CITIES AND TOWNS: MOTOR VEHICLES ~~LAW~~: Speed Limits - ~~SPEED LIMITS.~~ Cities and towns (municipal corporations) have the power to pass ordinances establishing speed limits on or in public alleys; but an ordinance which conflicts with, is contrary to or inconsistent with the provisions of Ch. ~~324~~ 321, Code 1958, is of no force and effect. (Peach & Dodds, St. Rep., undated) ✻ 59-1-1

Honorable Robert R. Dodds
House of Representatives
Fifty-eighth General Assembly
State House

Dear Sir:

This will acknowledge receipt of your request for an official opinion of the Attorney General relative to a certain legal problem therein stated as follows:

> "I would like a formal opinion on whether cities and towns have the power to set and enforce speed limits in alleys. There seems to be a difference of opinion on this subject and would like you to clarify it."

Section 389.40, Code 1958, provides that:

> "Cities and towns shall have power to restrain and regulate the riding and driving of horses, livestock, vehicles, and bicycles within the limit of the corporation, and prevent and punish fast or immoderate riding or driving within such limits."

Section 321.235, Code 1958, provides:

> "The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this chapter."

Section 321.236, Code 1958, provides as follows:

> "Local authorities shall have no power to enact, enforce, or maintain any ordinance, rule, regulation or

59-1-1

in any way in conflict with, contrary to or inconsistent with the provisions of this chapter, and no such ordinance, rule or regulation of said local authorities heretofore or hereafter enacted shall have any force or effect, however the provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

1. Regulating the standing or parking of vehicles.
2. Regulating traffic by means of police officers or traffic-control signals.
3. Regulating or prohibiting processions or assemblages on the highways.
4. Designating particular highways as one-way highways and requiring that all vehicles thereon be moved in one specific direction.
5. Regulating the speed of vehicles in public parks.
6. Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersections.
7. Licensing and regulating the operation of vehicles offered to the public for hire and used principally in intracity operation.
8. Restricting the use of highways as authorized in sections 321.471 to 321.473, inclusive.
9. Regulating or prohibiting the turning of vehicles at intersections.
10. Regulating the operation of bicycles and requiring the registration and licensing of the same, including the requirement of a registration fee."

Section 321.285, Code 1958, provides that:

"Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law.

> The following shall be the lawful speed except as hereinbefore or hereinafter modified, and any speed in excess thereof shall be unlawful:
>
> 1. Twenty miles per hour in any business district.
> 2. Twenty-five miles per hour in any residence or school district.
> 3. Forty miles per hour for any motor vehicle drawing another vehicle.
> 4. Forth-five miles per hour in any suburban district. Each school district as defined in subsection 59 of section 321.1 shall be marked by distinctive signs as provided by the current manual of uniform traffic control devices adopted by the state highway commission and placed on the highway at the limits of such school district.
> 5. Sixty miles per hour from sunset to sunrise."

In 25 Am. Jur., Highways, section 8, p. 344 it is stated:

> " * * . Public alleys are generally held to be public highways, and the words 'highway,' 'street,' and 'alley' constantly are found conjoined in statutes and ordinances without distinction as to the application of the particular law."

The Supreme Court of Iowa in the case of Mowrey v. Schulz, 230 Iowa 102, loc. cit. 105, 296 N.W. 789, said:

> " * * ; alleys are highways * * * "

and in the case of City of Covington V. Lee, 28 Ky. L. Rep. 492, 89 S.W. 493, the Court of Appeals of Kentucky said:

> " * * . A city alleyway is a public highway. Though its intended use is not expected to be the same as streets, yet it was designed to be used as a highway. * * * ."

In the case of Iowa Electric Co. v. Town of Cascade, 227 Iowa 480, 482, 483, 288 N.W. 633, the Supreme Court of Iowa stated:

> "This court has expressly recognized that in this state a municipal corporation possesses only such powers as are conferred upon it by the legislature."

and in the case of Van Eaton v. Town of Sidney, 211 Iowa 986, loc. cit. 989, 231 N.W. 475, the Supreme Court of Iowa stated:

> " * * . A municipality is wholly a creature of the legislature, and possesses only such powers as are conferred upon it by the legislature: that is, (1) such powers as are granted in express words; or (2) those necessarily or fairly implied in or incident to the powers expressly conferred; or (3) those necessarily essential to the identical objects and purposes of the corporation, as by statute provided, and not those which are simply convenient. (citing cases)."

Section 389.40, supra, is a general grant of legislative power to cities and towns.

The Supreme Court of Iowa in the case of Pugh v. City of Des Moines, 176 Iowa 593, loc. cit. 598, 156 N.W. 892, said, construing section 755, Code 1897, which now appears as section 389.40, Code 1958;

> "Under these statutes, the care and control of the * * , streets and sidewalks within cities, are committed to the proper governing body of the municipality, to the end that they may secure to the inhabitants and the general public, the convenient and unobstructed use and enjoyment of those thoroughfares for their appropriate purposes. So the state, through its legislature, has conferred upon cities the right to adopt, in order to promote the order, comfort and convenience of the inhabitants ordinances that are reasonable and not in conflict with the laws and policies of the state, or in violation of private right." Emphasis supplied).

And in the case of Fisher v. Cedar Rapids & Marion City Railway Company, 177 Iowa 406, loc. cit. 413, 157 N.W. 860, the Iowa Supreme Court said:

> " * * * . The city is given control of the public streets within its boundaries; and, within proper limits, and with due regard to the convenience and safety of the traveling public, may, be ordinance, direct and control the manner of their use."

However, Sections 321.235 and 321.236, supra, impose a particular statutory prohibition upon the general grant of power provided in Section 389.40, supra, and therefore, an ordinance that conflicts with, is contrary to, or inconsistent with existing state laws, must yield and consequently has no force or effect.

