subsection 23 to be the following:

> Saturday, Sunday, first day of January, 12th day of February, 22nd day of February, 30th day of May, 4th day of July, first Monday in September, 11th day of November, 25th day of December and the following Monday whenever any of the foregoing named holidays falls on a Sunday. Also any day appointed or recommended by the Governor of Iowa or the President of the United States as a day of Thanksgiving.

Rule 366 of the Rules of Civil Procedure specifies the following days as holidays in computing time under the Civil Procedure Rules, to wit: January 1st, February 12th and 22nd, May 30th, July 4th, November 11th, December 25th, the first Monday in September, the day of General Election and any day designated by the President or the Governor as Thanksgiving day.

Primary Election day is not designated in either of these statutes as holidays, therefore, the first Tuesday following the first Monday in September 1966 the courthouses of the state shall be open.

I call your attention to the fact that this Statute was litigated in the case of *Long v. Board of Supervisors* appealed from Benton County District Court, opinion filed May 3, 1966 validating the foregoing Act including Section 10 thereof. Previous opinions on this subject are withdrawn.

8.5

ELECTIONS: Election Boards—§49.15, 1966 Code of Iowa. Board of Supervisors may exercise its discretion in determining whether two of the judges shall belong to the political party casting the largest number of votes in the precinct in the last general election or to the party casting the next largest number of votes in the precinct in the last general election.

September 2, 1966

Mr. James W. McGrath
Van Buren County Attorney
Van Buren County Court House
Keosauqua, Iowa

Dear Mr. McGrath:

This in answer to your request for an opinion on the following question:

> In selecting members of an election board under Section 49.15, 1966 Code of Iowa, must the board of supervisors appoint two judges and one clerk from the political party casting the largest number of votes in the particular precinct at the last general election and one judge and one clerk from the party casting the next largest number of votes in the precinct at the last general election or may the Board of Supervisors exercise its own discretion in

determining whether two judges shall belong to the political party casting the largest number of votes or the political party casting the next largest number of votes in the precinct in the last general election? There are one or more electors of each party qualified and willing to act as judge or clerk.

Section 49.12, 1966 Code of Iowa states:

"*Election boards.* Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors of another party qualified and willing to act as judge or clerk. * * *"

Section 49.15, 1966 Code of Iowa states:

"*Supervisors to choose members—chairman.* The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented. The board of supervisors shall select said members from a list of persons submitted by the official county chairman of each of aforesaid parties, filed with the said board not more than forty-five days nor less than thirty days prior to each primary and general election. * * *"

While Section 51.4, 1966 Code of Iowa, relating to the selection of counting boards, requires that two judges be chosen from the political party casting the highest number of votes at the last preceding general election, that same requirement is not set out with relation to the selection of receiving boards under Section 49.15, 1966 Code of Iowa.

Legislative intention is to be deduced from language used and language is to be construed according to its plain and ordinary meaning. *Byers v. Iowa Employment Security Commission*, 247 Iowa 830, 76 N.W. 2d 892 (1956). In construing statutes, the courts look first to the language used. The question is not what the legislature should have said, or what it might have intended to say, but what it did say. *Shelby County Myrtue Memorial Hospital v. Harrison County*, 249 Iowa 146, 86 N.W. 2d 104 (1957). A court is not permitted to write into a statute words which are not there. *Dingman v. City of Council Bluffs*, 249 Iowa 1121, 90 N.W. 2d 742 (1958).

In light of these rules of construction and the fact that the language of Section 40.15 is unambiguous, it appears that the statute requires only that the Board of Supervisors make up the election board from the membership of those parties casting the largest and next largest number of votes in the precinct at the last general election, providing, however, that no more than two judges and no more than one clerk of any election board be members of the same political party. See also 38 O.A.G. 758. The Board of Supervisors may thus exercise its discretion in determining whether two of the judges shall belong to the political party casting the largest number of votes in the precinct in the last general election or to the party casting the next largest number of votes in the precinct in the last general election.

8.6

ELECTIONS: Special local option election—§§123.27(7)(e), 50.46, 1966 Code of Iowa. Will of voters, manifested in election pursuant to §123.27(7)(e), 1962 Code of Iowa, as amended, not vitiated by irregularity in compliance with §50.46, 1962 Code of Iowa.

September 22, 1966

Mr. Homer R. Adcock, Chairman
Iowa Liquor Control Commission
East 7th and Court Avenue
LOCAL

Dear Mr. Adcock:

This will acknowledge receipt of your letter of August 30, 1966, wherein you present substantially the following inquiry:

> Must an election, held pursuant to Section 123.27(7)(e), 1962 Code of Iowa, as amended, meet the requirements of Section 50.46, 1962 Code of Iowa, as amended, to be considered a valid election?

Section 123.27(7)(e), 1962 Code of Iowa, as amended, sets forth the procedure governing the conduct of a local option election held to determine if the sale of alcoholic beverages by the drink should be prohibited in a particular county. The portion of Section 123.27(7)(e), 1962 Code of Iowa, as amended, with which your inquiry is concerned, is as follows:

> "The provisions of the statutes of this state relating to election of officers, voting places, election apparatus and blanks, preparation and form of ballots, information to voters, delivery of ballots, calling of elections, conduct of elections, manner of voting, counting of votes, records and certificates of elections, and recount of votes, so far as applicable, shall apply to voting on the proposition under the provisions of this section."

Section 50.46, 1962 Code of Iowa, provides:

> "In case a special election has been held, the board of county canvassers shall meet at one o'clock in the afternoon of the second day thereafter, and canvass the votes cast thereat. The county auditor, as soon as the canvass is completed, shall transmit to the secretary of state an abstract of the votes so canvassed, and the state board, within five days after receiving such abstracts, shall canvass the returns. A certificate of election shall be issued by the county or state board of canvassers, as in other cases. All the provisions regulating elections, obtaining returns, and canvass the votes at general elections, except as to time, shall apply to special elections."

The general rule in this State regarding your inquiry is found in the case of *Poor v. Town of Duncombe*, 231 Iowa 907, 914, 2 N.W. 2d 294 (1942), wherein it is stated:

> ". . . immaterial departures from the statutory mode of holding an election may be disregarded, but, if such failures to comply with the law were widespread and general and of so flagrant a character as to raise a doubt as to how the election would have resulted had they not occurred, they could easily be fatal."

The principle underlying the above-quoted rule is that the votes of the people and not the return of the officers make an election, and an election, evidencing the will of the voters should not be invalidated unless it is shown that the discrepancy involved would have changed the result. See *Poor v. Town of Duncombe*, supra; *Wiedenheft v. Frick*, 234 Iowa 51, 11 N.W.2d 561 (1943). The expressed will of the voters should not be thwarted or set aside because of irregularities, or even illegalities, which are not shown to have affected the result of or prejudiced anyone. *State v. Creston Mutual Telephone Company*, 195 Iowa 1368, 191 N.W. 988.

In the circumstances about which you inquire, irregularities which may have appeared should not defeat the will of the people absent a showing that the irregularities were such as would have changed the results or prevented the voters from giving full expression to their will or desires.

We would thus advise that failure to certify a special election, held pursuant to Section 123.27(7)(e), 1962 Code of Iowa, as amended, will not of itself authorize the rejection of the vote of that election.

8.7

ELECTIONS: County conventions after the Primary Election—§§43.65, 43.66, 43.67, 43.97(1) and 43.98, 1966 Code of Iowa. A county convention cannot be called for the purpose of nominating and placing on the ballot candidates for those offices for which there were no primary candidates. Under the Iowa statute there are no "candidates" where there is no name on the ballot and no write-in votes. One write-in vote for a person makes that person a "candidate" under §43.66 and under §43.98, which refers to §43.66, and which authorizes a nomination to be made.

October 4, 1966

Mr. Richard Q. Madsen
Jefferson County Attorney
100½ North Main Street
Fairfield, Iowa

Dear Mr. Madsen:

You have submitted the following question for our consideration:

"Can a political party hold a special County Convention for the purposes of nominating and placing on the ballot candidates for those offices for which there were no primary candidate office seekers?"

Selection of candidates by a political party must meet the requirements of Chapter 43, 1966 Code of Iowa. See Sections 43.1 and 43.2.

Sections 43.65, 43.66 and 43.67 set out the conditions under which a person receiving votes in the primary has a right to have his name printed upon the official ballot to be voted at the general election.

These sections read as follows:

"43.65 Who nominated. The candidate of each political party for each office to be filled by vote of the people having received the highest number of votes in the state or district of the state, as the case may be, provided he received not less than thirty-five percent of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office, except as provided in section 43.66."

"43.66 Minimum requirement for nomination. A candidate whose name is not printed on the official ballot, must, in order to be nominated, receive such number of votes as will equal at least ten percent of the whole number of votes cast for governor at the last general election in the state, or district of the state, as the case may be, on the ticket of the party with which such candidate affiliates."

"43.67 Nominee's right to place on ballot. Each candidate so nominated shall be entitled to have his name printed on the official ballot to be voted at the general election without other certificate."

Under the above statutory provisions, it is clear that if there are no official candidates whose names are printed upon the primary ballot, a write-in candidate could nevertheless claim the right to have his name printed upon the ballot to be voted at the general election if he obtains thirty-five percent of the votes cast for that office and enough votes to equal ten percent of the votes cast for his party's candidate for governor in the last general election. *Zelmer v. Smith*, 206 Iowa 725, 221 N.W. 220 (1928).

If there is no candidate who, by virtue of the primary vote, has the right to have his name printed upon the official ballot to be voted for a particular office at the general election, then Sections 43.97(1) and 43.98, 1966 Code of Iowa, become relevant. Those sections read as follows:

"43.97 Duties performable by county convention. The said county convention shall:

1. Make nominations of candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor if such convention is held following the primary election. If the county convention was held preceding the primary election, the delegates to the last preceding county convention shall be reconvened within five days following the certification of the official election results for the purpose of making nominations as may be required by this subsection."

"43.98 Nominations permitted. The county convention, if the convention is held following the primary election, may make nominations for any offices for which no nomination exists due to the failure of any candidate to receive the number of votes required for nomination by section 43.66. If the county convention was held preceding the primary election, the party county central committee may make such nominations or may reconvene the delegates of the last preceding county convention for such purpose."

Section 43.98, last cited, was amended and changed somewhat by the 61st General Assembly. Previously, this section of the Code stated that the county convention could not make a nomination for an office unless in the primary election of that party a person received at least one-half of the number of votes required for nomination by Section 43.66 of the Code.

It has been held that a county convention operating under Section 43.97 has the authority to make a nomination for an office when a candidate has not received enough votes in the primary to meet the requirements of either Section 43.65 or Section 43.66. *Zellmer v. Smith*, 206 Iowa 725, 221 N.W. 220 (1928). The authority given under Section 43.97 appears not to have been altered by the 61st General Assembly. Thus, so far as the convening, or reconvening as the statute may require, of a convention, sufficient authority for this action appears to exist in Section 43.97, 1966 Code of Iowa.

It should be noted that Sections 43.97 and 43.98 both indicate that as a condition precedent to the convening or reconvening of a convention under those sections, there must be a *candidate* who did not receive the required number of votes. Because there cannot have been a candidate if no person received a vote, it is necessary that at least one write-in vote be cast before a convention may convene or reconvene under the provisions of Sections 43.97 and 43.98 when there were no official candidates in the primary.

Therefore, in answer to your question, it is my opinion that a political party cannot hold a special county convention for the purpose of nominating and placing on the ballot candidates for those offices for which there were no primary office seekers. In other words, a convention is not authorized by statute when there are no candidates on the ballot and when there are no write-in candidates. A write-in candidate, under Section 43.66, becomes a "candidate" by the fact that he may receive one write-in vote and thereby a convention may be called as this type of "candidate" comes under Section 43.98 which specifically mentions Section 43.66, and which contemplates nomination procedures for "candidates" who do not have enough votes. If there are "candidates" who do not have enough votes, then a convention may be called under Section 43.98.

8.8

Political Party: What is a Political Party?—§§ 43.1, 43.2, 43.4, 43.5, 43.26, 43.112, 43.114, 363.11, 1962 Code of Iowa. What is a political party; political party has right to exist in a charter city as well as in a county. Each organization is independent of the other. (Zeller to Representative Resnick, 1/29/65) #65-2-1

8.9

Elections—§§ 49.3, 49.4, 49.5, 49.7, 49.8, 49.9, 49.10, 49.11, 1962 Code of Iowa. City divided by township lines is correctly in different precincts, but Sections 49.7 and 49.10(2), provide for methods of changing the precincts. (McCarthy to Representative Grassley, 2/19/65) #65-2-15

8.10

Signatures on Nomination Papers—§43.20, as amended, 1962 Code of Iowa. §43.20 requires that nomination papers for next general election contain an aggregate number of signatures for a Democratic candidate for state office or U.S. Senator totalling at least 3,973 signatures. A Republican candidate must have at least 1,826 signatures. There is an additional requirement that in at least ten counties of this state the nominee must have signatures totalling more than 1% of his party's general election vote for Governor in that county in the last election. This is not a requirement for more signatures in the aggregate. (McCarthy to Cameron, Secretary of State, 12/9/65) #65-12-2

8.11

Precinct Caucus—§36, Chapter 89, Acts of 61st G.A. Persons voting at a precinct caucus need not be registered voters. (Clarke to Rasmussen, State Representative, 3/8/66) #66-3-3

8.12

Naturalized citizens—§48.6, 1962 Code of Iowa. The commissioner of registration is not required to obtain papers of naturalized citizens who are registering to vote but must secure information of date of naturalization papers and court, also date of naturalization of parents. (Strauss to Nims, State Senator, 4/19/66) #66-4-7

8.13

Branch and Mobile Voter Registration—§§48.6, 48.16 and 48.19, 1962 Code of Iowa, as amended; §1, Ch. 93, Acts of the 61st G.A. The commissioners of registration must appoint branch and mobile deputy registrars from the lists furnished to them by the county chairmen; the commissioners may exercise their discretion in determining which of the parties on the lists they wish to appoint. Branch and mobile deputy registrars need not be notaries public and need not notarize each new voter's registration as it is secured. Branch deputy registrars are to be compensated as provided by §48.18, 1962 Code of Iowa as amended. (Clarke to Dunn, Cerro Gordo County Attorney, 5/11/66) #66-5-3

8.14

Registration—§48.11, 1962 Code of Iowa. Applications for registration must not be received for nine full days between the last day of registration and election day as to that particular election. For any other election, however, applications for registrations must continue to be received. (Clarke to Fulton, Linn County Attorney. 5/26/66) #66-5-10

8.15

Vacancy in office—§§43.11(1), 43.81, as amended by §14, Ch. 89, Acts of the 61st G.A., 69.8 (4) and 69.13, 1962 Code of Iowa. No candidate for office named in §43.11 shall have his name printed upon official ballot unless nomination papers are filed as therein provided. Where a vacancy in the office of sheriff occurs after the time for filing nomination papers, to fill the vacancy such nomination may be made by the county convention if the convention has been held prior to the vacancy, nomination may be made by the party county central committee. If the vacancy in the office of sheriff occurs within fifty (50) days of the general election, it will be filled by the board of supervisors and the appointee shall serve until the next general election. (Strauss to Smith, O'Brien County Attorney. 6/7/66) #66-6-1

8.16

Proposed election procedures for City-County Authority—Chapter 49, 1962 Code of Iowa; §§ 49.1, 49.73 and 52.25, 1962 Code of Iowa; and Chapter 239, Acts of the 60th G.A. (1) Chapter 49, 1962 Code of Iowa, applies to the election procedures of a city-county authority formulated under Chapter 239, Acts of the 60th G.A. (2) The calling of an election under Chapter 239, Acts of the 60th G.A. is the obligation of the Authority. (3) The County Board of Supervisors retains its duties imposed by Chapter 49, 1962 Code of Iowa. (4) Voting machines may be used in an election under Chapter 239, Acts of the 60th G.A. (5) If the election occurs during the statutory period of daylight time, daylight time must be used. (6) Separate elections are not required. (7) A separate public measure pertaining to the city bond issue may also be voted on at the same time as the voting on the city-county building project. (Strauss to Burns, Dubuque County Attorney. 7/20/66) #66-7-4

8.17

Time of 1966 Primary Election—§43.37, 1966 Code of Iowa; Public Law 89-387, Eighty-ninth (89th) Congress. The 1966 Primary Election date

is September 6, 1966, and in all precincts in the State under the authority of Public Law 89-387, Eighty-ninth (89th) Congress, the time for opening and closing the polls fixed by Section 43.37 of the 1966 Code of Iowa is Central Standard Daylight Savings Time. (Strauss to Gillespie, O'Brien County Attorney. 8/2/66) #66-8-3

8.18

Nomination for county hospital trustees—§§347A.1, and 347A.25, 1966 Code of Iowa. Section 347A.1 provides for the election of trustees of county hospitals organized under Section 347A.1. Such nominations may be made under the provisions of Chapter 45, Code of 1966. The county treasurer shall be ex officio treasurer of the Board of Hospital Trustees and all money shall be disbursed by the treasurer under the direction of the Hospital Board of Trustees without distinction of its use. (Strauss to Lemon, Buchanan County Attorney, 8/9/66) #66-8-5

CHAPTER 9

HIGHWAYS

STAFF OPINIONS

LETTER OPINIONS

9.1

HIGHWAYS: Board of Supervisors: Contracts; Motor Vehicles; Secondary Roads—§313.2, 1962 Code of Iowa. A contract between Iowa State Highway Commission and a Board of Supervisors for the reason of redesigning a primary road to a secondary road is valid when made in compliance with §313.2, 1962 Code of Iowa.

June 24, 1965

Mr. Robert F. Schoeneman
Butler County Attorney
614-Eleventh Street
Aplington, Iowa

Dear Mr. Schoeneman:

We are in receipt of your request for an Attorney General's opinion dated March 29, 1965, and herein submit same based upon the following factual situation.

An agreement was entered into by and between the Butler County Board of Supervisors and the State Highway Commission. The agreement stated that upon completion of surfacing and improving of the primary road, 188, north of Clarksville, Iowa, the Board would accept the road into the county secondary road system. The agreement was entered into after the improvement of said primary road had begun, but several months prior to completion. The traffic count on the improved primary road is in excess of 400 vehicles per day. The improvement consisted of widening and grading the previous gravel roadbed and subsequent hardtop resurfacing of the same.

The questions asked in your letter are as follows:

"1. Has the said primary road been eliminated by reconstruction or relocation as said words are used in Section 313.2, 1962 Code of Iowa?"

"2. If this is such reconstruction or relocation as set out in said Section 313.2, and the traffic count is in excess of 400 vehicles per day, would this statute be determinative, or, can the State Highway Commission enforce the agreement entered into as above set out?"

"3. Assuming that said primary road has not been reconstructed or relocated as contemplated in said Section 313.2, is the agreement between the State Highway Commission and the Butler County Board of Supervisors binding and through the legal sanction of said agreement must the Board of Supervisors accept the said primary road into the Secondary Road System?"

The applicable portion of §313.2, 1962 Code of Iowa, is as follows:

"The highways of the state are, for the purpose of this chapter, divided into two systems, to-wit: the primary road system and the secondary road system. The primary road system shall embrace those main roads, not including roads within cities and towns, which connect all county-seat towns, cities, and main market and industrial centers and which have already been designated as primary roads in chapter 241, Code of 1924; provided that the said designation of roads shall be with the consent of the federal bureau of public roads, subject to revision by the state highway commission.

"Any portion of said primary road system eliminated by reconstruction or relocation shall revert to and become part of the local secondary road system, provided, however, that the highway commission shall, during a period of not to exceed one year from the date a county has been so notified that the road has reverted to the secondary system, maintain said road and conduct periodic traffic checks. If, at the end of one year the traffic on the section in question exceeds four hundred vehicles per day, it shall remain in the primary system. If, at the end of one year, the traffic on said section does not exceed four hundred vehicles per day, it shall revert to and become a part of the secondary system, provided, however, that the state highway commission shall first allocate sufficient funds to place the road in good repair sufficient for the the traffic thereon."

In answer to your question numbered one, it is our opinion that said primary road has been reconstructed as used in §313.2, 1962 Code of Iowa, and has not been eliminated from the primary road system, pursuant to the same Code section.

In answer to your question numbered two, it is our opinion that the 1962 Code of Iowa does apply to this situation in that the need has been reconstructed as contemplated in the statute, but pursuant to the same section, has not been eliminated from the primary road system by said reconstruction. The agreement between the Butler County Board of Supervisors and the Iowa State Highway Commission constitutes a notice of reversion as contemplated in §313.2, 1962 Code of Iowa. Said reversion will not take effect unless and until, pursuant to the Highway Commission's periodic traffic checks, the traffic count at the end of one year from receipt of said notice is less than 400 vehicles per day.

In answer to your third question, it is our opinion that §313.2, 1962 Code of Iowa, is a self-executing statute. If the Highway Commission's traffic count as contemplated in said statute falls below 400 vehicles per day, then the road in question becomes part of the secondary road system by operation of law, and there is no need for a formal acceptance of this fact on the part of the Butler County Board of Supervisors. If the Highway Commission's traffic count as contemplated in this section remains 400 vehicles or above per day, then the road in question remains part of the primary road system and any agreement between the Iowa State Highway Commission and the Butler County Board of Supervisors, which purports to redesignate said road from its present designation as primary to secondary, becomes void and of no force and effect.

9.2

HIGHWAYS: Public Liability Insurance: Bidding Requirements, Administrative Discretion, Highway Commission Contracts, Services— §517A.1 authorizes and empowers the Iowa State Highway Com-

mission to purchase and pay premiums on liability, personal injury, and property damage insurance covering all officers, proprietary functions and employees of such a body while in performance of any of their duties. Where identical bids are submitted from several agents of the same contractor, the Iowa State Highway Commission, in the exercise of its discretion, may determine which of the several agents is to administer the contract.

September 24, 1965

Mr. J. P. Denato
State Representative
542 Insurance Exchange Building
Des Moines, Iowa

Dear Sir:

In answer to your letter of recent date requesting an opinion as to the legality of the Iowa State Highway Commission awarding their insurance business, on identical bids, to the same agency each year where all the agents in question are representatives of the same contractor, we submit the following:

The awarding of this contract is a quasi-judicial decision in that §517A.1, 1962 Code of Iowa, sets out no procedure for the making of such awards. In *Lee v. City of Ames*, 199 Iowa 1342, 203 NW 790, 793 (1925), the Supreme Court examined a similar statute and stated:

"In the absence of a statutory requirement, the city was not required to let the contract for 'extra excavation' under competitive bidding, as is required in paving. . . . It is well settled that a municipal corporation need not, in making its contract, advertise for bids and let to the lowest bidder in the absence of an express statutory requirement, and where a city is not required to advertise for bids, neither is it required to let to the lowest bidder in case it does adopt such course . . ."

Under a statute such as §517A.1, 1962 Code of Iowa, where there is no bidding requirement expressly set out therein, an exercise of discretion on the part of the Commission or Board will not be upset unless fraud or abuse of discretion is shown. As the Supreme Court of Iowa stated in *Poor v. Incorporated Town of Duncombe*, 231 Iowa 907, 2 NW 2d 294, 304 (1942):

"No claim was made herein that the contract was unreasonable or disadvantageous to the town. Defendants cite *Keokuk Waterworks Co. v. Keokuk*, 224 Iowa 718, 277 NW 291, 299, where it is said (Quoting from 1 McQuillin, Mun. Corp., 2d Ed., Pg. 925): 'When the authority to exercise the power appears, wide latitude is allowed in its exercise, and, unless some abuse of power or a violation of organic or fundamental rights results, it will be upheld. A municipal corporation, when exerting its functions for the general good, is not to be shorn of its power by mere implication. The intention to restrict the exercise of its powers must be manifest by words so clear as to not to admit of two different or inconsistent meanings'."

See *Jackson v. Noel*, Civ. App. 37 SW 2d 787 (1931); *Cheney v. Board of Supervisors of Buffalo County*, 123 Neb. 624, 243 NW 881 (1932); *Entremont v. Whitsell*, 13 Cal. 2d 290, 89 P. 2d 392 (1939); *Harvey v. Iowa State Highway Commission*, 130 NW 2d 725, 724 (1964).

The Commission in its General Provisions as to Liability Insurance Covering Commissioners and State Owned Vehicles of June 18, 1965, as submitted to each bidder, sets out at Page 2, V, its own limitations as to awarding of the contract:

"The contract will be rewarded the lowest bidder, for amount of coverage and policy period selected by the contracting authority, based on grand total amount of the bid, except that consideration will be given to the financial responsibility of the bidder and subject to the approval of the Insurance Commissioner of Iowa."

The words "lowest bidder" and "financial responsibility" vest broad discretion with the Commission. The Commission may take into account the skill, ability, experience, reputation, faithfulness and regularity in discharge of duties, conscientious work, workmanship, performance and all other terms related to responsibility. The awarding of the contract is considered discretionary even when it must be exercised within the framework of a statutory description such as the "lowest responsible bidder", the decision as to who fits this test, in the absence of fraud, is not subject to judicial review. See *Commonwealth v. Mitchell,* 82 Pa. 343, 349 (1876); *People v. Kent,* 160 Ill. 655, 43 NE 760, 761 (1896); *Hutto v. State Board of Education* 165 S.C. 37, 162 S.E. 751, 753 (1932); *Pallas v. Johnson,* 100 Colo. 449, 68 P. 2d 559, 561, 110 ALR 1403 (1937), 10 Drake Law Review 61.

An important point to be made in the instant situation is that the contractor here is the insurance company and not the agent for such insurance company. Each of the four "bidders" in question here represented the same company and quoted identical bids. The Commission awarded the contract to the insurance company with the lowest bid; then exercised its discretion as to which of the four agents of the approved company would handle the contract. Bidding requirements in the issue before us are relative only to the contractor, not to the agents of the said contractor. *London & London Indemnity Co. v. Upper Darby Township* 28 Del. Co. Rep. (Pa.) 223, 30 Munic. L. Rep. 129 (1937), held that a statute requiring that all contracts or purchases made by a township involving expenditures in excess of a certain amount to be submitted on competitive bids, had no application to a contract of public liability insurance obtained through a broker, the Court saying:

"Requirements generally imposed on public authorities as to competitive bidding do not apply any more to an insurance broker or general insurance agent, in obtaining municipal insurances, than they do in the selection of an architect. Both are professional and personal services which the law does not recognize as necessary for competitive bidding, for, if it were otherwise, and as this municipality would desire us to hold in this action, then such a test would probably be the best that could be conceived for the obtaining of services of the least competent man and would be most disastrous to the material interest of a county."

See *Barnard v. Kandiyohi County, et al,* 213 Minn. 100, 5 NW 2d 317 (1942).

It is our opinion that this principle aplies to the instant case and the Commission could freely exercise its discretion as to which agent to handle the awarded contract and the circumstances of the instant case are not such as would show fraud or abuse of such discretion.

9.3

HIGHWAYS: Mobile Homes and House Trailers; Highways; Iowa State Highway Commission—Article I, Section 6 and Article III, Section 30 of the Iowa Constitution. §§321.469, 325.26(2)c, 327.15(3) and Section 2.2(9a, Rules and Regulations for the Issuance of Permits for the Operation and Movement of Vehicles of Excess Size and Weight. Regulation by the Iowa State Highway Commission for the issuance of permits for the operation and movement of ve-

hicles of excess size and weight, requiring that immediately after the first conviction of any violation of the permit rules, or motor vehicle laws of Iowa, the holder of a special permit to move a mobile home or house trailer shall be required to post a bond with the Commission, acknowledging the stipulations of the permit and agreeing to the forfeiture of said bond upon next conviction where the regulation on its face makes no attempt to correlate the amount forfeited with the damage done, and the regulation does not limit such forfeiture to violation of the laws of the State with respect to vehicles of excess weight and length, constitutes a penalty wherein power to impose such is legislative, not administrative.

December 7, 1965

Iowa State Highway Commission
Ames, Iowa

Gentlemen:

This office has been asked to render its opinion on the following question:

"Does §321.469 grant authority to the Iowa State Highway Commission to promulgate rules and regulations relative to the issuance of permits for the movement of mobile homes or house trailers, and in particular, does it authorize a rule requiring a bond with an automatic forfeiture provision designed so as to insure compliance with the stipulations of the permit or other motor vehicle laws of Iowa?"

It is the opinion of this office that §321.469 does not grant such authority to the Highway Commission, and that Section 2.2(9)a of the Iowa State Highway Commission's Rules and Regulations for the issuance of permits for the operation and movement of vehicles of excess size and weight does constitute a penalty in violation of Article 1, Section 6, and Article III, Section 30, of the Iowa Constitution.

Section 2.2(9)a states:

"Immediately after the first conviction of any of the permit rules or motor vehicle laws of Iowa, the holder of a special mobile home or house trailer permit, shall be required to post a bond in the amount of $500.00 with the Highway Commission, acknowledging the stipulation of the permit and agreeing to the forfeiture of said bond to the Commission for noncompliance of any of the stipulations of the permit or motor vehicle laws of Iowa. The bond shall be forfeited without prior notice on the next conviction of noncompliance of the terms of the permit or the motor vehicle laws of Iowa."

§321.469, 1962 Code of Iowa, states:

"The state highway commission or local authority is authorized to issue or withhold such permit at its discretion; or, if such permit is issued, to limit the number of trips, or to establish seasonal or other time limitations within which the vehicles described may be operated on the highways indicated, or otherwise to limit or prescribe conditions of operation of such vehicle or vehicles, when necessary to assure against undue damage to the road foundations, surfaces, or structures, *and may require such undertaking or other security as may be deemed necessary to compensate for any injury to any roadway or road structure.*" (Emphasis supplied)

The preceding code section imposes a duty on the Iowa State Highway Commission to require any such undertaking or other security as they may, in their discretion, deem necessary to compensate for any injury to any roadway or road structure. It is our opinion that the Highway

Commission could require a bond or an undertaking, or an insurance policy where the same is designed to provide the State with adequate compensation for the injury to its roadway or road structures as caused by the movement of mobile homes and house trailers of excess length or weight. *McLeland v. Marshall County,* 199 Iowa 1232, 201 N.W. 401 (1924), *Sandford Mfg. Co. v. Western Mut. Fire Ins. Co.,* 229 Iowa 283, 294 N.W. 406 (1940). Similar insurance requirements are found in §§325.26(2) and 327.15(3), 1962 Code of Iowa, by way of statutory regulation of "motor vehicles" and "motor trucks". It would appear, however, that Section 2.2(9)a is not a regulation reasonably calculated to accomplish this end. It is observed that the regulation makes no attempt to correlate the amount of the forfeiture with the quality of the violation, either with reference to distance traveled or relative amount of excess weight. For this reason the regulation does not constitute a penalty. It subjects the violator to extraordinary liability or liability not necessarily limited to the damage done to Iowa roads. *Stevenson v. Stoufer,* 237 Iowa 513, 21 N.W. 2d 287 (1946), 23 Am. Jur., Forfeiture and Penalties, Sections 27 and 29.

The regulation is subject to further objection in that it requires a forfeiture of the bond for ". . . noncompliance of any of the stipulations of the permit *or motor vehicle laws of Iowa* . . ." It would appear that a forfeiture could result not only where the permit holder violated the laws of Iowa, with reference to vehicles of excess weight and length, but would occur on the violation of any of the other various motor vehicle laws of Iowa. It is manifest that such a result would not be reasonably calculated to accomplish the statutory goal.

It would appear that the regulation is designed for the sole purpose of assuring compliance with the specifications of the permit, and not for the purpose of assuring the State receipt of compensation for damage done to its highways or structures as a result of the movement of these vehicles. It is the general rule that when a bond is given to a public body, as a condition of a license or other privilege, or conditioned upon compliance with the law, the full penalty of such bond may be recovered for a breach thereof, in the absence of express or implied provisions to the contrary in the statute or ordinance which prescribes the bond, or in the bond itself. 12 Am. Jur. 2d Bonds, Section 44 n.7, 103 A.L.R. Amount of Recovery on Bond to Public 405. It is noted that §321.469, supra, conveys no authority to the Highway Commission to require any forfeiture of a bond for violation of the stipulations of the permit. The Highway Commission may not require such except pursuant to a statute authorizing the issuance of the same. *City of St. Cloud v. Willenbring,* 195 Minn. 70, 261 N.W. 585, 103 A.L.R. 405 (1935).

For the foregoing reasons, it is the opinion of this office that Section 2.2(9)a of the Highway Commission's Rules and Regulations for the issuance of permits for movement of vehicles of excess size and weight imposes a penalty and the Highway Commission, an administrative body, has no power to provide such for violation of its rules or regulations. 42 Am. Jur., Public Administrative Law, Section 50.

9.4

Certified checks—23 U.S.C. 112(a): §541.188, 1962 Code of Iowa: Policy and Procedure Memorandum No. 21-6.3, §5. It is an unreasonable restriction on behalf of the Iowa State Highway Commission to require bidders to submit a certified check drawn on a solvent Iowa bank with their bid proposals. (Walton to Clauson, Chief Eng., Ia. Highway Comm., 5/27/65) #65-5-16

9.5

Interstate Highway System: Utilities—Title 23 U.S.C. §101(a); Title 23 U.S.C., §103(d); 23 U.S.C. §123; §306.10, 1962 Code of Iowa; Chapter 471, 1962 Code of Iowa; §306A.13, 1962 Code of Iowa; Policy and Procedure Memorandum No. 30-4, §3a(3); Policy and Procedure Memorandum No. 30-4, §2(a). The Iowa State Highway Commission is obligated to reimburse a utility for removal and/or relocation costs on a nonbetterment basis from private property or private right of way, if such removal and/or relocation is necessitated for construction of the interstate Highway System, as defined in 23 U.S.C., §101. (Walton to Clauson, Highway Comm., 6/25/65) #65-6-7

9.6

Access Control, Highways, Primary Road Extensions, Highway Commission—§§306.1, 306.2(1), 306.2(7), 306A.2, 306A.3, 306A.4 and 307.5, 1962 Code of Iowa, 62 I.D.R. 262, 23 U.S.C. §103(d). The Iowa State Highway Commission has the exclusive authority to control access on those portions of National Interstate and Defense Highway Systems located within the corporate limits of cities or towns and may also control access on extensions of Iowa primary highways within the corporate limits of cities or towns where it does so in co-operation with the respective cities or towns. (Walton to Goeldner, Keokuk County Attorney, 10/27/65) #65-10-15

9.7

Board of Supervisor's duty to repair and maintain—§§4.1(5), 306.2, 306.3, 309.67, 1962 Code of Iowa. Board of Supervisor's duty to repair and maintain a dedicated highway is dependent upon whether there was an acceptance of the dedication by the public; such acceptance being a prerequisite to the existence of a public road as defined in §§4.1(5) and 306.2, 1962 Code of Iowa. (Walton to Hughes, Attorney at Law, 1/25/66) #66-1-6

CHAPTER 10

INSURANCE

STAFF OPINIONS

LETTER OPINIONS

10.1

INSURANCE: Chattel loan licensees and their power to write insurance and issue certificates—§§514A.3 and 552.1, 1962 Code of Iowa; Senate File 146, Acts of the 61st G.A. Chattel loan licensees under Senate File 146 have no authority to write insurance without being licensed under §522.1. The authorized loans that a licensee may make are those which concern credit life insurance and credit accident and health insurance. A small loan licensee may no longer write credit insurance on a group plan whereby a policy is issued to the lender and certificates are given to the borrower.

August 4, 1965

Mr. Robert J. Link, Chief Counsel
Insurance Department of Iowa
State Office Building
L O C A L

Dear Mr. Link:

You have requested an opinion in regard to Section 14, Senate File 146, Acts of the 61st General Assembly, which amends Chapter 536 of the 1962 Code of Iowa in regard to small loans.

I.

Your first question reads as follows:

"Since the first sentence of Section 14 seems to prohibit the sale or offer to sell any insurance except that specifically authorized by the section and since there is no reference in the balance of the section to any type of insurance other than credit life insurance and credit accident and health insurance, does this mean that licensees under the Act are prohibited from writing other types or lines of insurance in connection with loans made under the provisions of Chapter 536?"

The first part of Section 14 of Senate File 146 provides as follows:

"No licensee shall, directly or indirectly, sell or offer for sale any insurance in connection with any loan made under this chapter except as and to the extent authorized by this section . . . ."

Section 522.1 of the 1962 Code of Iowa provides as follows:

"No person shall directly or indirectly, act within this state as agent, or otherwise, in receiving or procuring applications for insurance, or in doing or transacting any kind of insurance business for any company or association, other than county mutuals or fraternal beneficiary associations until he has procured from the commissioner of insurance a license authorizing him to act for such company or association as agent."

It is apparent from the above quoted portion of Senate File 146 and Section 522.1, that only a licensed agent may write insurance unless authorized by Section 14 of Senate File 146. An examination of the entire section does not contain any authority for chattel loan licensees, under Chapter 536 of the 1962 Code of Iowa, as amended, to sell or offer for sale any insurance without obtaining the insurance licenses required in Section 522.1.

The second sentence of Section 14 of Senate File 146 states:

". . . *Life, accident and health insurance, or any of them,* may be written by a licensed insurance agent upon or in connection with any loan for a term not extending beyond the final maturity date of the loan contract but only upon one (1) obligor on any one (1) loan contract." (Emphasis supplied)

An examination of the rest of Section 14 of Senate File 146 does not indicate any other types of insurance which are authorized by that section. That authority is necessary under the first sentence of Section 14 which provides in part as follows:

"No licensee shall, directly or indirectly, sell or offer for sale any insurance in connection with any loan made under this chapter *except as and to the extent authorized by this section* . . . ." (Emphasis supplied)

The statute is self limiting as to what policies may be written and there is a well settled legal doctrine that the express mention of one item in a statute implies the exclusion of others. *North Iowa Steel Co. v. Staley,* 253 Iowa 355, 112 N.W. 2d 364 (1962).

Therefore, our answer to your first question is that the licensees under Senate File 146 must be licensed under Section 552.1 to write insurance in connection with a chattel loan and are only authorized to write credit life insurance and credit accident and health insurance.

II.

Your second question is as follows:

"As originally passed by the Senate after the word 'policy' in line 35, there appeared the words 'certificate, or other evidence thereof'. This language was deleted by the House and the Senate concurred with the change. Does this mean that small loan licensees may no longer write credit insurance on the group plan whereby a policy is issued to the lender and certificates are issued to each borrower? If the answer to this question is in the negative, what kind of 'policy' must delivered to the borrower?"

Section 14 of Senate File 146 provides in part as follows:

". . . licensee shall cause to be delivered to the borrow a *copy of the policy* within fifteen (15) days from the date such insurance is procured." (Emphasis supplied)

The phrase, "a copy of the policy" does not appear to be ambiguous. Section 514A.3 of the 1962 Code of Iowa sets forth requirements for a "policy" of individual health and accident insurance in part as follows:

> "1. Required provisions. Except as provided in subsection 3 of this section each such policy delivered or issued for delivery to any person in this state shall contain the provisions specified in this subsection in the words in which the same appear in this section; provided, however, that the insurer may, at its option, substitute for one or more of such provisions corresponding provisions of different wording approved by the commissioner which are in each instance not less favorable in any respect to the insured or the beneficiary. Such provisions shall be preceded individually by the caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the commissioner may approve."

* * *

Section 514A.3 contains approximately twenty-nine subsections and covers almost four pages of the 1962 Code of Iowa.

The United States District Court, Northern District of Iowa, in the case of *Commercial Ins. Co. of Newark, v. Burnquist,* 105 F. Supp. 920 (1952), at page 931, pointed out as follows that a certificate issued under a group policy is not to be considered a policy of insurance:

> "The certificate itself does not purport to be part of the contract (of insurance). It merely certifies that the member to whom it was issued is insured under and subject to the conditions and limitations of the group policy, and then sets out the provisions of the master policy . . . . *The master policy rather than the certificate sent to the insured member is generally held to be the contract of insurance.*" (Emphasis supplied)

32A Words and Phrases under the topic "Policy of insurance" and under the subtopic "Group Policy." has the following citation at page 495:

> " 'Policy of insurance,' within statute providing that policy shall contain entire contract, was group life policy paid for by employer, and not certificate issued to employee thereunder. LSA-R.S. 22:170, 22:173, 22:174, 22:259, 22:618, 22:626. *Austin v. Metropolitan Life Ins. Co.* La.App. 142 So. 337, 338."

There is no ambiguity and the law is clear as to what a "policy" is and what a "certificate" is. Therefore, it is my opinion that a small loan licensee may no longer write credit insurance on the group plan whereby a policy is issued to the lender and certificates to the borrower. The individual policies must meet the requirements of Chapter 514A, which refer to individual health and accident policies, and must contain the entire contract.

10.2

INSURANCE: Tax Sheltered Annuities—Ch. 294, 1962 Code of Iowa, as amended by S.F. 276, 61st G.A. 1(a). S.F. 276 authorizes only individual annuity contracts, 1(b). "Annuity" includes incidental life insurance protection. 2. School districts are not authorized to limit number of insurance companies. 3. Amount employee uses to purchase annuity, but not incidental life insurance protection, is excluded from Iowa "net income." 4. Amount deducted from salary is includable in IPERS base.

August 17, 1965

Hon. Tom Riley
State Senator, Linn County
1215 Merchants National Bank Bldg.
Cedar Rapids, Iowa

Dear Senator Riley:

We acknowledge receipt of your letter of July 7, 1965, in which you state as follows:

"On July 4, 1965, Senate File 276, which permits public schools to enter into tax sheltered annuity arrangements with their employees, will become law.

"The following questions arise as to the interpretation of this amendment to Chapter 294 of the 1962 Code of Iowa, and your opinion is requested:

"1. It is provided that the school district may purchase an 'individual annuity contract' for an employee. Two questions arise from the use of the quoted words:

"(a) Does the word 'individual' mean that only individual annuity policies (as distinguished from group annuity policies) can be purchased by the school?

"(b) Does the use of the word 'annuity' mean that only policies which contain no insurance element may be purchased by the school, even though the term 'tax sheltered annuity' is defined under the federal income tax law to include insurance policies in which the death benefit does not exceed 100 times the prospective retirement income?

"2. It is provided that at the request of an employee a school district 'may' purchase an individual annuity contract . . . from such insurance organization . . . 'as the employee may select . . .'. Assuming that a school district agrees to enter into a contractual arrangement with its employees for the purchase of tax sheltered annuity policies, may it select or place a limit on the number of the insurance companies to which it will remit premiums?

Two other questions with respect to the application of the Iowa law arise as a result of the amendment to Chapter 294, and your opinion also is requested with respect to these matters.

"3. Assuming that proper arrangements are made between the public schools and its employees whereby the amount of the premium on the tax sheltered annuity policy purchased by the school for the employee will be excludable from the current taxable income of the employee under the provisions of Section 403(b) of the Internal Revenue Code of 1954, will the amount of the premiums also be excluded from the current taxable income of the employee for the Iowa income tax purposes under Section 422.7 of the 1962 Code of Iowa?

"4. Chapter 97B of the 1962 Code of Iowa provides for the imposition of a tax on both the employer and the employee of 3½ percent of the first $4800 of the wages paid by the employer to the employee, such tax to be remitted to the Iowa Employment Security Commission to fund the Iowa Public Employees' Retirement System. Assuming that a public school and its employees have entered into a proper contractual arrangement for the reduction of the employee's pay for the purchase of a tax sheltered annuity policy, and that the 'take home' pay of the employee would thereby be reduced

to an amount less than $4800, is the tax imposed on the gross amount of the employee's salary before the pay reduction or the net salary remaining after the reduction?

Your advice with respect to these matters will be sincerely appreciated."

Senate File 276 of the 61st G.A., 1965, states as follows:

"Section 1. Chapter two hundred ninety-four (294), Code 1962, is hereby amended by adding thereto the following:

"At the request of an employee through contractual agreement a school district may purchase an individual annuity contract for an employee, from such insurance organization authorized to do business in this state and through an Iowa licensed insurance agent as the employee may select, for retirement or other purposes and may make payroll deductions in accordance with such arrangements for the purpose of paying the entire premium due and to become due under such contract. The deductions shall be made in the manner wihch will qualify the annuity premiums for the benefit afforded under section four hundred three 'b' (403b) of the federal internal revenue code and amendments thereto."

Section 403(b) of the Internal Revenue Code states, in part, as follows:

"403(b) Taxability of Beneficiary Under Annuity Purchased By Section 501(c) (3) Organization or Public School.—

"(1) General Rule.—If—

(A) an annuity contract is purchased—

(i) for an employee by an employer described in section 501(c) (3) which is exempt from tax under section 501(a), or

(ii) for an employee (other than an employee described in clause (i)), who performs services for an educational institution (as defined in section 151(e) (4)), by an employer which is a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing,

(B) such annuity contract is not subject to subsection (a), and

(C) the employee's rights under the contract are nonforfeitable, except for failure to pay future premiums,

then amounts contributed by such employer for such annuity contract on or after such rights become non-forfeitable shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such amounts does not exceed the exclusion allowance for such taxable year. The employee shall include in his gross income the amounts received under such contract for the year received as provided in section 72 (relating to annuities)."

PREFACE

Section 403(b) of the Internal Revenue Code, (U.S.C.A., Title 26, par. 403(b) provides for a tax sheltered annuity which is, in effect, a voluntary individual pension plan whereby employer contributions (provided by the employee through a bona fide salary reduction or by foregoing a salary increase) are used to fund the purchase of an annuity on the employee's life. These contributions, if within certain limitations, are not currently taxable to the employee.

The primary provisions needed to make an annuity program available to a school staff are as follows:

(a) The annuity contract must be purchased by the school.

(b) The annuity contract must be nonforfeitable (all rights vested with the employee), except for failure to pay premiums.

(c) Each participating employee must direct the school to purchase his annuity and to withhold the premium from his salary. The amount of annuity which may be purchased is limited to a percentage of contract salary. The maximum allowable percentage may vary by using a years-of-service formula.

New and amended regulations under §403 IRC were adopted December 24, 1964, by T.D. 6783, 1965-5 I.R.B. 11. Essentially, these regulations provide that employees performing services for public schools and §501(c) (3) IRC organizations need not include in income the value of employer-purchased annuities until benefits are paid, even though the plan is not qualified, subject to a limitation of 20% of salary for all annuity plan contributions, both past and present. The new regulations provide that, with respect to post-1958 plans, such an employee may (but no more than once a year and prospectively only) elect a lower salary, and have the difference applied toward an annuity contract. The annuity contract may be either individual or group and may provide incidental life insurance.

1(a). With respect to the first part of your first question, Section 4.1(2), Code of Iowa, 1962, points out that "words and phrases shall be construed according to the context and approved usage of the language . . .". It is a well recognized rule of construction that the legislative intention is to be deduced from the language used, and the language is to be construed according to its plain and ordinary meaning. *Meredith Pub. Co. vs. Iowa Employment Security Comm.*, 232 Iowa 666, 6 N.W. 2d. 6 (1942); *Byers vs. Iowa Employment Security Comm.*, 247 Iowa 830, 76 N.W. 2d. 892 (1956). Thus, when S.F. 276, Laws of the 61st G.A., 1965, states that "a school district may purchase an *individual* annuity contract for an employee," we construe the word to mean an individual annuity policy as distinguished from a group annuity.

T.D. 6783, 26 CFR 1.403(b)-1(c) (3) clearly allows employee participation on either an individual or group basis. Had the General Assembly enacted enabling legislation authorizing group plans, such group plans could qualify for the special treatment accorded under federal tax law.

1(b). Prior to the amended regulations adopted December 24, 1964, by T.D. 6783 (Internal Revenue Bulletin No. 1965-5, February 1, 1965, p.11), the Internal Revenue Service defined annuity in a very narrow sense. There could be no pure insurance protection at any time. Rev. Rul. 55-639 is quoted in part as follows:

> "Annuity contract defined.—An annuity contract within the meaning of Code Secs. 402 and 403 is one which provides primarily for periodic installment payments to the annuitant named. Under it, the death benefits at any time cannot be more than the larger of the reserve or the total premiums paid for the annuity benefits. *Thus, in any annuity contract, there is no pure insurance protection at any time.* The fact that the contract may provide for return of total premiums paid in the case of death, and such total may exceed the reserve in early years, will not be considered as providing insurance protection." . . .

However, T.D. 6783, 26 CFR 1.403(b)-1(c) (3) provides for incidental life insurance protection as follows:

"(3) *Life insurance protection.* An individual contract issued after December 31, 1962, or a group contract, which provides incidental life insurance protection may be purchased as an annuity contract to which paragraph (a) or (b) of this section applies. For the rules as to nontransferability of such contracts issued after December 31, 1962, see §1.401.9. For the rules relating to the taxation of the cost of the life insurance protection and the proceeds thereunder, see §1.72-16. Section 403(b) is not applicable to premiums paid after October 26, 1965, for individual contracts which were issued prior to January 1, 1963, and which provide life insurance protection."

Revenue Ruling 60-83 states in essence that in a pension or *annuity plan* funded with insurance contracts, the life insurance benefit is deemed to be incidental where the insurance benefit is no greater than one hundred times the monthly annuity, e.g., $1000.00 of life insurance protection for each $10.00 of monthly annuity. Therefore, we conclude that the new regulations allow the individual annuity contract to include incidental life insurance protection. Thus, it is our opinion that an "annuity contract" as contemplated by S.F. 276 may include incidental life insurance protection, as limited by T.D. 6783.

2. It is our opinion that S.F. 276 does not authorize school districts to select or place a limit on the number of insurance companies to which it will remit premiums. The tax sheltered annuity program has been set up for the benefit of the school teacher and other employees performing services for public schools. S.F. 276 specifically states ". . . a school district may purchase an individual annuity contract for an employee from such insurance organization authorized to do business in this state and through an Iowa licensed insurance agent as the *employee may select* . . .". Thus, the employee may select the insurance agent and company. He is limited only by the legislative pronouncement that the agent must be licensed in Iowa and his company must be authorized to do business in the State of Iowa. The school district must ". . . make payroll deductions in accordance with such arrangements . . .".

3. With reference to your third question, Section 422.7, Code of Iowa, 1962, states in part as follows:

"422.7 ('Net Income'—how computed.

"The term 'net income' means the adjusted gross income as computed for federal income tax purposes under Internal Revenue Code of 1954, with the following adjustments . . .".

Section 403(b) of the Internal Revenue Code (quoted above in full) declares in essence that employees performing services for public schools need not include in their gross income the value of the employer-purchased annuity until benefits are paid so long as the amount does not exceed the exclusion allowance for the taxable year.

It is our opinion that since the amount the employee uses to purchase the annuity is not included in his gross income for federal income tax purposes, it would also not be included in the "net income" under section 422.7, supra.

The tax consequences of the life insurance protection are discussed in 26 CFR 1.72-16. Any amount paid by the employee to provide incidental life insurance protection is considered life insurance premiums and is includable in the gross income of the employee for income tax purposes. 26 CFR 1-72-16(b) (4).

4. To answer your final question, we look to Iowa Code Sections 97B.11 and 97B.41, as amended by Chapter 96, Laws of the 60th G.A., 1963:

"97B.11 Tax on employer and employee.

"In addition to all other taxes, there is hereby levied upon each employer, as defined in section 97B.41 and also upon each employee, as defined in section 97B.41, a tax equal to three and one-half percent of the wages paid by the employer to the employee for any service performed after June 30, 1953, while such employee is a member of the system."

"97B.41 Definitions. When used in this chapter:

"1. For the purpose of this chapter the term 'wages' means all remuneration for employment; including the cash value of remuneration paid in any medium other than cash, but not including the cash value of remuneration paid in any medium other than cash necessitated by the convenience of the employer, such amount as agreed upon by the employer and employee and reported to the commission by the employer shall be conclusive of the value of remuneration in a medium other than cash; except that such term shall not include . . .".

"(b) For the calendar year beginning on January 1, 1964, and each calendar year thereafter, that part of the remuneration for employment which exceeds forty-eight hundred dollars ($4,800.00) in each such calendar year."

Under the provisions of Section 403(b) of the Internal Revenue Code of 1954 as amended, the employee performing services for the public schools can voluntarily have the district deduct a portion of his cash pay or agree to a salary reduction so as to use this portion of his pay to purchase an annuity. It is our opinion that the amounts deducted from the employee's pay and paid to the insurance carrier are creditabie as wages for the purposes of Section 97B.11 and 97B.41 as amended, supra.

The term "wages" is defined in Section 97B.41 as amended, supra, as all remuneration for employment, and includes all such remuneration except for specific types of payments which are expressly excluded. The act of the participating employee in authorizing a reduction of current wage payments is a voluntary act in respect of the compensation otherwise payable. Thus, the annuity purchase amounts are not excludable from "wages" for the purposes of Section 97B.11 and 97B.41 as amended, supra. With a similar set of facts, the Social Security administration in SSR 64-59 decided that the amounts deducted and paid to the carrier by the employer under Section 403(b) of the Internal Revenue Code are not excluded from the term "wages" as defined by the Social Secuirty Act.

It should be noted that I have had the assistance of Thomas W. McKay, Special Assistant Attorney General assigned to the Iowa State Tax Commission, and Jerome R. Smith, Assistant Attorney General assigned to the Iowa State Tax Commission, in the preparation of this opinion, and any further inquiry with regard to this matter should be directed to them through this office.

10.3

INSURANCE: Taxation: Premium paid by County Mutual Insurance Associations—§432.1, as amended by Chapter 401, Acts of 61st G.A. The premium tax for a county mutual association shall be paid at the time of making the annual statement. County mutual insurance associations are liable for premium tax for all premiums received during the calendar year 1965, even though Chapter 401 was not effective until July 4, 1965.

December 20, 1965

Mr. Robert J. Link, Counsel
Insurance Department of Iowa
State Office Building
LOCAL

Dear Mr. Link:

You have asked the following two questions in regard to the effect of Chapter 401, Acts of the 61st General Assembly, as it applies to county mutual insurance associations:

"1. On what date, annually, is the premium tax required to be paid by county mutual associations?

"2. On the date taxes are due in 1966, are county mutual associations liable for the tax on all premiums received during the calendar year, 1965?"

Section 432.1 of the 1962 Code of Iowa reads in part as follows:

"Every insurance company or association of whatever kind of character, not including fraternal, beneficiary associations, county mutual 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 . . . ."

This section was affected by Sections 18 and 31 of Chapter 401 of the Acts of the 61st General Assembly, which are as follows:

"Sec. 18. Premium tax. After January 1, 1966, every association doing business under this chapter shall be required to pay to the treasurer of the state as taxes an amount equal to the following:

"Two percent of the gross amount of premiums received during the preceding calendar year, after deducting the amount returned upon the canceled policies, certificates and rejected applications; and after deducting premiums paid for windstorm or hail reinsurance on properties specifically reinsured; provided, however, that the reinsurer of such windstorm or hail risks shall pay two percent of the gross amount of reinsurance premiums received upon such risks after deducting the amounts returned upon canceled policies, certificates and rejected applications."

"Sec. 31. Section four hundred thirty-two point one (432.1), Code 1962, is amended by striking from line four (4) thereof, the words 'county mutual associations', and by adding to said section after the word 'following' in line nine (9) the words ', except that the premium tax applicable to county mutual associations shall be governed by section eighteen (18) of this Act'."

Section 432.1, because of the amendatory language of Section 31 will now read as follows:

"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, except that the premium tax applicable to county mutual association shall be governed by section eighteen (18) of this Act:

"1. Two percent of the gross amount of premiums received during the preceding calendar year . . . ."

I.

Section 432.1, as amended by Section 31, must be read together with Section 18 as to what date the premium tax is to be paid by a county mutual association. You will note that county mutual associations are now included in the words "every insurance company" who shall "at the time of making their annual statment as required by law" pay their taxes. A reading of the statute indicates that once this part of Section 432.1 is reached, the statute then is in regard to what amount is to be paid. The exception added by Section 31 points out that Section 18 provides what the premium taxes of county mutual associations shall be and in what amount.

It is my opinion that the premium tax for a county mutual association shall be paid at the time of making the annual statement. The first phrase of Section 432.1 points out when the tax should be paid, and the second phrase is in regard to the amount of premium tax. Section 515.42 of the 1962 Code of Iowa provides that non-life companies shall have their certificates of authority expire on the 1st day of April after their issuance, and they shall be renewed annually. Section 515.63 provides that the annual statement for companies licensed under that chapter are due March 1. Therefore, it is my opinion that the premium tax is to be paid on or before the 1st day of March by non-life county mutuals.

II.

You have inquired as to whether county mutual associations are responsible for a premium tax for the entire year of 1965. Section 18, quoted above, is controlling. It states that after January 1, 1966, premium tax shall be paid on those premiums "received during the preceding calendar year." Of course, the tax cannot be calculated until the year 1965 is over. The Supreme Court of Iowa has held premium taxes of this nature are payable after the end of that year because their total amount is not ascertainable until that time. *State v. National Life Insurance Co.*, 223 Iowa 1301, 275 N.W. 26 (1938). This would be explanatory of the language in Section 18 where the requirement to pay is said to be after January 1, 1966. What is controlling is the fact that the legislature plainly called for payment of premiums received "during the preceding calendar year." After January 1, 1966, this must be the year 1965.

The question as presented is whether this is a proper statute as it provides for taxation for an entire year where the statute became effective during the middle of the year. It should be pointed out that this is a case of revocation of an exemption. There is clear authority that a grant of tax exemption is a gratuity and that it is always competent for the legislature to repeal an exemption. 84 C.J.S., Taxation, Section 237; *Shiner v. Jacobs*, 62 Iowa 392, 17 N.W. 613 (1883).

It has been held that a citizen has no vested right in statutory privileges or exemptions. Cooley, Constitutional Limitations (8th Ed.) (1927) p. 792. It has also been held that tax statutes may be retroactive if the legislature clearly so intends. The reasonableness of each retroactive tax statute will depend upon the express circumstances. Sutherland Statutory Construction, 3rd Edition, Section 2211.

The Supreme Court of the United States in the case of *United States v. Hudson*, 299 U.S. 498, 81 L.Ed. 370, 57 S.Ct. 309 (1937) made the following statement in regard to income taxes:

"As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or *within so much of the calendar year as preceded the enactment;* and repeated decisions of this court have recognized this practice and sustained it as consistent with the due process of law clause of the Constitution." (Emphasis supplied)

The above cited language applies to the situation that you present. Therefore, it is my opinion that county mutual associations are liable for premium tax on all premiums received during the calendar year 1965, even though Chapter 401, Acts of the 61st General Assembly, was not effective until July 4, 1965.

10.4

INSURANCE: Authorization of Fair Board to purchase—§§517A.1 and 173.14, 1962 Code of Iowa as amended. Iowa State Fair Board may purchase property and liability insurance.

December 23, 1965

Mr. Kenneth Fulk, Secretary
State Fair Board
State House
L O C A L

Dear Mr. Fulk

This is to acknowledge receipt of your recent letter in which you request an opinion of this office in regard to the following questions:

"1. Is it within the scope of the law for the Iowa State Fair Board to invest in wind and fire insurance for property on the Iowa State Fairgrounds?

"2. Liability insurance?

"3. Is wind and fire, and or, liability insurance encouraged or required by law?"

Section 517A.1 of the 1962 Code of Iowa, as amended, is the controlling statute governing the purchase of liability insurance. That section reads as follows:

"*All state commissions, departments, boards, and agencies* and all commissions, departments, boards, districts, municipal corporations and agencies of all political subdivisions of the state of Iowa not otherwise authorized *are hereby authorized and empowered to purchase and pay the premiums on liability, personal injury and property damage insurance covering all officers, proprietary functions and employees of such public bodies,* including operating an automobile, truck, tractor, machinery or other vehicles owned or used by said public bodies, which insurance shall insure, cover and protect against individual personal, corporate or quasi corporate liability that said bodies or their officers or employees may incur." (Emphasis supplied)

As can readily be seen from a cursory reading of this section all commissions, departments, boards and other agencies of the state and its political subdivisions are authorized and empowered to buy liability insurance covering and insuring their officers and employees while in the performance of their duties.

There is no statutory code section which specifically makes provision for the purchase of indemnity insurance such as would be afforded by a wind or fire insurance policy. In insurance parlance an indemnity insurance contract or policy is one which provides for indemnity against loss, while a liability insurance contract or policy is one which indemnifies against liability on account of injuries to the person or property of another. 44 C.J.S. "Insurance" §19. Section 173.14 of the 1962 Code of Iowa, as amended, however, places the custody and control of the fairgrounds buildings and equipment in the fair board and imposes upon the board the duty of maintaining the buildings and equipment. Because the purchase of indemnity insurance is a normal and reasonable method of affording protection against a partial or complete loss of buildings in one's custody and control, it appears to be clear that the purchase of fire and wind indemnity insurance by the board is sufficiently within the scope of powers given by the latter statutory section.

In discussing your third question submitted, I refer you to 54 OAG 86, an opinion of this office interpreting Chapter 517A of the code, written October 5, 1953. That opinion states in part:

> "It is to be noted that providing this insurance coverage is not a *duty* imposed upon the several state departments, commissions, etc. By the terms of the Act such departments, commissions, etc. are *authorized* to purchase the coverage therein prescribed and to pay the premiums thereon. This difference between the duty imposed and authority conferred explains the intention of the legislature in the enactment of this Act . . ."

It would appear that liability insurance is not required by law but rather encouraged to the extent that the legislature has authorized its purchase.

In summary then, based on the foregoing, I am of the opinion that the State Fair Board has the authority to invest in liability insurance and in fire and wind indemnity insurance.

10.5

INSURANCE: Tax Sheltered Annuities—Ch. 294, 1962 Code of Iowa, as amended by S.F. 276, 61st G.A. A board of education, having elected to accept the annuity program, may not restrict the contracts to pure annuities without incidental life insurance protection.

October 12, 1965

Hon. Francis Messerly
State Senator
R.R. No. 3
Cedar Falls, Iowa

Dear Senator Messerly:

This is in reply to your letter dated October 5, 1965, in which you inquire if a board of education may accept a request for a tax sheltered annuity but refuse to allow the annuity contract to include any incidental life insurance protection. For a broad discussion of this subject matter, we invite your attention to an opinion of the Attorney General dated August 17, 1965, addressed to State Senator Tom Riley, a copy of which is enclosed.

With regard to the specific question posed in your letter, we have consulted the Iowa Insurance Department concerning the types of policies which have been approved for writing in Iowa. A number of

companies having on file contracts qualifying for tax sheltered treatment write only policies containing incidental life insurance features. Thus, a school board imposed limitation of the type of contract which the employee may select would necessarily put certain companies and agents "out of the market." This would be contrary to the legislative mandate of S.F. 276, 61st G.A., which provides in pertinent part:

> . . . a school district may purchase an individual annuity contract for an employee, from such insurance organization authorized to do business in this state and through an Iowa licensed insurance agent *as the employee may select* . . . (emphasis supplied)

It is our opinion that a board of education, having elected to accept the annuity program, may not restrict the contracts to pure annuities without incidental life insurance protection.

10.6

INSURANCE: **Group credit life insurance on bank deposit**—§509.1(2), 1962 Code of Iowa. Customers of a bank, who maintain savings accounts, are not eligible to purchase group life insurance in an amount equal to their deposit.

March 8, 1966

Mr. Robert J. Link
First Deputy Commissioner
Insurance Department of Iowa
State Office Building
LOCAL

Dear Mr. Link:

You have submitted the following question:

> "Are the customers of a bank, who maintain savings accounts, eligible to purchase group life insurance in an amount equal to their deposit in the bank?"

The statute which applies to the issuance of group credit life insurance is Section 509.1(2) which reads as follows:

> "509.1 Form of policy. No policy of group life, accident or health insurance shall be delivered in this state unless it conforms to one of the following descriptions: * * *
>
> "2. A policy issued to any one of the following to be considered the policyholder:
>
> "a. An advisory, supervisory, or governing body or bodies of a regularly organized religious denomination to insure its clergymen, priests, or ministers of the gospel.
>
> "b. A teachers' association, to insure its members.
>
> "c. A lawyers' association to insure its members.
>
> "d. A volunteer fire company, to insure all of its members.
>
> "e. A fraternal society or association, or any subordinate lodge or branch thereof, to insure its members.
>
> "f. *A common principal of any group of persons similarly engaged between whom there exists a contractual relationship, to insure the members of such group.*

"g. An association, the members of which are students, teachers, administrators or officials of any college, to insure the members thereof. For the purpose of this paragraph the students, teachers, administrators or officials of or for any such school or college shall constitute an association. * * *" (Emphasis supplied)

I have italicized the key language which sets the requirements that must be met in order for your question to be answered in the affirmative.

It is possible that a bank could be considered to be "a common principal" as this office in its opinion of November 19, 1959, the headnote of which is cited as 60 OAG 140, stated that a credit union could be a principal to its member depositors. However, a bank customer is different than a credit union member. We must determine whether or not bank depositors that maintain savings accounts are a "group of persons similarly engaged between whom there exists a contractual relationship."

The nature of a bank depositor is spelled out in 9 Corpus Juris Secundum, Banks and Banking, at Section 267c as follows:

"The primary duty of a bank is to its depositors, and it has been said that the contract between a bank and a depositor is not materially different from any other contract by which one person becomes bound to take charge of and repay another's funds. The relation between a bank and a depositor may be dual in character, the bank being the depositor's debtor with respect to one thing and his agent with respect to another, or his debtor at one time and his agent at another; and while the relation between the bank and a depositor with respect to a general deposit is generally regarded as that of debtor and creditor, yet in another sense the depositor is the owner of the deposit, in that he can demand repayment at any time."

It would require a straining of the meaning of "similarly engaged" to say that, because of the fact of a savings account, the depositors would have a common interest comparable to the interests which are required under Section 509.1(2). In the credit union situation which was discussed in the opinion cited above, Section 553.5 of the 1958 Code of Iowa was referred to which required credit union organizations to be limited to groups having a common bond of occupation or association or to be limited to neighborhoods, communities, or rural districts. There is no such restriction on banks.

Because of the credit union arrangement whereby the depositors became members, it was the Attorney General's opinion that there was a contractual area between the members of the credit union. I know of no similar situation which exists between a bank and its depositor. There is a contractual relationship between the depositor and the bank, but there is no membership or any other similar arrangement whereby contractual relationship between the depositors exists. Therefore, even though a bank could be considered to be a common principal, and even if a strained construction might be argued where it might be said that the depositors were similarly engaged, a contractual relationship between the depositors does not exist which is required by Section 509.1(2).

Therefore, it is my opinion that the customers of a bank who maintain a savings account are not eligible to have a group policy issued to the bank to insure the depositors in an amount equal to their deposit as no contractual relationship exists between these depositors which is required by Section 509.1(2).

10.5

Tax Sheltered Annuities—Chapter 294, 1962 Code of Iowa, as amended, by S.F. 276, Acts of the 61st G.A. A board of education, having elected to accept the annuity program, may not restrict the contracts to pure annuities without incidental life insurance protection. (McKay to Messerly, State Senator, 10/12/65) #65-10-7

10.6

Group credit life insurance on bank deposit—§509.1(2), 1962 Code of Iowa. Customers of a bank, who maintain savings accounts, are not eligible to purchase group life insurance in an amount equal to their deposit. (McCarthy to Link, First Deputy Insurance Commissioner, 3/8/66) #66-3-1

CHAPTER 11

LABOR

STAFF OPINIONS

LETTER OPINIONS

11.1

LABOR: Standards for state apprentice programs—§§91.18 and 96.12, 1962 Code of Iowa, House File 263, Acts of the 61st G.A. The Labor Commissioner and Bureau of Labor have no statutory authority to promulgate equal opportunity standards for state apprenticeship programs in an attempt to cooperate with "Title 29—Labor, Subtitle A, Office of the Secretary of Labor, Part 30—Nondiscrimination in Apprenticeship and Training."

June 9, 1965

Mr. Dale Parkins
Commissioner of Labor
State of Iowa
L O C A L

Dear Mr. Parkins:

Receipt is acknowledged of your letter of January 14, 1965, wherein you requested an opinion concerning the authority of your office to promulgate equal opportunity standards for the state apprenticeship programs in an effort to cooperate with "Title 29—Labor, Subtitle A, Office of the Secretary of Labor, Part 30—Nondiscrimination in Apprenticeship and Training." In your letter you asked the following questions:

"1. Since I do not have legislative authority regarding apprenticeship activities can we establish equal opportunity standards in the name of the state as requested by the Secretary?

2. Does the long standing position of the Apprenticeship Council within the state give it sufficient status to perform this function?

3. As Commissioner of Labor can I issue a directive setting forth equal opportunity standards in cooperation with the Secretary of Labor?

4. If not would an executive order from the Governor provide me with the authority to issue a directive covering equal opportunity standards?"

In response thereto, it is the opinion of this office that the Bureau of Labor has no authority to promulgate such equal opportunity standards in a cooperative effort. A state board is an agency of the state. The members of the board, while in discharge of their duties, stand in place of the state and their action is the action of the state. But such members have only the specific power and authority as set out in the enabling statutes. *State v. Cameron*, 177 Iowa 262, 158 N.W. 470, (1916).

Iowa Code Section 91.18 provides:

"The state bureau of labor is hereby designated and constituted the agency of the state for the purpose of such act (29 USC, §49 et seq.) with full power to co-operate with all authorities of the United States having powers or duties under such act and to do and perform all things necessary to secure to the state the benefits of such act in the promotion and maintenance of a system of public employment offices."

This section has been superseded by Iowa Code Section 96.12 which provides:

"1. Duties of commission. The employment security commission shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this chapter and for the purpose of performing such duties as are within the purview of the Act of Congress entitled 'An Act to provide for the establishment of a national employment system and for co-operation with the states in the promotion of such system, and for other purposes', approved June 6, 1933, as amended, and known as the Wagner-Peyser Act (48 Stat. L. 113; 29 USC §49). *All duties and powers conferred upon any other department, agency, or officer of this state relating to the establishment, maintenance, and operation of free employment offices shall be vested in the commission.*" (Emphasis added)

As the above section indicates, the later enactment has the effect of impliedly repealing the state bureau of labor's power in this area by the employment security commission. Thus, the conclusion is inescapable that the Bureau of Labor has no authority to promulgate such equal opportunity standards.

It should also be pointed out that "Title 29—Nondiscrimination in Apprenticeship and Training" was issued by the United States Secretary of Labor under the authority of 29 USC §50. Iowa Code Sections 91.18 and 96.12 refer only to 29 USC §49 et seq. It would appear from the context and history of these federal code provisions that 29 USC §49 et seq. includes only §§49, 49a, 49b, 49c, 49c-1, 49d, 49g, 49h, 49i, 49j and 49k, relating to public employment services and was not concerned with "Apprenticeship Training" which was a later enactment by Congress (August 16, 1937). It cannot be said that the Iowa legislature in enacting Section 91.18 intended to include 29 USC §50, "Apprentice Labor" since the statute specifically states "in the promotion and maintenance of a system of *public employment offices.*" It is therefore clear that there is no statutory authority for the adoption of "Title 29" by the Bureau of Labor or the Employment Security Commission.

House File 263, which was recently passed by the 61st General Assembly, is titled "An Act to establish a Civil Rights Commission to eliminate Unfair and Discriminatory Practices in Public Accommodations, Employment, Apprenticeship Programs, On-The-Job Training Programs, and Vocational Schools and to permit the Study of Discrimination in Housing."

Section 5 states:

"The commission shall have the following powers and duties:

* * *

(8) To cooperate, within the limits of any appropriations made for its operation, with other agencies or organizations, both public and private whose purposes are consistent with those of this Act,

and in the planning and conducting of programs designed to eliminate racial, religious, cultural, and intergroup tensions.

(9) To adopt, publish, amend, and rescind regulations consistent with and necessary for the enforcement of this Act."

On the basis of the above authority, it appears that the Civil Rights Commission has authority to promulgate equal opportunity standards which are "consistent with and necessary for the enforcement of" House File 263.

In conclusion we find it necessary to answer your first three questions in the negative. In response to the fourth question, it should be noted that the Governor has no Constitutional or statutory authority to legislate by attempting to delegate such power by means of an executive order, the Governor would be performing a legislative function and this would be illegal. Thus, it is necessary to answer your fourth question in the negative.

11.2

LABOR: Wage Assignments—House File 437, Acts of the 61st G.A. The exception in Section 2 of House File 437, is operative irrespective of whether there is a collective bargaining agreement between the parties that provides for such an assignment.

December 1, 1965

Mr. James J. Wengert
1512 West Second Street
Sioux City, Iowa

Dear Mr. Wengert:

Receipt is hereby acknowledged of yours wherein you requested an opinion concerning Section 2 of House File 437, Acts of the 61st General Assembly. Therein you state:

"The requested interpretation of your office is whether the sentence in Section 2 which reads 'This Act shall not apply to a wage assignment by an employee to an organization which represents the employee in labor relations with his employer.'

"A company attorney has taken the position that this exception is only valid if there is a collective bargaining agreement between the parties that provides for such an assignment.

"A union attorney has taken the position that such wage assignment must be recognized by the employer irrespective of whether such a contract exists so long as the 'assignment is by an employee to an organization which represents the employee in labor relations with his employer'."

In response thereto, it is well settled that an assignment of wages is actually an assignment of a *chose in action.* As a rule of common law, choses in action were not assignable; however, Section 539.4, Code of Iowa 1962 authorizes such assignments by implication. *Peterson v. Ball,* 121 Iowa 544, 97 N.W. 79 (1903).

Section 539.4 provides:

"No sale or assignment, by the head of a family, of wages, whether the same be exempt from execution or not, shall be of any validity whatever unless the same be evidenced by a written instrument, and if married, unless the husband and wife sign and acknowledge the same joint instrument before an officer authorized to take acknowledgements."

Section 2, House File 437, Acts of the 61st General Assembly amends Section 539.4 by adding thereto:

"Provided, however, that no such assignment or order shall be effective or binding upon the employer unless the employer has in writing agreed to accept and pay said assignment or order. *This Act shall not apply* to a wage assignment by an employer to an organization which represents the employee in labor relations with his employer."

It is important to note that Section 539.4 deals generally with assignments of wages while Section 736A.5 deals specifically with the deduction of union dues from wages, commonly called a "check-off." Section 736A.5 provides:

"Deducting dues from pay unlawful. It shall be unlawful for any person, firm, association, labor organization or corporation to deduct labor organization dues, charges, fees, contributions, fines or assessments from an employee's earnings, wages or compensation, unless the employer has first been presented with an individual written order therefor signed by the employee, which written order shall be terminable at any time by the employee giving at least thirty days written notice of such termination to the employer."

In an informal Attorney General Opinion dated May 13, 1957, the aforementioned statutes were analyzed and the writer concluded that they do not require an employer to withhold union dues from an employee's wages and pay the same to a labor union in the absence of a specific contract providing for a so-called system of "check-off." The opinion discusses the difference between a wage assignment and a "check-off." It has special significance to the question at hand, and though lengthy, it provides in part as follows:

"As the Iowa statutes seem to distinguish between the assignment of wages under Section 539.4 and an order for "check-off" under Section 736A.5, it may be well to set out some general considerations to guide you in your discussions with regard to assignment of wages. Generally, in the absence of statute, it does not appear necessary to obtain the assent of an employer to a single assignment of wages. Even if an employer gives notice that he will not consent to an assignment of wages by an employee, it appears that he cannot thereby escape liability to an assignee. I find that the Court decisions in the various states are not in agreement as to whether the 'check-off' is within a State's general statute prohibiting or regulating the assignment of future earning and wages. 14 ALR 2nd 177.

"As to assignments of wages in Iowa, the Iowa Court in *Metcalf v. Kincaid,* 87 Iowa 443, stated at page 448:

'The true rule is that an assignment of wages to be earned is good *if accepted,* and if at the time it is made, there is an existing engagement or employment by virtue of which, wages are being, and in the future, may reasonably be expected to be earned, even though there is no contract or fixed time of employment.'

"Subsequently, the Iowa Court, in *Coyle v. Gately's Inc.,* 230 Iowa 511, at page 514, changed their opinion with regard to assignment of wages in expectancy. The Court stated:

'* * * The great weight of authority holds that assignments of future personal earnings, wholly in expectancy and to accrue

from employment and not yet entered into or contracted for, are invalid.'

(Note citations therein)

"It is equally well established that the right of an assignee of salary or wages to recover from the employer, is the same as, but no greater than that of the employee. *Stetzer v. C. M. & St. P. Ry. Co.*, 156 Iowa 1. Also see 4 Am. Jur., Sections 41-44, pp. 260,264. Accordingly, it would appear that the employer has the right to pay the whole wage. If he were besieged by various assignees of his employee, or for partial payment of the debt for wages, it would seem that he might in law properly refuse to be subjected to suits by several assignees of an employee. 4 Am. Jur., Assignments, Sec. 65, p. 279. However, in equity, when the employee and all his assignees are parties, it would appear that an assignment of a claim for wages would be enforceable, as all parties would be present, and no prejudice to the employer would result by splitting up claims. 80 A.L.R. 413, 414, 423. It should be noted that we are not here concerned with action to enforce a collective bargaining contract which specifically provides for checkoff of dues.

"The law of the State of Illinois, with regard to assignment of wages generally, would appear to be the same as that of this State. In *State St. Furniture Co. v. Armour & Co.*, 345 111. 160, 177 N.E. 702, 76 A.L.R. 1298, the Illinois Supreme Court, as reported in the last citation, ruled 'that an assignment of wages made without the consent of the employer was valid notwithstanding the fact that, in the contract of employment, it was specifically provided that an assignment could not be made without the written consent of the employer, applied to wages that had been fully earned. The court took the position that, since the consent of an employer, was not one of the elements of an assignment of an *entire claim for wages*, his failure to give consent could not be said to make an assignment void; that otherwise the power to withhold consent would be the power to destroy valuable property rights. The court stated that nothing was involved, as between the employer and employee, except that the former had become the debtor and creditor, the former had no more right to restrain an alienation of the claim than he would have had to forbid the sale or pledge of other chattels."

For your consideration, enclosed is a copy of the above discussed opinion.

Thus, we are resolved to the question of whether an employee can make a wage assignment to an organization which represents the employer in labor relations with his employer, when there is no collective bargaining agreement authorizing such assignments between the employer and the representative organization and the employer has not consented to the assignment.

A literal reading of the exception in Section 2 of House File 437 would unquestionably authorize such assignments, irrespective of a collective bargaining agreement.

The statute is silent with respect to a collective bargaining agreement, and on the basis of the aforecited opinion of the Attorney General, it would appear that an assignment by an employee to the organization which represents him in labor relations with his employer would be valid and enforceable irrespective of the employer's consent.

It is therefore the opinion of this office that the exception in Section 2 of House File 437, is operative irrespective of whether there is a collective bargaining agreement between the parties that provides for such an assignment.

11.3

Commissioner of Labor—Jurisdiction over Unfired Pressure Vessel. §§89.4 and 89.12, 1962 Code of Iowa. The Commissioner of Labor is not empowered to prescribe rules and regulations in respect to unfired pressure vessels when said vessels do not contain water or steam thus not covered under Chapter 89 of the Code of Iowa. (McCauley to Parkins, Commissioner of Labor, 9/27/65) #65-9-16

11.4

Commissioner of Labor; inspection of low pressure boilers located in places of public assembly—Chapter 108, Acts of 61st G.A. and Chapter 89, 1962 Code of Iowa. A low pressure boiler, the location of which would constitute a danger to those who are present in a place of public assembly, is under the purview of Chapter 108, Acts of 61st G.A. (Bernstein to Chesher, Deputy Labor Commissioner, 3/14/66) #66-3-8

11.5

Railroad workshops—§88.3, 1962 Code of Iowa, as amended. Buildings or structures used by railroads to house section cars or trucks and for the storage of tools, supplies and materials can not be classified as workshops within the intent and meaning of §88.3, 1962 Code of Iowa, as amended. (Brick to Chesher, Deputy Commissioner of Labor, 5/19/66) #66-5-8

CHAPTER 12

LIQUOR

STAFF OPINIONS

LETTER OPINIONS

12.1

LIQUOR: Liquor Control Commission—Section 123.27, Code of Iowa, does not prohibit holders of liquor permits from serving in the General Assembly.

February 9, 1965

Mr. Gene L. Needles, Director
Law Enforcement Division
Iowa Liquor Control Commission
L O C A L

Dear Mr. Needles:

This is in response to your letter of January 4, 1965, requesting an opinion as to whether Section 123.27 subparagraph 4 of the Iowa Liquor Control Act prohibits holders of state liquor permits from serving in the Iowa legislature. The statute in relevant parts, is as follows:

> ". . . liquor control licenses may be issued to any person who . . . is not chargeable directly or indirectly with the administration or enforcement of the alcoholic beverages laws of the State of Iowa . . ."

An extensive discussion in the Harvard Law Review sets forth the following statement of the legislative conflict of interest problem:

> "It should be the aim of any attempt to deal with public servant's conflicts of interest to promote both the actual practice and the public appearance of impartiality and objectivity in government operations without disqualifying present and potential capable public servants through excessively stringent instructions. To be effective the guidelines expressing the balance must be closely tailored to the circumstances of those whose behavior is to be governed. The position of the legislator in most states is unique in that his job is customarily part time only and he receives regular compensation from sources other than the state. Few occupations are sufficiently flexible to permit time off for legislative participation: Statistics indicate that most of the legislators are lawyers, farmers, mechanics, or insurance or real estate brokers. Of these, all except lawyers frequently have a direct personal interest in state legislation, while lawyers may have similar interest in a representative capacity. The prevalence of these outside occupations with a natural proclivity toward government involvement militates toward stringent regulation of legislator's outside activities; yet, it would seem undesirable for the imposition of such restriction to result in a further narrowing of the occupational classes from which legislators will be drawn. Furthermore, in all states, there is hardly an item of concern to any state employee or officer which does not fall under the aegis of the legislature. Included are many subjects

perennially under its scrutiny which affect every legislator no matter what his occupation, such as tax rates, auto licenses fees, and utility rates; other concerns such as "blue sky" laws, teacher's qualifications or barbers' licenses are likely to affect certain lawmakers in their chosen field." 76 HLR 1209-1210 April 1963.