We are, therefore, of the opinion that under the general grant of legislative power evidenced by section 389.40, supra, cities and towns may by ordinance establish and enforce a speed limit applicable to a public alley within the corporate limits thereof. However, the legislature has imposed limitations upon the exercise of said power as evidenced by sections 321.235 and 321.236, supra, and if said ordinance in any way conflicts with, is contrary to or inconsistent with the provisions of chapter 324, Code 1958, excepting those powers expressly granted to local authorities in section 321.236, subparagraphs 1 to 10 inclusive, supra, said ordinance shall have no force or effect.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kt

COUNTIES: Recorder--

Fees and compensation of the County Recorder for performance of his official duties and those performed by him under cover of his office should be accounted for to the County.
(Strauss to Brodie, Woodbury Co. Atty., 1/27/59) #59-1-2

January 27, 1959

Mr. James R. Brodie
Woodbury County Attorney
204 Court House
Sioux City, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 21st inst. in which you submitted the following:

"Section 342.1 of the 1958 Code of Iowa provides as follows:

"Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county.

"I would appreciate your opinion as to whether the following services performed by a County Recorder and his employees constitute 'official service' and whether or not fees received for such services belong to the County:

"1. Preparation of daily memoranda slips for abstracters covering all real estate transactions in recorder's office.

"2. Preparation of daily memoranda for a legal newspaper covering all transactions in recorder's office.

"3. Searches of chattel mortgage records for finance companies.

"4. Making photostatic copies of miscellaneous instruments not filed in recorder's office.

> "I am acquainted with the 1911 Attorney General's Opinion concerning fees for preparation of information for abstracters, but in view of when this opinion was written, I feel that it should again be covered.
>
> "I was requested by both the Woodbury County Grand Jury and the County Board of Supervisors to obtain this opinion, and it will be of great help to this county if the opinion can be rendered as expeditiously as possible."

In reply thereto I advise as follows. Confirmation of the views of this Department insofar as the services of the Recorder are concerned, including those detailed by you, as exhibited in opinion of this Department found in the Report for 1911-1912 at page 209, is found in opinions of this Department issued September 11, 1951 to the Auditor of State, October 23, 1951, to the Page County Attorney, and issued July 9, 1957, to the Auditor of State. Copies of these opinions are hereto attached.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Encs.

9

Financial responsibility --

~~FINANCIAL RESPONSIBILITY --~~ MOTOR VEHICLES: A The registration of a motor vehicle must be suspended or revoked under § 321A.17 (1) (2) irregardless of the manner in which the same is registered, if said vehicle is registered in the name of the person whose license has been suspended or revoked. (Peseh to Brown, Pub. Saf. Comm., 1/23/59) # 59-1-3

January 23, 1959

Mr. Russell I. Brown
Acting Commissioner
Department of Public Safety
L O C A L

Dear Sir:

This will acknowledge receipt of your letter under date of January 8, 1959 as follows:

"Your opinion on the following matters is requested.

Whenever the Commissioner suspends or revokes the license, (operator's or chauffeur's), of any person within the purview of section 321A.17, who is a joint owner, (with, or without right of survivorship), of a motor vehicle with another person whose operator's or chauffeur's license in not subject to suspension or revocation must, or may, the Commissioner suspend the registration of the said motor vehicle, and seize the plates.

The points needing clarification are: (1) Do the words 'John Brown AND Mary Brown' on a title and motor vehicle registration certificate, prohibit the Commissioner from suspending the registration of the jointly owned vehicle where only John Brown, say, has had his operator's license suspended or revoked?

(2) Do the words 'John Brown OR Mary Brown' prohibit the Commissioner from suspending the registration of such a jointly owned vehicle where only John Brown, say, has had his operator's license suspended or revoked?

(3) Do the words 'John Brown AND/OR Mary Brown' prohibit the Commissioner from suspending the registration of such a jointly owned vehicle where only John Brown, say, has had his operator's license suspended or revoked?"

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In reply thereto I advise you as follows. I am of the opinion that the answer to your questions as submitted are found in the following provisions contained in Section 321A.17, Code 1958:

> "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, * * *. (Emphasis supplied).
>
> "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." (Emphasis supplied).

In other words, the conditions precedent in subsection 1 of Section 321A.17, supra, having been satisfied, the commissioner must suspend the registration for all motor vehicles registered in the name of the person whose operator's or chauffeur's license has been suspended or revoked. Subsection 2 of Section 321A.17, supra, further provides that the registration shall remain suspended and shall not be renewed nor shall any motor vehicle be thereafter registered in the name of the person so suspended or whose license has been revoked until so permitted by and under the motor vehicle laws and then only when proof of financial responsibility has been given and thereafter maintained.

The Code 1958 further provides in Section 321.30, subsection 4 thereof, as follows:

> "The treasurer shall refuse registration and issuance of a certificate of title or any transfer of title and registration upon any of the following grounds:
>
> "4. That the registration of the vehicle stands suspended or revoked for any reason as provided in the motor vehicle laws of this state."

In conclusion therefore, in view of the foregoing, the questions submitted in paragraphs numbered 1 to 3 inclusive, in your letter heretofore set out, are answered in the negative.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kt

Property tax, homestead credit--

TAXATION: ~~PROPERTY TAX, HOMESTEAD TAX CREDIT~~:

The fact that an individual votes in one county and claims a Homestead Tax Credit in another does not, standing alone, require a denial of the claim for Homestead Tax Credit. (Brinkman to Gray, Calhoun Co. Atty., 1/23/59

59-1-4

January 23, 1959

Mr. Jack R. Gray
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Gray:

This is to acknowledge receipt of your request for an opinion from this office dated January 15, 1959, stated as follows:

> "A person for some years has been residing in Calhoun County, but has been registering for voting purposes in Webster County, and has voted in the primaries and general elections in Webster County for several years, and in the meantime, has made application for homestead exemption for many years on the property which he owns in Calhoun County, Iowa and has been obtaining said exemption.
>
> "The County Assessor now wishes to know whether or not the party is legally entitled to have homestead exemption on his property in Calhoun County, when he has for many years been voting in Webster County and not in Calhoun County."

The following portions of Section 425.11, Code of Iowa (1958), are relevant to your inquiry:

> "425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:
>
> "1. The word, 'homestead', shall have the following meaning:
>
> "a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application and said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed, * * *.
>
> "* * *.
>
> "f. The words 'dwelling house' shall embrace any build-

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ing occupied wholly or in part by the claimant as a home."

It is thus seen that in order to qualify as a homestead the property must, among other things, embrace the dwelling house in which the owner is living. The dwelling house must be a building which is being occupied by the claimant as a home.

Whether or not an individual is occupying a certain building as a home is a question of fact. This question of fact is for the Board of Supervisors to resolve when they pass upon the claim. Many factors enter into a determination of whether a particular structure is or is not being occupied as a home.

The individual to which you refer may be voting in a different county without being legally entitled to do so. It is also entirely possible that this claimant is in the position contemplated by the Supreme Court of Iowa in Vanderpoel v. O'Hanlon, 53 Iowa 246, 5 N.W. 119 (1880), wherein it is stated: "Another proposition will, we think, be conceded, and that is that an individual cannot be entitled to vote in two different counties in this state at the same election; yet he may, in a certain sense, actually reside in one and be a legal voter in another."

It is my opinion that the fact that a claimant votes in a different county than that in which he claims the homestead exemption is not a sufficient factor, standing alone, to warrant a denial of a claim for Homestead Tax Credit.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

Personal property exemption--

TAXATION: ~~PROPERTY TAX EXEMPTIONS~~: Killed, processed and frozen turkeys are not exempt from taxation under the provisions of Section 427.1(13), Code of Iowa (1958). (Brinkman to Neuzil, Johnson C. Atty., 1/26/59)

#59-1-5

January 26, 1959

Mr. Ralph L. Neuzil
Attorney at Law
603 Iowa State Bank & Trust Building
Iowa City, Iowa

Dear Mr. Neuzil:

This is to acknowledge receipt of your letter of January 7, 1959, in which you request an opinion from this office stated as follows:

> "A situation exists here in Johnson County regarding turkeys in cold storage. The Maplecrest Turkey Cold Storage Plant is located here in Johnson County, Iowa, and birds are killed and processed and placed in cold storage at the locker plant.
>
> "Some time ago Mr. Charles A. Barker, former assistant County Attorney for this county, wrote to the State Tax Commission and asked for an opinion as to whether or not these birds were taxable or if these were exempt from taxation. At that time it was the opinion of Mr. Louis H. Cook, Director, Property Tax Division, that these were taxable, that is, stocks of frozen birds on hand on January 1st.
>
> "I have tried to find some law on this matter and I am sorry to state that it would appear that it is not very clear. The provision of the law, which is Section 427.1(13), seems to be able to be interpreted in two different ways. Would you kindly advise accordingly so that I may render an opinion to the Johnson County Assessor as to whether or not he should assess the frozen birds in stock."

The applicable statutory provision, as stated in your letter, is Section 427.1(13), Code of Iowa (1958), which reads as follows:

> "427.1 Exemptions. The following classes of property shall not be taxed:
>
> "* * *.

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> "13. Agricultural produce. Growing agricultural and horticultural crops and products, except commercial orchards and vineyards, and all horticultural and agricultural produce harvested by or for the person assessed within one year previous to the listing, all wool shorn from his sheep within such time, all poultry, ten stands of bees, honey and beeswax produced during that time and remaining in the possession of the producer, all swine and sheep under nine months of age, and all other livestock and fur-bearing animals under one year of age."

It is elementary that statutes which create an exemption from taxation are to be strictly construed in favor of taxation. Cornell College v. Board of Review of Tama County, 248 Iowa 388, 81 N.W.2d 25; Crown Concrete Company v. Conkling, 247 Iowa 609, 75 N.W.2d 351; Boss v. Polk County, 236 Iowa 384, 19 N.W.2d 225, and Theta Xi Building Association of Iowa City v. Board of Review of Iowa City, 217 Iowa 1181, 251 N.W. 76. This rule has been otherwise stated to the effect that a tax exemption statute must be strictly construed and if there is any doubt upon a particular question it must be resolved against exemption. Trustees of Iowa College v. Baillie, 236 Iowa 235, 17 N.W.2d 143; Board of Directors of Fort Dodge Independent School District v. Board of Supervisors of Webster County, 228 Iowa 544, 293 N.W. 38; Readlyn Hospital v. Hoth, 223 Iowa 341, 272 N.W. 90.

Another well recognized principle in the construction of statutes is that where the meaning of a word or a particular provision in a statute is uncertain the word or provision should be construed with reference to conditions existing at the time of the passage of the legislation. City of Cherokee v. Northwestern Bell Telephone Company, 199 Iowa 727, 202 N.W. 886.

The provision exempting poultry was enacted in 1897, Acts of the

Twenty-Sixth General Assembly, Extra Session. The process of cold storage of killed and processed meat was unknown at the time of the passage of this legislation. It is therefore a logical assumption that the Legislature did not contemplate exempting killed and processed turkeys kept in cold storage at the time this exemption provision was passed.

It has further been called to the attention of the writer that the State Tax Commission ruled in 1948 that processed meat does not enjoy exempt status under the provisions of Section 427.1(13) of the Code. It is a well known principle that administrative interpretations are often entitled to and are given much weight, particularly when they have been in force for a considerable time. School District of Soldier Township, Crawford County v. Moeller, 247 Iowa 239, 73 N.W.2d 43.

Applying all of these considerations to the problem at hand, it is my opinion that the stock of killed, processed and frozen turkeys to which you refer is not exempt from taxation.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

HIGHWAYS AND ROADS: Metes and Bounds descriptions-are permissible except on Official plats, Chapter 409, Code 1958. No paving assessments outside municipalities except as provided in Sections 311.1 to 311.11 inclusive, Code 1958. Chapters 471 and 472, Code 1958, determine procedure for acquiring right of way for roads.
(Rehearsants Hafner, Assn of Co. Commrs., 1/27/59) #59-1-6

January 27, 1959

E. R. Hafner, Executive Secretary
State Association of County Commissioners
P. O. Box 773
Tallahassee, Florida

Dear Mr. Hafner:

This is to acknowledge receipt of your letter of January 21, 1959, that set out as follows:

"We would like to have the statutory citations on the following phases of legislation in your state:

1. Information as to legislation that has been passed in your state in an attempt to prohibit the sale of lands by metes and bounds. This, of course, applies only to states which do not engage in the sale of land by such a method.
2. Information as to whether your state has enacted legislation providing for paving assessments upon property owners in areas outside of municipalities.
3. Information on legislation regarding methods of purchase of rights of way for road purposes and other uses."