The articles make no mention of any state attempting to prevent legislative conflicts of interest by excluding from membership certain private occupations. An attempt to regulate legislative conflicts of interest by Section 123.27 would be unique in the Iowa Code. 76 HLR 1223, N. 93. The Montana Constitution provides that a legislator who has a private interest in a bill shall disclose that fact to his fellows and abstain from voting. Mont. Const. Act V. Sec. 44. As a matter of fact, even this type of solution has proven ineffective in those situations when a member resists its application to him.

If Section 123.27 were interpreted to prohibit liquor permit holders from serving as legislators, it might create an invidious discrimination impairing the conduct of a lawful occupation. *Frecker v. City of Dayton*, 90 N.E. 851, 153 Ohio St. 14, 16A C.J.S. Constitutional Law §496. Members of other occupations required to be licensed by the state are not prevented from serving in the legislature.

As you well know, our constitution contains the traditional American political concept of separating the responsibilities of government into three branches. Constitution of Iowa. Article III Sec. 1.

The terms "administration" and "enforcement" used in Section 123.27 are generally considered functions of the executive branch of government. Constitution of Iowa, Article III Sec. 1., *State v. Lynch*, 169 Iowa 148, 155, 151 N.W. 81, Opinion of the Justices, 154 A 217, 85 N.H. 562, 16 CJS Constitutional §167.

The commission created and made accountable for the enforcement of the liquor control act is part of the executive branch of the state government, Section 123.6 Code of Iowa, as is the enforcement division Section 123.16 (9), Code of Iowa.

Because of the traditional definition of terms used in Section 123.27, because of the total absence of any other attempts by the legislature to prevent conflicts of interest between legislative duty and occupational pursuits, and because of a potential constitutional problem of invidious discrimination against those pursuing the particular occupation involved, we conclude it not to have been the intent of the legislature that Section 123.27 should have applicability to legislators.

Out of regard for the integrity of our state government, we feel inclined to point out that the question prompting this opinion is only legal in part. The people of Iowa have a right to expect from those of us who serve in government more than the minimum standards of conduct prescribed by law. This moral question of whether both the fact and appearance of honesty might best be served were a legislator to abstain from casting a vote which would affect his occupation or profession rests with the legislator himself.

12.2

LIQUOR: Liquor, Beer and Cigarettes—Voluntary payment of a consideration for the use of a premise will be considered to be rent within the meaning of Chapter 123, 1962 Code of Iowa, as amended by Section 30, Chapter 114, Acts of the 60th General Assembly, and further amended by Chapter 149, Acts of the 61st General Assembly, if the circumstances dictate that such a voluntary payment is, in fact, made in lieu of rent.

May 12, 1966

Honorable Bernard J. O'Malley
State Representative
420 Royal Union Building
Des Moines, Iowa 50309

Dear Mr. O'Malley:

This will acknowledge receipt of your letter of March 18, 1966, wherein you request the opinion of this office regarding substantially the following:

An instance has arisen where an ethnic group within this State has purchased a building in its name, for use by members of this group for activities which are cultural, educational, social, and religious in nature. Members who use this building are not required to pay a specified fee for the use of the building, but rather, the members contribute an unspecified amount, to be applied toward expenses. The members could attend free of charge if they so elected. The organization does not hold a liquor control license, nor are alcoholic beverages sold on the premises. A supply of soft drinks is maintained on the premises for the member's use, and while the members are not required to purchase these soft drinks, they may, and almost always do, contribute whatever amount they desire towards the end of defraying this expense.

Under the circumstances as set forth above:

1. Could members of this society bring their own alcoholic beverages on to the society premises for consumption?

2. Could an individual who was not a paid member of the society, but a part of the group in that membership dues are not mandatory, conduct his own social gathering in the society building, with the guests bringing their own liquor on to these premises for consumption?

3. If a contribution to the society is required before being admitted to a function conducted on the society premises, could those persons so attending this function bring their own liquor onto the premises for consumption?

4. If a mandatory admission price were imposed, could persons attending a society function under these circumstances bring and consume liquor on the non-licensed society premises?

As your questions concern a premise which does not hold an Iowa liquor control license, it would, of course, be unlawful to allow the dispensing or consumption of liquor on those premises, unless the exception contained in Chapter 123, 1962 Code of Iowa, as amended by Section 30, Chapter 114, Acts of the 60th General Assembly and further amended by Chapter 149, Acts of the 61st General Assembly, would permit such dispensing or consumption.

This exception, in pertinent part, provides:

"The provisions of this section shall have no application to private social gatherings of friends or relatives in a private home or a private place which is not of a commercial nature nor where goods or services may be purchased or sold nor any charge or rent or other thing of value is exchanged for the use thereof excepting it be for sleeping quarters."

Thus, only upon a finding that the occasions referred to constituted social gatherings of friends, such gathering being conducted in a

private place, not of a commercial nature; that no charge, rent or other thing of value was exchanged for the use of this private place; and further, that goods or services were not bought or sold at this private place, would those attending be allowed to bring liquor onto such a non-licensed premise for consumption.

The central point which must be resolved appears to be determination as to whether the monies voluntarily given by members using the society premises would constitute a payment of rent, charge, or exchange of another thing of value for the use of these facilities.

We must conclude that, while the operation of this premise may not be with a view towards securing a profit for the society, the operation and use of the building is such that a remittance is expected, and even required, on the part of the using member. It seems inconceivable that the use of these society facilities would be offered without any charge or rental fee whatsoever by an organization which apparently requires neither dues, nor a fixed payment of any nature, as a condition of membership. In such a circumstance as you have described, it appears that these contributions on the part of members using the facilities are, in fact, received in lieu of established charges or rental fees. Under such circumstances, should these voluntary contributions be insufficient to meet the cost of obtaining and maintaining the society building, the society would be faced with the choice of either charging an established fee or rental which would be sufficient to allow the society to meet its expenses, or to discontinue operation of the building. We think it to be clear that the society must receive a contribution, and this fact is communicated to the society members. The fact that such a payment is denominated as a contribution rather than a charge does not alter the fact that a payment is made by the members for the use of the building and should not serve to circumvent the requirement for a liquor control license. An obligation on the part of the member is created when the member uses the facility to contribute financially towards those expenses necessitated by the society having such a building.

Additionally, the members, realizing the obvious expense of providing soft drinks on the premises, are by their contributions defraying the expense of these articles. The members have received property and relinquished consideration therefor and thus designating as a contribution a process which is in reality a purchase.

Of course, in an instance where a "contribution" was mandatory, or where an admission price were levied, there would appear to be little question as to the aspect of a charge being imposed for the use of the facility.

Thus, in response to your questions, we would advise that where, either directly or indirectly, a charge or rent is solicited for the use of the society facility, and the use is actually conditioned on such a payment or contribution, or where, either directly or indirectly, goods may be purchased in the society facility, absent a correct liquor control license, liquor could not be dispensed or consumed on the society premises. As we conclude the member's contribution appears to be in reality a remittance by the member for the use of the facility, we must advise that persons would not be allowed to bring alcoholic beverages onto the non-licensed society premises for consumption under the factual circumstances you present. A priori, where a fixed charge or admission is required on the part of persons attending a function on the premises of the society there is clearly a charge being imposed for the use of the premises, thus placing such an arrangement without the exception found in Chapter 123, 1962 Code of Iowa, as amended, necessitating a finding that, absent an appropriate liquor control license for the premises, liquor could not be consumed on the premises.

12.3

Living Quarters Permit—§123.27(5), 1962 Code of Iowa, as amended. Liquor Control Commission does not have authority under §123.27(5), 1962 Code of Iowa as amended, to require that licensees agree to allow peace officers to inspect and search his adjoining residential or sleeping quarters at any time, without obtaining a living quarters permit. (Riley to Needles, Director, Law Enforcement Division, Iowa Liquor Control Commission, 9/15/65) #65-10-5

12.4

Duty of State Liquor Control Commission Employee Before Selling Liquor to Prospective Purchaser Who Appears to be Under Age Twenty-one—§123.92, 1962 Code of Iowa; Chapter 116, §11, Acts of the 60th G.A. Should an employee fail to adhere to dictates of Chapter 116, §11, Acts of the 60th G.A., he may be subject to liability under provisions of §123.92, 1962 Code of Iowa. (Riley to Needles, Director of Law Enforcement Division, Iowa Liquor Control Commissioner, 9/24/65) #65-10-1

12.5

Beer Permit—House File 66, Acts of the 61st G.A.—The provisions of House File 66, Section 5, Acts of the 61st General Assembly, are applicable only to those instances where permits have been revoked under the provisions of that section or revoked for cause under a provision of said section. (Riley to Beckman, 11/22/65) #65-11-11

12.6

Liquor, Beer and Cigarettes: Liquor Control License in Counties Who Have Exercised the Reverse Option—§123.27(7)(e), 1962 Code of Iowa, as amended. Liquor control licenses in effect at the time a county votes to prohibit the sale of liquor by the drink, under the provisions of §123.27(7)(e), 1962 Code of Iowa, as amended, may be renewed annually for a three year period from the date of such election, with all such liquor control licenses being subject to revocation at the expiration of the three year period from the date of the election (Riley to Hays, Marion County Attorney, 5/10/66) #66-5-4

CHAPTER 13

MOTOR VEHICLES

STAFF OPINIONS

LETTER OPINIONS

13.1

MOTOR VEHICLE: Motor Vehicle Financial Responsibility—A former Iowa resident who while a resident of Iowa had his operator's license and registration suspended under 321A.17 of the Code of Iowa, and who during such suspension moved to a different state and procured a license and had a vehicle registered in his name in that state and before filing proof of financial responsibility in Iowa was driving in this state, could be charged under 321A.32 for failure to file proof of financial responsibility. 321A.17(1) (2) (3) (4), 321A.32(1).

February 22, 1965

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

Dear Mr. Skinner:

This is in reference to your request for an opinion concerning the applicability of Section 321A.17, 1962 Code of Iowa, to certain facts as set forth in your letter of October 12, 1964, a copy of which is enclosed herewith.

The driver of a vehicle involved in an accident resulting in injury to or death of any person, or total property damage to an apparent extent of one hundred dollars, is required to file a report with the Department of Public Safety (Section 321.266). When such an accident occurs the operator must give security in a sum sufficient to satisfy any judgment for damages which might result *from that accident.* (Section 321A.5(1)). Attached to the official accident report is a form referred to as an SR21 on which the driver indicates the name of his insurance carrier. The SR21 is sent to the carrier by the Department; the carrier then either accepts or rejects liability *for that accident.* (Section 321A.5(3)).

We assume that the statement in the third paragraph of your letter, "an SR filing made by his insurance carrier", refers to the fact that the carrier accepted the SR21. This being so, "A" has complied with the requirements of Sections 321A.5 through 321A.11 with respect to security following an accident, and, therefore, no suspension was imposed under those sections.

However, "A" 's license to operate a motor vehicle was suspended under Section 321.210(7), for having committed a serious violation of the motor vehicle laws of this state, the Commissioner of Public Safety having received records of conviction for reckless driving and speeding.

In arriving at the conclusion hereinafter set forth, the case of *State v. Sonderleiter*, 251 Iowa 106, 99 N.W. 2d 393 (1959), has not been overlooked. That case is not applicable to this situation.

First, in the Sonderleiter case, the question of suspended *registration* was not at issue, the Court there stating:

> "The Court did not submit the question of suspension of registration to the jury. The only question submitted was 'while license is under suspension'."

Secondly, here there is involved a suspension which "continues to remain suspended or revoked under this chapter", by virtue of Sections 321A.17(1) and 321A.17(2). The court pointed out in the Sonderleiter case:

> "There is no question here of continuing to remain revoked. The State's evidence shows the license was revoked July 9, 1958, to September 6, 1958. The evidence shows the crime was committed August 27, 1958."

Section 321A.17(2) provides:

> "2. Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person until permitted under the motor vehicle laws of this state and not then unless and until he shall give and thereafter maintain proof of financial responsibility."

Section 321A.17(1) provides:

> "1. Whenever the commissioner, under any law of this state, suspends or revokes the license of any person upon receiving record of a conviction or a forfeiture of bail, the commissioner shall also suspend the registration for all motor vehicles registered in the name of such person, except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person."

The proof of financial responsibility required by this section is prospective in nature. Unlike security following an accident under Sections 321A.5 through 321A.11, which covers possible damages resulting from that accident alone, the proof of financial responsibility required by Section 321A.17 covers any possible future liability (1960 OAG, page 151).

This proof may be furnished by the filing of an SR22 or SR22A by an insurance carrier. We assume under your facts that this was not done, and therefore "A" 's registrations were suspended.

The term "registration" as used in Chapter 321A has been defined by Section 321A.1(11) as:

> ". . . Registration certificate or certificates and registration plates issued under the *laws of this state* pertaining to the registration of motor vehicles." (Emphasis supplied)

In addition, Iowa cannot give extraterritorial effect to its laws. Therefore, only "A" 's *Iowa* registrations have been suspended. It does *not* follow, however, that "A" may operate foreign registered vehicles in Iowa.

Sections 321A.17(3) and 321A.17(4) impose the same restrictions upon persons not licensed and upon nonresidents. (See Attorney General Opinion, Staff to Pesch, 6/20/63)

Section 321A.32(1) provides:

"Any person whose license *or* registration or nonresident's operating privilege has been suspended, denied or revoked under this chapter or *continues to remain suspended or revoked under this chapter*, and who, during such suspension, denial or revocation, *or during such continuing suspension* or continuing revocation, drives any motor vehicle upon any highway or knowingly permits any motor vehicle owned by such person to be operated by another upon any highway, except as permitted under this chapter, shall be fined not more than five hundred dollars or imprisoned not exceeding six months, or both." (Emphasis supplied)

The license *and* the registration of "A" continue to remain suspended by virtue of this section. The fact that "A" has changed his residence and/or the fact that "A" has valid Minnesota registration and a valid Minnesota license has no bearing upon the Iowa suspensions.

It is clear from the reading of this statute as a whole, and those in pari materia(1) (see Section 321.214), that the legislature intended that upon suspension as a result of a conviction one would not be able to operate a vehicle on the highways of this state unless proof of financial responsibility was established.

Under the facts presented in your letter, this could now be accomplished by an SR22 or SR22A filing by "A"'s present insurer as provided by Sections 321A.18 through 321A.23. However, "A" at the time of his arrest, had not done so.

13.2

MOTOR VEHICLE: Special permits for oversize vehicles—Sec. 321.467, 321.469 of the 1962 Code. State Highway Commission or local authorities may issue a special permit under Code Sec. 321.467 to vehicles of excess size to travel a distance not exceeding 25 miles. Only the State Highway Commission has authority to issue special permits for the movement of mobile homes of excess size and then only over the primary road system of the state.

March 12, 1965

Mr. J. G. Johnson
Assistant Fayette County Attorney
22 E. Charles
Oelwein, Iowa

Dear Mr. Johnson:

This is in response to your letter of January 12, 1965, in which you solicit the opinion of this office as to the proper interpretation of Section 321.467, 1962 Code of Iowa, in respect to the following:

"1. In the forepart of this Section, authority is granted to the State Highway Commission or proper local authorities to issue special permits for the movement of oversize or overweight vehicles for a 25 mile distance. Does this mean that such vehicle can be moved only a total of 25 miles under this Section, or may such vehicle be moved 25 miles per day? If the limitation is to a total of 25 miles, is there any statutory prohibition for the issuance of a separate permit for each day?

"2. With reference to the movement of oversized and overweight vehicles as mentioned above, both the State Highway Commission and local authorities have the authority and sole jurisdiction to issue permits for their respective highways. However, in the same Section where the movement of mobile homes is treated (lines 39-50) reference is made only to the State Highway Commission as authority for granting such special permit. In this connection three questions arise:

"a. Does this mean that a county Board of Supervisors, acting through the County Engineer's office, has no authority to issue a permit for the movement of a mobile home, such as is contemplated by this Section, over the secondary roads of that county?

"b. Does this mean that the State Highway Commission may issue such a special permit for the movement of such a mobile home over the secondary roads of a county without the permission of the local authorities?

"c. If this Section is interpreted as permitting the county to issue permits for the movement of such mobile homes over secondary roads, does the width limitation of 10 feet 9 inches imposed upon the Highway Commission apply also to the county authorities, or do the local authorities operate independently of the provision?"

In order to answer your first question it becomes necessary to construe the provisions of Section 321.467 along with Section 321.469 of the 1962 Code, in that the latter section relates to the issuance of the various permits authorized and enumerated in Section 321.467. The provisions of the statutes with which we are concerned are clear and unambiguous, and we therefore need make no effort to look behind the provisions to determine legislative intent inasmuch as such intent is clearly expressed on the face of the statutes. *Cook v. Bornhold*, 250 Iowa 696, 985 N.W. 2d 749. *Smith v. Sioux City Stockyards*, 219 Iowa 1142, 260 N.W. 551.

Section 321.467 of the 1962 Code in pertinent part provides:

"The State Highway Commission with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction may, in their discretion, upon application in writing and good cause being shown therefore, issue a special permit in writing authorizing the applicant to *operate or move for a distance not exceeding 25 miles a vehicle or combination of vehicles* of a size or weight of vehicle or load exceeding the maximum specified in this chapter or otherwise not in conformity with the provisions of this chapter . . ." (Emphasis added).

Section 321.469, 1962 Code reads as follows:

"The State Highway Commission or local authority is authorized to issue or withhold such permit at its discretion: or, *if such permit is issued, to limit the number of trips*, or to establish seasonal or other time limitations within which the vehicles described may be operated on the highways indicated, or otherwise to limit or prescribe conditions of operation of such vehicle or vehicles, . . ." (Emphasis added)

Both the above quoted sections provide that the issuance of any special permit is a discretionary act by the state highway commission or local authorities. Section 321.469 goes farther and provides that if

the permit is issued, the issuing authority then has the discretion to limit the number of trips under the particular permit. The express wording of these respective sections indicates that a special permit may be issued authorizing the applicant to move or operate any particular vehicle or combination of vehicles for a total distance of 25 miles per trip and that the issuing authority may allow more than one such trip under the permit.

It is therefore the opinion of this office that local authorities may issue a special permit under the provisions in question for a vehicle to travel over a specified route not exceeding 25 miles in distance but that one or more trips can be made over this specified route, conceivably in one day, if allowed by issuing authority. Further, it is the opinion of this office that there is no statutory prohibition against the local authorities issuing a permit for the same vehicle to travel over a different route the following day.

The language of section 321.467, 1962 Code which gives rise to your questions, reads as follows:

> "Provided further, that a mobile home manufacturer, or dealer, or a carrier authorized by the Interstate Commerce Commission or the Iowa State Commerce Commission may, *upon application to the state highway commission, be issued a special permit, under rules and regulations of the state highway commission,* to transport a mobile home of excess size not exceeding ten feet nine inches in width on the highways within the state, except on any part of the interstate highway system . . ." (Emphasis added)

Section 321.467 provides various statutory exceptions to the limitations on size and weight of vehicles permitted to use our primary and secondary roads. In stating some of the exceptions this statute creates authority in the state highway commission and local authorities to issue special permits allowing the exceptions upon the roads under their respective jurisdiction. However, in other exceptions contained in the statute, such as the one presently under discussion, the state highway commission alone is given authority to issue a special permit allowing the exception. It is a primary rule of the statutory construction that the express mention of one thing in the 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.

The legislature evidently did not contemplate the movement of mobile homes upon anything but our primary road system which, of course, is governed by the State Highway Commission.

Based on the foregoing this office is of the opinion that under Sec. 321.467 only the State Highway Commission has the authority to issue special permits for the movement of mobile homes of excess size and further that such permits may be issued only for movement over the primary road system of the state.

Thus the answer to question 2(a) is yes and the answer to 2(b) is no. Question 2(c) need not be answered.

13.3

MOTOR VEHICLE: Highway: Implements of Husbandry—§§321.1(1), 321.1(4), 321.1(5), 321.1(16), 321.453, 1962 Code of Iowa as amended. A pickup or motor truck is not considered an "implement of husbandry" as defined in Code Section 321.1(16).

July 6, 1965

Mr. Richard L. Barr
Special Assistant Grundy County Attorney
Willoughby, Strack & Sieverding Law Offices
Grundy Center, Iowa 50638

Dear Mr. Barr:

Receipt is hereby acknowledged of yours of May 18th as follows:

"On November 11, 1963 the defendant was driving a Chevrolet truck with an eleven ton license owned by his employer . . . from a farm owned by his employer located in Grundy County to a farm owned by his employer in Buchanan County. The truck was loaded with shelled corn that had been raised upon the Defendant's employers farm. This truck was not for hire. While en route between the two farms on Iowa primary highway No. 58 the defendant was stopped by an Iowa highway patrolman and his truck was checked to see if there was an overload on the axle. The truck was found to weigh 23,320 lbs. while the legal limit on this axle would be 18,000 lbs. or an overload of 5320 lbs.

"The defendant . . . believes this truck is an implement of husbandry and is exempt from weight limitations by section 321.453 of the 1962 Code of Iowa.

"1. Is a Pick Up Truck used on a farm and not for hire an implement of Husbandry?

"2. If you find it is an implement of husbandry would it be such an implement of husbandry as would be exempt under Section 321.453 of the size, weight and load restrictions?"

In answering your first question, it is necessary to analyze the definition of "implement of husbandry" which is defined in Section 321.1(16), 1962 Code of Iowa as amended, as follows:

" '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."

Section 321.1(5) defines "pickup" as:

". . . means any motor vehicle designed to carry merchandise or freight of any kind, not to exceed two thousand pounds."

Section 321.1(4) defines "motor truck" as:

". . . means every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers."

Section 321.1(1) defines "vehicle" as:

" '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 statutory rails or tracks."

It appears from the above definitions that a "pickup" or "motor vehicle" would be included in the definition of "vehicle". The first sentence of the definition of "implement of husbandry" specifies that the vehicle be designed for agricultural purposes so it is necessary to determine what is meant by this language.

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 sometimes synonymous with 'intent'; but physical property has no intention; and ordinarily, if property is spoken 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 colloquially say that an ordinary truck was 'designed for the manufacture of liquor'." *U.S. v. Sommerhauser,* 58 F. 2d 812, 813 (Kan., 1932).

As previously defined, a pickup or motor truck is not specifically related to farming operations. It may, of course, be used for agricultural purposes, but it 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, nor does it appear from the record that this particular truck is used exclusively for agricultural purposes. Thus, this 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.

Further authority for this conclusion can be found in the case of *State v. Bishop,* —Iowa—, 132 N.W. 2d 455 (Jan. 1965). The defendant therein was convicted before the district court of driving an unregistered motor truck. On appeal the Supreme Court held that a motor truck used exclusively in delivering and applying liquid fertilizers and modified for such use was "implement of husbandry" within statute providing exception to vehicles subject to registration, and thus conviction of defendant for driving unregistered motor truck was reversed. The Supreme Court analyzed Section 321.1(16) and at page 458 of the North Western Reporter said:

"So considered the statute includes these things in the definition: first, the implements designed for agricultural purposes and used by the owner in farming; second, loading chutes without regard to use on the farm; and third, the definition 'shall also include equipment of any kind for . . . transportation . . . of . . . liquid commercial fertilizer used . . . in delivering . . .' This is not an enumeration but adding something not included or contemplated in the first and second parts."

The Supreme Court said further at page 459 of the North Western Reporter:

". . . when the motor truck here used to deliver liquid fertilizer is used for any but this limited purpose it must be registered and of course meet all other statutory requirements."

(Please note that Senate File 388 which was enacted by the 61st G.A., strikes the last sentence of Section 321.1(16) but it is the opinion of the author that this does not affect the rational contained in the aforequoted opinion in its application to the factual situation at hand.)

Based on the foregoing I am of the opinion that the Pick Up Truck in question does not qualify as an implement of husbandry as defined in section 321.1(16), and consequently, your second question need not be answered.

13.4

MOTOR VEHICLE: Highway Commission: Motor Vehicles: Tandem Axle: Multiple Axle: Trailer—1940 O.A.G. 455. §321.459, 1962 Code of Iowa, applies to multiple axle units not within the weight limitation set out in House File 629, Acts of the 61st G.A.

September 3, 1965

Mr. Thomas E. Tucker
Deputy Lee County Attorney
Fort Madison, Iowa

Dear Sir:

In your letter of March 22, 1965, you ask for an opinion on the following:

"I wonder if you could give me a formal opinion reconciling this Code Section (§321.459) with the Attorney General's opinion dated December 13th 1939, and specifically whether or not this section applies to multiple axle trailers as well as tandem axle trailers." §321.459, 1962 Code of Iowa, provides as follows:

"Dual axle requirement. No motor vehicle, trailer, or semitrailer having axles less than forty inches apart center to center, shall be operated on the highways of this state."

In 1965, the 61st General Assembly passed House File 629 which provides:

"MOTOR VEHICLES—DUAL AXLE REQUIREMENTS House File 629

"An Act relating to dual axle requirements of motor vehicles, trailers, and semitrailers.

"Be it enacted by the General Assembly of the State of Iowa:

"Section 1. Section three hundred twenty-one point four hundred fifty-nine (321.459), 1962 Code of Iowa, is hereby amended by inserting in line four (4) after the word 'state' the following:

"'. . . unless the combined gross weight imposed on the highway by all of the wheels of all axles which are less than forty (40) inches apart center to center does not exceed eighteen thousand (18,000) pounds in the case of wheels equipped with pneumatic tires or fourteen thousand (14,000) pounds in the case of wheels equipped with solid rubber tires . . .'

"Approved June 2, 1965."

The "multiple axle" referred to in your communication is a three-axle unit with thirty-four-inch (34") center tandem axle spacing. The Attorney General's Opinion dated December 13, 1939, does not refer to tandem axles but rather deals with "split axles". Quoting from the opinion at Page 456 of the 1940 Report of Attorney General:

"Recently there has come into general use for heavy hauling, a type of trailer having what is known as 'split axles'. *In some cases* these are *mounted* in tandem . . ." (Emphasis supplied)

The "split axles" here referred to are, in reality, a single axle being split in the center. In the "multiple axle" or three axle unit now in question, there are three separate axles extending entirely across a vehicle.

The prior opinion in conclusion states:

> "We conclude therefore, that the enactment of Section 483 contemplated each axle as extending entirely across a vehicle of normal width regardless of the number of parts into which it may be divided; that the maximum wheel load permissible at either extremity thereof is four tons, and that the forty-inch measurement was and is intended to apply only to a tandem axle construction."

It is therefore our opinion that the Attorney General's Opinion of December 13, 1939, dealt with a single axle which was "split" and *mounted* in tandem and did not concern tandem axles as are found in the three-axle unit referred to in your communication.

We concur with the prior Attorney General's Opinion in that the "forty inch measurement was and is intended to apply only to *tandem axle construction*", as is the case in the three axle unit.

However, House File 629, passed by the 61st G.A., as set out supra, sets forth exceptions to §321.459 based on weight limitations. Within these limitations, a tandem axle unit will not be said to violate §321.459, 1962 Code of Iowa.

13.5

MOTOR VEHICLE: Implied Consent Law, Withdrawal of Blood From a Minor—Chapter 114, §§37 - 51, Acts of the 60th G.A. A duly qualified person is authorized to withdraw blood from the body of a minor in accordance with the implied consent law without first obtaining a written consent of the parents or guardians of such minor.

October 14, 1965

Mr. W. E. Don Carlos
Adair County Attorney
113 West Iowa Street
Greenfield, Iowa

Dear Mr. Carlos:

This is in reference to your letter dated July 21, 1965, in which you request our opinion on substantially the following question:

> Whether under the new "Uniform Chemical Test for Intoxication Act" a duly qualified person is authorized to withdraw from the body of a minor blood for the purpose of determining alcoholic content without first obtaining the written consent of the parents or guardian of such minor?

In 1963, the Iowa Legislature enacted the "Uniform Chemical Test for Intoxication Act", more commonly referred to as the "Implied Consent Law", Chapter 114, Sections 37 through 51, 60th G.A. Those Sections of Chapter 114 comprising the new Implied Consent Law were designated by the Code Editor for future inclusion in Chapter 321B as Sections 321B.1 through 321B.14 (Iowa Code Annotated, 1964 Cum. Pocket Supp.).

Section 321B.1 sets forth the policy of the Implied Consent Law and provides that it is "necessary in order to control alcoholic beverages and aid the enforcement of laws prohibiting operation of a motor

vehicle while in an intoxicated condition." Section 321B.3, as here pertinent provides:

> "*Any person* who operates a motor vehicle in this state upon a public highway . . . shall be deemed to have given consent to the withdrawal . . . of his blood . . . for the purpose of determining the alcoholic content . . ." (Emphasis added).

It will be noted that Section 321B.3 refers to "any person" and neither that Section nor any other provision of law purports to exempt minors from the "deemed consent" aspect of the new law. In this connection, we think it relevant to point out that Section 321.1(35), Iowa Code 1962, defines the word "person" to mean "every natural person." This definition has application to the "Driving while Intoxicated" provisions of Chapter 321 of the Code, as amended, which factor makes the definition of a "person" relevant to the inquiry here in view of the express purpose of the Implied Consent Law as set forth in Section 321B.1. Moreover, the Supreme Court of Iowa has often interpreted the words "any person" when used in a statute very broadly to include "anybody" or "every person", *State v. Logsdon*, 215 Iowa 1297, 1302, 248 N.W. 4; *Iowa Illinois Gas and Electric Co. v. City of Bettendorf*, 241 Iowa 358, 363, 41 N.W. 2d 16.

In view of the fact that a minor is a "person" and since the General Assembly did not see fit to exempt minors from the operation of the Implied Consent Law or to require consent from the parents or guardian of a minor as a condition to the withdrawal of a minor's blood, it is our opinion that your question must be answered in the affirmative. In conclusion, we should note that we have found no constitutional restraint which requires us to reach a different opinion.

13.6

MOTOR VEHICLE: Snow Tire with Protruding Metal Studs—§321.442, 1962 Code of Iowa. §321.442 prohibits the use on Iowa highways of snow tires on non-farm vehicles which contain metal studs which protrude beyond the tread of the traction surface of the tire.

November 23, 1965

Mr. William F. Sueppel, Commissioner
Iowa Department of Public Safety
State Office Building
L O C A L

Dear Commissioner Sueppel:

Your department has submitted the following opinion request:

> "Manufacturers of rubber tires have designed, manufactured, and distributed for sale in Iowa, a product commonly called 'metal studded snow tires.' Studded tires are imbedded with 72 to 108 studs either at the factory, the warehouse, or at the dealer's outlet. The studs are generally made with a hard tungsten carbide core enclosed in a steel jacket and fitted into a hole molded into the tire. Each stud is approximately 3/32 inches in diameter and protrudes about 1/16 inch beyond the tread of the traction surface of the tire.
>
> "Your opinion is respectfully requested on the following question: Does Section 321.442, Code 1962, prohibit the use of metal studded snow tires on Iowa's highways?"

The Code section which applies is Section 321.442, 1962 Code of Iowa, which reads as follows:

"No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat, or spike or any other protuberances of any material other than rubber which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use farm machinery with tires having protuberances which will not injure the highway, and except also that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice, or other conditions tending to cause a vehicle to skid."

You will note that the statute is drawn so as to be a strict prohibition of any projection on tires other than that of a rubber material, and you will note that the statute provides several exceptions. One of these is that certain farm machinery may have tires with protuberances which will not injure the highway. The second and only other exception allows the use of chains of reasonable proportions when conditions may require the use of chains.

This section was enacted by the 47th General Assembly in 1937 and is modeled after a section of the Uniform Motor Vehicle Code. The statute is plain in its meaning and purports to generally prohibit any and all projections, other than rubber, beyond the tread of the traction surface of the tire. You have given information in regard to tires that have hard tungsten carbide cores enclosed in steel jackets that protrude about 1/16 inch beyond the tread of the traction surface of the tire. The plain meaning of the statute certainly includes these rubber tires which you state are now ready for sale and distribution in Iowa for all motor vehicles. The contemplated sale does not appear to be within the farm machinery exception of the statute as a general sale for all vehicles appears to be contemplated. If sales are attempted under the farm machinery section, your department should make two administrative determinations. They are whether farm machinery is involved and whether or not the tires do damage the highway. The statute plainly prohibits the general use of the tire that you describe.

Because of the plain meaning of the statute, rules of construction cannot be used to obtain another meaning in this statute. It is a clear rule of law in Iowa that statutes can only be construed to ascertain the legislative intent and when the language of a statute is so clear, certain, and free from ambiguity and obscurity that its meaning is evident from mere reading thereof, canons of statutory construction are unnecessary. *Hindman v. Reaser*, 246 Iowa 1375, 72 N.W. 2d 559 (1956); *Motor Oil Company v. Abramson*, 252 Iowa 1058, 109 N.W. 2d 610 (1961). Even though the statute is penal in nature, the strict construction which is used by the courts in interpreting criminal statutes could not be used to change the clear meaning of this section.

I would suggest that the proper procedure is for the tire manufacturers and distributors to present evidence to the next General Assembly that these tires will promote safer winter driving and then the legislature by legislative enactment can make another exception of Section 321.442 of the 1962 Code of Iowa.

Therefore, it is my opinion that Section 321.442 of the 1962 Code of Iowa prohibits the use on the Iowa highways of snow tires on non-farm vehicles which contain metal studs which protrude beyond the tread of the traction surface of the tire.

13.7

MOTOR VEHICLE: Special Mobile Equipment—§§321.1(2), 321.1(17), 321.18(4), 1962 Code of Iowa. "Golf carts" towable at highway speeds to a golf course are not designed for or used primarily for the trans-

portation of persons or property over the highways and are special mobile equipment exempt from registration under the motor vehicle laws of Iowa.

March 9, 1966

Mr. James P. Hayes, Deputy Commissioner
Department of Public Safety
L O C A L

Dear Mr. Hayes:

You have requested an opinion of this office providing us with the following statement of facts:

"An Iowa company manufactures vehicles which are normally intended for the purpose of carrying persons who are playing golf, and the accompanying property of those persons, on a golf course. The vehicle, commonly called a 'golf cart', is towable at highway speeds and could be moved from a designated location to the golf course by towing.

"* * * Does the above described 'golf cart' come within the definition of special mobile equipment?"

In reply thereto, it is necessary to set forth the salient statutes:

"§321.18. Every motor vehicle . . . when driven *or moved upon a highway shall be subject to the registration provisions* of this chapter except:

"4. Any special mobile equipment as herein defined.

"§321.1(1). 'Vehicles' 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 statutory rails or tracks.

"§321.1(2). '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.

"§321.1(17). 'Special mobile equipment' means every vehicle not designed or used primarily for the transportation of persons or property *and* incidentally operated or moved over the highways, . . ." (Emphasis added)

Plainly, golf carts are designed for, or primarily used for, transportation of persons and property, but these golf carts are only so designed and used for transportation of persons and property *on a golf course*. They may be operated or moved incidentally over the highways but not for the purpose of transporting persons or property. All of these statutes in chapter 321 must be read in pari materia. Section 321.1(1) defines vehicle as any device by which any person or property may be transported or drawn *upon a highway*. Section 321.18 subjects to registration every motor vehicle driven or moved upon a *highway* excepting special mobile equipment. The exemption as to special mobile equipment is meant to insulate from registration those vehicles which are only incidentally operated or moved over the highways, if they are not designed or used primarily for the purpose of transporting persons or property. It is necessary to construe section 321.7(17) as exempting every vehicle not designed or used primarily for the transportation of persons or property "over the highways." We have read into the statute these last two words; it is only highway transportation which these statutes purport to regulate.

Therefore, it is this writer's conclusion that golf carts are exempt from registration as they are "special mobile equipment", because they are not designed or used primarily for the transportation of persons or property over the highways and if they are operated or moved at all over the highways, it is only incidental, and not for the purpose of transporting persons or property.

13.8

MOTOR VEHICLE: Highway: Special Mobile Equipment—Chapter 207, §§1, 3, and 6, Acts of the 60th G.A., §§321.1(16), 321.1(17), 321.1(25), 321.18(4), 321.123, 321.134, 321.310, 1962 Code of Iowa, as amended by Chapter 268, Acts of the 61st G.A. Non self-propelled trailers and bulk spreaders come within the purview of Chapter 207, §3, Acts of the 60th G.A., and the applicable three dollar fee. The combined gross weight can be determined by consulting either §§321.123 or 321.310, 1962 Code of Iowa. The plates obtained pursuant to Chapter 207, Acts of the 60th G.A. are not subject to the penalty provisions of §321.134, 1962 Code of Iowa. The Department can require fertilizer units to carry the necessary certificates of designation.

April 28, 1966

Mr. James P. Hayes
Deputy Commissioner
Department of Public Safety
State Office Building
L O C A L

Dear Mr. Hayes:

This is in reply to your request for an opinion on the following questions:

1. In cases where an applicator which is not self-propelled, having a gross weight of not more than six tons, is used for the transportation of fertilizer and chemicals used for farm crop production, will the equipment come within the purview of section 321.123, 1962 Code of Iowa, and the established five dollar fee be applied, or will the regular special mobile equipment fee of three dollars, pursuant to Chapter 207, Section 3, Acts of the 60th General Assembly be applicable.

2. Pursuant to the authority of section 321.310, if the dealer is pulling an applicator or a bulk tank which is a four-wheel trailer, for what combined gross weight must such motor truck be registered.

3. Is the delinquent payment of a special mobile equipment fee subject to the 5% penalty of the annual registration fee.

4. Can the Department require that each fertilizer unit carry at all times the necessary certificate of designation which would serve as proper identification.

The answer to your first question is dependent upon the statutory intent and language within the controlling provisions of Chapter 321, 1962 Code of Iowa.

Section 321.1(17), 1962 Code of Iowa formerly read as follows:

"'Special mobile equipment' means 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 ditch-digging apparatus . . ."

However, this section was amended by Chapter 268, Acts of the 61st General Assembly and now reads:

> " 'Special mobile equipment' means every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including trailers and bulk spreaders which are not self-propelled having a gross-weight of not more than six (6) tons used for the transportation of fertilizers and chemicals used for farm crop production, and other equipment used primarily for the application of fertilizer and chemicals in farm fields or for farm storage, but not including trucks mounted with applicators of such products, road construction or maintenance machinery and ditch-digging apparatus . . ."

Due to this amendment, it now appears that an applicator which is not self-propelled and which does not have a gross weight of more than six tons is to be classified as "special mobile equipment." Being classified as "special mobile equipment," it appears to be specifically excepted from vehicles subject to registration under section 321.18(4) which reads as follows:

> "Vehicles subject to registration—exception. Every motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter *except*:
>
> * * *
>
> "4. Any special mobile equipment as herein defined." (emphasis supplied)

However, Chapter 207, Section 3, Acts of the 60th General Assembly must also be considered before it may be stated that such vehicles are specifically exempt. This provision provides:

> "The department *shall* also issue special mobile equipment plates as applied for, which shall have displayed thereon the general distinguishing number assigned to the applicant. Each plate or pair of plates so issued *shall* have displayed thereon the words: Special Mobile Equipment. The fee for each plate or pair of special plates shall be three dollars." (emphasis supplied)

Therefore, in consideration of these sections, it would appear that an applicator which is not self-propelled and which does not weigh more than six tons *would* be subject to the "special mobile equipment" plate fee of three dollars by virtue of section 3 of Chapter 207, Acts of the 60th General Assembly and would not be exempted under section 321.18(4), 1962 Code of Iowa.

However, even though it be determined that the three dollar fee is applicable, a question arises as to whether the plates are a mandatory requirement. The reason for such a question becomes apparent when section 1 of Chapter 207, Acts of the 60th General Assembly is considered. That section provides in part:

> "A person owning any special mobile equipment as herein defined *may* make application to the department, . . . for a certificate . . . " (emphasis supplied)

The difficulty arises in the word "may" as used in this section, for it is generally construed to be permissive and not mandatory. However, it has been consistently held that "may" will be considered as mandatory where it is necessary to give effect to the legislature's intent and meaning and where public interests are concerned. *Bechtel v. Board of Supervisors of Winnebago County*, 217 Iowa 251, 251 N.W. 633 (1933); *Wolf v. Lutheran Mutual Life Insurance Co.*, 236 Iowa 334, 18 N.W. 2d 804 (1945).

In considering the legislative intent of the present provisions, Chapter 207, Section 3, Acts of the 60th General Assembly is entitled:

"An ACT to amend chapter three hundred twenty-one (321), Code 1962, to provide for the issuance of special mobile equipment certificate and plates."

From this phrase, it appears that the legislature intended that special mobile equipment plates were to be mandatory and required. This is also apparent from the consideration of section 321.1(16) amended by the 56th General Assembly in 1957 which allowed liquid fertilizer to be exempted from the registration provisions, but which was nullified by Chapter 268, Acts of the 61st General Assembly. When considering the enacting clause and the other provisions of Chapter 321 relating to special mobile equipment and which must be construed in *pari materia*, it is readily apparent that section 1 of Chapter 207, Acts of the 60th General Assembly is *not* to be considered as permissive but rather as mandatory and that special mobile equipment *must* have the required plates at a fee of three dollars.

The answer to your second question is as follows:

Section 321.119, 1962 Code of Iowa provides:

"Trucks with pneumatic tires. For motor trucks equipped with pneumatic tires, the annual registration fee shall be:

"For a gross weight of three tons or less, twenty-five dollars."

Therefore, the question you have presented does not involve the combined gross weight of the motor vehicle and the special mobile equipment, but instead involves the weight of the motor vehicle only. In light of the above quoted section and its relation to the specific equipment involved, the fee for such vehicle would in the majority of cases, be twenty-five dollars. This being due to the fact that the majority of special mobile equipment is pulled by what are commonly known as pickup trucks; the weight of which is generally three tons or less.

The answer to your third question is dependent on the construction of section 321.134 1962 Code of Iowa and Chapter 207, Acts of the 60th General Assembly.

Section 321.134 states in part:

"On February 1 of each year, a penalty of five percent of the annual *registration fee* shall be added to all fees not paid by that date . . ." (emphasis supplied)

However, when construing section 6 of Chapter 207, Acts of the 60th General Assembly, it is readily apparent that special mobile equipment are exempt.

Section 6 of Chapter 207, Acts of the 60th General Assembly provides in part:

"The certificates and plates issued hereunder shall be for purposes of identification only and shall not constitute a registration as required under the provisions of this chapter."

By this section, the certificates and plates obtained pursuant to Chapter 207, Acts of the 60th General Assembly are for identification purposes and are not to constitute a registration. Therefore, the penalty referred to under section 321.134 would not be applicable to "special mobile equipment" as defined in Chapter 321, 1962 Code of Iowa.

Furthermore, the fact that special mobile equipment is exempt from registration pursuant to section 321.18, 1962 Code of Iowa, is not such a registration fee on which a penalty may be based.

Your fourth question and the answer thereto are dependent on the ability of the Department of Public Safety to issue rules and regulations and the general intent of the legislature.

When considering statutory construction, unless there is language to the contrary, it is axiomatic that the plain meaning of the words shall control, *Glidden Rural Elec. Co-op. v. Iowa Employment Security Commission*, 236 Iowa 910, 20 N.W.2d 435 (1945), *In Re Van Vechtens' Estate*, 218 Iowa 229, 251 N.W. 729 (1933). Because of this consideration, section 1 of Chapter 207, Acts of the 60th General Assembly appears to allow the Department to decide whether such special mobile equipment shall carry such identification, that section provides in part:

> "The applicant shall also submit proof of the status of the vehicle or vehicles as special mobile equipment as *may reasonably be* required by the department." (emphasis supplied)

Furthermore, section 3, Chapter 207 states:

> "The department shall also issue special mobile equipment plates . . . which shall have displayed thereon the general *distinguishing number* assigned to the applicant." (emphasis supplied)

Section 3 of Chapter 207 is to the same effect in requiring the general distinguishing number. Due to the general language which must be given its plain meaning, it is apparent that the Department can require each fertilizer unit to carry at all times the necessary certificate of designation pursuant to their ability to develop rules and regulations. Furthermore, the basic intent of such plates is for identification purposes and not having them on or within the truck would operate so as to defeat the intent and purpose of the legislation.

13.9

MOTOR VEHICLE: Special permits to move mobile homes or house trailers—§§321.1(1), 321.467, 321.469, 1962 Code of Iowa, 1958 O.A.G. 193. State Highway Commission or local authorities may issue a special permit under Code §321.467 to such vehicles to travel a distance not to exceed 25 miles. Neither the Commission nor local authorities may issue a special agricultural or construction permit to such vehicles. Only the Commission may issue permits to manufacturers, dealers and carriers to move such vehicle where they do not exceed 10 ft. 9 in. in width and then only on the primary highways of the State. Such vehicles in excess of 10 ft. 9 in. in width may be moved for a distance exceeding 25 miles only under permit from the Commission and then only in an emergency or under special or unusual circumstances or where it is essential to cooperate with national defense officials.

June 28, 1966

Mr. C. F. Schach
Deputy Chief Engineer
Iowa State Highway Commission
Ames, Iowa 50010

Dear Mr. Schach:

It has come to the attention of this office that some problems have arisen in connection with the application of an Attorney General's Opinion issued March 12, 1965 to Mr. J. G. Johnson, Assistant Fayette County Attorney relative to the movement of mobile homes throughout the State. This earlier opinion held that the State Highway Commission or local authorities may issue a special permit under Code Section 321.467 to vehicles of excess size to travel a distance not exceeding

twenty-five miles. Only the State Highway Commission has authority to issue special permits for the movement of mobile homes of excess size over the primary road system of the State.

In light of the difficulty in achieving understanding and uniform enforcement of this opinion, I have had occasion to reanalyze the law. It is my opinion that the better interpretation is as follows:

Section 321.467, 1962 Code of Iowa, states in pertinent part:

"The state highway commission with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move for a distance not exceeding twenty-five miles a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in this chapter or otherwise not in conformity with the provisions of this chapter upon any highway under the jurisdiction of the party granting such permit and for the maintenance of which said party is responsible, provided, however, that the state highway commission or such local authorities may in their discretion issue a special permit for the movement of *construction machinery, equipment or material, or agricultural machinery, equipment or material* for a distance exceeding twenty-five miles on a vehicle or combination of vehicles, *not including mobile homes or house trailers, of a size or weight of vehicle or load exceeding the maximum specified in this chapter, or otherwise not in conformity with the provisions of this chapter, upon any highway under the jurisdiction of the party granting such permit,* except on any part of the completed interstate highway system, if the gross weight on any axle of any such vehicle, or combination of vehicles, does not exceed the maximum axle load as prescribed in section 321.463, and if such machinery, equipment or material is to be moved to or from construction projects, or agricultural projects in this state or is manufactured or assembled within the state. Provided further, that *a mobile home manufacturer, or dealer, or a carrier* authorized by the Interstate Commerce Commission or the Iowa state commerce commission may, *upon application to the state highway commission,* be issued a special permit, under rules and regulations of the state highway commission, to transport a mobile home of excess size not exceeding ten feet nine inches in width on the highways within the state, except on any part of the interstate highway system . . . Provided further that, in any emergency, or very special or unusual cases, or as a means of cooperating with national defense officials, the state highway commission may grant permits for moving oversize or overweight vehicles or objects over the highways *for a distance exceeding twenty-five miles,* if in the judgment of the commission, such special, unusual, emergency or defense movement is essential . . ." (Emphasis supplied)

Section 321.469, 1962 Code of Iowa, reads as follows:

"The state highway commission or local authority is authorized to issue or withhold such permit at its discretion; or, if such permit is issued, to limit the number of trips, or to establish seasonal or other time limitations within which the vehicles described may be operated on the highways indicated, or otherwise to limit or prescribe conditions of operation of such vehicle or vehicles, . . ."

Section 321.1 states:

"1. '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."

It is apparent that this definition includes mobile homes. Thus, mobile homes may be moved either over primary or secondary roads under a proper permit even though they exceed the length or width restrictions of the chapter for distances not to exceed twenty-five miles. This distance limitation is subject only to the later exception as found in Section 321.467 that in an emergency, or very special or unusual cases, or where it is essential as a means of cooperating with the national defense officials, the State Highway Commission may grant permits for moving oversized or overweight vehicles or objects over the highways for a distance exceeding twenty-five miles. Such an emergency permit could include mobile homes. In this connection, see the opinion from Lyman to Butler, 1958 O.A.G. 193. A permit under this exception may not be issued by local authorities.

Counties are therefore authorized to issue permits for the movement of any vehicle or combination of vehicles for a distance of twenty-five miles over its county roads. The Highway Commission could also authorize such a movement or the two authorities might issue a permit authorizing use of a part of the primary highway system and a part of the secondary highway system where the total distance does not exceed twenty-five miles.

However, where the move is to exceed a distance of twenty-five miles, the Iowa State Highway Commission or the local authority may issue a special permit only to construction or agricultural machinery, equipment or material, and not to mobile homes or house trailers of a size or weight or load exceeding the maximum specified in this chapter. No other vehicle, with the exception of those specifically enumerated, would be eligible for a permit to move a distance of greater than twenty-five miles either upon the secondary road system or the primary road system under this proviso of the section.

The second proviso, as found in Section 321.467, would grant authority only to the Iowa State Highway Commission to grant permits to manufacturers, dealers and carriers authorized by the Commerce Commission to move mobile homes or house trailers for distances exceeding twenty-five miles. Such moves must be made under the rules and regulations of the State Highway Commission. Thus, mobile homes not in excess of ten feet nine inches in width may be moved either across the county or across the State but only on the primary highway system. In this connection, Section 321.467 indicates that the State Highway Commission alone is given authority to issue such a permit. It is a primary rule of statutory construction that the expressed mention of one thing in the statute implies the exclusion of others. *Dotson v. City of Ames,* 251 Iowa 467, 101 NW 2d 711 (1960). *Archer v. Board of Education,* 251 Iowa 1077, 104, NW 2d 621 (1960). Wherein the Highway Commission has jurisdiction only over the primary highways of the state, it would appear that the legislature intended such moves to be made over such highways.

By way of conclusion, either the Highway Commission or the counties may issue:

1. A general permit to any vehicle, including a mobile home in excess of the weight or size restrictions of Chapter 321, for a distance not to exceed twenty-five miles.
2. A special permit only to construction and agricultural machinery equipment or material for a distance greater than twenty-five miles. But such a special permit may not be issued to a mobile home in excess of the size and weight restrictions of the chapter.

At the same time, the Highway Commission, and only the Highway Commission, may issue:

1. Permits to manufacturer dealers and carriers authorized by the I.C.C. or the I.S.C.C. for the movement of mobile homes not exceeding ten feet nine inches in width for indeterminate distances, and

2. Special permits for the movement of oversize and overweight vehicles, including mobile homes, in emergencies, or in special or unusual circumstances or where it is essential to cooperate with national defense officials.

13.10

Chauffeur's License—County employees whose regular employment entails the operation of road maintainers are required to possess a chauffeur's license. Section 321.1(2), 321.1(4), 321.1(17), 321.1(43), Code of Iowa, 1962. (Brick to Krohn, Jasper Co. Atty. 2/15/65) #65-2-13

CHAPTER 14

SCHOOLS

STAFF OPINIONS

LETTER OPINIONS

14.1

SCHOOLS AND SCHOOL DISTRICTS: Retention of report cards to cover payment of school fees—A school board has no authority to retain a student's report card to coerce payment of school fees when student has completed scholastic requirements.

March 2, 1965

Mr. Lee J. Farnsworth
Crawford County Attorney
Crawford County Court House
Denison, Iowa 51442

Dear Mr. Farnsworth:

Reference is herein made to your request for an opinion of January 22, 1965, wherein you asked whether a school could withhold a student's report cards pending payment of certain dues or educational fees.

I am of the opinion that this procedure cannot be used to coerce payment of a financial obligation according to the authorities enumerated.

In the case of *Perkins v. The Board of Directors of the Independent School District of West Des Moines*, 56 Iowa 476, the Board had promulgated a rule that a pupil could be suspended for not paying damages when the student had damaged or defaced school property. Here the plaintiff had accidentally hit a baseball through a school window and both plaintiff and his parents had refused to pay for the damage. The Court held the rule requiring the plaintiff to make payment is

not intended to secure good order, but to enforce an obligation to pay a sum of money which the Board of Directors had no authority to do.

In the case of *Valentine v. School District,* 187 Iowa 555, a high school student had completed her full four year course and had passed all required examinations. A rule was invoked that required prospective graduates to wear caps and gowns at graduation exercises. The plaintiff refused to do this and the board refused to issue a diploma. The Court held that the completion of the presented work entitled plaintiff to her diploma, and that mandamus would lie to compel the board to deliver the same to plaintiff.

Further authority is found in an opinion of this office appearing in the Report of Attorney General for 1940 at page 247, when a school board had adopted a resolution to bar students from further graduation activities where the student had been absent from one activity. The opinion stated that the school board was without authority to adopt a resolution that would deny a student his diploma for being absent from one graduation activity.

The boards of directors of school corporations possess only those powers conferred by statute and such implied powers as are necessary to carry out the express powers granted. *District Township of Washington v. Thomas,* 59 Iowa 50; *Hibbs v. Board of Directors,* 110 Iowa 306, 38 OAG 249. Rules created under such powers must be reasonable in character. *Valentine v. School Dist.* (cited supra). According to the above cited authority, it appears that a school board is exceeding its authority when it creates a rule which denies the student a diploma that he has earned or a rule used primarily "to enforce an obligation to pay a sum of money." *Perkins v. Board of Directors.* (cited supra) The retention of report cards, which a student has earned, to coerce the payment of school fees is merely an attempt to enforce an obligation to pay a sum of money, for which the student's parents are primarily liable. Section 252A.3, Code of 1962, provides as follows:

> "A husband . . . is hereby declared to be liable for the support of his wife and child or children under seventeen years of age . . . if possessed of sufficient means or able to earn such means, may be required to pay for their support a fair and reasonable sum according to his means, . . ."

The term "support" in the above statute reasonably includes education fees such as those involved here. (Vocational agricultural fees, book rent, locker rent, gymnasium fees.) The above authority indicates the present statute of the law in the state of Iowa which is relevant to the point in question.

It is, therefore, our opinion that the school has no authority to retain the earned report cards of a student to coerce the payment of educational fees.

14.2

SCHOOLS: **School Reorganization: Former School district has authority to act prior to July 1**—§§275.29, 275.25, 275.24, 1962 Code of Iowa. A former school district contained in a newly formed reorganized school district has the authority over property owned by it prior to the effective date of change or reorganized school district and the division of assets and liabilities, both occurring on July 1st after the organization of the reorganized school district. The newly formed school district through its elected Board of Directors has complete control of the employment of all personnel for the ensuing year.

March 29, 1965

Mr. Harlan L. Lemon
Buchanan County Attorney
714 First Street East
Independence, Iowa

Dear Mr. Lemon:

You have requested an opinion from this office on the powers of various school boards based on the following set of facts:

"Eleven school districts, including the Independence Independent School District, have undergone a reorganization under chapter 275. Subsequent to the approval by the people of the re-organization plan, directors of the new school district, the Independence Community School District, were elected. The organizational meeting of the new board was held in February.

"The School Board of one of the old districts, the Independence Independent School District, owns three old school buildings which are no longer being used. This board had received bids for the dismantling of these three old buildings, when a technical error in the specifications was noted and all bids were rejected. They have since, again, received bids and unanimously resolved to accept the low bid.

"My questions involve an interpretation of Section 275.25, which provides in part: 'The new Board of Directors shall have complete control of the employment of all personnel for the newly formed Community School District for the ensuing year. Following the organization of the new board, they shall have authority to establish policy, organize curriculum, enter into contracts, and complete such other planning and take such action as is essential for the efficient management of the newly formed community school district.'

"My questions —are: (1) Can the board of the Independence Independent School District validly enter into a contract to dismantle these unoccupied school buildings, or is the quoted language of Section 275.25, to be interpreted so that only the new board of the reorganized district has such power? (2) Along the same lines, there are six rural buildings presently in use, that the new board does not intend to use in the coming year. Can the rural school district directors assuming compliance with other statutory directives, dispose of these buildings or must they hold them so as to allow the board of the newly formed district to make disposition of them? (3) Generally speaking, are the school boards of the former districts free to deal with assets of their districts, ie., may they spend cash assets for new equipment or sell property between now and July 1, 1965, when a division of the assets and liabilities of the several boards will be made according to 275.29? (4) Must the board of the newly formed district employ an administrator whose contract has another year to run?"

In reply thereto, I advise as follows. The language of Section 275.25 which we are concerned with here is set out as follows:

". . . The new board shall organize within fifteen (15) days following their election upon call of the county superintendent. The new board of directors shall have complete control of the employment of all personnel for the newly formed community school district *for the ensuing school year.* Following the organization of the new board they shall have authority to establish policy, organize curriculum, enter into contracts, and complete such other planning and take such action as is essential for the efficient management of the newly formed community school district." (Emphasis added)

This portion of the section was added in 1959 by Acts 1959 (58 G.A. Chapter 191 §1). This was contained in Senate File 529 which was entitled "A Bill For" An Act to amend . . . (275.25) and (275.29) . . . to provide for the *organization and legal responsibility of a newly elected board of a commnunity school district within fifteen* (15) days after election." (Emphasis added)

We do not have the benefit of case law interpreting this language. The legislative intent of the following quoted passage, ". . . and take such action as is essential for the efficient management of the newly formed community school district," would not appear to give clear authority to the new board in the first question you raise. We are of the opinion that resort must be had to other sections of this chapter and their legislative history to determine the legislative intent.

Section 275.24 entitled "Effective date of change" is as follows:

> "When any school district is enlarged, *reorganized,* or changes its boundary by the method hereinabove provided, the *effective date of such change shall be July 1 following the election of the new board,* or if no new board is elected then on July 1 following the enlargement, reorganization or boundary change." (Emphasis added)

This statute is clear and will admit of no interpretation. Prior to July 1 following the election of the new board of directors, the old board has valid authority to act.

Additionally, Section 275.29 entitled "Division of assets and liabilities after reorganization" is as follows:

> *"Between July 1st and July 20th the board of directors of the newly* formed community school district *shall meet* with the boards of all the old districts or parts of districts affected by the organization of the new school corporation for the purpose of reaching joint agreement on an equitable division of the assets of the several school corporations or parts thereof and an equitable distribution of the liabilities of the affected corporations or parts thereof." (Emphasis added)

This section was amended to read this way also by Senate File 529, Acts 1959 (58 G.A. Chapter 191, §2). The former 275.29 derived from Acts 1953 (55 G.A.) Chapter 117, §29 was stricken and this one enacted in lieu thereof. The old provision read as follows:

> "Sec. 29 Division of Assets and Liabilities. *Within twenty days after the organization of the new boards, they shall meet* jointly with the several boards of directors whose districts have been effected by the organization of the new corporation or corporations and all of said boards acting jointly shall recommend to the several boards an equitable division of the assets of the several school corporations or parts thereof and an equitable distribution of the liabilities of such school corporations or parts thereof among the new corporations." (Emphasis added)

This section was the former Section 274.19 which was repealed by Acts 1953 (55 G.A.) Chapter 117, §36. An opinion of this office construed the forerunner of this section (then section 2802 supplement of 1913) that "When a new consolidated school district is formed and directors elected therefor, it is the duty of the old school boards to wind up their business and turn the property over to the new board. All contracts in force at the time of consolidation should be carried out." 1919 AGO 577. It was also said in this opinion at page 577 and 578:

"Immediately upon the election of the directors they have authority to and charged with the duty of caring for the property and affairs of the new district. *It is to be understood, however, that before they can be clothed with jurisdiction over the property in the hands of the old board or boards, that the old board shall turn it over to the new board in the manner provided in section 2802, supplement of 1913.*"

Section 2802, Supplement of 1913 states in part:

"The boards of directors in office at the time the changes are made in the boundaries of the school corporations *shall continue to act until the boards of directors representing the newly formed districts have been duly organized, whereupon the new boards shall make an equitable division of all assets and liabilities of the corporations affected.*"

This section was construed by the Supreme Court of Iowa in *Districts Twp. v. Wiggins,* 110 Iowa 702, 80 N.W. 432 (1899). In this case it was said:

"The schoolhouse and all its belongings are the property of the original district until awarded to the newly formed independent district. Such division must be made by the board, and not by the courts."

We do agree with the statement in the above quoted Attorney General's opinion: "All contracts in force at the time of consolidation should be carried out."

It was stated in *State ex rel. Warrington v. Community School of St. Ansgar,* 1956, 247 Iowa 1167, 78 N.W. 2d 86:

"By enactment of statutes relating to reorganization of school districts and creation of new school districts, legislature will not be presumed to have intended to overturn long-established legal principles unless such intention is made to clearly appear by express declarations or by necessary implication."

The "Division of assets and liabilities" section then has undergone three notable changes: No. 1—The division of assets and liabilities to occur upon the newly formed district being duly organized; No. 2—Within Twenty (20) days after the organization of the new board; No. 3—Between July 1 and July 20 following the organization of the newly formed school district. The third one, of course, is the present law. We cannot escape the conclusion that the foregoing interpretations of the history of the "Division of Assets section" permits the old school board to exercise authority in reference to property owned by it until the division of assets occur between July 1 and July 20.

For the foregoing reasons and reading the quoted sections together, I would answer your first three questions as follows: (1) The Independence Independent School District can validly enter into a contract to dismantle these occupied school buildings up and until July 1, 1965; (2) Yes, the rural school district, assuming compliance with other statutory directives, may dispose of six rural buildings presently being used by that school district; (3) Yes, the school board of the former districts are free to deal with the assets of their districts up and until July 1, 1965, when a division of the assets and liabilities of the several boards will be made according to 275.29, 1962 Code.

You also ask in question (4) "Must the board of the newly formed district employ an administrator whose contract has another year to run?" The answer in my opinion is clearly in the negative based on the language: "The new board of directors *shall have complete control*

of the employment of all personnel for the newly formed community school district for the *ensuing school year.*" 275.25, Code of Iowa 1962. (Emphasis added)

14.3

SCHOOLS: School Boards — Transportation of Resident Pupils— §§285.1(1)(c), 285.1(1)(e), 1962 Code of Iowa. School Board has statutory discretionary authority to transport certain resident students who they otherwise would not be required to transport.

April 27, 1965

Mr. Paul F. Johnston
Superintendent of Public Instruction
State Office Building
L O C A L

Dear Mr. Johnston:

This will acknowledge your letter of February 9, 1965, wherein you ask the following question:

"Does a public school board of education have the discretionary authority to transport resident students as provided in Sections 285.1(c) and 285.1(e)?"

In answer to your question, the applicable sections of the 1962 Code of Iowa are as follows:

"285.1 When entitled to state aid.

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

* * *

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

Boards at their discretion may provide transportation for resident elementary children attending public school who live less than the distance at which *transportation is required.*

* * *

e. High school pupils residing in a district containing a city of twenty thousand population or over *must live* more than three miles from high school designated for attendance *to be entitled to transportation* thereto.

Boards at their discretion may provide transportation for all high school pupils residing inside the corporate limits of any town, village, or city, and more than two miles from designated high school." (Emphasis supplied)

The language of the legislature is clear, but the impression is made that the first paragraphs of (c) and (e), when read alone, place a requirement upon the student to live within a certain mileage in order to be eligible to be transported. This is caused by the use of the words "must live" and "be entitled to transportation." Paragraphs (c) and

(e) must be read with subsection 1. When these are read together there is no ambiguity. Where there is no ambiguity, the plain meaning controls. *Miller Oil Co. v. Abramson,* 252 Iowa 1058, 109 N.W. 2d 610 (1961).

Please note the italicized portion of the second paragraph of Section 285.1(1)(c) which plainly states that the boards have discretionary power in regard to resident children "who live less than the distance at which *transportation is required*" (emphasis supplied). This language plainly shows that Section 285.1 and the first paragraph of paragraph (c) place a duty to transport on the board. It should be further noted that the discretion granted in the second paragraphs of (c) and (e) is, of course, limited by the first paragraphs of said sections and by Section 285.1(1).

Subsection 1 of Section 285.1, when read together with the first paragraph of paragraphs (c) and (e), places a duty upon the school boards to transport certain eligible students. The second paragraphs of (c) and (e) grant the school boards a discretionary power to transport certain additional students. Therefore, the answer to your question must be "yes."

14.4

SCHOOLS AND SCHOOL DISTRICTS: Reorganization—§§275.12 to 275.23, 275.40, 1962 Code of Iowa. A high school district involved in a merger with a non-high school district may not participate in a school district reorganization until the merger is complete by the statutory time of July 1.

April 27, 1965

Mr. Van Wifvat
Dallas County Attorney
Law Building
1215 Warford
Perry, Iowa

Dear Mr. Wifvat:

This is in response to your request dated April 5, 1965, wherein you stated:

> "A non-high school district merges with a high school district by the procedure set forth in Section 275.40, 1962 Code of Iowa, as amended. The merger will become effective July 1, 1965. May the high school district involved in this merger participate in a school district reorganization project with another district or with several districts under procedures set forth in Sec. 275.12 to 275.23 inclusive, 1962 Code of Iowa, as amended, between the dates of said merger and July 1?"

I recommend that the high school district cannot participate in another reorganization proceeding under Section 275.12 to 275.23, Code of Iowa, until the previous merger is completed on July 1.

Authority for the above proposition is found in the case of *State ex rel Harberts v. Klemme Community School District,* 247 Ia. at page 51, where the court, in determining the prerequisite jurisdictional requirements for the purpose of school district reorganization said:

> "It is elementary that the *same land cannot* be within the jurisdiction of two pending reorganization proceedings at the same time." (Emphasis added)

Further on this point, the court in *Turnis v. Board of Education (Jones County)*, 252 Ia. at page 933, said:

> "As required by the statutes, the vital time of exclusive jurisdiction of the involved subject matter relates to the time the boundaries are finally determined, and covers the territory included in the proposed reorganization as published in the election notification. Any attempt to include territory *at that time involved in a prior or pending proceeding not abandoned, released or completed,* would result in a jurisdictional defect and an invalid election and reorganization." (Emphasis added)

In an opinion of the Attorney General, April 21, 1960, wherein the same issue was considered, the opinion ruled that there cannot be two concurrent reorganizations, one under sections 275.12 to 275.23, and the other under 275.40.

In the case at hand, the merger under Section 275.40 will not become effective until July 1. Thus, the merger proceeding is not "completed" until the effective date. The above authority clearly indicates that a second reorganization involving the same land which was involved in a previous reorganization, not completed, is illegal and void. The jurisdictional requirement fails.

14.5

SCHOOLS: "Shared time"—Art. I, Sec. 3, and Art. IX, Sec. 12, Iowa Constitution; Sec. 343.8, 1962 Code of Iowa. Public schools may admit private school pupils for specific classwork not available to them in their own schools.

April 28, 1965

Hon. John Kibbie
Senate Chamber
L O C A L

Dear Senator Kibbie:

This is in response to your request for an opinion on this question:

> "Does Iowa's Constitution or its statutes prohibit children who are enrolled in private schools from being enrolled at the same time (under what is called a 'shared time' arrangement) in public schools to avail themselves of certain classes not available in their private schools?"

Shared time is defined as an arrangement whereby non-public schools send their pupils to public schools for instruction in one or more subjects during a regular school day. (Research Report 1964—R. 10, National Education Association, at Page 5). It contemplates dual enrollment. It is not to be confused with "released time," an arrangement under which public schools release pupils for limited periods to attend classes in religion off premises.

The question asked here is significant at this time in light of the Elementary and Secondary Education Act of 1965 (H.R. 2362), which provides federal funds for the enlargement of education opportunities in local public school districts. The House Committee on Education and Labor has said (see House Report No. 143, 89th Congress, 1st Session, page 7):

> "No provision of the bill authorizes any grant for providing any service to a private institution, but at the same time the bill does contemplate some broadening of public educational programs

and services in which elementary and secondary school pupils who are not enrolled in public schools may participate. The extent of the broadened services will reflect the extent that there are educationally disadvantaged pupils who do not attend public school."

The question is also pertinent in light of legislation introduced in the Iowa General Assembly to provide for construction of vocational-technical schools whose doors would be open to private school students on a shared time basis.

Pertinent provisions of the Iowa Constitution and the Code of Iowa are:

"Article 1. Religion. Sec. 3. The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

"Sec. 343.8. Money for sectarian purposes. Public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control."

The Constitution as adopted also had this provision:

"Article IX. Common schools. Sec. 12. The Board of Education shall provide for the education of all the youths of the State, through a system of Common Schools and such school shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school as aforesaid may be deprived of their portion of the school fund."

Iowa case law and a number of opinions from this office over a period of years have interpreted the inhibitions. In *Knowlton v. Baumhofer,* 182 Iowa 691, 706, 166 N.W. 202 (1917), the court said:

"In this state, the Constitution (Art. 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."

And at Page 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 organizations, sect, creed or belief."

If what is contemplated here neither establishes, nor subsidizes, nor intrudes upon the free exercise of a religion, it is not violative of the Constitution or laws of Iowa. Violations or prospective violations have been found in the following situations: A school district rents a room from and sends its pupils to a Roman Catholic school for instruction

by a nun garbed in habit and subsidizes the instruction (*Knowlton, supra*); public monies are appropriated to help finance a sectarian school (13 OAG 117); a county allocates funds to sectarian orphanages (26 OAG 59); a school district proposes to make available the services of its physician, dentist and nurse to private school pupils (28 OAG 4); a school district lets a room in a public school to a sectarian institution (28 OAG 147); a public school permits a Roman Catholic nun to teach in a public school garbed in habit (30 OAG 338); a nun teaching in a public school transmits her salary to her superiors in the order of which she is a member (36 OAG 69); a school district rents class space in a private school (64 OAG ——). A 1928 opinion (28 OAG 174) disapproved transportation of pupils to parochial schools. A 1936 opinion (36 OAG 53) approved transportation of parochial pupils from their homes to the public school, from which they could walk to their private school. *Silver Lake Consol. Sch. Dist. v. Parker*, 238 Iowa 984, 29 N.W.2d 214 (1947), construed the statute authorizing school districts to provide transportation for pupils as authorizing only transportation of public school pupils. School districts, the Iowa Supreme Court said, possessed powers under the statutes only in respect to public schools and public school pupils, in the absence of express statutory authority to the contrary.

We believe the foregoing can be distinguished from what is involved in the "shared time" arrangement. In each of the above there is either an admission of sectarian influence into the public school domain, or public assistance to a sectarian establishment. Admitting parochial pupils to public school classes constitutes no governmental endorsement of a religion embraced by those pupils, nor does it subsidize the private schools which they attend. It may be argued that admitting them to one or two classes would relieve the private school of the financial burden of providing instruction in those areas, but this is merely an incidental benefit. Art. IX, Sec. 12 of the Iowa Constitution commands the public education "of all the youths of the state . . . ." And ". . . the law makes no distinction whatever as to the right of children . . . to attend the common schools; and there is no discretion left with, or given to, the board of school directors to make any distinction in regard to children . . . ." *Clark v. Board of Directors*, 24 Iowa 266; *Smith v. School District of Keokuk*, 40 Iowa 518; *Dove v. School District of Keokuk*, 41 Iowa 689. If private school pupils were seeking admission to the public schools as fulltime students, without question their right to admission would be unhesitatingly recognized.

It should be pointed out that Article IX, Sec. 12, provided for the creation of a Board of Education. Sec. 15 of that same article authorized the General Assembly at any time after 1863 to abolish it, to reorganize it, and "provide for the educational interests of the state in any other manner that to them shall seem best and proper." The Board of Education was abolished by the General Assembly in 1864 and provision made by statute for education. But it is clear that the power given to the General Assembly did not negative the injunction to provide "for the education of all youths of the state . . . ."

We say that any benefits to private schools under "shared time" would be incidental. That was the finding of the U. S. Supreme Court in *Everson v. Board of Education*, 330 U.S. 1 (1947), where it considered the constitutionality of a school district's reimbursement of parents for bus fares paid to transport their children to school, whether private or parochial. The court viewed the statute which permitted the payments as public welfare legislation, comparable to that which provides police and fire protection. It was meant to insure the safety of all children, the court said, and declared that a state cannot deny any of its citizens the benefits of public welfare legislation because of their religion. All such legislation, Justice Black observed, incidentally

benefits religious institutions; i.e., they are not denied police and fire protection.

It should also be pointed out that Iowa aids religious institutions in a conspicuous way by exempting their non-profit properties from taxation. Section 427.1(9), Iowa Code of 1962. The sectarian causes themselves are the incidental beneficiaries of this exemption.

The Everson case is pertinent because the question asked here must be considered in the light of the United States Constitution and the lessons extracted from it, as well as the Iowa Constitution and Iowa laws. In 1934, in *Hamilton v. Regents of the University of California*, 293 U.S. 245, the U.S. Supreme Court ruled that the Fourteenth Amendment restrains states from impinging on the freedom of religion insured to citizens of the United States by the First Amendment. A state, where religion is involved, cannot do in respect to its citizens what the federal government cannot do in respect to citizens of the United States.

Everson, in effect, permitted under the incidental benefits rationale a more palpable fraternization between state and church—a payment of money which assisted parents in the private education of their children —than what is contemplated in "shared time."

We are aware of an Attorney General's opinion (40 OAG 234) which held that a public school could not admit parochial students to three classes—in manual training, agriculture, and mathematics—not available to them in their own schools. The opinion stated a conclusion without stating authority for it. And since then the U.S. Supreme Court has articulated the incidental benefits criterion which we believe adheres here.

It is the opinion of this office, therefore, that it will violate neither the Constitution nor the laws of Iowa to admit private school pupils to public school classes on a "shared time" basis.

14.6

SCHOOLS: County Schools: Loan of library materials to non-public or parochial schools—Section 292.2, 1962 Code of Iowa. A County Superintendent of schools shall not loan county library materials to non-public or parochial schools.

April 30, 1965

Mr. Earl T. Klay
Sioux County Attorney
Orange City, Iowa

Dear Mr. Klay:

This is in response to your request dated February 1, 1965, wherein you asked the following question:

> Can the Sioux County Board of Education legally loan library materials, i.e., books, film strips, film and other special materials to a non-public or parochial school within the confines of the above county?

In reply thereto, we advise that Chapter 273, Code of Iowa, creates the county school system which is a part of the *public* school system of the state. (Emphasis supplied). The county board of education which is created by Section 273.4, 1962 Code of Iowa, is empowered by Section 273.13(6) to:

". . . make provisions for establishment and maintenance of county school libraries, in conformity with the provision of Chapter 292."

Section 292.1, 1962 Code of Iowa, provides:

"The Auditor of each county in this state shall withhold annually the money received from the semi-annual apportionment of the interest of the permanent school fund for the several school districts for the purchase of books . . ."

Section 292.2, 1962 Code of Iowa, provides two methods for distributing the above mentioned books. The first method allows the county board of education to distribute the books to the librarians of the schools and the second alternative allows the board to entrust the custody of such books to the county superintendent to be loaned by him to the county schools in the manner of a circulating library. Once the books reach the respective libraries they may be loaned to teachers, pupils and other residents of the district. Section 292.6, 1962 Code of Iowa. Although, a parochial school could be a resident of a school district for some purposes I am of the opinion that it is not a resident within the meaning of this work in Section 292.6, 1962 Code of Iowa.

It is a general rule of statutory construction that words of a statute will be interpreted in their ordinary acceptation and significance and the meaning commonly attributed to them. *Flood v. City National Bank*, 218 Iowa 898; *Rohlf v. Kasemier*, 140 Iowa 182; 50 Am. Jur. 228. Resident is defined in Webster's New Collegiate Dictionary 1959 as "*One* who resides in a place." (Emphasis supplied) The word "who" is defined in Webster's as 'a simple relative;—now *properly used of persons* (corresponding to "which" as applied to things)." (Emphasis supplied) It seems clear from the above definitions that "residents" means *persons* who live in a place rather than a *legal entity or thing* (parochial school) which is domiciled in a certain place.

In reading Chapters 273 and 292 I have been unable to find any specific statutory authority conferring on the County Boards of Education or the County Superintendent the power to loan books to non-public or parochial schools. Inasmuch as the county boards of education and county superintendents are creatures of statute, their powers must be derived either from the express statutory language or must be reasonably and necessarily incident to the exercise of a power or performance of a duty expressly conferred or imposed. *Silver Lake Consolidated School District v. Parker*, 238 Iowa 984, 29 N.W.2d 219 (1947); *Independent School District of Danbury v. Christiansen*, 242 Iowa 963, 49 N.W.2d 263 (1951).

Since there does not seem to be an express statute authorizing the loaning of library materials to non-public or parochial schools, then to sustain this type of activity we must find that this power is reasonably and necessarily implied from the exercise or performance of an express power owing to the County Board of Education or the County Superintendent.

Section 292.2, 1962 Code of Iowa authorizes the county board of education to entrust the custody of library books to the county superintendent. The county superintendent in turn may loan these books to schools in the county in the manner of a circulating library. Can we imply that this section gives the county superintendent the authority to loan library materials to non-public or parochial schools? The Supreme Court of Iowa in the Silver Lake case, supra, has answered this question. Basically, the plaintiff in the Silver Lake case argued that Iowa's school transportation laws were applicable to non-public or parochial as well as to public schools based on 276.26, 1946 Code of

Iowa requirement that the board provide "suitable transportation . . . for every child of school age." The Supreme Court answered this contention at page 993 of the Iowa Reports by saying:

> "We may agree with the proposition of the plaintiff that the duty of transportation placed upon the school board is mandatory, *but mandatory only as to pupils under the jurisdiction of such boards.* That is, the pupils of the public school, with whom only is the school board concerned. The board of the consolidated school district is not required by law, to exercise jurisdiction over private schools, except in the few instances required by statute. Examples of such special requirements are sections 280.4 to 280.8, inclusive, relating to flags upon schoolhouses, teaching subjects in the English language, teaching American citizenship and constitution and American history; also sections 299.3 and 299.4, reports as to private schools, and section 299.1, the compulsory school law.
>
> "*We believe that the school laws of the state concern only the public schools,* unless otherwise expressly indicated, and do and can apply only to the schools within the purview of the school statutes, or under the control or jurisdiction of the school officials, and that this would apply to transportation. (Emphasis supplied)
>
> "While we believe that all the school laws refer to the public schools only, except where otherwise expressly indicated, we are satisfied also that the power of local boards to provide for transportation is limited strictly to those who attend public schools."

From the above language of the Iowa Supreme Court I am of the opinion that the County Superintendent of Schools cannot loan library materials to non-public or parochial schools. As mentioned on page one of this opinion, Section 292.6, 1962 Code of Iowa empowers district librarians to loan books to teachers, pupils, and other residents of the (public school) district. Therefore, any person, who is a resident of the district, could borrow these library books including teachers and pupils of Catholic schools. In other words, the statutory prohibition extends only to a Superintendent's loaning library books directly to a parochial school, but not to the right of parochial school teachers or students, as residents of the district to borrow the books once they reach the library.

In the 1934 edition of the Report of the Attorney General at page 680, there is an opinion which in essence states as follows:

> "School boards may purchase and loan textbooks for use of children or scholars in private and parochial schools if authorized by a vote of the school district."

This opinion was based on the decision of the United States Supreme Court in the case of *Cochran v. Board of Education,* 281 U. S. 370, and Section 4238 of the 1931 Code of Iowa. From the Cochran case the writer of the 1934 opinion concluded that the loaning of books, purchased from tax funds, to parochial school students would not violate the "establishment clause" of the First Amendment of the United States Constitution. Therefore, he inferred that the loaning of books to parochial school students in Iowa, under the authority of Section 4238 of the 1931 Code, would not violate Article 1, Section 3 of the Iowa Constitution. Section 4238 of the 1931 Code provided:

> "4238. Insurance-supplies-textbooks. It may provide and pay out of the general fund to insure school property such sum as may be necessary, and may purchase dictionaries, library books, including books for the purpose of teaching vocal music, maps, charts,

and apparatus for the use of the schools thereof to an amount not exceeding two hundred dollars in any one year for each school building under its charge; and may furnish schoolbooks to indigent children when they are likely to be deprived of the proper benefits of the school unless so aided; and shall, when directed by a vote of the district, purchase and loan books to scholars, and shall provide therefor by levy of general fund."

However, Section 4238 has been amended over the years and the portion remaining is embodied in Section 279.25, which reads as follows:

"279.25 Insurance-supplies-textbooks. It may provide and pay out of the general fund to insure school property such sum as may be necessary, and may purchase dictionaries, library books, including books for the purpose of teaching vocal music, maps, charts, and apparatus for the use of the schools thereof to an amount not exceeding two hundred dollars in any one year for each school building under its charge; and may furnish schoolbooks to indigent children when they are likely to be deprived of the proper benefits of the school unless so aided."

In reading the above section I am of the opinion that we must interpret the word schools used therein as meaning *public schools. Silver Lake Consolidated School District v. Parker*, (supra), 238 Iowa 984, 29 N.W. 2d 219. For the above reasons I feel that the opinion found at page 680 of the 1934 Report of the Attorney General is no longer applicable.

14.7

SCHOOLS AND SCHOOL DISTRICTS: County Board of Education— Chapter 273, 1962 Code of Iowa. The constitutional apportionment standards which apply to state legislature and county boards of supervisors do not apply to County Boards of Education.

May 17, 1965

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

Dear Mr. Simpson:

You have submitted the following questions to our office:

"1. Is your recent ruling in the Woodbury County Supervisors case (Staff to Samore, Woodbury County Attorney, 3/15/65) also applicable to Section 273.3 Code of Iowa, as to fulfilling constitutional requirements of director districts on the County Board of Education?

"2. If such ruling is applicable, then shall all the directors be elected at-large and should said election be held this coming September?"

In our recent ruling in regard to Woodbury County Supervisors, we stated in the conclusion of our opinion as follows:

"In view of the persuasive case authorities cited above, it is my opinion that the principle of equal representation involved in these cases applies to county boards of supervisors in the state of Iowa inasmuch as those boards of local government are given legislative power and are composed of elected members."

In that opinion we quoted from 65 Columbia Law Review, page 23, as follows:

"There is strong reason to believe that the apportionment standards which apply to states also apply to those municipalities that (1) exercise general governmental functions and (2) are designed to be controlled by the voters of the geographic area over which the municipality has jurisdiction. Counties, towns, cities and villages meet these tests. They are fundamental and important organs of government within the state; they exercise a large measure of the state's power and, because of the nature of the services rendered, are the medium of government most often in direct contact with the people."