In reply thereto:

1. Metes and bounds descriptions are permissible in Iowa provided they describe parcels of land by completely inclosing said parcels and from such descriptions they can be surveyed in accordance with Chapter 355, Code 1958. The only limitation on a metes and bounds description is where a landowner wants to divide the property into three or more parcels for the purpose of laying out a town or city or making an addition thereto, or a subdivision of a suburban area. Then conveyances will be made according to description of parcels of land in the addition or subdivision and not by metes and bounds. Specific reference is made to Chapter 409, Code 1958.

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2. There are three main types of roads as classified by the Code of Iowa, 1958. These are: primary roads as set out in Chapter 313, secondary roads as set out in Chapter 309, and farm-to-market roads as set out in Chapter 310. There is no legislation providing for paving assessments upon property owners along the primary and farm-to-market roads. Generally speaking, there is a secondary road fund to provide paving outside municipalities, however there is a legislative provision to provide for secondary road assessment districts in counties. The paving assessments can be made upon the property owners in those districts by the county board of supervisors. Specific reference is made to this in Sections 311.1 to 311.11, inclusive, Code 1958.

3. Legislation regarding methods of purchase of right of way for road purposes may be found in Chapters 471 and 472, inclusive, Code 1958.

Very truly yours,

THEODOR W. REHMANN, Jr
Assistant Attorney General

TWR:mmh5

Reorganization appeals, Joint districts --

SCHOOLS: ~~REORGANIZATION APPEALS, JOINT DISTRICTS~~ -- The joint county boards cannot properly be made a party to an appeal from their decision rendered under Code section 275.16. Where improperly named, interested local or county board should intervene. (Ltr. to McGrath, Van Buren Co. Atty., 1/27/59)

#59-1-7

January 27, 1959

James W. McGrath
County Attorney
Keosauqua, Iowa

Dear Sir:

Receipt is acknowledged of your letter of January 8 as follows:

> "I am the present County Attorney of Van Buren County and the County Superintendent of Schools has asked for an opinion on the question of who, if anyone, by law is required to represent the Joint County Board of Education organized under provisions of Section 275.16 in the 1958 Code.
>
> The factual situation is this: The Joint County Board's of Van Buren, Henry and Lee Counties are involved in an appeal taken from their action now pending in the District Court of Van Buren County, Iowa, brought by areas within the proposed new school district which areas are located within Van Buren County. Previous to my taking office January 1st, 1959, I represented the appellants. The joint board, in such proceedings as have already taken place, were represented by a member of the Henry County Board who is also an attorney. The preceeding County Attorney in Van Buren County also attended but has taken the position that he was not appearing for the joint board but only the County Board, which as I see it, is not a party.
>
> My question boils down to one of whether or not the Van Buren County Attorney must represent the joint boards in this situation."

A great deal of confusion has attended the matter as to who are proper parties in school reorganization appeals under chapter 275 of the Code. Obviously the joint boards cannot retain independent counsel as they have no funds. Neither are they given statutory standing as a body corporate or

politic nor do they have the statutory power to sue or be sued. They are merely a temporary creature, a board of arbitrators which "frets and struts its brief hour upon the stage and then is heard no more". Under chapter 275 and specifically section 275.16 their exclusive function appears to be to conduct hearings on petitions for joint districts and render decisions based upon such hearings. When they have rendered their decision their function terminates. In this respect they differ from the board of a single County acting upon a proposed district lying entirely within such county. If they dismiss the petition there is nothing further for them to do. If they enter an order fixing boundaries, all further acts are performed by the County Superintendent with whom the petition was originally filed. It is my impression that the function of the joint county board is exclusively quasi-judicial in nature and that it is not properly a party in interest when its decision is appealed.

In school reorganization matters there are actually only two classes of real parties in interest, i.e. the proponents (petitioners) and opponents (objectors). Code section 275.16 expressly limits who may appeal from the decision of the joint board. Only county boards of education and local school districts may take such an appeal. They act, however, in a representative capacity for the individual objectors or petitioners who are the only real parties in interest. There is, for example, no provision authorizing a joint board to appeal from the decision of the state department. The right of appeal is purely statutory, Everding v Board, 247 Iowa 743, 76 N.W. 2d 205; Sigmer et al v Crawford Co., 247 Iowa 766, 76 N.W. 2d 213. As was said in the Everding case; the reason for confining appeals to certain boards acting in representative capacity is:

> "The practical effect of permitting individuals to appeal to the state department and then to the district court . . . might result in placing upon the department and the court the duty to settle numerous individual grievances over the establishment of boundaries. We don't think the legislature intended this . . . "

Since the right of appeal has been held to be purely statutory and no statute confers any such right on the joint board at any level of appeal, it follows they are not properly named a party at any stage of the proceedings.

Bearing in mind that the only real parties in interest in a reorganization controversy are the petitioners and the objectors and that neither can perfect an appeal in their own name but must do so through their county or local board acting in a representative capacity, it follows that where a county or local board becomes an appellant in such capacity the only properly-named appellee is the county or local board whose views coincide with those expressed by the joint board in reaching its decision. In other words, if the objectors prevailed before the joint board, then the county or local board whose views more nearly coincide with those of the petitioners are the only eligible appellants and the county or local board whose views coincide with those of the objectors and the decision reached by the joint board are the only proper appellees; and vice-versa.

I would, therefore, advise you that, in my opinion, you, as County Attorney, are never under any obligation to represent the joint board for the reason that the joint board is never properly a party to such appeal. However, if the county board of education in your county is in agreement with the result reached by the joint board it is proper for you to file a petition of intervention on behalf of your own county board as appellee. Similarly, the attorney for any local school district affected whose board's views coincide with the result reached in the decision of the joint board or are adverse to the contentions of appellants may intervene as appellee at the direction of such board of directors. The joint board should be dropped as a party under the provisions of R.C.P. 27.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kt

STATE OFFICERS AND DEPARTMENTS: Employment Security - ~~EMPLOYMENT SECURITY COMMISSION:~~ A fact determination made by the Commission and a ruling issued thereon must be adhered to and followed by the Board of Control of State Institutions
(Perch to Bd of Control, 1/20/59) # 59-1-8

January 20, 1959

Board of Control of State Institutions
L O C A L

Attn: J. R. Hansen, Member

Dear Sir:

This will acknowledge receipt of your letter pertaining to IPERS and FICA Deductions as follows:

> "Enclosed with this message you will find a copy of our letter to Mr. J. C. Blodgett of the Iowa Employment Security Commission, as well as a copy of the letter written to us by Mr. William E. Campbell, Assistant Business Manager at Cherokee.
>
> We believe that this material will give you all the facts upon which to base your study.
>
> As suggested by Mr. Blodgett, it may be well for you to get in touch with Judge Don Allen, Chief of Legal Services Division of the Iowa Employment Security Commission.
>
> In line with the thoughts expressed in our telephone conversation with you - and again with Mr. Blodgett - we have instructed the Business Office at Cherokee to handle their December payroll in the same fashion as they have been doing in the past and will not issue any new instructions to them until you have had an opportunity of studying this problem and making your recommendations to us."

The letter directed to the Mental Health Institute, Cherokee, Iowa, under date of November 25, 1958, and over the signature of John D. Lukin, Accountant V, Iowa Public Employees Retirement System, Iowa Employment Security Commission, is as follows:

> "Reference is made to your communication relating to the subject matter. Study of the material submitted seems not to disclose any substantial or material difference in facts between the others you have listed and the

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instant cases of the Drs. Hanlon and Molyneux. With respect to each of these doctors, it was found that they were employees and not independent contractors and therefore subject to State and Federal retirement taxes. This also holds true and applies to the others similarly situated and who are listed in yours of August 13, 1958.

This ruling applies to chaplins as well as doctors. In each case, there seems to be a degree of direction or control of services performed, which is one of the tests applied in determining status as independent contractor or employee. There is no showing that termination of the arrangement under which the doctors and chaplins perform services, by either party, would result in liability to the other.

It is held by this system on the basis of the foregoing, that each of these individuals under consideration are part-time appointive officials, are employees of the Mental Health Institute at Cherokee, Iowa, and each is subject to coverage under IPERS and Federal Social Security."

Section 97B. 41 (3) (b), Code 1958, provides:

"b. The term, 'employee', means any individual who is in employment as defined in this chapter, except
(1) Members of the general assembly, elective officials in positions for which the compensation is on a fee basis, elective officials of townships, and elective officials of other political subdivisions who are in part-time positions.
(2) Such persons who are members of any other retirement system in the state which is maintained in whole or in part by the public contributions other than persons who are covered under the provisions of chapter 97, Code 1950, as amended by the Fifty-fourth General Assembly on June 30, 1953, under the provisions of sections 97.50 to 97.53, inclusive."

Section 97B. 41 (2), Code 1958, defines employment to mean:

" . . , any service performed under an employer - employee relationship under the provisions of this chapter."

The following provision is contained in Section 97B. 42, Code 1958:

" . . The term 'employee' as used herein shall not include any individual performing any service in any calendar quarter in which the remuneration for such service does not equal or exceed the sum of two hundred dollars . . "

Additionally, Section 97B. 62, Code 1958, provides:

"Every employee accepting employment or continuing in employment shall as long as he continues to be a member and has not become a member of another retirement system in the state which is maintained in whole or in part by public contributions or payments be deemed to consent and agree to any deductions from his compensation required by this chapter and to all other provisions thereof."

The Iowa Employment Security Commission also has obligatory duties within and under Chapter 97C, Code 1958, otherwise known as the Federal Social Security Enabling Act. The tax imposed under this chapter is to be collected by each employer from the employee by deducting the amount of the tax from wages as and when paid. Section 97C.6, Code 1958.

A ruling, on the basis of fact determination, has been made by the Iowa Employment Security Commission pertaining to IPERS and FICA coverage of doctors, dentists, chaplins, and others at the Mental Health Institute, Cherokee, Iowa, and it is the advice of this office that said ruling must be adhered to in every respect and manner.

Very truly yours,

CHP:kt
cc: J. C. Blodgett, Chief
Retirement Div.

Don Allen, Chief
Legal Services Division

CARL H. PESCH
Assistant Attorney General

SCHOOLS: Acceptance of Gifts-- Code sections 297.2 and 297.3 do not limit nor do they apply to acceptance of the use and occupancy of federally-owned land by way of gift from the federal government for a period of twenty years. What effect, if any, said sections may have upon the power to retain all of the land when fee title passes to the district at the end of the twenty years is purely speculative and need not be determined at this time. (Ltr. to Parkin, Jefferson Co. Atty.; 1/22/59) # 59-1-9

January 22, 1959

Mr. Robert D. Parkin
County Attorney
Fairfield, Iowa

Dear Sir:

Receipt is acknowledged of yours of January 15 in which you inquire whether a community school district may accept, by way of gift, land in excess of the amount specified in Code sections 297.2 and 297.3.

You also refer to Code section 565.6 which authorizes school districts to accept gifts with conditions attached. Under the facts set forth in your letter, the school district would initially receive the beneficial use and occupancy of 91.56 acres of land from the federal government and, if it actually used the land for school purposes for twenty years, the further gift of the fee title at the end of the twenty-year period. According to the facts set forth in your letter, the school district would pay nothing in connection with the initial gift of beneficial use of the land and would pay nothing for the fee title when ultimately conveyed.

Also pertinent to your inquiry is Code section 274.1 which, among other things, authorizes school districts to "hold property". Although the phrase, "Each school district now existing" injects some ambiguity into the provision, it appears section 275.27 by providing, "all provisions of the law applicable to common schools generally shall be applicable to such (community) districts" tends to cure the ambiguity insofar as community districts are concerned.