To answer your first question, we must examine the nature of a county board of education as constituted in Iowa. The general nature of a county board of education must be determined from the constitution and the statutes. Article IX, Part 2, Section 1, of the Iowa Constitution reads as follows:

"The educational and school funds and lands, shall be under the control and management of the General Assembly of this State."

Chapter 273 of the 1962 Code of Iowa refers to county school system. Sections which are pertinent read as follows:

"273.1 System created. There is hereby created in each of the several counties of the state, a county school system which shall be a part of the public school system of the state."

"273.2 Schools included. The county school system shall embrace all the public schools of the county, except independent and consolidated school districts that maintain four-year high schools and shall be under the direction of the county board of education as provided in this chapter. Any independent school district or consolidated school district may become a part of the county school system upon approval by the voters of the district in the manner provided in chapter 278, and notifying the county superintendent, the superintendent of public instruction and the county auditor, in which case the district shall become a part of the county school system on the first secular day of July next following. The county board of education shall effect no change in the operation of the schools in said district coming into the county school system prior to the first of July following its becoming a part of the county school system.

"An independent or consolidated school district joining the county school system by such vote, situated in more than one county shall be a part of the county school system of the county in which the building is located.

"In the event an independent school district or consolidated school district is proposed to be formed from one or more school districts within the county school system, the new district shall be a part of the county school system unless composed in part of an independent or consolidated district maintaining an approved four-year high school not in the county school system."

"273.3 Election areas. The territory of the entire county shall be divided into four election areas, as nearly as possible of equal size and contiguous territory, to be designated as the first, the second, the third and the fourth election areas. 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. In the event of changes in the limits of school districts, the county board of education shall make any such adjustments as may be necessary to equalize the territorial size of the election areas, provided that no such change shall be made less than sixty days prior to the date of the annual school election."

"273.12 Power and duties—general. The county board shall exercise such powers as are specifically assigned to it by law. In general their powers and duties shall relate to matters affecting the county school system as a whole rather than specific details relating to individual schools or districts. It shall be the duty of the county board after considering the recommendations of the county superintendent to exercise the following general powers:

"1. The county board shall determine and adopt such policies as are deemed necessary by it for the efficient operation and general improvement of the county school system.

"2. The county board shall adopt such rules and regulations as in its opinion will contribute to the more orderly and efficient operation of the county school system.

"3. The county board shall adopt such minimum standards as are considered desirable by it for improving the county school system.

"4. The county board shall have the power to perform those duties and exercise those responsibilities which are assigned to it by law and which are not in conflict with the powers and duties assigned to the local board by law, in order to improve the county school system and carry out the objectives and purposes of the school laws of Iowa."

"273.13 Specific duties. The county board of education shall:

"1. Appoint a county superintendent of schools provided in this chapter and fix his salary. The board shall also fix traveling expense of the superintendent. Upon the recommendation of the county superintendent, the county board may appoint an assistant county superintendent and such other supervisory, and clerical assistants, as are deemed necessary and fix their salaries and duties. During the absence or disability of the superintendent the assistant superintendent shall perform all the duties of a county superintendent.

"2. Select a county attendance officer, if deemed expedient, on recommendation of the county superintendent, either on a part or full-time basis; and fix his duties and salary within limits prescribed by law.

"3. Approve the curriculum as recommended by the county superintendent in conformity with the course of study prescribed by the state department of public instruction.

"4. Adopt textbooks and other instructional aids for rural school districts under the administration of the county superintendent, and purchase, sell, rent or loan them as provided in sections 301.15 to 301.28, inclusive, and serve as a central depository and purchasing agent of such books and instructional aids for school districts under its jurisdiction, and make proper accounting for same or the county board of education may, with its own funds, buy such books and instructional aids for the school districts under its jurisdiction and rent them to the pupils of the various districts, and make proper accounting for same.

"5. Purchase and provide such general school supplies, school board supplies, and other materials as are necessary to the conduct of its office.

"6. Adopt rules and regulations, where deemed expedient, and make provisions for establishment and maintenance of county school libraries, in conformity with the provision of chapter 292.

"7. Enforce all laws, and rules and regulations of the department of public instruction for the transportation of pupils to and from public school in all school districts of the county.

"8. Act with the county superintendent as an appeal board in and for all school districts of the county, in all matters properly brought before it as provided by law.

"9. Cooperate with federal, state, county and municipal agencies, and with local school officers in territory adjacent to, but outside the county, in all matters relating to the improvement of the educational program, when deemed expedient.

"10. At the regular or a special meeting held between July 1 and 15, consider the budget as submitted by the county superintendent, and certify to the board of supervisors the estimates of the amounts needed. Such estimates shall follow the budget procedure under chapter 24. The board of supervisors shall then levy a tax on all the taxable property in the county for the amount certified, and the money so raised shall go into a fund hereinafter called the county board of education fund.

"11. At each meeting of the board, audit all bills and claims which upon approval shall be paid by warrants of the county auditor, upon the written order of the secretary, counter-signed by the president, from the county board of education fund. All regular employees of the board shall be paid monthly by warrants drawn on the above fund by the county auditor.

"12. With the assistance of the county superintendent and the cooperation of the boards of the districts within the county, plan and supervise the orderly reorganization of districts, by union, merger or centralization, into larger and more efficient attendance and administrative units. No reorganization shall be submitted to a vote of the people of the district until the plan of reorganization has been referred to and approved by the county board of education.

"13. Cause to be published annually in the official newspapers 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.

"14. In any county of more than one hundred twenty-five thousand population, upon request of the board of supervisors, provide suitable curriculum, teaching staff, books, supplies and other necessary materials for the instruction of children of school age who are inmates of the detention home of such county provided for in section 232.35."

The county school system as now constituted was set up by Chapter 147 of the Acts of the 52nd G.A. The enacting clause read as follows:

"An act creating a county school system, relating to the operation thereof, and to the county board of education, county superintendent of schools, and his assistants, the matter of their selec-

tion and prescribing their duties and powers and providing for the selection of textbooks for said system."

The establishment of a county school board should be contrasted with the powers of a county as set forth in Section 332.1 which reads as follows:

"332.1 Body corporate. Each county is a body corporate for civil and political purposes, may sue and be sued, must have a seal, may acquire and hold property, make all contracts necessary for the control, management, and improvement or disposition thereof, and do such other acts and exercise such other powers as are authorized by law."

We find at page 54 of the Reports of the Attorney General for the year 1952 the following language:

"From the foregoing it seems quite clear that the county board of education is not a political subdivision and is not an entity that may sue or be sued. It is not a person, firm, or corporation, and therefore not an employer within the terms of the workmen's compensation law."

There is a considerable difference between a board of supervisors as a political subdivision of the state and the statutory creation of a county board of education giving it limited powers. Not only is the extent of powers quite different; the nature of the powers is different. The county school system does not have any more power than that of an administrative agency. There are no powers inherent to the county board of education.

On September 11, 1964, the Circuit Court for the County of Kent, Michigan, decided the case of *Brouwer v. Bronkema*. This is one of the first decisions requiring a County Board of Supervisors to be represented on a population basis. In that decision the Court stated as its conclusion the following:

"It is the 'supreme law of the land' that each 'person' have equal representation in the legislative body in which the legislative power of the State is exercised and such right requires that the membership of such body be apportioned on a population basis. A part of the legislative power of the State is delegated to and exercised by County Boards of Supervisors. That Board, like its parent body, the State Legislature, must be apportioned on a population basis if all persons in the County are to have equal representation therein. I, therefore, conclude that the Equal Protection Clause of the Fourteenth Amendment requires that the County Board of Supervisors meet the same 'basic constitutional standard' as required of the State Legislatures, namely that it be apportioned on a population basis."

The latest case is that of *State v. Sylvester*, a Wisconsin Supreme Court case which was decided on January 5, 1965, and is cited as 132 N.W. 2d 249, which also concerned the representation on a County Board of Supervisors. The Wisconsin Court in its conclusion stated:

"Since the composition of the Legislature must conform to the principle of equal representation, it is logical that the *arm of political subdivision of such Legislature enacting legislation should* be governed by the same principle of equal representation." (Emphasis supplied)

I do not believe that these cases, and the language contained therein, apply to the County Boards of Education as constituted in the state of Iowa. The nature of the county school boards, which appears to be

primarily administrative; the fact that they are not political subdivisions of the state; the fact that they have no inherent powers; and the fact that their powers to legislate, if any, are extremely limited, all force me to conclude that the answer to your first question is that the constitutional requirements which may apply to a County Board of Supervisors do not apply to the District Directors of County Boards of Education.

In our opinion to Woodbury County Attorney Samore of March 15, 1965, we set out at page 12 instances where various governmental subdivisions were considered to be legislative bodies. These included the following:

1. County Council
2. Board of Education
3. A City and County Board of Supervisors
4. Interstate Commerce Commission
5. A City Board Commission
6. A Town Board of Trustees
7. A County Board of Supervisors
8. A County Board of Commissioners

The Board of Education involved a case of *Andeel v. Woods*, 258 P. 2d 285, 288, 174 Kan. 556. That case did not involve a situation close to an Iowa County Board of Education and that case itself did not consider the question now before us.

Inasmuch as your first question was answered in the negative, it becomes unnecessary to consider your second question.

14.8

SCHOOLS: Lease of vacant public school building—First Amendment of United States Constitution, Article I, Section 3 Iowa Constitution, §297.22, 1962 Code of Iowa. A public school board may lease a vacant school building to a parochial school board for one year if adequate consideration is paid for the leasehold interest.

June 14, 1965

Mr. Dale E. Gray
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Gray:

This is to acknowledge receipt of your request for an opinion wherein you pose the following factual situation:

> "Rockwell City Community School District is presently building a new elementary school which will be ready for use on or before 7-1-65, therefore elementary schoolhouse presently being used by the Rockwell City Community School District will not be needed for school purposes after 7-1-65. St. Francis Parish is now making plans to construct a new elementary school on the site now occupied by their old school in Rockwell City. In order to accommodate their 90 pupils during the period of demolition and construction, could St. Francis Parish lease Rockwell City's unused schoolhouse for one year?"

Section 297.22, 1962 Code of Iowa, provides in part that:

"The board of directors of other school corporations may sell, lease, or dispose of, in whole or in part, any school house . . . belonging to the corporation of a value not to exceed the following amounts:

"1. Twenty-five hundred dollars in school districts which maintain a high school and in which the average daily attendance in the preceding year was two hundred or less.

"2. Five thousand dollars in school districts which maintain a high school and in which the average daily attendance in the preceding year was more than two hundred but less than five hundred.

"3. Ten thousand dollars in school districts which maintain a high school and in which the average daily attendance in the preceding year was five hundred or more.

"4. Five hundred dollars in any school district which does not maintain a high school."

The above section empowers a school board to lease or sell school property without the necessity of having the electors vote on the proposition at a regular election as in Section 278.1(2), 1962 Code of Iowa. However, before a lease or sale can be consumated, there are certain specific conditions precedent, found in Subsections 1 through 4 of Section 297.22 (supra) that must be met. Subsections 1 through 3 require that before a board of directors may sell or lease property belonging to the school corporation the property must be less than the value stated in the respective subsection, the district must maintain a high school and the average daily attendance in the district during the preceding year must meet the requirements of the specific subsections. 62 OAG 348. Subsection 4 allows the board to sell or lease school property without reference to daily attendance in the district for the preceding year or whether the district maintained a high school if the value of the property to be sold or leased is $500 or less.

The last paragraph of Section 297.22 (supra) requires that:

"Before the board of directors may sell, lease or dispose of any preperty belonging to the school corporation, it shall comply with the requirements set forth in sections 297.15 to 297.20, inclusive and section 297.23 and 297.24 . . .

Section 297.15, 1962 Code of Iowa is a general reversion statute which provides:

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

In attempting to reconcile the above section with the last paragraph of Section 297.22 (supra), I am of the opinion that the requirements set forth in Sections 297.15 to 297.20, 1962 Code of Iowa, with one exception which will be discussed later, have no application in a lease arrangement. This conclusion is based on the fact that Section 297.15 (supra) is a general reversion statute that governs only *resales* to the present owner of the tract from which the unused school site was taken. In the case of *Waddell v. Board of Directors,* 190 Iowa 400, 405, 175 N.W. 65, 67 (1919), the Supreme Court of Iowa said the following of Section 2816, the fore-runner of 297.15 (supra):

"Both the parent statute and the present statute appear by their terms to be applicable to rural school districts only. They contemplated the carving of school sites out of farms, *and the restoring of the sites back to the farm when school uses ceased.* (Emphasis supplied)

Sections 297.16 to 297.20 provide specific methods of determining value of the school house site when it is being resold to the owner of the tract within the scope of Section 297.15. *Suck v. Benton Twp. Benton County,* 246 Iowa 1, 7, 66 N.W. 2d 434, 437 (1954). As previously stated, this being a lease arrangement, the only instance when the directives of Sections 297.15 to 297.20 (supra) must be complied with is when there is an outstanding reversion or option to repurchase the unused school house site owing to the present owner of the tract from which it was taken. However, in the situation at hand this school house site is located within Rockwell City and therefore no reversion nor option to purchase would exist. Section 297.15 (supra).

Sections 297.23 and 297.24, 1962 Code of Iowa, would not apply to our lease situation because they clearly refer only to sales of unused school house sites.

This office has been informed that the present value of the old Rockwell City elementary school building is approximately $8600, that the district maintains a high school, and that the average daily attendance in the school district last year was 783 students. 62 OAG 348. Therefore, I am of the opinion that Section 297.22(3) (supra) would authorize the contemplated lease agreement.

It now remains for us to determine whether the leasing of an unused public school building to a parochial school board will violate the prohibitions of the "establishment clauses" of the Federal or Iowa Constitutions. The First Amendment of the United States Constitution which is made applicable to the states by the due process clause of the Fourteenth Amendment and Article 1, Section 3, of the Iowa Constitution, provides in part:

". . . the (Congress) General Assembly, shall make no law respecting an establishment of religion . . ."

From prior court decisions we have learned that the "establishment clauses" prohibit the lending of a public classroom for religious instruction during "released time": *McCollum v. Board of Education,* 333 U. S. 203, 92 L.Ed. 644 (1948); the lending of public credit: *Zorach v. Clauson,* 343 U.S. 306, 314, 96 L.Ed. 954, 962 (1962); tuition payments made by the state to church school pupils: *Almond v. Day,* 197 Va. 419, 89 S.E. 2d 851 (1951); *Swart v. South Burlington Town School Districts,* 122 Vt. 177, 167 A. 2d 514 (1961); the reading of Bible verses and recitation of Lord's prayer in public schools, *Abington Township v. Schemp,* 374 U. S. 203, 10 L.Ed. 2d 844 (1963); and the renting of public school purposes of the second floor of a parochial school building by a public school board with the public school being taught by nuns. *Knowlton v. Baumhover,* 182 Iowa 691, 166 N.W. 202 (1918).

The above examples are illustrative of what the courts have called direct benefits which have as their primary purpose aid to religion or whose primary effect is to benefit a religious group as such. However, the primary purpose of the lease contemplated by Rockwell City Community School District is to dispose of unused public school property on the most advantageous terms available to the community for a consideration equivalent to that which was given up, i.e., a leasehold of the school for the period of one year. The primary benefit of this lease agreement will flow to the public school district in that it will realize income from school property which otherwise might remain vacant, while

the benefit received by the St. Francis Parish would only be incidental to the main purpose, and one for which the Parish has paid quid pro quo. In the case of *Everson v. Board of Education*, 330 U. S. 1, 91 L.Ed. 711 (1946) the United States Supreme Court refused to strike down a New Jersey statute which provided for the spending of tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it paid the fares of pupils attending public and other schools. In reaching its decision the United States Supreme Court adopted the position that the New Jersey statute in question should not be held unconstitutional as a violation of the "establishment clause" just because it happens to confer an *incidental* benefit upon parochial schools.

In the Everson opinion the United States Supreme Court stated:

> ". . . New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson v. Board of Education*, 330 U. S. 1, 16; 91 L.Ed. 711, 724 (1946)

In view of the above quote it would seem that the proposed lease would not violate the "establishment clauses" of the Federal or Iowa Constitutions. Section 297.22, 1962 Code of Iowa, expressly permits the sale, lease or disposal of school property, and this is undeniably a valid legislative prerogative. Therefore, I am of the opinion that this proposed lease to the St. Francis Parish should be read in this light. The establishment clause should not be construed so as to exclude St. Francis Parish from receiving the incidental benefits of Section 297.22, 1962 Code of Iowa, or prohibit the state of Iowa from extending its general state law benefits to all of its citizens without regard to their religious beliefs. If in the disposal of excess school property by lease or sale for adequate consideration a school board refuses to contract with the highest bidder just because it is a church, the board might be violating the "free exercise of religion clause" of the Federal and State Constitutions.

Since adequate consideration will be paid by St. Francis Parish for the rental of the building, Section 343.8, 1962 Code of Iowa, which provides in part, public money shall not be appropriated, given or loaned . . . in favor of any institution . . . which is under ecclesiastical or sectarian management or control will not be violated. In addition, money paid by the Community School District for fire insurance will not be an "appropriation" because this sum will undoubtedly be reflected in the terms of the lease and also for the reason that this money will go to insure its own property.

The renting of school property is not a new proposition in Iowa. In 1878 the Iowa Supreme Court ruling was that the renting of a school for religious meetings would not violate the "establishment clause" of the Iowa Constitution. *Davis v. Boget*, 50 Iowa 11 (1878).

For the above reasons, it is my opinion that the lease arrangement in question would not be illegal.

14.9

SCHOOLS AND SCHOOL DISTRICTS: **Community School Districts and School Districts in general**—Chapter 274, 1962 Code of Iowa. The constitutional apportionment standards which apply to state legislatures and county boards of supervisors do not apply to community school districts or school districts in general.

June 29, 1965

Mr. Richard R. Jones
Taylor County Attorney
518 Court Street
Bedford, Iowa 50833

Dear Mr. Jones:

You have submitted the following question:

"The Lenox Community School District was reorganized under the provisions of Chapter 275 of the Code of Iowa. The method of electing the directors was done under the provisions of Section 275.12 (2) (d). This statutory provision permits the division of the entire school district into geographical sub-districts and each sub-district elects its own director.

"The Lenox Community School District is divided into five sub-districts. The city of Lenox plus a small fringe area adjoining make up one of these sub-districts. The remaining four sub-districts are located in the rural area. The sub-district in which the city of Lenox is located has approximately 853 eligible voters. The remaining four sub-districts have approximately 813 eligible voters.

"Does this situation meet the U. S. and Iowa constitutional requirements that voting be based primarily upon population standards? Does this situation fall within such constitutional requirements, and, if so, what steps should the Lenox Community School District Board of Directors take to remedy this situation? These questions arise out of your recent Opinion concerning the Board of Supervisors in Woodbury County. (Staff to Samore, Woodbury County Attorney, 3-15-65, S65-3-3)."

Section 274.1 of the 1962 Code of Iowa, having to do with the powers and jurisdiction of school districts, reads as follows:

"Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and *exercise all the powers granted by law*, and shall have exclusive jurisdiction in all school matters over the territory therein contained." (Emphasis supplied)

Chapter 274 is one of many chapters having to do with the school districts. An examination of these various chapters indicates that there is considerable statutory control. Some of these chapters and their titles are:

275—Reorganization
277—Elections
278—Board of Directors and powers and duties
279—Standards for attendance and tuition
285—State aid for transportation
291—Duties of president, secretary and treasurer of School Board of Directors

294—Teachers
296—Indebtedness
297—Schoolhouses and schoolhouse sites
298—School taxes and bonds
302—School fund

In essence, your question is whether the U.S. Constitutional requirements that voting be primarily based on population standards would also apply to an Iowa school district. On March 15, 1965, this office submitted an opinion to the Woodbury County Attorney that the Woodbury County Board of Supervisors was a governmental body which would be required to meet the constitutional voting requirements. The basis for that opinion was the fact that county boards of supervisors in Iowa are legislative bodies and are arms or political subdivisions of the state legislature so that the cases applying to legislature would apply to a county board of supervisors. There are direct court holdings that counties would be under such a constitutional restriction. One of these is the case of *State v. Sylvester*, — Wisc. —, 132 N.W. 2d 249 (1965).

On May 7, 1965, this office issued an opinion that county boards of education in Iowa were not under the constitutional requirements which apply to state legislatures and county boards of supervisors. The reason for that opinion was that there was considerable difference between a board of supervisors, which is a political subdivision of the state, and a county board of education, which is a legislative creature of limited powers. The nature of these powers was very restrictive and the extent of these powers was less.

The Iowa Supreme Court has set out in its opinion of *Waddell v. Board of Directors*, 190 Iowa 400, 175 N.W. 65 (1919), at page 406 of the Iowa Reports as follows:

". . . The defendant is a school corporation. It is a legislative creation. It is not organized for profit. It is an arm of the state, a part of its political organization. It is not a 'person', within the meaning of any bill of rights or constitutional limitation. It has no rights, no functions, no capacity, except such as are conferred upon it by the legislature. The legislative power is plenary. It may prescribe its form of organization and its functions today, and it may change them tomorrow. It may confer or withhold power to take title to real estate. Conferring such power, it may qualify it, both as to the title and tenure of the real estate. It may dissolve the corporation at any time, and may direct the disposition of its property."

This case discusses the legislative power of the state legislature and how it may change those powers in regard to the school districts.

An analysis of the powers of the school districts leads one to believe they are closer to the organization of a county board of education than they are to a county board of supervisors. It should be noted that a school district does have somewhat broader powers than a county board of education. The Wisconsin case of *State v. Sylvester*, cited above, which was the basic authority for our opinion that a county board of supervisor election would be under the U.S. Supreme Court's rule as to voting requirements, made the following statement:

"Since the composition of the Legislature must conform to the principle of equal representation, it is logical that the *arm or political subdivision of such Legislature enacting legislation should* be governed by the same principle of equal representation." (Emphasis supplied)

The 65 Columbia Law Review article, which we quoted in both our prior opinions, stated at page 23 as follows:

> "There is strong reason to believe that the apportionment standards which apply to states also apply to those municipalities that (1) exercise general governmental functions and (2) are designed to be controlled by the voters of the geographic areas over which the municipality has jurisdiction. Counties, towns, cities and villages meet these tests. They are fundamental and important organs of government within the state; they exercise a large measure of the state's power and, because of the nature of the services rendered, are the medium of government most often in direct contact with the people."

While school districts have somewhat broader powers than county boards of education, they do not have the legislative power of a county board of supervisors, nor are they a political subdivision of the legislature, nor do they have inherent powers, nor do they have extensive legislative power. Because of all these considerations, it is my opinion that the constitutional requirements, which I have stated as applying to a county board of supervisors, do not apply to an Iowa community school district.

Perhaps there will be case developments which will place the constitutional requirements on community school districts in Iowa, but they have not proceeded to that extent and from the legal writings that are presently available, it is my opinion that this legal development will not occur.

14.10

SCHOOLS: Transportation—S.F. 553, 61st G.A. Private school pupils enrolled concurrently in public schools may ride public school buses, at the times the service is provided and to the places it is provided.

July 14, 1965

Mr. Dale Tieden
State Representative
Clayton County
Garnavillo, Iowa

Dear Mr. Tieden:

This is in response to your request for an opinion as to whether a private school student who avails himself of the provisions of Senate File 553, as enacted by the Sixty-first General Assembly, may ride public school buses to and from the public school he attends.

Sec. 4 of S. F. 553 permits "the enrollment in public schools for specified courses of students who also are enrolled in private schools, when the courses in which they seek enrollment are not available to them in their private schools . . ."

What is provided here is defined as "shared time" enrollment. It is an arrangement whereby non-public schools send their students to public schools for instruction in one or more subjects during a regular school day. It contemplates dual enrollment—that is, the student is enrolled concurrently in two school systems, a private and a public.

This office, in an opinion issued April 28, 1965, found this provision of S. F. 553 constitutional. In the context of doing so, cases were cited in which the Iowa Supreme Court enunciated early in the history of this state strictures against discriminating among children enrolled in the public schools. The discrimination sought to be defended was racial, but we are constrained to accept the same conclusion in respect to the question asked here. A child enrolled in a public school,

although for limited periods of class work, is a public school student. A school board may not discriminate against him. The cases cited for this proposition in the earlier opinion were *Clark v. Board of Directors*, 24 Iowa 266; *Smith v. School District of Keokuk*, 40 Iowa 518; and *Dove v. School District of Keokuk*, 41 Iowa 689.

This does not mean that a school district must provide ferry service for dually-enrolled pupils between their schools. It means only that a dually-enrolled pupil may ride public school buses at the times when service is provided and to the places it is provided, if he is within the description of those generally for whom such service is provided. No exception may be made *for* him; but on the other hand no exception may be made *of* him.

It is the opinion of this office, therefore, that private school pupils enrolled in public school "shared time" classes may ride public school buses in accordance with the foregoing.

14.11

SCHOOLS: **Lease Purchase Agreements**—S. F. 313, Acts of the 61st G.A. Boards of Directors of school districts may with the approval of sixty per cent of the voters enter into lease-purchase agreements for pre-fabricated classroom units.

July 14, 1965

Mr. B. Michael Dunn
Cerro Gordo County Attorney
Cerro Gordo County Court House
Mason City, Iowa

Dear Mr. Dunn:

In your request of March 11, 1965, you indicated that the Independent School District of Mason City will not have sufficient available classroom space commencing in September, 1965, to accommodate its expected enrollment of both senior high and junior college students. The school board believes that if it could acquire one or more re-locatable units which would consist of pre-fabricated classrooms constructed upon a slab or floor located on school district property, its needs could be temporarily met. You also state that various firms have proposed that they could erect such units if the school district could enter into a valid lease-purchase contract providing for periodic payments over a period of approximately five years. You then specifically ask:

1. Can the Board of Directors of a school district enter into a valid contract to acquire one or more needed units for classrooms or for needed laboratory purposes?

2. If such agreement can be made, can the cost be raised from the levy of the district for its general fund?

In response thereto, Senate File 313 enacted by the 61st General Assembly, is controlling. This statute reads as follows:

"The board may, with approval of sixty (60) per cent of the voters, voting in a regular or special election in the school district, make extended time contracts not to exceed twenty (20) years in duration for rental of buildings to supplement existing schoolhouse facilities; and where it is deemed advisable for buildings to be constructed or placed on real estate owned by the school district, such contracts may include lease-purchase option agreements, such amounts to be paid out of the schoolhouse fund.

"Before entering into a rental or lease-purchase option contract, authorized by the electors, the board shall first adopt plans and

specifications for a building or buildings which it considers suitable for the intended use and also adopt a form of rental or lease-purchase option contract. The board shall then invite bids thereon, by advertisement published once each week for two consecutive weeks, in a newspaper published in the county in which the building or buildings are to be located, and the rental or lease-purchase option contract shall be awarded to the lowest possible bidder, but the board may reject any and all bids and advertise for new bids.

"The voters at the regular or special election shall have the power to vote a schoolhouse tax not exceeding five (5) mills on the dollar in any one (1) year providing for lease-purchase option of school buildings."

The above indicates that in the leasing of school buildings under this section, the Board shall observe the following procedure:

1. Adopt plans and specifications for said buildings;
2. Adopt the form of the rental contract;
3. Obtain the approval of sixty (60) per cent of the voters at a regular or special election; and
4. Invite bids for the construction of said building or buildings.

In addition, the legislature gave the school boards the authority to purchase said buildings *if they are to be constructed or placed on real estate owned by the school district.*

Therefore, it is my opinion that the Independent School District of Mason City may enter into a valid lease-purchase agreement if they observe the above procedure.

In answer to your second question, Senate File 313 also provides that the cost of said lease or lease-purchase agreement is to be paid out of the schoolhouse fund and that the voters may vote a schoolhouse tax not exceeding five mills on the dollar in any one year to pay the costs of a lease-purchase option on school buildings. In this vein, it should also be pointed out that the limitations of Section 296.1, 1962 Code of Iowa, limiting the amount of indebtedness incurred by any school corporation to five per cent of the actual value of the taxable property within such corporation would be a further limitation on the five mill levy contemplated by Senate File 313.

Therefore, the answer to your second question must be in the negative.

14.12

SCHOOLS: Education. Appeals to county superintendent—§§4.1(23) and 290.1, 1962 Code of Iowa. In computing time for appeal under §290.1 you must exclude the day on which the board renders its decision and include the thirtieth day from the day next succeeding the date of the decision.

August 25, 1965

Mr. Frank M. Krohn
Jasper County Attorney
301 Court House
Newton, Iowa

Dear Mr. Krohn:

Receipt is acknowledged of your recent letter to the Attorney General wherein you requested an interpretation of section 290.1, 1962 Code of Iowa in regard to the following factual situation:

"Last November a student was expelled for the remainder of the semester by a community school board. The board met on January 13, 1965 and voted to refuse the student admission for the second semester but the student or his parents were not given a hearing at that time. On January 20th the school board notified the parents that as a matter of grace, they could petition for a hearing before the board, wherein additional evidence could be presented in the matter and the board would reconsider its previous decision in light of this evidence. The parents petitioned for a hearing and a hearing was held on February 1, 1965. Based on this hearing one member of the Board moved that the student be readmitted but the motion failed for want of a second. A notice of appeal to the county superintendent was filed on March 3, 1965."

You pose the following specific question based on the aforementioned factual situation.

"Did the thirty day period for appeal begin to run on February 1, 1965 and if this be the case had the time for appeal expired on March 3, 1965?"

In order to answer your questions it is necessary that we look at the pertinent parts of 290.1, 1962 Code of Iowa as amended which is the governing section in regard to time of appeal to a county superintendent from an order or decision of board of directors: to wit,

"Appeal to county superintendent. Any person aggrieved by any decision or order of the board of directors of any school corporation in a matter of law or fact may, within thirty days after the rendition of such decision or the making of such order, appeal therefrom to the county superintendent of the proper county; the basis of the proceedings shall be an affidavit filed with the county superintendent by the party aggrieved within the time for taking the appeal, which affidavit shall set forth any error complained of in a plain and concise manner."

Your request presents a single question of law namely, whether or not the time for appeal to the county superintendent starts running from the actual date that the board of directors renders its decision or rather from the next succeeding day.

I am of the opinion that the day next succeeding the date of the board's decision should be counted as the first day of the thirty day period of appeal.

The factual situation of the case at hand is somewhat complex in that the board of directors held two hearings, one on January 13, 1965 and the second on February 1, 1965. I think, however, that we need only concern ourselves with the latter, as it was at this meeting that the board rendered its final decision not to readmit the student. The board in effect granted a rehearing on their first consideration of this case and this action tolled the thirty day limitation period for perfecting an appeal to the superintendent from this decision.

The rendition of the appealable order or decision of the board took place on February 1, 1965 and to determine the last available day for perfecting an appeal therefrom we must look to section 4.1(23) of the 1962 Code of Iowa as amended which is the governing provision in regard to computing time under the various statutes and rules contained in the code. This section reads as follows:

"Computing time—legal holidays. In computing time the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to in-

clude the whole of the following Monday, provided that, whenever by the provisions of any statute or rule prescribed under authority of a statute, the last day for the commencement of any action or proceedings, the filing of any pleading or motion in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official falls on a Saturday, a Sunday, the first day of January, the twelfth day of February, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, the twenty-fifth day of December, and the following Monday whenever any of the foregoing named legal holidays may fall on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time therefor shall be extended to include the next day which is not a Saturday, Sunday or such day hereinbefore enumerated."

Section 290.1 states that "an aggrieved person may within thirty days after the rendition of such decision appeal therefrom." In accordance with the aforequoted statutory mandate that the first day, in this case February 1st, be excluded we count February 2nd and twenty-nine days thereafter to arrive at the thirtieth and last day for perfecting an appeal after the rendition of the board's decision.

Based on the foregoing I am of the opinion that the thirty day period for appeal began to run on February 2, 1965 and expired thirty days thereafter on March 3, 1965. Accordingly the appeal in this case was perfected within the period of time allotted by section 290.1.

14.13

SCHOOLS: Special Education Classrooms—H.F. 553, §2(10), 61st G.A. County School boards may acquire facilities in fee or may lease said facilities for a reasonable period for special education purposes.

August 31, 1965

Mr. Charles H. Barlow
Palo Alto County Attorney
2121½ Main Street
Emmetsburg, Iowa

Dear Mr. Barlow:

This is in reply to your recent letter in which you requested an opinion on the following questions:

1. By House File 553 of the 61st General Assembly do the words in Section 2(10), "lease, acquire, maintain and operate," extend authority for a county board of education or joint board of education to purchase facilities in fee?

2. If a board of education may acquire facilities in fee, does the instrument of title run to the county board of education or the county?

3. If funds were budgeted and available for such acquisition, would a vote of the electors be necessary in the event the purchase price would exceed $10,000.00?

4. It being apparent that a joint board or county board can lease such facilities, would a lease for a term of ten years be considered reasonable?

In considering your first question, it is necessary to construe the words "lease" and "acquire" as used in Section 2(10) of House File 553. The Iowa Supreme Court has, in *Boss v. Polk County*, 236 Iowa 384, 389, 19 N.W.2d 225, 227 (1945), stated:

> "The word 'acquire' imparts ownership, and is not satisfied by the mere custody or control . . . (citation of cases). Webster's New International Dictionary defines the word 'acquire' as to get as one's own. The Oxford New English Dictionary defines it as 'to gain, obtain, or get as one's own, to gain the ownership of.'
>
> "* * * The word 'acquired' is not a term of art in the law of property but one in common use. The plain import of the word is 'obtained as one's own'."

On the basis of the definitions approved by the court, it would seem evident that the legislature in adopting such language used the plain meaning of the word "acquire". Therefore, a county board of education will be allowed to lease *or* purchase the land in fee, and to hold the land as their own, subject to the approval of the State Board of Public Instruction.

In answer to your second question, Section 10 of House File 553 states in part as follows:

> "*Joint boards or county boards* . . . are hereby authorized . . . to lease, acquire, maintain and operate such facilities and buildings as deemed necessary to provide authorized courses and services and administer such authorized programs." (Emphasis supplied)

Since the legislature provided for the joint or county boards to acquire such property, it would seem that the intent was to place the fee title within the boards and not the county. Further authority for this is to be found in Section 273.1, 1962 Code of Iowa, wherein the legislature has created the county school system and made them a part of the public school system of the state. Section 274.1 specifically allows a school district to hold property of and by the district.

Since the above section of House File 553 amends Chapter 273 of the 1962 Code of Iowa and is to be included therein, it would seem that the county school boards are not a part of the county, but are rather a separate legal entity. The school board, as a separate legal entity, has authority to hold fee title and the county may, in no way, infringe on this right.

In regard to your third question, there is no statutory authority for any $10,000.00 debt limitation on the acquisition of property by the county school board. Therefore, it would seem evident that a county board of education may acquire land and construct a schoolhouse without the approval of the electorate of that district.

In answer to your last question, an Attorney General's opinion of July 10, 1963, stated that a year-to-year lease is not necessary and a board may enter into a longer term lease. We do not attempt at this time to state what would be a reasonable time for a lease, but rather this should be left to the discretion of the board. However, the legislature by Senate File 313, Acts of the 61st General Assembly, amended Chapter 278, specifically Section 278.1, 1962 Code of Iowa, by allowing a school board to make extended time contracts not to exceed twenty years for rental of buildings to supplement existing schoolhouse facilities and hence this may serve as a guideline.

In conclusion, it should be pointed out that on May 23, 1963, this office issued an opinion which stated in effect that the County Board of Education is without authority to rent or purchase buildings or rooms

in order to establish and organize special education classes. We believe that House File 553 has eliminated the necessity for this opinion and it should, therefore, be expressly overruled.

14.14

SCHOOLS: **School District**—Art. I, §2, Constitution of the State of Iowa. §282.3(1), 1962 Code of Iowa. 26 OAG 447. The bare fact of marriage does not disqualify a person otherwise qualified to attend school.

September 23, 1965

Hon. Stanley Heaberlin
Pleasantville, Iowa

Dear Senator Heaberlin:

This is in reply to your recent request for an opinion on the following question:

> May a local school board keep a married couple who have not completed their high school education from attending the high school?

It is a well-settled rule that the rights or privilege to attend the public school is subject to such regulations as the legislature may from time to time see fit to make. Therefore, the legislature has provided in Section 282.3(1) of the Code of Iowa, 1962:

> "The board may exclude from school children . . . whose presence in school may be injurious to the health or morals of other pupils or to the welfare of such school."

However, Art. 1, Section 2 of the Constitution of the State of Iowa must also be considered where it states that:

> "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it."

In light of the above one can see that the board has great discretion subject to the constitutional restriction as to whom they may or may not allow to attend school. Such rules and regulations must be reasonable. Unless the regulations are reasonable they may not be enforced. As the Supreme Court of Iowa has stated:

> "While the board of directors of a school district has power, under the statute, to dismiss a pupil for *gross immorality or for persistent violation of the regulations of the school*, it has not power to dismiss or suspend for conduct short of this." *Murphy v. Board of Directors Independent District*, 40 Iowa 429 (1870) (Emphasis supplied)

The statute which the Supreme Court referred to in the *Murphy Case* is presently in effect as discussed previously in 26 OAG 447 and therefore the rule set out is, in our opinion effective.

Therefore, the bare fact of marriage is not sufficient misconduct to allow suspension from completion of the couples education or to hold it in abeyance for any period of time.

14.15

SCHOOLS: **Transportation**—H.F. 263, Acts 61st G.A. H.F. 263, The Civil Rights Act of 1965, does not require the state to transport all children to all schools on public school buses.

October 28, 1965

The Honorable Donald W. Murray
R.F.D. 1
Bancroft, Iowa 50517

Dear Senator Murray:

This is in response to your request for an opinion in respect to the following:

"According to the Acts of the 61st General Assembly of 1965 in Regular Session, the 'Civil Rights Act of 1965' and also known as House File 263 was enacted. Having followed the passage of this legislation with much interest, I would appreciate an official interpretation from your office to help clarify this Act as it would involve the transportation of our citizens on school or public busses to state approved educational institutions of the citizen's choice.

"In Section 2, paragraph 10, a 'public accommodation' is *required* to be defined as 'each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee or charge, provided that any place, establishment, or facility that caters or offers services, facilities, or goods to the general public gratuitously *shall be deemed a public accommodation if the accommodation receives any substantial governmental support or subsidy.*'

"And later in Section 6, subparagraph a, it states that it is unlawful 'to refuse or deny to any person because of race, creed, color, national origin, or religion the accommodations, advantages, facilities, services, or privileges thereof, or otherwise to discriminate against any person because of race, creed, color, national origin, or religion in the furnishing of such accommodation, advantages, facilities, services, or privileges.'

"Other parts of this Act might also refer to this area of transportation of citizens on public accommodations to educational institutions of their choice. My understanding would be that any citizen would be entitled to the convenience of any state subsidized and supported public accommodation that might be available." (Emphasis as in original letter).

Section 2(10) of House File 263, enacted by the 61st General Assembly, in its complete form is as follows:

"10. 'Public accommodation' means each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee or charge, provided that any place, establishment, or facility that caters or offers services, facilities, or goods to the general public gratuitously shall be deemed a public accommodation if the accommodation receives any substantial governmental support or subsidy. Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the general public for fee or charge or gratuitously, it shall be deemed a public accommodation during such period of use. Public accommodation shall not include housing accommodations other than housing accommodations available primarily for transients."

I call your attention to the use of the words "general public." A public accommodation is one which caters to the "general public." If the accommodation is not offered to the general public, but is transportation offered by a school district on busses operated by the school district, it is immaterial whether it is offered for a fee or provided gratuitously under government subsidy. Only those accommodations offered to the public at large, i.e., the general public, are within the strictures of the act. That is the plain meaning of the statutory language. The "general public" embraces all the people. *Rayor v. City of Cheyenne*, 63 Wyo. 72, 178 P. 2d 115, 116. Transportation to the public schools is not offered to all the people, but only to those enrolled in the public schools and then only within limitations.

It is my opinion that the Civil Rights Act of 1965 does not compel the transportation of all pupils to all schools on school busses operated by school districts since transportation to schools is not an accommodation offered to the general public.

14.16

SCHOOLS: **Shared time**—Senate File 553, Acts of the 61st G.A. (1) Senate File 553 permits shared time arrangements. (2) Local school board has the authority to determine whether or not shared time arrangements will be permitted with regard to their district. (3) State Board of Public Instruction has the authority to determine the purpose of Senate File 553 but once shared time arrangement has been entered into by public school board and private school and meets the purposes as defined by state board, the state board has no discretion with regard to prohibiting shared time arrangements.

November 4, 1965

Mr. Paul F. Johnston
State Superintendent of Public Instruction
State Office Building
L O C A L

Dear Mr. Johnston:

This is in response to your recent inquiries on Senate File 553.

1. The term "Chapter" in our scheme of statutory codification is a word of art referring to those portions of the Code delineated as Chapter. In this instance "Chapter" refers to Chapter 257 as amended.

2. Section 257.10(12) provides in part:

> "[The state board shall] prescribe such * * * rules and regulations * * * as it may find desirable to aid in carrying out the provisions of the Iowa school laws."

By authority set out above the State Board may promulgate interpretive regulations listing and defining the "purposes" of Chapter 257, it is incumbent on the State Board to give effect to the manifest legislative intent as it existed in the legislative mind when the statute was enacted. The State Board shall not in the guise of interpreting Chapter 257 enlarge or reduce the scope of the provisions found in said chapter.

3. In view of answer to Question 2 this question is now moot.

4. The "purposes" of Chapter 257 as amended include but are not limited to "the purpose of promoting the general intelligence of the people constituting the body politic, and thereby increasing the usefulness and efficiency of the citizens." 78 C.J.S., Schools and School Districts §13. The fundamental policy of public education is to obtain the best possible education and educational facilities for the children

of the state. *Appeal of Mulhollen,* 155 Pa. Super. 587; 39 A. 2d 283 (1944); *Johnson v. United School District Joint Board,* 201 Pa. Super. 375; 191 A. 2d 897 (1963). The 61st General Assembly via Section 4 of Senate File 553 has told us that it is interested in seeing that all school children within the State obtain the best possible education. To this end the Legislature provided a medium whereby private school students can obtain an education equivalent to the education of a student enrolled in public school. This was done by allowing the private school student to enroll in public school to obtain courses that are not available in private school. If the legislative intent i.e. allowing the private school student to obtain an education equivalent to that of a public school student is to be effectuated, I am of the opinion that "necessity" arises when a private school student seeks courses that are not available to him in his private school. In view of the above, I am of the opinion that "necessity" will occur independent of any action or determination by the State Board. However, before a Senate File 553 shared time arrangement, which meets the purposes of Chapter 257 as interpreted by the state board, can be approved, the state board must determine that the private school is satisfying the State's minimum curriculum and the approval standards implementing said minimum curriculum. A further discussion of this requirement will be found in the answers to Questions 6 and 14.

5. The State Board's interpretation and listing of the "purposes" of Chapter 257 as amended, is essentially a prerequisite to approval of each shared time program instituted under Section 4 of Senate File 553. However, as was stated in Answer #4 "necessity" occurs independent of State Board action. Therefore, a finding of "necessity" is a prerequisite only in that the State Board must determine that the course the private student is seeking is not available to him in his private school.

6. Section 2 of Senate File 553 prescribes the minimum curriculum for public and parochial schools and empowers the State Board to establish approval standards, rules and regulations to implement the minimum curriculums for the said schools. Therefore, public and parochial schools are required to offer programs based on the State's minimum curriculums. In addition, Section 4, Subsection 2 provides:

> "The enrollment in public schools for specified courses of students who also are enrolled in private schools, when the courses in which they seek enrollment are not available to them in their private schools, provided such students have satisfactorily completed prerequisite courses, if any, *in schools maintaining standards equivalent to the approval standards* * * *." (Emphasis added)

The italicized portion above indicates that private schools entering into shared time agreements must maintain approval standards based on the State's minimum curriculum. I am of the opinion that the Legislature intended that private schools should meet state minimum curriculum standards rather than depend on the public schools to supply the minimum curriculum.

7. In view of the answer to question 6 this question is now moot.

8. The word "shall" appearing in a statute is to be construed as mandatory when a right or benefit depends on the exercise of the power or the performance of a duty. *School Township 76 of Muscatine County v. Nicholson,* 227 Iowa 290, 288 N.W. 123 (1939). Therefore, I am of the opinion that the word "shall" in Section 4 of Senate File 553 deprives the State Board of discretion to disapprove dual enrollments.

9. The "specified courses" should be set out in the shared time arrangement between the private and public school. The list of courses

may include any course that is not available to private school students in their private schools.

10. A private school student enrolled in a school not maintaining standards equivalent to approval standard can still participate in a shared time program if he shows equivalent competence for the specified courses through fair and reasonable testing.

11. The State Board has the power to adopt approval standards, rules and regulations to implement the minimum curriculum for public and parochial schools. The State Board is also empowered to determine after investigation whether the schools are complying with the said approval standards. If your question seeks to discover whether the State Board can determine if a private school is complying with State approval standards the answer is yes. However, if you are inquiring as to whether the private school in addition to complying with State standards, must also offer a program equivalent to that of the public school the answer is negative.

12. In response to your twelfth question I refer you to Section 4(2) of Senate File 553, which provides in part:

> "The enrollment in public schools for *specified courses* of students who also are enrolled in private schools, when the courses in which they seek enrollment are not available to them in their private schools, *provided such students have satisfactorily completed prerequisite courses,* if any, in schools maintaining standards equivalent to the approval standards for public schools, *or have otherwise shown equivalent competence through testing.*" (Emphasis supplied)

If a shared time program is instituted a private school student seeking to attend public school for a course or courses not offered in private school need only to have completed the prerequisite courses or have shown competence through testing. The clear intent of Section 4(2) above was to provide a medium whereby private school students could obtain instruction in courses that were not available in private schools. Private school students are not required to receive instruction in physiology, hygiene and physical education. Section 280.13, 64 OAG 347, 349. The purpose of this Act will not be served by requiring private school students, who attend public schools for a otherwise unavailable course, to take additional courses that they are not statutorily bound to take. On July 14, 1965, this office issued an opinion to the Honorable Dale Tieden, Clayton County Representative, which stated in part:

> "A child enrolled in a public school, although for limited periods of class work, is a public school student."

The above opinion provided:

> "that a dually enrolled pupil may ride public school buses *at the times when service is provided and to the places it is provided.*" (Emphasis added)

In accord with the above opinion the school district is not required to ferry dually-enrolled pupils between their schools. It only provided that *for the limited purposes* of bus transportation *at the regular times and to the regular places* a dually-enrolled pupil was a public school student.

The exemption for dually-enrolled students for physiology, hygiene and physical education becomes obvious when we consider the provisions of the driver education statute. *House File 390*, Acts of the 61st General Assembly. Section 5 of House File 390 provides:

> "Every public school district in Iowa shall offer or make available to all students residing in the school district an approved course in driver education * * *."

"Student, for purposes of this Act shall mean any person between the ages of fifteen (15) years and twenty-one (21) years who resides in the public school district * * *."

Anyone between the ages of 15 and 21 that receives driver education instruction at a public school would be a public school student. However, it cannot be seriously urged that by virtue of becoming a public school student for driver education that a person is also compelled to take other courses required in public schools e.g. physiology, hygiene and physical education.

As in the Driver Education Act, which does not require students to take other public school required courses, Section 4 of Senate File 553 does not contemplate that dually-enrolled private school students will be required to take physiology, hygiene and physical education. Therefore, in the absence of statutory provisions to the contrary I am of the opinion that dually-enrolled private school students are exempt from the provisions of Sections 280.10, 280.13 and 280.14.

13. In response to your thirteenth question the answer is affirmative, however, I refer you to Section 274.7, 1962 Code of Iowa which provides in part:

"The affairs of each school corporation shall be conducted by a board of directors * * *."

In discussing the local board of directors' power to permit dual enrollment under Section 274.7 this office has stated:

"Under the power and authority of the board as authorized in Section 4224, (predecessor of Section 274.7) it is within the discretion of the board to refuse to permit resident students of the district to enroll in the public high school for two periods per week * * * if such students are enrolled in a parochial school for their regular high school work." 28 OAG 112

Therefore, it appears that the local boards have discretionary powers independent of Section 4, Subsection 2 to conduct a shared time program when deemed advisable. Section 4(2) of Senate File 553 also provides that:

"The provisions of this section shall not deprive the respective boards of public school districts of any of their legal powers, statutory or otherwise, * * *."

For the above reasons I am of the opinion that the local board's discretionary power to allow a shared time program remains intact independent of Senate File 553.

14. In response to your fourteenth question please be advised that the State Board is not empowered to deny dual enrollment for some courses specified if they are not available in the private school.

The State Board can deny dual enrollment to students of a given private school if the said private school has failed to meet State approval standards. However, students from the said unapproved private school can still be dually enrolled if they individually show "equivalent competence through testing."

As a footnote to this answer you should remember that the local school board via its discretionary power can institute a shared time program, as discussed in thirteen, without regard to whether the private school is an approved school. However, to remain on the approved list it will be incumbent on all private schools to satisfy the minimum curriculum as implemented by the State Board's approval standards.

15. Section 4 is silent on the question of who should make application to the State Board for a Chapter 257 shared time program. Section 257.10(12) empowers the State Board to make rules and regulations to aid in the carrying out of the provisions of the school laws. I am of the opinion that the State Board by rule or regulation should determine who shall make application giving due consideration to administrative efficiency and the purposes of Section 4.

16. By virtue of Section 274.7 the local public school board has discretionary power to refuse shared time students. 28 OAG 112. Section 4 of Senate File 553 provides:

> "The provisions of this Section shall not deprive the respective boards of public school districts of any of their legal powers, statutory or otherwise, * * *."

Therefore, I am of the opinion that a local school board in the exercise of their discretionary powers could adopt a rule prohibiting shared time enrollments.

17. (a) In response to Question 17a I answer in the affirmative.

(b) In response to Question 17b, Section 4(2) provides:

> "* * * the board of the affected public school district shall be given notice by the state board * * * not later than six (6) months prior to the opening of the * * * school year, *except that the board of the public school district may, in its discretion, waive such notice requirement.*" (Emphasis added)

The local board's discretion should not be disturbed unless it is so unreasonable that it amounts to an abuse of discretion. *Kinzer v. Directors of Independent School District of Marion*, 129 Iowa 441; 105 N.W. 686, 3 L.R.A., N.S. 496 (1906). In some cases a local board might be equipped with staff and finances to handle shared time students immediately and in other cases the board may not be so equipped. The Legislature left this decision to the discretion of the local board, the agency that is abreast of the school's staff and financial situation. This office should not enlarge or restrict statutory language nor disturb the future exercise of a board's discretion in abstraction. Therefore, I am of the opinion that a board in a given case could waive all of the six month notice period without abusing its discretion.

(c) In view of the State Board's power to issue rules and regulations to aid in carrying out the school laws, I am of the opinion that the State Board can by rule or regulation fix a reasonable deadline for the submission of a Senate File 553 shared time application. However, I might add that there is no requirement for the submission of an application under a Section 274.7 shared time agreement.

14.17

SCHOOLS AND SCHOOL DISTRICTS: **Elections**—H.F. 553, Acts of the 61st General Assembly. In the formation of area school districts the merger of districts for such purpose fails if the majority of votes is not obtained in every county involved. The petition is required to be signed in each county by ten per cent of the aggregate of the votes for Governor in each county in the 1964 election. The County Board of Education, County Superintendent of Schools and County Attorney are officials responsible for setting up of the special election involved therein.

November 29, 1965

Honorable Kenneth Robinson
State Representative
Bayard, Iowa

Dear Mr. Robinson:

This will acknowledge receipt of the 4th inst., in which you submitted the following:

"I am writing to you in reference to House File 553 which was passed by the 1965 Legislature and became law when the Governor signed it.

"As you know, this law calls for the formation of area school districts to replace county boards of education. The last part of the bill which was an amendment first proposed by me states that two or more counties may join together in an area school by vote of the people after petitions by ten percent of the voters have signed.

"My question is this and I would like an official written attorney general's opinion—After an election has been held in a certain number of counties what must the vote be for it to carry? In other words, does a majority vote in all counties carry the proposal or does it have to carry in each of the counties voting? Or, does it take effect only in the counties in which it carries and not in those who fail to give it a majority?

"Also, I would be interested in your rules if you have any on how the proper number of signatures for a call of the election must be obtained and could you furnish me with a proper form for the petitions?"

1. In reply thereto I would advise that the statue to which you refer is Section 3, House File 553, enacted by the 61st General Assembly. This section provides as follows:

"In addition to the procedure set forth in section two (2) of this Act for the merger of county school systems the county boards of education of any two or more adjacent counties upon receipt of a petition signed by not less than ten (10) per cent of those voting for governor in the last general election in each county, shall call a special election in said counties for the purpose of merging the respective county school systems into one school system. The elections shall be on the same day in each of said counties and the question on the ballot shall be: 'Shall the county school systems of (insert the names of the counties) counties be merged into one school system?' If a majority of the votes cast in each of said counties be in favor of the proposal the county boards of education in the respective counties shall by concurrent action merge the county school systems into one school system. Prior to setting a date for said elections, approval of the state board of public instruction shall be obtained and all provisions covering a merger heretofore set out above shall also be applicable to a merger under this procedure."

According to the terms thereof, this proposal to merge under the foregoing is in effect according to its terms if a majority of the votes in each county are cast in favor of the proposal of merger. If a majority is not obtained in any one of the counties in the proposal, then the proposal to merge fails.

2. With reference to your question regarding obtaining the proper number of signatures to a petition, this figure may be obtained from the Iowa Official Register by adding together the votes each candidate

for Governor is shown to have received in the 1964 election in each county in the merger proposal. Signatures in the amount of ten percent of the figures upon a petition in each county is sufficient to satisfy the requirements.

3. The election machinery required to set up the special election to be held to adopt or reject the merger proposal is set out in Chapters 49, 277 and 273, Code of 1962. Setting up the several and various requirements in a special election is a duty of the County Boards of Education, the several County Superintendents of Schools and the several County Attorneys. Of course, the services of this department are available in connection therewith.

14.18

SCHOOLS AND SCHOOL DISTRICTS: Rental of a school's classroom space for religious instruction—§297.9, 1962 Code of Iowa. A community school district does not have the statutory power to rent classroom space to be used for the purpose of religious instruction after termination of all daily school activity.

December 8, 1965

Mr. Robert N. Merillat
Greene County Attorney
102 Arcade Building
Jefferson, Iowa 50129

Dear Mr. Merillat:

This is in response to your request for an opinion on the following question:

"May a community school district rent classroom space to religious organizations for the purpose of religious instruction in the use of these classrooms after termination of all daily school activities and the rent adequately covers the expenses to be incurred by the school district?"

Section 297.9, 1962 Code of Iowa, is pertinent. That statute is as follows:

"297.9 Use for other than school purposes. The board of directors of any school corporation may authorize the use of any schoolhouse and its grounds within such corporation for the purpose of meetings f granges, lodges, agricultural societies, and similar rural secret orders and societies, for parent-teacher associations, for community recreational activities, for public forums and similar community purposes; provided, however, that the board may not grant such permission to any organization known or believed to hold views that are in conflict with the republican form of government as set forth in the constitution of the United States; and for election purposes, and for other meetings of public interest; provided that such use shall in no way interfere with school activities; such use to be for such compensation and upon such terms and conditions as may be fixed by said board for the proper protection of the schoolhouse and the property belonging therein, including that of pupils."

The foregoing statute expressly authorizes the rental of schoolhouses and schoolhouse grounds to specified groups or for specified purposes. Religious institutions are not among the groups named. Authority may not be implied to include them since a power may be implied only where it is indispensable to the exercise of the express powers granted by the statute. Moreover, religious instruction is not one of the specified purposes for which schoolhouses may be rented, and

its inclusion may not be implied. An additional rule of statutory construction which must be considered, we believe, is that which requires the exclusion of things not mentioned in a statute which enumerates certain specific things. *Pierce v. Bekins Van & Storage Co.*, 185 Iowa 1346, 172 N.W. 191 (1919). Sec. 297.9 enumerates specific groups to which schoolhouses may be rented and specific purposes for rentals. Those groups and purposes not enumerated must be excluded.

The question presented here does not require consideration of the Constitutions of Iowa and the United States. We would confront constitutional questions only if constrained to find Section 297.9 permits the rental of school rooms to religious organizations: The rules of construction, however, dictate a contrary conclusion.

This opinion is to be distinguished from the June 14, 1965, opinion of this office, which concluded that a school building no longer in use by the public school district could be leased to a Catholic parish under Section 297.22, 1962 Code of Iowa, for use as a schoolhouse. Section 297.22 provides for the sale, lease or disposal of school property, and is not applicable to rental of space within a schoolhouse still in use as such.

Consonant with the foregoing, it is the opinion of this office that a school district may not rent classroom space after hours to religious organizations for use in offering religious instruction.

14.19

SCHOOLS: Assignment of attached district to an election area within the twelve grade district—Chapter 240, Acts of the 61st G.A., §§275.1, 275.12, 275.25, 275.35, 275.36 and 275.37, 1962 Code of Iowa. The County Board has the implied power to assign an attached district to an election area within the twelve grade district.

December 14, 1965

Mr. Dewayne A. Knoshaug
Wright County Attorney
Wright County Court House
Clarion, Iowa

Dear Mr. Knoshaug:

This is in reply to your recent letter in which you requested an opinion on the following question:

> "If a school district is reorganized by attachment by the County Board as outlined by Section 275.1 as amended by the 61st General Assembly, who will determine the number of directors and the method of election of the School directors for the new reorganized district?"

Section 275.1 was amended by the 61st General Assembly to provide for the attachment of a non-high school district to a district maintaining twelve (12) grades. However, the Legislature did not expressly provide a method to realign membership on the school board to give the newly acquired area representation on the school board. Sections 275.12 and 275.25, which provide for the method of election of directors and the manner in which said elections are to be called, pertains to long form reorganizations and not to attachments.

The mechanics for changing the number of directors or the method of election of the directors is listed in Sections 275.35, 275.36 and 275.37. The mechanics incorporated in the above sections are only applicable in cases where the enlarged district has at a prior date adopted a specific number of directors and a method for their election

which gave representation to the whole enlarged district. Sections 275.35, 275.36 and 275.37 were designed to provide a school district that is dissatisfied with either its number or its method of election of directors with a vehicle whereby the district could change its said uniform number of directors or method of their election to any method authorized in Section 275.12. The above sections were not designed to be used incident to an attachment. This is clearly indicated by the fact that the said sections do not provide mechanics to solve problems peculiar to attachment. For instance, in an existing school district if a Section 275.35 proposition fails to receive the requisite number of votes the said district will continue to operate in accord with the existing number of directors and the existing method of election adopted previously. However, if a Section 275.35 proposition used incident to attachment fails the newly created district does not have a uniform number of directors or method of election that can be resorted to which will give the representation to the whole district. Therefore, the newly created district would be without a board of directors or the mechanics by which one may be selected. For the above reasons I am of the opinion that Sections 275.35, 275.36 and 275.37 can not be used incident to attachment.

In furtherance of the stated policy of the state "to encourage the reorganization of school districts" Chapter 240, Acts of the 61st General Assembly, directs in part as follows:

> "* * *If any area of the state is not a part of such a district [maintaining twelve grades] by April 1, 1966, or is not included in a reorganization petition filed in accordance with section two hundred seventy-five point twelve (275.12) of the Code on or before April 1, 1966, the area *shall* be attached by the county board of education to a district, or districts maintaining twelve grades, * * " (Emphasis added)

The County Board is given express authority to compel attachment. "It is the universal rule of statutory construction that, wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied." *Gilchrist v. Bierring*, 234 Iowa 899, 906; 14 N.W.2d 724, 728 (1944); *Willis v. Consolidated School District*, 210 Iowa 391, 396; 227 N.W. 532, 535 (1930). Applying the above rule of construction to the situation at hand we are faced with the problem of providing representation for the non-high school area after it is attached.

I am of the opinion that incident to the express power to compel attachment is the power to designate that attached portion to an election area within the twelve grade district. Therefore, I believe the County Board should also designate the director district or districts to which the non-high school district is being attached.

14.20

SCHOOLS AND SCHOOL DISTRICTS: Driver training—§5, Chapter 274, Acts of the 61st G.A. "Resides" as used in Chapter 274 means present personal residence rather than domicile.

December 23, 1965

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

Dear Mr. Shaff:

This is in reply to your recent letter requesting an opinion on the following question:

"Under House File 390, Acts of the 61st General Assembly, may the required driver education training be afforded to students who attend private or public schools in a given school district when the home of those students is located elsewhere without or within the State of Iowa?"

Section 5 of House File 390, (now cited as section 5, chapter 274, Acts of the 61st G.A.) reads as follows:

"Student for purposes of this Act shall mean any person between the ages of fifteen (15) years and twenty-one (21) years who *resides* in the public school district * * *." (Emphasis added)

In answering your question it will be necessary to determine which of several meanings the Legislature intended to attach to the word "resides." In this connection the Supreme Court of Minnesota has stated the following:

"The word 'reside' has two quite distinct meanings. The one legal and technical; and the other personal, actual or physical habitation of a person. Where a person lives with his family at an established home, the place where he 'resides' is clear. That is his technical legal residence. Such residence embraces two elements; First, residence; second, the intention to remain there permanently for an unlimited time. To 'reside' in such manner gives a domicile, ... That [domicile] is also the place of his actual or physical habitation. A person who has no such fixed place or domicile wherein he 'resides', but dwells in hotels, boarding houses, or the homes of others as suitable to his employment or convenience also resides where he actually or personally lives. . . . . One may have a residence before he acquires a domicile. . . . . Domicile is residence but residence is not always domicile. . . . . He may have such legal residence or domicile with his family and such actual or personal residence away from his home. In such event, the word 'reside' may be correctly used to denote either the technical legal or the personal residence." . . . . *Town of Smiley v. Village of St. Hilaire*, 183 Minn. 533, 535; 237 N.W. 416, 417, (1931).

In order to determine the meaning that the Legislature affixed to the elastic term "resides" we must interpret it in the light of the purpose of the statute in which the term was used. In *Re National Discount Corporation*, 196 F. Supp. 766, 769 (D.C.S.C. 1961). Chapter 274 seeks to remedy the poor record of drivers between 16 and 24 years of age by providing for a comprehensive program of driver education. The explanation of Chapter 274 provides in part as follows:

"The essential elements of this bill are as follows: (1) To raise the age for driving to 18 unless the person has successfully completed a driver education course in which case the minimum age is 16. The age limit would be raised over a two-year period to give schools, the teachers and the pupils adequate time to work into it; (2) *To make driver education available to all young people between 15 and 21 years of age; . . .*" (Emphasis added)

As stated in the explanation, the Legislature intended to make the driver education program available to all young people. The legislative intent will be effectuated in the situation you have presented by reading the word "resides" to mean present personal or temporary residence rather than domicile. It is submitted that the Legislature contemplated that residents of one school district might attend a private boarding school in another school district, therefore, the Legislature used terms that indicate "resides" should not be be interpreted to mean domicile.

The Supreme Court of Iowa adopted the meaning of "resides" here suggested when it stated:

> ". . . There is not necessarily the idea of permanence connected with the signification of the words "reside" and "residence." A resident may have a settled abode for a time, to be determined by circumstances. *His residence may be temporary* for temporary purposes . . . ." *Mann v. Taylor*, 78 Iowa 355, 363; 43 N.W. 220, 223 (1889). (Emphasis added)

Although, the students matriculating to Our Lady of Angels Academy and Mount Saint Clare locate within the Clinton Community School District for a temporary purpose, I am of the opinion that they "reside" in the said district within the intended meaning of the word as used in Chapter 274.

Therefore, all students actually living in the Clinton Community School District must be afforded an opportunity to participate in the driver education program.

Inherent in the question that you have presented is the question of whether a domiciliary of another State that "resides" in Iowa solely for the purpose of attending a secondary boarding school is eligible to participate in the driver education program. As previously stated, House File 390 proposes to make driver education available to any person between the ages of fifteen and twenty-one who "resides" in a public school district. The statute makes no exception for persons domiciled outside of Iowa. The only residence requirement is that the "student" "reside" in an Iowa school district.

This is not to say, nor meant to include coverage to those students not "residing" in the school district. Black's Law Dictionary has defined "reside", "residence" and "resident" as follows:

> "RESIDE, live, dwell, abide, sojourn, stay, remain, lodge."
>
> "RESIDENCE. A factual place of abode; Living in a particular locality."
>
> "RESIDENT. One who has residence in a place."

The Legislature has defined student as any person between the ages of 15 and 21 years of age who resides in the School District; further, they have not ordained how "resides" is to be used in this context. Certainly, "resides" has different meanings in different contexts. Assume persons within the ages provided who eat, sleep and dwell in another school district, within or without the state, and who come into a particular school district to attend school daily, either public or private, or to avail themselves of the driver's training course solely, and return to their place of abode. In our judgment to state that such persons "reside" in that school district where they attend school or take the driver's course, would be to extend the definition beyond that which the Legislature had intended.

"It is our duty to accept the law as the legislative body enacts it. We do not decide what the Legislature might have said, or what it should have said in the light of the public interest to be served, but only what it did say; . . . ." *Holland v. State of Iowa*, 253 Iowa 1006, 1011; 115 N.W. 2d 161, 164 (1962). For the above reasons it is my opinion that foreign domiciliaries who "reside" in a particular school district in Iowa and persons from Iowa who "reside" in that particular school district are eligible to participate in the driver education program.

14.21

SCHOOLS: **Maintaining twelve grades**—Chapter 240, Acts of the 61st G.A., §275.1, 1962 Code of Iowa. To avoid attachment every school district must be capable of maintaining twelve grades on July 1, 1966.

January 18, 1966

Mr. David P. Miller
Scott County Attorney
416 W. 4th Street
Davenport, Iowa

Dear Mr. Miller:

This is in response to a recent request from your office concerning Section 275.1 as amended by Chapter 240, Acts of the 61st General Assembly. Your inquiry stated:

> "Under Senate File No. 190 [Chapter 240], Acts of the 61st General Assembly, Section 1, which amends Section 275.1 of the 1962 Code of Iowa, there is a provision for reorganizing school districts which requires attachment to a district maintaining twelve grades by the county board of education on or before July 1, 1966. It also provides in such section that if the reorganization petition filed before April 1, 1966, fails to pass, the attachment by the county board to a district maintaining twelve grades also becomes effective on that date.
>
> "We have been requested to obtain an opinion from your office relative to whether or not a petition filed under Section 275.12 which does pass, but does not have twelve grades in full operation before July 1, 1966, will also be attached to a district maintaining twelve grades at that time.
>
> "There are several districts in Scott County, Iowa, which are attempting to reorganize under Section 275.12 but would not have twelve grades in operation by that date."

If I understand your question correctly, you are asking whether a newly reorganized district would be "maintaining twelve grades" by tuitioning its students out until a high school building can be constructed. This question is answered by Section 275.1, as amended by Chapter 240, Acts of the 61st General Assembly, which provides in part:

> "It is further declared to be the policy of the state that all the area of the state shall be in a district *maintaining twelve grades* by July 1, 1966. If any area of the state is not a part of such a district by April 1, 1966, or is not included in a reorganization petition filed in accordance with section two hundred seventy-five point twelve (275.12) of the Code on or before April 1, 1966, the area shall be attached by the county board of education to a district, or districts *maintaining twelve (12) grades, ...*" (Emphasis added)

The purpose of Section 275.1, as amended by Chapter 240, Acts of the 61st General Assembly, is to require that all school districts operate grades 1 through 12 rather than tuitioning some or all of the said grades. Viewed in the above context it is evident that the Legislature intended the phrase "district maintaining twelve grades" to mean that a district must be ready to personally operate twelve grades by July 1, 1966.

The question that you presented has been decided by the Supreme Court of Illinois in the case of *People ex rel Baber v. Covalt*, 297, 111. 621; 131 N.E. 106 (1921). The Illinois Supreme Court stated at page 107 of the Northeastern Reporter:

"The question arising on the replication of the plaintiff in error is whether or not* * * *the directors of school district 103 could send all of their children into school district 104 and still comply with the requirements of clause 9 of Section 114 that they maintain a school. We think not. *It seems clear that transferring pupils to a school maintained by another district is not maintaining a school by the district in which pupils reside.*" (Emphasis added)

The Supreme Court of Colorado has reached a similar result. Section 2, Article IX of the Colorado Constitution, provided that "one or more public schools shall be maintained in each school district within the state, * * *" The board of directors of school district No. 11, Phillips County, Colorado, did not maintain a school in district No. 11, but rather they provided transportation and school facilities for their children in another school district. The Supreme Court of Colorado stated:

"We are of opinion that the constitutional provision is mandatory, and, since it has been pertinently invoked by protesting and competent parties, it follows, the record here considered, that the board's arrangement for school accommodations in another district, however desirable such action may have seemed, does not satisfy the constitutional mandate [one or more schools shall be maintained in each school district], ..." *Duncan v. People ex rel Moser*, 89 Colo. 149, 151; 299 P. 1060, 1061, (1931).

Therefore, I am of the opinion that the tuitioning arrangement described in your request would not satisfy the legislative mandate: i.e. "that all the area of the state shall be in a district maintaining twelve grades by July 1, 1966." The Legislature did not exempt from attachment school districts with future plans to build suitable buildings if the said district will be without facilities to maintain twelve grades on July 1, 1966. If it had been the intention of the Legislature to create the said exemption they could have so stated. See Chapter 122, §5-31 Smith-Hurd Illinois Annotated Statutes. Neither the courts nor the Attorney General can by judicial decision or opinion extend or enlarge a legislative enactment. *Wall v. County Board of Education of Johnson County*, 249 Iowa 209; 86 N.W.2d 231 (1957). In view of the foregoing, I am of the opinion that the school districts in question must be capable of personally operating twelve grades on July 1, 1966.

14.22

SCHOOLS: Rental and Lease-Purchase Option Contracts—Chapter 242, Acts of 61st G.A. The provisions of Chapter 242, Acts of 61st G.A., govern rental and lease-purchase option contracts consummated by school boards to provide additional schoolhouse facilities.

January 18, 1966

Mr. Thomas A. Renda
State Representative
Polk County
5004 S.W. 16th Place
Des Moines, Iowa

Dear Mr. Renda:

This is in response to your recent inquiry concerning the following situation:

"The Board of Directors of a particular school district is presently contemplating entering into a lease for an all-steel building 30 ft. by 60 ft. to be placed on a concrete slab on property owned by

the school district. The length of lease is five years, with a monthly or annual rental rate to be agreed upon between the parties. The period of the lease is to commence when the facilities are made ready for occupancy.

"Under the terms of the lease, upon expiration of the lease period the school board shall be afforded an opportunity to renew its lease on a year-to-year basis for amounts to be agreed upon between the parties, or in the alternative, the school board shall be afforded an opportunity to purchase outright the facilities from the lessor for its then fair market value as determined by an independent professional appraiser to be mutually agreed upon between the parties.

"It is my further understanding that the lease will contain provisions that upon expiration of the original lease if the school board does not choose to renew the lease on a year-to-year basis, and does not choose to purchase the facilities, the lessor shall be obligated to dismantle and remove the facilities from the situs, at which time all contractual relations between the parties will have been terminated.

"Senate File 313 was recently enacted by the 61st General Assembly during the last days of its session. As it might pertain to the instant circumstances, this legislation appears to be expressly limited to situations involving lease-purchase option arrangements. In such lease-option instruments the rental payments are applied in reduction of the purchase price of the facilities in connection with an exercise of the contracted-for purchase option. In the circumstances it appears that Senate File 313 was designed specifically to authorize the terms under which a school district may enter into a contract containing such lease-purchase option provisions, whereby the rentals are to be applied as an offset against the purchase price. It has no apparent application to the classical rental of facilities pursuant to lease where the school district is under no obligation to purchase."

You then ask:

"Does Chapter 242, [S. F. 313], Acts of the 61st General Assembly govern lease agreements entered into by a school board to rent a building or is its [Chapter 242] application limited solely to lease-purchase agreements made by the school board for the purchase of school buildings."

In response to your question Chapter 242, Acts of the 61st General Assembly, is controlling. The pertinent portion of Chapter 242 provides:

"The board may, with the approval of sixty (60) per cent of the voters, voting in a regular or special election in the school district, *make extended time contracts not to exceed twenty (20) years in duration for rental of buildings to supplement existing schoolhouse facilities;* and where it is deemed advisable for buildings to be constructed or placed on real estate owned by the school district, such contracts may include lease-purchase option agreements, such amounts to be paid out of the schoolhouse fund.

"Before entering into a *rental or lease-purchase option contract,* authorized by the electors, the board shall first adopt plans and specifications for a building or buildings which it considers suitable for the intended use and also adopt a form of *rental or lease-purchase option contract.* The board shall then invite bids thereon, by advertisement published once each week for two consecutive weeks, in a newspaper published in the county in which the build-

ing or buildings are to be located, and the *rental or lease-purchase option contract* shall be awarded to the lowest responsible bidder, but the board may reject any and all bids and advertise for new bids." (Emphasis added).

Contrary to your suggestion, Chapter 242, Acts of the 61st General Assembly appears to be applicable to both regular lease and also lease-purchase option agreements. The first sentence of Chapter 242 authorizes school boards, with the approval of sixty per cent of the voters, to enter into two types of lease contracts for the rental of buildings to supplement existing schoolhouse facilities. The first type of contract provided for is an extended time agreement, not to exceed twenty years in duration for the rental of buildings located presumably any place within the district. This is authorized by the following language:

"The board may, with the approval of sixty (60) per cent of the voters, * * *, make extended time contracts not to exceed twenty (20) years in duration for rental of buildings to supplement existing schoolhouse facilities; . . ." *Chapter 242, Acts of the 61st G.A.*

The second type of contract authorized is a lease-purchase option contract which the school board may enter into only in cases where the buildings are constructed on real estate owned by the school district. This contract is authorized by the following language:

". . . and where it is deemed advisable for buildings to be constructed or placed on real estate owned by the school district, such contracts may include lease-purchase option agreements, . . ." *Section 1, Chapter 242, Acts of the 61st G.A.*

The Iowa Supreme Court has laid down some very definite rules relative to statutory construction indicating that the language used in the statute must be construed according to its plain and ordinary meaning. In *Smith v. Sioux City Stock Yords Co.*, 219 Iowa 1142, 1149; 260 N.W. 531, 534 (1935) the Supreme Court said:

" 'Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the Legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of the law, or because the Legislature did not use proper words to express its meaning, or the court would be assuming legislative authority'."

In the case of *Hahn v. Clayton County*, 218 Iowa 543, 551; 255 N.W. 695, 699, (1934) the Iowa Supreme Court said:

"One of the first and most controlling maxims of construction, however, is that, where the language of a statute is plain and unambiguous, there is no room for construction. As said in 12 C. J. 1302:

" 'Construction can only be employed for the discovery of the true intent and meaning of an instrument, and when the language is plain there can be no construction, because there is nothing to construe; hence, the term can have no application to a statute in which there is nothing doubtful or ambiguous in its terms'."

There can be no doubt as to the application of Section 1, of Chapter 242, Acts of the 61st General Assembly, to rental contracts when we consider that the first sentence of the said Act in plain and unambiguous language authorizes school boards to enter into two types of lease agreements. Lending support to the view expressed above is

the fact that this Act authorizes the consummation of rental contracts for buildings located any place within the school district, however, lease-purchase option contracts can be entered into by the school board only when the real estate on which the building or buildings are to be placed is owned by the school district.

The phrase "rental or lease-purchase option contract" is used in three places in the second paragraph of this statute. The word "or" as it appears in the above phrase is a disjunctive article, and it marks an alternative as either "this" or "that", and in its strict significance the term expresses a disjunctive meaning and marks an alternative. " 'It is a rule of construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to'." *State v. Smith*, 46 Iowa 670, 673 (1877). In viewing the words "rental or lease-purchase option contract" in the above light it is evident that the provisions of Chapter 242, Acts of the 61st General Assembly govern both "rental and lease-purchase option contracts" entered into by a school board to provide additional schoolhouse facilities.

14.23

SCHOOLS AND SCHOOL DISTRICTS: School Lunch Program— §291.13, Chapter 283A, 1962 Code of Iowa, and Chapter 251, Acts of the 61st G.A. The costs incident to the operation of the school lunch program may be reflected in the budget of and paid from the school's general fund.

March 8, 1966

Mr. Paul F. Johnston, Superintendent
Department of Public Instruction
State Office Building
L O C A L

Dear Mr. Johnston:

This is in response to your recent request in which you asked whether the cost of operating a school lunch program can be reflected in the budget of and paid from the school's general fund.

In response to your question I refer you to Chapter 283A, 1962 Code of Iowa, which provides as follows:

"283A.1 Definitions. For the purpose of this chapter:

1. 'School board' means a board of school directors regularly elected by the qualified voters of a school corporation or district of the state of Iowa.

2. 'School' means a public school of high school grade or under.

3. 'School lunch program' means a program under which lunches are served by any public school in the state of Iowa on a non-profit basis to children in attendance, including any such program under which a school receives assistance out of funds appropriated by the Congress of the United States.

"283A.2 School boards. School boards shall have power to operate or provide for the operation of school lunch programs in schools under their jurisdiction, and may use therefor funds disbursed to them under the provisions of this chapter, gifts, funds received from sale of school lunches under such programs, and any other funds legally available.

"283A.3 Expenditure of federal funds. The superintendent of public instruction is hereby authorized to accept and direct the disbursement of funds appropriated by any Act of Congress and appropriated to the state of Iowa for use in connection with school lunch programs. The superintendent of public instruction shall deposit all such funds with the treasurer of the state of Iowa, who shall make disbursements therefrom upon the direction of the superintendent of public instruction.

"283A.4 Administration of program. The superintendent of public instruction may enter into such agreements with any agency of the federal government, with any school board, or with any other agency or person, prescribe such regulations, employ such personnel, and take such other action as he may deem necessary to provide for the establishment, maintenance, operation, and expansion of any school lunch program, and to direct the disbursement of federal and state funds, in accordance with any applicable provisions of federal or state law. The superintendent of public instruction may give technical advice and assistance to any school board in connection with the establishment and operation of any school lunch program and may assist in training such personnel engaged in the operation of such program. The superintendent of public instruction and any school board may accept any gift for use in connection with any school lunch program.

"283A.5 Accounts, records, reports, and operations. The superintendent of public instruction shall prescribe regulations for the keeping of accounts and records and the making of reports by or under the supervision of school boards. Such accounts and records shall at all times be available for inspection and audit by authorized officials and shall be preserved for such period of time, not in excess of five years, as the superintendent of public instruction may lawfully prescribe. The superintendent of public instruction shall conduct or cause to be conducted such audits and inspections with respect to school lunch programs as may be necessary to determine whether its agreement with school boards and regulations made pursuant to this chapter are being complied with, and to insure that school lunch programs are effectively administered."

In the above comprehensive Chapter the Legislature vested local school boards with the power to establish, maintain and operate nonprofit lunch programs in Iowa's public schools. By the enactment of the above statute, it appears that the Legislature intended to make the school lunch program a part of the total school program.

School districts are authorized to maintain and make expenditures from only two funds i.e. the schoolhouse fund and the general fund. *Section 291.13.* Chapter 251, Acts of the 61st General Assembly authorizes the use of general fund monies for the following purposes:

"*for the cost of maintaining and operating the school* and the cost of instruction and supervision occasioned by the teaching of the curriculum of said school and for the purposes set forth in chapters ninety-seven B (97B) and ninety-seven C (97C) and sections two hundred ninety-four point eight (294.8), two-hundred ninety-four point nine (294.9), two hundred ninety-four point ten (294.10), two hundred ninety-four point eleven (294.11), two hundred ninety-four point twelve (294.12), as amended by chapter one hundred seventy-seven (177), Acts of the Sixtieth General Assembly, two hundred ninety-four point thirteen (294.13), and two hundred ninety-four point fourteen (294.14) of the Code." (Emphasis added)

Chapter 283A is not specifically mentioned, however, the above chapter provides that the general fund shall be used "for the cost of maintaining and operating the school . . ." Inasmuch as the school lunch program is a part of the total operation of a school, the cost of the said lunch program should be considered as one of the costs incident to maintaining and operating a school. Therefore, I am of the opinion that the costs incident to the operation of the school lunch program should be reflected in the budget of and paid from the school's general fund.

14.24

SCHOOLS AND SCHOOL DISTRICTS: Area Vocational Schools; Director Districts—§5(13), Chapter 247, Acts of 61st G.A. The statutory requirement of director districts being of approximately equal population means that very little population variance is allowed between director districts.

March 9, 1966

Mr. D. Quinn Martin
Black Hawk County Attorney
309 Court House Building
Waterloo, Iowa 50703
ATTN: Henry Cutler, Assistant County Attorney

Gentlemen:

You have submitted the following request:

"Chapter 247, Acts of the 61st General Assembly, is in regard to area vocational schools and Section 5, subsection 13, provides the following:

"'Sec. 5. Plans formulated for a merged area when submitted to the state board shall include the following: * * *

13. The boundaries of director districts which shall number not less than five (5) or more than nine (9) if such districts have been agreed upon. Director districts shall be of approximately equal population.'

"My question is: To what extent can the director districts vary in population in view of the above cited language?"

The answer to your question depends on the meaning of the last sentence of Section 5, subsection 13, and the effect of the word "approximately" upon that sentence.

It is a primary rule of statutory construction that the Supreme Court and other interpreters of the law must accept the law as the legislative body enacted it and where the language of the statute is plain and its meaning clear, statutory construction is not to be used. *Holland v. State*, 253 Iowa 1006, 115 N.W. 2d 161 (1962); *Board of Education of Franklin County v. Board of Education of Hardin County*, 250 Iowa 672, 95 N.W. 2d 709 (1959).

We must then look to the ordinary meaning of the word "approximately" and see if any meaning has been attached to it by our state courts.

Webster's Third New International Dictionary defines the word "approximately" as follows:

"Reasonably close to: Nearly, Almost, About."

The word "approximately" has been discussed by the Iowa Supreme Court in the case of *Fiesel v. Bennett*, 225 Iowa 98, 280 N.W. 482 (1938). We find the following language at page 484:

"1. An examination of chapter 148 of the 47th G.A., hereinabove set out, shows that paragraph (b) of section 1 of that act requires that the petition set out, inter alia, 'the approximate district to be served.'

"It is contended by appellee, and it may be true, that it is not necessary to set out the exact description contained in the petition filed with the board by the property owners because the act provides that it designate 'the approximate district to be served.'

"[1] Appellant contends that this provision of the statute is not met when the district established contains at least 30 per cent more property than that contained in the original petition.

"Webster's New International Dictionary defines the word 'approximate' as, 'situated or drawn very near or close together,' 'near to correctness,' 'nearly exact,' 'not perfectly accurate.'

"It is our conclusion that when it is proposed to establish a district almost one-third larger than that petitioned for, the petition does not set out an 'approximate' description of the property in the district proposed to be served, and therefore the terms of the statute are not substantially complied with."

Because we must use the plain meaning of the Iowa Legislature and the meaning of the word "approximately" is plainly defined and has been construed by the Iowa Supreme Court parallel to the dictionary definition, our answer must follow these definitions.

Our opinion is that the director districts may have very little variance in population. The director districts shall be of nearly equal population, or of almost equal population, or of about equal population. No other conclusion can result from the meaning of the word "approximately."

14.25

SCHOOLS AND SCHOOL DISTRICTS: Incompatibility of Office— §§279.14, 294.4, and 294.5, 1962 Code of Iowa, and Chapter 247, Acts of the 61st G.A. The offices of State Senator and board director of an area vocational school or community college are incompatible. The offices of teacher or local school superintendent are not incompatible with the office of board director of an area vocational school or community college.

April 15, 1966

Mr. W. T. Edgren
Assistant Superintendent
Department of Public Instruction
State House
L O C A L

Dear Mr. Edgren:
This is to acknowledge your recent inquiry appearing as follows:

1. "Whether a State Senator may serve on the governing board of an area vocational school or community college?"

2. "Whether a teacher or superintendent of a local school district may serve on the governing board of an area vocational school or

community college encompassing the same territory as such local school district?"

In response to your first question I refer you to Section 12, Chapter 247, Acts of the 61st General Assembly, which prohibits members of the local school board or the county school board from also serving on the board of the area vocational school or community college. The said section provides as follows:

"The governing board of a merged area shall be a board of directors composed of one (1) member elected from each director district in the area by the electors of the respective district. Members of the board shall be residents of the district from which elected. Successors shall be chosen at the annual school elections for members whose terms expire on the first (1st) Monday in October following such elections. Terms of members of the board of directors shall be three (3) years except that members of the initial board of directors elected at the special election shall determine their respective terms by lot so that the terms of one-third (⅓) of the members, as nearly as may be, shall expire on the first (1st) Monday in October of each succeeding year. Vacancies on the board which occur more than ninety (90) days prior to the next annual school election shall be filled at the next regular meeting of the board by appointment by the remaining members of the board. The member so chosen shall be a resident of the district in which the vacancy occurred and shall serve until the next annual school election, at which election a member shall be elected to fill the vacancy for the balance of the unexpired term. A vacancy shall be defined as in section two hundred seventy-seven point twenty-nine (277.29) of the Code. *No member shall serve on the board of directors who is a member of a board of directors of a local school district or a member of a county board of education.*" (Emphasis added)

Neither the Iowa Constitution nor the relevant Iowa statutes prohibit a State Senator from also serving on the board of directors of an area vocational school or community college. However, where the holding of dual offices is involved we must also review the common law to determine if the two positions are incompatible. *Bryan v. Cattell,* 15 Iowa 538 (1864). The said doctrine has been described as follows:

"The doctrine of the incompatibility of public offices is imbedded in the common law and is of great antiquity. It rests on the view that office holders are inherently subject to regulations and conditions. While a private person may accept as many employments as he can procure, it has always been held that the holding of a public office may render it improper for the holder to accept another public office. The correctness and propriety of this rule are so well established as to be assumed without discussion in practically every case in which the matter of common law incompatibility arises." *22 R.C.L., §54, p 412.*

Therefore, it is incumbent upon us to determine from the common law whether the duties of two positions in question render them incompatible.

The Supreme Court of Iowa has stated: "the (incompatibility) must be determined largely from a consideration from the duties of each [office], * * *." The said Court then laid down the following tests for incompatibility:

"* * * the test of incompatibility is whether there is an inconsistency in the functions of the two, *as where one is subordinate to the other 'and subject in some degree to its revisory power,'* or

where the duties of the two offices 'are inherently inconsistent and repugnant.' [Citations omitted] * * * It has been held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'." [Citations Omitted] (Emphasis added) *State ex rel Crawford v. Anderson,* 155 Iowa 271, 273, 136 N.W. 128, 129, (1912); *State ex rel Banker v. Bobst,* 205 Iowa 608, 610, 218 N.W. 253, 254 (1928), 22 R.C.L., §56, p. 414.

Applying the first test set out above to the problem presented by you leads me to believe that there is an inconsistency in the said offices. The area vocational schools are a legislative creation similar in organization to our local school districts. The Supreme Court described the subordinate status of the local school district to the Legislature in the following manner:

"The defendant is a school corporation. It is a legislative creation. It is not organized for profit. It is an arm of the state, a part of its political organization. It is not a 'person,' within the meaning of any bill of rights or constitutional limitation. It has no rights, no functions, no capacity, except such as are conferred upon it by the legislature. *The legislative power is plenary. It may prescribe its form of organization and its functions today, and it may change them tomorrow.* It may confer or withhold power to take title to real estate. Conferring such power, it may qualify it, both as to the title and tenure of the real estate. *It may dissolve the corporation at any time . . .*" (Emphasis added) *Waddell v. Board of Directors of Aurelia Consolidated Independent School District,* 190 Iowa 400, 406, 175 N.W. 65, 67 (1919).

If the above is true in the case of local school districts it should also be true in the case of area vocational schools and community colleges.

The Supreme Court of Michigan was called upon to decide whether an incompatibility existed between the offices of county school commissioner and state representative. That Court held the said two offices were incompatible and Justice Boyles in his concurring opinion stated:

"I cannot agree that the office of county school commissioner is not subject to the supervisory power of the legislature. It is not a constitutional office and is within the general regulatory power of the legislature 'as its wisdom shall dictate.' (Citation Omitted) The legislature has provided for the election of a county school commissioner in each county, fixed the tenure of office (Citation Omitted), determined who shall be eligible to hold the office (Citations Omitted), prescribed the powers and duties, * * *. The legislature may abolish the office or transfer the powers and duties to another office (Citations Omitted). The county school commissioner in some instances directs the expenditure of moneys appropriated by the legislature. *It seems to me that no one should occupy the office of county school commissioner and at the same time sit in the legislature with power to increase or decrease his salary, tenure of office, enlarge or diminish his own powers and duties; in fact have general control as a member of the legislature over his official functions as county school commissioner. This should not be.*" (Emphasis added) *Weza v. Auditor General, et al,* 297 Mich. 868, 692, 693, 298 N.W. 368, 370 (1941).

In view of the above, I am of the opinion that the area schools or community colleges and their boards are *subordinate* to the Legislature and subject to its revisory power. Therefore, in accord with the test

pronounced in *State ex rel Crawford v. Anderson,* supra, I feel constrained to rule that the offices of State Senator and Director of an area vocational school or community college are incompatible.

Your second question regarding incompatibility in the offices of teacher and local superintendent versus the board of directors of an area vocational school or community college can be resolved by considering the respective duties imposed on these offices. Section 23, Chapter 247, Acts of the 61st General Assembly, spells out some of the duties of the area board director as follows:

"Sec. 23. The board of directors of each area vocational school or area community college shall:

"1. Determine the curriculum to be offered in such school or college subject to approval of the state board.

"2. Change boundaries of director districts in merged areas after each decennial census or change in boundaries of the merged area to compensate for changes in population if such population changes have taken place.

"3. Have authority to determine tuition rates for instruction as authorized under section eighteen (18), subsection three (3) of this Act.

"4. Have the powers and duties with respect to such schools and colleges, not otherwise provided in this Act, which are prescribed for boards of directors of local school districts by chapter two hundred seventy-nine (279) of the Code.

"5. Have the power to enter into contracts and take other necessary action to insure a sufficient curriculum and efficient operation and management of the school or college and maintain and protect the physical plant, equipment, and other property of the school or college.

"6. Establish policy and make rules, not inconsistent with law and administrative rules, regulations, and policies of the state board, for its own government and that of the administrative, teaching, and other personnel, and the students of the school or college, and aid in the enforcement of such laws, rules, and regulations.

"7. Have authority to sell any article resulting from any vocational program or course offered at an area vocational school or area community college. Governmental agencies and governmental subdivisions of the state within the merged areas shall be given preference in the purchase of such articles. All revenue received from the sale of any article shall be credited to the funds of the merged area.

"8. With the consent of the inventor, and in the discretion of the board, secure letters patent or copyright on inventions of students, instructors, and officials of any vocational school or community college of the merged area, or take assignment of such letters patent or copyright and make all necessary expenditures in regard thereto. Letters patent or copyright on inventions when so secured shall be the property of the board of the merged area and the royalties and earnings thereon shall be credited to the funds of the board."

Additional duties are conferred on the area vocational school or community college directors in Sections 15, 16, 17, 18 and 19 of Chapter 247, Acts of the 61st General Assembly, however, the duties contained

therein are only involved with the management of the said area vocational schools and community colleges.

The office of local school superintendent is created by Section 279.14. It does not appear that the Legislature has imposed any duties on the superintendent that will conflict with or be inconsistent to the duties imposed on the area vocational school or community college board. The same can be said of the duties imposed on school teachers. See Sections 294.4 and 294.5, 1962 Code of Iowa.

The local school system, the employer of teachers and superintendents, and the area vocational schools and community colleges are totally independent of each other. Unlike the relationship that exists between local and county school systems, there is no interconnection between local school districts and the said area boards.

In view of the above I am unable to find a conflict or inconsistency in the functions of the two offices. Nor am I able to find that the established governmental scheme subordinates one of the said offices to the other or causes a clash of duties inviting the incumbent to prefer one obligation over the other. Therefore, I am of the opinion that the offices of teacher and local superintendent are not incompatible with the office of director on the area vocational school or community college board.

In conclusion I would like to refer you to a portion of an opinion of the New Jersey Supreme Court dealing with incompatibility of offices. The Court stated:

> "Except as to offices created by the Constitution, public offices and employments are ultimately the creatures of legislation. The Legislature alone may determine the duties and the interrelation of the public posts it establishes or authorizes to be established. Within the constitutional framework, the Legislature is the architect of the structure of government. The Judiciary has no creative power in that area. The court's function is to enforce prohibitions fashioned by statute or by the common law. Whether a further ban would be wise or unwise is not a subject upon which we may properly venture a view, and this opinion should not be understood to do so. We hold only that the common law did not bar the dual officeholding involved in this case, and that the question whether it should be barred in the public interest reposes in the power and responsibility of the legislative department." *Reilly v. Ozzard*, 33 N.J. 529, 553, 166 A.2d 360, 372, 89 A.L.R. 2d 612, 627 (1960).

14.26

SCHOOLS AND SCHOOL DISTRICTS: **Driver Education**—§§4.1(2), 282.7, 282.24, 285.1(6), 285.1(10), 285.4 and 285.10(1), 1962 Code of Iowa and §6, Chapter 226, §5, Chapter 274, Acts of the 61st G.A. Sections 282.7 and 285.4 do not provide the exclusive procedure for making a course in driver education available. School districts may not make driver education available by contracting for the same with a private or commercial driving school. In cases where one district contracts with another district to provide driver education for the former district, the said former district may also provide transportation for its students to and from the place of instruction. Tuition rates as described in Chapter 282 do not apply to the driver education act. Reimbursement shall not exceed $30.00 per student, however, it shall be the actual cost if the same is less than $30.00 per student.

May 9, 1966

Mr. Paul F. Johnston
Superintendent of Public Instruction
LOCAL

Dear Mr. Johnston:

This is in response to your inquiries on the Driver Education Act, Chapter 274, Acts of the 61st General Assembly.

In the first question you stated:

"Our first question has to do with the meaning of the phrase 'make available.' (It appears that a school district could comply with the 'offer' part of the quoted provision by installing a driver education course as part of the course of study prescribed by the local school board under section 280.1, Code of Iowa, in the same way that other required subjects prescribed in sections 280.6, 280.7, 280.8, 280.10, 280.12 and 280.13 are 'offered' by school districts which operate their own schools.) However, our first question is as to the manner or procedure to be employed by a school district which either operates no school or does not operate a school at the grade level at which driver education would ordinarily be taught. Is, as in the case for other required subjects, section 282.7, Code of Iowa, and section 285.4, Code of Iowa, the governing law, as to the manner or procedure whereby a school district would 'make available' a driver training course, as the alternative to 'offering' same?"

The relevant portion of Section 5, Chapter 274, Acts of the 61st General Assembly, provides:

"Commencing with the September, 1965, school term, the state of Iowa shall reimburse each public school district in an amount not to exceed thirty (30) dollars per student for each student completing an approved driver education course offered *or made available* by the school district. Every public school district in Iowa shall offer *or make available* to all students residing in the school district an approved course in driver education . . ."

The phrase "make available" as used above has not acquired a technical or peculiar meaning in law; therefore, it should be construed according to the context and the approved usage of the language. Section 4.1(2), 1962 Code of Iowa. The California District Court of Appeal, First District, has adopted Webster's Dictionary definition of the phrase "make available" which is as follows:

"The phrase 'to make available' means to make 'accessible or attainable, ready or handy' . . ." *DeKay v. DeKay Pneumatic Tools*, 131 C.A. 2d 625, 633, 281 P. 2d 76, 82 (1955).

The above broad definition of the phrase "make available" implies that a school board is not limited to the provisions of Sections 282.7 and 285.4 in making a driver education course available. In accord with the adopted definition of the phrase "make available", it would seem that a district that had discontinued all or part of its school facilities could use any procedure whereby an approved driver education course is made "accessible or attainable" to all the residents of the district between fifteen and twenty-one years of age.

Sections 282.7 and 285.4 of the 1962 Code of Iowa, to which you have referred, provide in part:

"282.7 Attending in another corporation—payment. The board of directors in any school district may by record action, discontinue any or all of its school facilities. When such action has been taken,

the board shall designate an appropriate approved public school or schools for attendance. Tuition shall be paid by the resident district as required in section 279.18 and section 282.20 for all pupils attending designated school, except that high school pupils may attend school of choice and be entitled to tuition, but must attend school designated for attendance to qualify for transportation. Designations shall be made as provided in chapter 285 . . ."

"285.4 Pupils sent to another district. On or before July 8, 1949, the board in districts not maintaining high school facilities shall by record action designate the school or schools for attendance of all high school pupils from their respective districts. In making designations, the local board shall give consideration to the wishes of the majority of the patrons, the adequacy of the facilities and curricular offerings and available bus service to avoid duplication of transportation facilities to different receiving schools . . ."

The above sections are limited in their application to the designation of schools and the transporting of *actual students*, grades one through twelve, when a school has discontinued all or part of its school facilities. However, Section 5 of the Driver Education Act defines "student" to include, not only persons enrolled in school, but also high school graduates and dropouts. Attorney General opinion issued to State Representative Paul E. Craig dated October 29, 1965.

Chapter 274, Acts of the 61st General Assembly, is a legislative attempt to educate a segment of the Iowa driving public that has been involved in a high percentage of fatal accidents within the state. See explanation of House File 390, Acts of the 61st General Assembly. One of the essential elements of this Act is 'to make driver education available to all young people between 15 and 21 years of age." Ibid, House File 390. The legislature did not prescribe an exclusive procedure by which this course could be made available. Had the legislature intended to extend the procedures in Section 282.7 and 285.4 to Section 5, Chapter 274, Acts of the 61st General Assembly, they could have so stated. "Neither the trial court nor this court can by judicial decision enlarge the enactments of the Legislature." *Wall v. County Board of Education of Johnson County*, 249 Iowa 209, 218, 86 N.W. 2d 231, 237 (1957). The Iowa Supreme Court has also stated:

"Ours not to reason why, ours but to read and apply. It is our duty to accept the law as the Legislative body enacts it. We do not decide what the Legislature might have said, or what it should have said . . . but only what it did say; and this we must gather from the language actually used." *Holland v. State*, 253 Iowa 1006, 1011; 115 N.W. 2d 161, 164 (1962).

Therefore, it is my opinion that Sections 282.7 and 285.4 do not provide the exclusive procedure for making a course in driver education available.

II.

Your second question reads as follows:

"Under the quoted public designation statutes [§§282.7 and 285.4], is a driver education course, together with associated equipment, classroom, and instructional personnel, a 'school facility?' Is it, by reason of the age-level requirements, in H.F. 390 [Chapter 274] a 'high school facility?' "

The statutes to which you refer in your question are limited in their application by our answer to your first question. Therefore, it does not appear that we can properly answer this question because of our prior answer.

III.

Your third question reads as follows:

"If sections 282.7 and 285.4 provide the manner or procedure whereby a school district which does not 'offer' driver training may 'make available' such training, do said sections provide the *exclusive* manner or procedure?"

This question has been answered by my answer to your first question.

IV.

What you have designated as your fourth question is as follows:

"Where a school district elects to 'make available' driver training rather than to 'offer' same may it designate other than 'an appropriate *approved public* school or schools for attendants?' (sic) May it contract with a commercial school? May it contract with a Parochial school that has a driver-training facility? If it may contract with a private or parochial school to provide driver-training, may it make such provision only for *part* of the 'resident students' in the district and train the balance in its own facility? In other words, where driver training is the specific subject under consideration, may it *both* 'offer' and 'make available?'"

This question contains several questions and they are answered by Section 6 of Chapter 226, Acts of the 61st General Assembly, which reads as follows:

"The boards of directors of two or more school districts may by agreement provide for attendance of pupils residing in one district in the schools of another district for the purpose of taking courses not offered in the district of their residence. Courses *made available* to students in this manner shall be considered as complying with any standards or laws requiring the offering of such courses. The boards of directors of districts entering into such agreements may provide for sharing the costs and expenses of such courses." (Emphasis supplied)

This is clear authority for the right to contract with another school district. This section does not limit what authority a school district otherwise might have in making driver education courses available. However, we must look elsewhere for that authority.

Section 5 of Chapter 274, Acts of the 61st General Assembly, partially defines an approved driver education course as follows:

"'An approved driver education course as programmed by the department of public instruction shall consist of at least thirty (30) clock hours of classroom instruction, and six (6) or more clock hours of laboratory instruction of which at least three (3) clock hours shall consist of street or highway driving . . .'"

Chapter 226, supra, is entitled "Educational Standards" and it deals with the powers of the Department of Public Instruction. It is contemplated that the Department supervise and evaluate the school programs of the several school districts of the state, both public and parochial. In accord with the above chapter the Department of Public Instruction is authorized to approve parochial school driver education courses that meet the Department's programming requirements. Chapter 226, supra, when read together with Chapter 274, would require an interpretation that the Department of Public Instruction should not

supervise and evaluate courses in private or commercial driver education schools which are to be licensed by the Department of Public Safety. Section 5, Chapter 274, Acts of the 61st General Assembly.

School districts have those powers which are express or implied from the express power. School districts may exercise those things normally incident to carry out their statutory duties. However, the statutory duties of a school district must be construed in light of the framework existing within the Department of Public Instruction and how it relates to the local school districts. It is the intent of the legislature that driver education courses in the public and parochial schools be controlled to some extent by the Department of Public Instruction, who would have no authority to supervise these courses if they were in private or commercial driver education schools which are to be licensed by the Department of Public Safety.

The private or commercial driver education schools which are to be licensed by the Department of Public Safety do not include parochial schools. It is my opinion that express statutory authority is necessary to authorize a public school to make available an approved driver education course in a private or commercial driving school. I find no such authority.

Therefore, it is my opinion that the statutes of the State of Iowa, as amended, contain no authority for making available approved driver education courses except through Section 6 of Chapter 226, Acts of the 61st General Assembly, which is through other public school districts.

My answer to the first, second and third parts of your question is "no."

Because of these answers, it is not necessary to answer the fourth and fifth parts of your question.

V.

Your fifth question reads as follows:

> "Where one school district not 'offering' driver-training facilities makes the same 'available' by designating an appropriate approved public school in another district, is a student, who wishes to enroll in the other district for driver training only entitled to have transportation as well as tuition paid by his home district?"

Section 6, Chapter 226, Acts of the 61st G.A., has been cited above and it applies, together with Sections 285.1(6), 285.1(10), and 285.10(1). The rules by which a student is entitled to school bus transportation are found in Section 285.10(1). This provides transportation for students who attend a public school and who are entitled to transportation under the laws of this state. Section 285.1, subsections 6 and 10, contemplate situations where school districts may send students back and forth.

These sections, read together with Section 6 of Chapter 226, Acts of the 61st General Assembly, would appear to be authority for the transportation of students from a district which is required to make available an approved driver education course to another district which, by agreement, will give the course. It can be further argued that the cost of the course provided for in Section 6 of Chapter 226 can also include the cost of transporting students which could be the major expense factor.

VI.

Your sixth question reads as follows:

"Does the formula set forth in section 282.24 for computation of maximum high school and elementary tuition rates also apply to computation of driver-training maximum tuition rates to be applicable to tuition students who enroll for driver training only? Or, does the lack of specific provision for separate computation of driver-training tuition rates leave it up to each district to determine what rate it will charge for driver training?"

The formula to which your question refers is for the computation of tuition to be paid by a receiving school district when the district of the student's residence no longer operates a school. However, it is a general statute and the general rule of statutory interpretation is that when construing together a general statute and a particular statute, the particular statute will control. *Rath v. Rath Packing,* ——— Iowa ———, 136 N.W. 2d 410 (1965). The specific language in Section 6 of Chapter 226, Acts of the 61st General Assembly, provides that individual agreements in regard to cost may be entered into. I do not believe that the tuition rates as described in Chapter 282 apply to the driver education bill. In addition, there is no statutory authorization for a separate computation of driver education tuition rates.

VII.

Your seventh question is as follows:

"Does Section 6, Chapter 226, Acts of the 61st General Assembly, provide an alternative method or procedure whereby a school may 'make available' a driver training course? To what extent must the provisions of section 282.7 and 285.4 be read together with the Section 6, Chapter 226, for the purpose of ascertaining the procedure whereby a school abandoning or foregoing establishment of course facilities in a particular field of subject matter may avail itself of course facilities in another school? Or, is the manner or procedure provided in this section separate, independent, and distinct from that provided in sections 282.7 and 285.4? Does the phrase 'school district' preclude a public school district from 'making available' driver training facilities by contract with a commercial or private school, under the provisions of this section? Must maximum tuition rates applicable to the course facility arrangements made under this section be computed annually by means of the formula provided in section 282.24? Or, does the provision for cost-sharing agreements between the respective boards of directors preclude the necessity for such tuition computation? Is this section applicable to students who are enrolled in no course other than driver training?"

In answering your prior question, I have discussed at length the application of Section 6, Chapter 226 and I believe that the matters you have raised in this question have already been resolved.

VIII.

Your eighth question reads as follows:

"If the annual amount allocated to the special driver education fund is insufficient to meet the aggregate of claims for reimbursement, are payments to be prorated? Is such the effect of the phrase 'not to exceed' or is that phrase intended to limit reimbursement to actual cost in cases where the same is less than $30 per student?"

I am of the opinion that according to the plain language of Chapter 274, such reimbursement is made to each school district in an amount not to exceed $30.00 per student, if the cost of each student is that much. But if the actual cost is less than $30.00 per student, reimbursement is limited to such cost. There appears to be neither express or implied intent that there should be a prorating in the event of deficiencies. The amount secured from students of payment of tuition will be reckoned in connection with the reimbursement of $30.00.

IX.

Your ninth question reads as follows:

"Under House File 390, does the State Department of Public Instruction have any duties with respect to driver training courses other than 'programming' an 'approved driver education course' and administering the special driver education fund?"

I am of the opinion that the Department of Public Instruction shall have the specific power to program approved driver education courses under Chapter 274, Acts of the 61st General Assembly, and that they have the specific power to supervise and evaluate the school programs of the schools of Iowa under Chapter 226, Acts of the 61st General Assembly, and may establish standards, regulations, and rules for approval of the various schools in the State of Iowa, also under Chapter 226, and may administer the driver training aid appropriation authorized by Chapter 24, Acts of the 61st General Assembly.

14.27

SCHOOLS AND SCHOOL DISTRICTS: Group Insurance for County School System Employees—§§509.15, 509.25, 1962 Code of Iowa. County School Systems are "institutions" within the meaning of the word as it was used in Section 509.15, and the County Board of Education is a "person" within the meaning of the word as used in Section 509.25, 1962 Code of Iowa.

August 5, 1966

Mr. Henry Cutler
Assistant Blackhawk County Attorney
309 Court House
Waterloo, Iowa

Dear Mr. Cutler:

This is in response to your recent inquiry wherein you stated as follows:

"Our County Board of Education, through its Superintendent, has asked us to request an opinion of your office. The opinion concerns the interpretation of Chapter 232, Section 1 and 10, of the Acts of the 60th General Assembly. More particularly, the problem concerns whether or not a County Board of Education can extend group medical insurance to its employees under the aforementioned Chapter 232. An interpretation appears to be needed with reference to the phrase 'governing body' and the word 'institution'."

In reply, I direct your attention to Section 1, Chapter 232, Acts of the 60th General Assembly, which provides as follows:

"The governing body of the state, county, school district, city, town or *any institution supported in whole or in part by public*

funds may establish plans for and procure group insurance, health or medical service for the employees of the state, county, school district, city, town or tax-supported institution." (Emphasis added) (Note: Chapter 232, Acts of the 60th General Assembly has been designated for future inclusion in Chapter 509.15 through 509.26; and in this opinion I will refer to the latter Code designations.)

Your question seeks a determination of whether the Legislature intended to include the county school systems of Iowa within the word "institution" as it was used in the above Section.

The Supreme Court of Iowa has apparently adopted the position that the public school system of the state and the county school system of the state are "educational institutions." *Eckles v. Lounsberry,* 253 Iowa 172, 111 N.W. 2d 638 (1961), *McColl v. Dallas County,* 220 Iowa 434, 262 N.W. 824 (1935). In *McColl v. Dallas County,* supra, at page 439 of the Iowa Reports, the Supreme Court stated:

"The school system of a county in this state is an 'educational institution,' . . . It cannot be questioned that the county or state school systems of this state are educational *institutions.*" (Emphasis added)

In accord with the above Iowa Supreme Court Ruling, it is our opinion that the County School System qualifies as a tax-supported institution within the provision of Section 509.15.

"The words 'governing body' means the executive council of the state, the board of supervisors of counties, the school boards of school districts, the city or town council of cities or towns and the superintendent or other *person in charge of an institution* supported in whole or part by public funds." (Emphasis added)

The County School Board is the agency that is in charge of the county school system: i.e. the county educational "institution." Therefore, we must determine whether the county school board is a person within the provisions of Section 509.25. Initially we are confronted with several Iowa Supreme Court decisions which on their face appear to rule that a school corporation is not a "person". However, the said decisions can be distinguished from the case presented by you. In *Waddell v. Board of Directors of Aurelia Consolidated Independent School District,* 190 Iowa 400, 175 N.W. 65, (1920), the Iowa Supreme Court ruled that a school district was "not a 'person,' within the meaning of any bill of rights or constitutional limitation," however, the Court did not say that a school district could not be a person within the meaning of a statutory provision.

In *Julander & Julander v. Reynolds,* 206 Iowa 1115, 221 N.W. 807 (1928), the Iowa Supreme Court held that a school district was not a "person" within the meaning of the word as used in Section 11815, 1927 Code of Iowa, which allowed private citizens to bring equitable garnishment actions against "persons" indebted to a judgment debtor. This case was decided on the declared policy of Iowa that municipal and political corporations of the state should not be garnished.

Although a school district may not be classified as a "person" for the purposes of challenging the constitutionality of statutes under which it operates, *Lincoln Township School District, Dallas County v. Redfield Consolidated School District,* 226 Iowa 298, 283 N.W. 881 (1939) or for the purposes of garnishment, *Julander & Julander v. Reynolds,* supra; it does not mean that a district could not be a person for other purposes. *Skelly v. Westminster School District of Orange County,* 103 Cal. 652, 37 P. 643 (1894).

In *Skelly v. Westminster School District of Orange County*, supra, at page 644 of Volume 37 of the Pacific Reporter, the Supreme Court of California stated:

> "The rule is that the state is not bound by general words in a statute which would operate to trench upon its sovereign rights, or injuriously affect its capacity to perform its functions, or establish a right against it. In *Savings Bank v. U. S.*, 19 Wall. 239, it is said: 'The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him (the king) in the least, if they tend to restrain or diminish any of his rights or interest. * * * The rule thus settled respecting the British crown is equally applicable to this government . . ."

In *United States v. Coumataros*, 165 F. Supp, 695 (1958), the Maryland Federal District Court at page 700 stated:

> "The general rule of construction excluding the government (federal, state, or their agencies) from the purview of a statute expressly applicable to a person or corporation finds its basis in no small part in the doctrine of governmental immunity (*State of Ohio v. Helvering*, supra, 292 U. S. 360, 368-369, 54 S. Ct. 725, 78 L. Ed. 1307). *Thus the general exclusionary rule has no application where no impairment of sovereign powers will result, where immunity has been waived, or where the government is given, rather than deprived of, powers.* 82 C. J. S. Statutes §317, p. 556. (Emphasis added)

Construing the county board of education as a "person" within the meaning of the word as used in Section 509.25 will not impair any of its sovereign power nor will it cause a waiver of the county board of education's immunity. The said construction will confer upon the county board of education the power to establish a life, health and accident insurance plan for its employees.

Applying the test set out in *United States v. Coumantaros*, supra, to the Group Insurance For Public Employee Act, it is our opinion that the construction excluded state agencies from a statute applicable to persons should not be adopted in this instance. Therefore, it is our considered opinion that the county board of education is empowered to adopt a plan for group insurance, health or medical service for the employees of the educational institution under its control.

14.28

High School District Merger—§275.40, 1962 Code of Iowa as amended. This section requires the County Board which has jurisdiction of a particular school district, operating a high school, to approve or disapprove a proposed merger into such district, rather than the approval of each and every county which has territory in such district. (Brick to Representative Dunton, 4/9/65) #65-4-6

14.29

Reorganization—§§274.37 and 275.1, 1962 Code of Iowa. Area from a 12 grade system district may not be placed into a district that does not maintain a 12 grade system. (Brick to Glenn M. McGee, Mills Co. Atty., 7/6/65) #65-7-11

14.30

Residence of Subdistrict Director of School Board—§277.29, 1962 Code of Iowa. The office of the subdistrict director becomes vacant whenever the

incumbent ceases to be a resident of the subdistrict from which he was elected. (Gentry to Poston, Wayne Co. Atty., 7/8/65) #65-7-3

14.31

Schools Reorganization—Joint County Plan—§275.8, 1962 Code of Iowa. A change in the internal boundaries of a joint county plan must be adopted by the joint county boards in the same manner that the original joint county plan was adopted. (Gentry to Barlow, Palo Alto Co. Atty., 7/26/65) #65-7-17

14.32

Schools and Schools Districts—§§297.5 and 291.13, 1962 Code of Iowa; Senate File 269, Acts of the 61st G.A. Money resulting from levy made under Section 297.5, 1962 Code of Iowa as amended by Senate File 269, Acts of the 61st G.A., for the purchase of school sites shall be placed in the schoolhouse fund and may be so expended without submission to the electors. (Strauss to Samore, Woodbury Co. Atty., 7/27/65) #65-7-18

14.33

Enlargemen of School Districts—§275.27, 1962 Code of Iowa. Independent School Districts enlarged under the provisions of Chapter 275 thereafter become community school districts. (Gentry to Samore, Woodbury County Attorney 9/22/65) #65-9-12

14.34

High School Defined—§286.2, 1962 Code of Iowa. A school district operating ninth, tenth, eleventh or twelfth grades or any portion thereof is operating a high school for the purpose of State supplementary aid. (Gentry to Hageman, Winneshiek County Representative 9/22/65) #65-9-14

14.35

School District Treasurer—§291.13, 1962 Code of Iowa. The treasurer of a school district is not required by the language of §291.13 to keep separate bank accounts where the statutory language requires "a separate account for each fund." Because of the requirements of separateness of the schoolhouse fund and the general fund, it is a better practice to maintain separate bank accounts. (McCarthy to Worthington, State Auditor, 10/14/65) #65-10-10

14.36

Reorganized School Districts—S.F. 190, Acts of the 61st G.A., §§274.37, 275.1, 275.12 and 275.40, 1962 Code of Iowa. S.F. 190 is operative only if any area of the state (1) is not by April 1, 1966, a part of a reorganized district, or (2) is not at that time included in a reorganization petition filed in accordance with §275.12. If either of these exists, then §§275.12, 275.40 or 274.37, are available for reorganization. (Strauss to Barlow, Palo Alto County Attorney, 10/15/65) #65-10-13

14.37

Incompatibility of office—The offices of County school psychologist and district director within the county are incompatible. (Gentry to Edgren, Assistant Superintendent of Public Instruction 11/1/65) #65-11-2

14.38

Merger with de facto school districts—§§24.3(3), 275.40(3), 1962 Code of Iowa. If no appeal is taken by an aggrieved party mergers become final ten days after the County Board of the twelve grade district approves the same. At that point in time other non-twelve grade districts contiguous to the newly created de facto district can merge with the latter. (Gentry to Morrison, Washington County Atty., 11/4/65) #65-11-4

14.39

Boundary Changes—Chapter 240, Acts of the 61st G.A., Chapter 273, §§273.3 and 274.37, 1962 Code of Iowa. A Section 274.37 boundary, involving a school district with area in two counties, need only be approved by the county board exercising jurisdiction over the said district. Section 274.37 is available as a method of reorganization regardless of its July 1, 1966, effective date. (Gentry to Hudson, Pocahontas County Attorney, 12/16/65) #65-12-8

14.40

School Bus Drivers—§§321.12(27), 321.177, 321.375, and 321.376, 1962 Code of Iowa, and Chapter 274, Acts of the 61st G.A. The provisions of Chapter 321, 1962 Code of Iowa, apply indiscriminately to private as well as public school bus operators and both having an approved drivers education program may be licensed at the age of sixteen years. (Thornton to Klay, Sioux County Attorney, 1/14/66) #66-1-4

14.41

Leasing Junior College Dormitories—§§262.35, 262.36, 1962 Code of Iowa, and Chapter 242, Acts of the 61st G.A. Chapter 242, Acts of the 61st G.A., does not authorize school boards to lease dormitories for the district's junior college. (Gentry to Fitzgibbons, Emmet County Attorney, 1/31/66) #66-1-13

14.42

Attachment—§§275.1, 275.18, 285.12, 1962 Code of Iowa, and Chapter 240, Acts of 61st G.A. An attachment appeal taken under Chapter 240, Acts of 61st G.A., does not suspend the effective date or operation of the attachment. (Gentry to Worthington, Auditor of State, 3/17/66 #66-3-11

14.43

Authority of board of the reorganized school district to terminate teacher's contract—§§275.25 and 279.13, 1962 Code of Iowa. The new Board of Directors of a reorganized school district does have the authority to terminate a contract of a teacher of a rural school district which, by virtue of the reorganization, becomes a part of the reorganized school district. (McCauley to Dunton, State Representative, 3/30/66) #66-3-17

14.44

Compensation for School Treasurer—§§275.27, 277.26 and 279.29, 1962 Code of Iowa. A community school district does not come within the exception of Section 279.29, allowing some school district to compensate the school treasurer. (Gentry to McGrath, Van Buren County Attorney. 4/6/66) #66-4-6

14.45

Driver Education—§§279.10, 279.11, 282.6 and Ch. 280, 1962 Code of Iowa, §2(6)(a), Ch. 226, §1, Ch. 248 and Ch. 274, Acts of the 61st G.A. School districts may offer driver education in summer school and school boards have the discretionary power to waive instructional fees in "hardship cases". Driver education must be offered during the regular school year. (Gentry to Edgren, Asst. Superintendent, Dept. of Public Instruction 5/6/66) #66-5-1

14.46

Driver Education—Title 1 Public Law 89-10, §274.7, 1962 Code of Iowa; §4(1), Ch. 226, §4(2), Ch. 226 and §5, Ch. 274, Acts of the 61st G.A. Public Schools may not send their driver education instructor into a private school. The public school district "offering" driver education must "offer" the same to all residents between the ages of 15 and 21. (Gentry to Brinck, State Representative, 5/20/66) #66-5-9

14.47

Equalization Levy—§§275.29 and 275.31, 1966 Code of Iowa. Section 275.31 is applicable only in cases where a school will be maintained in the portion of the original district which remains after the reorganization. (Gentry to Goeldner, Keokuk County Attorney, 8/29/66) #66-8-13

14.48

Application of local budget law—§§24.2(1), 280A.16 and 280A.17, 1966 Code of Iowa. Area vocational schools and community colleges are governed by the provision in the Local Budget Law. (Gentry to Young, Budget Examiner, Office of the Comptroller, 9/7/66) #66-9-2

14.49

Elections: Effect of improper ballot used in regular school election—§§277.8, 277.29 and 279.6, 1966 Code of Iowa. The providing —to the voters in a school election of a ballot, which ballot did not contain the write in squares and blank lines for each officer to be elected, voided the election. This failure to elect causes vacancy in office, which may be filled by remaining members of the board. (Strauss to Madsen, Jefferson County Attorney, 11/21/66) #66-11-3

14.50

Retirement for School Teachers—Ch. 97B and §§294.8, 294.9 and 294.10, 1966 Code of Iowa. Any school district in the state school system may establish a pension system under the provisions of §§294.8, 294.9 and 294.10 and a membership therein will not be a bar to membership in IPERS, being Ch. 97B. The word "teachers" used in §294.8 means a teacher under contract. (Strauss to Johnston, 12/7/66) #66-12-3

CHAPTER 15

STATE OFFICERS AND DEPARTMENTS

STAFF OPINIONS

LETTER OPINIONS

15.1

STATE OFFICERS: Chiropractors—Prescribing Diets and Vitamins—Chapter 151 of the Code does not contemplate that persons licensed within the state as chiropractors may prescribe diets or prescribe and dispense vitamins.

February 9, 1965

Mr. G. T. Lammers, D. C. PH. C.
Secretary-Treasurer, Board of Chiropractor Examiners
State Department of Health
L O C A L

Dear Mr. Lammers:

This is in reply to your letter of January 20, 1965, which presented the following questions:

"1. May a Chiropractor prescribe a diet?

2. May a Chiropractor prescribe vitamins?

3. May a Chiropractor properly suggest and dispense to his patients, vitamins or vitamin materials?"

Chapter 151.1, Code of Iowa, 1962, defines Chiropractors as:

"1. Persons publicly professing to be Chiropractors or publicly professing to assume the duties incident to the practice of Chiropractic.

2. Persons who treat ailments by the adjustment by hand of the articulations of the spine or by other incidental adjustments."

Interpreting this statute is the 1939 case of *State v. Boston*, 226 Iowa 429, 278 N.W. 291, an action to restrain a chiropractor from the unauthorized practice of medicine by, among other things, prescribing diets to his patients. While granting the injunction as to other activities, the District Court specifically declined to restrain the defendant

"from using his reasonable judgment in recommending to a patient certain changes of diet, exercise or such of his general habits as affect his health." *State v. Boston*, Supra, at Iowa 430, N.W. 291.

The State appealed as to this part of the ruling and the Iowa Supreme Court held the District Court in error. Citing from the opinion at page 431 of the Iowa Reports, and page 292 of the Northwestern Reporter:

"When defendant professed to use and used modalities other than those defined in section 151.1, as curative means or methods, the conclusion seems unavoidable that he was attempting to function outside the restricted field of endeavor to which the Legislature has limited the practice of chiropractic."

"We approve the decree as restraining defendant from professing to and treating human ailments in modes and manners outside the field of chiropractice, excepting that defendant should have been enjoined wholly from the prescribing for or the advising of his patients with respect to diet." *State v. Boston*, Supra, Iowa 435, N.W. 294.

On rehearing, the Court established the rule that if the questioned conduct would constitute a part of the practice of medicine and surgery, and does not come within the statutory definition of Chiropractic, it is an excess of authority. *State v. Boston*, Supra, Iowa 437-8, 284 N.W. 143, 144.

The Boston case was relied upon as recently as 1961, in an Attorney General's opinion issued April 1 of that year, holding Chiropractors may not use the radiological facilities of a county hospital for the treatment of their patients. Op. Attorney General, April 1, 1961.

Therefore, the present Iowa law does not, in our opinion, contemplate the prescription of diets, or the prescription and distribution of vitamins as within the rights and privileges of one licensed to practice Chiropractic medicine as provided in Chapter 151 of the Code of Iowa.

15.2

STATE AND STATE OFFICERS: **Iowa Bonus Board**—Chapter 35, Section 19.23. Iowa Bonus Board which sold $1600 of furnishings and placed receipts in the Bonus Board administrative fund has no statutory authority to do same, but authority properly resides in Executive Council by virtue of Section 19.23 (disposal of State property).

March 4, 1965

Hon. Lorne Worthington
Auditor of State
State House
LO C A L
Re: Iowa Bonus Board

Dear Mr. Worthington:

You have submitted the following question:

"At the last meeting (of the Iowa Bonus Board) we noticed in their annual report that they had sold some office furnishings, about $1600 worth, and that these receipts had been retained by the Board for general use. We failed to give our approval to the annual report until we could have you give us your opinion as to the legality of this type of transaction."

A review of the statutory provisions reveals that the Iowa Bonus Board has no statutory authority to do what is contemplated in your question.

Section 35.11 dealing with administrative expenses of the Board is as follows:

"Any expense incurred in carrying out the provisions of this chapter shall be chargeable to this fund."

I do not feel that the selling of personal property and retention of the proceeds of such a sale for general use, can be read into this section.

However, the authority *to dispose of* personal property would appear to reside explicitly in the Executive Council by virtue of Section 19.23 et seq.:

"19.23 Disposal of State property. Said council may dispose of any personal property when the same shall, for any reason, become unnecessary or unfit for further use by the state."

From this authority to "dispose of" state property, it would logically follow that the Council can exercise control over the proceeds of such a sale.

Then, in such a situation as you present, the proper procedure for the Bonus Board would be:

1. Request the Executive Council's authority to sell.
2. Request the proceeds of such a sale be remitted to the bonus fund.

15.3

STATE AND STATE OFFICERS: Department of Public Instruction: Retirement of Employees—Sections 257.9, 257.19, 257.21, 257.24, 8.5, 97B.45, 97B.46, 97B.47, 1962 Code of Iowa. The Department of Public Instruction has the authority to compel the retirement of all employees at age sixty-five.

March 17, 1965

Hon. Kenneth Robinson
State Representative
Audubon - Guthrie Counties
L O C A L

Dear Mr. Robinson:

You recently requested an Attorney General's opinion in respect to the following:

"It has come to my attention that the Department of Public Instruction has a departmental ruling which forces all employees out of employment when they attain the age of 65. It is my understanding that the State of Iowa has a policy whereby employees, upon reaching the age of 65, are considered on a periodic basis. I have in my possession the names of 10 such persons who have been forced out of employment and all of whom want to continue working for the State of Iowa.

"I am enclosing a copy of a letter which calls attention to certain Code sections and rulings which may be of help to you in reaching this decision.

"Specifically, I want to know if this Department has exceeded its power in arbitrarily forcing all employees to leave their job when they reach the age of 65. I will appreciate your decision at your earliest convenience."

The following provisions of the Code of Iowa, 1962, are pertinent:

"257.9 General powers and duties of board. The state board shall exercise the following general powers and duties:

1. Determine and adopt such policies as are authorized by law and are necessary for the more efficient operation of any phase of public education.

2. Adopt necessary rules and regulations for the proper enforcement and execution of the provisions of the school laws.

3. Adopt and prescribe any minimum standards for carrying out the provisions of the school laws.

4. Perform such duties prescribed by law as it may find necessary for the improvement of the state system of public education in carrying out the purposes and objectives of the school laws."

"257.19 Department of public instruction established. There is hereby established a department of public instruction to act as an administrative, supervisory, and consultative agency under the direction of the superintendent of public instruction and the state board. The state department shall be located in the office of the state superintendent, and shall assist the state superintendent in providing professional leadership and guidance and in carrying out such policies, procedures, and duties authorized by law or by the regulations of the state board, as are found necessary to attain the purposes and objectives of the school laws of Iowa."

"257.21 Employees of department. The state superintendent shall appoint all employees, with due regard to their qualifications for the duties to be performed, designate their titles and prescribe their duties. If deemed advisable, the state superintendent may for cause effect the removal of any employee in the state department of public instruction. The total amount of compensation for employees shall be subject to the limitation of the appropriation and other funds available for the maintenance of the department. The appointment, promotion, demotion, change in salary status or removal for cause of any employee shall be subject to the approval of the state board."

"257.24 Salaries of superintendent and assistants. The salary of the superintendent of public instruction shall be fixed by the general assembly. The salaries of the assistant or assistants provided for in section 257.22 shall be fixed by the state board but not to exceed three-fourths of the salary of the superintendent. All appointments to the professional staff of the department of pub-

lic instruction shall be without reference to political party affiliation, religious affiliation, sex, or marital status, but shall be based solely upon fitness, ability and proper qualifications for the particular position. The professional staff, including the state superintendent, shall serve at the discretion of the state board; provided, however, that no such person shall be dismissed for cause without at least ninety days notice, except in cases of conviction of a felony or cases involving moral turpitude. In cases of procedure for dismissal, the accused shall have the same right to notice and hearing as teachers in the public school systems as provided in section 279.24 or as much thereof as may be applicable."

"8.5(6) Division of personnel. There shall be a personnel division in the office of the state comptroller which shall be organized as follows:

(a) Director. The division shall be in the charge of an administrative officer appointed by the comptroller with the approval of the governor, and shall be known as the director of personnel.

(b) Plan of classification and compensation. Through the personnel director, the executive council shall adopt and establish a plan of classification and compensation for each position and type of employment in state government, except for positions for which the salaries or compensation is fixed by statute, and shall prescribe therein the necessary salary schedules, fixing a minimum and maximum for each class of employees doing the same general type of work. With the approval of the executive council, the personnel director shall make such regulations and adopt such methods of qualifying employees for positions as will make the plan effective, and shall prescribe rules to provide for personnel administration which shall include rules governing appointments, promotions, demotions, transfers, separations, vacations and sick leave as provided by law, and hours of employment. * * *

(c) Exempted employees. The employees under the attorney general, employees of the supreme court, employees of the clerk and reporter of the supreme court, employees of the board of control or employees in institutions under the board of control, and those employees under the state banking board and the employees of institutions under the state board of regents shall not come under the division of personnel."

"97B.45 Retirement age at sixty-five. A member may retire on the first day of any month coinciding with or following the date he attains the age of sixty-five upon written notification to the commission, setting forth at what time the retirement is to become effective, provided such effective date shall be after his last day of service. A member shall retire from the employment of the employer no later than the first day of the month coinciding with or next following the date he attains the age of seventy, except as otherwise provided in section 97B.46 following."

"97B.46 Service after age seventy. A member may, on the request of the employer, remain in the active employ of the employer beyond the date he attains the age seventy for such period or periods as the employer from time to time shall approve. The member shall retire from the employment of the employer at the end of the last approved period, on the first day of the month next following or coinciding with such date."

"97B.47 Retirement at age sixty-five. A member may retire from the employment of the employer on the first day of any month

coinciding with or next following the date he attains he age of sixty-five, upon written notification to the commission, made by the member, setting forth at what time the retirement is to become effective, provided that such effective date shall be after his last day of service, and after the filing of such notice, but shall not be less than thirty days or more than ninety days subsequent to the filing of such notice."

Chapter 17A of the Code of 1962, relating to administrative rules and regulations, was repealed by the sixtieth General Assembly in 1963, and a substitute enacted for it. Chapter 66, Acts of 60th G.A. A subparagraph of Paragraph 3 of Section 1 of that Act provides:

"'Rule' does not include rules or regulations relating solely to the internal operation of the agency nor rules adopted relating to the management, discipline or releases of any person committed to any state institution, nor rules of an agency which may be necessary during emergencies such as floods, epidemics, invasion or other disasters."

The rule in respect to compulsory retirement was adopted by the State Board of Public Instruction in the form of a resolution spread upon the minutes, according to W. T. Edgren, Assistant Superintendent. A preliminary question is whether this was a sufficient promulgation of a departmental rule. We are satisfied that it was. The rule is relevant only to the "internal operation" of the department and therefore does not constitute a "rule" which must be promulgated and published in accordance with the provisions of Chapter 66.

A second preliminary question is whether the Department possesses general authority to fix its personnel policies. Provisions of the Iowa Code are in conflict. Section 8.5, paragraph 6, office of the State Comptroller, the appointment of a director of personnel, the adoption of a plan of classification and compensation "for each position and type of employment in state government" excepting employees whose salaries are fixed by statute, and provides for the drafting and implementation (with executive council approval) of "rules to provide for personnel administration which shall include rules governing appointments, promotions, demotions, transfers, separation, vacations and sick leave as provided by law, and hours of employment." Certain employees are put outside the jurisdiction of the division of personnel. State Department of Public Instruction employees are not among them.

Chapter 114, Acts of the 55th G.A., established the State Board of Public Instruction. Chapter 45, Acts of the 54th G.A., established the personnel division in the office of the state comptroller. In 1954, the state comptroller asked this office to advise whether the personnel director of the Board of Public Instruction had jurisdiction to fix salaries of public instruction employees. The answer given was that the Board of Public Instrutcion had the power. (1954 Report of the Atty. Gen., P. 113) It was reasoned that Chapter 114, which placed personnel powers in the state superintendent and made their exercise subject to the approval of the state board (Sec. 257.21, Code 1962), impliedly repealed the power of the personnel director in respect to employees in the Department of Public Instruction. We have no reason to quarrel with that reasoning.

Conceding, then, that the department has personnel powers, what is their extent? Section 257.21 provides that the state superintendent shall appoint all employees and may for cause effect the removal of any employee. "The appointment, promotion, demotion, change in salary status or removal for cause of any employee shall be subject to the approval of the State Board." Nothing is said in the Section about retirement.

Chapter 97B, Code of Iowa, 1962, defines the Iowa Public Employees' Retirement System. Section 97B.45 provides that an employee "may retire on the first day of any month coinciding with or following the date he attains the age of sixty-five upon written notification to the commission . . ." and that he "shall retire . . . no later than the first day of the month coinciding with or next folowing the date he attains the age of seventy, except as otherwise provided in Section 97B.46 following." Section 97B.46 permits retaining employees seventy and older. Section 97B.47 permits retirement at age fifty-five. Also pertinent is Section 11.2 of the rules of the State Board for Vocational Education. Iowa Departmental Rules, 1962, at Page 674. The rule states that "no permanent employee . . . is discharged except for cause or for reasons of curtailment of work or lack of funds . . ." The State Board of Public Instruction constitutes under another hat the Board for Vocational Education. The quoted rule adheres in respect to employees in the vocational division.

'Retirement" has been defined as "the act of retiring, or state of being retired; voluntary withdrawal. It has been said that the word 'retirement' . . . does connote something like a voluntary act." 77 C.J.S. 330. It follows that if employees are being retired under a departmental policy at age sixty-five they are being compelled to do what the applicable statute says they 'may" do at that age. But Section 97B.45 does not say that employees may not be retired at sixty-five against their will: It merely establishes that the benefits are available to them at that age. As Snell, J., said in a concurring opinion in *Smith v. Newell,* 254 Iowa 496, 504, 117 N.W.2d 883 (1962),:

> "Chapter 97B of the Code establishes a retirement system, provides for its administration and the payment of benefits upon retirement thereunder. It has nothing to do with the original power of appointment or discharge."

By inference it can be said further that Chapter 97B does not defiine or circumscribe personnel policies of specific agencies. Nor does it expressly or impliedly vest a right in an employee to remain employed until the age—seventy—at which retirement becomes compulsory. A "vested right" is a right which is fixed, unalterable, or irrevocable. *Miller v. Johnstown Traction Co.,* 74 A2d 508, 511; 167 Pa. Super. 22. A right to be "vested" in a legal sense, must be complete and consummated and one of which the person to whom it belongs cannot be divested without his consent. *Scamman v. Scamman,* Ohio Com. Pl., 90 N.E.2d 617, 619. The various statutes specify a number of circumstances and the procedures by which employees may be separated from employment without their consent.

Section 257.19, which establishes the Department of Public Instruction, provides that the Department . . . "shall assist the state superintendent in providing professional leadership and guidance and in carrying out such policies, procedures, and duties authorized by law or by *the regulations of the state board as are found necessary to attain the purposes and objectives of the school laws of Iowa.*" (Emphasis supplied.) Section 257.9 defines the general powers and duties of the state board. Among them are to "determine and adopt such policies as are authorized by law and are necessary for the more efficient operation of any phase of public education." If this quoted subparagraph of Section 257.9 means only that the board is to act lawfully, then it is a superfluity. It may not act unlawfully even absent such language. This section constrains the department under its granted authority to adopt policies which promote efficiency: That is its substance. If the board determines that it can achieve its legal objectives more efficiently by compelling the retirement of employees at age sixty-five, it impliedly has the power to do so, absent express strictures to the contrary. There is none.

Section 257.24 lends further support to this view. It says, in part: "The professional staff, including the state superintendent, shall serve at the discretion of the state board . . ."

We do not believe that compulsory retirement is equitable with discharge or removal "for cause," by which is meant a separation from employment under circumstances that imply some misconduct or disobedience of the law on the part of the employee. No such question is inferentially present where the separation occurs at an age at which retirement benefits are available.

In *Markey v. Schunk,* 152 Iowa 508, 132 N.W. 882, the Court said:

> "It is conceded that the power of removal is always implied from the power of appointment, and that it always exists, unless restrained and limited by some other provision of the law. And such is undoubtedly the general rule. But it is equally well settled that both the power (sic) of appointment and removal, or either of such power, may be fixed and regulated by the law, as embodied in the Constitution or the statute, and that the law as expressly stated, or as clearly implied, will govern in place of the power implied from the appointment."

The essence of this is that in the absence of or within statutory inhibitions the power of removal is implied from the power of appointment. We need not discuss that statutory inhibitions are present in respect to the removal of employees, but we do extract from the court's statement a corallary: That the power of appointment implies a power to fix a retirement age, within statutory inhibitions. The inhibitions present in Chapter 97B, as we said previously, relate only to the ages at which employees "may" and "shall" retire and may avail themselves of benefits. Within those confines, it is possible to imply a residual power in this agency to compel retirement at any age at which retirement benefits are available, and we are constrained to imply it.

It is the opinion of this office, therefore, that the Board of Public Instruction may compel its employees to retire at age sixty-five.

15.4

STATE OFFICERS: Governor: Authority to cause the issuance of land patents—§§10.5, 10.6, 589.19, 1962 Code of Iowa. The Governor may not cause the issuance of a patent to real estate conveyed to the State of Iowa in a foreclosure prior to 1943 of a school fund mortgage, where the Board of Supervisors of the county in which the real estate lies deeded the real estate to a purchaser before that same date, and the full purchase price was credited to the county school fund: The General Assembly extinguished the State of Iowa's interest in such lands.

May 10, 1965

The Hon. Harold E. Hughes
Governor's Office
State House
L O C A L

Dear Governor Hughes:

This is in response to your request for an opinion as follows:

> "In response to an inquiry addressed to this office an opinion from the Attorney General with respect to the following matter is requested.

"A patent in respect to described lands is requested from the State of Iowa, under the provisions of Section 10.6, Iowa Code, 1962. A school fund mortgage on the property was foreclosed during the depression and a Sheriff's Deed was issued to the State of Iowa.

"In March of 1937 the real estate in question was conveyed by the Warren County Board of Supervisors to A. L. and E. R. Lotz. The Board of Supervisors reportedly made the conveyance on behalf of the State of Iowa. It had no power to do so. Nevertheless, A. L. and E. R. Lotz paid the purchase price to the school fund, as shown by a certificate of the Warren County Auditor attached to the request for a patent. A. L. and E. R. Lotz and their assigns have been in possession of the described lands ever since the conveyance by the Supervisors.

"Does the Governor, under Section 10.6, Iowa Code, 1962, or other provisions of the law, have authority to order a patent issued from the Secretary of State's office for the described lands?" Pertinent sections of the 1962 Code of Iowa are:

"10.5 Patents. Patents for lands shall issue from the land office, shall be signed by the governor and recorded by the secretary; and each patent shall contain therein a marginal certificate of the book and page on which it is recorded, which certificates shall be signed by the secretary, and all patents shall be delivered free of charge."

"10.6 When patents issued. No patents shall be issued for any lands belonging to the state, except upon the certificate of the person or officer specially charged with the custody of the same, setting forth the appraised value per acre, name of person to whom sold, date of sale, price per acre, amount paid, name of person making final payment, and, if thus entitled by assignment from the original purchaser, setting forth fully such assignment, which certificate shall be filed and preserved in the land office.

"Whenever the governor is satisfied that the purchase price has been paid by the person to whom the sale has been made and that a patent has not been issued to the purchaser, a patent shall be issued, signed by the governor and secretary of state and recorded by the secretary of state. The passage of seventy-five years from the date of sale without issuance of a patent shall be conclusive proof that the purchase price has been paid."

"589.19. Conveyances under school-fund foreclosures. In any case where the title to real estate has been conveyed prior to January 1, 1943, by the sheriff of any county in the state of Iowa pursuant to sheriff's sale under the foreclosure of permanent school-fund mortgages to the state of Iowa, or to the state of Iowa for the use of the school fund, or to the county for the school fund; and said land has been heretofore sold under authority of the board of supervisors of said county and conveyed under its authority, prior to January 1, 1943, and the full purchase price paid and credited to, and used by, the county for the permanent school fund of said county, all right, title, or interest of the state of Iowa in and to said real estate is hereby relinquished and quit-claimed to the purchaser or his grantees forever, and the title thereto confirmed in such purchaser, or his grantees insofar as the aforesaid erroneous conveyance is concerned."

The General Assembly has extinguished the State's interest in real estate such as that in respect to which a patent is requested. Sec. 589.19, 1962 Code of Iowa. This is a real property legalizing act. It embraces the factual situation set out in your letter.

It specifically relinquishes and quit claims all right, title, or interest of the State of Iowa to real estate sold by the sheriff prior to January 1, 1943, in foreclosing a permanent school fund mortgage, where the Board of Supervisors, before that same date, deeded the same real estate to a purchaser who paid the full purchase price into the county's school fund.

The owners in possession should file of record an affidavit which sets out the facts in respect to the foreclosure and the sheriff's and supervisors' sales of the property, along with the language of the legalizing statute, Sec. 589.19. This should cure any objections to the title based on the apparent interest in the lands of the State of Iowa.

Consequent on the foregoing, it is my opinion that you have no authority to issue a patent for the real estate described, not because of any limitation in Sec. 10.6 on your power to do so, but because the General Assembly by Sec. 589.19 has alienated any interest in such lands possessed by the State of Iowa.

15.5

STATE AND STATE OFFICERS: State Treasurer's Investment powers—§§12.8, 452.10, 453.1, 682.45 and 682.46, 1962 Code of Iowa. The Treasurer of State may invest funds not currently needed for operating expenses and eligible for investment in the securities mentioned in §682.45.

May 11, 1965

Mr. Harry B. Graefe
Investment Consultant
Office of Treasurer
LOCAL

Dear Mr. Graefe:

You have requested an interpretation of Section 682.45 of the 1962 Code of Iowa. You have asked whether or not the Treasurer of the State of Iowa may invest surplus general and special trust funds in debentures and discount notes issued by the Federal National Mortgage Association.

Sections 682.45 and 682.46 read as follows:

"682.45 Federal insured loans. Insurance companies and building and loan associations (1) may make such loans and advances of credit and purchases of obligations representing loans and advances of credit as are eligible for insurance pursuant to title 1, section 2, of the National Housing Act (12 USC §§1701-1732), and may obtain such insurance, (2) may make such loans, secured by real property or leasehold, as the federal housing administrator insures or makes a commitment to insure pursuant to title II of the National Housing Act, and may obtain such insurance.

"*It shall be lawful for* insurance companies, building and loan associations, trustees, guardians, executors, administrators, and other fiduciaries, *the state* and its political subdivisions, and institutions and agencies thereof, and all other persons, associations, and corporations, subject to the laws of this state, *to invest their funds* and the moneys in their custody or possession, *eligible for investment,* in bonds and notes secured by mortgage or trust deed insured by the federal housing administrator, and in the debentures

issued by the federal housing administrator pursuant to title II of the National Housing Act, and in securities issued by national mortgage associations, or similar credit institutions now or hereafter organized under title III of the National Housing Act, and in real estate loans which are guaranteed or insured by the administrator of veterans' affairs under the provisions of title III of the Servicemen's Readjustment Act of 1944, as amended, otherwise known as the 'G.I. Bill of Rights.'" (Emphasis supplied)

"682.46 Inapplicable statutes. No law of this state requiring security upon which loans or investments may be made, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments which may be made, shall be deemed to apply to loans or investments pursuant to section 682.45."

The basic provisions of Section 682.45 were enacted in Chapter 120 of the Acts of the 46th General Assembly. The heading of House File 438, as indicated in Chapter 120, is as follows:

"An Act to promote the objects of the national housing act by authorizing insurance companies and building and loan associations, to make loans pursuant to titles I and II of the national housing act, and by authorizing insurance companies, building and loan associations, trustees, guardians, executors, administrators, and other fiduciaries, the state of Iowa and its political subdivisions, and institutions and agencies thereof, and all other persons, associations and corporations, subject to the laws of this state, to invest in mortgages insured, and in debentures issued by the federal housing administrator, and to invest in securities of national mortgage associations."

This heading indicates a legislative intent to promote the objects of the National Housing Act by authorizing the state of Iowa to invest in named securities.

The plain meaning of Section 682.45 is that the state of Iowa may invest its funds eligible for investment.

The Code sections we then must consider are Sections 452.10 and 453.1. Section 452.10 reads as follows:

"452.10 Custody of public funds—investment or deposit. The state treasurer and each county treasurer shall at all times keep all funds coming into their possession as public money, in a vault or safe, to be provided for that purpose, or in some bank legally designated as a depository for such funds. *However, the treasurer of state shall invest, unless otherwise provided, any of the public funds not currently needed* for operating expenses in United State government bonds and certificates, providing suitable issues are available; or make time deposits of such funds in banks as provided in chapter 453 and receive time certificates of deposit therefor. With respect to any time deposits that the state treasurer may place with any depository, it shall be his policy to place with such depository an amount of demand deposits equal to not more than ten percent of such time certificate of deposit money, insofar as he may be able so to do." (Emphasis supplied)

It should be noted that the words "unless otherwise provided" contemplate such a section as 682.45. It should also be noted that the words "eligible for investment" as contained in Section 682.45, do not conflict with Section 452.10 which has language which is of a like nature when it uses the words "not currently needed for operating expenses."

Section 453.1 contains the following language:

"However, the treasurer of state shall invest or deposit as provided in section 452.10 any of the public funds not currently needed for operating expenses."

This language is not inconsistent with the powers granted in Sections 452.10 and 682.45, because Section 453.1 allows for the powers included in Section 452.10 which, in turn, allows for other provisions such as Section 682.45.

It is also to be noted that the Code Editor in the 1962 Index to the Code of Iowa noted that the Treasurer of State was concerned with the investment of Federal insured loans as provided in Sections 682.45 and 682.46. Under the heading "Treasurer of State" we find the following:

'Federal insured loans, investment, 682.45, 682.46."

The only officer of the state government of the State of Iowa with investment power is the Treasurer of State and that power is contained in Section 12.8 which states in part as follows:

"The treasurer of state shall invest or deposit, as *required by law*, any of the public funds not currently needed . . . ." (Emphasis supplied)

Therefore, we interpret Section 682.45 to mean that the Treasurer of State may invest funds not currently needed for operating expenses and eligible for investment in the securities mentioned in that Code section.

15.6

STATE OFFICERS AND DEPARTMENTS: Iowa Development Commission—§§321.493, 21.4, 8.6 (16), Iowa Tort Claims Act, §§2.5, 4, 8, 10. The Iowa Tort Claims Act enacted by the 61st G.A. permits the state to be sued in those instances contemplated by the Act, but the individual state executive branch employee is still fully liable for his own negligence. The Act makes no distinction between the employee driving a state-owned vehicle or private car, but speaks of "while in the scope of office or employment." Additional insurance charges are **not** reimbursable expense for those state employees who use their private automobile on state business. State employees will be authorized to use a combination of public forms of transportation for state business when they do not have access to state pool auto or personal auto.

May 17, 1965

Mr. William Brown
Assistant to Director
Iowa Development Commission
L O C A L

Dear Mr. Brown:

You have requested an opinion from this office on the following questions:

"1. What is the individual state executive branch employee's responsibility in the event of an accident with a state-owned automobile?

"2. What is the state's responsibility to a state employee driving a personal auto on state business in the event of an accident involving a liability suit?

"3. Are additional expenses (such as additional insurance charges) a legitimate, reimbursable business expense for state employees who are required to use personal auto frequently on state business?

"4. In the event a state employee is requested to make in-state trips for business purposes and does not have access to state pool auto or personal auto, will he be authorized to utilize a combination of public forms of transportation such as plane, bus, rail, or taxi in order to make his appointments?"

Before entering this discussion, I would like to quote applicable provisions of the 1962 Code of Iowa and what is to be known as the "Iowa Tort Claims Act" which the present General Assembly has enacted into law.

"321.493. Liability for damages. In all cases where damage is done by any motor vehicle by reason of negligence of the driver, and driven with the consent of the owner, the owner of the motor vehicle shall be liable for such damage."

"Sec. 2.5. 'Claims' means any claim against the state of Iowa for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state *while acting within the scope of his office or employment, under circumstances where the state, if a private person,* would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where are act or ommission occurred. However, 'claim' includes only such claims accruing on or after January 1, 1963; and does not include any claim which was presented to the sixtieth General Assembly and which is barred under the provisions of section twenty-five point seven (25.7) of the Code." (Emphasis added)

"Sec. 4. * * *

"The immunity of the state from suit and liability is waived to the extent provided in this Act."

"Sec. 8. *The final judgment* in any suit under this Act shall *constitute* a *complete bar* to any action by the claimant, by reason of the *same subject matter,* against the *employee* of the state whose act or omission gave rise to the claim. However, this section shall not apply if the court rules that the claim is not permitted under this Act." (Emphasis added)

"Sec. 10. * * *

"The acceptance by the claimant of such award shall be final and conclusive on the claimant, *and shall constitute a complete release* by the claimant of any claim against the state *and against the employee of the state whose act or omission gave rise to the claim, by reason of the same* subject matter." (Emphasis added)

Replying thereto, I advise as follows: The individual state executive branch employee is fully liable for his own negligence. The present session of the legislature in enacting the "Iowa Tort Claims Act" has permitted the state to be sued, and eliminates the state sovereign immunity with respect to those matters contemplated by this Act. This is cited as Acts of the 61st G.A. You will note that this Act *permits* the state to be sued and relieves the individual employee's liability only

to the extent provided in Sections 8 and 10, i.e. final judgment in any suit under this Act shall constitute a complete bar against any recovery from the employee (this is not applicable if the court rules that the claim is not permitted under the Act), or, if the state should settle the claim this will be a complete release to the employee also.

Thus, the state has permitted itself to be liable to a claimant when a state employee causes injury, etc. "while acting in the scope of his office or employment."

It must be pointed out that no distinction is drawn in the Act whether the employee is driving a state-owned car or his private auto. The Act speaks only of one acting in scope of his office or employment.

Should the employee be driving his private car, it would appear he would be liable as owner of the vehicle under Section 321.493, supra.

In referring to the quoted language of Section 4 of the Act supra;

> "The immunity of the state from suit and liability is waived to the extent provided in this act."

and reading this together with the language in Section 2.5 of the Act, that the state can be liable in those situations contemplated by this Act as *if it were a private person,* it is at least arguable that when the state employee is driving a state-owned auto, the state would also be liable as owner of the vehicle under 321.493.

Nowhere in this Act does it require a prospective claimant to institute proceedings against the State of Iowa, and except as pointed out the individual state employee's liability for his own acts remains unchanged.

Specifically then, in answer to your first two questions (1) the individual state employee is still fully liable for his own negligence when driving a state-owned auto, (2) the State of Iowa owes no responsibility to the individual state employee in the event of an accident driving his personal auto while on state business, except as contemplated by the Act.

In respect to your third question, the answer would be in the negative. Authority for this is found in Section 21.4 of the 1962 Code of Iowa set out as follows:

> "Private use—rate for state business. No state officer or employee shall use any state-owned car for his own personal private use, *nor shall he be compensated for driving his own motor vehicle except if such is done on state business and in such case he will not receive more than seven cents per mile*". (Emphasis added)

In answer to your fourth question, under authority of Section 8.6 (16) the State Comptroller is charged to make such rules and regulations, subject to the approval of the Governor, that may be necessary for carrying on the work of the State Comptroller's office. In keeping with this, rules were promulgated and became effective July 1, 1961. As bearing on this question, I call your attention to Rules 10, 11, 13, and 15.

> "Rule 10. The statutory allowance of seven cents per mile for use of private automobile in state business *shall include all expense of automobile.* Authorized use of private automobile on out of state trips shall be at the rate approved by the State Car Dispatcher."

> "Rule 11. *The hire of special conveyance will be allowed only when no public or regular means of transportation are available,*

or when such public or regular means of transportation cannot be used advantageously, in which case receipt therefor should accompany claim, or its absence satisfactorily explained." (Emphasis added)

"Rule 13. Pullman fare and dining car meals should be charged under the heading, 'Hotel Expense'. Railroad or bus fare and automobile mileage or expense should be charged under the heading 'Transportation'."

"Rule 15. It is the duty of department heads and executive officers of boards and commissions to keep expenditures at the lowest reasonable amount in connection with expense incurred by reason of public service."

It would appear then, from a reading of the foregoing that the answer to your last question would be "yes."

15.7

STATE OFFICERS AND DEPARTMENTS: State Fire Marshal, availability of public records—§100.5, 1962 Code of Iowa. The result of an investigation of a fire, even where a criminal offense may be pending must be made available to the criminal defendant or his attorney.

June 2, 1965

Mr. William F. Sueppel, Commissioner
Department of Public Safety
State Office Building
LOCAL
ATTN.: James P. Hayes, Deputy Commissioner

Dear Mr. Sueppel:

You have submitted the following question:

"Section 100.5, Code 1962, reads as follows:

" 'The fire marshal shall keep in his office a record of all fires occurring in the state, showing the name of the owners, name or names of occupants of the property at the time of the fire, the sound value of the property, the amount of insurance thereon, the total amount of insurance collected, the total amount of loss to the property owner, together with all the facts, statistics, and circumstances, including the origin of the fire, which may be determined by the investigation. Such record shall at all times be open to public inspection.'

"Much of any record made by the Fire Marshal is necessarily highly confidential due to the nature of the offense which may be involved.

"An opinion is respectfully requested from your office on the following question:

"Pursuant to 100.5, Code of 1962, what records maintained by the State Fire Marshal are required to be open to public inspection?"

You, no doubt, are referring to whether Section 100.5 will require the fire marshal to make available the results of his investigation when a criminal offense may be contemplated or pending. The general rules in regard to the right to inspect records are set out in 76 Corpus Juris Secundum at Sections 35a, 35b and 36. The headnotes of these sections are as follows:

"The right of inspection of public records exists at common law, but such right is subject to a number of limitations, and, although there is some authority to the contrary, it has been held that the right is limited to persons having a special interest and that there is no right of inspection when inspection is sought merely to satisfy curiosity or to further any improper or useless end or purpose."

"Statutes providing for the right of inspection may be merely declaratory of the common law or may enlarge the common-law right, and the legislature may surround the right with such restrictions as it deems necessary and proper; but, generally speaking, statutes in derogation of the common-law right should be strictly construed, while those enlarging the right should be liberally construed in favor of inspection."

"Generally speaking, any document which may properly be considered a public record is subject to inspection, and, where inspection is sought under a statute, the term of the statute as reasonably construed determine the records subject to inspection."

We find the following language in Section 36 at page 139:

"On the other hand, various records have been held not subject to inspection, including records of administrative or executive officers, agencies, or departments of the government which are kept merely as evidence of the transactions involved; records of an insane asylum; records of pawnbrokers' transactions filed by them with specified officers under the provisions of a statute; state secrets, such as diplomatic correspondence; *records in the offices of those charged with the execution of the laws relating to the apprehension, prosecution, punishment, or parole of criminals;* and generally records inspection of which would be detrimental to the public interest or is specifically exempted or prohibited by statute." (Emphasis supplied)

The language of Section 100.5 is very broad, particularly when it states:

". . . together with all the facts, statistics, and circumstances, including the origin of the fire, which may be determined by the investigation."

The primary rule in the construction of a statute in Iowa is to ascertain and give effect to the intention of the legislature. In re *Klug's Estate,* 251 Iowa 1128, 104 N.W. 2d 600 (1960). The intent of the legislature, which is controlling in the interpretation of the statute, is to be gathered from the statute itself. *Iowa Hardware Mutual Insurance Company v. Hoepner,* 252 Iowa 660, 108 N.W. 2d 55 (1961). The meaning of Section 100.5 is clear and the intent was to provide for the public inspection of the records of the fire marshal's office.

It is to be noted from Section 36 of Corpus Juris Secundum the following:

". . . terms of the statute as reasonably construed determine the records subject to inspection."

It is also to be noted that Section 35b states as follows:

". . . statutes in derogation of the common-law right should be strictly construed, while those enlarging the right should be liberally construed in favor of inspection."

While it is readily apparent that there is justification for restricting disclosures in those officers which have the duty of apprehending and prosecuting criminals, it does not appear that the Iowa statute contravenes an established public policy. Public policy rests largely in judicial judgment and public opinion. *Kintz v. Harringer,* 99 Ohio St.

240, 124 N.E. 168, 12 A.L.R. 1240 (1919). The courts have been usually very slow to recognize non-legal sources as basis of public policy. 3 Sutherland Statutory Construction, Section 5905. As we have found no authority indicating that there is legal basis for a public policy for the proposition of withholding information in regard to criminal prosecutions, our office is unable to recognize non-legal sources.

The Michigan Supreme Court in the case of *Barnard v. Dunham*, 191 Mich. 567, 158 NW. 202 (1916) made the following statement at page 204 of the Northwestern Reporter:

> "The right to examine public records, for all reasonable purposes exists by statute, and might at proper times and under proper re strictions be exercised by any citizen, *whether accused of crimes or not*, if these records were in the office of the city treasurer of Grand Rapids, where they ordinarily belonged. It was within the discretion of the court to make the order complained of, and under the circumstances shown we do not find that there was any abuse of discretion in making it." (Emphasis supplied)

Therefore, in reply to your question our answer must be that public records under Section 100.5 of the 1962 Code of Iowa must be made available to a criminal defendant or his attorneys even though they may be thought to be of a confidential nature.

15.8

STATE OFFICERS AND DEPARTMENTS: Department of Banking—Negotiable Instruments—§§541.1, 541.4, 1962 Code of Iowa. The green form of the Iowa Retail Installment Contract as submitted is nonnegotiable.

July 9, 1965

Mr. Holmes Foster
Deputy Superintendent
Department of Banking
500 Central National Building
Locust at Fifth Street
Des Moines, Iowa

Dear Mr. Foster:

You requested an opinion as to whether the green form of the Iowa Retail Installment Contract you submitted is negotiable and/or "as to any other content which would render the position of any bank as purchaser or assignee of the contract invalid against the endorser, maker or security." By the last phrase I assume you mean deprive the purchaser or assignee of defenses available to a holder in due course of a negotiable instrument. It is my opinion that the submitted copy of the Iowa Retail Installment Contract is nonnegotiable under present Iowa law. On July 1, 1966, the Uniform Commercial Code will become the law in Iowa, and I will discuss the negotiability of this instrument under that law.

As is pointed out in an earlier opinion of this office, 58 OAG 12, Sec. 541.1, Code of Iowa, provides:

> "*Form of negotiable instrument.* An instrument to be negotiable must conform to the following requirements: . . . (4) Must be payable to the order of a specified person or to bearer."

The provision in this regard in the Iowa Retail Installment Contract submitted at the time of the earlier opinion, and which you have submitted again as the white form, provides:

"TIME BALANCE OWED TO DEALER (Sum of items 6 and 7) . . . $....., which amount Buyer promises to pay at the office of.....in....., Iowa, in..... equal installments of $....., all payable on the same day of each successive month beginning on the.....day of....., 19..., or as indicated below in the Details of Unequal or Irregular Payments."

In this form the amount payable to the dealer is neither payable to the order of a specified person nor to bearer. Thus it fails to comply with a statutory requirement for negotiability.

However, the green form provides:

'8. TIME BALANCE OWED TO DEALER (Sums of Items 6 and 7) . . . $.....which amount Buyer promises to pay to the order of.....at....., Iowa in .....equal installments of $.....each and one final installment of $....., all payable on the same day of each successive .....beginning on the.....day of....., 19..., or as indicated below in the Details of Unequal or Irregular Payments."

In this form the debt is payable to the order of a specified person, assuming his name is filled in the appropriate blank. It thereby complies with Sec. 541.1 (4).

However, the second objection raised in 58 OAG 12 is applicable to the green form and renders it nonnegotiable under present Iowa law. That opinion points out that Sec. 541.4 provides:

"*Determinable future time—what constitutes.* An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable:

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

The forms submitted for the first opinion and those submitted at this time provide:

". . . if holder ever considers the indebtedness hereunder insecure, or the car in danger of misuse or confiscation . . . then in any such cases the entire unpaid time balance of the purchase price shall, without notice to the Buyer forthwith become immediately due and payable and the holder may, without previous demand or notice take immediate possession of said car wherever found, with or without any process of law . . ."

The earlier opinion concluded this provision made the instrument nonnegotiable because, in reserving to the holder of the note an uncontrolled power to determine the existence of a deficiency in the security and thus to accelerate maturity of the debt, the time of payment is rendered uncertain, and thus it fails to satisfy Sec. 541.4. The opinion refers to *First National Bank v. McCarton,* 206 Iowa 1036, 1041, 220 N.W. 364 (1928), wherein it is stated that:

". . . Presented here is a different situation from that which arises, causing 'acceleration' because the 'maker' fails to perform some duty, and for that reason is in default. Under the illustra-

tion, the 'due date' is 'advanced' because of the 'maker's' failure; while in the actual case before us, the 'advancement' was attempted, not because of the 'maker's' omission, but due to the mere volition of the 'holder.' Applying the general principles to the facts here, it is found that the clause contained in the 'note' puts it in the power of the 'holder,' if he so desires, to render it due at any time, regardless of anything the 'maker' may do. Therefore, the maturity date is uncertain, and nonnegotiability results, *Iowa National Bank v. Carter*, supra, and *Des Moines Savings Bank v. Arthur*, supra. [163 Iowa 205, 143 N.W. 556 (1913)]

The holding of this case was and is the law of Iowa and thus the provision referred to above found in the green form contract makes it nonnegotiable.

However, the Uniform Commercial Code, which will come into effect in Iowa July 1, 1966; changes the law in this regard. It provides in Section 3-109 that:

"*Definite Time*

(1) An instrument is payable at a definite time if by its terms it is payable . . .

(c) at a definite time subject to any acceleration; . . ."
Comment 4 under this section states:

"4. . . . So far as certainty of time of payment is concerned a note payable at a definite time but subject to acceleration is no less certain than a note payable on demand, whose negotiability never has been questioned. It is in fact more certain, since it at least states a definite time beyond which the instrument cannot run. Objections to the acceleration clause must be based rather on the possibility of abuse by the holder, which has nothing to do with negotiability and is not limited to negotiable instruments. That problem is now covered by Section 1-208.

Subsection (1)(c) means the certainty of time of payment and the negotiability of the instrument are not affected by any acceleration clause, whether acceleration is at the option of the maker or the holder, or automatic upon the occurrence of some event, and whether it is conditional or unrestricted. Of course if the terms under which acceleration is permitted are uncertain, the instrument may fail as a contract although it doesn't fail in negotiability.

Section 1-208 clarifies the objection to an acceleration clause based on the possibility of abuse by the holder in stating:

"*Option to accelerate at will.* A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional colateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.
The comment to this section provides:

"*Purposes:*

The increased use of acceleration clauses either in the case of sales on credit or in time paper or in security transactions has led to some confusion in the cases as to the effect to be given to a clause which seemingly grants the power of an acceleration at the whim and caprice of one party. This Section is intended to make clear that despite language which can be so construed and which

further might be held to make the agreement void as against public policy or to make contract illusory or too indefinite for enforcement, the clause means that the option is to be exercised only in the good faith belief that the prospect of payment or performance is impaired."

Thus the acceleration clause in the green form of the Iowa Retail Installment Contract does not render it nonnegotiable under the Uniform Commercial Code. But the U.C.C. is not yet a part of the law of Iowa. We refer to it only to point up the different conclusions which will follow when it does. Another requisite of negotiability is contained in Sec. 541.1 where it is specified that:

"*Form of negotiable instrument.*

An instrument to be negotiable must conform to the following requirements:

. . . 2. Must contain an unconditional promise or order to pay a sum certain in money . . .

Sec. 541.2 further provides that:

"*Certainty as to sum—what constitutes.*

The sum payable is a sum certain within the meaning of this chapter although it is to be paid:

1. With interest; or

2. By stated installments; or

3. By stated installments, with a provision that upon default in payment of any installment, the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity."