Your question then, essentially is whether the specific acreage limitations as to the amount of land a school district may "take and hold" as set forth in Code sections 297.2 and 297.3 preclude acceptance of a greater amount of land by way of gift. It is my impression that sections 297.2 and 297.3 are not in the strict sense statutes of mortmain, although it is unquestionably true that each parcel of land removed from taxation by a school district diminishes the district's tax base for purposes of operation of the schools and increases the school tax burden on the remaining taxable land in the

59-1-9

district. This need not concern us as the federal government has already removed the land in question from taxation.

Code section 297.6 appears directly related to Code sections 297.2 and 297.3. The latter sections authorize, as above stated the taking and holding of a certain number of acres. The former authorizes the acquisition thereof by condemnation. In other words, the sections, collectively, relate to the acquisition of a certain amount of land by a certain method and do not necessarily preclude acquisition of other land by other methods, if any there be.

This proposition was to some degree discussed but not definitely decided by our Supreme Court in Smith v. Marish, 226 Iowa 552 at page 555:

> " . . . The only theory, upon which appellant might now block the project, would have to be bottomed on the premise that the school district had no title to any part of the 29.21-acre tract appellees are undertaking to improve. The record does not support appellant's contention."
>
> "The school district has general power to acquire and hold property for its legitimate purposes. Sec. 4123 of the Code. (Sec. 274.1, Code 1958.) This statute would authorize the school district to acquire real estate for a school site. Independent District v. Fagen, 94 Iowa 676, 63 N.W. 456. Code section 4361 (Sec. 297.3, Code 1958.) also authorizes a school districts to take and hold real estate for a school site. The trial court held that the latter section applies only to acquisition of title by condemnation. This tract was was shown to be acquired by purchase. The court held that title was acquired under authority of section 4123 of the Code and, therefore, that the limitations of section 4361 did not apply. It is not necessary for us to decide that question."
>
> "Even under appellant's theory the school district had power to acquire two blocks and five acres for the school site. Were we to assume this, the fact that the district acquired 29.1 acres would not render its title absolutely void. It would only be voidable as to the excess . . . "

Relating the foregoing to your question, it appears that since the use and occupancy of the land in question is all that the school district would initially receive from the federal government, there would be no violation of sections 297.2 or 297.3 for the twenty-year period following the initial gift. When the twenty years have elapsed and the school district acquires title in fee simple the only possible consequence, were sections 297.2 and 297.3 then held applicable would be at worst, that the school district might be compelled to sell the excess. In the meantime it is entirely possible the district might find it necessary to construct additional schoolhouses (note the limitation is per schoolhouse rather than per district) or the statutes may have seen amended.

It is, therefore, my opinion that sections 297.2 and 297.3 do not prohibit the school district from accepting the initial gift of twenty years use of the land and that the question whether they may retain all of the land when the title finally vests need not concern us until the end of the twenty years.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kt
cc: 2 Paul Johnston
Dept. Pub. Instr.

COURTS: Municipal Courts -- Question of establishment not properly submitted at time and place of regular school election held under Code Chapter 277.
(Ltr. to Erhardt, Wapello Co. Atty.; 1/6/59) # 59-1-10

January 6, 1959

Mr. Samuel O. Erhardt
Wapello County Attorney
Ottumwa, Iowa

Dear Mr. Erhardt:

Receipt is acknowledged of your letter of December 16 in which you inquire whether the question of establishing a municipal court in a city may be submitted at the regular school election held in a school district whose boundaries approximate but do not conform to the city limits. You refer to section 602.2, Code 1958, which provides such question may be submitted at a "general, municipal, or special election."

According to the statutes and to prior opinions of this office a regular school election is not within the meaning of the phrase "general, municipal or special election." According to code sections 49.1 and 49.2 (1) a school election is not a general election in the sense that term is used in the statutes. According to section 49.2 (2) a municipal election is a city election, not a school election. Reference to sections 277.1 and 277.2 reveals that the regular school election is distinguished from a special election.

Since a regular school election does not fall within the meaning of the terms "general," "municipal," or "special" I am of the opinion that a proposition under code section 602.2 may not properly be submitted in connection with a regular school election held under code chapter 277. In arriving at this view, I am cognizant of the fact that the legislature has expressly excepted school elections in

59-1-10

the phraseology of section 49.1, to wit, "except school elections" and has provided in chapter 277 a separate and distinct procedure for conducting school elections. This indicates legislative intent that school elections should be kept free of all distractions or questions relating to matters other than school matters.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

kr

COUNTIES: Sheriff--
Ch. 338, Code 1958, respecting certain powers of the sheriff is limited in its applicability to cities having a population in excess of 80,000. The employment of cooks and other assistants, such as jailer, etc. in other cities by the sheriff is not expressly provided for. The performance of such duties is part of the duties of the office, the performance of some of which fees may be charged. (Strauss to Scholz, Mahaska Co. Atty.; 1/7/59) # 59-1-11

January 7, 1959

Mr. Charles H. Scholz
Mahaska County Attorney
Oskaloosa, Iowa

My dear Charlie:

This will acknowledge receipt of yours of the 10th ult. in which you submitted the following:

> "Your opinion on the following questions is requested.
>
> "1. Does a County Sheriff have the power and authority, under Section 238.4 of the 1958 Code of Iowa, or by virtue of any other statutory provision, to appoint a person to act as a jailer or so-called 'turnkey' for his County Jail?
>
> "2. Does a County Board of Supervisors have any discretion in the matter of determining the 'need' for a cook and other 'assistants', including a jailer, appointed by a County Sheriff under the provisions of said Section 338.4, and if the Board does not have such discretion, what authority does a County Board of Supervisors have with reference to the granting or withholding of approval of the cook and other assistants, as appointed by the Sheriff under that statute?
>
> "3. Does a Board of Supervisors have absolute power to fix the amount of the salaries of a cook and other assistants who have been appointed by the Sheriff and approved by the Board under the provisions of Section 338.4?
>
> "You will note that Section 338.4 uses the term 'assistants' and does not specifically specify that a jailer or turnkey may be appointed by a County Sheriff. Also, I note that Attorney General's opinions issued interpreting Section 344.1 of the Code, relating to the appointment

> of deputies or assistants for certain county officers, limit the authority of a Board of Supervisors to withhold approval of appointments made, and seem to indicate that the Board of Supervisors' power of approval is limited to a determination of the number of deputies or assistants.
>
> "Your early reply to the questions propounded will be appreciated, since the problems involved will probably arise in this county on January 2, 1959, when a newly elected Sheriff of this county will take office."

In reply thereto I advise as follows.

1. Insofar as your questions 1, 2 and 3 are concerned, I am of the opinion that Chapter 338, including Section 338.4, Code of 1958, is not available to Mahaska County. By its terms, this Chapter is applicable only to counties having a population in excess of 80,000. See Chapter 133, Acts of the 44th General Assembly.

2. Insofar as a cook and other assistants, a jailer, etc. are concerned, I am of the opinion that the Sheriff under his authority can assign such duties to deputies to be performed as part of the duties of the Sheriff except such administration of the jail and prisoners as would entitle him to fees therefor.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

HEALTH: Chiropodist – Chiropodist is the only name for licensed foot-doctor recognized by the Code of Iowa. (Abels to Reinheimer, Chir. Examiners, 1/5/59) #59-1-12

January 5, 1959

Claude Reinheimer, D.S.C. Secretary
214 ½ First Avenue West
Newton, Iowa

Dear Sir:

Receipt is acknowledged of your letter of December 27 in which you submit the following question:

> Specifically, we request that you give us your official opinion as to whether the Iowa law permits the use of the dual term of Chiropody-Podiatry to designate our profession.

In answer to your question you are referred to Chapter 80, Acts of the 53rd G.A., the titis of which reads in pertinent part:

> "An Act to amend Chapters one hundred forty-seven (147), one hundred forty-eight (148), and one hundred fort-nine (149), Code 1946, relating to the practice of podiatry in the state of Iowa, to change the name from podiatry to chiropody wherever the same appears therein; and the name of practitioners from podiatrists to chiropodists . . . (Emphasis supplied)

Since there has been no further change since the quoted Act, the answer to your question is in the negative.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

ELECTIONS: Contest court expenses—
District court judges appointed to serve on contest court involving a State office are entitled to be paid from the State treasury under such appointment for their travel and attendance in the sum of $6.00 per day with such mileage as is allowed members of the General Assembly as provided by §61.14, Code 1958. The actual hotel and living expense provided by §§605.2 and 604.26, Code 1958, is not available to such judges. (Strauss to Sarsfield, St. Comp., 1/5/59)

January 5, 1959

57-1-13

Mr. Glenn D. Sarsfield
State Comptroller
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours of the 31st ult.

In which you submitted the following:

"Section 605.1 and 605.2, Code of Iowa, 1958, read as follows:

"'605.1 Salary of Judges. The salary of each judge of the district court shall be ten thousand dollars per year.

"'605.2 Expenses. Where a judge of the district or supreme court is required, in the discharge of his official duties, to leave the county of his residence or leave the city or town of his residence to perform such duties, he shall be paid such actual and necessary hotel and living expenses not to exceed the sum of nine dollars per day and transportation expenses as shall be incurred.'

"Section 61.14, Code of Iowa, 1958, reads as follows:

"'61.14 Compensation of judges. The judges shall be entitled to receive for their travel and attendance the sum of six dollars each per day, with such mileage as is allowed to members of the general assembly, to be paid from the state treasury.'

"I respectfully request an opinion as to whether or not a district court judge, serving on the court for the trial of contested state offices, as provided by Chapter 61, Code of Iowa, 1958, is entitled to receive the sum of six dollars ($6.00)

59-1-13

> per day, with such mileage as is allowed to members of the general assembly, and in addition thereto such actual and necessary hotel and living expenses not to exceed the sum of nine dollars ($9.00) per day, all of which would be in addition to his statutory salary provided by Section 605.1, Code of Iowa, 1958."

In reply thereto I advise as follows. I am of the opinion that the sections exhibited in your letter, while bearing upon the compensation, expenses and mileage of judges, are clearly not in pari materia. On the other hand, the Legislature having provided specifically for compensation and mileage for the services of judges in the arbitration of contested elections, it has restricted by this specific language such compensation and mileage as the only available compensation and mileage for such service. I thing the maxim "The expression of one thing is the exclusion of another" applies here. Specific enumeration in the statute of the compensation and mileage for judges set forth in Section 61.14, Code 1958, excludes those not mentioned therein. See State v. Andrews, 167 Iowa 273. Confirmation of this conclusion is found in the fact that in the performance of duties specifically provided to be performed by judges other than their ordinary statutory duties, expense is provided to be paid in these situations. First, that in cases involving removal from office in the provisions of Chapter 66, express provision is made by Section 66.25 for allowance to the judge and his official reporter for necessary and

actual expenses incurred by reason of such hearing. Such section specifically provides the following:

> "Expense of judge and reporter. A judge who is required to preside at such hearing, outside of his judicial district, and the judge's official reporter who is required to report such hearing, shall be allowed, from the state treasury, their necessary and actual expenses incurred by reason of such hearing."

And, second, where judges are involved in disbarment proceedings specific provision is made for the payment of their reasonable expenses in attending such hearings. Section 610.35, 1958 Code, provides the following:

> "Costs and expenses. The court costs incident to such proceedings, and the reasonable expense of said judges in attending said hearing after being approved by the supreme court shall be paid as court costs by the executive council."

Third, where a judge from one district is assigned to temporary service in another, his expenses are provided in Section 604.26, as follows:

> "Expenses. The judge so transferred shall be allowed and paid all reasonable and actual expenses while in the performance of his duties in said temporary character, in addition to his salary."