The language in the Iowa Retail Installment Contract specifies:

". . . Buyer shall procure and maintain for the term hereof insurance against all physical damage risks at Buyer's expense in such form and for such amounts as holder may require, the proceeds thereof to be payable as interest shall appear. Holder may, as creditor of buyer, purchase such insurance effective from the beginning of the term hereof and also at any time and from time to time thereafter, although nothing herein contained shall impose a duty upon holder to do so. Buyer will reimburse holder for the actual cost of such insurance to the extent that the same is not included in the time balance, the amount of reimbursement together with interest thereon at the highest lawful contract rates to be paid in equal installments over the remaining term concurrently with the remaining unpaid installments set forth above, and to constitute an additional obligation of buyer hereunder . . ."

". . . Any taxes, liens or encumbrances upon the car arising subsequent to the date hereof may be paid by the holder and any money so disbursed shall be repaid by Buyer immediately and until repaid in cash title to said car shall not pass to the Buyer . . ."

In *Hubbard v. Robert B. Wallace Co.*, 201 Iowa 1143, 1146, 208 N.W. 730, 45 A.L.R. 1065 (1926), the mortgage provided:

"In the event the parties of the first part . . . shall for any reason fail to keep the said premises so insured or fail to deliver the poli-

cies of insurance to the said party of the second part, if it so elects, may have such insurance written and pay the premiums thereon, and any premiums so paid shall be secured by this mortgage and repaid by the parties of the first part . . . In default thereof, the whole principal sum and interest and insurance premium with interest on such sum paid for such insurance from the date of payment may be and shall become due at the election of the said party of the second part. . . . And it is further mutually convenanted and agreed by said parties that in default of the payment by said parties of the first part of all or any taxes, charges and assessments which may be imposed by law upon the said mortgaged premises or any part thereof, it shall and may be lawful for the said party of the second part . . . to pay the amount of any such tax, charge or assessment; with any expenses attending the same; and any amounts so paid the parties of the first part shall repay to the said party of the second part . . . on demand, with interest thereon, and the same shall be a lien on the said premises and be secured by the said note and by these presents; and the whole amount hereby secured if not then due shall thereupon, if the said party of the second part so elects, become due and payable forthwith . . ."

The court stated in 201 Iowa at Page 1147 that:

". . . it was held in *Des Moines Savings Bank v. Arthur, supra,* that the negotiability of a note was not affected by the provision in a mortgage executed to secure the payment thereof which authorized the mortgagee to pay the taxes on the mortgaged premises and to recover the same of the mortgagor. The doctrine of these cases is not applicable to the present controversy, for the very obvious reason that the note in question by its specific terms incorporates in and makes every provision of the mortgage a part thereof. The proposition here urged by appellant must be disposed of in exactly the same manner and upon the same principle as it would if the provisions of the mortgage above set out were written in the body of the note. If a note containing identical provisions would be nonnegotiable, then the note in question must be. It is true that the note on its face expresses a definite amount, and also a definite time of payment. Does the provision of the mortgage relating to taxes, assessments, and insurance, the exact amount of which it is impossible to foresee, give rise to such uncertainty as to destroy negotiability? The mere statement of the proposition would seem to answer the inquiry in the affirmative. The court referred to this question, but reserved it for the future, in *Des Moines Savings Bank v. Arthur, supra;* and, as it has not been previously decided by this court, we must look to the authorities in other jurisdictions in which the Uniform Negotiable Instrument Law has been enacted."

In doing so the court found:

"Cases more directly in point, sustaining appellees' contention that provisions of a mortgage such as we are considering, incorporated in the note which it secures, render it uncertain as to amount, and therefore nonnegotiable, are not numerous; but the following will be found to so hold, in terms or effect: *King Cattle Co. v. Joseph,* 158 Minn. 481 (198 N.W. 798); *Consterdine v. Moore,* 65 Neb. 291 (96 N.W. 1021); *Peterson v. Kuhn,* 110 Neb. 372 (193 N.W. 756); *Frost v. Fisher,* supra; *Walker v. Thompson,* 108 Mich. 686; *Hull v. Angus,* 60 Ore. 95 (118 Pac. 284); *Central Sav. Bank of Oakland v. Coulter* (Cal.) . . ."

The court, in concluding that the instrument in question was nonnegotiable, stated:

"Emphasis is placed by counsel upon the provision in the mortgage 'that the said parties of the first part, for the better securing of the payment of the said sum of money mentioned in the conditions of the said note, have granted, bargained,' etc., as bearing upon the purpose for which the mortgage was made a part of the note, and as throwing light upon the intention of the parties. The thought of counsel, as we understand it, is that the sole purpose of the parties in making the mortgage a part of the note was to emphasize the fact that it was intended for the better security of the indebtedness, which included taxes, assessments, and insurance, as incidental to the fixed and determinable obligation of the note. The point is not wholly without merit; but, in our opinion, it cannot be given controlling importance in the interpretation and construction of the two contracts, which, although they serve different purposes, are by their terms united in one. The note, it seems to us, is clearly nonnegotiable, and subject to defenses in the hands of appellant."

Thus where an instrument provides that the holder may pay the taxes, assessments and insurance if the obligor fails to do so, and then recover what he pays from the obligor, the exact amount of which it is impossible to foresee, such uncertainty is created as to the sum owed as to make the instrument nonnegotiable. It is my opinion that similar provisions in the green form of contract have the same effect.

That such is the case in regard to taxes is pointed out in dictum in *Des Moines Savings Bank v. Arthur*, 163 Iowa 205, 143 N.W. 556 (1913). The court, in that case, held that a provision as to taxes did not make the note nonegotiable because there was no condition in the note entitling the mortgagee to recover tax payments as a part of the indebtedness evidenced by the note. The court then stated:

"In this respect, the mortgage differs from that considered in *Garnett v. Meyers*, 65 Neb. 287 (91 N.W. 400, 94 N.W. 803); *Consterdine v. Moore*, 65 Neb. 291 (91 N.W. 399, 96 N.W. 1021, 101 Am. St. Rep. 620), where it was provided that 'the said party of the second part, or the legal holder or holders of said note . . . may elect to pay such taxes, assessments . . . and the amount so paid shall be secured by the mortgage and may be collected in the same manner as the principal debt hereby secured, with interest at the rate of ten per cent per annum.' In holding that this provision rendered the note non-negotiable, the court seems to have held that, under this clause, taxes so paid by the mortgagee might be recovered in an action on the note, and therefore the amount payable was uncertain. No one can anticipate precisely what the tax levies of the future will be, and for this reason such a stipulation when contained in a note, renders it nonnegotiable. *Farquar v. Fidelity Ins. etc., Co.*, Fed. Cas. No. 4,676; *Howell v. Todd*, Fed. Cas. No. 6,783; *Walker v. Thompson*, 108 Mich. 686 (66 N.W. 584); *Carmody v. Crane*, 110 Mich. 508 (68 N.W. 268). See, also, *Brooke v. Struthers*, 110 Mich. 562 (68 N.W. 272, 35 L.R.A. 536)."

The Uniform Commercial Code provides in this regard in Section 3-106:

"Sum Certain.

(1) The sum payable is a sum certain even though it is to be paid

(a) with stated interest or by stated installments; or

(b) with stated different rates of interest before and after default or a specified date; or

(c) with a stated discount or addition if paid before or after the date fixed for payment; or

(d) With exchange or less exchange, whether at a fixed rate or at the current rate; or

(e) with costs of collection or an attorney's fee or both upon default.

(2) Nothing in this section shall validate any term which is otherwise illegal."

This code section makes no reference to the types of provisions in question. Presumably, therefore, this section does not reject a decision which has denied negotiability to an instrument because of the inclusion of such provisions. Specifically as to taxes in this regard it is pointed out that:

"The N.I.L., however, is silent with respect to the promises to pay taxes, and, as a result, some courts continue to hold that an auxiliary promise to pay taxes renders an instrument nonnegotiable because its sum is uncertain.

"Section 3-106 elaborates the rule of the N.I.L. without making any real changes. The section provides, in effect, that the sum payable is a sum certain even though it is paid with specified interest, discounts, exchange, costs, or attorney fees. There is nothing in the section with respect to taxes, the one real problem area remaining under the N.I.L. Presumably, therefore, the section does not reject the decisions which have denied negotiability to promissory notes and drafts because of auxiliary promises to pay taxes." Hawkland, Commercial Paper, 13 (1964).

We have said more than we needed to say, but have done so in the interest of calling attention to the fact that answers to questions in the field of negotiable instruments will change in improvement respects in the not too distant future.

It is my conclusion, however, that in accordance with the foregoing, the green form contract is non-negotiable under the law that will remain in effect until June 30, 1966, and that purchasers and assignees of the contract take the promissory note included in the contract uninsulated from defenses that could be raised against the creditor-assignor.

15.9

STATE OFFICERS AND DEPARTMENTS: Department of Banking— §§536.9, 536.12, 1962 Code of Iowa. The Department of Banking has no authority to discipline small loan companies for advertising other than that which violates §536.12.

July 15, 1965

Mr. Walter Ewald, Supervisor
Small Loan Division
Department of Banking
607 Locust
L O C A L

Dear Mr. Ewald:

This is in response to your request for an opinion as to the authority of the Department of Banking to discipline two small loan companies.

You submitted a copy of a form letter sent to small loan licensees in Iowa June 4 advising them they should not advertise the prospective rise in the small loan ceiling until the act authorizing the change became effective July 4. The two companies in question nevertheless mailed bulk rate advertisements to residents of their community in mid-June. The advertisements were identical and stated in part:

"There's been a change in the Small Loan Law."

"On and after July 1st you can get $1,000."

The date of July 1st was of course incorrect. Both companies failed to heed your advice "that under Chapter 536 no advertising or solicitation should be made in any manner until the law becomes effective . . . ."

You ask: "Are we in a position to invoke Paragraph 2 of Section 536.9: If not, is there any other action that may be properly taken?"

Sec. 536.9(2), 1962 Code of Iowa, is as follows:

"If the superintendent shall find that probable cause for revocation of any license exists and that the enforcement of the chapter requires immediate suspension of such license pending investigation, he may, upon five days written notice and a hearing, suspend such license for a period not exceeding thirty days."

The foregoing spells out a procedure invocable where an immediate suspension is advisable, pending an investigation and hearing that prospectively will lead to a revocation. Probable cause for revocation must be present. Sec. 536.9(2) does not specifically compel or prohibit conduct: What's required of small loan companies is the subject of the chapter as a whole. Sec. 536.9(1) is to that effect:

"1. The superintendent may, upon at least twenty days written notice to the licensee stating the contemplated action and grounds, and upon reasonable opportunity to be heard, revoke any license issued hereunder if he shall find that:

a. The licensee has failed, after ten days notice of default, to pay the annual license fee or to maintain in effect the bond or bonds required under the provisions of this chapter or to comply with any rule or regulation of the superintendent lawfully made pursuant to and within the authority of this chapter; or that

b. The licensee has violated any provision of this chapter or any rule or regulation lawfully made by the superintendent under and within the authority of this chapter; or that

c. Any fact or condition exists which would clearly have warranted the superintendent in refusing originally to issue such license.

Most pertinent is Sec. 536.9(1)(b). Considered with Sec. 536.9(2), the question then becomes: Is there probable cause to believe the two companies violated "any provision of this chapter" or "any rule or regulation lawfully made"? Sec. 536.12 states in part:

"False representations—miscellaneous restrictions. No licensee or other person shall advertise, print, display, publish, distribute, or broadcast or cause or permit to be advertised, printed, displayed, published, distributed, or broadcast, in any manner whatsoever, any statement or representation with regard to the rates, charges, terms, or conditions for the lending of money, credit, goods, or things in action in the amount or of the value of five hundred dollars or

less, which is false, misleading, or deceptive. The superintendent may order any licensee to desist from any conduct which he shall find to be a violation of the foregoing provisions.

"If any licensee refers in any advertising matter to the rate of charge to be made upon loans the superintendent may require such licensee to state such rate of charge fully and clearly in such manner as he may deem necessary to prevent misunderstanding thereof by prospective borrowers."

Senate File 146 of the Sixty-first General Assembly amended the words "five hundred" to "one thousand." That is the new maximum. In two respects the advertisements were false. As of the time of the mailing of the ads the law had not been changed. A bill had been passed; but it was technically incorrect to say there had been a change in the law until the effective date of implementation: July 4. The date on the ads was July 1. This of course also was incorrect and being incorrect, was false.

On these narrow grounds the two companies could be proceded against under Sec. 536.9. It is my thought, however, that ignorance and not deceitfulness probably coerced the falsehoods, and that in substance the representation that the law had been changed was correct (although erroneously stated technically and syntactically) and that the date was misstated also probably in ignorance. I would not advise proceeding against the companies for violations of 536.12 unless as a matter of fact they did loan sums of more than $500 on July 1, 2 or 3.

I find no authority for penalizing the two companies solely because they advertised prior to July 4 contrary to your advice. Nothing in Chapter 536 empowered your department to prevent them from so doing, either by informal "opinion advice" or by formally promulgated rule or regulation. The companies erred legally not in disobeying your admonition but in not stating the facts correctly in their ads.

In conclusion, it is my opinion that you should not proceed against the companies unless you are prepared to prove that (1) they intentionally misstated the date on which loans of up to $1,000 could be made, or (2) that they did make loans of more than $500 on July 1, 2 or 3.

15.10

STATE AND STATE OFFICERS: Employment Security Commission—Volunteer Workers in Youth Opportunity Centers—§§85.61(2), 1962 Code of Iowa, Section 2, Subsection 3, Senate File 322, Acts of the 61st General Assembly. Clerical workers in the Youth Opportunity Centers, paid a stipend from federal funds, but otherwise under the direction and control of the Commission are employees for Workmen's Compensation purposes, although gratuitous volunteers are not so covered. Both classes, paid or volunteer, would come under the provisions of the "Iowa Tort Claims Act."

September 22, 1965

Mr. Lorne M. Boylan
Assistant General Counsel
Iowa Employment Security Commission
L O C A L

Dear Mr. Boylan:

Receipt of yours dated July 15,. is hereby acknowledged. Therein you made request for an opinion as to whether certain "Volunteers

in service to America" (VISTA), who are to perform services in connection with the Youth Opportunity Centers and in certain local offices throughout the state, will be entitled to Workmen's Compensation if injured on the job. You also inquired whether the state or this agency will be liable for damages if these individuals negligently injure others in the course of their service.

In response thereto, it is necessary to determine first whether these "VISTA" workers are employees within the contemplation of the Workmen's Compensation Act.

The definition of an employee under the Iowa Workmen's Compensation Law is found in Subsection 85.61(2) which provides:

> "2. 'Workman' or 'employee' means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, except as hereinafter specified."

In construing Section 85.61(2) the court in *Sister Mary Benedict v. St. Mary's Corporation,* 255 Iowa 847, 124 N.W. 2d 548, 550 (1963), held:

> ". . . a person 'who has entered the employment of an employer' is 'a person who works under contract of service, express or implied . . .' In other words, employment implies the required contract on the part of the employer to hire and on the part of the employee to perform service."

The above indicates that the essential element of the employer-employee relationship is a contractual obligation. See also *Muscatine City Water Works v. Duge,* 232 Iowa 1076, 7 N.W. 2d 203 (1943).

Your letter requesting this opinion indicates that the "VISTA" workers volunteer their services for one of two positions. The first being individuals who will perform chiefly clerical duties. The second being individuals who will establish and maintain contact with neighborhood centers or groups where disadvantaged youth congregate or are served. They are to interest these youths in the opportunity center and motivate them to avail themselves of the vocational and developmental opportunities of said center. The individuals in both classifications will be under the control and direction of regular employees of the Iowa Employment Security Commission and said employees are empowered to accept and discharge their volunteers. The clerical workers receive a stipend of $50.00 per month while the second class of individuals receive no pay. The stipend is paid by the Commission from federal funds pursuant to an agreement by the Employment Security Commission and the federal Office of Economic Opportunity.

In determining whether a contract for services exists, the Court in *Prokop v. Frank's Plastering Co.,* 133 N.W. 2d 878, 883 said:

> "The factors for determining an employer-employee relationship are, (1) the right of selection, or to employ at will, (2) responsibility for the payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed. *Usgaard v. Silver Crest Golf Club,* Iowa 127 N.W. 2d 636, 637; *Bashford v. Slater,* 252 Iowa 726, 731, 108 N.W. 2d 474; and *Hjerleid v. State,* 229 Iowa 818, 826-827, 295 N.W. 139, 143."

In applying this text to the case at hand, it appears that the *clerical workers* would qualify as employees. As indicated previously, the Em-

ployment Security Commission (1) has the right of selecting these volunteers. It appears that (2) the commission has the actual responsibility for the wage payments regardless of the fact that the funds come from the Federal Government. The source of the fund is immaterial. OAG, August 12, 1965 (McCauley to Greiner). It also appears that the commission, (3) has the right to discharge or terminate the relationship and it (4) has the right to control the work which is done. Further it is apparent that (5) the commission is the responsible authority in charge of such work.

From this analysis it appears that the relationship of the Employment Security Commission and the clerical workers in question is one that provides the necessary elements of the employer-employee relationship for the purpose of the Workmen's Compensation Act.

However, as to the second mentioned class of "VISTA" workers those who receive no compensation, I am of the opinion that they will not qualify as an employee. Their relationship satisfies requirements 1, 3, 4 and 5, but there is no responsibility for the payment of wages as set out by requirement (2) of the *Prokop* case, supra. Thus, their class of workers would be considered gratuitous volunteers as the essential element of contracted consideration is missing. See *Norman v. City of Chariton,* 206 Iowa 790, 121 N.W. 481; *Usgaard v. Silver Crest Golf Club,* Iowa , 127 N.W. 2d 636.

The answer to your second question is controlled by the provisions of Senate File 322, Acts of the 61st General Assembly. This act is cited as the "Iowa Tort Claims Act" and Section 2, Subsection 3 thereof provides:

> " 'Employee of the state' includes any one (1) or more officers or employees of the state or any state agency, and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, *whether with or without compensation.*" (Emphasis added)

The main body of the Iowa Tort Claim Act provides the terms and conditions upon which the State of Iowa may be held liable for its torts, however, the only question relevant to your inquiry is whether the "VISTA" workers will qualify as employees of the state for the purposes of the Iowa Tort Claims Act.

As stated in Section 2, Subsection 3 above, employee includes any person acting on behalf of any state agency "whether with or without compensation." Thus, since compensation is not an element of "employment" for the purposes of the Iowa Tort Claims Act, it would appear that both classes of the "VISTA" workers would qualify as "employees of the State" and that in the proper cases the State of Iowa may be held liable for their negligent acts:

Specifically then, in answer to your questions:

1. a. Those "VISTA" employees who receive a stipend from federal funds and otherwise under the direction and control of the Employment Security Commission are employees under Iowa Workmen's Compensation Law;

b. Those volunteers who do not receive a stipend are not employees under the Workmen's Compensation Law;

2. Both such classes of persons in the "VISTA" program come within the provisions of the Iowa Tort Claims Act.

15.11

STATE OFFICERS AND DEPARTMENTS: Board of Social Welfare— §§8.5 (6) (d), 234.6, 1962 Code of Iowa. The power to institute a compensation plan remains in the Board of Social Welfare.

September 23, 1965

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Mr. Hoover:

You requested an Attorney General's opinion in respect to the following:

"Are the employees of the Iowa State Board of Social Welfare subject to the provisions of the compensation plan and rules promulgated by authority of Section 8.5, 1962 Code of Iowa?"

To be eligible for participation in Federal Grant-in-Aid programs, States are required to institute either a statewide civil service system or a merit system of personnel administration which complies with federal regulations and standards in the following respects:

1. Prohibition of Discrimination.
2. Limitation of Political Activity.
3. Classification Plan.
4. Compensation Plan.
5. Recruitment and Appointment of Personnel.
6. Promotions.
7. Layoffs and Separations.
8. Performance Evaluations.
9. Personnel Records and Reports. 28 Fed. Reg. 734 (1963).

Subsequent to the creation of the Merit System Council in Iowa, the legislature enacted a bill establishing a division of personnel. Chapter 45, Sec. 3, Acts of the 54th G.A. The Executive Council was empowered to adopt a plan of classification and compensation for each position and type of employment in state government, with exceptions as specified. Subsequent 8.5 (6) (d) of the personnel statute provides:

"Merit system. The present joint merit system now effective (July 4, 1951) in state agencies expending federal funds shall remain in full force and effect so far as they apply to such agencies *until such time as the plan and rules promulgated under the provisions of the preceding sections are approved by the appropriate federal agencies.*" (Emphasis added.)

It is clear that Section 8.5 (6) is not applicable to state agencies expending federal funds until the State Personnel Plan and regulations are approved. Authority for this, beyond the plain language of the statute, is found in *Iowa Employment Security Commission v. Sarsfield,* Equity No. 62070, D. Iowa, March 25, 1954, a case directly on point. The Iowa Employment Security Commission, a merit system agency, established new classifications and salary ranges in accord with Section 96.11 (4) without obtaining the approval of the State Personnel Director as required by Section 8.5 (6). The Comptroller refused to issue warrants covering the new job classifications and salary ranges. An action was

brought in District Court of Polk County, Iowa, to compel the issuance of said warrants. The District Court found that Section 8.5 (6) (d) exempts state agencies which expend federal funds from Section 8.5 (6) and concluded that the Iowa Employment Security Commission was exempt pending federal approval of the State Personnel Plan. By the same token the Iowa State Board of Social Welfare, a merit system agency expending federal funds, should also be excluded from the scope of Section 8.5 (6) by subsection 8.5 (6) (d) pending federal approval of the State Personnel Plan.

Heretofore, the State Board of Social Welfare has fixed the compensation of its employees in accord with Section 8.5 (6). The Comptroller has contended this board is within the State Personnel Plan. Presumably, at least the compensation portion of the state plan and regulations have received the approval of the Merit System Council and the appropriate federal agency. But the question is whether the Board of Social Welfare must submit to the Personnel Plan in the absence of federal approval of that plan as a whole. The following section of the 1962 Code of Iowa is relevant:

> "234.6 Powers and duties of the state board. The state board shall be vested with the authority to administer old age assistance, aid to the blind, aid to dependent children, child welfare, and emergency relief, and any other form of public welfare assistance that may hereafter be placed under its administration. It shall perform such duties, formulate and make such rules and regulations as may be necessary; shall outline such policies, dictate such procedure and delegate such powers as may be necessary for competent and efficient administration. It shall have power to abolish, alter, consolidate or establish divisions and may abolish or change offices created in connection therewith. *It may employ necessary personnel and fix their compensation.* * * *" (Emphasis supplied.)

The emphasized portion indicates the power to fix compensation for Department of Social Welfare employees rests in the State Board of Social Welfare and not the Personnel Director. Section 234.6 remained in the Code of Iowa after the passage of Section 8.5 (6) and must be given effect unless it was impliedly repealed by the adoption of Section 8.5 (6), 1962 Code of Iowa. The Supreme Court of Iowa has adopted the following position on repeals by implication:

> "Additionally, there is the rule thus stated in 50 Am. Jur., Section 538, pages 545, 546:
>
> "'* * * an intent to repeal by implication to be effective, must appear clearly, manifestly, and with cogent force. The implication of a repeal, in order to be operative, must be necessary, or necessarily follow from the language used, because the last or dominant statutes admits of no other reasonable construction. *The courts will not hold to a repeal if they can find reasonable ground to hold to the contrary; if two constructions are possible, that one will be adopted which operates to support the earlier act rather than to repeal it by implication'.*" (Emphasis supplied.) *Haubrich v. Johnson*, 242 Iowa, 1236, 1241; 50 N.W. 2d 19, 22 (1951); *State ex rel McElhinney v. All-Iowa Agricultural Association*, 242 Iowa 860, 867; 48 N.W. 2d 281, 285 (1951).

But we need not base our conclusion on what is necessary to find an implied repeal. We believe the language of Section 8.5 (6) (d) clearly inhibits such a finding and, moreover, conditionally exempts agencies receiving federal funds in language which is reasonably plain. Until the personnel plan and all of the rules authorized by Section 8.5 (6) have been approved by the "appropriate federal agency," the joint merit system remains in "full force and effect" in respect to those

state agencies which are members of the Merit System Council. There is no specific authority in the Code for the creation of such a council: It was erected on the authority each of the member agencies possesses to hire personnel and fix salaries. See 1962 I.D.R., Page 284. To find that these participating agencies' personnel authority had been repealed by Section 8.5 (6) would be to destroy the legal posture of the Merit System Council, which was created expressly to enable agencies eligible for federal funds to exercise their independently possessed personnel powers to qualify for those funds. Section 8.5 (6) (d) states the condition under which these agencies may be subject to the personnel plan; i.e., they may be so subjected when rules adopted to implement the personnel plan satisfy the aid-allocating federal agencies' requirements. The intent of the legislature is clear: It did not want to bring these U.S.-aided state agencies under the personnel plan if the result of doing so would be the loss of that aid.

It is the opinion of this office, therefore, that employees of the State Board of Social Welfare are insulated from the personnel powers of the State Comptroller unless and until his personnel division receives federal approval for all rules sought to be applied. And in anticipation of questions from other agencies, we say that the same situation obtains in respect to the Employment Security Commission, the State Department of Health, the State Services for Crippled Children, the Mental Health Authority, and the Civil Defense Administration, all of which receive federal aid and all of which are members of the Merit System Council. And we make the further comment that when personnel division rules are approved by the appropriate federal bodies in respect to each and all of the above listed agencies, the condition which has exempted them from the personnel division's control will have been removed, they will come under the personnel division, and those separate grants of personnel powers which supported the creation of the Merit System Council will have been repealed by implication.

15.12

STATE OFFICERS AND DEPARTMENTS: State Fair Board—§§23.1, 23.2, 23.18, 173.14, 173.14(1), 1962 Code of Iowa; §2, S.F. 586, Acts of 61st G.A. The appropriation by the 61st General Assembly to the state fair board is to be governed by Chapter 23, 1962 Code of Iowa.

October 12, 1965

Mr. Kenneth R. Fulk
State Fair Board
LOCAL

Dear Mr. Fulk:

This is in reply to your letter of August 10, 1965, in which you requested an opinion on the following question:

> Must the State Fair Board accept bids on all of its work on repair of buildings, water and sewer systems as per Chapter 19 or Chapter 23 of the 1962 Code of Iowa?

In reply thereto please be advised that, in my opinion, Chapter 23 of the 1962 Code of Iowa is the applicable statutory provision. Section 23.1, 1962 Code of Iowa, states:

> "The words 'public improvement' as used in this chapter shall mean any building or other construction work to be paid for in whole or in part by the use of funds of any municipality."

It also states as follows:

"The word 'municipality' as used in this chapter shall mean county . . . state fair board. . . ." (Emphasis supplied)

Consequently, the state fair board is considered a municipality and as a result of that, Section 23.2 of the 1962 Code of Iowa is applicable and it states:

"Before any municipality shall enter into any contract for any public improvement to *cost five thousand dollars or more*, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor . . . ." (Emphasis supplied)

As for the bid procedure, Section 23.18, 1962 Code of Iowa, states that:

"*When* the estimated total cost of construction, erection, demolition, alteration or repair of any public *improvement exceeds five thousand dollars, the municipality shall advertise for bids.* . . . ." (Emphasis supplied)

However, we should be aware of Section 2 of Senate File 586, Acts of the 61st General Assembly, which states as follows:

"Before any of the funds hereinabove appropriated shall be expended, it shall be determined by the state fair board, with the approval of the executive council, that the expenditures shall be for the best interests of the state."

Further authority for the ability by the state fair board to do the work can be witnessed in Section 173.14, 1962 Code of Iowa, which states:

"The state fair board shall have the custody and control of the state fair grounds, including the buildings and equipment thereon. . . ."

Section 173.14(1), 1962 Code of Iowa, further states that the state fair board shall have power to:

"Erect and repair buildings on said grounds and make other necessary improvements thereon."

Therefore, it is my opinion that the state fair board is a municipality and that so long as improvements or repairs have been determined to be in the best interest of the state by the fair board with the approval of the Executive Council, and so long as the improvements or repairs are under five thousand dollars, there is no need for hearing or the letting of bids for said improvements or repairs.

15.13

STATE AND STATE OFFICERS: Employment Agency Commission, right to hearing—§§95.1, 95.2, 95.3, 95.5, 95.6, 1962 Code of Iowa; 14th Amendment, United States Constitution. Where a statute is silent as to a right to formal hearing, no hearing is necessary before a commission can refuse a new applicant's license. The due process clause of the Constitution, however, requires this licensing authority to give notice and hearing before refusing a renewal applicant's license even when the statute is silent as to such hearing. When an existing employment agency changes hands, the new owner must apply and receive the license to do business.

October 14, 1965

Mr. Dale Parkins
Labor Commissioner
State of Iowa
Bureau of Labor
Des Moines, Iowa

Dear Mr. Parkins:

Receipt is hereby acknowledged of yours of June 22 wherein you state:

> "The Employment Agency Commission (Secretary of State, Industrial Commissioner and the Labor Commissioner) do hereby request a formal opinion as to whether or not they must grant a formal hearing to any applicant before denying a license for a private employment agency.
>
> "We would also like an opinion as to whether it is permissible to license an agency of the same name and location in the event the ownership changes hands. In other words, is ownership a factor or is the Agency."

In response to your first question, Section 95.3, 1962 Code of Iowa, indicates nothing with respect to whether a hearing must be accorded an applicant before his license application can be refused. It merely indicates that the commission shall either grant or refuse such application within thirty days after full investigation of the applicant. There is also a provision indicating all licenses issued shall expire on June 20 next succeeding their issuance.

It appears that where a statute is silent as to a right to formal hearing, no hearing is necessary before a commission can refuse a *new applicant's license*. This proposition is indicated by the dissent in *Gilchrist v. Bierring*, 234 Iowa 899, 919, 14 N.W. 2d 724, 734.

However, as to whether the commission has power to *refuse to renew a party's license* ex parte without giving notice and an opportunity for a hearing presents another question. This question involves the right of every citizen of the United States to procedural due process as guaranteed by the 14th Amendment of the United States Constitution.

The *Gilchrist* case, supra, involved an action in mandamus to require defendant—board of cosmetology examiners to renew plaintiff's license to operate a school of cosmetology. One issue in the case was whether the board had power to refuse renewal of plaintiff's license without giving him notice and opportunity for a hearing.

After reviewing numerous authorities on this question the court concludes at page 914, as follows:

> "Pursuant to the foregoing authorities, it is manifest that plaintiff's license could not be revoked without notice and a hearing. The defendants do not seriously challenge this proposition. Their contention is that, granting plaintiff was entitled to notice and a hearing before his license could be revoked, it does not follow that he is entitled to notice and a hearing on his application for a renewal of his license. The argument is that when his license expired, his rights were extinguished. We do not so interpret the requirements of due process. The reasoning of the cases above, quoted from demonstrates the fallacy of the contention.
>
> "The cases from which we have quoted clearly announce fundamental principles, essential to the life of a free people living under a republican form of government. The right to earn a living is among the greatest of human rights and when lawfully pursued, cannot be denied. It is the common right of every citizen to engage

in any honest employment he may choose, subject only to such reasonable regulations as are necessary for the public good. Due process of law is satisfied only by such safeguards as will adequately protect these fundamental, constitutional rights of the citizen. *Where the state confers a license to engage in a profession, trade, or occupation not inherently inimical to the public welfare, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.* Were this not so, no one would be safe from oppression wherever power may be lodged; one might be easily deprived of important rights with no opportunity to defend against wrongful accusations. This would subvert the most precious rights of the citizen.

"VI. The state cannot, by issuing only annual licenses, ingeniously thwart these precious rights. As stated in *Craven v. Bierring*, supra, 222 Iowa 613, 619, 269 N.W. 801, 805, once an annual license is issued to a dentist, 'Unless he has violated some of the provisions of the statute applicable to his profession, he is entitled to a renewal of his license as a matter of right * * *.' This is because a dentist, doctor, lawyer, or the member of any other profession, does not devote the years of study and preparation necessary to qualify as a practitioner merely that he may be accorded the right to practice for one year. When he qualifies for the practice, he does so for life. That right cannot be taken from him except by due process of law. If he has violated the canons of his profession he may be denied the right to continue therein, either by a revocation of his current license or by a refusal to renew it. *But, in either event, the determination that his conduct renders him unworthy to continue in the practice constitutes the exercise of a judicial function which requires notice and an opportunity to be heard. This is also true of the right to pursue any other lawful business or vocation as well as a profession.*" (Emphasis supplied)

This decision is in accord with the decision of the Supreme Court of the United States in *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S. Ct. 215, 70 L.Ed. 494 (1926). See also, Davis, Administrative Law Treatise §§7.18 - .19, (1958).

On the basis of the foregoing authority, it is therefore the opinion of this office that the Employment Agency Commission must afford notice and a formal hearing to an applicant before denying *renewal of his license.* However, no hearing is required before refusal of a license sought for the first time.

In response to your second question, section 95.1, 1962 Code of Iowa, provides; "Every person, firm, or corporation who shall keep or carry on an employment agency . . . shall before transacting any such business whatsoever procure a license. . . ."

Section 95.2, Code of Iowa 1962, requires that an applicant for such license "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."

Section 95.6, 1962 Code of Iowa, provides; "Any person in any manner undertaking to do any of the things described in section 95.1, without first securing a license *as herein provided,* shall be guilty of a misdemeanor." (Emphasis supplied).

The above sections indicate that the only way an employment agency license can be secured is by application to the Employment Agency Commission. This method is exclusive and any person who undertakes employment agency work must first secure a license by this method.

Failure to do so constitutes a misdemeanor. Moreover, the implicit premises in such construction indicates that an employment agency license cannot be sold or transferred.

Chapter 95 in substance authorizes the issuance of employment agency licenses to commonly recognized legal entities, specifying "Every person, firm, or corporation." Such license is personal to each person, firm or corporation and whenever *the agency ownership is severed* from any one of them, the new owner must procure a new license by applying to the Employment Agency Commission in the manner provided in Chapter 95.

It should also be pointed out that if the individual proprietorship, partnership (firm), or corporation which has secured an employment agency license is dissolved or destroyed, the new owner of its assets, before transacting any employment agency business, must procure a new agency license from the Commission. For example, if the license is issued to a sole proprietorship which owns the agency and then sells it, the successor must procure a new license since the agency is now owned by a different legal entity.

If the license is issued to a partnership from which one or more partners withdraw, the originally licensed partnership ceased to exist and a new legal entity remains. In this case, a new license must again be procured since the licensed legal entity no longer exists.

Although on principles of corporate law alone a license presumably belongs to the same continuing legal entity before and after corporation ownership changes, specific statutes may preclude saying that new owners of a corporation may function under the license previously owned. For example, Section 95.2 requires that "each of the members or officers" of a corporation shall have been the subject of affidavits, attached to an application, which certify to their good moral character and reliability. No such affidavits will have been provided, as required, if a corporation is sold to strangers; we think the language plainly precludes a strangers' continuing use of the same license.

Specifically in conclusion then:

1. The Employment Agency Commission can refuse to grant a formal hearing to a new applicant who was denied a license, however due process requires formal notice and hearing to licensees whose license the Commission has failed to renew or has been revoked.

2. Yes, ownership is a factor and the new owner must secure a license before carrying on the business of the Employment Agency.

15.14

STATE OFFICERS AND DEPARTMENTS: State Board of Health—State Operated Central Tumor Registry—Chapter 121, Acts of the 60th G.A. A reporting agency would not be legally liable for reporting individual cancer patients by a central registry.

November 12, 1965

Arthur P. Long, M.D., Dr. P.H.
Commissioner of Public Health
State Department of Health
State Office Building
LOCAL

Dear Dr. Long:

In your request for an official opinion concerning a State operated Central Tumor Registry, you state as follows:

"The Iowa State Deaprtment of Health is planning to establish a State operated Central Tumor Registry at the University of Iowa Hospital in conjunction with the College of Medicine. We hope to go ahead within a month, but before we can do so, we will need an opinion similar to the one issued by the Attorney General of California (enclosed) before that State began operations 18 years ago. Although cancer is not a reportable disease in California, he ruled in effect that 'hospitals, clinics, and physicians would not be subject to any liability, civil or criminal, for reporting information to the Department of Public Health concerning patient's with neoplastic disease without the patient's written consent, since such information would be maintained as a matter of confidence between the Department and the reporting agency.' Thus, a reporting agency (a hospital or medical society sponsored tumor registry) would not be legally liable for reporting individual cancer patients by name to a central registry.

"The situation in Iowa will be the same as in California, except that Iowa's Central Tumor Registry will be a joint venture between the State Department of Health and the State University of Iowa College of Medicine and Hospital, the latter being more closely associated with the central registry's actual operations. We hope that you can provide us with an opinion similar to the one issued in California. Also, since we hope to start soon, we would greatly appreciate a reply with your opinion at your earliest convenience."

Your question appears to be the last sentence of the first paragraph of your above letter which I set out again.

"Thus, a reporting agency (a hospital or medical society sponsored tumor registry) would not be legally liable for reporting individual cancer patients by name to a central registry."

It is our opinion that Chapter 121, Laws of the 60th G.A., 1963, which is entitled "*Morbidity* and *Mortality Study*" is applicable to your question. Chapter 121 is described as follows:

"An act relating to the confidential character of research studies for the purpose of reducing morbidity or mortality."

Section 1 of Chapter 121, Laws of the 60th G.A., 1963, reads as follows:

"Any person, hospital, sanitorium, nursing or rest home or other organization may provide information, interviews, reports, statements, memoranda, or other data relating to the condition and treatment of any person to the state department of health, the Iowa medical society or any of its allied medical societies or the Iowa society of osteopathic physicians and surgeons or any in-hospital staff committee, to be used in the course of any study for the purpose of reducing morbidity or mortality, and no liability of any kind or character for damages or other relief shall arise or be enforced against any person or organization by reason of having provided such information or material, or by reason of having released or published the findings and conclusions of such groups to advance medical research and medical education, or by reason of having released or published generally a summary of such studies."

Thus a "reporting agency" would be defined by section 1 as "*any person, hospital,* sanitorium, nursing or rest home, *or other* organization." (Emphasis supplied)

Also "information, interviews, reports, statements, memoranda, or other data relating to the *condition* and *treatment* of *any person*"

(Emphasis supplied) would include such information of a cancer patient identified by his name.

Section one specifically provides that *such information* may be given to the *State Department of Health,* "and *no liability* of any kind or character for damages or other relief shall arise or be enforced against *any person or organization by reason of having provided such information* . . . .", (Emphasis supplied) for the purpose of reducing morbidity or mortality. In your situation, the State Department of Health in conjunction with the State University of Iowa College of Medicine and Hospital is to establish the Central Tumor Registry which will receive information of individual cancer patients identified by name.

It is our opinion that "a hospital or medical society sponsored tumor registry" would not be liable for reporting information or data of individual cancer patients identified by name to the Iowa Central Tumor Registry to "advance medical research and medical education" for the purpose of reducing morbidity and mortality.

It should be noted that section 2 of Chapter 121, Laws of the 60th G.A., 1963, puts a restriction on the use of the information concerning the patient once it is received from the "reporting agency." Section 2 reads in part:

> "In all events the *identity* of *any person* whose condition or treatment has been studied *shall be confidential* and *shall not be revealed under any circumstances.* A violation of this section shall constitute a misdemeanor and be punishable as such." (Emphasis supplied)

Thus the name of the individual cancer patient must be kept confidential between the "reporting agency" and the Iowa Central Tumor Registry.

15.15

STATE OFFICERS: State Civil Rights Commission: Discrimination because of sex—Chapter 121, Acts of the 61st G.A.; §735.1, 1962 Code of Iowa. There are no Iowa statutory prohibitions against discrimination because of sex.

November 30, 1965

The Rev. Philip A. Hamilton, Chairman
Iowa State Civil Rights Commission
State Capitol
LOCAL

Dear Mr. Chairman:

You requested an opinion as to the

> ". . . position of the Law of Iowa relative to civil rights and discrimination by sex."

Before the 61st General Assembly, Iowa had two substantive statutes pertaining to civil rights and discrimination. Section 735.1, 1962 Code of Iowa, reads as follows:

> "735.1 Civil rights defined. All persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, chophouses, eating houses, lunch counters, and all other places where refreshments are served, public conveyances, barber shops, bathhouses, theaters, and all other places of amusement."

The 60th General Assembly enacted the folowing penal statute found in Acts of the 60th General Assembly, Chapter 330, at page 513:

> "1. Every person in this state is entitled to the opportunity for employment on equal terms with every other person. It shall be unlawful for any person or employer to discriminate in the employment of individuals because of race, religion, color, national origin or ancestry . . . ."

It is arguable that the language of Section 735.1, supra, and the first line of Chapter 330, supra, prohibits discrimination based upon sex in public accommodations and employment, respectively. However, since sex discrimination is not common in public accommodations, and Chapter 330 was a short-lived statute, no Iowa Supreme Court cases interpreting them in terms of sex discrimination exist.

The 61st General Assembly repealed both these statutes. Chapter 121, Sec. 14, 61st G.A., prohibits discrimination in certain public accommodations and certain types of employment because of:

> ". . . race, creed, color, national origin, or religion . . . ." H.F. 263, §§6(1)a, 6(1)b, 7(1)a, 7(1)b, 7(1)c and 8(2).

When legislatures list specific items, they impliedly exclude items not mentioned. (expressio unius est exclusio alterius) *Everding v. Board*, 247 Iowa 743, 76 N.W. 2d 205, *State v. Flack*, 251 Iowa 529, 101 N.W. 2d 535, *Dotson v. City*, 251 Iowa 467, 101 N.W. 2d 711, *Archer v. Board*, 251 Iowa 1077, 104 N.W. 2d 621, *North Iowa Steel Co. v. Staley*, 253 Iowa 355, 112 N.W. 2d 364.

The conclusion that discrimination because of sex in employment, accommodations or other "civil rights" is not prohibited in this state by statute is unavoidable. This position gains support from the absence of any discussion of sex discrimination in the work preliminary to H.F. 263, supra, by Professor Arthur Bonfield published in 49 Iowa Law Review 1067.

In contrast to the Iowa statute I think it well to point out the very concise and explicit Federal statute covering this area of civil rights and employment discrimination by sex, to wit: Section 703(a) of the Civil Rights Act 1964, Public Law 88-352; 78 Stat. 241 reads as follows:

> "Sec. 703. (a) It shall be an unlawful employment practice for an employer —
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
>
> * * *

As can readily be seen from a cursory reading of these provisions of the statute there is little doubt concerning the intent of Congress to prohibit such discrimination. However, as previously stated, the Iowa statutes contain no similar provisions.

15.16

STATE OFFICERS: Board of Social Welfare—§§234.6(2), 237.2 (as amended), 237.3, 1962 Code of Iowa. Sec. 234.6(2) vests no authority in the Board of Social Welfare in respect to the operation of children's boarding homes which it does not possess by express, or necessarily implied, grants of power elsewhere in the Code.

December 3, 1965

Mrs. Irene Smith
Vice-Chairman, State Board of Social Welfare
State Office Building
L O C A L

Dear Mrs. Smith:

This is in response to your request for an opinion on the licensing of children's boarding homes. You ask no specific question. You do ask for an opinion which "defines the scope of authority delegated to the State Board of Social Welfare" in respect to licensing children's boarding homes. You point to Sec. 234.6(2) which is as follows:

"The state board shall: * * *

"2. Co-operate with the federal social security board created by title VII of the social security act, 42 U.S.C. 901, enacted by the 74th congress of the United States and approved August 14, 1935, or other agency of the federal government for public welfare assistance, in such reasonable manner as may be necessary to qualify for federal aid, including the making of such reports in such form and containing such information as the federal social security board, from time to time, may require, and to comply with such regulations as such federal social security board, from time to time, may find necessary to assure the correctness and verification of such reports."

I am assuming that your question here is whether this section vests authority in the State Board to do what it does not otherwise have express power to do. The answer to that question is no. Section 234.6(2) is a direction to the board to cooperate with agencies of the federal government in qualifying for financial aid to non-federal public welfare assistance programs. It requires the board to supply information to federal agencies, to fill out forms, to make requisite reports, abide by federal regulations in the use of aid funds, and to do generally those clerical tasks necessary to assure the federal government that funds are being employed for the purposes for which they were appropriated. Sec. 234.6(2) vests no authority in respect to the regulation of children's boarding homes not present expressly elsewhere. That is, what the State Board of Social Welfare has no express or necessarily implied authority to do, it may do on grounds that some federal program requires it done as a prerequisite of assistance.

I assume further that the second of your questions has to do with Sec. 237.2, 1962 Code of Iowa, as amended by Chapter 154 of the Acts of the 60th G.A. That section is as follows:

"237.2. 'Children's boarding home' defined. Any person who receives for care and treatment or has in his custody at any one time one or more children under the age of sixteen years unattended by parent or guardian, for the purpose of providing them with food, care, and lodging, except children related to him by blood or marriage, and except children received by him with the intent of adopting them into his own family, shall be deemed to maintain a children's boarding home. This definition shall not include any person who is caring for children for a period of less than thirty (30) days."

Also pertinent is Section 237.3, 1962 Code of Iowa, which is as follows:

"237.3 Power to license. The state board of social welfare is hereby empowered to grant a license for one year for the conduct of any children's boarding home that is for the public good, that has adequate equipment for the work which it undertakes, and that is conducted by a reputable and responsible person."

Section 237.3 vests authority in the Board to license children's boarding homes. Nothing that is not within the definition in Section 237.2 may be licensed as such. The definition of a children's boarding home in Section 237.2 was amended in 1963. The last sentence of Section 237.2 before 1963 was:

"This definition shall not include any person who, without compensation, is caring for children for a temporary period."

It now says:

"This definition shall not include any person who is caring for children for a period of less than thirty (30) days."

The plain meaning of Section 237.2 as it now reads is that no person who has in his care one or more children under sixteen for the purpose of providing them with food, care and lodging is operating a children's boarding home, unless he is doing so for a period of thirty days or more. Whether that person is paid is immaterial. He may be operating a children's boarding home subject to licensing even though providing care gratuitously.

The exemption of persons who provide food, care and lodging for less than thirty days is plain and unambiguous, however, and a statute which is plain and unambiguous is not subject to construction—that is, it is not subject to scrutiny and the invocation of rules of construction to elicit its meaning.

You have refered to us *Iowa v. Hay*, ... Iowa ....., 131 N.W. 2d 452 (1964). At 131 N.W. 2d 453, the Court expressly states that the amendment to Chapter 237 enacted by the 60th G.A. "did not affect the merits of the case at Bar." True, there is dictum (at page 454) to the effect that the amendment to Section 237.2 "meant that if a family desired to leave their children with a neghbor or friend for less than thirty days it was not necessary that a license be secured." The negative of this—that anyone not a neighbor or friend who feeds, cares for and lodges children for less than thirty days must be licensed—cannot be taken as having been established by this decision. The decision itself expressly precludes any such conclusion, since construction of the amendment to Section 237.2 formed none of the bases for a resolution of the issues.

In the absence of specific questions, this as far as we shall go. If you wish to pose specific questions based on specific fact situations, please submit them.

15.17

STATE OFFICERS AND DEPARTMENTS: **Veterans' Preference: Mandatory Retirement**—§§8.5(6)(b) and 70.6, 1962 Code of Iowa. §8.5(6)(b) which provides that a personnel plan may be formulated in regard to appointments and separations does not affect the Veterans' Preference law whereby a qualified veteran, once appointed to a non-confidential position in public service, is not removable except for cause and only after notice and hearing.

December 14, 1965

Mr. Lloyd G. Jackson, Secretary
Executive Council of Iowa
State House
L O C A L

Dear Mr. Jackson:

In your letter of November 15 you indicate that you have been requested by the Adjutant General to obtain our opinion as to whether the Soldiers' Preference law may be affected by a mandatory retirement system which may be part of a plan under Section 8.5(6)(b) of the 1962 Code of Iowa.

Section 8.5(6)(b) reads as follows:

"8.5 General powers and duties. The state comptroller shall have the power and authority to:
* * *

"6. Division of personnel. There shall be a personnel division in the office of the state comptroller which shall be organized as follows:

* * *

"b. Plan for classification and compensation. Through the personnel director, the executive council shall adopt and establish a plan of classification and compensation for each position and type of employment in state government, except for positions for which the salaries or compensation is fixed by statute, and shall prescribe therein the necessary salary schedules, fixing a minimum and maximum for each class of employees doing the same general type of work. With the approval of the executive council, the personnel director shall make such regulations and adopt such methods of qualifying employees for positions as will make the plan effective, and shall prescribe *rules* to provide for personnel administration which shall include *rules governing appointments*, promotions, demotions, transfers, *separations*, vacations and sick leave as provided by law, and hours of employment.

"The plan adopted for personnel administration shall be based on merit system principles and standards.

"All departments under the director of personnel shall have the right to appeal any plan of classification and compensation for each type of employment to the executive council provided that the request comes from the head of the department.

"The executive council shall hear the appeal within thirty days from the date requested and evidence and argument may be submitted on behalf of the department.

"The executive council shall enter a written opinion directing the director of personnel to take whatever action is necessary to carry out their decision." (Emphasis supplied)

You will note that the rules that may be prescribed may include rules for appointments, as well as separations.

Section 70.6, which is part of the Veterans' Preference law, reads as follows:

"No person holding a public position by appointment or employment, and belonging to any of the classes or persons to whom a

preference is herein granted, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the right of such employee or appointee to a review by a writ of certiorari."

The law of Iowa was enunciated in 21 Iowa Law Review at page 142 as follows:

"Having once been appointed to a position in the public service, under the usual statute a veteran is not removable except for cause and only after notice and hearing. Statutes to this effect curtail the general rule that power to appoint implies power to remove, but if the statute gives a preference only with respect to employment and is silent on the question of removal, such has been held not to abrogate the power to discharge. Even though the statute does give a perference as to removal it is not in violation of a constitutional provision which includes the power to remove in the power to appoint. Though the effect is to nullify the provision as to removal, the courts justify this on the basis that since an implied power to remove would be no objection to such regulation, the mere expression of the power in the Constitution has no greater effect. Furthermore, the constitutional provisions as to appointment and removal have been held not to apply in the case of a subordinate, ministerial employee.

"The veterans' preference laws do not purport to maintain an ex-serviceman in public office when need no longer exists for his services, and therefore he has no cause for complaint when his office is abolished because its work is at an end. But a veteran will be entitled to reinstatement if his office is abolished in name alone and another person appointed to perform the same services under a different title. Changes may be made in public administration in the interests of efficiency and economy, and when this is done in good faith no rights of the veteran will be violated. Neither do the veterans' laws purport to affect existing laws with respect to terms of office or service, and where the term is prescribed by statute, the appointment is for the term therein described, and the incumbent, although a veteran, is not entitled to preference over another veteran for the next term. If the term is unfixed, the employment must be regarded as of a continuous nature, and the veteran will be removable only as provided by statute, with a right to review by certiorari. A veteran who is aware of his superior's intention to remove him must make known the fact that he is a veteran and claims the statutory preference, unless his status is already known to the superior."

It does not appear that Section 8.5(6)(b) is in conflict with the Veterans' Preference law as there are no provisions within this statute for removal other than what might be adopted as a plan. Any plans or rules and regulations that would be formulated would have to be in accordance with the expressed intent of the legislature which would also include Chapter 70, the Veterans' Preference chapter. Section 8.5(6)(b) does not sufficiently spell out removal procedures as to be in conflict with Chapter 70. It is not at all like the Civil Service preferences discussed by the Iowa Supreme Court in the case of *Andreano v. Gunter*, 252 Iowa 1330, 110 N.W. 2d 649 (1961).

An examination of Section 8.5(6)(b) shows no conflict with and indicates no intent of repealing the Veterans' Preference law. It is well established in Iowa that repeal by implication is not favored. *State v. Higgins*, 121 Iowa 19, 95 N.W. 244 (1903).

It is the opinion of this office that Section 8.5(6)(b) does not change the provisions of the Veterans' Preference law where it provides that

once a veteran is appointed to a non-confidential position in public service, a qualified veteran is not removable except for cause and only after notice and hearing.

15.18

STATE OFFICERS: Natural Resources Council: Flood Control Projects—Chapter 85, Acts of the 61st G.A. H.F. 188 which authorizes the joint exercise of governmental powers by public agencies, is not invocable where other statutes expressly provide for such cooperation on specific projects. The specific statutes control.

January 18, 1966

Mr. Othie R. McMurry, Director
Iowa Natural Resources Council
State House
L O C A L

Dear Mr. McMurry:

This is in response to your request for an opinion, which you phrased as follows:

"Construction by the U.S. Corps of Engineers of a local flood protection project at Des Moines has been authorized for construction by the Congress and the City of Des Moines has given assurances as to its financial participation in the construction, operation, and maintenance of the project.

"The City now desires to alter plans for the project to make a levee portion of the project also serve as a roadway, the most convenient and economical means of providing the needed City street without diminishing the effectiveness of the flood control project. The City proposes to contract with the Corps of Engineers for inclusion of the roadway feature in the flood protection project and to prepay the additional cost of preparing the levee as a roadway.

"Questions have been raised regarding the respective responsibilities of the City of Des Moines and of this office with regard to House File 188, 61st General Assembly. Since the questions are likely to arise with regard to every Federal project hereafter constructed in Iowa, your opinion as to the respective duties of affected governmental entities and this office with regard to compliance with the provisions of House File 188 in contracting for and constructing projects pursuant to specific authority contained in Code Section 368.47, as amended by House File 387, is respectfully requested."

The question is whether House File 188 applies to this specific project. House File 188 is a comprehensive statute which authorizes public agencies of Iowa to cooperate in exercising powers mutually possessed, and to act conjointly with private agencies, agencies of sister states and agencies of the Federal government where the laws of those governments also permit such cooperation. The powers mutually possessed which are to be cooperatively exercised, do not derive from House File 188: They are either present elsewhere in statutes (except in the case of private agencies) or not at all.

Where express powers enable the agencies to do conjointly what they seek to do, they need not and may not invoke House File 188. House File 188 supplies generally the power of cooperation where it is not expressly granted with reference to the exercise of specific, substantive powers.

You point to Section 368.47, 1962 Code of Iowa, as amended by House File 387. That section is as follows:

"368.47 Agreement with federal government. Whenever the government of the United States, acting through its proper agencies or instrumentalities, will undertake, in whole or in part, the original construction or planning of improvements within or adjacent to the corporate boundaries of any municipal corporation or the repair or alteration of existing improvements within or adjacent to the corporate boundaries of any municipal corporation and which improvements will benefit said municipal corporation, or which could be constructed, repaired, or altered by said municipal corporation acting by itself, said municipal corporation, when authorized by a resolution passed by a two-thirds vote of the city council or by a majority vote of the electors thereof at a general, regular or special election called for that purpose as provided in section 368.48, acting through its dock board in the case of improvements referred to in chapter 384 or acting through its council in the case of all other improvements, shall have the power to enter into and to perform such agreements with the United States as may be necessary to meet federal requirements, including the payment to the United States of all or any part of the cost to the United States of the said undertakings as such apportionment of said cost may be determined by such agreements with the United States, the giving of indemnifying agreements to the United States holding and saving the United States free from damages due to the construction and subsequent maintenance of the improvements, including the granting of easements or other interests in real estate, and including the taking over, repair, and maintenance of the improvements. Any agreement or agreements with the United States contemplated herein may be entered into by the municipal corporation as herein provided in advance of the adoption of a final plan for such improvements, such agreement to be effective if the plan of improvement is finally adopted. Payments to the United States in furtherance of said agreements may be made to the United States in whole or in part in advance of the letting of contracts by the United States for such undertakings to secure the United States in the letting of said contracts subject to the provision that any such payments be made on condition that any excess of such payments over and above the actual cost as so apportioned shall be refunded."

Also to be considered are Chapters 395 and 455A, 1962 Code of Iowa, specific sections of which are as follows:

"395.1 Authorization. Cities and towns are hereby empowered to establish a flood control system for the protection or reclamation of property situated within the limits of such cities or towns, from floods or highwaters and to protect property in such cities from the effects of flood water, whenever the establishment of such a flood control system shall, in the judgment of the city council, or other governing body, of such city, be conducive to public convenience and welfare, and such cities and towns may in accordance with the provisions of this chapter, deepen, widen, straighten, alter, change, divert, or otherwise improve watercourses within or without their limits, by constructing levees, embankments, structures, impounding reservoirs, or conduits, and improve, widen and establish streets, alleys, and boulevards across and adjacent to the abandoned or new channel or conduit and provide for the payment of the cost and maintenance of such flood control activities under the terms of this chapter.

"The establishment, construction and operation of a flood control system as authorized by this section is declared to be a local im-

provement, conferring special benefits upon property affected thereby."

"395.26 Federal aid. Cities and towns may in accordance with the provisions of this chapter accept federal aid in the doing of the acts provided in section 395.1, and may assume such portion of the cost thereof not discharged by such federal aid. They shall have power of condemnation as provided in section 395.2."

"395.27 Right of way. The cost of all right of way acquired by purchase or condemnation may be borne by the city or town together with any other property rights which may be required in furtherance of such projects and the work of actual construction and the cost thereof may be borne by the federal government."

"395.28 Division of expense. Sections 395.26 to 395.30, inclusive, contemplate that the actual direction of the project and the doing of the work in connection therewith is assumed by the federal government and that the city or town provides and assumes the cost of necessary right of way over and above such contributions in that regard as the federal government may choose to make. Under such limitation all appropriate portions of this chapter shall apply."

"395.29 Contributions—maintenance assumed. Cities and towns in furtherance of such flood control projects may accept contributions to enable them to pay for necessary right of way. They may also enter into agreement with the federal government to maintain levees, dikes or other construction and to do all other acts required by the federal government in maintaining the work of construction when completed."

"395.30 Street fund may be used. The council shall have power to allocate a portion of the street fund for the purchase of right of way or the maintenance of the completed flood control project."

"455A.2 Declaration of policy. It is hereby recognized that the protection of life and property from floods, the prevention of damage to lands therefrom and the orderly development, wise use, protection and conservation of the water resources of the state by the considered and proper use thereof, is of paramount importance to the welfare and prosperity of the people of the state, and, to realize these objectives it is hereby declared to be the policy of the state to correlate and vest the powers of the state in a single agency, the Iowa natural resources council, with the duty and authority to establish and enforce an appropriate comprehensive state-wide program for the control, utilization, and protection of the surface and ground-water resources of the state. It is hereby declared that the general welfare of the people of the state of Iowa requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use, or unreasonable methods of use, of water be prevented, and that the conservation of such water be exercised with the view to the reasonable and beneficial use thereof in the interest of the people, and that the public and private funds for the promotion and expansion of the beneficial use of water resources shall be invested to the end that the best interests and welfare of the people are served.

"Water occuring in any basin or in any watercourse, or other natural body of water of the state, is hereby declared to be public waters and public wealth of the people of the state of Iowa and subject to use in accordance with the provisions of this chapter, and the control and development and use of water for all beneficial

purposes shall be in the state, which, in the exercise of its police powers, shall take such measures as shall effectuate full utilization and protection of the water resources of the state of Iowa."

"455A.18 Jurisdiction—diversion of water. 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 the action of cities, towns and other sub-divisions 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."

Chapter 368 spells out the general powers of cities and towns. Section 368.47 authorizes cities and towns to enter into agreements with Federal government for the construction and planning of improvements within municipal corporations. The amendment to this section, House File 387, relates to the financing of those improvements.

Chapter 395 authorizes cities and towns to establish flood control systems. Sections 395.26 through 395.30 permit cities and towns to accept Federal aid in the construction of flood control projects and contemplates that the labor shall be done by the Federal government.

Chapter 455A of the Code vests powers in the Natural Resources Council over flood control within the state.

Chapters 395 and 455A must be construed in *pari materia*—that is, together. They treated the same subject matter and neither can be considered in isolation. When statutes relate to the same subject matter they must be construed together. *Franze v. Benter*, 256 Iowa . . . . . , 128 N.W. 2d 268. By Section 455A.18 the General Assembly clearly made it necessary for cities and towns to defer to the Natural Resources

Council in the solution of flood control problems, and to satisfy the Council in respect to lands it develops under the authority of Chapter 395. Section 455A.18 authorizes the Council "to perform such duties in cooperation 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." "Person" is defined in Section 455A.1 to encompass municipal corporations.

Cities and towns have express powers to enter into agreements with the Federal government for flood control projects in Sections 395.26 through 395.30, as we stated earlier. They may invoke the general powers present in Section 368.47 as amended if necessary in compliment to those express powers granted in the flood control section.

To correlate what we have said, we say:

1. House File 188 is not applicable to municipal flood control projects, because municipalities have express powers elsewhere to cooperate with the Federal government in the implementation of such works.

2. The Natural Resources Council also has express powers to cooperate both with municipal corporations and with the Federal government in such projects.

3. Although municipal corporations have no express powers to cooperate with or defer to the Natural Resources Council in flood control projects, the plain meaning of the presence of Chapter 455A in the Code is that municipal projects of this sort are subject to the powers expressly given the Natural Resources Council. The power of a municipal corporation to cooperate with the Natural Resources Council in this area is implicit in the express power of the Resources Council to cooperate with a municipal corporation.

We will not attempt to say what House File 188 does require of participating agencies where it can be invoked. That question, it seems to us, must be answered within the context of the specific project in respect to which cooperation is sought. Therefore, in conclusion, we say that the Natural Resources Council, the municipal corporation, and the Federal government, should proceed in respect to flood control projects without reference to what House File 188 provides.

15.19

STATE OFFICERS AND DEPARTMENTS: **Personal deposit funds of inmates and patients who are state charges in institutions under the jurisdiction of the Board of Control**—§§65, 66, 67, 70, 84, 87, Chapter 207, Acts of 61st G.A. Where a state charge is involved, the State Comptroller is not empowered to request the excess over $200 of the personal deposit funds of patients or inmates under the jurisdiction of the Board of Control for deposit in the General Fund of the State of Iowa.

January 18, 1966

Marvin R. Selden, Jr.
Comptroller, State of Iowa
State House
L O C A L

Dear Mr. Selden:

You have recently requested an opinion of this office on the following question:

"Where a state chcarge is involved, can the State Comptroller request the amount over $200 [funds of patients or inmates in

institutions under the jurisdiction of the Board of Control] for deposit in the General Fund of the State of Iowa?"

Our attention has been directed to Section 94, Chapter 208, Acts of the 61st G.A. This Section reads as follows:

"Sec. 94. Chapter two hundred eighteen (218), Code 1962, is hereby amended by adding the following section: 'The board of control shall direct the business manager of each institution under its jurisdiction mentioned in section four hundred forty-four point twelve (444.12) of the Code, as amended by section two of chapter one hundred fifty-two (152) and by chapter two hundred seventy-two (272), Acts of the Sixtieth General Assembly, to quarterly inform the auditor of the patient's or inmate's county of legal settlement of any patient or inmate who has an amount in excess of two hundred (200) dollars to his account in the patients' personal deposit fund and the amount thereof. The board shall direct the business manager to further notify the auditor of such county at least fifteen (15) days before the release of such funds in excess of two hundred (200) dollars or upon the death of such patient or inmate. *If any such patient or inmate shall have no county of legal settlement, notice as required by this section shall be made to the board of control.*'" (Emphasis supplied)

This section, it is seen, does not answer your precise question but simply sets forth mandatory notice requirements by the business manager of funds of patients and inmates in excess of $200 to the county of legal settlement or the board of control.

Section 65 of this law requires the Board of Supervisors or the court to advise the Board of Control when the legal settlement of a person is found to be ". . . in a foreign state or country or is found to be unknown. . . ."

Under Section 66, the Board of Control is directed to conduct an investigation and to proceed as follows:

"If the board finds that the decision of the board of supervisors . . . is correct [i.e., that the person's legal settlement is in a foreign state or country or is unknown] the board of control shall cause the person either to be transferred to a hospital-school and there *maintained at the expense of the state* or to be transferred to the place of foreign settlement." (Emphasis supplied)

Sections 67 and 70 of this Act provide for the payment of all necessary and legal expenses of the transfer and the cost of admission or commitment of "state" patients ". . . out of any money in the state treasury not otherwise appropriated." Without further specification as to which fund was intended, it is obvious that the General Fund of the State of Iowa is the proper fund for the payment of the transfer to the state hospital-schools, the cost of admission or commitment of a person to said hospital-school, and for the maintenance as provided in Section 66.

The establishment of the patient's personal deposit fund is found in Section 85 and Section 86 provides in pertinent part as follows:

"Sec. 86. Any funds coming into the possession of the superintendent or any employee of a hospital-school belonging to any patient in that hospital-school shall be deposited in the name of the patient in the patients' personal deposit fund, except that if a guardian of the property has been appointed for the person, the guardian shall have the right to demand and receive such funds. . . ."

Section 87 following provides in toto as follows:

"Sec. 87 Whenever the amount in the account of any patient in the patients' personal deposit fund exceeds the sum of two hundred (200) dollars, *the business manager of the hospital-school may apply any amount of the excess to reimburse the county* of legal settlement for liability incurred by such county for the payment of care, support, and maintenance of the patient when billed therefore by the county of legal settlement. Money earned by a patient for work performed in or for a hospital-school shall not be subject to this section or to attachment." (Emphasis supplied)

The writer deems it important that the italicized portion of the above does not include similar language applicable to state patients. That is to say that the business manager is *not* given discretion to reimburse the state for state patients who have funds in excess of two hundred dollars. That such funds may be administered by superintendents and business managers only as authorized by statute, has heretofore been decided by this office. See 1962 OAG 257. We do by this reference adopt the principle enunciated therein. Further, the state's right to recover as to this class of persons, appears to be couched in Section 84 of this Act. That reads as follows:

"Sec. 84 The *estates* of all *nonresident patients* who are provided treatment training, instruction, care, habilitation, and support in or by any hospital-school *and all persons legally bound for the support of such persons, shall be liable to the state for the reasonable value of such services* in the hospital-schools. The certificate of the superintendent of any hospital-school in which any nonresident is, or has been a patient, showing the amounts drawn from the state treasury or due therefrom as provided by law on account of such nonresident patient shall be presumptive evidence of the reasonable value of such services furnished such patient by the hospital-school." (Emphasis supplied)

It is seen that those state patients whose legal settlement is unknown, although they may well be residents of Iowa are not included in this liability section. It is axiomatic that legal settlement is a creature of statutory creation and is not synonymous wih the terms "domicile" or "residence". See *State ex rel Rankin v. Peisen,* 233 Iowa 865, 10 N.W. 2d 645 (1943).

For the foregoing recited reasons, we are constrained to advise that there is no authority for the State Comptroller to request the amount over $200 for deposit in the General Fund of the State of Iowa of those mentally retarded persons.

Certainly, the bulk of Chapter 208 deals with support of the mentally retarded in this State, solely. Enacted into law as Senate File 444, it is entitled:

"AN ACT to revise and recodify the statutes providing for the treatment, training, instruction, care, habilitation, and support of mentally retarded persons in this state."

Only in Section 94, regarding the notice requirements, are the mentally ill included in its scope. Three amendatory sections are provided for in enumerated sections 95, 96, and 97 of the Act. They amend sections 230.15, 230.18 and 230.20, respectively dealing with the support of mentally ill by striking its coverage as to mentally retarded persons and those people legally liable for their support to the state remains unchanged by chapter 208. There is no provision for the State Comptroller to request the amount over $200 for deposit in the General Fund of the State of Iowa, and therefore as to mentally ill persons your question must be answered in the negative.

15.20

STATE OFFICERS AND DEPARTMENTS: Department of Public Instruction's powers and duties relative to inspecting private school buses—§§321.1(27), 321.372, 321.373, 321.374, 321.378, 321.379, 1962 Code of Iowa, as amended. The term "school" in §321.1(27) was intended by the legislature to include both public and private school buses and thus §321.374 places an affirmative duty on Superintendent of Public Instruction to require inspection of private and public school buses and to issue inspection seals of approval to those satisfying the minimum requirements of §321.373.

January 21, 1966

Mr. Paul F. Johnston
Department of Public Instruction
State Office Building
L O C A L

Dear Mr. Johnston:

You have requested an opinion as to whether the Department of Public Instruction has the power and duty to require inspection of private school buses and issue inspection seals of approval for private school buses under Section 321.374, 1962 Code of Iowa, as amended.

In response thereto, it is necessary to set forth all relevant statutes. Section 321.1(27), 1962 Code of Iowa, provides:

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

"27. '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 children in the immediate family of the driver." (Emphasis supplied)

Section 321.372, 1962 Code of Iowa as amended by Chapter 285, Acts of the 61st General Assembly, provides in part:

"Discharging pupils—regulations. 1. The driver of any *school bus used to transport children to and from a public or private school shall,* when stopping to receive or discharge pupils, *turn on the flashing stop warning signal lights* at a distance of not less than three hundred feet, nor more than five hundred feet from the point where said pupils are to be received or discharged from the bus. At the point of receiving or discharging pupils *the driver of the bus shall bring bus to a stop and extend the stoparm.* After receiving or discharging pupils, the bus driver shall turn off the flashing stop warning lights, retract the stoparm and then proceed on the route. No school bus shall stop to load or unload pupils unless there is at least three hundred feet of clear vision in each direction.

"A school bus, when operating on a highway with four or more lanes shall not stop to load or unload pupils who must cross the highway, except at designated stops where pupils who must cross the highway may do so at points where there are official traffic control devices or police officers.

"2. All pupils shall be received and discharged from the right front entrance of every school bus and if said pupils must cross the highway, they shall be required to pass in front of the bus, look in both directions, and proceed to cross the highway only on signal from the bus driver . . . ." (Emphasis supplied)

Sections 321.373, 1962 Code of Iowa as amended by Chapter 285, Acts of the 61st G.A., provides in part:

"Required construction. *Every school bus* except private pasenger vehicles used as school buses *shall be constructed and equipped to meet the following* standards: . . . ." (Emphasis supplied)

Section 321.374, 1962 Code of Iowa provides:

"Inspection-of approval. *No vehicle shall be put into service as a school bus* until it is given an original inspection to determine if it meets all legal and established uniform standards of construction for the protection of the health and safety of children to be *transported.* Vehicles which are approved shall be issued a seal of approval by the superintendent of public instruction. All vehicles used as school buses shall be given a safety inspection at least once a year. Buses passing the inspection shall be issued an inspection seal of approval by the superintendent of public instruction. The seal of original inspection and the annual seal of inspection shall be affixed to the lower right hand corner of the windshield." (Emphasis supplied)

Section 321.378, 1962 Code of Iowa provides:

"Applicability. The provisions of sections 321.372 to 321.380, inclusive, shall apply to any and all types of school districts where children are transported to and from public schools."

Section 321.379, 1962 Code of Iowa provides:

"Violations. *No school board, individual or organization* shall purchase contract for use, *to transport pupils to or from school, any school bus which does not comply with the minimum requirements of section 321.373* and any individual, or any member or officer of such board or organization who authorizes the purchase construction, or contract for any such bus not complying with these minimum requirements shall be guilty of a misdemeanor punishable as provided in section 321.482." (Emphasis supplied)

The question which you raise can only be resolved by determining what the legislature intended the terms "school bus" and "school" in the aforecited statute to encompass. As previously set forth, section 321.1(27) defines "school bus" to mean "every vehicle operated for the transportation of children *to or from school* . . . ." The legislature is its own lexicographer and when the legislature defines its term by express enactment, said definition is controlling, *Cowman v. Hansen,* 250 Iowa 358, 92 N.W. 2d 682 (1958).

However, the legislature has not defined the term "school" in the aforecited definition. Thus, the question arises as to whether the term "school" means "public school" only or both "public and private school."

This question was passed upon in 1956 O.A.G. 44 when it was said:

"The foregoing definition [section 321.1(27)] does not exclude private school buses. It follows that unless the context of any specific provision of the chapter relating to school buses connotes otherwise, the provision will apply to buses of both public and private schools."

The opinion continues at page 45:

"The reference in section 321.378 to 'all types of school districts' relates to public school districts and does not affect the question here considered. However, the provision is not exclusionary and

the provisions of sections 321.372 to 321.380 may apply to private school buses where the context does not indicate otherwise . . . ."

The above opinion clearly holds that section 321.374 may apply to private school buses.

In your request, you indicate that the case of *Silver Lake Consolidated School District v. Parker*, 238 Iowa 984, 29 N.W. 2d 214 (1947), may be controlling as to the meaning of "school" in the statute in question. This case involved a declaratory judgment action brought for the purpose of securing a judicial determination of the powers, duties and responsibilities of a consolidated school corporation in regard to the transportation of rural school children who attend private schools and live along established bus routes. The court ruled that the Consolidated School Corporation had no duty or authority under the school statutes to provide transportation to private school students. At page 993 of the Iowa Reports the Court said:

> *"We believe that the school laws of the state concern only the public schools, unless otherwise expressly indicated,* and do and can apply only to the schools within the purview of the school statutes, or under the control or jurisdiction of the school officials, and that this would apply to transportation." (Emphasis supplied)

It is important to note that the court was talking only with reference to the "school laws of the state" as applying exclusively to public schools. At page 989 of the Iowa Reports the court stated that the school laws of the state are as follows:

> "The laws of Iowa relating to education are found in Title XII of the Code, being Chapter 257 to Chapter 305, inclusive. They constitute, in general, what may be termed the school code and contain practically all of the statutes having relation to the public school."

It is the opinion of this office that the Silver Lake case, supra, does not control the disposition of the question at hand. The court said the "school laws" are found in Title XII of the Code. Here we are dealing with Section 321.374 which is found in Title XIII of the Code. This section deals with "Motor Vehicles and Law of Road" rather than the "school laws."

Particularly in point is the case of *Livingston v. Davis*, 243 Iowa 21, 50 N.W. 2d 592 (1951). The case involved an action in equity to enjoin operation in a residential district of a private pre-school or nursery school as a violation of a zoning ordinance. A question arose as to what was meant by the term "Elementary School" in the ordinance. The court said at page 27 of the Iowa Reports:

> "An accepted definition of school is 'a place for instruction in any branch or branches of knowledge.' See Webster's New Intl. Dict., 2d Ed.; *Alexander v. Phillips*, 31 Ariz. 503, 254 P. 1056, 52 A.L.R. 244, 246, 247 (holding stadiums for athletic games are included within the term 'schoolhouses'); *Langbein v. Board of Zoning Appeals*, supra, 135 Conn. 575, 67 A. 2d 5, 8.
>
> "Another common definition of school is 'a place where instruction is imparted to the young.' *People v. Levisen*, 404 111. 574, 575, 90 N.E. 2d 213, 215, 14 A.L.R. 2d 1364, 1367. *Board of Education v. Ferguson*, 68 Ohio App. 514, 39 N.E. 2d 196, 198; 47 Am. Jur., Schools, section 2. Our conclusion that defendants operate a school finds support especially in the Langbein and Levisen cases, supra, and in *People v. Collins*, 191 Misc. 553, 83 N.Y.S. 2d 124.

"If defendants' place is a school certainly it is a private school, organized and managed by individuals, not by the public as an institution of the state.

"* * *

'It is true, as the plaintiffs argue, a statute pertaining to our public school system provides that persons between 5 and 21 shall be of school age, section 282.1, Code, 1950, I.C.A. Code section 286.2 in the chapter on Supplementary Aid to School Districts states that for the purposes of this chapter an elementary pupil is one of school age attending public school who has not entered the ninth grade. A like statute is section 286A.2. And section 260.5 in the chapter on Board of Education Examiners says, 'For the purposes of this act the elementary school field shall be construed to include the kindergarten and grades one to eight * * *.'

"These statutes relate only to our public school system in which there are no nursery schools. They do not purport to define or describe private elementary schools. As stated in *People v. Collins*, supra, 191 Misc. 553, 83 N.Y.S. 2d 124, 125, '* * * there is not necessarily any relationship between the Education Law definition of a school and the zoning ordinance definition.' "

The court then held that the term "Elementary School" applied to the private nursery school of the defendant. It is thus apparent that the term "school" can mean both public and private places "for instruction in any branch or branches of knowledge."

As set forth supra, section 321.374 provides for the inspection and approval of school buses "to determine if it meets all legal and established uniform standards of construction for the protection of the health and safety of children to be transported." The purpose of this section could not be more explicit. The legislature has chosen to exercise its police power by setting the minimum standard for the construction and operation of vehicles used to transport children to and from school. In fact, the legislature in section 321.379 has made it a misdemeanor for any "school board, individual, or organization" to "purchase, construct, or contract for use, to transport pupils to or from school, any school bus which does not comply with the minimum requirements of section 321.373." By using the terms "school board, *individual*, or *organization*" the legislature clearly intended section 321.379 to apply to private as well as public bodies which purchase and provide school buses for transportation of children.

It is therefore the opinion of this office that the term "school" in section 321.1(27), 1962 Code of Iowa, was intended by the legislature to mean both private and public schools. Section 321.374, 1962 Code of Iowa thus places an affirmative duty upon the Superintendent of Public Instruction to require inspection of private and public school buses and to issue inspection seals of approval to those which satisfy the minimum requirements of section 321.373.

15.21

STATE OFFICERS AND DEPARTMENTS: Vacation rights of State employees—§79.1, 1962 Code of Iowa; Chapter 99, Acts of 61st G.A. The four-week vacation grant contained in Chapter 99 is available to those State employees who have fifteen or more years of employment as of July 4, 1965, regardless of whether they have taken their vacation or not.

February 4, 1966

Mr. Ray Pratt
State Personnel Director
State House
L O C A L

Dear Mr. Pratt:

You have requested an opinion from this office in regard to the effect of Chapter 99, Acts of the 61st General Assembly, which changed Section 79.1 of the 1962 Code of Iowa so that it now reads in part as follows with the italicized portion being the insertion caused by Chapter 99 in place of the words "all subsequent years of employment":

> ". . . All employees of the state including highway maintenance employees of the state highway commission are granted one week's vacation after one year's employment and two weeks' vacation per year after the second and through the tenth year of employment, and three weeks' vacation per year after the tenth and *through the fifteenth year of employment, and four weeks vacation after the fifteenth year and all subsequent years of employment,* with pay . . . ."

The question which arises is whether the employees of the State who have more than fifteen years of employment as of July 4, 1965, the effective date of Chapter 99, are eligible for the extra week of vacation which is granted by Chapter 99, and whether those employees of more than fifteen years' employment who have exercised their vacation rights before July 4, 1965, would still be entitled to another week's vacation.

There is a 1955 Attorney General's opinion, cited as 56 OAG 46, which indicates that if the vacation rights are exercised before the effective date of a similar increase which occurred in vacation time which resulted from the Acts of the 56th General Assembly, there would be no additional week of vacation granted.

Subsequent to this opinion of May 19, 1955, members of the State of Iowa Employees Association brought suit in Polk County challenging the Attorney General's interpretation. In the case of *Kennedy et al v. Board of Social Welfare,* Equity 63463, the District Court held that all members who had, or would have, more than ten years of service in 1955 were entitled to the full three weeks' vacation, irregardless of whether they had exercised part or all of their vacation rights.

This office is bound to respect the decrees of the courts of the State of Iowa and an examination of the prior equity file reveals that the district court judge considered the same question.

This office also has the duty to construe statutes so logical and harmonious results are obtained in interpreting the acts of the Iowa legislature. To interpret Chapter 99, Acts of the 61st General Assembly, as only applying to members who would become eligible for the additional week of vacation after the enactment of the statute, would be to penalize those employees who had already put in fifteen years of State service before July 4, 1965.

Therefore, it is the opinion of this office that the new law entitles any State employee who had or will have fifteen years or more of service on July 4, 1965, to four weeks' vacation with pay, irregardless of the fact whether they had taken their 1965 vacation or not.

15.22

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture; affiliated societies—Chapter 178, 181, 183, and 185, 1962 Code of Iowa. The personnel employed in the various agencies affiliated with the Department of Agriculture are not state employees. The Executive Council should not furnish these agencies with office space or supplies without charge, and these people are not entitled to the assignment or use of state cars.

February 16, 1966

Mr. Kenneth E. Owen
Secretary of Agriculture
State House
L O C A L

Dear Mr. Owen:

You have submitted the following questions:

"The Iowa legislature created under Chapter 178, the Iowa State Dairy Association, under Chapter 181, the Iowa Beef Cattle Association, under Chapter 183, the Iowa Swine Producers Association, and under Chapter 185, the Iowa State Sheep Association.

"The executive committees of these above named associations may employ one or more persons to carry out the provisions of these various chapters. These aforesaid associations presently receive appropriations from the General Assembly as state aid.

"(1) Are the personnel employed by the aforementioned executive committee of the various associations employees of Iowa state government?

"(2) If these personnel are considered employees of the State of Iowa, are they subject to the same rules and regulations of the State Personnel Director, State Comptroller, the Executive Council and the Department of Agriculture?

"(3) If the above mentioned personnel are not state employees, is the state Executive Council required to furnish them office space without charge?

"(4) Are they entitled to the use of state vehicles?"
Previously your department gave us the following information:

"1. The secretaries to the fieldmen of the affiliated societies were hired by the board of directors subject to the approval of past Secretaries of Agriculture or hired by the Secretary of Agriculture and subject to the approval of the board of directors of the affiliated Societies.

"2. The present employees are excluded from IPERS.

"3. I have received no clarification as no one seems to know whether the employees of the affiliated societies are entitled to Workman's Compensation.

"4. By discussion, I have been led to believe that these employees are not under the State Merit Plan.

"5. I have been informed that these employees take a paid vacation, pay received from the state appropriation for the affiliated societies.

"6. The employees of the affiliated group are given expense account allowances the same as any other state employee, the expenses being paid by the budget derived through state appropriation.

"7. There is no clarifiication as to whether the employees are granted sick pay. The cashier of our department claims that sick pay is allowed. In conversing with an employee of the affiliated societies, the employee suggested exclusion from sick pay benefits.

"8. The payroll of employees of the affiliated societies is paid from the budget derived from state appropriations."

The questions you have submitted raise the issue as to whether the personnel employed by the various affiliated agencies of the Department of Agriculture are state employees. The first agency which you mentioned is the Iowa State Dairy Association which is Chapter 178 of the Code. This is a typical chapter. The first section is entitled "Recognition of organization." The second section is entitled "Duties and objects of association" where certain activity is encouraged and an annual report of the proceedings and expenditures is to be made to the Secretary of Agriculture. The third section is entitled "Executive committee" which consists of five officers, including the Secretary of Agriculture. The fourth section deals with the people that may be employed by the Executive Committee and is entitled "employees of committee." They are to be under the direction of the Executive Committee and the salaries of such persons are to be set by the Executive Committee, subject to the approval of the Secretary of Agriculture and they are to hold their office at the pleasure of the Executive Committee. The State Dairy Association, along with other affiliated agencies, does receive state aid. This is included in the additional duties of the Secretary of Agriculture under Section 159.6 which reads in part as follows:

"159.6 Additional duties. In addition to the duties imposed by section 159.5, the department shall enforce the law relative to: * * *

11. State aid received by certain associations as provided in chapters 175 to 186, inclusive."

It should be noted that under Chapter 1, Acts of the 61st General Assembly, Section 32, the amount of $18,770.00 was appropriated for each year of the biennium for the Dairy Association.

The elements of an employment relationship is that there be a contractual relationship calling for assent by both parties, that there be a right to enter into the relationship, that there be direction and control on the part of the employer, that wages be paid, and that services be rendered to the master. 56 Corpus Juris Secundum, Master and Servant, Section 2.

The Iowa cases have held that the basic test, as far as the Iowa courts are concerned, in regard to whether an employment relationship exists, is whether there is control over the work by the principal. The situation that we have under Chapter 178 is that the committee conrols the employee and that the Secretary of Agriculture only has one out of the five votes. The duties and objects of the Association, as set out in the statute, do not sufficiently give direction and control of the work to the State of Iowa. Inasmuch as the first section indicates that the Iowa State Dairy Association existed prior to the enactment of the statute and was not created by statute would further give weight to the rationale that the state is not the employer of the employees of the State Dairy Association Committee. The fact that state aid may fi-

nance most of the salaries of these employees is not controlling. In Iowa, as we have stated before, the most important consideration is that the work be subject to the approval and satisfaction of the employer. *Meredith Publishing Co. v. Iowa Employment Security Commission,* 232 Iowa 666, 6 N.W. 2d 6 (1942).

The first two questions which you asked can be answered by stating that the personnel employed by these affiliated associations are not state employees and they are not subject to the rules and regulations of the State Personnel Director.

Sections 19.15 and 19.25 provide for the assignment by the Executive Council of rooms and supplies. Assignments are made to *officers* and departments. One of those departments eligible for supplies is the Secretary of Agriculture. Inasmuch as the members of the affiliated committees are not state employees, they are not officers. Furthermore, these agencies are not departmnts of state government. They are only affiliated with the Department of Agriculture and are not part of the Department of Agriculture as their employees are not state employees.

Section 21.2(1) states as follows:

". . . Subject to the approval of the governor, the said state car dispatcher shall have the following duties:

1. He shall assign to a state officer or employee or to a state office, department, bureau, or commission, one or more motor vehicles which may be required by said officer or department, after said officer or department has shown the necessity for such transportation. The state car dispatcher shall have the power to assign said motor vehicle either for part time or full time. He shall have the right to revoke said assignment at any time."

It should be noted that the only assignments are to state officers, employees, and to offices, departments, bureaus or commissions. Inasmuch as the employees of the affiliated agencies are not state officers or employees and they are not a state office, department, bureau or commission, the car dispatcher should not assign vehicles to any of the affiliated agencies.

SUMMARY

It is my opinion that the personnel employed in the various agencies affiliated with the Department of Agriculture are not state employees. Furthermore, it is my opinion that the Executive Council should not furnish these agencies with office space or supplies without charge, and these people are not entitled to the assignment or use of state cars.

15.23

STATE OFFICERS AND DEPARTMENTS: Treasurer of State: Investment of 4% certificates of deposit at a discount—§453.6, 1962 Code of Iowa, as amended by Chapter 368, Acts of 61st G.A., and by Chapter 278, Acts of the 60th G.A. The Treasurer of State may not invest at a discount in certificates of deposit bearing 4% as this will permit an interest yield which is greater than 4%. An interest yield of over 4% is prohibited by §453.6.

March 16, 1966

Mr. Paul Franzenburg
Treasurer of State
State House
LOCAL

Dear Mr. Franzenburg:

You have submitted the following question:

"During the 61st General Assembly, the undersigned sought to have Chapter 453, 1962 Code of Iowa, as amended, be so revised as to be more realistic in light of then current conditions.

"I was particularly interested in having Section 453.6, as amended, be further amended to allow a maximum of 4% interest on public funds. My interest stemmed from the fact that the then maximum of 3% did not allow me to deposit state funds in Iowa banks since the yield from U. S. Government securities was at that time approximately 4% .

"The Legislature and Governor Hughes concurred with my views, the maximum rate was established at 4%, and the committee authorized in 453.6 determined the rate for that calendar quarter and, later, for following quarters, to be 4%.

"As a result, this office deposited $33.7 million in Iowa banks. Soon after, however, the rates on U. S. Government securities began to rise and today these rates approximate 5%. Thus, I am confronted with a problem almost exactly like that described above —the maximum rate under 453.6 is again approximately 1% less than available yields from U. S. Government securities.

"I will, therefore, appreciate your opinion on the following:

"Can we discontinue Certificates of Deposit so as to permit a yield greater than 4%?"

Your investment powers are found at Sections 12.8 and 452.10 of the 1962 Code of Iowa, as amended. Under Section 452.10 you are empowered to "make time deposits of such funds in banks as provided in Chapter 453 and receive time certificates of deposit therefor."

Section 453.6 of the 1962 Code of Iowa, as amended, provides the interest rate in regard to time certificates. It reads as follows:

"Henceforth public deposits shall be deposited with reasonable promptness and shall except for time certificates of deposit be evidenced by passbook entry by the depository legally designated as depository for such funds. *Time certificates of deposit for public funds shall draw interest* at rates to be determined January 1 and quarterly thereafter by joint action of the superintendent of banking, insurance commissioner and treasurer of state, of which a majority shall control their actions in setting such rates. *Said rates shall not be less* than one percent, nor *more than four percent.*" (Emphasis supplied)

One issue which must be considered is whether there is statutory authority for the Treasurer to accept a certificate of deposit which is actual evidence of more funds than were deposited.

Under the statutory language the Treasurer has the authority to make time deposits of public funds not currently needed for operating expenses and he shall receive time certificates of deposit for the deposit of such funds. It is clear that he cannot receive a certificate of

deposit at a loss and the question is whether he may receive a time certificate of deposit which, in essence, is for the funds that he has deposited and is also evidence of a profit to the State.

The general rule in reagrd to the investment of public funds is that boards and officials having public funds in their control are not authorized to depart from the statutory requirements as to the investment of such funds. 42 American jurisprudence, Public Funds, Section 10. This general rule is invoked to protect the public and to prevent a misuse of public funds to the detriment of the public.

The Treasurer has long been authorized to accept gifts to the State. *Eckles v. Lounsberry,* 253 Iowa 172, 111 N.W. 2d 638 (1962). However, gifts to the State are limited by Section 565.3, 1962 Code of Iowa, and require Executive Council approval. The above, of course, only applies if the transaction can be considered to be a gift on the part of the bank. It does not appear that the transaction is a gift on the part of the bank There is but one transaction.

The weight of authority holds that a discount is interest paid in advance and is an effect of taking out of the principal sum and retention by the lender of interest charge for the use of capital. 12A Words and Phrases, Discount, page 290, contains annotations which all point out that discount is interest. Several of the annotations are as follows:

" 'Discount is interest, either paid in advance or reserved in the note.' *First Nat. Bank v. Childs,* 133 Mass. 248, 252, 43 Am. Rep. 509."

"The term 'discount,' as a substantive, means the interest reserved from a sum of money lent at the time of making the loan. *State v. Boatmen's Sav. Inst.,* 48 Mo. 189, 191."

"The word 'discount' as used in Rev. St. U. S. §5136(7), 12 U.S.C.A. §24, relating to powers of national banks, necessarily carries with it the idea of the charging of interest in advance. *Cooper v. National Bank of Savannah,* 94 S.E. 611, 614, 21 G a.APP. 356."

"Discount is the taking out of the principal sum, and the retention by the lender, at the time of the loan, of the interest charged for the use of the principal. *Planters' & Merchants' Bank v. Goetter,* 19 So. 54, 55, 108 Ala. 408, citing *Saltmarsh v. Planters' & Merchants' Bank,* 14 Ala. 668, 677; *Youngblood v. Birmingham Trust & Savings Co.,* 12 So. 579, 95 Ala. 521, 20 L.R.A. 58, 36 Am. St. Rep. 245."

The transaction you set out necessarily contemplates interest in excess of four percent and, therefore, it is my opinion that such a transaction is in violation of Section 453.6, as amended, and may not be performed by you.

15.24

STATE OFFICERS: **Corporations: Conditions under which building and loan associations may establish branch offices**—Chapter 534, 1962 Code of Iowa. Building and loan associations organized under Chapter 534 have the implied authority to establish branches. However, this authority is subject to the approval of the Executive Council and the requirements of §534.3(3)(a) must be met.

March 23, 1966

Mr. Lorne R. Worthington
Auditor of State
State House
LOCAL

Dear Mr. Worthington:

You have requested an opinion from this office as to whether a savings and loan association operating under Chapter 534, 1962 Code of Iowa, may have branch facilities.

As your question clearly indicates, Chapter 534 controls the operation of state savings and loan associations in the State of Iowa. The following sections are pertinent to your question:

"534.2 Definitions. When used in this chapter, the following words and phrases shall have the following meaning, except to the extent that any such word or phrase is specifically qualified by its context:

1. 'Association' shall mean a corporation organized under the provisions of this chapter to promote thrift and home ownership by providing for its members a co-operative and mutual plan for saving money and investing money so saved in home loans to its members. These 'associations' shall be known as building and loan associations or savings and loan associations or savings associations. 'Foreign companies' shall be any other savings and loan associations or building and loan association or organization, incorporated for the purposes specified herein under the laws of another state or country. * * *

5. 'Regular lending area' shall mean the country in which the *home office* of an association is located, and the counties of the state or adjoining state immediately adjoining and abutting on such county, or any additional area within fifty miles from the *home office,* whether within or without the state, whichever is the greater." (Emphasis supplied)

"534.3 Incorporation and organization. * * *

2. Articles. The articles of the incorporation shall show: * * *

b. The name of the association and its *principal place of business.* * * *

3. Approval of articles—certificate of authority.

a. The proposed articles of incorporation for any proposed new association, together with proposed bylaws, shall be presented to the auditor of state and by him submitted to the state executive council and if it finds that they are in conformity with the law and based upon a plan equitable in all respects to its members, and further finds from the best sources at its command and from such investigation as it may deem necessary ,that the proposed incorporators are persons of good character, ability and responsibility; *that a reasonable necessity exists for such new institution in the community to be served;* that it can be established and operated without undue injury to existing local thrift and home financing institutions and that the proposed name of such institution is not similar to that of any other association operating in the same community and is not misleading or deceitful, the executive council shall attach thereto its certificate of approval and enter its approval of record, and thereupon such articles of incorporation shall be recorded in the office of the secretary of state and in the office of the recorder of the county in which the association's *principal*

place of business is to be situated and then be filed in the office of the auditor of state who shall at that time issue a certificate authorizing the association to transact business as a building and loan or savings and loan association. * * *

g. Amendments or renewed and substituted articles of incorporation may be approved from time to time at any regular or special meeting of stockholders and shall be submitted for approval and processed in the same general manner as outlined in subsection 3 of this section." (Emphasis supplied)

"534.19 General powers. Every such association shall have the following general powers:

1. General corporate power. To sue and be sued, complain and defend in any court of law or equity; to purchase, acquire, hold, and convey real and personal estate consistent with its objects and powers . . ."

"534.36 Consolidation with other companies. Any building and loan or savings and loan association organized under the laws of this state shall have authority to consolidate its business and membership with one or more building and loan or savings and loan associations of the same class organized under the laws of this state and to transfer to such association or associations its entire assets subject to its existing liabilities."

An examination of these statutes, together with Section 534.3(3)(b) which refers to "principal place of business" and Sections 534.4, 534.6, 534.18, 534.61 and 534.68 which refer to "home office" indicates that the statute is unclear as to whether the legislature contemplated that branch offices were to be operated or not. Certainly no section comparable to Section 528.51 of the 1962 Code of Iowa, whereby branch bank operations are prohibited, is found.

In 1962 this office noted that there was no express authority under Chapter 534 for a savings and loan association to have the power to establish a branch. It was held that the Executive Council, under Section 534.3(3) could not approve articles with the power to establish branches reserved to the savings and loan association. That opinion noted the use in the statute of "principal place of business" and felt that the language of itself did not include the power to establish branch offices. The pattern established by Chapter 534 is that a savings and loan institution can only be established or operated where it is shown to the Executive Council that "a reasonable necessity exists for such new institution in the community to be served; that it can be established and operated without undue injury to existing local thrift and home financing institutions and that the proposed name of such institution is not similar to that of any other association . . ." The above quote is from Section 534.3(3)(a). It is clear that a savings and loan association cannot, by itself, establish a branch with approval of the Executive Council.

While recognizing the governing effect of Chapter 534, it is important to note the general powers of corporation as first set out in the Iowa case of *Home Insurance Co. v. North Western Packet Co.*, 32 Iowa 223, 7 Am. Rep. 183 (1871), and noted in the case of *Iowa Federation of Women's Clubs v. Dilley*, 234 Iowa 417, 12 N.W. 2d 815 (1944), as follows:

"It is a well-recognized rule that a corporation has the implied and incidental powers to do whatever is reasonably necessary to effectuate the powers expressly granted and to accomplish the purposes for which it was formed, if such acts are not prohibited by law or its charter. 13 Am. Jur. 772, section 740."

The general rule is that a corporation may locate and carry on its business at any place within the state in which it is chartered in the absence of any limitation expressed in its charter or in the applicable state statutes. Fletcher, Cyclopedia of Private Corporations, 1950 Ed., Vol. 6, Section 2498, page 287.

One of the first cases in regard to your question was the case of *North Arlington National Bank v. Kearney Federal Savings & Loan Assn.*, 187 F. 2d 564 (1951), where the U. S. Court of Appeals in the Third Circuit decided a case under the Federal Savings and Loan Act which is the Home Owners' Loan Act of 1933. The case involved a branch office which was approved by the Federal Home Owners' Bank Board. The Home Owners' Loan Act did not give explicit authority to the Board to permit branch offices for associations under its jurisdiction. The court made the following statement:

> "Strong argument for the existence of the power on the part of the Board to establish a branch office for an association we think comes from other words of the statute. *The Board is authorized in Section 1464(a) to issue charters for Federal savings and loan associations 'giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.'* Here is an area where the Board is given the duty and authority to make policy." (Emphasis supplied)

This is certainly similar to the language cited above from Section 534.3(3)(a).

In 1960 the case of *Southwestern Savings & Loan Assn. of Houston v. Falkner*, 160 Tex. 417, 331 S.W. 2d 917, was decided by the Supreme Court of Texas. That court stated that even though there was no provision in the Texas statutes which expressly authorized building and loan associations to establish and operate branch offices, such authority may reasonably be implied from the Texas statutes.

Previous to this case, on March 11, 1957, the Attorney General of Texas issued an official opinion wherein he held that a state-chartered building and loan association may maintain an office separate and apart from its home office, but that each separate office must be approved by the Texas Department of Banking.

The most recent and most pertinent case is the case of *Austin Savings & Loan Assn. v. First National Bank of Stewartville*, 270 Minn. 208, 133 N.W. 2d 505 (1965). The Minnesota Supreme Court held that statutes which authorized a state-chartered savings and loan association to conduct business in counties immediately contiguous to their *principal place of business* and where the statute empowered those associations with rights and privileges incidental to or necessary to the accomplishment of their objectives, they may establish branch offices in the county contiguous to their principal place of business without express authority. This Minnesota case seems quite persuasive even though Iowa does not have a statute comparable to the Minnesota statute which gives savings and loan associations incidental powers to accomplish their objectives. The court discusses the use of the words "principal place of business" and "home office" which are found throughout the Iowa statute. The following is language from Page 213 of the Minnesota reports:

> "The use of the term 'principal place of business' in §§51.01, subd. 3, and 51.36 and the term 'home office' in §51.36, when considered in conjunction with §51.34, subd. 1, under which state-chartered savings, building, and loan associations are empowered with such other rights and privileges as may be incidental to or necessary for the accomplishment of their objectives and purposes, would appear

to clearly manifest both a legislative intent that such associations might establish branch offices incidental to their operations in contiguous counties as well as in the area within a 100-mile radius from their home offices and legislative authorization for so doing."

This Minnesota case was also preceded by an Attorney General's opinion issued by the Minnesota Attorney General in January of 1963, where it was held that a savings and loan association could amend its bylaws to include other offices in addition to its principal place of business and then seek approval of the Commissioner of Banks.

Besides the Texas and Minnesota Attorneys General issuing official opinions in this field, the Attorney General of Kansas issued a similar official opinion on this question on May 31, 1962. The Kansas statutes were similar to the Iowa statutes with no prohibition against branch offices and considerable reference to "home office" together with references to a "regular lending area" which is defined in Iowa Code Section 534.2(5) and is set out above. The Kansas Attorney General held that to prohibit branch facilities would (1) render that statutory reference to "home office" meaningless; (2) block the necessary objects and purposes when the "regular lending area" was statutorily defined to include the county of the home office and adjoining counties (which is the same as the Iowa definition); and (3) defeat the policy behind the statute which is to prohibit thrift institutions in which people may invest their funds and also to provide for the financing of homes.

Applying these cases and their general theory to Iowa Code Chapter 534, it appears from the plain meaning of the phrases contained therein that branch offices are contemplated by this chapter and may be approved by the Executive Council. We find throughout the Iowa Code the use of the words "home office" and "principal place of business" which were persuasive to the Minnesota Court. We find local standards in Section 534.3(3)(a) which are similar to the standards which the federal courts feel were persuasive in allowing branches under the federal statutes which contained no express powers or prohibitions as to branching. In addition, it should be noted that Section 534.36 contemplates consolidation of savings and loan associations. Inasmuch as the statute is silent as to restricting this to one location, it would appear that two locations, one home office and one branch, are contemplated. Section 534.2(5) also contains language which is in regard to "regular lending area" which was the situation which the Minnesota Supreme Court felt was persuasive in holding under similar statutes that branching was permissible. The identical language was persuasive to the Kansas Attorney General. While the Iowa statute does not contain any incidental powers such as Minnesota, it does provide in Section 534.19 that savings and loan associations may acquire real estate consistent with their objects and powers. There is certainly no limitation there as to the number of facilities that a savings and loan association may own.

The policy of Chapter 534 must be considered. That policy is to promote thrift and home ownership and to provide cooperative and mutual plans for saving money and investing money so saved in home loans. The promotion of savings and of home financing certainly will not be impeded by allowing branch offices. However, these branches must of necessity be subject to the prior approval of the Executive Council.

Our prior opinion at 62 OAG 77 properly held that the Executive Council could not approve articles of incorporation which include the power to branch. However, I see no prohibition of branching in Chapter 534 and it is my opinion that the statute impliedly contains the power to branch subject to approval of the Executive Council in regard to the conditions set forth in Section 534.3(3)(a). This can be accomplished in the original application or by amendments which are pro-

vided for in Section 534.3(3)(g) which is quoted above. The Iowa court in *Brady v. Mattern*, 125 Iowa 158, 100 N.W. 358 (1904) made the following statement:

> "We see no reason why the Legislature cannot authorize the Executive Council to determine whether the plan and methods in accordance with which the building and loan business is to be conducted by any particular association are fair, reasonable, and in accordance with public policy . . ."

The above still is a fair statement of the purpose and intent of Chapter 534 whereby branching of savings and loan associations may be permitted within the framework of Chapter 534 when Executive Council approval must be obtained and the requirements of Section 534.3(3)(a) are met.

Therefore, it is my opinion that savings and loan associations may have branch offices subject to the approval of the Executive Council.

15.25

STATE OFFICERS AND DEPARTMENTS: Department of Public Instruction; Elementary-Secondary Education Act of 1965, Church and State questions—Article I, Sec. 3, Iowa Constitution; §343.8, 1962 Code of Iowa; Chap. 83, Acts of the 61st G.A. Title I of the Elementary-Secondary Education Act of 1965 does not violate Article I. Section 3 of the Iowa Constitution nor 343.8 of the Iowa Code. Chapter 83, Acts of the 61st G.A. allows any public agency to enter into agreements with private agencies for joint cooperative action. School districts may provide non-instructional public school teachers and equipment to private school buildings to instruct pupils there. Chapter 285 of the Code does not allow the transportation of pupils from private school premises to public school premises.

April 14, 1966

Mr. Paul F. Johnston
Superintendent of Public Instruction
L O C A L

Dear Mr. Johnston:

Your recent request as to whether Iowa may participate in the Elementary-Secondary Education Act of 1965 to the extent contemplated by that federal act presents three problems that will be discussed therein.

They are:

1. Does the Iowa Constitution prohibit Iowa's participation?
2. Does Iowa law (statutory) prohibit it; and
3. Does Iowa law (statutory) permit the participation?

I

Article 1, Section 3 of the Iowa Constitution states as follows:

"Religion Sec. 3. The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

This provision of our constitution has been construed and explained in the past by our Supreme Court. *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202 (1918) is an example. There the court held that the carrying on with public school funds of a public school in conjunction with and as a part of a parochial school, devoted in part to sectarian teaching is wholly illegal. However, the court did construe the Iowa constitutional provision under consideration here. It said at pages 705 and 706 of Iowa Reports:

> ". . . He has *no right*, however, to *ask* that the *state*, through *its school system, shall employ its power or authority*, or *expend money acquired by public taxation, in training his children religiously*. The same principles which assure to him the right of perfect freedom of conscience in matters of church affiliation and religious belief, *forbid the employment of public authority of any kind to impose his views upon his neighbor or his neighbor's children*. For like reasons, while withholding from the state all authority in matters of religion, it is no less important that *those* who are *employed in public stations*, and especially in public schools, *do not make use of the advantages of their position to teach or promote their peculiar religious notions*. To guard against this abuse, most of our states have enacted constitutional and statutory provisions, forbidding religious exercises and religious teaching in all public schools, and all use or appropriations of public funds in support of sectarian institutions. These provisions have varied somewhat in form of expression, but their clear purpose and intent, when construed in the light of our history and development as a people, are, for the most part, quite similar. In this state the Constitution (Article 1, Section 3) forbids the establishment by law of any religion or interference with the free exercise thereof, and all taxation for ecclesiastical support . . ." (Emphasis supplied)

Thus, we see that the thrust of this constitutional provision is to prohibit the *state* from expending public funds to train children religiously. I would also add that the state must not use state funds to maintain a minister or a ministry.

But what is contemplated by Title I of the Elementary-Secondary Education Act of 1965 that is under consideration here? It is the helping of children who are handicapped in speech, reading, walking, seeing, hearing and other remedial welfare projects. *Religion* is not contemplated nor is the aid of any religion contemplated by the Elementary-Secondary Education Act of 1965. In fact, it is expressly prohibited. See *Guidelines*, pages 24 and 25, supra. There will be no "training (his) children religiously" by noninstructional public school teachers.

The quoted language in *Knowlton*, supra, is not new. In 1870, almost 100 years ago, Judge Taft in an unpublished opinion stated the ideal of the American people as to religious freedom as one of:

> "Absolute equality before the law, of all religious opinions and sects . . . The government is neutral, and while protecting all, it *prefers* none, and it *disparages* none." (Emphasis supplied) Superior Court of Cincinnati, February 1870.

The opinion is not reported but is published under the title, *The Bible in the Common Schools*. (Cincinnati: Robert Clarke & Co., 1870). Judge Taft's views, expressed in dissent, prevailed on appeal. See *Board of Education of Cincinnati v. Minor*, 23 Ohio St. 211, 253 (1872).

However, before we continue our discussion of this "neutrality" of Iowa's constitutional provision under scrutiny, it is well to remind ourselves that the United States Constitution's First Amendment mandate that "Congress shall make no law respecting an establishment of re-

ligion, or prohibiting the free exercise thereof" has been made wholly applicable to the states by the 14th Amendment. In 1940 *Cantwell v Connecticut,* 310 U. S. 296 held:

> " 'The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws'."
>
> * * *
>
> "In a series of cases since Cantwell the [U. S. Supreme] Court has repeatedly reaffirmed that doctrine . . . *Murdock v. Commonwealth of Pennsylvania,* 319 U. S. 105, 108, 63 S. Ct. 870, 872, 87 L. Ed. 1292 (1943); *Everson v. Board of Education,* 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947); Illinois ex rel. *McCollum v. Board of Education,* 333 U. S. 203, 210-211, 68 S. Ct. 461, 464-465, 92 L. Ed. 649 (1948); *Zorach v. Clauson,* 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952); *McGowan v. Maryland,* 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Torcaso v. Watkins,* 367 U. S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961); and *Engel v. Vitale,* 370 U. S. 421, 428, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962)."

The "Neutrality" Doctrine has been written on in many U. S. Supreme Court cases, and we adopt them here. The latest occurred in 1963. In two landmark cases, *School District of Abington Township, Pennsylvania, et al v. Edward Lewis Schempp et al,* and *William J. Murray III et al v. John N. Curlett, et al,* 83 Sup. Ct. Reporter 1560, at page 1571 of that decision, the U. S. Supreme Court determined the criterion by which legislation involving the First Amendment is to be tested by these words:

> "The test may be stated as follows: *what are the purpose and the primary effect of the enactment?* If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education,* supra; *McGowan v. Maryland,* supra." (Emphasis supplied)

Thus, we must determine factually whether the placing of non-instructional public school instructors into a non-public school for the purpose of aiding children in their capacity to speak, walk, read, see and hear meets the test of neutrality.

We believe that it does. The purpose of the placement of non-instructional teachers in non-public schools is to aid children, their *need,* and the effect is to bring these educationally deprived children up to the educational standard of other less deprived children. Thus, both the purpose and effect is secular—not sectarian. It is to meet the requirements of their *need* and *not* the requirements *of their creed.* Furthermore, the Elementary-Secondary Education Act of 1965 applies to *all* children between the ages of five and seventeen regardless of whether they are in a public school, non-public school *or* no school at all. It is based solely on the child benefit theory. *Cochran v. Board of Education,* 281 U. S. 370 (1929) and *Everson v. Board of Education,* 330 U. S. 1, 17 (1946).

An excellent explanation of the child benefit theory is found in *Cochran v. Board of Education,* supra, where Chief Justice Hughes stated:

"One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.

* * *

". . . The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. *Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.*" (Emphasis supplied)

Also see *Chance et al v. Mississippi State Textbook Rating and Purchasing Board, et al,* 200 So. 706 (1941).

We point out that Title 1 of the Elementary-Secondary Education Act of 1965 designates a program to aid and benefit "educationally deprived children." The aid is given regardless of whether that child attends public, non-public or no school at all. The act does not authorize funds for the payment of salaries of private school teachers. It does not authorize the purchase of materials or equipment or the construction of facilities for private schools. It does not authorize direct grants or benefits to private schools. The responsibility for identifying areas of concentration and designing projects rests wholly with the public educational agency, and services provided for educationally deprived children *must* be designed to benefit the child rather than the school they attend. We point out that the teachers employed by the public school district will be non-instructional teachers who will be providing special services of a therapeutic, remedial, welfare, guidance, counseling or services of a similar nature. They may provide these services or arrangements only when such are not normally provided by the private school, and of course these services or arrangements must be designed to meet the special educational needs of educationally deprived children. See the report of the Committee on Labor and Public Welfare of the U. S. Senate on the Elementary-Secondary Education Act of 1965 (H.R. 2362) and also a pamphlet entitled *Guidelines,* Special Programs for Educationally Deprived Children, distributed by the U. S. Department of Health, Education and Welfare.

We define "non-instructional teachers" to be those who will render specialized educational services designed to meet the special educational needs of educationally deprived children (such as therapeutic, remedial, or welfare services).

In furnishing shelter for its needy, food for its hungry, care for its insane, and protection against corruption of the morals of our youth, the State recognizes them with a gaze which throws out of focus any credal background. "Even as there is no religious qualification in its public servants for office, there should be no religious disqualification in its private citizens for privileges available to a class to which they belong." *Chance v. Mississippi,* supra.

Further, that:

"The State is under duty to ignore the child's creed, but not its need . . . The State which allows the pupil to subscribe to any religi-

ous creed should not, because of his exercise of this right, proscribe him from benefits common to all." *Chance v. Mississippi,* supra. (Emphasis applied)

We hold therefore that the placement of non-instructional public school teachers in a non-public school pursuant to Title 1 of the Elementary-Secondary Education Act of 1965 does *not* violate Article 1, Section 3, of the Iowa Constitution.

II.

We now turn to the question of whether Iowa law prohibits what Title I of the Elementary-Secondary Education Act of 1965 contemplates.

Statutory Section 343.8 provides:

"343.8 Money for sectarian purposes. Public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control."

This section proscribes corporate authorities of any county, township, city and town (Section 368A.16) from providing *state* or *city* funds to a sectarian institution.

The words "Public Money" cannot be construed to include federal funds. It is elementary that a state cannot pass laws that prohibit the federal government from spending funds as it sees fit. Only the U. S. Congress can pass laws affecting federal spending. Would one sensibly argue that the Iowa legislature could prohibit the federal government from spending funds to support our military action in Viet Nam? Obviously, this would be chaotic and sheer idiocy. Would one seriously argue that the Iowa legislature could prohibit the federal government from loaning an Iowa resident funds which that student would use to pay tuition at Loras College, a sectarian institution? The answer must be no.

The fact is, all Iowa can do in relation to federal funds is accept or reject them; and if they are accepted, Iowa must use those funds in a manner consistent with the Federal Act which makes the funds available.

The funds available to Iowa under the Elementary-Secondary Education Act of 1965 are federal funds—all of them. *They do not at any time become state funds.* They do not change their character because of their location; neither do they change their character because they are handled by someone other than a federal employee. The misappropriation of these funds would be a federal crime. See *U. S. ex rel Marcus v. Hess,* 317 U. S. 537 (1943). *Madden v. U. S.,* 80 F. 2d 672 (1935).

Furthermore, the state is nothing more than a conduit for the federal funds. It receives and disburses them. The State Department of Public Instruction must use the *obligation* basis of accounting in maintaining fiscal records and reporting. The same is true for the local agency. The reports should include:

"The amount approved for the project.

"The total of all Federal funds received for the project during the fiscal year, including the amount for summer programs if such were approved under the project.

"The total amount of all obligations incurred under the project.

"The total of all funds disbursed under the project, broken down by expenditure accounts in the project budget showing the Federal funds disbursed under Title I.

"Outstanding unliquidated obligations.

"Title I Federal funds on hand.

"Federal funds received but not needed—cash balance." *Guidelines*, supra, pages 7 and 8.

Furthermore, staff members from the Office of Education will examine the fiscal aspects of State Administration. Regular annual audits will also be conducted by the Department of Health, Education and Welfare Office of audits on a substantially current basis, and, of course, audits will also be conducted by the U. S. General Accounting Office. The audits will be used to verify the following:

"Funds disbursed by the local agency were received and properly accounted for.

"Payments reported by the local agency were actually made to the vendors, contractors, and employees and that they conform to applicable laws and regulations, including procurement requirements.

"Refunds, discounts, etc., were properly credited to the specific programs as reductions of the gross expenditures.

"Payments are supported by adequate evidence of the delivery of goods or performance of services.

"Obligations reported were actually incurred during the fiscal year or project period for which the project was approved and, upon liquidation, were properly adjusted.

"The same item is not reported as an expenditure for 2 fiscal years, e.g., obligation in one year and payment in another.

"All obligations claimed for federally supported Title I projects were made for properly approved projects and are easily identifiable with these projects.

"State and local agency rules applicable to equipment records and control are followed.

"Costs, such as salaries, travel, etc., are correctly prorated.

"The sources of funds expended for federally reimbursed projects were stated correctly, and that the same expenditures were not claimed under more than one Federal program.

"Unexpended or unearned Federal funds advanced or overpaid were returned promptly or otherwise correctly accounted for.

"If the local agency is on a fiscal year different from the Federal fiscal year, the audit report reflects outstanding obligations as of June 30 or August 31, whichever the case may be, in sufficient detail to permit identification of subsequent payments. Such obligations should be compared with reports submitted by the local agency to the State agency." *Guidelines*, supra, page 10.

Thus, it is plain that the State Department of Public Instruction is nothing more than a conduit for Federal funds.

Furthermore, Title I permits the use of monies for *secular* and *not* sectarian purposes. See the answer to question I contained herein.

We conclude then that state law does *not* prohibit the use of *Federal funds* for providing Title I benefits to all children, regardless of where they may be attending school.

III.

We now turn to the last question:

Does Iowa law permit what Title I of the Elementary-Secondary Education Act of 1965 requires?

Chapter 226, Acts of the 61st General Assembly, establishes standards for all the schools of Iowa, parochial as well as public. It was enacted in the spring of 1965. Included within that act is authority for "shared time" classes (dual enrollment). It was the Legislature's intent to qualify public school districts to avail themselves of funds allocated to states by Title I of the Elementary-Secondary Education Act of 1965. Chapter 226, it is true, does not anticipate or grant authority for all of the arrangements under which school districts might choose to implement specific programs. The nature of these programs, moreover, is for local school districts to determine in accordance with local needs within, of course, the limitations spelled out in Title I. Obviously the sending of a public school teacher or other employee to serve educationally deprived children in a private school presupposes an agreement between the school district and the private agency as to when, where, how and who. Chapter 83, Acts of the 61st General Assembly, authorized such agreements. Section 4 of that chapter reads as follows:

> "Sec. 4. Any public agency of this state may enter into an agreement with one (1) or more public *or private agencies* for joint or cooperative action pursuant to the provisions of this Act, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force." (Emphasis supplied)

Section 2 of the Act defines "public agency" to include "any political subdivision of this state." A school district is a political subdivision of the state.

Under an agreement as contemplated by the foregoing act, a public school district may send an instructor, therapist, counselor or other employee to the private school. It may not do so as a general proposition: it may do so only within the confines of what is contemplated by Title I. The teacher or other specialist must be employed by the school district and paid by the school district. As to that segment of his time expended in a Title I program, the school district must pay him in federal funds. The teacher or specialist sent to the private school must be insulated from direction by, or responsibility to, private school authorities. Title I funds are meant to aid youths of all creeds and sects whatsoever, and not religious institutions as such.

No funds may be paid to or funneled to individuals through a sectarian institution, nor may any agreement be made between the public agency and private agency—a sectarian institution, in this context—which favors the institution itself. Any arrangement that fails to assist solely and exclusively the children themselves, individually or collectively, is barred.

I also call your attention to Section 116.1(i) of *Rules and Regulations, Title 45—Public Welfare,* Federal Register Vol. 30, Number 178, which states:

"(i) 'Educationally deprived children' includes handicapped children."

Thus, Title I of the Elementary-Secondary Education Act of 1965 includes handicapped children as educationally deprived children. Does Iowa have a statute that allows the placement of teachers in a handicapped children's home for the purpose of aiding that child or wherever that child may be located? We believe the answer to be in the affirmative. See Sections 281.1, 281.2 and 281.3 of the 1962 Code of Iowa, as amended.

"281.1 Division of education created. There is created within the state department of public instruction a division of special education for the promotion, direction, and supervision of education for children requiring special education in the schools under the supervision and control of the department. The state superintendent, subject to the approval of the state board of public instruction, is authorized to organize the division and to employ the necessary qualified personnel to carry out the provisions of this chapter."

"281.2 Definition. The term 'children requiring special education' shall be interpreted for the purpose of this chapter as either of the following:

1. Children under twenty-one years of age who are crippled or have defective sight or are hard of hearing or have an impediment in speech or heart disease or tuberculosis, or who by reason of physical defects cannot attend the regular public school classes with normal children.

2. Children under twenty-one years who are certified to be emotionally maladjusted or intellectually incapable of profiting from ordinary instructional methods.

"Provided, that the term 'children requiring special education' shall include children under five years of age but shall not include the blind, the deaf, and other physically and mentally handicapped children attending special schools or institutions provided by the state."

"281.3 Powers and duties of state department. The division of special education, subject to the approval of the state board, shall have the following duties and powers:

1. To aid in the organization of special schools, classes and instructional facilities for children requiring special education, and to supervise the system of special education for children requiring special education.

2. To establish standards for teachers to be employed under the provisions of this chapter, to give examinations for teachers to qualify to teach children requiring special education, and to issue certificates to teachers who qualify for such teaching.

3. To adopt plans for equitable reimbursement, in whole or in part, for costs of carrying out programs of special instruction, as provided for herein.

4. To adopt plans for the establishment and maintenance of day classes, schools, home instruction, and other methods of special education for children requiring special education.

5. To purchase and otherwise acquire special equipment, appliances, and other aids for use in special education, and to loan or lease same under such rules and regulations as the department may prescribe.

6. To prescribe courses of study, and curricula for special schools, special classes and special instruction of children requiring special education, including physical and psychological examinations, and to prescribe minimum requirements for children requiring special education to be admitted to any such special schools, classes or instruction.

7. To provide for certification by competent medical and psychological authorities of the eligibility of children requiring special education for admission to, or discharge from, special schools, classes or instruction.

8. To initiate the establishment of classes for children requiring special education in hospitals and convalescent homes, in co-operation with the management thereof and local school districts or county boards of education.

9. To co-operate with school districts or county boards of education in arranging for any child requiring special education to attend school in a district other than the one in which he resides when there is no available special school, class, or instruction in the districts in which he resides.

10. To co-operate with existing agencies such as the the state department of social welfare, the state department of public health, the state school for the deaf, the Iowa braille and sight-saving school, the state tuberculosis sanatorium, the children's hospitals, or other agencies concerned with the welfare and health of children requiring special education in the co-ordination of their educational activities for such children.

11. To investigate and study the needs, methods and costs of special education for children requiring special education.

12. To make rules and regulations to carry out the foregoing powers and duties."

These sections presuppose that the State Department of Public Instruction has supervision and control over schools. Is that true as to non-public schools? We believe that to be true because of Chapter 226, Acts of the 61st General Assembly. Thus, we are of the opinion that Iowa law permits what Title I requires.

CONCLUSION

Based on the foregoing, we are disposed to answer your three questions in the following manner:

1. May a public school district send public school teachers to private school buildings to instruct pupils there?

Answer: Yes

2. May it send equipment?

Answer: Yes

3. Title I of the Elementary-Secondary Education Act of 1965 provides for helping "educationally deprived" children. Grants will be made by the federal government through the State Department of Public Instruction to local public school districts to broaden and strengthen elementary and secondary school programs. May a public school district transport educationally deprived private school pupils on public school buses between private and public schools, if the costs of doing so are paid by the Federal government under the 1965 Act?

Answer: No. Chapter 285, 1962 Code of Iowa, grants authority to school districts to provide transportation for pupils from home to school and return, within limitations, and for transportation to special events. It does not provide authority to transport pupils between private and public schools, or for collecting children from various points within a school district for transportation to the single school within a perhaps large district at which a Title I project exists.

However, Title I of the Elementary-Secondary Education Act requires the development of all projects proposed under it in cooperation with the public or nonprofit agency responsible for a community action program where there is such a program promulgated under the Economic Opportunity Act of 1964. Federal funds are available under the latter act to pay the costs of transporting pupils enrolled in Title I projects. Local school districts may enter into agreements with community action agencies which contemplate the transportation, under contracts effected by community action agencies with independent transportation facilities, of Title I enrollees where necessary in circumstances outside of those provided for by Chapter 285, 1962 Code of Iowa. No State moneys may be used for this transportation.

15.26

STATE OFFICERS AND DEPARTMENTS: Offices of Economic Opportunity, Transportation of Children to Summer "Head Start" and Elementary and Secondary Act projects—§§285.1, 285.11(2), 285.11(7), 285.11(9) and 321.494, 1962 Code of Iowa. A school district will not be liable for injury to children being transported privately to summer "Head Start" projects. A public school transportation system may not be used to transport pupils to "Head Start" classes, unless the children are enrolled in the public schools and they are "properly designated pupils" under Chapter 285.

April 14, 1966

Mr. C. Edwin Gilmour, Director
Iowa Office of Economic Opportunity
State Capitol
L O C A L

Dear Mr. Gilmour:

This is in response to your request for an opinion on three questions, which you phrased as follows:

"(1) Is a district school system, as distinguished from a county school system, liable for any accidents to children being transported to and from summer education programs by volunteer 'transportation aides', i.e., private citizens transporting children in their own automobiles, at no expense to the school system? Such a practice was widespread in Iowa last Summer, with any number of volunteers picking up pre-school children for a Head Start Program and returning them home afterwards, and it is anticipated that limited funds may make such a practice common again this Summer. Should not a volunteer driver, in agreeing to transport *particular* children *regularly*, be considered as inviting these children to be his guests, and, hence, have his automobile liability insurance give protection to these children in case of an accident?

"(2) Is there any change in liability if the situation above described is exactly the same, save that the summer educational program is being administered by a county Board of Education, as distinguished from a district school system?

"(3) If children are transported to a Head Start Summer program, financed under the Economic Opportunity Act of 1964, by a bus owned and operated by a district school system, may transportation on this bus also be made available to children of the same family participating in a summer educational project financed under the Elementary and Secondary Education Act of 1965, and administered by the same school district?"

Your first question contemplates transportation which is privately arranged. It is assumed that the public school district is not a participant in those arrangements, contractually or otherwise. Whether the children regularly transported by the volunteer driver are "guests" may be determinative of the driver's liability to those children for harm to them caused by his own negligence. Section 321.494, 1962 Code of Iowa provides:

"321.494 Guest statute. The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle."

The intent of the "guest statute," enunciated by the Iowa Supreme Court (*Hardwick v. Bublitz*, 253 Iowa 49, 111 N.W. 2d 309 [1961]) is to prevent recovery for ordinary negligence by a passenger who has accepted the hospitality of an owner or driver, and to allow damages to guests only when they are injured as a result of gross negligence or intoxicated operation of the vehicle. What motivates the undertaking is considered. *Nielsen v. Kohlstedt*, 254 Iowa 470, 117 N.W. 2d 900 (1962). If the transportation confers a benefit only on the passengers, they probably are guests within the meaning of the statute. But if the transportation tends to promote the mutual interests of both him who extends the invitation and those who accept, they are not guests. *Bodaken v. Logan*, 254 Iowa 230, 117 N.W. 2d 470 (1962). The question is one of fact as well as law. A public school district itself will not be liable in respect to the transportation involved, if it is private transportation, privately arranged. It must necessarily be that. If the school district assumes a role in transportation, it can do so only in conformance with what Chapter 285, 1962 Code of Iowa, requires. It is not purporting to assume such a role here. Liability, therefore, is a private matter, too. Volunteer drivers should determine what their own policies cover—that is, whether the policies prospectively protect the child-passengers and to what extent. The question of the driver's liability to the children, as we said, may be a question of their status, of whether they are guests. We cannot say as a matter of law that they are or are not. The "guest" question is in any case irrelevant to the question of school district liability if the school district is not providing the transportation.

The answer to your second question is necessarily the same, since what is contemplated is presumably private transportation, privately arranged.

In respect to your third question, a school district may provide transportation to pupils only in conformance with Chapter 285, 1962 Code of Iowa. It has no authority to provide transportation in circumstances other than those in which state aid is available. A school district is a creature of statute: it possesses only the authority delegated to it

by the legislature. *Lincoln Township School District of Dallas County v. Redfield Consolidated School District,* 226 Iowa 298, 283 N.W. 881 (1939). It follows, *a fortiori,* that it may not do what it has no express or necessarily implied power to do simply because the costs of doing it are met out of the federal treasury.

Section 285.11(9) states:

"9. Bus routes shall be established only to give service to properly designated pupils."

Who are "properly designated pupils?" They are those "whose homes are beyond the statutory walking distance to the nearest appropriate school." *Section 285.11(2).* The distances are fixed by Section 285.1.

The "Head Start" programs under the Economic Opportunity Act of 1964 and programs under the Elementary and Secondary Education Act of 1965 are federal programs, federally funded. Transportation of pupils under these programs differs from what is provided for by Chapter 285, as, for example, in the collection of children during the summertime from widely-separated homes and their transportation to perhaps the single school in a district where the "Head Start" program is offered children not otherwise enrolled in a public school are eligible and may not be excluded. Yet it is only children enrolled in a public school to whom transportation may be provided by the public school district. *Silver Lake Consolidated School District v. Parker,* 238 Iowa 984, 29 N.W. 2d 214, (1947).

There exists a very important distinction between the Economic Opportunity Act and the Elementary and Secondary Education Act as it relates to the transportation of pupils. The "Head Start" programs of the Economic Opportunity Act are operated in Iowa under the auspices of private nonprofit corporations and not local school boards. Children attending "Head Start" projects are not entitled to transportation by virtue of their participation in the said projects because Chapter 285 authorizes transportation to and from school for only those pupils under the jurisdiction of the local school boards. *Section 285.11(7).* On the subject of pupil transportation the Supreme Court of Iowa has stated:

"We believe that the school laws of the state concern only public schools, unless otherwise expressly indicated, and do and can apply only to the schools within the purview of the school statutes, or *under the control or jurisdiction of the school officials, and that this would apply to transportation.*

"While we believe that *all of the school laws refer to the public schools only,* except where otherwise expressly indicated, we are satisfied also that the *power of local boards to provide for transportation is limited strictly to those who attend public schools.*" (Emphasis added). *Silver Lake Consolidated School District v. Parker,* 238 Iowa 984, 993, 29 N.W. 2d 214, 219 (1947).

In accord with the above, it is the opinion of this office that local school boards are without express or implied authority to transport children attending "Head Start" projects or to rent their buses to the nonprofit agencies operating the same. *Section 285.11(7).*

Projects under the Elementary and Secondary Education Act are to be distinguished from the above because of the nature of their administration. Projects of the Elementary and Secondary Education Act are proposed and administered by the local school boards to meet the "special educational needs of the educationally deprived children in a [school district] . . . ." *30 Fed. Reg. 11811 (1965).* The said projects provided federal funds whereby the local school boards can

extend their services in certain areas. However, the federally funded projects are adjuncts of the local board's over-all program. Therefore, the pupils so enrolled would be "properly designated pupils" and eligible for transportation under Chapter 285, if they otherwise qualify under Section 285.1.

Consequent on the foregoing, it is the opinion of this office that a public school transportation system may not be used to transport pupils to "Head Start" classes, unless the children are enrolled in the public schools and they are "properly designated pupils" under Chapter 285, 1962 Code of Iowa.

This means that in most, if not all "Head Start" projects, transportation, if provided at all, must be provided independently of a public school district. A "community action agency" probably may contract itself for transportation, however, and pay the costs from Economic Opportunity funds. It probably may do the same in respect to Education Act programs, since the Elementary and Secondary Education Act of 1965 not only contemplates but requires the cooperation of "community action agencies" in projects promulgated under Title I of the 1965 Act.

15.27

STATE OFFICERS: Board of Control. Commitment of OMVI Offenders—Chapter 278, Acts of the 61st G.A., an amendment to §321.281, 1962 Code of Iowa, Sections 337.11, 337.12, and 321.281 of the 1962 Code of Iowa, as amended. The county is financially responsible for the legal costs and expenses incident to the commitment of a person to a state hospital in accordance with the provision of 321.281 of the 1962 Code of Iowa, as amended.

July 5, 1966

Mr. Russell L. Wilson
Chairman, Board of Control
State Office Building
L O C A L

Dear Mr. Wilson:

This is in response to your recent letter wherein you stated the following:

> "We would appreciate an opinion as to whether the county or state is financially responsible for the legal costs and expenses attending the taking into custody, care, investigation, and commitment of a person to a state hospital in accordance with the provisions of Section 321.281 as amended."

Section 321.281 of the 1962 Code of Iowa, as amended, pertains to the offense of operating a motor vehicle while intoxicated. Upon conviction, punishment may be accorded by way of fine and/or imprisonment, depending upon whether it is the first, second, or third offense. If it is the second offense, the OMVI offender may be fined or sentenced to the penitentiary or both.

Chapter 278, Acts of the 61st G.A., which was an amendment to Section 321.281 of the 1962 Code of Iowa, affords an additional method of handling second and subsequent offenders. Chapter 278 of the 61st G.A., pertinent to your request, reads as follows:

> "In lieu of, or prior to imposition of, the punishment above described for second offense, third offense and each offense there-

after, the court upon hearing may commit the defendant for treatment of alcoholism to any hospital or institution in Iowa providing such treatment. The court may prescribe the length of time for such treatment or it may be left to the discretion of the hospital to which the person is committed. A person committed under this Act shall be considered a state patient."

It is within the Court's discretion to commit an OMVI offender to a hospital or institution for treatment of alcoholism. If that discretion is exercised, he is then to be considered a state patient, but not until he has been committed. If a convicted OMVI offender is sentenced to the penitentiary, upon incarceration, he is maintained at state expense. See Section 218.1 of the 1962 Code of Iowa as amended. The costs and expenses incident to that commitment are the responsibility of the committing county pursuant to Sections 337.11 and 337.12 of the 1962 Code of Iowa. Sections 337.11 (14) and 337.12 read as follows, respectively:

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

337.11(14). *"For conveying one or more persons to any state, county, or private institution by order of court,* or commission, he shall be allowed his necessary expenses, for himself and such person or persons, and in addition thereto, forty cents per hour for the time necessarily employed in going to and from such institution, same to be charged and accounted for as fees. Should the sheriff need any assistance in taking any person to any such institution, the same shall be furnished at the expense of the county.

377.12 Costs—when payable by county. "In all criminal cases where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice as far as their knowledge extends, and verified by the affidavit of the sheriff, *the fees allowed by law* in such cases shall be audited by the county auditor and paid out of the county treasury. The board of supervisors may pay same out of the general fund or the court fund." (Emphasis supplied)

Pursuant to Section 321.281 of the 1962 Code of Iowa, as amended, the Court may order an OMVI offender, after conviction, to either a hospital or institution for treatment of alcoholism or to a penitentiary for punishment. Insofar as the question of responsibility for costs and expenses incident to the commitment of that person is concerned, we see no difference whether the Court's order designates a state hospital or the penitentiary. The authority for the proposition that the expenses and costs of the commitment of an OMVI offender to a penitentiary are to be charged to the county, should also apply in this case. Therefore, it is the opinion of this office that the county is financially responsible for the legal costs and expenses in respect to the commitment of a person to a state hospital in accordance with the provision of Section 321.281 of the 1962 Code of Iowa as amended.

15.28

STATE OFFICERS AND DEPARTMENTS: **State Auditor—duty to audit certain funds**—Chapters 11 and 473A, 1962 Code of Iowa, as amended, Chapter 110, Acts of the 60th G.A. The Auditor of State has the duty to audit the funds of the Metropolitan Planning Commission created by the 60th G.A., including such funds in the hands of a unit of such commission. Its funds are public money and the power to possess funds necessarily implies the power to keep the money in a bank for safekeeping and to keep records.

July 26, 1966

Mr. Carroll E. Worlan, Director
Iowa Development Commission
250 Jewett Building
Des Moines, Iowa 50309

Dear Mr. Worlan:

Reference is herein made to your letter of May 13 in which you submitted the following:

"(1) Should the funds of a Metropolitan or Regional Planning Commission, formed under Chapter 473A, State Code of Iowa, be audited by the State Auditor?

"(2) If one member agency of the Metropolitan or Regional Planning Commission acts as Treasurer, will the funds received and dispersed by the Metropolitan or Regional Planning Commission be audited as a part of the records of that member agency?

"(3) Should the Metropolitan or Regional Planning Commission set up their own record-keeping system, including a Treasurer, a finance committee, a bank account and publish a financial report each year?"

The foregoing questions involve the status of public money, the title to which is in the Metropolitan Planning Commission, a statutory unit. In answer to your first question, audits of public money are the duty of the Auditor of State. Pursuant to the provisions of Chapter 11, 1962 Code of Iowa, the Auditor of State has the duty of auditing the state, all state offices and departments, and all persons receiving or expending state funds.

This is the requirement of Sections 11.1 and 11.2 which read as follows:

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

"11.2 Annual settlements. The auditor of state shall annually, and oftener if deemed necessary, make a full settlement between the state and all state officers and departments and all persons receiving or expending state funds, and shall annually make a complete audit of the books and accounts of every department of the state.

Provided, that the accounts, records, and documents of the treasury department shall be audited daily.

Provided further, that a preliminary audit of the educational institutions and the state fair board shall be made periodically, at least quarterly, to check the monthly reports submitted to the comptroller's office as required by Section 8.6, subsection 7 and that a final audit of such state agencies shall be made at the close of each fiscal year."

The Metropolitan Planning Commission, created by Chapter 110, Acts of the 60th General Assembly, has the statutory authority whereby it "may accept and expend . . . state . . . funds."

Section 11.1, quoted above, provides a definition of state departments for which Section 11.2, also quoted above, requires an audit. The Metropolitan Planning Commission does not receive an appropriation

from the 60th or 61st General Assemblies and it may be argued that an appropriation is necessary for the Metropolitan Planning Commission to be a "department." The language of Section 11.1 does not require an appropriation. It provides that a "department" may be "any authority *charged by law* with the official responsibility for the expenditure of public money of the state . . . ."

It is my opinion that, if the Commission has statutory authority to accept and expend state funds, it is a department under Section 11.1 whether it has received an appropriation from the legislature or not as it has received the authority to expend state money. Further, it is my opinion that, since the Metropolitan Planning Commission is an organization generally composed of public bodies that are audited by the State Auditor, and since the funds of the Metropolitan Planning Commission are generally public funds, it is only proper that these Metropolitan Planning Commission funds be audited and, accordingly, that Section 11.1 be construed to include this commission.

Insofar as your second question is concerned, I am of the opinion that money belonging to the Commission must remain in the hands of the Commission and would not be audited as the money of the unit designated as Treasurer of the Commission.

With regard to your third question, it is to be observed that, as previously stated, the money available to the Commission according to Section 3 of Chapter 110, Acts of the 60th General Assembly, is public money. With regard to this the annotation in 104 A.L.R., at page 622, states:

> "Directions for the care of public funds in the control of boards or officials are provided in nearly all jurisdictions, generally by statutes which specifically regulate such control. * * *
>
> "Boards and officials in control of public funds are governed by strict regulations in regard to depositories and deposits of such funds therein or in banks other than designated depositories, and they have generally been held to be without power to deviate from the letter of the governing statutes except where such action appeared, in the eyes of the court, to be justified by the necessities of the occasion."

This foregoing rule has been followed by the State of Iowa which, by Chapter 453 of the 1962 Code of Iowa, has legislated meticulously with respect to the funds of counties, cities, towns, school corporations, township clerks, county officers and the treasurer of state. However, Chapter 110, Acts of the 60th General Assembly, creating the Metropolitan Planning Commission, does not, nor does any other statute, provide regulations for the safe control of the moneys of the Commission. There is no authority in such chapter for the existnce of the office of treasurer thereof, nor any designation of the person who may act as such. While authority to expend the money of the Commission is given, there is no designation of the place of deposit of such funds, nor are there provisions made to designate such a depository. These are omissions of the legislature, who gave the Metropolitan Planning Commission express power to have money, but neglected to spell out who should handle the money and how it should be handled.

The only powers agencies have are those expressly granted by the legislature and those necessarily or fairly implied or incident to the powers expressly granted. 1 American Jurisprudence 2d, Administrative Law, Section 44.

From the express power to possess money, it can be fairly implied that a Metropolitan Planning Commission may place the money in

a bank for safekeeping and may establish a record keeping system to keep track of the money. However, it does not follow that a treasurer or finance committee are necessary or would have any legal standing or that a yearly financial report would have any legal standing.

15.29

STATE OFFICERS AND DEPARTMENTS: Secretary of Agriculture; Commercial Feed Report—§198.14, 1966 Code of Iowa. The Secretary of Agriculture is given discretionary powers concerning the substance of the commercial feed bulletin. The legislature requested that the Secretary publish a "resume" and placed restrictions upon the disclosure of the operation of any person.

August 8, 1966

Mr. Kenneth E. Owen
Secretary of Agriculture
State House
LOCAL

Dear Mr. Owen:

This is in reply to your recent letter in which you requested a clarification of the meaning of Section 198.14 of the 1966 Code of Iowa which reads as follows:

"198.14 Commercial feed bulletin. The secretary shall publish at least annually, in such form as determined after a public hearing to which all Iowa feed registrants and other interested parties are invited, a resume of the analytical results obtained including information concerning the sales of commercial feeds, together with such data on their production and use as he may consider advisable, and a resume of the results of the analyses of official samples of commercial feeds sold within the state as compared with the analyses guaranteed in the registration and on the label; provided, however, that the information concerning production and use of commercial feeds shall not disclose the operation of any person."

The section in question is derived from the Uniform State Feed Bill as prepared and approved by the Association of American Feed Manufacturers Association. The pertinent section from the uniform bill reads as follows:

"The . . . shall publish at least annually, in such forms as he may deem proper, information concerning the sales of commercial feeds, together with such data on their production and use as he may consider advisable, and a report of the results of the analyses of official samples of commercial feeds sold within the State as compared with the analyses guaranteed in the registration and on the label; provided, however, that the information concerning production and use of commercial feeds shall not disclose the operations of any person."

The Iowa act departs from this model uniform act in several regards. Among these are the following more important departures:

1. The Iowa act states that there shall be a prior public hearing to determine the form of the publication.

2. The Iowa statute states ". . . a resume of the analytical results . . . including information concerning sales . . . together with such data on their production and use . . . and a resume of the results or analyses of official samples. . . ."

In any comparison between the uniform act and the Iowa Code provision, the Iowa rule of statutory interpretation can be applied: Where there is a change of language of a statute there is usually an indication of an intent to change its meaning. *City of Ottumwa v. Taylor*, 251 Iowa 618, 102 N.W. 2d 376 (1960).

The changes effected by the Iowa legislature do indicate an intent to change the meaning of the statute from that evidenced in the uniform act. In the first regard it may be summarily stated that the legislature has indicated that the form of the publication is not to be arbitrary, but rather is to be determined by the Secretary after a public hearing.

The second regard in which the legislature has chosen to change the uniform law is to require the publication of an analytical resume, including information concerning sales, together with such data on their production and use, and a resume of the analysis of the results of official samples, provided the information concerning production and use shall not disclose the operation of any person. This language requires a further explanation.

An "analysis" is "a scientific ascertainment of the elements and their proportion contained in a substance submitted for examination by chemical processes." *Shivers v. Newton*, 45 N.J.L. 469, 475. It is difficult to see how ". . . a resume of the analytical results obtained . . . ." would not equate to ". . . a resume of the results of the analyses of official samples. . . ." It is my opinion, therefore, that these two phrases may be construed together.

Another important consideration concerns the use of the term "resume" in lieu of the more specific term "report" as employed in the uniform act. By definition, a "resume" is a summing up, a condensed statement, abridgement, summary, while a "report" means a detailed account or statement, an audit, a formal account of the results of an investigation or an analysis of operation and progress. It is demonstrated that the legislature has rejected a more all-inclusive term for a more restrictive one, thereby displaying an intent that the Secretary not be required to publish all of his analytical findings. Rather, for publication in the bulletin he need only combine his findings and present them in a summary fashion. If this may be accomplished in a satisfactory manner by rejecting the inclusion of the specific names of the companies involved, then, in my opinion, such may be done. There is no reason to presume that the legislature intended the opposite interpretation. The same conclusion is reached in regard to a listing of the sales of the various companies, i.e., there is no reason to believe that the legislature desired a naming of the companies in the listing of the sales of these companies.

Of course, in regard to "data on their production and use," a specific naming of the companies in the resume is prohibited by reason of the phrase ". . . provided, however, that the information concerning production and use of commercial feeds shall not disclose the operation of any person."

Inasmuch as the word "production" "may designate as well a thing produced as the operation of producing" (*Durand v. Green*, 60 F. 392, 395), this strengthens the above contention that the specific company names and the specific company product need not be specifically mentioned anywhere in the resume. In fact, it appears that such may very well be prohibited. (Note: However, nothing in this opinion or in the specific act should be construed as prohibiting the Department of Agriculture from revealing, if it wishes, the official results of the laboratory analyses, including the names or the names of the specific companies when requested to do so by an interested party, and a reference in the said official resume that such may be procured is, in my opinion, also not prohibited.)

In summary, it is my opinion that, while the Secretary of Agriculture is given discretionary powers concerning the substance of the resume, he is prohibited from disclosing the name of any company in such regard as previously discussed and I would advise that he act on the presumption that he is so prohibited.

15.30

STATE OFFICERS AND DEPARTMENTS: **Budget law and transfer of funds**—Chapter 24, 1966 Code of Iowa, §§24.9 and 24.22, 1966 Code of Iowa. Where a simple transfer of funds is requested which would not increase the budget appropriation, the transfer may be accomplished, if it is a fund that may be transferred, and if approved by the state board as required by Section 24.22, without the necessity of publication of notice and a public hearing as required under §24.9.

August 26, 1966

Mr. Lorne R. Worthington
Auditor of State
State House
LOCAL

Dear Mr. Worthington:

You have submitted the following question:

"In instances where a simple transfer of funds is requested that would not increase the budgeted appropriations, can this transfer be completed by simply obtaining the proper approval of the State Appeal Board?"

Chapter 24 of the 1966 Code of Iowa is entitled Local Budget Law. After its definitions, it sets out in Section 24.3 the requirements of the local budget and what the estimates must contain. Section 24.3 reads as follows:

"No municipality shall certify or levy in any year any tax on property subject to taxation unless and until the following estimates have been made, filed, and considered, as hereinafter provided:

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

2. The amount proposed to be raised by taxation.

3. The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing, which in the case of school districts shall be the period of twelve months beginning on the first day of July of the current calendar year.

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

The next sections discuss the estimates and Section 24.9 provides for the filing of estimates and amendments to estimates. This section reads as follows:

"Each municipality shall file with the secretary or clerk thereof the estimates required to be made in sections 24.3 to 24.8, inclusive, at least twenty days before the date fixed by law for certifying the same to the levying board and shall forthwith fix a date for a hearing thereon, and shall publish such estimates and any

annual levies previously authorized as provided in section 76.2, with a notice of the time when and the place where such hearing shall be held at least ten days before the hearing. Provided that in rural independent districts, school townships, and municipalities of less than two hundred population such estimates and the notice of hearing thereon shall be posted in three public places in the district in lieu of publication.

"For a county, such publication shall be in the official newspapers thereof.

"For any other municipality such publication shall be in a newspaper published therein, if any, if not, then in a newspaper of general circulation therein.

"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 appropriated 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. Such amendments to budget estimates may be considered and adopted at any time during the fiscal year covered by the budget sought to be amended, by filing such amendments and upon publishing the same and giving notice of the public hearing thereon in the manner required in this section. Within twenty days of the decision or order of the certifying or levying board, such proposed amendment of the budget shall be subject to protest, hearing on such protest, appeal to the state appeal board and review by such body, all in accordance with the provisions of sections 24.27 to 24.32, inclusive, so far as applicable. Amendments to budget estimates accepted or issued under the provisions of this section shall not be considered as within the provisions of section 24.14."

The fourth paragraph of Section 24.9 is very important in regard to the question you have submitted. The legislature has contemplated that an amendment to budget estimates whereby budgets may be amended and increased may be made when two circumstances arise. The first is in the addition of "cash balances on hand at the close of the preceding fiscal year and which cash balances had not been estimated and appropriated for expenditure during the fiscal year of the budget sought to be amended. . . ." The second is "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. . . ." Later, the fourth paragraph requires publication and notice of public hearing in regard to these amendments.

Section 24.9 was originally enacted by the Extra Session of the 40th General Assembly in 1923 as Chapter 4, Section 66. A substantial change occurred in 1953 when the fourth paragraph was added.

Section 24.7 of the 1966 Code of Iowa also provides for an additional estimate whereby supplemental estimates may be made when they are authorized by law. Notice is required, as under Section 24.9. Section 24.7 was enacted also by the 40th General Assembly in 1923 and this section was interpreted by the Attorney General at 32 OAG 262, along with what was then Section 24.9, where the Attorney

General stated that whenever items in an estimate were increased, public hearing was necessary. The Attorney General indicated that the purpose of publication of the estimate and hearing thereon was to apprise the taxpayers of the proposed expenditures for the ensuing year and give them an opportunity to be heard in connection therewith. Even before the addition of Section 24.9 in 1953, we had amendments to budgets which required public hearing.

Chapter 24 contains two sections in regard to transfer of funds and they are Sections 24.21 and 24.22 which read as follows:

"24.21 Transfer of inactive funds. Subject to the provisions of any law relating to municipalities, when the necessity for maintaining any fund of the municipality has ceased to exist, and a balance remains in said fund, the certifying board or levying board, as the case may be, shall so declare by resolution, and upon such declaration, such balance shall forthwith be transferred to the fund or funds of the municipality designated by such board, unless other provisions have been made in creating such fund in which such balance remains."

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

It appears that your question deals with Section 24.22 and with whether the provisions of publication and hearing of Section 24.9 would apply to a transfer under Section 24.22.

The history of Section 24.22 is important. This section was originally enacted as Section 78 of Chapter 4, Acts of the Extra Session of the 40th General Assembly, in 1923. There have been few changes in this section which, when originally enacted, read as follows:

"Sec. 78. Return of funds transferred. Subject to the provisions of law relating to municipalities, and upon the approval of the director, it shall be lawful to transfer money from one fund of a municipality to another fund thereof, and the certifying board or levying board, as the case may be, shall provide that money so transferred must be returned to the fund from which it was transferred as soon as may be, provided, that it shall not be necessary to return to the emergency fund or to any other fund no longer required, any moneys transferred therefrom to any other fund."

This law has been uniformly interpreted by the Attorney General as calling only for the approval of the director of the budget which position is now held by the State Board. Such opinions are contained at 26 OAG 112, 28 OAG 336, 32 OAG 3, 36 OAG 654, 38 OAG 721, and 48 OAG 219.

The Iowa Supreme Court cases have never called for publication or public hearing under Section 24.22. The Supreme Court of Iowa in

the case of *Mathewson v. City of Shenandoah*, 233 Iowa 1368, 11 N.W. 2d 571 (1943), made the following statement at page 1370 of the Iowa Reports:

> "Code chapter 24, Local Budget Law, pertains to tax levies by municipalities. Code section 373, as amended [chapter 59, section 1, Acts of the Fiftieth General Assembly], provides that with the approval of the state board first secured, a municipality may include in its estimate an estimate for an emergency fund, with power to levy a tax therefor at a rate of not more than one mill, and that moneys may be transferred therefrom to any other fund of the municipality for the purpose of meeting deficiencies in any such fund arising from any cause, after written approval of the state board, upon request by two thirds of the governing body of said municipality."

Prior to that, the court had decided the case of *State v. Manning*, 220 Iowa 525, 259 N.W. 213 (1935), and the court held that the then Section 24.22 was constitutional as it did not give the director of the budget an unconstitutional grant of legislative power. The Iowa Supreme Court in that case, in its lengthy decision, analyzed the budget law and further stated that notice and public hearing was only necessary in regard to budget estimates.

An analysis of Chapter 24 indicates that the legislature was discussing estimates, which it defines to constitute certain matters under Section 24.3, and it specifically provides the instances where amendments to the budgets are necessary under Sections 24.7 and 24.9 and, under those instances, publication and notice are required. Transfers of funds are not budget estimates and do not amend the budget as contemplated by Sections 24.7 and 24.9, and it cannot be said that the purposes of the general budget law in forming budgets should be applied. The basic reasons for notice and hearing are to advise the taxpayer of what expenditures are going to be made which will result in his rate of taxation. A transfer of funds does not affect the taxpayers and it has never been contemplated by the Iowa Attorney General, except in one instance, or by the courts, that notice and hearing be required under Section 24.22.

An opinion issued by this office on January 31, 1962, and cited as 62 OAG 36, is hereby withdrawn.

The answer to your question is that where a simple transfer of funds is requested which would not increase the budget appropriation, the transfer may be accomplished, if it is a fund that may be transferred, and if approved by the state board as required by Section 24.22, without the necessity of publication of notice and a public hearing as required under Section 24.9.

15.31

STATE OFFICERS AND DEPARTMENTS: Comptroller; payment of claims for commitments—§321.281—§§25.1 and 321.281, 1966 Code of Iowa. §321.281 does not contain an appropriation whereby claims of private treatment centers may be paid by the State. A valid claim may be presented under §25.1 to the State Appeal Board.

September 21, 1966

Mr. Marvin R. Selden, Jr.
State Comptroller
State House
LOCAL

Dear Mr. Selden:

Reference is made to your recent letter requesting an opinion as follows:

"Chapter 278. Laws of the Sixty First General Assembly reads as follows: SECTION 1. 'Section three hundred twenty-one point two hundred eighty-one (321.281), Code 1962, is hereby amended by inserting after the first paragraph of said section after the period in line twenty-three (23) the following:

" 'In lieu of, or prior to imposition of, the punishment above described for second offense, third offense and each offense thereafter, the court upon hearing may commit the defendant for treatment of alcoholism to any hospital or institution in Iowa providing such treatment. The court may prescribe the length of time for such treatment or it may be left to the discretion of the hospital to which the person is committed. A person committed under this Act shall be considered a state patient.'

"We respectfully request an opinion regarding the following questions: (1) Do the provisions of the above referred to Chapter provide for the payment of claims by the State to private or any other qualified treatment center for persons committed in keeping with the provisions of the Chapter?

"(2) If the answer to one (1) above is in the affirmative, upon whose certification are the claims honored?

"(3) If the answer to one (1) above is in the affirmative, what funds are to be used in the payment of said claims?"

In reply thereto I advise that there is no express provision in the foregoing statute for the payment of claims by the State arising under the provisions of Chapter 278, Acts of the 61st General Assembly. It is fundamental that no money may be withdrawn from the treasury except in consesuence of an appropriation made by the legislature. Iowa Constitution, Article III, Section 24. This section was construed by the Attorney General in 1936 in an opinion cited as 36 OAG 682 which contains the following language at page 685:

" 'No money shall be drawn from the treasury but in consequence of appropriations made by law.'

"The word 'appropriations,' as contained in Section 24 of Article III of the State constitution, is not limited to the specific appropriations of the General Assembly which are grouped together and designated as the 'appropriation acts.' The Legislature makes more appropriations than those that are specifically contained and grouped together in the so-called 'appropriation acts.'

"This rule of law was first determined by the Supreme Court of Iowa in the case of *Prime v. McCarthy*, 92 Iowa 569. In this case the question raised was as to the authority of the State Treasurer to pay the expenses incurred by the national guard that was called into service by the Governor to prevent the invasion of 'Kelly's Army.' A general statute authorized the governor to call out the guard on such occasions and specifically provided for the per diem pay of the soldiers while on duty. It did not provide for

their subsistence. There was no appropriation act to specifically cover and pay for such an expense. The Supreme Court, in this case, held that the statutes authorizing the auditing and certifying of such expenses by the Executive Council, and the general law authorizing the Governor to call out the guard, constituted an appropriation within the meaning of the above constitutional provision."

What constitutes an appropriation is stated in the case of *Prime v. McCarthy,* 92 Iowa 569, 61 N.W. 220 (1894), as follows:

"Appropriations, as applied to the general fund in the treasury, may perhaps be defined to be authority from the legislature, given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the state."

Also note 42 American Jurisprudence, Public Administrative Law, page 479.

Applying these rules to Chapter 278, there is nothing in the statute whereby it can be said that a money appropriation has been made. However, it is obvious that there is legislative intent that the state furnish the care necessary to all those committed to state institutions. To furnish this care may not necessarily require an additional appropriation of money. This is the obvious intent of the legislature which used the words "state patient." When a person is committed to a state mental health institute under Section 321.281, there is no expenditure of money, but merely a billing by the mental health institute under the jurisdiction of the Board of Control of the State of Iowa.

Where the problem arises is where there is a commitment by the court to a private hospital providing treatment for alcoholics. The legislature has made no appropriation of money to take care of this situation.

However, the legislature has provided for instances where there is state liability and there is no appropriation under Chapter 25 of the 1966 Code of Iowa. Section 25.1 applies and reads as follows:

"When a claim is filed or made against the state, on which in the judgment of the comptroller the state would be liable except for the fact of its sovereignty or which has no appropriation available for its payment, the comptroller shall deliver said claim to the state appeal board. The state appeal board shall make a record of the receipt of said claim and forthwith deliver same to the special assistant attorney general for claims who shall, with a view to determining the merits and legality thereof, fully investigate said claim, including the facts upon which it is based and report in duplicate his findings and conclusions of law to the state appeal board."

This provides for the filing of a claim where there is liability and no appropriation available with the State Appeal Board. It is the opinion of this office that private institutions may properly file legitimate claims with the State Appeal Board for their care of persons committed to them by the court under Section 321.281.

In addition, there is a possibility of funds available under Chapter 123A of the 1966 Code of Iowa which is entitled "Alcoholism Study Commission," if the facts of the commitment would fit the limited grants of authority as contained in Chapter 123A.

Therefore, in reply to your first question, it is my opinion that the provisions of Section 321.281 do not contain an appropriation whereby claims of private treatment centers may be paid by the state; however, a claim may be presented to the State Appeal Board under Chapter 25 and there is a slight possibility of the availability of funds under Chapter 123A. In view of the foregoing answer, there is no necessity of answering your second and third questions.

15.32

Conservation Commission, prison industries—Sections 246.18, 246.21, 246.23, 246.24, 1962 Code of Iowa. The Conservation Commission has no authority to give to the Highway Commission picnic tables manufactured by convict labor detached by the Board of Control for service in the State parks. (Scism to Conservation Comm. 2/18/65) #65-2-20

15.33

Authority of Executive Council—Chapter 19 and §306.16, 1962 Code of Iowa. Administrative body of specific powers and has no authority to hold administrative hearing on the question of approval of sale by the Highway Commission; Statutory authority for such hearing is lacking. (Strauss to Wellman, Sec. Executive Council, 3/8/65) #65-3-4

15.34

Department of Agriculture. Feed law—Acts of the 60th G.A., Chapter 137. Feed distributors do not have to register as manufacturers, nor does a manufacturer have to have a manufacturer's license after he discontinues manufacturing a feed. Labeling requirements of the feed law only require the name and address of the distributor, and do not require the manufacturer's name if the manufacturer is not the distributor. (McCarthy to Owen, Sec. of Agriculture, 3/17/65) #65-3-13

15.35

Executive Council and Personnel Director—§8.5 (6), 1962 Code of Iowa. The grants of power to the Executive Council and the Personnel Director as contained in §8.5 (6), are valid and if the rules authorized therein are proper, state departments cannot disregard action taken by the Personnel Director authorized by said rules. (McCarthy to R. E. Conner, State Personnel Director, 4/20/65) #65-4-7

15.36

General Assembly—Legislation by Reference—Legislation by reference is an approved form thereof but such legislation includes other statutes only. House Files 606 and 607 are both legislation by adopting by reference compilations which have no official status. (Strauss to Fischer, 5/3/65) #65-5-2

15.37

Department of Agriculture, Weights and Measures—215.1, 215.2, 215.4, and 215.18, 1962 Code of Iowa. The Department of Agriculture is not required by statute to make a six-month inspection of scales upon request of the owner. The Department has statutory authority to charge fees for inspections made more than once a year. The Department cannot make rules to charge fees to cover total costs of additional tests

as the subject matter is already covered by statute. (McCarthy to Boyd, Chief Weights and Measures Division, Dept. of Agriculture, 6/29/65) #65-6-12

15.38

State Auditor, Assistant Auditor—§§11.7, 11.8, 64.1, 64.2 and 64.6, 1962 Code of Iowa as amended. Assistants to State Auditors are not "public officers" who are required by statute to give bond as a condition of employment. (McCarthy to Lorne Worthington, State Auditor, 6/29/65) #65-6-9

15.39

Industrial Loan Companies Act—S.F. 132 Acts of the 61st G.A. The Auditor of State may require completion of the license application forms sent out on May 28, 1965. The effective date of a license granted to existing loan companies is May 27, 1965. The act requires that a fifty dollar license fee be submitted by existing loan companies for the period May 27, 1965, to December, 1965. (Clarke to Lorne R. Worthington, State Auditor, 7/6/65) #65-7-2

15.40

Corporations: Trade Names—Industrial Loan Companies Act. §§2, 4 and 25 of S. F. 132 61st G.A., §§496A.7, 547.1, 1962 Code of Iowa as amended. The Industrial Loan Companies Act does not prohibit the use of trade names by loan corporations. The auditor may not promulgate a regulation prohibiting use of trade names. A corporation may use a different trade name at each of its various business locations. (Clarke, Jr., to Worthington, 7/7/65) #65-7-8

15.41

Board of Control-Mental Health Services—§§229.42, 230.20, 1962 Code of Iowa. 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. Paying the cost of hospitalization of voluntary mental patients is the obligation of the county of legal settlement. (Strauss to Selden, State Comptroller, 8/27/65) #65-9-1

15.42

State Board of Medical Examiners—§21 of Chapter 122, Acts of the 60th G.A., 1963. The Board of Medical Examiners may not issue a temporary license to the same individual upon the expiration date of a previously issued temporary license. (Bernstein to Saf, Exec. Sec. Iowa State Board of Medical Examiners, 11/22/65) #65-11-9

15.43

Board of Architectural Examiners, Architectural Documents—Chapters 114 and 118, 1962 Code of Iowa, as amended. Architectural documents of Architects duly registered under Chapter 118, 1962 Code of Iowa, as amended, are not required to meet the requirements of Chapter 114, 1962 Code of Iowa, as amended, before an agency of the State of Iowa or subdivision or municipal corporation of the State of Iowa may record or approve such documents. (Clarke to Board of Architectural Examiners, 12/16/65) #65-12-10

15.44

Insurance; Securities—§§502.3(4), 502.3(6), 502.4, 502.5 and 502.11, 1962 Code of Iowa. An Issuer whose only function is issuing stock which is an exempt security under §502.4 is not a "dealer" within the meaning of §502.11 (McCarthy to Timmons, 12/30/65) #66-1-1

15.45

Department of Health; licensing and qualifications of physical therapists—§5, Chapter 167, Acts of 61st G.A. The term "office" as used in §5(1) may refer to a doctor's office or a private office of a physical therapist. (Bernstein to Long, Commissioner of Public Health, 3/17/66) #66-3-10

15.46

Military Code and related matters: Accrual of state vacation time by National Guard technicians—Section 79.1, 1962 Code of Iowa, as amended. National Guard technicians may not be credited with their periods of service as technicians in connection with accrual of annual vacation under §79.1 nor may their period of service as technicians be considered in connection with salary eligibility under the provisions of the classification and compensation plan promulgated by the State Personnel Director. (Brick to May, 3/25/66) #66-3-16

15.47

Civil Rights: National Guard—§§29.2 and 29.6, 1962 Code of Iowa; §2, Chapter 73, Acts of the 60th G.A.; §§1 and 2, Chapter 86, and §§2(2) and 2(5), Chapter 121, Acts of the 61st G.A. The Iowa National Guard is an agency of the State, therefore, it comes within the statutory definition of "person." (Gentry to Thomas, Executive Director, Iowa Civil Rights Commission. 4/21/66) #66-4-8

15.48

Peace officers' retirement system—§97A.6(8)(f), 1962 Code of Iowa. The monthly benefits mentioned under §97A.6(8)(f), 1962 Code of Iowa, are to be paid regardless of the type of benefit plan selected by the widow. (Clarke to Hayes, Deputy Commissioner Department of Publice Safety. 7/22/66) #66-7-6

15.49

State legislator may not also hold office of township trustee—§22, Article 111, Iowa Constitution; §359.46, 1966 Code of Iowa. When a public office provides compensation, the office is a "lucrative office" under §22, Article 111 of the Iowa Constitution. (McCarthy to Rasmussen, 8/26/66) #66-8-16

15.50

Department of Health; Length of postgraduate study requirements to renew optometric license—§154.6, 1966 Code of Iowa. Approximately 6 clock hours constitute a day of educational programs and approximately 12 clock hours constitute 2 days in a statute whereby an applicant for renewal of an optometric license is required to attend an educational program or clinic for a period of at least 2 days. (McCarthy to Long, M.D., Commissioner of Health. 10/18/66) #66-10-7

CHAPTER 16

TAXATION

STAFF OPINIONS

LETTER OPINIONS

16.1

TAXATION: Real property; exemptions—Section 427.1, 1962 Code of Iowa. Real property devised to State Board of Regents vests immediately upon death of testator and existing real property tax liens merge in the title in the state. Real property taxes subsequently assessed and levied against the property are illegal and must be cancelled.

February 1, 1965

Mr. Ira "Ike" Skinner, Jr.
County Attorney
Buena Vista County
P.O. Box 555
Storm Lake, Iowa

Dear Mr. Skinner:

Pursuant to a request of your County Assessor, you have submitted a question relative to real estate taxes for the years 1959, 1960, and 1961 on the following property:

"The Northwest Quarter (NW¼) of Section Twenty-nine (29), Township Ninety (90) North, Range Thirty-five (35), Newell Township, Buena Vista County, Iowa."

George M. Allee devised this farm

"to the State of Iowa, through its board of education for the use and benefit of the Agriculture Experiment Station of the Iowa State College of Agricultural and Mechanic Arts, in trust however for the following conditions:

"Said property shall be known as the George M. Allee Experimental Farm and shall be held, operated and maintained and used for the development and maintenance and used for the development and improvement of various agriculture products but especially for the breeding and making of a Hybred Corn suitable to be grown in the Newell Community and all like areas. * *

The testator died May 31, 1958. The estate was opened June 4, 1958, and closed January 8, 1962. While no deed was ever issued, the State Board of Regents (formerly State Board of Education) accepted this gift on September 12, 1958. The Executive Council approved on October 27, 1958. A Change of Title Certificate issued by the Buena Vista County District Court Clerk was recorded with the Secretary of State's Office June 26, 1962. Real estate taxes were levied for the years 1959, 1960, and 1961.

The Iowa State University of Science and Technology, formerly the Iowa State College of Agriculture and Mechanic Arts, Ames, Iowa, falls within the exemption granted under Section 427.1(1), which provides:

"427.1 Exemption. The following classes of property *shall not be taxed:*

"1. Federal and State property. The property of the United States and this state, including state university, university of science and technology, and school lands. * * *"

The first question to be considered is whether the real estate devised is subject to tax. The Attorney General has previously considered this general problem in 1938 OAG 692, 1940 OAG 604, 1948 OAG 3, and in a staff opinion to Mr. James W. McGrath, Van Buren County Attorney, dated September 11, 1963. These opinions relate to the problem herein involved, and the reasoning therein should be adopted and followed.

1938 OAG 692 held that lands acquired by the state or its agency after the levy of taxes, but before such taxes are due and payable, is not subject to such tax. Also, if the real estate has not gone to tax sale, the Board of Supervisors should authorize cancellation of such apparent lien. The granting of the exemption to land owned by the state is automatic, i.e., by operation of law.

Since the particular property in question would be tax exempt in the hands of the state, the question arises as to when title vested in the state. Testator, George M. Allee, died on May 31, 1958. The Iowa Supreme Court has consistently held that all estate property vests immediately upon the death of the decedent. *Moore v. Gordon,* 24 Iowa 158 (1867); *In Re Cooper* 229 Iowa 921, 295 N.W. 448 (1940); *Reichard v. Chicago, Burlington & Quincy Railroad Company,* 231 Iowa 563, 1 N.W. 2d 721 (1942); *Palmer v. Evans, Iowa,* 124 N.W. 2d 856 (1963). Iowa State University of Science and Technology was the beneficiary and they were entitled to the exemption.

In *Iowa Wesleyan College v. 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 at page 1240 Iowa 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 the filing of its deed for record. The property was that of the plaintiff, an 'educational institution,' on September 8th. In levying the tax, therefore, the supervisors acted in violation of Section 6944. Its levy was

illegal. If the 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."

We are not aware of any statute or opinion which would require a deed to issue by the executor of the Allee Estate and failure to record would have no bearing on the question as presented here. The Clerk of the Buena Vista County District Court has issued a Certificate Change of Title and the same has been filed with the Secretary of State. It should also have been filed with the Buena Vista County Auditor. Sections 606.14 and 558.66, Code of Iowa, 1962.

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 1958, the property in question was not taxable since title had vested in the state subject to divestment, i.e., rejection by the Board of Regents.

"565.5. Gifts to State institution. Gifts, devises or bequests of property, real or personal, made to a state institution for purposes not inconsistent with the objects of such institution, may be accepted by its governing board. * * *."

Because the property was acquired by the state on May 31, 1958, prior to the date of levy in September, 1958, we are of the opinion that the tax levies for 1959, 1960, and 1961, were illegal under the Iowa Wesleyan College case, supra, and that they should be cancelled by resolution of the Board of Supervisors.

Although there is not direct authority in Iowa on this point, it is our 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 v. Maricopa County*, 38 Ariz. 347, 300 P 175 (1931), wherein the Court held that any tax lien existing upon property acquired by the state merges with the legal title when acquired. Also see *Hoover v. Minidoka County*, 50 Idaho 419, 298 P 366 (1931), where the Idaho Supreme Court held that when the state obtained complete unconditional title to land, the title was freed from any change of taxes, either present or past, and that all such liens on the tax records become null and subject to cancellation.

It is the opinion of this office that upon acquisition of real property by the state, subsequent real property taxes assessed and levied upon that property are illegal and must be cancelled; and real property tax liens in existence against that property become merged with the title in the state.

The proper procedure for effecting the cancellation of these taxes would be by resolution of the Board of Supervisors directing the county Treasurer to cancel the assessments of real estate taxes against the property for the years 1959, 1960, and 1961.

A certified copy of the minutes of the meeting of the Board of Regents of September 12, 1958, and of the Executive Council meeting of October 27, 1958, and a certified copy of the Certificate of Change of Title recorded in the Secretary of State's Office are enclosed for recordation in Buena Vista County to complete the chain of title.

16.2

TAXATION: Easements on real property; exemptions—Sec. 427.1, 1962 Code of Iowa. Grantors of a purported easement to a municipal corporation are not taxable on the real property in respect to which the

purported easement is granted where the interest conveyed is found to be tantamount to a fee; and the grantee is exempt by reason of Statute.

February 12, 1965

Mr. Richard G. Davidson
County Attorney
Page County
Clarinda, Iowa

Dear Mr. Davidson:

Pursuant to a request from the Page County Auditor, you have requested an opinion from this office on the following question:

"Where private owners of real property convey to a municipal corporation what purports to be an easement, conditioned on the establishment within five years of a public park on the land which is the subject matter of the easement, are the owners of the fee taxable on the whole of the fee until such time as the park is in fact established?"

Although the above is ostensibly the question, the real question, it seems to us, is whether what was granted was in law an easement. If it was an easement, then the value of the fee is lessened by the value of the easement—an interest in real property—granted away. The taxes would remain assessable to the owners of the fee.

If, however, an interest tantamount to a fee was granted to the City of Clarinda, then Section 427.1, Code of Iowa, 1962, applies. That section provides:

"427.1 Exemptions. The following classes of property shall not be taxed:

'2. Municipal and military property. The property of a county, township, city, town, school district or military company of the State of Iowa, when devoted to public use and not held for pecuniary profit'."

Appreciating that the question of liability for taxes pivots on a construction of the deed of grant, you have sent us a photostat of that deed, which reads as follows:

"WARRANTY DEED. KNOW ALL MEN BY THESE PRESENTS: That we, Lloyd G. Young and Betty I. Young, husband and wife, of Pottawattamie County, and State of Iowa, in consideration of as hereinafter stated do hereby SELL AND CONVEY unto the said City of Clarinda, Page County, Iowa, easement covering the following described premises, situated in the county of Pottawattamie, and State of Iowa, to-wit:

'Lot Four (4) Block Four (4) of the Subdivision of Part 11 of West Height Manor, in the City of Clarinda, Page County, Iowa.'

"In consideration of the City of Clarinda, Iowa as Grantee, its agents, boards or commissions, developing a public recreation center and park of the above described real estate within a period of five years from the date of this deed, and its improving and maintaining such area for this purpose, easement for park purposes only is given the grantee. It is mutually agreed by the grantors and the grantee that upon discontinuance of use of the real estate above described as a public park, such Easement is cancelled and the land will revert back to the grantors, their heirs or assigns.

"And we covenant with the said City of Clarinda, Iowa that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same; that they are free and clear from all liens and incumbrances whatsoever and we covenant to WARRANT AND DEFEND the title to said premises against the lawful claims of all persons whomsoever.

Signed this 21st day of November A.D. 1964,

/S/ Lloyd G. Young

Lloyd G. Young

/S/ Betty I. Young

Betty I. Young"

In construing a deed, the entire deed must be considered and the intent of the grantor determined as made manifest therein. *Crecelius v. Smeith*, ... , Iowa . . . . . , 125 N.W. 2d 786 (1964), and earlier cases. The modern tendency is to disregard technicalities and treat all uncertainties in conveyances as ambiguities, subject to be cleared up by resort to the parties' intention as gathered from the instrument itself, circumstances attending and leading to its execution, and the subject matter and the parties' situation as of that time. *Switzer v. Pratt*, 237 Iowa 788, 23 N.W. 2d 837 (1946).

We see, first of all, that the deed purports to grant an easement coextensive with the description of the land in respect to which the easement is meant to be an incumbrance. At any moment from the time of the grant, the City of Clarinda may wholly occupy the land described, for the purposes specified, subject only to divestment of its right to occupy on its failure within a five year period to do so, or its failure to maintain a public park in the future after having established such a park within the five year period. Its occupation of the whole thus is potentially into perpetuity. As it was said in *Lee v. Pennsylvania-Reading Seashore Lines*, 20 A.2d 71, 129 N.J. Eq. 530, a grant of the exclusive use of lands, excluding the grantor from all benefits, is a grant of the soil itself, and not of a "mere easement." Because the grantee's rights to exclusivity in the land could be exercised instantly on delivery of the deed, it obtained not a mere "easement" but an interest which, if not a fee, has the basic characteristics of a fee.

"Although imposed upon corporeal property, an easement carries no corporeal interest or right to the land. Not being a possessory interest or an interest which may become possessory, it is not an estate. However, where the whole exclusive use of a thing is obtained, the right becomes an interest, and there is no longer an easement." I Thompson on Real Property 513.

An easement is always distinct from the occupation and enjoyment of the land itself. *Wessels v. Colebank*, 174 111. 618, 51 N.E. 639, 640.

We believe the finding that this was not the grant of a mere easement is consonant with the intent of the parties. In the language of the deed, "It is mutually agreed by the grantors and grantee that upon discontinuance of use of the real estate above described as a public park, such easement is cancelled and the land will revert back to the grantors, their heirs or assigns." The language is that the "land will revert back."

The deed can be construed as conveying a fee interest, subject to determination on the failure of the grantee to establish a park within five years or its subsequent failure to maintain a park, with the possibility of reverter remaining in the grantor.

Our conclusion therefore is that the grantors are not taxable in respect to this land for the reason that the fee rests in the grantee. The grantee is not taxable, either, because exempt under the provision of Section 427.1(2) quoted above.

16.3

TAXATION: Real property tax—exemptions—Sec. 427.1(2), Code, 1962. Renting of part of municipal airport grounds for farming is only incidental to the public use, and thus does not affect tax-exempt status of that property.

March 31, 1965

Mr. Robert N. Merillat
Greene County Attorney
Suite 102, Arcade Building
Jefferson, Iowa

Dear Mr. Merillat:

This is in reply to your letter of March 19, 1965, in which you state as follows:

"The Greene County Board of Supervisors, County Auditor and County Assessor, have requested that I secure an opinion from you as to whether or not the Airport at Jefferson, Iowa, is subject to taxation. My predecessor in office was supposed to have asked for an opinion. He is unable to find a copy of any such request and I do not know whether or not any such request was ever actually made.

"In the event that it was not, I will again set out the facts as I understand them as basis for an opinion.

"The Airport at Jefferson, is owned by the City of Jefferson. The City has paved the Airport to where it is one of the better Airports for Cities of our size.

"Land adjacent to the runways is also owned by the City and rather than to leave the ground idle, the City has caused approximately 77.85 Acres to be put in cultivation and crop.

"The County Assessor, acting under his interpretation of Code Section 427.1, paragraph 2 thereof, held that the 77.85 Acres was subject to taxes and levied a tax against this property. The City has refused to pay the tax.

"It is the contention of the Assessor that this property is subject to tax based upon the last clause of sub-paragraph 2, which states that the property shall be exempt 'When devoted to public use and not held for pecuniary profit.' The City, however, contends that the whole Airport is *held* as an Airport, that the City is not in the farming business, but is simply using so much of the ground as it can profitably, in order to reduce the tax levy. The City, by way of anology contends that its situation is exactly the same as the Greene County Home. The Greene County Home consists of 160 Acres of land on which is located the County Home. The farm ground is all farmed. Historically, it has never been taxed, is not now taxed, and no one wants to place it on the tax rolls.

"Based upon my interpretation of the Code, I would think the entire City Airport would be exempt from tax. I think the City of Jefferson is correct and that it *holds* the real estate for public purposes and not for pecuniary profit."

It must be pointed out that Section 427.1, Code of Iowa, 1962, is an exempting statute and as such must be strictly construed. If there is any doubt upon the question, it must be resolved against the exemption and in favor of the taxation. *National Bank of Burlington vs. Huneke,* 250 Iowa 1030, 98 N.W. 2d 7 (1959), *Trinity Lutheran Church of Des Moines vs. V. L. Browner,* .... Iowa ...., 121 N.W. 2d 131 (1963.)

Sections 427.1(2) and 427.1(21) provide as follows:

"427.1 Exemptions. The following classes of property shall not be taxed:

* * *

"2. Municipal and Military Property. The property of a county, township, city, town, school district, or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit.

* * *

"21. Public Airports. Any lands, the use of which (without charge by or compensation to the holder of the legal title thereto) has been granted to and accepted by the state or any political subdivision thereof for airport or aircraft landing area purposes."

Section 427.1(21) is inapplicable to the instant case, since the land upon which the airport is located is owned by the City of Jefferson rather than by a private owner. As a general rule of law, if there is no express exemption, land of a city or other municipal corporation which is rented out to private parties and from which the city derives a revenue is subject to taxation. 1934 Op. Atty. Gen. 749. Thus, such property, in order to be entitled to a tax exemption, must be exempted by a specific constitutional or statutory provision. Section 427.1(2) specifically provides that "property of a county, township, city, town . . . when devoted to public use and not held for pecuniary profit . . ." shall not be taxed.

Does the fact that the City of Jefferson derives an income from its property deprive the property of its character as property "devoted to public use and not held for pecuniary profit"?

Generally speaking, it can be said that where the primary and principal use to which the property is put is public, the mere fact that an income is incidentally derived from it does not effect its character as property devoted to public use. An Iowa case on this point is *City of Osceola vs. Board of Equalization,* 188 Iowa 278, 176 N.W. 284, (1920), where the Court held that where a charge is made for the use of property, which charge is consistent with and *incidental* to the public use, it does not change the character of the property.

Thus, in Iowa, where the exemption given under the statute is to publicly owned property devoted to a public use, the question must resolve itself upon the use to which the property is put rather than upon ownership. In *Brown vs. City of Sioux City,* 242 Iowa 1196, 1204, 49 N.W. 2d 853 (1951), the Supreme Court stated:

"The trial court held the city's 'farming operation' in connection with the operation of the airbase was 'but an incident thereto.' . . . The defendant chose to conduct its farming operations on the airport property by leasing to tenants. This it had the right to do in furtherance of an economical administration of the municipal airport."

In the instant case, it is our opinion that farming would be incidental to the operation of the airport. Therefore, we must answer your

question by stating that the 77.85 Acres at the airport in the City of Jefferson in cultivation and crop are not subject to property taxation. This opinion is entirely consistent with two previous letter opinions of the Attorney General dated April 10, 1959, and August 5, 1960, copies of which are enclosed.

Consideration should be given to the possible application of Chapter 284, Code of Iowa, 1962, to your situation.

16.4

TAXATION: Real Property—Boards of Review—Sections 428.4, 441.31, 441.33, 441.35, and 441.37, Code of Iowa, 1962. (1) Provision that local board of review include a licensed real estate broker is not mandatory. (2) Board of review must meet on May 1, 1965, because that date is not a Sunday or holiday. (3) Taxpayer's written protest must be filed with local board of review not later than May 20. (4) (a) Local board of review may adjust valuations of individual property only in quadrennial real estate assessing year. (4) (b) State Board of Review has the authority in any year to make percentage adjustments in the valuation of the kinds and classes of property within the jurisdiction of the local assessor. (5) Local Board of Review can make percentage changes in valuation of any part or all of the real estate within its jurisdiction in any year other than the quadrennial real estate assessment year.

April 19, 1965

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

Dear Mr. Tipton:

In your request for an official opinion as to the sessions and duties of local boards of review in the State of Iowa, you state as follows:

"Inasmuch as the year 1965 is a regular real estate assessment and equalization year under provisions of Section 428.4, Code 1962, and as there have been numerous real estate revaluation projects completed in the state within the past four (4) years, this year will be an important and very busy one for local boards of review throughout the state. There very likely will be a sizeable number of protests for many of the boards to consider and act on. It will be important for all such boards to be legally constituted and to carry out their statutory duties in conformity with the laws.

"The Property Tax Division respectfully requests an official opinion that would take into account the facts and questions hereinafter stated.

"Factual Matter:

"The county board of review of 'X' county in the state of Iowa consists of five (5) members, there being a farmer, building contractor, a retired merchant, and an oil station operator presently serving on such board. There is a vacancy in the membership of the board due to the recent death of the member who was a real estate broker. At this time no real estate broker can be found in the county who will consent to serve on such board. The board plans to hold its first regular meeting in the year 1965 on Monday, May 3rd. It anticipates that it will be necessary for it to seek permission of the Iowa State Tax Commission to remain in regular session until at least June 30th, 1965, to complete its work.

"Question 1.

"If the county conference board of 'X' county cannot locate a real estate broker to serve on the county board of review will it be legal for said conference board to appoint a retired druggist, who owns a farm and a commercial building in the county, but is not a real estate broker, and would the said board of review then come within the requirements of Section 441.31, Code 1962?

"Question 2.

"Taking into account the provisions of Section 441.33, Code 1962, and that May 1, 1965, falls on Saturday, and further that most of the local boards of review hold their sessions either in the county court house or city hall, many of which ordinarily are closed on Saturdays, is it a requirement under the law that all local boards of review in the state meet in regular session on Saturday, May 1, 1965, and must they accept written protests on that day, filed in accordance with provisions of Section 441.37?

"Question 3.

"If a local board of review asks for and receives permission from the State Tax Commission to continue in regular session until and including June 30, 1965, to complete its work, can said local board or the State Tax Commission extend the time for property owners or aggrieved taxpayers to file with said board a written protest against their assessment? For example, could such time be extended from May 20th until we'll say May 31st?

"Question 4.

"(a) Does a local board of review in a year for the listing and valuing of real estate, as provided for in Section 428.4, Code 1962, have the authority to make percentage adjustments in the actual and assessed valuations on taxable real and personal property within their jurisdiction by classes and in certain cities and towns or townships, or must its adjustments in valuations be made separately on individual properties? For example, the year 1965 is a regular real estate assessment year under Section 428.4, Code 1962. Can a local board of review in this real estate assessment year make a legal and effective order for the assessed valuations on all taxable boats within their jurisdiction to be increased 15%?; for the assessed valuations of all residential lots and buildings in a particular town increased 10%; for the assessed valuations of all agricultural lands and buildings in a particular township decreased 10%; for the assessed valuations on all commercial lots and buildings throughout the county increased 10% across the board?

"(b) If the answer is 'No' to the above and foregoing question 4-(a), does the State Tax Commission constituting the Iowa State Board of Review have such authority in the year 1965, or in any quadrennial real estate assessment year under Section 428.4, Code 1962, to make such percentage adjustments in the valuations of kinds and classes of property within the jurisdiction of an assessor and local board of review?

"Question 5.

"If the answer to the (a) section of Question 4 herein is 'No', then does a local board of review in any of the years 1966, 1967, 1968, or any year not a regular real estate assessment year under Section 428.4, Code 1962, have the authority, where it finds that the *real estate* in a city or town or township within its jurisdiction has changed in value, to make percentage changes in the valuations of any part or all of the real estate within any such city, town or township, under Section 441.35, Code of 1962?"

The following sections of the Code of Iowa, 1962, are applicable to the problem:

"441.31 Board of review. The chairman of the conference board shall call a meeting by written notice to all of the members thereof for the purpose of appointing a board of review for all assessments made by the assessor. Such board of review may consist of either three members or five members. As nearly as possible this board shall include one licensed real estate broker and one registered architect or person experienced in the building and construction field. In the case of a county, at least one member of the board shall be a farmer. Not more than two members of the board of review shall be the same profession or occupation and no two members of the board of review shall be citizens of the same town or township except in the case of cities having their own assessor in which case the members shall be selected so as to give each of the townships included within the city the highest possible numerical representation. The terms of the members of the board of review shall be for six years, beginning with January 1 of the year following their selection. In boards of review having three members the term of one member of the first board to be appointed shall be for two years, one member for four years and one member for six years. In the case of boards of review having five members, the term of one member of the first board to be appointed shall be for one year, one member for two years, one member for three years, one member for four years and one member for six years."

"441.33 Sessions of board of review. The board of review shall be in session from May 1 to May 31, both inclusive, each year and shall hold as many meetings as are necessary to discharge its duties. On June 1 said board shall return all books, records and papers to the assessor except undisposed of protests and records pertaining thereto. If it has not completed its work prior to June 1, the state tax commission may authorize the board of review to continue in session for such period as is necessary to complete its work, but in no event shall the state tax commission approve a continuance extending beyond August 1. On June 1 or on the final day of any extended session authorized by the state tax commission as herein provided the board of review shall be adjourned until May 1 of the following year. It shall adopt its own rules of procedure, elect its own chairman from its membership, and keep minutes of its meetings. The assessor shall be clerk of said board. It may be reconvened by the state tax commission. All undisposed protests in its hands on August 1 shall be automatically overruled and returned to the assessor together with its other records."

"441.37 Protest of assessment—grounds. Any property owner or aggrieved taxpayer who is dissatisfied with his assessment 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. Said protest shall be in writing and signed by the one protesting or by his duly authorized agent. Taxpayer may have an oral hearing thereon if request therefor in writing is made at the time of filing the protest. Said protest must be to one or more of the following grounds: * * *"

(1) With respect to your first question, it is our opinion that the provision in Section 441.31, Code of Iowa, 1962, which states as follows: "As nearly as possible this board shall include one licensed real estate broker and one registered architect or person experienced in the building and construction field" is a directory rather than a mandatory provision. Thus, in a situation where a licensed real estate broker

cannot be located, the retired druggist can serve so long as he meets the requirements set down in Section 441.31 as to occupation and residence. When the Legislature used the words "as nearly as possible", they used precatory words requiring the board to be composed as near to the statutory ideal as is possible under the circumstances.

(2) In answer to your second question, the words used in Section 441.33, Code of Iowa, 1962, which states in part: "The board of review shall be in session from May 1 to 31, both inclusive, each year . . ." are mandatory words and must be complied with unless there is a legal holiday or a Sunday to prevent compliance. Section 4.1(23), Code of Iowa, 1962, provides for legal holidays. Neither the date May 1 or the day of the week, Saturday, is considered by the statute to be a legal holiday. Thus, it is our opinion that the board must hold a session and accept written protests on May 1, 1965.

(3) In regard to question three, Section 441.37, Code of Iowa, 1962, states in part as follows: "Any property owner or aggrieved taxpayer who is dissatisfied with his assessment 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 assessment." The legislature has made it clear this is the period that the board of review will accept a protest from the property owner or the aggrieved taxpayer. The meaning is clear from the face of the statute. It is our opinion that there must be a definite cut off day. All property owners and aggrieved taxpayers must file their protests not later than May 20, in order that the board can then make a determination prior to its deadline of June 1, or, if extended, not later than August 1.

(4) (a) With reference to your fourth question, it is our opinion that the local board of review has the authority to make adjustments in the actual and assessed valuations on the taxable property within their jurisdiction for the *individual* property only in the real estate assessing year as determined by Section 428.4, Code of Iowa, 1962.

Section 441.35, Code of Iowa, 1962, provides as follows:

"The board of review shall have the power:

"1. To equalize assessments by raising or lowering the *individual* assessments of real property, including new buildings, personal property, or moneys and credits made by the assessor.

"2. To add to the assessment rolls any taxable property which has been omitted by the assessor.

"In any year after the year in which an assessment has been made, all of the real estate in any taxing district, it shall be the duty of the board of review to meet as provided in Section 441.33, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the actual value and compute the taxable value thereof, and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years. * * *"

The statute specifically provides that the board has the power to equalize assessments by raising or lowering the *individual* assessments of real property. It is our opinion that the word individual means a single piece of taxable property rather than all of the real estate contained in a certain taxing district.

(4) (b) With regard to the second part of your fourth question, the following provisions of the Iowa Code are applicable.

Section 441.46 State board of review

"The state tax commission shall constitute the state board of review, and shall meet at the seat of government on the second Monday of July in each year."

Section 441.47 Adjusted valuations

"The state board of review shall adjust the valuation of property in the several counties adding to or deducting from the valuation of each kind or class of property such percentage in each case as will bring the same to its taxable value as fixed in this chapter and chapters 427 to 443 inclusive. It shall also adjust the valuations as between each kind or class of property in any city assessed by a city assessor and each kind or class of property in the same county assessed by the county assessor."

At one time, the State Tax Commission was vested with the power to correct individual assessments. Section 6943-27(9a), Code of Iowa, 1935; *Yoeman Mutual Life Insurance Co. v. State Board*, 229 Iowa 320, 294 N.W. 330 (1940). This was not the general rule for the Supreme Court stated in *Des Moines Gas Company v. Saverude*, 190 Iowa 165, 170, 180 N.W. 193 (1920):

"The duty of the state board of equalization is to adjust the value of property of the several kinds, adding to or deducting from the valuation of each kind . . . such percentage, in each case, as will bring the same to its reasonable value. Its function is to equalize the value of property between the several counties, not to review the action of the assessor or of the local board of review, or of the district court on appeal."

It is our opinion that the State Board of Review has the authority in any year, including the quadrennial real estate assessment year under Section 428.4, Code of Iowa, 1962, to make such percentage adjustments in the valuation of the kinds and classes of property within the jurisdiction of the local assessor and local board of review. Section 441.47, Code of Iowa, 1962, specifically provides for the same when it states:

"It shall also adjust the valuations as between each kind or class of property in any city assessed by a city assessor and each kind or class of property in the same county assessed by the county assessor."

Thus, the State Board now has a two-fold duty as pointed out by Section 441.47, Code of Iowa, 1962. One duty was mentioned above. The other duty is to equalize the value of property between the several counties.

In addition, it is provided in Section 421.17(10), Code of Iowa, 1962, as follows:

"421.17 Powers and duties. In addition to the powers and duties transferred to the state tax commission, said commission shall have and assume the following powers and duties:

* * *

"10. * * * 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."

Thus, the State Tax Commission must determine uniformity of valuation between the various taxing districts of the state and it may order uniform increases or decreases of all property within any taxing district.

(5) With respect to your last question, it must be pointed out that the local board of review owes its existence to the statutes of this state and, as such, enjoys no powers over and above those conferred by such statutes. The pertinent section of the Iowa Code, 1962, Section 441.35 is quoted supra. A close reading of this statute reveals that this body may adjust individual assessments to arrive at a listing of property at taxable value. The statutes also grant to the local board of review the power to revalue and reassess all or part of the property within its jurisdiction; however, this power is limited to any year after a year in which the entire taxing district has been assessed and is further contingent upon finding a change of value. It is our opinion that if the statutory prerequisites are in evidence, the local board of review can make percentage changes in the valuation of any part or all of the real estate within its jurisdiction in any year not a regular real estate assessment year under Section 428.4, Code of Iowa, 1962.

16.5

TAXATION: Property Tax Exemption—Chapter 269, Laws of the 60th G.A., 1963. Property detained in transit to accomplish a particular purpose or object of the owner, other than transportation to its ultimate destination, may be taxed in the state in which it was detained, for the property acquires a taxable situs in that state. When the legislature passed Chapter 269, Laws of the 60th G.A., 1963, it created an exemption for personal property which has been detained, in transit in Iowa for the business convenience of the owner and ultimately transshipped to another state. Any property that comes to rest in Iowa and is to be sold or ultimately used or consumed in Iowa is subject to taxation in Iowa. Chapter 269 does not provide an exemption for that property.

April 28, 1965

Mr. Ballard B. Tipton
Director, Property Tax Division
Iowa State Tax Commission
State Office Building
L O C A L

Dear Mr. Tipton:

In your request for an official opinion on the taxing of an inventory of natural gas in underground storage facilities in Iowa, dated February 18, 1965, you state as follows:

> "Chapter 438, Code of Iowa, 1962, provides for assessments and taxation on pipeline companies operating within the state of Iowa. Presently there are some fourteen (14) companies being assessed by the Iowa State Tax Commission under those statutory provisions. At least three (3) of those companies have underground storage facilities located within the state of Iowa, and the Property Tax Division respectfully requests an official legal opinion as to assessing the inventory of natural gas contained in such underground storage facilities.
>
> "N" Company, a Delaware corporation with its principal office located outside the State of Iowa, owns and operates a pipeline system through which its transmits natural gas purchased by it

at points in the southwestern part of the United States to points in the states of Kansas, Nebraska, Iowa, Minnesota, Wisconsin, Illinois, and others, where some of the gas is locally distributed through one of the company's divisions and the balance resold to others.

"Said Company has an underground gas storage field in a county in the state of Iowa. The Company claims to transmit natural gas which it owns outside the state of Iowa through its pipeline system in other states and in this state to its underground storage field in the state of Iowa for storage purpose, and further claims that the major portion of the natural gas reaching such underground storage field is in time transmitted through its pipeline system in this state and other states to points outside the state of Iowa, many of such points being in the states of Minnesota, Wisconsin and Illinois. The Company has made claim for tax exemption, under Chapter 269, Laws of the 60th G.A., on that portion of the natural gas in the underground storage field in the state of Iowa said to be in transit. Said claim for the year 1965 having been filed with the State Tax Commission prior to February 1, 1965, and such a claim was also filed by the Company as an original with the County Assessor of the county in Iowa in which the underground storage field is located. It, too, was filed on or before February 1, 1965.

"Question No. 1

Is natural gas in an underground storage field of a gas pipeline company in the state of Iowa to be reported to, valued and assessed by the local assessor under provisions of Section 428.16 and 428.17, Code of Iowa, 1962, or is such inventory of natural gas to be reported to, valued and assessed by the State Tax Commission under the provisions of Chapter 438, Code 1962?

"Question No. 2

If it is ruled that the inventory of natural gas referred to in Question No. 1 hereof is to be assessed by the State Tax Commission, then is the entire assessed value of the taxable inventory to be certified to the county in this state in which the underground storage field is located, even though the pipelines of the Company extend into other counties in this state?

"Question No. 3

Are the provisions of Chapter 269, Laws of the 60th G.A., applicable to property of companies that is subject to being valued and assessed by the State Tax Commission, or are those provisions applicable only to property that is subject to assessment by local assessors?

"Question No. 4

Is an underground storage field in this state, owned by a private corporation, wherein natural gas for heating, cooking, and related purposes is stored, to be regarded as a 'private warehouse', as same is defined in Chapter 269, Laws of the 60th G.A.?

"Question No. 5

Is natural gas used for heating, cooking, and related purposes, an inanimate tangible personal property, goods, wares and merchandise?

"Question No. 6

The natural gas and LP gas stored in an underground storage field in this state may be actually in such store facility for an indefinite period of time. Is the interruption or cessation of move-

ment, or the break in the continuity of the journey of the gas by its storage in the underground storage field sufficient to remove it from being in interstate commerce?"

1. With respect to your first question, it is our opinion that the natural gas in the underground field of a gas pipeline company in the State of Iowa should be reported to, valued, and assessed by the State Tax Commission under the provisions of Section 438, Code of Iowa, 1962. Historically and as a matter of practice, the State Tax Commission assesses the property of public service companies in the state. In *Pierce v. Green*, 229 Iowa 22, 31, 294 N.W. 237 (1940), the court states that "the statutes provide that all of these companies shall report the properties to the *Tax Commission* to be valued, assessed and taxed at their actual values." The court made reference to all public service companies including pipeline companies.

2. In answer to your second question, Section 438.14, Code of Iowa, 1962, provides:

"The state tax commission shall on or before the third Monday in August of each year determine the value of pipeline property located in each taxing district of the state, and in fixing said value shall take into consideration the structures, equipment, pumping stations, etc., located in said taxing district, and shall transmit to the county auditor of each such county through and into which any pipeline may extend, a statement showing the assessed value of said property in each of the taxing districts of said county. The said property shall then be taxed in said county and lesser taxing districts, based upon the valuation so certified, in the same manner as in other property."

The statute must be construed according to the provisions of Section 4.1(2), Code of Iowa, 1962. Thus, even though the pipeline of the gas company extends into other counties of Iowa, it is our opinion that the entire assessed value of the taxable inventory of gas in storage should be certified to the county where the underground storage field is located. The statute specifically provides that the Commission "in fixing said value shall take into consideration the structures, . . . pumping stations, *etc., located in said taxing district* . . . The said property shall then be *taxed in said county* . . ." Generally speaking, in considering the place at which property is taxable and the governmental unit which may rightfully levy and collect the tax, the fundamental factor is the situs of the property in question. *Coe v. Errol*, 116 U.S. 517, 29 L. Ed. 715, 6 S. Ct. 475 (1886). The statute quoted above seems to reiterate this proposition.

3. In regard to question three, it appears from the wording of the provisions of Chapter 269, Laws of the 60th G.A., that there is some doubt as to whether the provisions apply to personal property that is subject to being valued and assessed by the State Tax Commission. It is our opinion that the provisions of Chapter 269, Laws of the 60th G.A., do apply to personal property that is being valued and assessed by the State Tax Commission, as well as to personal property assessed by local assessors.

In seeking the meaning of a law, the entire act and other related statutes should be considered. *Ahrweiler v. Board of Supervisors*, 226 Iowa 229, 283 N.W. 889 (1939). *Davis v. Davis*, 246 Iowa 262, 67 N.W. 2d 566, 1954. Thus, in the instant case, we read Section 438.1 et seq. Code of Iowa, 1962 with Chapter 269, Laws of the 60th G.A.

Under the provisions of Section 438.3, a detailed statement is required to be presented to the State Tax Commission, which includes under paragraph 9, "any and all other property owned by said pipeline company within the state . . .". From this detailed statement, the State

Tax Commission values and assesses the property of the pipeline company. Sec. 438.13, Code of Iowa, 1962. In assessing the pipeline company, the State Tax Commission makes the assessment upon the taxable value of the entire pipeline property in Iowa. Thus, when the statute is read with the related provisions of Section 438.1 et seq., Code of Iowa, 1962, the application of the statute becomes more evident. Hence, our opinion on the question.

4. In regard to your fourth question, Sec. 4.1(2), Iowa Code, 1962, points out that "words and phrases shall be construed according to the context and approved usage of the language . . .". It is a fundamental principal of statutory construction "that words of a statute are to be given their accepted meaning in law, and that Courts will not give a statute construction contrary to plain, unambiguous language . . .". *Sears v. City of Maquoketa*, 183 Iowa 1104, 166 N.W. 700 (1918), *Scott v. Wamsley*, 218 Iowa 670, 253 N.W. 524 (1934). Thus, Chapter 269, Laws of the 60th G.A., define "private warehouse" to mean "any building, structure, or *inclosure* used or to be used for the storage of inanimate tangible goods . . .". In a limited sense a private warehouse is a place where goods are received and stored for a profit. However, the words have been used in a broader sense to mean a building *or a place* used for storage of goods, wares, and merchandise. *Coats v. L. B. Price Mercantile Co.*, 201 Miss. 871, 30 So. 2d, 75, 76 (1947). In effect, when the legislature defined the word "private warehouse", it chose the broad definition. The word inclosure would therefore include the underground storage facilities owned by private corporations.

5. In answer to your fifth question, it is our opinion that natural gas is an inanimate, tangible, commodity that can be considered personal property, goods, wares, and merchandise. The peculiar characteristic which differentiates gas and oil from the solid minerals have given rise to conflicting ideas as to the rights of property therein. It is agreed on all sides that when gas and oil are extracted from the earth and brought to the surface or put into pipelines, these minerals become personal property, and, as such, commodities subject to sale and exchange. *White v. New York State Natural Gas Corporation*, 190 F. Supp. F. 342 (1960); *Crystal Ice and Cold Storage v. Marion Gas Company*, 35 Ind. A. 295, 74 N.E. 15 (1905); *Phillips Petroleum Company v. Mecom*, (Tex Civ App) 375 S.W. 2d 335 (1964); *Lone Star Gas v. Murchison*, (Tex Civ App) 353 S.W. 2d 870 (1962). Since natural gas is a commodity subject to sale and exchange, and since natural gas can be measured and metered off, it can be considered inanimate, tangible, personal property. In *Lone Star Gas v. Murchison*, (Tex Civ App) 353, S.W. 2d 870, 879 (1962), the court discusses with much thoroughness the fact that natural gas is personal property and is "an inanimate, diminishing, non-reproductive substance of its own, and instead of running wild . . . as large animals do, is subject to be moved by pressure or mechanical means."

6. With respect to your last question, it is a general rule of law that personal property actually in transit in interstate commerce is protected by the commerce clause of the United States Constitution from local taxation only when it is in transit in interstate or foreign commerce. *Champlain Realty Company v. Brattleboro*, 260 U.S. 366, 67 L. Ed. 309, 43 S. Ct. 146 (1922). However, when the interstate transit is broken or interrupted in a particular state, the issue resolves itself as to whether the property may be thereupon subjected to local taxation therein. The United States Supreme Court has held with lower federal courts and various state courts that if the break in the interstate journey was caused by the exigencies or conveniences of the chosen means of transportation or natural causes over which the taxpayer had no control, then the continuity of the transit remains unimpaired. The immunity of the goods from state and local taxation is not en-

dangered. If the interruption in the journey is due to the business convenience or profit of the taxpaper or owner of the property, then the continuity of the transit is destroyed, and there is no longer any immunity from local taxation. *Carson Petroleum Co. v. Vial,* 279 U.S. 95, 73 L. Ed. 626, 49 S. Ct. 292 (1929). *Champlain Realty Company v. Brattleboro,* 260 U.S. 366, 67 L. Ed. 309, 43 S. Ct. 146 (1922). *Fennell v. Pauley,* 112 Ia. 94, 83 N.W. 799 (1900).

To be more specific, any property of "N" Company that comes to rest in the Iowa "storage facility" and is sold in the State of Iowa by "N" Company is subject to taxation by the State of Iowa. A lengthy discussion of the historical development of the law on this point in *Sears, Roebuck & Company v. City of Ft. Madison,* 251 Iowa 854, 102 N.W. 2d 916 (1960) concluded:

> "Both state and federal courts have faced the realities of the situation, in view of the complexity of modern commerce, and have modified their position as to what property, stopped in transportation, is at rest and subject to taxation."

The Iowa Court emphasized that it was in agreement with the Supreme Court decisions holding that if the interruption in the interstate journey of the goods occurred for the purposes connected with the convenience or profit of the taxpayer, or the owner of the property, then the continuity of the transit must be regarded as having been so disturbed as to destroy the immunity of the property from local taxation.

To summarize, we state that property detained in transit to accomplish a particular purpose or object of the owner, other than its transportation to its ultimate destination, may be taxed in the state in which it was detained, for the property acquires a taxable situs in that state. When the legislature passed Chapter 269, Laws of the 60th G.A., 1963, it created an exemption for personal property which is detained in transit in Iowa for the business convenience of the owner, and which is ultimately transshipped to other states. Nevertheless, any property that comes to rest in Iowa and is to be sold or ultimately used or consumed in Iowa is subject to personal property taxation in Iowa. Chapter 269, Laws of the 60th G.A., 1963, does not provide an exemption for natural gas which is used or consumed in Iowa.

16.6

TAXATION: Use Tax—Sec. 423.4, Code of Iowa, 1962. Advertising materials shipped to a manufacturer in Iowa where they are broken down into smaller lots and reshipped to retailers both inside and out of Iowa have a "taxable moment" in Iowa prior to their consumption in interstate commerce, and are thus subject to Iowa Use Tax.

May 11, 1965

X. T. Prentis, Chairman
A. L. George, Vice Chairman
Lynn Potter, Member
Iowa State Tax Commission
State Office Building
L O C A L

Gentlemen:

Your opinion request dated February 18, 1965, states as follows:

> "The Iowa State Tax Commission hereby requests a Staff Opinion concerning the following question:

"Advertising materials are ordered from a supplier or printer located in a state other than Iowa, and delivered to the purchaser, a manufacturing corporation, in Iowa. This advertising material is broken down into smaller lots, and then is reshipped to retail dealers, both inside and out of Iowa. Only a small percentage of the materials is shipped to dealers in Iowa. These materials are supplied to retailers free of charge, and used in promoting the manufacturer's product.

"Has this advertising material had a taxable moment when delivered, accepted by the purchaser in Iowa, and the materials come to rest in Iowa before being reshipped to dealers located outside of Iowa for use in other states?"

The Iowa use tax is an excise tax imposed on the use in this state of tangible personal property purchased for use in Iowa. Use means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, (Section 423.1(1), Code of Iowa, 1962), with certain exceptions set out in Section 423.4, Code of Iowa, 1962.

Your question, in effect, asks if the following exemption is applicable to your fact situation:

"Section 423.4 Exemptions

"The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this chapter:

* * *

"2. Tangible personal property used (a) in interstate transportation or interstate commerce * * *"

There are two issues to discuss. First, were the goods sought to be taxed diverted from interstate commerce? Then, was there a taxable moment at which the goods came to rest in Iowa?

As a general rule of law, tangible personal property brought into a state and there brought to rest permanently or merely halted for a moment before resuming its interstate course or character can be taxed by the state and such taxes upon the privilege of use, storage, or consumption within the state do not impose an unconstitutional burden on interstate operations. In other words, the courts have applied the principle that "use and storage" are subject to local taxation when there is an interval after the articles have reached the end of their interstate movement and before their consumption in interstate operation has begun. *Southern Pacific Co. v. Gallagher,* 306 U.S. 167, 83 L. Ed. 586, 59 S. Ct. 389 (1939).

With the general rule in mind, we now attempt to answer the issues posed. We feel that the goods sought to be taxed were diverted from interstate commerce. Courts seem to be rather liberal in their determination of this point. So long as the taxpayer exercises any right of ownership in the state after the termination of the interstate shipment and before the use or consumption in interstate commerce, the courts feel that there is a diversion from interstate commerce. *Pacific Tel. Co. vs. Gallagher,* 306 U.S. 182, 83 L. Ed. 595, 59 S. Ct. 396 (1938). A typical case is *Maver Shrimp and Oyster Co. vs. Stone,* 221 Miss. 519, 73 So. 2d 109 (1954). There the taxpayer was a canner. Ninety-five per cent of the raw materials used by the taxpayer were procured outside the State of Mississippi. The taxpayer used its own boats to import these raw materials. Repair parts for these boats were purchased outside the state, and were shipped to a wharf in the state where they were immediately placed on the boat in need of re-

pair. The state attempted to impose a use tax on these repair parts. The court held that there could be a tax imposed on the use of tangible personal property because the purchased articles were retained in Mississippi upon their delivery, at least momentarily, and the taxpayer *exercised his right of ownership* of the articles, by installing them in boats of its choosing.

To answer the second issue, it must be pointed out that there is some confusion in the application of the "taxable moment" theory as applied to certain fact situations in Iowa. It appears from the reading of the Iowa cases that the status of the property before interstate use and the immediacy of further interstate activity are material factors affecting the possible application of the doctrine. *Northern Natural Gas. Co. vs. Lauterbach,* 251 Iowa 885, 100 N.W. 2d 908 (1960), *Bruce Motor Freight, Inc. vs. Lauterbach,* 247 Iowa 956, 77 N.W. 2d 613 (1956), *Michigan-Wisconsin Pipeline Co. vs. Johnson,* 247 Iowa 583, 73 N.W. 2d 820 (1955). Thus, the problem in the instant case is not unlike that faced by the court in the Northern Natural Gas Company case.

The majority opinion in that case stated as follows:

> "While it lies dormant as a part of the mass of property in the state not yet converted to any use or purpose, it is not tangible personal property used (a) in interstate transportation or interstate commerce. The legislature did not intend Section 423.4(2) to include property because it is about to be used in interstate transportation or commerce."

In the Northern Natural Gas case, the court suggested that when the 56th General Assembly in 1955 failed to amend Section 423.4(2) by adding the words "or to be used", it indicated a legislative intent not to override the holding of the Michigan-Wisconsin case, 251 Iowa at 893, 100 N.W. 2d at 913. This amendment failed again in the 59th General Assembly, 1961 (H.F. 346).

In *Mitchell Publishing Co. vs. Wilder,* 74 S.D. 343, 52 N.W. 2d 732 (1952), wherein the court found non-taxability, the construed statute exempted that "which is used *or to be used* in operating or maintaining interstate commerce." (Emphasis supplied).

In *Rowe v.s. State Tax Commission,* 249 Iowa 1207, 91 N.W. 2d 548, (1958), the court held that where an advertising agency placed orders with out-of-state suppliers expressly stating it was acting for a disclosed principal as its agent and that where such agent was assessed for use tax on the materials, it was an improper assessment. The court reasoned this "all incidents of ownership of any kind or character immediately vested in the client." The advertising agency-taxpayer did not receive possession of the merchandise. It was shipped directly from the supplier to the principal.

In *Michigan-Wisconsin Pipeline Company vs. Johnson,* supra, the court applied the "taxable moment" doctrine to uphold a tax assessment on property brought into Iowa that was used in the construction of a compressor station and auxiliary building of a pipeline system. The court reasoned that the property, in Iowa, had not become part of the interstate transportation system prior to its actual installation in and as part of the transportation system.

The Iowa Supreme Court reached different conclusions in the *Bruce Motor Freight* case, supra, and *Northern Natural Gas* case supra. The "taxable moment" doctrine was applied in both cases, but with different results. In the instant case, the problem presented is like that before the court in these previous cases. The test of the "taxable moment" doctrine is *actual use* in the state.

The facts in the *Maver Shrimp and Oyster Co. vs. Stone,* supra, were previously stated in this opinion. The court agreed with the test of actual use in the state when it stated:

"The articles purchased by appellant (taxpayer) and handled in the aforesaid manner reached the end of their interstate transit upon "use or storage" in this state, before they began to be utilized in interstate operations . . . upon delivery to the wharf . . .by the common carrier . . . the interstate movement of the articles was completed. Beyond question, regardless of the speed with which the articles were installed upon the boats, the interstate consumption of the articles had not begun until they had been installed . . . in the boats."

It is our opinion that in the instant case there was a taxable moment when the goods had reached the end of their interstate operation. At that moment, the use tax became effective.

16.7

TAXATION: Real Property Tax; Tax exemption of a veterans' organization—Sections 427.1(6) and 427.1(24), Code of Iowa, 1962. An exemption from real property taxation cannot be denied to a veterans' organization's property which is devoted entirely to its own use and not held for pecuniary profit. A partial disallowance of the tax exemption should be made in those cases where the use of a portion of the subject property is not for the appropriate objects of the organization.

May 21, 1965

Mr. Gordon L. Winkel
Kossuth County Attorney
Box 405
Algona, Iowa

Dear Sir:

Your request for an opinion dated May 5, 1965, states as follows:

"I would like to request your opinion concerning the present status of the tax exemption of Chapter 427 of the 1962 Code of Iowa. In particular, I would like to know whether there has been any more recent opinion or court decision than the opinion of July 26, 1956, wherein you referred to the Jones Case, which is reported in 246 Iowa. It seems to me that there was a recent opinion or decision construing the Federal Tax Permit as it relates to a Federal Retail Liquor Sales Permit. However, I do not seem to find a more recent decision and if one does exist, you could simply send me a copy of same.

"If you do not know of a more recent decision or opinion relating to this matter, would you kindly advise whether or not a veterans organization, which is the holder of a Retail Liquor Stamp should be denied the tax exemption under the aforementioned section. The organization has an Iowa Liquor License and Beer Permit."

Section 427.1, Code of Iowa, 1962, provides in part as follows:

* * *

"The following classes of property shall not be taxed:

"6. Property of associations of war veterans. The property of any organization composed wholly of veterans of any war, when

such property is devoted entirely to its own use and not held for pecuniary profit." * * *

"24. Statement. Every society or organization claiming an exemption under the provisions of either subsection six (6) or subsection nine (9) of this section shall file with the assessor not later than February first (1st) of the year for which such exemption is requested, a statement upon forms to be prescribed by state tax commission, describing the nature of the property upon which such exemption is claimed and setting out in detail any uses and income from such property derived from such rentals, leases or other uses of such property not solely for the appropriate objects of such society or organization. The assessor, in arriving at the valuation of any property of such society or organization, shall take into consideration any uses of the property not for the appropriate objects of the organization and shall assess in the same manner as other property, all or any portion of the property involved which is leased, let or rented and is used regularly for commercial purposes for a profit to any party or individual. In any case where a portion of the property is used regularly for commercial purposes no exemption shall be allowed upon property so used and the exemption granted shall be in the proportion of the value of the property used solely for the appropriate objects of the organization, to the entire value of the property. No exemption shall be granted upon any property upon or in which persistent violations of the laws of the state of Iowa are permitted. Every claimant of an exemption shall, under oath, declare that no such violations will be knowingly permitted or have been permitted on or after January first (1st) of the year for which a tax exemption is requested. Claims for such exemption shall be verified under oath by the president or other responsible heads of the organization." * * *

"26. Property under federal permit or license. No exemption shall be granted upon any property which is the location of a federal retail liquor sales permit or in which federally licensed devices not lawfully permitted to operate under the laws of the state of Iowa are located."

At the outset it must be pointed out that Section 427.1, Code of Iowa, 1962, is an exempting statute and as such must be strictly construed. If there is any doubt upon the question, it must be resolved against the exemption and in favor of the taxation. *National Bank of Burlington vs. Huneke,* 250 Iowa 1030, 98 N.W. 2d 7 (1959), *Trinity Lutheran Church of Des Moines vs. V. L. Browner,* .... Iowa ...., 121 N.W. 2d 131 (1963).

Subsections 6 and 24 must be read together, for subsection 24 is a procedural section rather than an exemption section. The purpose of the statement of the objects and uses of the organization which files the statement with the assessor is to establish whether all or part of the property is used for purposes that can be considered tax exempt. A partial disallowance should be made only in those cases where the use of a portion of the subject property is not for the appropriate objects of the organization. 1956 OAG 176, 177.

The language of subsection 6 (quoted above) authorizes the exemption of the property of veterans organizations when said property is devoted *entirely to its own use* and *not held for pecuniary profit.* Such a provision must be strictly construed. The courts have stated that "use of the property rather than charter declarations" is the controlling factor as to an exemption from taxation. *Theta Xi Building Association of Iowa City vs. Board of Review,* 217 Iowa 1181, 251 N.W. 76 (1933).

The Attorney General has at least twice considered the question

posed by your letter. In 1931, the Attorney General stated that in his opinion a dance pavilion operated by the American Legion from which a profit is made was not exempt from taxation as property of a veterans organization *"not held for pecuniary profit."* 1932 OAG 12. In 1956, an exemption from taxation was denied as to the entirety of any property owned by a veterans' organization which is the location of a federal retail liquor sales permit. 1956 OAG 176.

Since 1956, there have been changes in the Iowa liquor law. Sale of liquor at retail by properly licensed persons or organizations is not an illegal act or something that gives rise to "persistent violations of the laws of the State of Iowa." Chapter 114 and 115, Acts of the 60th G.A., 1963.

Thus, we must use a fresh approach to the problem presented by Section 427.1(6), Code of Iowa, 1962. Certainly, the property of associations of war veterans should be treated as divisible. 1956 OAG 176, 177. In other words, a partial disallowance of the exemption in subsection 6 can be based upon the non-use of the property for the appropriate objects and the use of the subject property for commercial purposes. Section 427.1(24). Therefore, a strict construction of Sec. 427.1(6) would allow an exemption to the veterans' organization for the property "devoted *entirely* to its own use and not held for pecuniary profit." As was mentioned earlier, use of the property is the controlling criterion.

It is our opinion that Section 427.1(26), Code of Iowa, 1962, will no longer act as a bar to an exemption or a mandatory denial of the claim for exemption. The statute, quoted above, states in part that, "No exemption shall be granted upon any property which is the location of a federal retail *liquor sales permit*. . . ." We have been unable to determine where such a "federal retail liquor sales permit" exists in the Federal law. The district director of internal revenue will issue a special tax stamp to liquor dealers. However, the stamp is not a Federal permit or license, but is merely a receipt for the tax. 26 CFR 194.123.

In summary, we state that in our opinion an exemption from taxation cannot be denied to the property of a veteran's organization which is devoted entirely to its own use and not held for pecuniary profit. A partial disallowance should be made in those cases where the use of a portion of the subject property is not for the appropriate objects of the organization.

16.8

TAXATION: Property Tax—§441.29, Code of Iowa, 1962. The Assessor must rely upon the Auditor's Plat Book for there is nothing in the Iowa Code that will allow him to take an independent survey to determine the exact number of acres held by the taxpayer.

June 25, 1965

J. G. Johnson, Esq.
Fayette County Attorney
22 East Charles
Oelwein, Iowa

Dear Mr. Johnson:

We acknowledge receipt of your letter dated May 12, 1965, in which you request an opinion from this office. Your letter states as follows:

"At the request of our County Assessor, we are asking for an opinion in regard to the powers and duties of the Assessor's office.

"The facts are as follows: The Northeast Quarter of Section 18-92-8 in Fayette County has been deeded from party to party for many years. Some time ago, however, a fence along this property was straightened and the net result of this straightening was to cut off from the farm normally described as the Northeast Quarter of Section 18 a piece of land containing approximately 8.3 acres. This piece of land is now being used by the neighbor to this property, and because this fence line has been established for more than ten years, it is presumed that this neighbor could claim title to this property under the statutory provisions therefor. The present title holder knew of this fact at the time he took title to this farm, and he had a survey made, and this survey revealed that this particular farm contained 151.97 acres. Accordingly, the deed by which the current title holder took title to the property reads as follows: The Northeast Quarter of Section 18, 92, 8 containing 160 acres more or less: also described as (here is set out metes and bounds description) . . . containing 151.97 acres.

"The problem is this: There is no dispute at the present time that the current title holder owns only 151.97 acres. The question is whether or not the remaining 8.3 acres can be assessed to the neighbor who is using this property or whether it might be assessed to the current title holder. The Auditor's Plat has not been changed, and therefore it indicates that the current title holder owns a full 160 acres.

"The questions are these:

"1. Does the County Assessor have authority to undertake an independent survey to determine the exact amount of acres held by this title holder or any other title holder?

"2. Or must the Assessor rely upon the Auditor's Plat and make the assessment to the title holders in the amount of 160 acres regardless of an independent survey or recitation in the deed?

"3. Or must the Assessor accept the recitation in the deed in regard to the number of acres contained in a particular piece of property?

"4. If the original title holder is to be assessed for only 151.97 acres, to whom are the 8.5 acres assessed? Can they be assessed to the neighbor who is using this property and who might claim title to it even though this title has not been established yet? Or must these acres be assessed to "owner unknown" under Section 428.5?

"Aside from the particular problem involved in this case, this seems to be a recurring issue for the County Assessor. There are many instances in which a deed may recite that a certain amount of land is included, when the actual amount may be greater or smaller. If the Assessor has the authority to undertake an independent survey when necessary to determine the exact amount of land, it would greatly facilitate the equitable distribution of assessment. For this reason we are requesting the opinion concerning the Assessor's authority in this area, and we appreciate your attention to this request."

Section 441.29, Code of Iowa, 1962, provides as follows:

"441.29 Plat book. The county auditor shall furnish to each assessor a plat book on which shall be platted the lands and lots in his assessment district, showing on each subdivision or part thereof, written in ink or pencil, the name of the owner, the number of acres, or the boundary lines and distances in each, and

showing as to each tract the number of acres to be deducted for railway right of way and for roads and for rights of way for public levees and open public drainage improvements."

With regard to your first question, it is our opinion that the county assessor does not have authority to undertake an independent survey to determine the exact number of acres held by a landowner. Section 441.29 specifically states that "the county auditor shall furnish to each assessor a plat book on which shall be platted the lands and lots in his district. . . ." We find no statutory authority for the assessor to make an independent survey.

In order to answer your next two questions, the following sections of the Iowa Code are pertinent.

"Section 558.59 Final record. Every such instrument shall be recorded, as soon as practicable, in a suitable book to be kept by the recorder for that purpose; after which he shall complete the entries aforesaid so as to show the book and page where the record is to be found."

"Section 558.60 Transfer and index books. The County auditor shall keep in his office books for the transfer of real estate, which shall consist of a transfer book, index book and plat book."

"Section 558.63 Book of plats—how kept. The auditor shall keep the book of plats so as to show the number of lot and block, or township and range, divided into sections and subdivisions as occasion may require, and shall designate thereon each piece of real estate and mark in pencil the name of the owner thereon, in a legible manner; which plats shall be lettered or numbered so that they may be conveniently referred to by the memoranda of the transfer book, and shall be drawn on the scale of not less than four inches to the mile."

From these sections quoted supra, we determine that the county auditor must keep the book of plats, and in order to do so, he must get from the county recorder a copy of the deed after the county recorder has completed recording said deed. The auditor, who has the responsibility to keep the book of plats, must take cognizance of the recitation in the deed and designate the property in question as such on his plat book. Section 558.63, Code of Iowa, 1962.

The Iowa Code is rather unclear as to the method to be used by the auditor in correcting the book of plats. Unless directed by the board of supervisors, the county auditor does not direct a resurvey to correct his book of plats. Chapter 333, Code of Iowa, 1962. As a practical matter, the land owner retains a private land surveyor to physically survey the land using the "rules prescribed by the acts of congress, and instructions of the secretary of the interior. . . ." Section 355.4, Code of Iowa, 1962. The registered land surveyor, in his certificate, must certify that this survey was done in accordance with these rules and instructions.

The plat is then recorded in the Recorder's office. Section 558.41, Code of Iowa, 1962. After the plat has been photostated and the original made available for return to the owner or surveyor, the original plat should be filed in the auditor's office. Sections 448.59 and 558.63, supra.

Pursuant to Section 355.5, Code of Iowa, 1962, the plat becomes presumptive evidence of the correctness of the acreage set out therein.

Thus, the assessor must rely upon the auditor's plat book. See answer to question one, supra. It is our opinion that the auditor's plat

should take cognizance of the recitation in the deed and designate the property in question as such in his plat book. In the instant case this was not done and the facts recite that the auditor's plat continues to show the land owner's property to be 160 acres. It must also be pointed out that a private survey was made of the property in question by the land owner. The results of said survey should have been filed in the auditor's office according to the procedure described in preceding paragraphs of this answer.

There is no evidence that anyone has made an attempt to correct the auditor's plat book. Since this was not done, the assessor must rely only upon the plat book as it stands and cannot accept the recitation in the deed as the amount of acres to be assessed.

With the answer to the first three questions in mind, we answer your last question by stating that it is our opinion that the original title holder must be assessed for the entire 160 acres. The assessor can only rely upon the auditor's plat book. Therefore, since there is nothing in the Iowa Code that will allow him to take an independent survey to determine the exact number of acres held by the original title holder, he must assess the entire acreage to the original title holder.

16.9

TAXATION: Taxable Valuation—H.F. 349, 61st G.A. "Taxable valuation" for the purpose of computing the salaries of county officials is "taxable value" as defined in Sec. 441.21, Code of Iowa, 1962, reduced by the aggregate military exemptions.

June 25, 1965

D. Quinn Martin, Esq.
County Attorney
Black Hawk County
309 Court House Bldg.
Waterloo, Iowa 50703

Dear Sir:

We beg to acknowledge receipt of your letter dated June 3, 1965, in which you state as follows:

> "This is in reference to the Pay Increase Bill which covers the offices of County Auditor, County Treasurer, County Recorder and Clerk of Courts. As you know, the new salary schedule is based upon the amount of taxable valuation in the county, less money and credits valuation and states that salaries of the officials named shall be fixed in conformity with the population standards set up "on the taxable valuation of the county as certified by the Iowa State Tax Commission or in conformity with this Act."
>
> "The officials in my county who are affected by the Bill have asked my opinion on the meaning of taxable valuation. Specifically they want to know whether tax valuation is the amount of valuation before making allowances for homestead and military exemptions, or whether taxable valuation as used in the Statute means the valuation upon which a levy is actually made and taxes paid."

Section 1 of House File 349, Sixty-first General Assembly, bases part of the annual compensation of the County Auditor, County Treasurer, County Recorder and Clerk of the District Court on the "taxable valuation of county" less the valuation of moneys and credits.

It is a fundamental rule of statutory construction that the legislature is its own lexicographer. *State of Iowa vs. City of Des Moines*, 221 Iowa 642, 266 N.W. 41 (1936). At the outset it must be pointed out that the term "taxable value" is not synonymous with or the equivalent of "the value of the taxable property." *N. W. Halsey & Co. vs. City of Belle Plaine, et al.*, 128 Iowa 467, 104 N.W. 494 (1905). In Section 441.21, Code of Iowa, 1962, the Iowa General Assembly has defined the term "taxable value." Section 441.21 states as follows:

"441.21 Actual, assessed, and taxable value

All property subject to taxation shall be valued at its actual value which shall be entered opposite each item, and shall be assessed at sixty percent of such actual value. Such assessed value shall be taken and considered as the taxable value of such property upon which the levy shall be made. The actual value in such cases shall be one and two-thirds times the assessed value as shown by the assessment rolls and may be so determined and ascertained.

In arriving at said actual value the assessor shall take into consideration its productive and earning capacity, if any, past, present and prospective, its market value, if any, and all other matters that affect the actual value of the property; and the burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate or inequitable."

Thus, it can be determined from the statute, the assessor is required to enter the actual value of the property assessed. The assessed value or *the taxable value is sixty percent of the actual value.* This percentage applies to real property, tangible personal property, and to such public utility property as the state tax commission assesses. Sections 441.21, 428.29, 433.6, 434.15, 435.7, 436.8, 437.7, and 438.13, Code of Iowa, 1962. *Pierce v. Green*, 229 Iowa 22, 294 N.W. 237 (1940). The state tax commission fixes the taxable value of the public utilities and certifies the taxable value to the taxing districts in each county where such valuations are a part of the aggregate taxable valuations on which taxes are levied.

With regard to a taxpayers individual property, we recognize that Section 427.3, Code of Iowa, 1962, provides a military service exemption for these property owners who qualify under Section 427.5, Code of Iowa, 1962. Since the applicable amount of the exemption is in the form of *taxable* value to be deducted from the taxable value assigned to the property, there is a reduction in the taxable value on which is levied a tax.

However, the homestead "exemption" is in reality a homestead credit. Section 425.1(2), Code of Iowa, 1962, states in part as follows:

"Sec. 425.1. * * * 2. The homstead credit fund shall be apportioned each year as hereinafter provided so as to give *a credit against the tax on each* eligible *homestead* in the state, as defined herein; the amount of such credit to be in the same proportion that the assessed valuation of each eligible homestead in the state in an amount not to exceed twenty-five hundred dollars bears to the total assessed valuation of all eligible homesteads in the state in an amount not to exceed twenty-five hundred dollars for each homestead. * * *" (Emphasis supplied)

As provided in Section 425.11, Code of Iowa, 1962, the maximum valuation on which homestead credit is allowed is the taxable valuation before any veteran's exemption. The homestead tax credit is a credit against the tax levied. It is a credit against the computed tax and is

not itself a reduction of "taxable value" of the property. 1944 OAG 44.

Thus, we conclude that the meaning of taxable valuation to be used in the computation of county officials' salaries would be the taxable value as defined in Section 441.21, Code of Iowa, 1962, reduced by the aggregate military exemptions.

16.10

TAXATION: Exemptions—§§427.1(9), 427.1(24), 427.1(25), 1962 Code of Iowa. Chambers of Commerce generally are not charitable or benevolent institutions entitled to an exemption from taxation of their real property and the burden is on a claimant Chamber of Commerce to prove that, unlike Chambers generally, it is such an institution.

July 12, 1965

Mr. David A. Fitzgibbons
Emmet County Attorney
Estherville, Iowa

Dear Mr. Fitzgibbons:

This is in response to your recent inquiry in which you ask the question as to whether or not your local Chamber of Commerce is exempt from taxation under the provisions of Section 427.1(9).

The following provisions of the Code of Iowa, 1962, are particularly important:

"427.1(9) Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

"427.1(24) Statement of objects and uses filed. Every society or organization claiming an exemption under the provisions of either subsection 6 or subsection 9 of this section shall file with the assessor not later than February 1 of the year for which such exemption is requested, a statement upon forms to be prescribed by the state tax commission, describing the nature of the property upon which such exemption is claimed and setting out in detail any uses and income from such property derived from such rentals, leases or other uses of such property not solely for the appropriate objects of such society or organization. The assessor, in arriving at the valuation of any property of such society or organization, shall take into consideration any uses of the property not for the appropriate objects of the organization and shall assess in the same manner as other property all or any portion of the property involved which is leased, let or rented and is used regularly for commercial purposes for a profit to any party or individual. In any case where a portion of the property is used regularly for commercial purposes no exemption shall be allowed upon property so used and the exemption granted shall be in the proportion of the value of the property used solely for the appropriate objects of the organization, to the entire value of the property. No exemption shall be granted upon any property upon or in which persistent violations of the laws of the state of Iowa are permitted.

Every claimant of an exemption shall, under oath, declare that no such violations will be knowingly permitted or have been permitted on or after January 1 of the year for which a tax exemption is requested. Claims for such exemption shall be verified under oath by the president or other responsible heads of the organization."

"427.1(25) Delayed claims. In any case where no such claim for exemption has been made to the assessor prior to the time his books are completed, such claims may be filed with the local board of review or with the county auditor not later than July 1 of the year for which such exemption from taxation is claimed and a proper assessment shall be made either by the board of review or by the county auditor, if said property is all or in part subject to taxation."

It is generally understood that a Chamber of Commerce is "a board or association to promote the commercial interests of a locality, a county, or the like; a society of the principal merchants and traders of a city who meet to promote the general trade and commerce of the place." This definition was accepted in *Chamber of Commerce v. Unemployment Compensation Commission,* 356 Mo. 323, 201 S.W. 2d 771, 774 (1947). We will assume that it is applicable here. It should be said, however, that any organization may establish for exemption purposes it is not what its generic name suggests

Adopting the foregoing definition, we preclude the possibilities that a Chamber of Commerce is a religious, literary, scientific or agricultural institution or society. If it is to win exemption, then, it must be either charitable or benevolent. Charitable and benevolent, although not synonymous in all contexts, are usually found to be so when employed conjunctively in tax exemption statutes. If an institution is one it also is the other. See *Boston Chamber of Commerce v. Assessor of Boston,* 315 Mass. 712, 54 N.E. 2d 199 (1944).

If a chamber is such an institution or society, it is entitled to an exemption in respect to buildings and grounds used solely for its "appropriate objects", i.e., for the charitable and benevolent purpose for which it exists.

The Iowa Supreme Court has not answered the specific question asked here. But it has said that where the tax exemption is claimed by a corporation, the objects and purposes of the corporation as stated in its articles are not conclusive. It is the use made of the real property used by the corporation which determines availability of the exemption. *Readlyn Hospital v. Hoth,* 223 Iowa 341, 272 N.W. 90 (1937). Exemption statutes are strictly construed, and any doubts must be resolved against exemption and in favor of taxation. *Jones v. Iowa State Tax Commission,* 247 Iowa 530, 74 N.W. 2d 563.

In *Chamber of Commerce v. Unemployment Compensation Commission,* supra, the question was whether the Chamber was required to make contributions in proportion to wages paid employees under Missouri's unemployment compensation law. No contributions were required as to services "performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes . . . ." The Chamber contended it was incorporated exclusively for charitable and educational purposes, as stated in its articles.

The Court said:

"Viewing appellant's activities . . . we find that many of them were devoted to purely charitable purposes, however, appellant had the power under its charter and did in fact promote the trade and

commerce of North Kansas City. The evidence disclosed that it was interested in bringing new industries to the community. * * * Bringing in new industries, promoting just and equitable principles of trade and actively fostering other purposes enumerated in appellant's charter, may all be considered very beneficial to a community and the citizens in general and certainly they are all laudable purposes. However, under the great weight of authority a Chamber of Commerce is not exempt . . . ."

And in *Memphis Chamber of Commerce v. City of Memphis*, 144 Tenn. 291, 232 S.W. 73, 74, Tennessee's Supreme Court noted that the Chamber's charter provided, among other things, that it would act "in the improvement of labor conditions, foreign trade and merchant marine, traffic and transportation, good roads and highways, municipal civic conditions, and public health in the city," but concluded it was not exempt. The Court said:

"It is true it is not a corporation for profit but . . . its primary objective is to promote the business and commercial interests of the city of Memphis. This is expressly stated in its charter. We are of the opinion, therefore, that it cannot claim the benefit of the exemption extended to religious, charitable, scientific, or educational institutions. The mere fact that it administers to charity, or may give instructions of an educational nature along certain lines, does not render it an educational or charitable institution . . . ."

The same conclusion—that a Chamber is not a charitable institution or society entitled to exemption—was reached in *Boston Chamber of Commerce v. Assessor of Boston*, supra.

The authorities quoted from are persuasive on the question of the nature of a Chamber of Commerce. They are consonant, we believe, with the general understanding of what a Chamber of Commerce is and what it does. The burden is on any individual Chamber of Commerce to show that it is something other than what is commonly signified by the name it functions under. It must show this to the satisfaction of the assessor and Board of Review, or, if the claim of exemption is filed after adjournment of the Board's May session, then to the county auditor's satisfaction.

It is the opinion of this office that Chambers of Commerce in general are not charitable or benevolent institutions, and are not entitled to the tax exemption granted in Sec. 427.1(9). The burden is on a claimant Chamber to establish that it is a charitable institution or society entitled to exemption.

16.11

TAXATION: Income Tax—§§422.4(8) and 422.5, Code of Iowa, 1962; Income Tax Regulation 22.8(2)-10. The income of new residents derived from sources outside of Iowa prior to the period of residence is not subject to Iowa Individual Income Tax.

November 24, 1965

Lynn Potter, Chairman
State Tax Commission
State Office Building
L O C A L

Dear Mr. Potter:

The question of the legality of the following paragraph found on page 5 of the 1965 Iowa Individual Income Tax Instructions has been raised:

"A taxpayer who moves into Iowa and does acquire residency during the tax year reports all of his income to Iowa and takes appropriate tax credit for any income tax paid to another state, such credit developed on Page 2 of Form IT-1, referred to above. Federal income tax deductions should be similarly apportioned."

In effect, the Commission proposes to impose a tax on the income of new residents derived from sources outside of Iowa at a time when these people were not residents of Iowa.

The imposition of the tax is by Section 422.5, Code of Iowa, 1962, which provides in pertinent part:

"422.5. *Tax imposed-applicable to federal employees.* A tax is hereby imposed, beginning the first day of January, 1934, upon every resident of the state, and beginning on the first day of January, 1937, upon that part of the taxable income of any nonresident which is derived from any property, trust, or other source within this state, including any business, trade, profession, or occupation carried on within this state, which tax shall be levied, collected, and paid annually upon and with respect to his entire taxable income as herein defined at rates as follows: * * *"

First of all, the quoted paragraph of the Instructions is contrary to the Commission's own regulations. Reg. 22.8 (2)-10, filed and indexted August 24, 1962 (January, 1963, Supplement to Iowa Departmental Rules, page 62) provides:

"*Taxpayers moving in or out of the State.* A taxpayer moving into the state during the tax year need only report his earnings for the period of residence. This also applies to a person moving out of the state. If itemized deductions are used for Federal income tax purposes they must be adjusted to reflect only the deductions attributable to the period of Iowa residence. Federal income tax withheld or paid must be adjusted in the same manner as the income. Personal exemption and credit for dependents need not be prorated.

"For example, if your income for the year is from one source, reported in one total, use a fraction of the months of out-state residence and subtract that portion of your income from the total reported on line 4, page 1. The remainder will represent your Iowa earned income. If you moved into Iowa August 1st, the ratio would be 5/12 Iowa income and 7/12 out-state income."

This regulation has not been amended, repealed or rescinded under the procedures prescribed by Chapter 66, 60th G.A. (1963), as amended by Chapter 75, 61st G.A. (1965), and therefore remains in full force and effect. It is our opinion that the Commission is bound to adhere to its published regulations.

A state's jurisdiction to levy individual income tax is based on either (1) residence of the taxpayer in the taxing state, or (2) income derived from business or property located within the taxing state, or from services performed therein. Your instruction seeks to tax income derived from sources outside of Iowa by persons who were not residents of Iowa at the time the income was earned, accrued, or received. A state cannot tax the income of a nonresident derived from property or sources outside the state. *Forrester v. Culpepper,* 194 Ga. 774, 22 S.E. 2d 595 (1942); *State ex rel Attorney General v. Burnett,* 200 Ark. 655, 140 S.W. 2d 673 (1940); *Martin v. Gage,* 281 Ky. 95, 134 S.W. 2d 966, 126 A.L.R. (1939); *Hart v. Tax Commissioner,* 240 Mass., 37, 132 N.E. 621 (1921).

It is therefore our opinion that the questioned portion of the 1965 Instructions is unenforceable because it is (1) contrary to the Commission's own regulations, and (2) lacks a jurisdictional basis for the imposition of tax.

In reply to your other questions, we first cite Section 422.4(8), Code of Iowa, 1962:

"422.4. *Definitions controlling division.* For the purpose of this division and unless otherwise required by the context: * * *

"8. The word 'resident' applies only to individuals and includes, for the purpose of determining liability to the tax imposed by this division upon or with reference to the income of any tax year, any individual domiciled in the state, and any other individual who maintains a permanent place of abode within the state."

An individual becomes a "resident taxpayer" for Iowa income tax purposes on whatever date he moves to Iowa with the intention to abandon his former residence and to become a permanent inhabitant of Iowa.

For that portion of the taxable year that he was not a "resident taxpayer" he need only report to Iowa such income as was derived from sources within Iowa. When he becomes a "resident taxpayer" he reports to Iowa his taxable income for the period of residence.

The deduction for federal income tax withheld or paid is adjusted in the same manner as income. In other words, the federal income tax attributable to the income, if any, derived from sources within Iowa prior to the period of residence and the federal income tax paid or withheld during the period of residence is deductible on the Iowa return.

Becoming a "resident taxpayer" has no common basis with the periods of residence required for eligibility for homestead tax credit, agricultural land tax credit and military service tax credit.

16.12

TAXATION: Moneys and Credits; Domestic Insurance Companies— Sections 432.5, 431.1, 1962 Code of Iowa; Ch. 360, Acts of the 61st G.A. Shares of stock of domestic insurance companies are subject only to one mill moneys and credits tax.

January 24, 1966

Mr. Ballard B. Tipton
Director, Property Tax Division
State Tax Commission
LOCAL

Dear Sir:

You have requested an opinion as to whether or not shares of stock of domestic insurance companies are exempt from the statutory five mills money and credits tax by virtue of Ch. 360, Laws of the 61st G.A. 1965.

Section 432.5, Code of Iowa, 1962, provides as follows:

"432.5 Domestic companies-shares of stock. The shares of stock of every insurance corporation or association having capital stock, organized under the laws of this state, shall be assessed for taxation in the manner provided for the assessment of the shares of corporate stock in sections 431.1 to 431.5, inclusive, and said shares of stock shall not be otherwise assessed. In addition to the state-

ment required in section 431.2, the corporation shall furnish to the assessor a copy of its annual report made to the commissioner of insurance."

Section 431.1, Code of Iowa, 1962, as amended by Section 3, Ch. 360, Laws of the 61st G.A., reads as follows:

"431.1 Shares of stock. The shares of stock of any corporation organized under the laws of this state, except corporations otherwise provided for in chapters 427 to 439, inclusive, and except as provided in section 437.14, shall be assessed to the owners thereof as moneys and credits at the place where its principal business is transacted. The assessment shall be on the value of such shares on the first day of January in each year. In arriving at the assessable value of the shares of stock of such corporations, the amount of their capital actually invested in the real estate or tangible personal property shall be deducted from the actual value of such shares. Such property other than moneys and credits shall be assessed as other like property. Any corporation whose shares of stock are subject to assessment under this section shall be entitled to deduct from the actual value of such shares the actual value of shares owned by it in any other corporation subject to assessment under this section, upon submitting satisfactory proof to the assessor that such shares of stock have been assessed under the provisions of this section to the corporation issuing such shares of stock.

"For the year 1966 and subsequent years, this section shall apply only to the shares of stock of any corporation which is organized under the laws of this state, is exempt from taxation under the provisions of subsection one (1) of section four hundred twenty-two point thirty-four (422.34) of the Code, *and* is not otherwise provided for in chapters four hundred twenty-seven (427) to four hundred thirty-nine (439), inclusive, and section four hundred thirty-seven point fourteen (437.14) of Code. However, for the purposes of the tax imposed by section thirty-five B point eleven (35B.11) of the Code, this paragraph shall not be applicable and the preceding paragraph of this section shall be applicable." (Emphasis added)

Two elements are now necessary under Section 431.1, as amended, to impose the five mills moneys and credits tax against the stock of a domestic corporation. First, the corporation must be exempt from taxation under Section 422.34(1), and second, the corporation must be "not otherwise provided for" in Chapters 427 to 439, inclusive, of the Code.

Insurance companies are exempt from the Iowa Corporation Income Tax (Division III, Ch. 422, Code) by virtue of Section 422.34(1), Code of Iowa, 1962, but are "otherwise provided for" by a tax on gross premium income, as imposed by Chapter 432, Code of Iowa, 1962. Section 422.34(1) has no application to taxes imposed against individual persons.

Section 432.5, Code of Iowa, 1962, provides that the assessment of the shares of stock of every domestic insurance corporation shall be in the manner provided for the assessment of shares of corporate stock in Sections 431.1 through 431.5, Code of Iowa, 1962. Section 431.5 makes Sections 430.12 through 430.15 applicable to corporations subject to the provisions of Chapter 431.

Section 430.12 makes the corporation liable for the *payment* of the taxes *assessed to the stockholders*. Section 430.13 allows the corporation to recover from each stockholder his proportion of the taxes so paid, and gives the corporation a lien on the stockholder's stock and unpaid dividends. The method of enforcement of the lien is provided in Section 430.14.

Under the provisions of Ch. 360, 61st G.A., Iowa corporations coming within the provisions of Section 431.1, commencing with the assessment of January 1, 1966, will no longer be required to pay on behalf of their shareholders the five mills moneys and credits tax provided for in Section 429.2, Code of Iowa, 1962, but will be subject to the levy of the one mill tax provided in Section 35B.11, Code of Iowa, 1962.

We conclude from the provisions of Section 432.5 that the shares of stock of domestic insurance corporations shall be assessed against the persons owning the same in the manner provided for assessment of corporate stock in Sections 431.1 to 431.5, *"and said shares of stock shall not be otherwise assessed."* This places such shares of stock on the same tax basis as shares of corporations under Section 431.1. This was true before the enactment of Ch. 360, 61st G.A., and is just as true after its enactment. Since the shares of corporations referred in Section 431.1 to 431.5 are no longer subject to the five mill moneys and credits tax, the shares of domestic insurance companies are not so taxed.

The purpose of Chapter 360, Acts, 61st G.A., was to lower the rate of moneys and credits taxation assessed against individuals from six to one mill. Section 431.1 assesses individuals, but not corporations. Thus, it must be concluded that the 61st General Assembly intended to lower the rate of taxation of shares of stock of domestic insurance companies, since these shares are assesed to individuals, as is true with respect to most other domestic corporations.

It is our opinion that the shares of stock of domestic insurance corporations are subject only to the one mill moneys and credits tax provided for in Section 35B.11.

16.13

TAXATION: Refund of Sales and Use Tax—Section 422.45(7), Section 419.11, Code of Iowa, 1966. A municipality is eligible under Section 422.45(7) for refund of sales or use tax paid by a contractor on goods or merchandise used in the fulfillment of a written contract with such municipality which property becomes an integral part of the project under the contract and at the completion thereof becomes public property. Section 419.11 does not require the municipality to annually remit a sum equal to the sales and use tax refund allowed under Section 422.45(7).

October 7, 1966

Mr. Carroll Worlan, Director
Iowa Development Commission
L O C A L

Dear Mr. Worlan:

Several months ago you requested an opinion relative to the refund provision of Section 422.45(7) of the 1966 Code of Iowa. Since that time the facts upon which your request was based have changed in certain particulars. Accordingly, we shall paraphrase your facts and update them.

FACTS

American Can Company and Skelly Oil are planning to operate a petrochemical plant and related facilities in Clinton, Iowa, as a joint venture under the provisions of Chapter 419 of the 1966 Code of Iowa. Skelly and American have formed the Chemplex Construction Corporation to construct the plant, and upon its completion title in fee simple will be conveyed by the construction corporation to a municipality, the

City of Clinton, Iowa. The construction of the plant will be financed by municipal bonds issued in accordance with Chapter 419 of the Code. After title to the plant has been conveyed to the municipality, Skelly and American Can will lease the plant back from the municipality, the rent being sufficient to make the principal and interest payments on the bonds. The lease will grant to the lessee an option to purchase the property from the municipality, and the right to prepay rent to permit early retirement of the outstanding bonds.

The construction corporation has and will engage various subcontractors in the actual performance of the construction, and it appears that these subcontractors will be subject to sales and use tax on the purchase of tangible personal property used in the construction of the plant. Skelly and American want to know whether the municipality can recover this sales and use tax under Section 422.45(7) of the 1966 Code.

QUESTIONS

Predicated on these facts you have posed substantially the following two questions:

1. Is a municipality entitled to a refund of sales and use taxes under Section 422.45(7) of the 1966 Code of Iowa on a project financed by municipal bonds issued under the provisions of Chapter 419 of the Code?

2. Where a statute allows a municipality to acquire industrial buildings but requires it to annually pay out of the revenue from such buildings to the State and its political subdivisions, authorized to levy taxes, a sum equal to the amount of tax which the State or such subdivisions would receive if the property were privately owned, would a municipality be required to remit an amount equal to the sales and use taxes that a private person would be required to pay?

I

In 1953 the General Assembly introduced a sales or use tax refund provision whereby a tax certifying or tax levying body could recover the amount of sales or use tax paid by a contratcor for goods or merchandise used in fulfillment of a written contract with the tax levying body, Chapter 206, Acts of the 55th G.A. Though amended twice, this thirteen year old provision has remained substantially intact and in its present form, Section 422.45(7), reads in pertinent part as follows:

> "7. Any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof . . . may make application to the state tax commission for the refund of any sales or use tax upon the gross receipts of all sales of goods, wares or merchandise to any contractor, used in the fulfillment of any written contract with the state of Iowa, or any political subdivision thereof, which property becomes an integral part of the project under contract and at the completion thereof becomes public property . . ."

In resolving the first question posed we are mindful of the cardinal rule that where a statute contains plain and unambiguous language we are not free to vary its meaning because of what the legislature might have or should have said in light of differing public interests, *Holland v. State*, 253 Iowa 1006, 115 N.W. 2d 161; *State v. Valeu*, ... Iowa ....., 134 N.W. 2d 911. Applying this rule to Section 422.45(7) and assuming the sale of taxable goods or merchandise, to be eligible for a refund of sales or use taxes the municipality must, for our purposes, establish the following three factors:

1. The goods, wares or merchandise sold to "any contractor" were used in the fulfillment of a written contract with the City of Clinton.

2. Such goods and merchandise become an integral part of the project under contract.

3. Such project under contract became at the completion thereof public property.

Respecting the first factor, it is clear that the municipality has, in accordance with Chapter 419 of the 1966 Code, entered into a written contract with the Chemplex Construction Company under which a petrochemical plant is in the process of construction. The actual construction of the project will depend mostly on subcontractors engaged or to be engaged by Chemplex. To this extent the sale of "goods, wares or merchandise . . . used in the fulfillment of [this] written contract" will be sales to the subcontractors and not, as the statute speaks, sales to "any contractor." Though we have found no decision by the Iowa Court on the subject, we think that for the purpose of obtaining a refund it is irrelevant that the taxable goods or merchandise were sold to a subcontractor. We have previously so ruled, 1954 O.A.G. 64, 65:

"[T]he dealings between the general contractor and his subcontractor, whether they were by written contract or oral, would be immaterial in a case of this character. The general contractor would be required to submit, under oath, a statement of all sales or use taxes paid for materials which become an integral part of the project. He would assume the responsibility for the accuracy of all purchases made by himself or by his subcontractor in the performance of the project."

As to the second factor, we assume there has and will be sales of taxable goods and merchandise, which property has or will become "an integral part of the project" in issue. This factor must, of course, be established as a prerequisite to eligibility for a refund, cf. Section 422.45(7)(a)-(b).

With regard to the final factor, you clearly state that the industrial complex, property wise, will be conveyed in fee simple to the municipality upon completion thereof. The question remains as to whether upon completion of the construction the project becomes "public property" within the meaning of the statute. *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 131 N.W. 2d 5, upholding the constitutionality of Chapter 419 of the Code, answers the question in the affirmative. There, the Iowa Supreme Court approved a program quite similar to the plan proposed by Skelly Oil and American Can and in doing so adopted (256 Iowa at 1205) the following conclusion of the trial court (256 Iowa at 1206-1208):

"'In the Wayland case [*Wayland v. Snapp*, 334 S.W. 2d 633 (Ark)] a question arose as to the status for the purposes of taxation of land and manufacturing facilities to be acquired by a city and county in Arkansas, pursuant to a statute which authorized the issuance of bonds and the development of new industries. The plant in question was to be occupied by the Seiberling Rubber Company, Inc. So far as material to a ruling in the Wayland case the Arkansas Constitution required that for property to be exempt from taxation it must be public property and must be used exclusively for public purposes. At pages 641 and 642 of 334 S.W. 2d, the Arkansas Court said:

"'(a) It must be admitted here that the grounds, the building and facilities will be owned by the City of Batesville and will, therefore, be public property.

"'(b) Likewise, we think it is clear that the property will be used exclusively for a public purpose. If it is, it will be exempt from taxation under the Constitution and if it is not it must be taxed. After careful thought and consideration, we cannot escape the conclusion that the whole purpose, and the only purpose, for the adoption by the people of Amendment No. 49, the passage by the Legislature of Act No. 9, and the efforts of the people of Batesville and Independence County (in attempting to implement said Amendment and said Act) was for the public welfare—obviously and undoubtedly a 'public purpose'. . ."

Though the municipality seems to be eligible for a refund within the plain meaning of the statute, we are pressed with the argument that it was contemplated that a tax levying body would be eligible for a refund only on contracts involving the exercise of its governmental function and not where it is acting in a proprietary capacity. This argument misses the point of *Green v. City of Mt. Pleasant,* supra. The Iowa Court in approving Mt. Pleasant's acquisition of industrial buildings and the lease arraignment to Vega, made it clear that Mt. Pleasant was performing a governmental function (256 Iowa at 1207):

"[L]egislative enactments, such as chapter 247 [Chapter 419, 1966 Code], serve a public purpose and promote the general public welfare and the advantages to the particular industry are merely incidental. Since these statutes, according to the overwhelming weight of authority, do serve a public purpose and promote the public welfare, the ownership and use of the facilities would certainly fall within the classification of a public use."

We are of the opinion that the municipality will be entitled to refund under Section 422.45(7) of the Code.

II

The resolution of your second question depends on the meaning of Section 419.11 of the 1966 Code of Iowa, which in pertinent part provides:

"any municipality acquiring . . . industrial buildings, as provided in this Act, shall *annually* pay out of the revenue from such industrial buildings to the state of Iowa and to the city, town, school district and any other political subdivision, authorized to levy taxes, *a sum equal to the amount of tax which the state, county, city, town, school district or other political subdivision would receive if the property were owned by any private person or corporation,* any other statute to the contrary notwithstanding." (Emphasis added)

The question you pose as we shall paraphrase it in the words of the statute is: "would the municipality be required annually to remit out of the revenue from such industrial buildings a sum equal to the sales and use tax which the State would receive if the property were privately owned?"

The argument is advanced that while the municipality is eligible for and can receive the refund discussed in the first division of this opinion, Section 419.11 admits of the possibility that the city must pay back to the State out of the revenue from the industrial buildings the amount of the sales and use tax refund. In passing on the validity of this contention, we must give Section 419.11 the interpretation its language calls for and we are not free to speculate as to the probable legislative intent or as to what the Assembly might have said or should have said, *State v. Bishop,* ..... Iowa ....., 132 N.W. 2d 455 (1965); *Lever Bros. Co. v. Erbe,* 249 Iowa 454, 87 N.W. 2d 469.

In keeping with this principle, we cannot torture the wording of the statute to reach a result we think desirable, *Hardwick v. Bublitz,* 253 Iowa 49, 111 N.W. 2d 309. Finally, we are often and have recently been told by the Iowa Court that if the meaning of a taxing statute is uncertain, it must be construed strictly against the taxing authority, *Farnsworth v. Iowa State Tax Commission,* ..... Iowa ....., 132 N.W. 2d 477 (1965).

Under the literal language of Section 419.11 a municipality acquiring industrial buildings must annually pay out of the revenue (rent) therefrom "a sum equal to the amount of tax which the state . . . *would receive if the property were owned by any private person or corporation*" (emphasis added). The obvious meaning of the italicized language is that the State will receive from the municipality the tax that would have been paid but for the fact that the city and not the corporation owns the real estate. In the instant case, however, the ownership of the property is irrelevant to the liability for sales and use tax incurred in connection with the purchase of goods and merchandise used in the fulfillment of the contract to construct the petrochemical plant. As to such goods and merchandise, the contractor has or will have to pay the tax and the State has or will *have received* the sales and use tax on a quarterly basis despite the fact that upon its completion the plant will be deeded to Clinton.

The fact that the State *did receive* the tax in issue is no less a reality because subsequent to its payment the municipality can, under a different statute, receive a refund of the sum paid. If the General Assembly did not intend that a municipality in this situation should have the benefit of the refund provision it was certainly free to say so. In this respect, both Section 422.45(7) and Section 419.11 were considered and amended by the 61st General Assembly, see Acts of the 61st G.A., ch. 345 §9 and ch. 352 §1. The recognition of this fact is important because the Iowa Supreme Court has repeatedly said that statutes relating to the same or similar subject and enacted at the same session are to be considered together and effect given to each rather than to infer that one destroys the other, *Eckerson v. City of Des Moines,* 137 Iowa 452, 115 N.W. 177; *McKinney v. McClure,* 206 Iowa 285, 220 N.W. 354; *Manilla Community School Dist. v. Halverson,* 251 Iowa 496, 101 N.W. 2d 705. The argument that the municipality must, under Section 419.11, pay back to the State the amount of the refund received under Section 422.45(7), places the legislature in the proverbial posture of having marched up the hill and back down again. To put it differently, we are not readily prepared to say that on one day during the 61st Session the Assembly considered and perpetuated the right to the refund and that on the next it revoked the refund for all practical purposes. To ascertain if such was the legislative intent we are enjoined to look at the whole of Chapter 419 of the Code, *State v. City of Des Moines,* 221 Iowa 642, 260 N.W. 41.

The purpose behind Chapter 419, which is ascertainable to a degree, detracts somewhat from the argument that the refund must be repaid. Generally, the purpose is to provide a method by which a municipality can promote its economical well-being by allowing private concerns to establish in the locality without the necessity of expending their own capital for the physical plant necessary to the proposed industrial operation, cf. *Green v. City of Mt. Pleasant,* 256 Iowa 1184, 1195-1196, 131 N.W. 2d 5. In *Green,* the Supreme Court, in speaking of Mt. Pleasant's situation, said that they could judicially notice "that for many years there has been a continuing and discouraging decline in the population of the rural area surrounding Mt. Pleasant, agriculture is no longer as dominent and significant a factor in the Iowa economy as it was . . . and that many people are moving from Iowa farms and smaller towns because of a lack of adequate opportunities to earn a living"

(256 Iowa at 1195). Prefaced in this language of local need, the Court said it intended to deal with the issues fully "as we are well aware not only Mt. Pleasant but many other Iowa municipalities are interested in promoting new industries under the [new law]" (256 Iowa at 1196). As noted before, one of the issues decided was that such promotion served the general public welfare and at one point the Court reasoned by analogy "that unemployment brings in its wake increase in vagrancy and crimes against property, reduction in the number of marriages, deterioration of family life, [etc.]" (256 Iowa at 1201-1202). If these are the considerations prompting the legislation, as the Iowa Court seems to infer, it is hard to attribute to the General Assembly the intent that under Section 419.11 the municipality must repay the refund received under Section 422.45(7).

The problems confronted in an attempt to so read Section 419.11 do not, however, end here. Section 419.11 states that the municipality shall "*annually*" pay out of the revenue of the buildings a sum equal to the tax the State would receive if the property were privately owned. The amount of sales and use tax involved in the construction of the plant must be established before the City can obtain a refund. But if we read Section 419.11 as meaning that such an amount must be repaid "annually", we encounter the extremely difficult question of how much must be paid each year. As to this problem the statute is silent; nor do we find anything of relevance on the question elsewhere in the Code. May the municipality annually remit ten dollars to fulfill the alleged obligation? How is the money to be remitted and to what office or department within the framework of State Government? It is not at all unfair to say that because of the "annual payment" provision we would have to strain the wording of Section 419.11 to read it as requiring a municipality to pay back the refund received under another statute.

Though not absolutely necessary to the resolution of your second question, the most logical construction of Section 419.11 is that it chiefly speaks of real property tax, which tax is levied "annually," Section 444.9 of the 1966 Code. The statute says the municipality shall annually pay "a sum equal to the amount of tax which the state, county, city, town, school district, or other political subdivision *would receive if the property were owned* by [the] corporation, any other statute to the contrary notwithstanding." As noted from the italicized language the tax spoken of is geared to ownership of the property. If the property were owned by the corporation the only tax that the various political subdivisions "would receive" because of such ownership is their share of the real property tax. Moreover, if the property were privately owned the State also "would receive" its share of the real property tax levied annually, see for example, Section 35B.11 of the 1966 Code. Section 427.1(2) specifically exempts from taxation property owned by a municipality and not held for pecuniary profit. Section 419.11, however, expressly directs that the exemption statute is inapplicable to property acquired under Chapter 419 of the Code by the language "any other statute to the contrary notwithstanding." Finally, it is not without significance to note that the Supreme Court of Iowa in *Green v. City of Mt. Pleasant,* 256 Iowa 1184, 1208, 131 N.W. 2d 5, in discussing the tax equivalent provision, viewed it as a real property assessment problem.

We do not necessarily conclude that the statute speaks only of a tax equivalent in real property terms. We are of the opinion, however, that Section 419.11 cannot be fairly construed so as to require a municipality to remit out of the revenue from the acquired industrial property a sum equal to the refund of sales and use tax received by the municipality under Section 422.45(7) of the Code. Accordingly, we answer your second question in the negative.

16.14

TAXATION: Sales and Use Tax—Exemptions—Chapter 174 and Section 422.45(5), 1966 Code of Iowa. A county fair or agricultural society organized under Chapter 174 of the Code is an agency or instrumentality of state government. Accordingly, it is entitled to a sales and use tax exemption for its purchases of goods, wares or merchandise to be used for public purposes as defined in this opinion.

November 18, 1966

Mr. Kenneth R. Fulk, Secretary
Iowa State Fair Board
L O C A L

Dear Mr. Fulk:

This is in reference to your letter of October 20, 1966, relative to an opinion under date of August 25, 1966, issued by Thomas W. McKay, Special Assistant Attorney General, to the Marion County Attorney. The opinion referred to ruled that the Marion County Fair Association is not an "agency, . . . or instrumentality of county government" within the meaning of Section 422.45(5), of the 1966 Code of Iowa, relating to the sales and use tax exemption on the purchase of goods, wares or merchandise to be used for a public purpose.

You state in your letter that the expenditures in question were connected with interim profit activities of the Marion County Fair Association and not for carrying out the purpose and intent of the county fair law which is to ". . . further interest in agricultural products, livestock, articles of domestic industry, implements, and other mechanical devices", Section 174.2 of the 1966 Code of Iowa. You further indicate that we did not give sufficient attention to other statutory entities which perform a similar function, which entities are clearly agencies or instrumentalities of State government. You have requested that, we reconsider the opinion of August 25, 1966, in light of these observations.

As you will note hereinafter, we have given your request detailed consideration. Unfortunately, the narrow factual background prompting the Marion County opinion no doubt influenced the result reached. At any rate, further research has led us to believe that the former opinion is too broad in certain respects. Accordingly, the opinion of August 25, 1966, is superseded by the instant one.

BACKGROUND INFORMATION

Section 422.45(5) of the 1954 Code of Iowa, specifically exempted from sales and use tax liability:

> "The gross receipts of all sales of goods, wares or merchandise used for public purposes to any tax certifying or tax levying body of the State of Iowa or governmental subdivision thereof, except sales of goods, wares or merchandise used by or in connection with the operation of any municipally-owned public utility engaged in selling gas, electricity, or heat to the general public."

The Attorney General, in considering this exemption statute, ruled on August 25, 1955, that a County Fair Association is not a tax certifying or tax levying body of the State of Iowa and that, accordingly, such Association was not entitled to the sales and use tax exemption. 1956 O.A.G. 93.

The 1963 Report of the Iowa State Fair, published by the State in accordance with Section 173.21 of the 1962 Code of Iowa, reflects the following observations by Donald E. Cunningham, then Director of the Sales and Use Tax Division, relative to this ruling (Report, p. 31):

"MR. CUNNINGHAM: Thank you very much. I will try to cover what I believe you people are interested in from talking with a few of you, that is the scope of the sales tax and use tax so far as you people in the Fair Associations are concerned.

"Now, giving you a little historical background, . . . on August 25, 1955, an attorney general's opinion signed by Dayton Countryman, said in substance that a fair association, when purchasing something, even though part of the money used in making such purchases was allocated from a county, the state tax would apply on those purchases. This kind of caught you and us unprepared. We had to police it as we are required to do all over the state. There were quite a few audits made of Fair Associations within the state since 1955 and revenue has come in small amounts in these examinations to a rather substantial amount. The last session of the lawmakers had this problem in mind, so they extended the exemption through enacting a piece of legislation . . . which really in substance exempted all *agents or instrumentalities* of federal, state, county, city, and municipalities, provided the items that they acquired were used for a public purpose . . ." (Emphasis supplied)

DISCUSSION

The legislation to which the Director referred was Section 1, Chapter 264, Acts of the 60th General Assembly, which is presently codified as Section 422.45(5) of the 1966 Code of Iowa, Section 422.45(5) reads as follows:

"Exemptions. There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:

* * *

"5. The gross receipts of all sales of goods, wares or merchandise *used for public purposes to* any tax-certifying or tax-levying body of the state of Iowa or governmental subdivision thereof, including the state board of regents, board of control of state institutions, state highway commission and *all* divisions, boards, commissions, *agencies or instrumentalities of state, federal, county or municipal government which derive disbursable funds from appropriations or allotments of funds raised by the levying and collection of taxes,* except sales of goods, wares or merchandise used by or in connection with the operation of any municipally-owned public utility engaged in selling gas, electricity or heat to the general public.

"The exemption provided by this subsection shall also apply to all such sales of goods, wares or merchandise subject to use tax under the provisions of chapter four hundred twenty-three (423) of the Code." (Emphasis supplied)

The new statute does not require the governmental entity to be a tax certifying or a tax levying body as a prerequisite to the sales and use tax exemption. The question you pose and the one you ask us to reconsider is whether a "county fair or agricultural society" is an *"agency or instrumentality"* of state [or] county . . . government which derives disbursable funds from appropriations or allotments of funds raised by the levying and collection of taxes." If such a society is an agency or instrumentality of state or county government, then it would be entitled to the sales and use tax exemption on the purchase of goods, wares or merchandise used for public purposes. In resolving the question for reconsideration, we are mindful of the well articulated principle that statutes relating to the same or similar subject matter are in pari materia and must be considered together, *France v. Benter,* ..... Iowa ....., 128 N.W. 2d 268; *Manilla Community School Dist.*

v. Halverson, 251 Iowa 496, 101 N.W. 2d 705. In this respect, our opinion of August 25, 1966, because of the limited facts not there articulated, failed to give sufficient consideration to other relevant portions of the Code. Such provisions shall now be considered for whatever bearing they might have on the instant question.

CHAPTER 159:

Chapter 159 of the Iowa Code is concerned with the Department of Agriculture, which we suppose all will concede is an arm, agency, or instrumentality of the State. Section 159.2 defines the objects of the Department, in part, as follows:

"1. To encourage, promote, and advance the interests of agriculture, including horticulture, livestock industry, dairying, cheese making, poultry raising, beekeeping, production of wool, production of domesticated fur-bearing animals, and other kindred and allied industries.

"2. To promote and devise methods of conducting said industries with the view of increasing production and facilitating an adequate distribution of the same at the least cost to the producer."

Chapter 159 also provides for the production of the Iowa Book of Agriculture and Section 159.10 directs that such book shall contain information and data concerning "the agricultural interests of the state," including data relative to the reports of the state fair board, the county and district fair societies, the farmers institutes and short courses, and the farm aid associations. Finally, Section 159.20 establishes a "marketing division" which division is enjoined "to do or cause to be done those things designed to lead to more advantageous marketing of Iowa agricultural products."

CHAPTER 173:

Chapter 173 of the Code of Iowa relates to the Iowa State Fair Board which by definition is a department of state government. Section 173.14 provides that the State Fair Board shall have the custody and control of the state fair grounds including the buildings and equipment thereon belonging to the State and shall have, inter alia, the authority to do the following:

"1. Erect and repair buildings on said grounds and make other necessary improvements thereon.

"2. Regulate the construction of street railways within said grounds and determine the motive power by which the same shall be propelled.

"3. Hold an annual fair and exposition on said grounds.

"4. Prepare premium lists and establish rules of exhibition for such fair which shall be published by the board not later than the first day of June in each year.

"5. Take and hold property by gift, devise, or bequest for fair purposes, and the president, secretary, and treasurer of the board shall have charge and control of the same, subject to the action of the board. Such officers shall give bonds as required in the case of executors, to be approved by the board and filed with the secretary of state.

"6. The state fair board may grant a written permit to such persons as it deems proper to sell fruit, provisions, and other articles not prohibited by law, under such regulations as the board may prescribe.

"7. The president of the state fair board may appoint such number of special police as he may deem necessary and such officers are hereby vested with the powers and charged with the duties of peace officers.

"8. Adopt all necessary rules in the discharge of its duties and in the exercise of the powers herein conferred."

Finally, Sections 173.20 and 173.21 enjoin the State Fair Board to file annually with the department of agriculture and with the Governor designated reports, such reports to contain among other things information relative to the State Fair and Exposition and the district and county fairs.

CHAPTER 176A:

In keeping with its concern under Chapters 159 and 173 of promoting agriculture and other related state interests, the General Assembly recently enacted the "County Agricultural Extension law." Section 176A.2 of the 1966 Code of Iowa specifically sets forth the policy of that law in the following language:

"It is hereby declared to be the policy of the legislature to provide for aid in disseminating among the people of Iowa useful and practical information on subjects relating to agriculture, home economics and rural and community life, and to encourage the application of the same in the several counties of the state through extension work to be carried on in co-operation with Iowa State University of science and technology and the United States department of agriculture as provided in the Act of Congress May 8, 1914, as amended by Public Law 83 of the Eighty-third Congress."

Section 176A.3 establishes the "county agricultural extension district" and explicitly defines such district as "a governmental subdivision of this state, and a public body corporate organized in accordance with the provisions of this chapter" for the purposes thereafter enumerated. The remainder of Chapter 176A concerns itself mainly with the agricultural extension council, which council is largely responsible for administering the County Agricultural Extension law and for this purpose the council is specifically designated "an agency of the state;" see Section 176A.8(3). Though it is unnecessary to consider in detail the powers granted the district extension council, it should be noted that Section 176A.8(10) provides that it shall be responsible for "the preparation and adoption of the educational program on extension work in agriculture, home economics and 4-H club work . . . ." In the latter respect, the General Assembly specifically provided in Section 176A.9 that the extension council shall have for its sole purposes the dissemination of information, the giving of instruction and practical demonstrations on subjects relating to agriculture, home economics, rural and community life and the encouragement of the application of the same to and by all persons in the extension district, and the imparting to such persons of information on said subjects through field demonstrations, or other media. Finally, the county agricultural extension work is to be financed by taxes as provided for in Sections 176A.10-176A.12.

CHAPTER 174:

It is clear that the various entities thus far discussed exist to further the agricultural and related interests of the State. It is further clear that each is an agency or instrumentality of the State and as such, each receives or can receive "disbursable funds from appropriations or allotments of funds raised by the levying and collection of taxes,"

Section 422.45(5). Accordingly, each of these governmental entities is eligible for the sales and use tax exemption applicable to the purchase of goods, wares and merchandise to be used for a public purpose. It remains to inquire if a "county fair or agricultural society" authorized by Chapter 174 of the Code shares enough in common with these governmental units to qualify as an agency or instrumentality of State or County government.

Section 174.1 of the 1966 Code of Iowa defines as a "Fair" a bona fide exhibition of agricultural, dairy and kindred products, livestock and farm implements. That section further defines as a "Society" a county or district fair or agricultural society incorporated under the laws of this State for the purpose of holding such fair. Section 174.2 sets forth the powers of such a society in the following language:

> "Each society may hold annually a fair to further interest in agriculture and to encourage the improvement of agricultural products, livestock, articles of domestic industry, implements, and other mechanical devices. It may offer and award such premiums as will induce general competition.
>
> "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.
>
> "No salary or compensation of any kind shall be paid to the president, vice-president, treasurer, or to any director of the association for such duties."

Sections 174.3 through 174.5 grant to such a society further powers quite comparable to those granted to the State Fair Board under Section 173.14 of the Code. Section 174.8 enjoins each society to annually publish a financial statement and Section 174.9 provides for the allocation of State aid to a society if it files with the State Fair Board annually a sworn statement showing the following:

> "1. The actual amount paid by it in cash premiums at its fair for the current year, which statement must correspond with its published offer of premiums.
>
> "2. That no part of said amount was paid for speed events, or to secure games or amusements.
>
> "3. A full and accurate statement of the receipts and expenditures of the society for the current year and other statistical data relative to exhibits and attendance for the year.
>
> "4. A copy of the published financial statement published as required by law, . . . and a certified statement showing an itemized list of premiums awarded, and such other information as the state fair board may require."

If the various requirements considered above have been complied with, a society is entitled to receive from the State annually an amount not to exceed $2,100.00, see Sections 174.10 through 174.12. Apart from this allocation of state funds to a society, Chapter 174 also provides for county aid under designated circumstances. For example, Section 174.13 grants to a county board of supervisors the discretion to levy a tax not to exceed one-quarter mill upon all taxable property of the county, the funds realized therefrom to be known as the fairground fund. The fairground fund is specifically earmarked for the following purposes:

". . . fitting up or purchasing fairgrounds for the society, or for the purpose of aiding boys and girls 4-H Club work and payment of agricultural and livestock premiums in connection with said fair . . ."

Finally, Sections 174.14 and 174.15 establish a procedure whereby the electors of a given county can authorize the board of supervisors to purchase or accept as a gift real estate to be used for county or district fair purposes. If a majority of the votes are in favor of such proposition, the property, if purchased, will be paid for out of the general fund, title taken in the name of the county, but the board of supervisors shall place such real estate under the control and management of the county or district fair society.

Predicated on the above discussion of a "county fair or agricultural society," it is readily apparent that this entity shares much in common with the other entities previously considered, as for example, the "county agricultural extension district." Since the other entities are agencies of the State, the question here is whether a "county fair or agricultural society" is a *public corporation* created by the legislature for the local administration of a part of the affairs of the State? The answer to this question is crucial because it is well established that a "public corporation" is an agency or instrumentality created for the administration of a portion of the powers of government, delegated to it for that purpose, *Harris v. City of Des Moines*, 202 Iowa 53, 57, 209 N.W. 454; *Georgia Hussars v. Haar*, 118 S.E. 563, 564, 156 Ga. 21; *Edson v. Griffin Hospital*, 144 A. 2d 341, 343, 21 Conn. Supp. 55; *Heffner v. Cass and Morgan Counties*, 62 N.E. 201, 206, 193 Ill. 439.

In resolving this question the following observation is inescapable: the General Assembly must have believed that it was creating a *public corporation* because it lacked the authority to allocate state and local tax funds in aid of a private corporate entity. Section 1 of Article VII of the Iowa Constitution so provides:

"The credit of the State shall not, in any manner, be given . . . to, or in aid of, any individual, association, or corporation; . . . ."

The word "corporation" found in the quoted constitutional provision does not, however, extend to a public corporation created by the legislature as a component part of the State, *State v. Executive Council*, 207 Iowa 923, 936-937, 223 N.W. 737. In this respect, we are now constrained to rule that a county fair or agricultural society is an agency or instrumentality of the State. We reach this conclusion not only because of the above constitutional observation, but also because of the judicial pronouncements on the subject.

Williams v. Dean, 134 Iowa 216, 111 N.W. 931, considering prior but substantially similar legislation relative to a county fair society, contains very significant dictum. In that case, the Iowa Court noted that such societies are created and exist in part for "educational purposes" and the Court specifically characterized such a society as being "a sort of arm or branch of the State" (134 Iowa at 220).

With but one exception, all of the cases we have discussed from other jurisdictions hold that a fair or agricultural society created, as here, under state legislation is an agency or instrumentality of state or local government, *People v. San Joaquin Valley Agricultural Ass'n.*, 91 Pac. 740, 151 Cal. 797; *Excise Board v. Kansas City Southern Ry. Co.*, 47 P. 2d 580, 173 Okla. 238; *Petersen v. Bannock County*, 102 P. 2d 647, 61 Idaho 419, and *Guidi v. State*, 252 P. 2d 708 (Cal. App.).

People v. San Joaquin Valley Agricultural Ass'n., supra, involved an agricultural society created by the legislature for functions very similar to those shared by a fair or agricultural society in Iowa. In that case, the Association argued that it was a public corporation

created for the local administration of a part of the affairs of the state, and that, as such, its property was not subject to execution. The Supreme Court of California after reviewing the relevant constitutional and statutory provisions, as we have done above, held that "these associations are public agencies of the state, . . . and charged with the performance of a part of the functions of state government" (91 Pac. at 743).

In *Excise Board v. Kansas City Southern Ry. Co.*, supra, the Court stated that an Oklahoma County Fair Association was "organized under authority of law for county purposes . . . and . . . financed under the authority of section 9, article 10, of the Constitution as a part of the county expense" (47 P. 2d at 582). The *Petersen* and *Guidi* decisions cited above are also in point, but will not be here considered.

In view of all of the above, we now conclude that a county fair or agricultural society organized in accordance with Chapter 174 of the Code is an agency or instrumentality of state government. Moreover, such a society is entitled to and does derive "disbursable funds from appropriations or allotments of funds raised by levying and collection of taxes," Section 422.45(5). Accordingly, it follows that such agency or instrumentality is eligible under Section 422.45(5) of the Code for an exemption from sales and use tax on its purchases of goods, wares and merchandise to be used for public purposes. We think a cautionary footnote is, however, in order. The purchase of goods, wares and merchandise is for a public purpose only where the same is made by the corporate society in keeping with the public purpose for which it was established, to wit: the holding annually of "a fair to further interest in agriculture and to encourage the improvement of agricultural products, livestock, articles of domestic industry, implements, and other mechanical devices", Section 174.2 of the Code. Thus, for example, the purchase of goods, wares and merchandise to be used in connection with a society's interim profit activities, such as weekly auto races, would not qualify for the exemption.

16.15

TAXATION: Penalties for nonpayment of tax after unsuccessful litigation—Chapter 445, 1966 Code of Iowa. The law is that where a taxpayer in good faith contests his tax liability and enjoins the collection thereof, such a taxpayer is liable for penalty if the decision is adverse to him.

December 2, 1966

Mr. Homer K. Young
Budget Examiner
State Comptroller's Office
State Capitol
L O C A L

Dear Mr. Young:

This is in reply to your letter of November 3, 1966, in which you state as follows:

> "On October 25, 1966, Attorney Marion Hirschburg, special counsel for the State Tax Commission, issued a letter to the 55 county attorneys in regards to the assessment of the Chicago and North Western Railway Co.
>
> "Since the court has dismissed the petition of the C & NW Ry. Co., we now have a problem as to an interpretation of the date penalties should be assessed against the railroad.

"In his letter he stated in part as follows:

'The court's decree dismissed plaintiff's petition and dissolved the temporary injunction issued on September 17, 1966, restraining your county treasurers from collecting the second half of the North Western's 1965 taxes payable in 1966. You should advise your respective county treasurers and county auditors that *they may now proceed in the ordinary manner to collect from the North Western Railway its 1965 taxes payable in 1966.*'

"On what date should penalty be added to the second half taxes of 1965 due in 1966? The first half taxes were paid.

"In addition to the above he stated as follows:

'You should advise your respective county auditors that they may now proceed to *spread the 1964 assessed value* of the North Western Railway as originally determined by the State Tax Commission and certify same to your respective county treasurers for *collection of 1964 taxes payable in 1965* by the North Western Railway. *Said 1964 taxes should be determined on the basis of millage rates used in computing 1964 taxes for other taxpayers.*'

"On what date should penalty be added to the 1964 taxes due in 1965, which were certified to this office November 1st as per instructions from the Iowa State Tax Commission?

"In this last instance he stated in part as follows:

'On October 19, 1966, the court entered its ruling in the above referenced case dismissing the contempt proceedings initiated by the North Western Railway and dissolving the temporary injunction which had restrained the tax commission from certifying said reassesed value for the year 1963 to your respective county auditors. You may advise your county auditors that they will shortly receive *from the tax commission* certification of said reassessed value with instructions for spreading same for collection of *1963 taxes payable in 1964 by the North Western Railway.*'

"On what date should penalty be added to the 1963 taxes due in 1964 on the reassessed value as certified by the Iowa State Tax Commission? These taxes will be a balance due as one-half of them were paid before the original assessment was declared void.

"Please note that in the first instance and the last instance that taxes were certified to the county treasurers previous to this time, but in the second instance they are just in the process of being certified to the county treasurers."

It is well established in Iowa that a taxpayer litigates tax liability at his peril and in the event he is unsuccessful in such litigation he is liable for the statutory penalties for nonpayment of the tax. *Iowa National Bank v. Stewart,* 214 Iowa 1229, 1246-1247, 232 N.W. 445 (1930); *Lamont Savings Bank v. Luther,* 200 Iowa 180, 185, 204 N.W. 430 (1925); *Cedar Rapids & Missouri Railroad Company and Iowa Railroad Land Company v. Carroll County,* 41 Iowa 153, 192 (1875).

In *Iowa National Bank v. Stewart,* supra, the Iowa Court set forth the following reasoning in support of the rule (214 Iowa at 1247):

". . . taxpayers ought not to be encouraged in the non-payment of taxes by saving them the penalties pending unsuccessful litigation on the plea that the litigation was prosecuted in good faith.

One of the purposes of penalties is to discourage evasion and procrastination."

In *Cedar Rapids & Missouri Railroad Company and Iowa Railroad Land Company v. Carroll County,* supra, plaintiffs brought suit to restrain the defendants from selling plaintiff's land for the nonpayment of taxes. A temporary injunction was ordered. At the final hearing the injunction was made perpetual to some taxes and dissolved as to others. Although the taxpayer was successful in having a portion of the tax invalidated, the taxpayer was still liable for the penalty for failure to pay the portion of tax which was sustained. With regard to the penalty the Supreme Court stated at pages 191 and 192:

"It is urged that the penalties are onerous, inequitable and oppressive; that they have accrued, while plaintiffs' were, in good faith, contesting the rights of defendant to enforce them and that the questions of law involved were doubtful, and justified plaintiffs in resisting the payment of the taxes. That plaintiffs' will suffer a hardship in the payment of these heavy penalties is very apparent; that the questions involved in the cause were doubtful, and the litigation has been prosecuted in good faith, may be conceded, but these things give us no authority to annul a statute and remit a penalty explicitly provided for, and in which defendant has a vested right.

"The delay incident to the progress of this cause, especially in this court, has been great, and plaintiff has been subject thereby to suffer from the enormous increase of the penalties. *This is no ground for relief; it is an incident of litigation, the risk of which parties are required to assume.* None of these considerations will authorize us, without law or precedent, to abate any part of the sum to which defendant is entitled under the law. With the hardships of the law, or with those resulting fortuitous circumstances connected with its administration, we have nothing to do. When the rule is admited that equity will not relieve against penalties imposed by statute, arguments based upon hardships furnish us no avenue of escape from its operation. The relief asked upon the application under consideration is refused." (Emphasis added)

The Northwestern Railroad successfully resisted in the Iowa courts the payment of the second half taxes for the year 1963, payable in 1964, up to the point that the State Tax Commission, pursuant to court order, reassessed these taxes on November 29, 1965. Subsequent legal efforts by the railroad failed. This date the taxes due and owing are those of the assessment of November 29, 1965. Applying the rules of law announced above, it is our opinion that the taxpayer owes penalties from the time that this valid assessment would have been placed on the county roles. Apparently this could have been done by the end of November, so that the penalties would have started accruing to the State of Iowa as of December 1, 1965.

The Northwestern Railroad also resisted in the courts the collection of the taxes for the year 1964, payable in 1965. These efforts have been unsuccessful. The first half of this tax became due on March 30, 1965, and the second half on September 30, 1965, and it is my opinion that the penalties accrue from the first day of April 1965 for the first half, and the first day of October 1965 for the second half.

The railroad's effort as to the second half of the 1965 taxes payable in 1966 was also unsuccessful. These taxes became due on September 30, 1966, and it is, therefore, my further opinion that the penalties accrue from October 1, 1966.

16.16

TAXATION: State Tax Commission's authority to issue a county-wide revaluation and reassessment of realty—Chapter 421 and 441 of the 1966 Code of Iowa. Upon a finding that the assessment of real property within a county has not been uniform and equitable as required by law, the Commission has statutory authority to order the assessor to undertake a county-wide revaluation and reassessment of all realty. The assessor is obligated by law to comply with such order and should he refuse, the Commission has statutory authority to enforce compliance. In this respect, the assessor must have funds to carry out the order and should the county conference board refuse to make monies available under the normal budgeting procedures of Section 441.16 of the Code, such refusal would constitute arbitrary action in frustration of Commission's lawful order and subject the conference board to mandamus.

December 9, 1966

Mr. Dewayne A. Knoshaug
Wright County Attorney
Clarion, Iowa

Dear Mr. Knoshaug:

This is in reply to your letter of August 19, 1966, in which you submitted the following:

"The Iowa State Tax Commission, acting under the authority of Iowa Code Section 421.17(2) 1962, has ordered the Assessor of Wright County to make a complete reappraisal of all real estate in said county, to be completed by September 1, 1968.

"In accordance with said order the Assessor submitted to the Conference Board, in the proposed budget for 1967, the sum of $40,000.00 for a Special Appraiser's Fund, which was a partial levy of the amount necessary to make a complete reappraisal by professional appraisers.

"However, the Conference Board in final action on the 1967 budget, deleted the $40,000.00 Special Appraiser's Fund, leaving the assessor with only enough funds to carry on the regular work of the office, and with no funds to carry out the order of the State Tax Commission.

"Even if funds were levied next year, for the 1968 budget, such funds would not be available until after January 1, 1968; and of course we have no assurance any funds will be provided in the 1968 budget.

"It is the opinion of the Assessor that any reappraisal should start early in 1967, if adequate time is to be allowed to make and check such an appraisal, if it is to be ready for the quadrennial assessment due in 1969."

Predicated on this factual background, you pose for the resolution the following questions:

"1. Does the State Tax Commission have the authority to order and enforce an order for reappraisal?

"2. Is the assessor compelled to carry out a reappraisal order without funds being made available for that purpose?

"3. Assuming the answer to question one is in the affirmative, can the State Tax Commission, by appropriate court action, compel a levy to be made so that their order to reappraise can be complied with?

"4. Can the County Conference Board determine whether the reappraisal should be by professional appraisers or by an appraiser directed by the assessor with local personnel?"

At the outset it should be noted that some members of the staff have pointed out that the Commission's March 11, 1966, order did not direct a reappraisal as is suggested in your facts, but rather ordered a county-wide *revaluation* and *reassessment* of all realty. In this respect, it is arguable that the words "valuation" and "assessment" have a limited technical meaning and that a revaluation and reassessment can be accomplished without an appraisal or reappraisal of the property in issue, cf. *Iowa National Bank v. Stewart*, 214 Iowa 1229, 1240, 232 N.W. 445; *Sonait v. Board of State Affairs*, 83 So. 760, 146 La. 450; Robert B. Throckmorton, *Judicial Review of Tax Assessments in Iowa*, 26 Iowa Law Rev. 723. A careful reading of the Commission's order in total, however, leaves little doubt that the revaluation and reassessment ordered is to be accomplished through an actual appraisal of the realty. Thus, for example, page three (3) of the order recites that "the revaluation and reassessment of real property ordered herein be in keeping with recognized and accepted *appraisal* procedures in this state." Accordingly, this opinion is issued on the premise that the Commission's order contemplates an actual appraisal of the property in issue. Your first three (3) questions will be considered together and the last one separately.

I

STATUTES INVOLVED

Chapter 421 and Chapter 441 of the 1966 Code of Iowa contain numerous provisions relevant to your inquiry. To set them forth here would unduly prolong the text of this opinion. Accordingly, we have collected such provisions and set them forth in an appendix hereto. Though we shall not discuss all the provisions of law having some relevance to the Tax Commission's authority in the premises, that appendix is, in its entirety, hereby incorporated by reference and made a part of this opinion.

DISCUSSION:

The Iowa Constitution, Article III, Section 30, provides that as to the assessment and collection of taxes for State, county and road purposes, the General Assembly "shall not pass local or special laws" and that laws with respect to such taxation "shall be general and of *uniform operation throughout the State.*" (Emphasis added)

As is reflected in several Supreme Court opinions, e.g., *Smith v. Sioux City Stock Yards Co.*, 219 Iowa 1142, 1151, 260 N.W. 531, early legislation relative to the assessment and the equalization of taxation in keeping with this constitutional mandate was piecemeal, resulting in a complicated patchwork system of revenue measures *with no central authority*, and with no practicable way of bringing about a statewide system that would insure even an approach to uniformity in the burden of taxation. The mischief thus resulting was an object of concern to the 43rd General Assembly and it sought to correct the problem by creating a State Board of Assessment and Review to the end that "all assessments of property and taxes levied thereon be made relatively just and uniform in substantial compliance with law." Chapter 205, Acts of the 43rd G.A.; *Smith v. Sioux City Stock Yards Co.*, supra. Or, to put it in the language of *State v. Local Board*, 225 Iowa 855, 867, 283 N.W. 87, the aim of the Assembly in creating the new state board "was to accomplish uniformity, equality and justice." This legislation establishing *a central authority* and defining its powers to

achieve the mentioned aims with respect to tax assessments has remained substantially unchanged and is presently codified in Chapter 421 of the Code, the pertinent provisions of which are set forth in the appendix hereto.

In your opinion request it is neither suggested nor inferred that the Commission erred in its finding set forth in the March 11, 1966, order that "the assessment of real property within [Wright] county has not been uniform and equitable as required by law." Assuming the finding was correct (an assumption we must make for the purposes of this opinion), the questions you pose with the possible inference that the General Assembly in creating a central authority "to accomplish uniformity, equality and justice" in matters of taxation failed to grant such authority the power to achieve these aims. We would, however, be extremely reluctant to rule that the Assembly has created such a sterile central body, particularly in view of the mandate in Section 4.2 of the Code that "its provisions and all proceedings under it shall be *liberally construed* with a view to promote its objects . . ." Keeping in mind the constitutional and legislative aim in establishing a central taxing authority and giving a liberal construction to such legislation with a view to promote its objects, we are of the opinion that the Commission had the authority to issue the revaluation and reassessment order and that it also has the power to effectively enforce the order.

To the end that all assessments of property be relatively just and uniform, Section 421.17(1) provides that the Tax Commission shall have and exercise:

> *General supervision* over the administration of the assessment and tax laws of the state, over boards of supervisors and all other officers or boards of assessment and levy in the performance of their official duties." (Emphasis added)

In construing the predecessor to Section 421.17(1), the language of which was the same, the Iowa Supreme Court held that "the state board of review [had] the power to and authority of supervising and reviewing the official acts of subordinate assessing officials and boards and *of compelling them to correct any apparent errors or irregularities as determined by the state board of review*," *State v. Local Board*, supra, 225 Iowa at 867 (Emphasis added). In that case, the Iowa Court, in construing the words "general supervision" quoted with approval the following language from other cases (225 Iowa at 868-870):

> "The power of supervision given . . . *is broad*, and in our judgment sufficient warrant alone for the order in question. To supervise is to superintend, to direct, to have charge over, with the power of direction. (Emphasis supplied)
>
> * * *
>
> "The state board of tax commissioners is given general supervision over assessors . . . to the end that all taxable property shall be placed on the assessment rolls and equalized as between the different counties . . . so that equality of taxation shall be secured according to the provisions of law. What is meant by 'general supervision'? Counsel . . . contends that it means to confer with, to advise, and that the board acts in an advisory capacity only. We cannot believe that the Legislature went through the idle formality of creating a board thus impotent . . . Certainly a person or officer who can only advise or suggest to another has no general supervision over him, his acts or his conduct."

Having thus reviewed the language from other cases *State v. Local Board concluded thusly* (225 Iowa at 870):

"Under the facts in this case, if a local board of assessment and review has practiced an unjust and discriminatory method of assessment and taxation, as the state board found and determined did exist in this case, then the state board under the statute hereinabove set out, must have had the power and authority to order the assessment corrected, otherwise it would be meaningless."

So in the instant case the Commission found the assessment of real property in Wright County has not been uniform and equitable as required by law. In keeping with the Iowa Court's view of the Commission's power of general supervision and the statutory injunction that it exercise such power "to the end that all assessments of property . . . be made relatively just and uniform," we think the power of supervision given by Section 421.17(1) "is broad and in our judgment sufficient warrant alone for the order in question" (225 Iowa at 868). We need not, however, rest here.

Section 421.17(2) specifically enjoins the Commission to supervise the work of the assessor and authorizes the Commission "to order the reassessment of all or part of the property in any taxing district in any year." Subparagraph (4) of the same statute grants the Commission the power to "confer with, advise, and *direct* . . . [those] obligated by law to make levies and assessments, as to their duties under the law." Finally, subparagraph (10) specifically states that the 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." In keeping with the plain meaning of these statutory provisions, we think that quite apart from its power of "general supervision" the Commission has been granted specific authority to issue a revaluation and reassessment order such as the one in issue. Indeed, it appears that under Section 421.17(2) the Commission could have ordered the reassessment to be completed within a year; such was not the case, however, the work need not be finished until September 1, 1968, with the new values to have no effect before the year 1969.

The Commission order being within the authority granted, the county assessor must abide by the same. Section 441.7 of the Code so provides:

"The assessor shall:

* * *

"(4) Co-operate with the state tax commission as may be necessary or required, and he shall obey and execute all orders, directions, and instructions of the state tax commission, insofar as the same may be required by law."

Thus, in answer to your first question the Commission had the authority to issue the order in question and if necessary it has the power to cause the order to be enforced by resort to Section 421.20 of the Code which authorizes an appropriate action in the district court "to compel the performance of any order made by said commission . . ." Furthermore, the order being lawful noncompliance with the same will give rise to an action under Section 441.52 of the Code for the forfeiture of $500.00:

"If any assessor . . . shall . . . neglect to . . . perform any of the duties required of him by law, at the time and in the manner specified . . . he shall forfeit and pay the sum of five hundred dollars . . ."

We shall not answer your second question until we have disposed of the third question: to wit, can the Commission, by an appropriate court action, compel a levy to be made so its order can be effectively complied with?

Special Appraiser's Fund v. Assessment Expense Fund:

The Commission's order directed the county assessor that in preparing the budget of expenses for his office he should include an estimated amount for proceeding with the revaluation and reassessment ordered. The Commission also directed the Wright County conference board to take such action as will insure a just and equitable revaluation and reassessment of the property. To comply with this portion of the Commission's order the assessor had available two distinct statutory fund sources from which he could endeavor to obtain the necessary monies—the first being the general *"assessment expense fund"* established by Section 441.16 of the Code; the second being the *"special appraiser's fund"* which the conference board is authorized to establish under Section 441.50 of the Code. Your facts reflect that the assessor chose to request the conference board to allow, as a 1967 budget item, the sum of $40,000.00 for a special appraiser's fund. The item was disallowed.

In the latter respect, Section 441.50 provides that the conference board *"may* certify for levy annually an amount not to exceed one and one-half mills . . . for the purpose of establishing a special appraiser's fund, to be used only for such purposes." We will assume that the decision to certify such levy for this *special fund* is discretionary and the conference board exercised discretion in not causing the special levy. It does not, however, follow from this observation, that the Commission's lawful order can be frustrated by the simple expedient of not applying for or obtaining funds via the normal budgeting procedure available to the assessor. In this respect, Section 441.16 as material provides:

"441.16 Budget. All expenditures under this chapter shall be paid as hereinafter provided.

"Not later than July 1 of each year the assessor, the examining board, and the board of review, shall each prepare a proposed budget of all expenses for the ensuing year . . .

* * *

"Such combined budgets shall contain an itemized list of the proposed salaries of the assessor and each deputy, the amount required for field men and other personnel, their number and their compensation; the estimated amount needed for expenses, printing, mileage and other expenses necessary to operate the assessor's office . . .

* * *

"Each year the chairman of the conference board shall, by written notice, 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, field men, and other personnel of the assessor's office.

"2. The salaries and compensation of members of the board of review, the assessor, chief deputy, other deputies, field men, and other personnel, and determine the time and manner of payment.

3. The miscellaneous expenses of the assessor's office, the board of review and the examining board, including office equipment, records, supplies, and other required items.

"4. The estimated expense of assessment appeals. All such expense items shall be included in the budget adopted for the ensuing year.

"All tax levies and expenditures provided for herein shall be subject to the provisions of chapter 24 and the conference board is hereby declared to be the certifying board.

"Any tax for the maintenance of the office of assessor and other assessment procedure shall be levied only upon the property in the area assessed by said assessor and such tax levy shall not exceed one and one-half mills in assessing areas where the valuation upon which the tax is levied does not exceed twenty-five million dollars; one and one-quarter mills in assessing areas where the valuation upon which the tax is levied exceeds twenty-five million dollars and does not exceed thirty million dollars; one mill in assessing areas where the valuation upon which the tax is levied exceeds thirty million dollars. The county treasurer shall credit the sums received from such levy *to a separate fund to be known as the 'assessment expense fund' and from which fund all expenses incurred under this chapter shall be paid. . . .*" (Emphasis supplied)

Section 441.16 must also be read together with the first part of Section 441.50 which grants the conference board the authority to employ appraisers or other expert help to assist in the valuation of property, "the cost thereof *to be paid in the same manner as other expenses of the assessor's office.*" (Emphasis supplied)

A careful reading of Chapter 441 of the Code, starting with Section 441.17 and those following, reflects that the Legislature has specifically enjoined the assessor to execute numerous duties, including the injunction to "co-operate with the . . . commission . . . and obey and execute all orders, directions, and instructions of the . . . commission, insofar as the same may be required by law." The order in issue is a lawful one and the assessor is required to execute the same. In this respect, it is axiomatic that the assessor cannot perform this or his other duties without the necessary funds. The source of such monies is the "assessment expense fund" established by Section 441.16 of the Code "from which fund all expenses incurred under . . . chapter [441] shall be paid. In our opinion the assessor would have been and will be as to the next budget year entitled to a reasonable sum of money from the assessment expense fund to comply with the Commission's order. If the conference board refuses to authorize a reasonable sum to meet this expense then we believe mandamus will lie to correct the refusal.

Budgeting provisions such as Section 441.16 are revenue measures enacted by the legislature for the purpose of permitting municipalities and the officials thereof to perform the duties imposed upon them by law, 20 C.J.S. Counties, §279, pp. 1214-1215. Such statutes contemplate a sufficient levy to meet revenue requirements and it is the duty of the proper county officer or board to allow or cause to be made a levy authorized by statute to secure the enforcement of duties imposed by law as well as to discharge lawful obligation incurred by a political subdivision of the State. cf. *Coy v. The City Council of Lyons City*, 17 Iowa 1, 5; *Looney v. Consolidated Ind. Sch. Dist.*, 201 Iowa 436, 443, 205 N.W. 328; *Protest of Kansas City Southern Ry. Co.*, 11 P. 2d 500, 508, 157 Okl. 246; *Woolfolk v. Driver*, 41 S.E. 2d 463, 184 Va. 174.

The two Iowa cases just cited stand for the proposition that a political subdivision can be compelled to levy a tax to meet an obligation imposed upon it by law. The remaining two cases are even more in point. In *Protest of Kansas City*, supra, the Court said (11 P. 2d at 508-509):

"As stated in the Smart Case, the Legislature may not establish a system which will ' * * * depend upon the whim and caprice of certain local officials who might, by failing and refusing to make proper provision therefor, render it impossible to secure an enforcement of such laws by the officers charged with the duty of so doing.'

"So much of the ad valorem tax rate authorized by the Legislature as is necessary for the performance of constitutional governmental functions must be appropriated and used for those purposes, and if the funds produced by the legislative rate of ad valorem taxation, with the income and revenue from other sources, is not sufficient for those purposes, a rate of ad valorem taxation must be levied which, with the income and revenue from other sources, will be sufficient for the performance of constitutional governmental functions, not exceeding the maximum rate of ad valorem taxation provided by section 9, article 10, of the Constitution . . ."

While *Protest of Kansas City* dealt with the appropriation of funds made necessary by reasons of constitutional provisions creating county offices, its reasoning is applicable to the office of county assessor and the budgeting provisions established by the General Assembly. In a similar vein, the Supreme Court of Virginia made the following observation in *Woolfolk v. Driver*, supra, (41 SE. at 468):

"It is perfectly obvious that the county government could not function without the annual county levy. It was the mandatory duty of the board of supervisors of Caroline county to levy a general county levy each year 'on all property within the county segregated by law for local taxation,' etc."

We, of course, recognize that the amount to be allowed under Section 441.16 involves a judgment decision by the conference board and the good faith exercise of such judgment is not subject to judicial review, by mandamus or otherwise, *Pierce v. Green*, 229 Iowa 22, 40, 294 N.W. 237. But it is one thing to exercise judgment as to the amount necessary to run the assessor's office and another thing to simply refuse to make any monies available to allow the assessor to carry out a part or all of the duties enjoined upon him by law, cf. *Pierce v. Green*, supra, at 40; *Miller v. Hanna*, 221 Iowa 56, 61-62, 265 N.W. 127. Suppose a county conference board in any given year refused to allow any funds to operate the assessor's office for the following year? Would anyone contend that mandamus would not lie?

So in the instant case the Wright County assessor is duty bound by law to comply with the Commission's order. This he cannot effectively accomplish without funds and should the conference board refuse to allow such funds under Section 441.16 they will have acted in an arbitrary manner and in evasion of a positive duty imposed upon them by law, cf. *Miller v. Hanna*, supra, at 62:

"A public officer or inferior tribunal may be guilty of so gross an abuse of discretion, or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty, enjoined, or to act at all, in contemplation of law; and in such case a mandamus would afford a remedy where there was no other adequate remedy provided by law."

In reaching this conclusion, we should also note that Section 421.18 of the Code specifically directs "all public officers of the state and of all municipalities . . . to co-operate with and aid the commission in its efforts to secure a fair, equitable, and just enforcement of the taxation and revenue laws." The county conference board is composed

of public offices of the county, a municipality by definition under Section 24.2 of the Code. Should it undertake to frustrate the Commission's lawful order by not allowing the money to comply with the same, it has failed in its statutory duty to co-operate and aid the Commission. As was noted above, the Commission in its order specifically called upon the conference board to "take such action in this matter as will insure a just and equitable revalution and reassessment of real property in [Wright] county."

Accordingly, we are of the opinion that as to the next budget year the assessor can apply for and should receive monies from the assessment expense fund to carry out the Commission's order. In the event, the conference board refuses to authorize a reasonable sum of money for the contemplated work, the refusal would be in frustration of the Commission's lawful order and would constitute an arbitrary act subject to correction by mandamus instituted either by the Commission or the county assessor. Thus, your third question is answered in the affirmative.

As to your second question, we recognized that the assessor cannot request funds under Section 441.16 until July 1 of the next year. In this respect, we are of the opinion that the assessor must take any steps reasonably available now to comply with the Commission's order. To this end we call your attention to Section 24.6 of the Code establishing an emergency fund and suggest that such provision may provide a source of monies to commence the work ordered by the Commission. We are not unmindful of those officials who control the emergency fund and we accordingly quote once again from Section 421.18:

> "It shall be the duty of all public officers of the state and of all municipality to . . . co-operate with and aid the commission in its efforts to secure a fair, equitable, and just enforcement of the taxation and revenue laws."

II

The answer to question four is provided in part by Section 441.50, of the 1966 Code of Iowa.

> "441.50 *Appraisers employed.* The conference board shall have power to employ appraisers or other technical or expert help to assist in the valuation of property, the cost thereof to be paid in the same manner as other expenses of the assessor's office . . ."

It follows from this provision that the conference board has the power to determine whether the appraisal should be conducted by the assessor with local personnel or by professional outside help. This conclusion is, however, subject to our comments relative to your third question to the end that the Commission's lawful order is not frustrated.

APPENDIX

STATUTES INVOLVED

The following provisions of the 1966 Code of Iowa have either been considered in the text hereto or are otherwise relevant to the questions proffered.

> "421.17 Powers and duties. In addition to the powers and duties transferred to the state tax commission, said commission shall have and assume the following powers and duties:
>
> "1. To have and exercise general supervision over the administration of the assessment and tax laws of the state, over boards of

supervisors and all other officers or boards of assessment and levy in the performance of their official duties, in all matters relating to assessments and taxation, to the end that all assessments of property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law.

"2. To supervise the activity of all assessors and boards of review in the state of Iowa; to co-operate with them in bringing about a uniform and legal assessment of property as prescribed by law.

"The state tax commission shall have the power to order the reassessment of all or part of the property in any taxing district in any year. Such reassessment shall be made by the local assessor according to law under the direction of the state tax commission and the cost thereof shall be paid in the same manner as the cost of making an original assessment.

"The state tax commission shall determine the degree of uniformity of valuation as between the various taxing districts of the state and shall have the authority to employ competent personnel for the purpose of performing this duty.

"For the purpose of bringing about uniformity and equalization of assessments throughout the state of Iowa, the state tax commission shall prescribe rules and regulations relating to the standards of value to be used by assessing authorities in the determination, assessment and equalization of actual value for assessment purposes of all property subject to taxation in the state, and such rules shall be adhered to and followed by all assessing authorities.

* * *

"4. To confer with, advise, and direct boards of supervisors, boards of review, and others obligated by law to make levies and assessments, as to their duties under the laws."

* * *

"6. To require city, town, township, school districts, county, state, or other public officers to report information as to the assessment of property and collection of taxes and such other information as may be needful or desirable in the work of the commission in such form and upon such blanks as the commission may prescribe.

* * *

"9. To investigate the work and methods of boards of review, boards of supervisors, or other public officers, in the assessment, equalization, and taxation of all kinds of property, and for that purpose the commission, and members or employees thereof, may visit the counties or localities when deemed necessary so to do.

"10. To require any board of review at any time after its adjournment to reconvene and to make such orders as the state tax commission shall determine are just and necessary; to direct and order any county board of equalization to raise or lower the valuation of the property, real or personal, in any township, town, city, or taxing district, to order and direct any county board of equalization to raise or lower the valuation of any class or classes of property in any township, town, city, or taxing district, and generally to make any order or direction to any county board of equalization as to the valuation of any property, or any class of property, in any township, town, city, county, or taxing district, which in the judgment of the commission may seem just and necessary, to the end that all property shall be valued and assessed in the manner and according to the real intent of the law.

* * *

"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.

* * *

"421.18 Duties of public officers. It shall be the duty of all public officers of the state and of all municipalities to give to the commission information in their possession relating to taxation when required by the commission, and to co-operate with and aid the commission in its efforts to secure a fair, equitable, and just enforcement of the taxation and revenue laws.

* * *

"421.20 Actions. The commission may bring actions of mandamus or injunction or any other proper actions in the district court or before any judge thereof, to compel the performance of any order made by said commission or to require any board of equalization or any other officer or person to perform any duty required by this chapter.

* * *

"441.16 Budget. All expenditures under this chapter shall be paid as hereinafter provided.

"Not later than July 1 of each year the assessor, the examining board, and the board of review, shall each prepare a proposed budget of all expenses for the ensuing year. The assessor shall include in his proposed budget the probable expenses for defending assessment appeals. Said budgets shall be combined by the assessor and each deputy, the amount required for field men and other personnel, their number and their compensation; the estimated amount needed for expenses, printing, mileage and other expenses necessary to operate the assessor's office, the estimated expenses of the examining board and the salaries and expenses of the local board of review.

"Each year the chairman of the conference board shall, by written notice, 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, field men, and other personnel of the assessor's office.

"2. The salaries and compensation of members of the board of review, the assessor, chief deputy, other deputies, field men, and other personnel, and determine the time and manner of payment.

"3. The miscellaneous expenses of the assessor's office, the board of review and the examining board, including office equipment, records, supplies, and other required items.

"4. The estimated expense of assessment appeals. All such expense items shall be included in the budget for the ensuing year.

"All tax levies and expenditures provided for herein shall be subject to the provisions of chapter 24 and the conference board is hereby declared to be the certifying board.

"Any tax for the maintenance of the office of assessor and other assessment procedure shall be levied only upon the property in the area assessed by said assessor and such tax levy shall not exceed one and one-half mills in assessing areas where the valuation upon which the tax is levied does not exceed twenty-five million dollars; one and one-quarter mills in assessing areas where the valuation upon which the tax is levied exceeds twenty-five million dollars and does not exceed thirty million dollars; one mill in assessing areas where the valuation upon which the tax is levied exceeds thirty million dollars. The county treasurer shall credit the sums received from such levy to a separate fund to be known as the 'assessment expense fund' and from which fund all expenses incurred under this chapter shall be paid.

* * *

"441.17 Duties of assessor. The assessor shall:

* * *

"4. Co-operate with the state tax commission as may be necessary or required, and he shall obey and execute all orders, directions, and instructions of the state tax commission, insofar as the same may be required by law.

* * *

"441.50 Appraisers employed. The conference board shall have power to employ appraisers or other technical or expert help to assist in the valuation of property, the cost thereof to be paid in the same manner as other expenses of the assessor's office. The conference board may certify for levy annually an amount not to exceed one and one-half mills upon all taxable property for the purpose of establishing a special appraiser's fund, to be used only for such purposes. From time to time the conference board may direct the transfer of any unexpended balance in the special appraiser's fund to the assessment expense fund.

* * *

"441.52 Failure to perform duty. If any assessor or member of any board of review shall knowingly fail or neglect to make or require the assessment of property for taxation to be of and for its taxable value as provided by law or to perform any of the duties required of him by law, at the time and in the manner specified, he shall forfeit and pay the sum of five hundred dollars to be recovered in an action in the district court in the name of the county or in the name of the city as the case may be, and for its use, and the action against the assessor shall be against him and his bondsmen."

16.17

Sales Tax—§§422.43, 422.42(10), 422.45(1), 422.42, 1962 Code: Sales and Use Tax Regulation No. 147. (1) Under Regulation 147, no sales tax need be paid by retailer-builder on materials purchased in Iowa and used by it in Minnesota construction projects. (2) Sales tax is not applicable to materials delivered by retailer to purchaser outside of Iowa for use in construction outside of Iowa. (3) Illinois may properly impose use tax on materials delivered in Illinois for use in Illinois. (4) Differential between sales at invoice price and retailer's net cost (invoice price less cash discount) is sufficient "gain" to constitute doing "business" by retailer. (McKay to Cunningham, Iowa State Tax Commission, 2/4/65) #65-2-3

16.18

Homestead Tax Credit—§425.11, Code of 1962: Chapter 18, Section 5, Acts 60 G.A. (1) Enclosed porch attached to mobile home qualifies as

"dwelling house." (2) Addition and garage appurtenant to mobile home qualifies as "dwelling house." (3) Mobile home itself does not qualify as "dwelling house." (McKay to Tipton, Ia. State Tax Comm., 2/8/65) #65-2-4

16.19

Moneys and Credits—§429.4, Code, 1962. Mortgages which do not bear interest are exempt from moneys and credits tax. (McKay to Riehm, Hancock Co. Atty., 2/26/65) #65-2-21

16.20

Property exemption and taxable—§427.1(17), 1962 Code of Iowa. It is not necessary that a person make his livelihood *solely* by farming in order to be granted the exemption provided by the statute. (McKay to Goeldner, Keokuk Co. Atty., 3/9/65) #65-3-2

16.21

Taxes: Personal Property Taxes: Lien of Personal Taxes—§445.29, 1962 Code of Iowa. The purchases at an execution sale takes the personal property free of liability for the unpaid personal property taxes since the lien for personal property taxes created by Section 445.29, Code of Iowa, 1962, is not a prior and superior lien. (McKay to Carstensen, Clinton Co. Atty., 3/17/65) #65-3-10

16.22

Sales and Use Tax Exclusions—§422.42(3), 1962 Code of Iowa, as amended by Acts of the 60th G.A. Ch. 260, Sec. 1, effective July 4, 1963, and Section 423.1(1), Code, 1962, as amended by Acts 1963, 60 G.A., Ch. 260, Sec. 2, effective July 4, 1963. "Dry ice" is a chemical, and when consumed or dissipated in processing meat intended to be sold ultimately at retail is excluded from the imposition of sales and use tax. (McKay to Vogl, Chief Auditor, Sales & Use Tax Division, State Tax Cimmission, 3/18/65) #65-3-11

16.23

Personal Property Tax: Tax Exemption of Property Stored in a Public Warehouse—§427.1(29), 1962 Code of Iowa. Cartons stored in a public warehouse are exempt from personal property taxation if they become the property of the manufacturer-user prior to the time said property was placed in the warehouse. However, if the cartons are sold to the manufacturer-user from the warehouse, the cartons are subject to personal property taxation. (McKay to Krohn, Jasper Co. Atty., 3/22/65) #65-3-16

16.24

Personal Property Tax—§428.17, 1962 Code of Iowa. Article I, Section 6, Article III, Section 30, Article VII, Section 7, and Article VIII, Section 2, Iowa Constitution. The taxation of merchants and farmers inventories is constitutional. (McKay to Reichardt, Polk Co. Representative, 3/23/65) #65-3-17

16.25

Inheritance Tax—§450.86, 1962 Code of Iowa, as amended by Ch. 277, Acts of the 60th G.A. "Joint owner" refers to ownership of safety

deposit box, not contents. Notice to Tax Commission must be given and inventory made before delivery or transfer of contents. Failure to comply with statute renders bank liable for inheritance tax on assets taken from safety deposit box. (McKay to Thomas E. Tucker, Lee Deputy Co. Atty., 4/20/65) #65-4-8

16.26

Sales Tax—Application of sales tax to communication services—§422.43, 1962 Code of Iowa. State Tax Commission rules consider commercial telephone exchanges to be "communication services" taxable under Sec. 422.43, while newspapers are considered to be a "service," and, as such, exempt from tax. (Smith to Representative Fischer, 4/21/65) #65-4-11

16.27

Real Property—§428.4, Ch. 441, 1962 Code of Iowa. Statutes regarding quadrennial reassessment of real estate take precedence over 1962 district court decree purporting to set assessed and taxable valuation of certain real estate for a period of ten years. (McKay to Hoover, Clay Co. Atty., 5/6/65) #65-5-4

16.28

Real Property—Taxation of Railway Companies—§434.1 et seq., 1962 Code of Iowa. Railway companies are responsible to the State Tax Commission to file the required statement for the portion of the year the railroad property was "owned, operated, or leased by" the railway company. The taxing counties are the third party beneficiaries of any agreement made between the lessor and lessee of the railroad property as to which party will actually pay the taxes. (McKay to Tipton, Tax Comm., 5/13/65) #65-5-9

16.29

Moneys and Credits—§§428.1, 428.8, 1962 Code of Iowa. Portions of joint bank accounts located in banks outside of Iowa and allocable to residents of Iowa are subject to moneys and credits tax. (McKay to Davidson, Page Co. Atty., 5/14/65) #65-5-10

16.30

Use Tax—§§ 423.1, 423.2 and 423.7, 1962 Code of Iowa. Use tax cannot be imposed and collected upon a vehicle which had been previously registered in the State of Iowa, and upon which use tax has been collected once. (McKay to Skinner, Buena Vista Co. Atty., 5/18/65) #65-5-12

16.31

Exemptions—§97A.12, 1962 Code of Iowa. All pensions, annuities, retirement allowance and other rights mentioned in §97A.12, as well as the amount contributed by the employee are exempt from any tax of this state. (McKay to Needles, Liquor Control Comm., 5/18/65) #65-5-11

16.32

Taxing District Defined—§24.2, 1962 Code of Iowa. A taxing district is the area throughout which a particular tax or assessment is ratably apportioned and levied upon the inhabitants. (McKay to Vanderbur, Story Co. Atty., 5/26/65) #65-5-15

16.33

Real Property Tax—§§427.1(2), and 427.1(9), 1962 Code of Iowa. Renting a building of the Wright County Junior Fairgrounds for garaging a school bus is only incidental to public use and does not affect tax exempt status of that property. (McKay to Knoshaug, Wright Co. Atty., 6/7/65) #65-6-3

16.34

Property Tax—§441.5, 1962 Code of Iowa as amended by H.F. 385, Acts of the 61st G.A. Any qualified elector of the State of Iowa, including employees of the State Tax Commission, shall be allowed to take the examination for the position of County Assessor, irrespective of the county in which he resides. It is up to the examining board to determine who is an elector, and, if an applicant is not a qualified elector, he will not be allowed to take the examination. (McKay to Ballard B. Tipton, State Tax Commission, 7/12/65) #65-7-4

16.35

Inheritance Tax—Clearance Without Administration—Sections 450.22 and 606.15, Code of Iowa, 1962. Proceedings should be docketed in Probate or separate docket reserved for Clearance for Inheritance Tax Without Administration. Fees may be charged for certificate and seal and entering Order, but statutory probate fees may not be charged. Property should be recorded in Inheritance Tax and Lien Book. (McKay to Ryan, Poweshiek Co. Atty., 8/3/65) #65-8-1

16.36

Real Property Tax Exemptions—§§427.1 (9), and 427.1 (24), 1962 Code of Iowa. A partial disallowance of the real property tax exemption should be made where the use of a portion of the property of a Masonic lodge is not for the appropriate objects of the organization. (McKay to Davidson, Page County Attorney, 9/9/65) #65-9-3

16.37

Federal Income Tax and FICA Withholding—§3401, Internal Revenue Code of 1954, and §97C.3, 1962 Code of Iowa. Withholding of Federal Income Taxes and FICA from the per diem of the members of the State Board of Regents is a correct practice. (McKay to Dancer, State Board of Regents, 9/14/65) #65-9-5

16.38

Property Tax refunding erroneous or illegal tax—§§445.60, 1962 Code of Iowa. Refund provisions of §445.60 apply where private individual erroneously paid taxes on lots owned by county. (McKay to Poston, Wayne County Attorney, 9/21/65) #65-9-8

16.39

Real Property Tax Exemptions—Dormitories leased by college—§427.1 (9), 1962 Code of Iowa. A private college is considered a charitable organization. Property leased by the college for dormitory purposes is tax exempt. H.F. 331, 61st G.A. (1965) concerning assessment and valuation of such property is applicable and is effective as of January 1, 1965 (McKay to Farnsworth, Crawford County Attorney, 9/24/65) #65-9-10

16.40

Federal Income Tax and FICA Withholding—§3401, Internal Revenue Code of 1954; §§97C.3 and 356.22, 1962 Code of Iowa. Federal Income Taxes and FICA are not to be withheld from amounts credited to county jail prisoners. (McKay to Doyle, Asst. County Attorney, Scott County, 10/7/65) #65-10-3

16.41

Property Tax; Monies and Credits—§§429.2 and 431.1, 1962 Code of Iowa, as amended, by S.F. 583 and S.F. 642, Acts of the 61st G.A. Shares of stock of a subsidiary Iowa corporation owned by the present Iowa corporation are subject to assessment and taxation in the hands of the parent, where such shares are not assessed and taxed at the source. (McKay to Fenton, Polk County Attorney, 10/18/65) #65-10-11

16.42

Exemptions—§§411.13 and 422.66, Code of Iowa, 1962. All pensions, annuities, retirement allowances and other rights mentioned in Section 411.13 are exempt from any tax of this state. Refund may be applied for under the provisions of Section 422.66. (McKay to Fenton, Polk County Attorney, 1/27/66) #66-1-12

16.43

Real Property; Exemptions—§§427.1(9) and 427.1(24), 1962 Code of Iowa. Property owned by a school district, which is used as the residence of the school administrator, rent-free, is exempt from taxation provided Sections 427.1(9) and 427.1(24) are fully complied with. (Kelly to Burdette, Decatur County Attorney, 1/31/66) #66-1-14

16.44

Personal property tax; pick-up campers—§§321.1(1), 321.1(2), and 321.130, 1962 Code of Iowa. A "camper" which is permanently mounted on a pick-up truck is not subject to taxation as personal property. If the "camper" is easily or conveniently detachable, however, it is subject to taxation as personal property. (Kelly to Glenn, State Representative, 3/18/66) #66-3-13

16.45

Property Tax Redemption Certificates—Chapter 447, 1962 Code of Iowa. The right of redemption requires an interest in the property itself. Mere possession with no claim of right or color of title is insufficient to permit redemption. A redemption certificate having been issued to one not entitled to redeem can be cancelled only by declaratory judgment or other appropriate legal action. (Bindner to Knoshaug, Wright County Attorney, 4/12/66) #66-4-3

16.46

Personal Property Taxes—Tax on leased personalty in possession of lessee: §§428.1, 428.4 and 428.9, 1962 Code of Iowa. Leased personalty must be listed and taxed to the owner thereof, unless the property is voluntarily listed by the lessee, or unless the owner does not reside in the county where the lessee has possession of the property, in which case it is listed and taxed to the lessee. (Bindner to Lee, Hamilton County Attorney, 4/13/66) #66-4-4

16.47

Agricultural Land Tax Credit to life tenants—Chapter 426, 1962 Code of Iowa; Chapter 356, Acts of the 61st G.A. A domiciliary of the State of Iowa who owns the life interest in real estate may qualify as an "owner" and is entitled to the Agricultural Land Tax Credit. (McCarthy to Bedell, Dickinson County Attorney, and Hoover, Clay County Attorney, 4/27/66) #66-4-12

16.48

Property tax exemptions—§427.1(9), 1962 Code of Iowa. Senior citizens' homes qualify as charitable or benevolent institutions or societies if the purpose and use of their property results in the amelioration of persons in unfortunate circumstances, assistance to the needy, care and comfort of those in ill health and not pecuniary profit. (Bindner to Tipton, Director, Property Tax Division, 7/20/66) #66-7-5

16.49

Sales and Use Tax—Exemption—§422.45(5), 1966 Code of Iowa. A county fair association is a special type of non-profit organization and is not an agency, board, commission, division or instrumentality of county government. Thus it is not entitled to a sales tax exemption for its purchases of goods, wares or merchandise. (McKay to Hays, Marion County Attorney, 8/25/66) #66-8-10

16.50

Taxing District Defined—§§441.35 and 441.37, 1966 Code of Iowa. "Taxing district" as used in Sections 441.35 and 441.37 means the "same assessing district." (McKay to Tipton, Director, Property Tax Division, State Tax Commission, 9/21/66) #66-9-4

16.51

Assessment of platted lots—§409.48, 1966 Code of Iowa. Assessment procedure enacted by Ch. 339, Acts of the 61st G.A., applies not only to plats recorded after July 4, 1965, but also to plats recorded within 3 years prior to that date. (McKay to McDonald, Cherokee, County Attorney, 9/22/66) #66-9-5

16.52

Homestead Tax Credit—§425.11(2), 1966 Code of Iowa. Where surviving husband and nephew by affinity hold title to homestead property, both qualify as an "owner" within statutory definition. (McKay to Sturges, Plymouth County Attorney, 10/6/66) #66-10-4

CHAPTER 17

WORKMEN'S COMPENSATION

STAFF OPINIONS

17.1

WORKMEN'S COMPENSATION: County Conservation Board. County conservation commissioners fall within the purview of the Workmen's Compensation law, as an "employee" under 85.61(3)(c) and should be covered by this Act—§85.61(3)(c), §111A.2.

March 2, 1965

Mr. David C. Tracey
Delaware County Attorney
Court House
Manchester, Iowa

Dear Mr. Tracey:

You have requested an opinion of this office on the following question:

"Are County Conservation Commissioners required to be covered by Workmen's Compensation?"

I assume from your question as submitted that the "commissioners" are in fact the board members of the County Conservation Board appointed by the County Board of Supervisors under authority of Section 111A.2 of the 1962 Code of Iowa as amended. You have cited in your letter to us Chapter 85 of the Workmen's Compensation law Code of Iowa 1962, § 61, entitled "Definitions" and under subparagraph c of paragraph 3 reading as follows:

"A person holding an official position, or standing in a representative capacity of the employer, *however officials elected or appointed* by the State, *Counties*, School Districts, County Boards of Education, and Municipal Corporations, shall be deemed employees including members of the Iowa Highway Safety Patrol and Conservation Officers. (Emphasis added)

As pointed out before County Conservation Board members are appointed by the respective County Boards.

By a clear reading of the above cited excerpt of Section 85.61(3)(c), it would appear that such officials are designated employees for Workmen's Compensation purposes, and thus it would be this writer's opinion that County Conservation Board members fall within the purview of this Act.

17.2

WORKMEN'S COMPENSATION: University's Liability to Injured Athlete Signatory to Proposed Financial Aid Agreement Form—§§85.61(1), 85.61(2), 1962 Code of Iowa. Such language as "make an honest effort in athletics" contained in forms signed by athletes, raises the implication of a contractual arrangement and as such would be covered under the Iowa Workmen's Compensation Law.

July 19, 1965

Mr. Maurice W. Soults
Assistant Director of
Cooperative Extension
Services
Curtiss Hall
Iowa State University
Ames, Iowa

Dear Mr. Soults:

You requested an Attorney General's opinion as to the affect that Appendix B (Per Minute No. 1698), (1), Page 1698, (2), Page 782) *Financial Aid Agreement Form* and Appendix C (Per Minute No. 1698), (2), Page 782) *Language Which Must Be Included In Coaches' Supplementary Letters To Prospective Student Athletes,* will have as to the University's liability under the Iowa Workmen's Compensation Law to a scholarship student injured while engaged in athletics. You submitted a memorandum from the Resident Counsel of the University of Colorado in which he advised that the words "make an honest effort in athletics" be deleted from the next to last paragraph of Appendix C and that the last paragraphs be deleted from both appendices. You requested that the Iowa law relating to the advisability of such a deletion be determined.

Subsection 85.61(1) of the 1962 Code of Iowa as amended, defines "employer" as follows:

> "1. 'Employer' includes and applies to any person, firm, association, or corporation, *state,* county, municipal corporation, school district, county board of education and the legal representatives of a deceased employer." (Emphasis added)

It is recognized in Iowa that an institution such as a state university is an arm of the state. *Weary v. State,* 42 Iowa 335(1876). 36 OAG 379. Further in reference to whether a township is an employer under the Workmen's Compensation Law it was stated that: "Every other body politic within the state having authority to employ labor has been included within the terms used." *Hop v. Brink,* 205 Iowa 74, 81; 217 N.W. 551 (1928). Thus it apears that a State university logically falls within the statutory designation of the "state" as an employer for the purposes of the Workmen's Compensation Law. This conclusion was also reached in 1 Iowa Law Bulletin 43, 44 (1915).

The definition of an employee under the Iowa Workmen's Compensation Law is found in Subsection 85.61(2) which provides:

> "2. 'Workman' or 'employee' means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, except as hereinafter specified."

In construing Section 85.61(2) the court in *Sister Mary Benedict v. St. Mary's Corporation,* 255 Iowa 847, 124 N.W. 2d 548, 550 (1963), held:

> ". . . a person 'who has entered the employment of an employer' is 'a person who works under contract of service, express or implied . . .' In other words, employment implies the required contract on the part of the employer to hire and on the part of the employee to perform service."

This language, which is cited with approval in the later case of *Usgaard v. Silver Crest Golf Club,* ..... Iowa ....., 127 N.W. 2d 636, 637 (1964), indicates, as the cases cited by the University of

Colorado Resident Counsel in his memorandum points out, that the essential element in the necessary employer-employee relationship is contractual obligation. *Muscatine City Water Works v. Duge,* 232 Iowa 1076, 7 N.W. 2d 203 (1943).

The *Sister Mary Benedict* case further points out that:

> "The major elements of the employer-employee relationship for the purposes of workmen's compensation under the Iowa Act are: (1) the employer's right of selection, or to employ at will, (2) responsibility for the payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) is the party sought to be held as employer the responsible authority in charge of the work or for whose benefit the work is performed." 124 N.W. 2d at 551.

I am in agreement with the University of Colorado Resident Counsel that the previous stipulation that "awards may be discontinued only for low scholarship, misconduct, or failure to remain enrolled," seem to avoid any implication that participation in athletics was required. This stipulation indicates that there was no contractual obligation to engage in athletics as is required for the Iowa Workmen's Compensation Law to apply. Further, elements (3) and (4) of the *Sister Mary Benedict* case are not met as to athletic participation. There was no power to discharge or terminate the relationship for failure to participate in athletics nor was there a right of control or direction over the scholarship students' athletic participation. That these elements are necessary in order to find an employment relationship was also pointed out in *Muscatine City Water Works v. Duge,* supra.

However, the changes resulting from the deletion of this provision and the addition of the words "make an honest effort in athletics" in the next to last paragraph of Appendix C and of the last paragraphs in both appendices tend, I believe, to raise the implication that the necessary employment relationship as to athletic participation does exist.

Appendix B, the *Financial Aid Agreement Form,* the only form the scholarship athlete signs, while stating that the award may be renewed each year as long as the scholarship athlete remains academically qualified and abides by acceptable conduct standards, provides that in case of injury incurred during supervised athletic conduct the scholarship athlete will be asked to assist in conducting the athletic program. This language tending to indicate an obligation on the part of the scholarship student is reinforced by the same stipulation in the last paragraph of Appendix C and by the provision of the next to last paragraph in Appendix C that the scholarship athlete must "make an honest effort in athletics" in order to be assured that the coach will recommend to the scholarship committee that his award be renewed.

That this language may raise the required obligation to participate in athletics is indicated by *Meader v. Incorporated Town of Sibley,* 197 Iowa 945, 950-951, 198 N.W. 72 (1924), which provides:

> ". . . if the intention of the parties and the consideration upon which an obligation is assumed are that there shall be a corresponding obligation on the part of the other party, the law will imply such obligation."

Although Appendix C is not part of the formal scholarship agreement and is not signed by the scholarship athlete, it would probably be considered, with Appendix B, in determining whether the scholarship athlete was under an obligation to participate in athletics because, in Iowa, it is recognized that in determining the meaning of

the words in an instrument and of the instrument as a whole, when they are ambiguous, it is proper to examine the subject matter thereof, and the situation of the parties to which such words refer. *Bare v. Cole,* 220 Iowa 338, 260 N.W. 338. (1935).

While there is ambiguity as to whether there is an obligation to participate in athletics, this will not likely prevent the finding of such an obligation because where the terms of the contract are so ambiguous or uncertain that the intention of the parties is not clear, doubtful language is to be construed strictly against the party that prepared it. *Wenthe v. Hospital Service, Inc.,* 251 Iowa 765, 100 N.W. 2d 903. 1960.

In the recent Iowa case of *Freese v. Town of Alburnett,* 255 Iowa 1264, 125 N.W. 2d 790 (1964) the Court found that there was doubt as to what the parties actually had in mind when they used certain language. The court then held:

> "This being true, we apply the rule that from the situation of the parties, the objects they were trying to accomplish, and any other facts in evidence, the actual intention of the parties must be determined."

The application of these rules of contract construction to our situation is likely to raise an implied contract for the scholarship athlete to engage in athletics.

In addition to the greater evidence of a contractual obligation that arises with the changes, they also to a greater extent, fulfill the major required element of the employer-employee relationship as set forth in the *Sister Mary Benedict* case, supra.

The likelihood that the questionable language in Appendices B and C will bring the university under the Act is increased by the accepted view that:

> "In case of doubt the Workmen's Compensation Act is liberally construed to extend its beneficent purpose to every employee who can fairly be brought within it." *Usgaard v. Silver Crest Golf Club,* supra, 127 N.W. 2d at 639.

You have inquired specifically into the advisability of such a deletion. It is my opinion that, in the absence of circumstances in the particular case showing that no obligation to participate in athletics was intended under Iowa law, the language of the additions could very possibly raise an implied contract to participate in athletics and thereby the necessary employer-employee relationship required for the application of the Iowa Workmen's Compensation law. One circumstance that will be particularly important in arriving at this determination is the weight that the coach's recommendation will have in determining whether the scholarship is renewed because, it appears that one element that influences his decision is whether the scholarship athlete makes an "honest effort in athletics."

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