By reason of the foregoing I advise you that I am of the opinion (1) that judges serving on the court for the trial of a contested state office are entitled to the sum of $6.00 per day with such mileage as is allowed to members of the General Assembly to be paid from the State treasury in addition to their statutory salaries, and, (2) that such judges so serving are not entitled to the payment from the State treasury of actual

and necessary hotel and living expenses provided by Section 605.2, Code 1958, or Section 604.26, Code 1958.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

STATE OFFICERS AND DEPARTMENTS: Legislative Programs -- Under code section 13.7 no occasion exists for the appointment of special assistant attorneys general for the purpose of preparing departmental legislative programs. (Erbe to Berlin, Ia. Aer. Comm., 1/8/59)

January 8, 1959 #59-1-14

Mr. Frank W. Berlin, Director
Iowa Aeronautics Commission
Des Moines 19, Iowa

Dear Mr. Berlin:

Receipt is acknowledged of your letter of January 7th in which you state:

> "The Iowa Aeronautics Commission in a meeting held on January 2, 1959 directed me to submit a request for the appointment of Mr. Upton Kepford of Waterloo as a Special Assistant Attorney General, for the purpose of reviewing the Code of Iowa as it affects aviation, and to submit to the legislature revisions, additions, or amendments to the existing Code as may be deemed necessary. Mr. Kepford has had recent experience with aviation law in Iowa."

In response thereto I would advise that we are pleased to note that the Aeronautics Commission is interested in reviewing the Iowa aeronautics law in order to make it fit with aviation practices and we tender to you the services of the regular Assistant Attorney General, Leonard Abels, who has handled your departmental assignment for three years, to assist you in this study. The appointment of a Special Assistant Attorney General for this purpose is not required.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NAE:MKB

59-1-14

SCHOOLS: Sale of site -- Code section 297.16 requires appraisal only where adjoining owner and school corporation disagree on value of site. (Abels to Cahill, Des Moines Co. Atty., 1/5/59) #59-1-15

January 5, 1959

William S. Cahill, County Attorney
Des Moines County, Iowa
403-9 North Main Street
Burlington, Iowa

Dear Sir:

Receipt is acknowledged of your letter of December 31 as follows:

> As a result of the formation of the new Mediapolis Community School District on July 1, 1958, there are several school sites which will become vacant. The Township Trustees, in several instances, desire to purchase the school sites and use them for the purposes contained in Chapter 360. However, in at least two cases there are persons other than the Township Trustees or persons owning the adjacent land who desire to purchase the sites.
>
> Would you please advise me if in your opinion a nominal appraisement under Chapter 297.16 could be made which would permit the adjoining land owner to purchase the property at the appraised value and resell to the Township Trustees. This would avoid the possibility of some third party purchasing the property at a figure higher than its actual value.

In answer to your inquiry you are referred to the express language of section 297.16, concerning which you inquire, which is:

> "In case the school corporation and said owner of the tract from which said site was taken do not agree as to the value of such site, the county superintendent ... shall ... appoint three disinterested voters of the county to appraise said site." (Emphasis supplied)

Since no disagreement between adjoining owner and school corporation is stated in the fact situation described in your letter, section 297.16 appears to have no application.

59-1-15

Irrespective of to whom the tract is sold by the school corporation, it may only be sold for adequate consideration and not for merely nominal consideration. Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W.2d 813.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:mmh

A State Senator in the General Assembly cannot at the same time hold office as a member of the Iowa Natural Resources Council under provisions of Art. III, Sec. 22 of the Constitution.

January 7, 1959.

COMPATIBILITY OF OFFICE: Senator--

(Strawsath Loveless, Gov., 1/7/59) #59-1-16

Honorable Herschel C. Loveless
Governor of Iowa
B u i l d i n g

My dear Governor:

This will acknowledge receipt of yours of the 6th inst. in which you submitted the following:

> "I respectfully request the opinion of your office on the following question:
>
> "May a member of the Iowa Natural Resources Council who has subsequently been elected to the office of State Senator, continue to hold his position as a member of the Natural Resources Council?
>
> "Your prompt attention to this request will be appreciated."

In reply thereto I would advise as follows. Section 455A.7, Code of 1958, provides with respect to the compensation and expense of members of the Iowa Natural Resources Council the following:

> "Compensation and expenses. Each member of the council not otherwise in the full-time employment of any public body, shall receive the sum of twenty-five dollars for each day actually and necessarily employed in the discharge of official duties provided such compensation shall not exceed two thousand dollars for any fiscal year. In addition to the compensation hereinbefore described, each member of the council shall be entitled to receive the amount of his traveling and other necessary expenses

59-1-16

> actually incurred while engaged in the performance of any official duties, when so authorized by the council. No member of the council shall have any direct financial interest in, or profit by any of the operations of the council."

Such members of the Council are officers within the definition thereof in opinion of this Department appearing in the Report for 1934 at page 203. The compensation provided by Section 455A.7 for such officers is obviously lucrative and holding such office would disqualify a person from holding a seat in the General Assembly under the provisions of Article III, Section 22 of the Constitution, which provides as follows:

> "Disqualification. Sec. 22. No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly; but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

I therefore answer your question that a member of the Iowa Natural Resources Council subsequently elected to the office of State Senator may not continue to hold such membership and at the same time hold a seat in the General Assembly.

With the renewal of my respect, I am

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS: Reorganization -- Effect of creation of new district upon teachers contracts under code section 275.33. (Opelo to Jensen, Taylor Co. Atty., 1/7/59) #59-1-17

Reading

January 7, 1959

Mr. A. Elton Jensen
Taylor County Attorney
Bedford, Iowa

Dear Mr. Jensen:

Receipt is acknowledged of your letter of December 30 in which you inquire what effect the creation of a new school district to become effective July 1, 1959, will have upon contracts with teachers made by districts which will cease to exist on that date.

Code section 275.33 purports to govern the matter. It provides as follows:

> "Contracts not affected. The terms of employment of superintendents, principals, and teachers, for any current school year shall not be affected by the formation of the new district."

The trouble with the quoted provision is the ambiguity inhering in the phrase, "current school year." This ambiguity is discussed at length in a letter opinion dated April 10, 1958, a copy of which is attached hereto and by reference made a part hereof.

Because of the ambiguity inhering in section 275.33 by reason of its failure to fix a chronological reference point with respect to the word "current," it is impossible to conclude with any degree of certainty whether "current" in the fact situation you describe means the school year 1958-59 or the school year 1959-1960. In the absence of section 275.33

59-1-17

it would seem that contracts made with the old boards prior to July 1, 1959, for the school year 1959-1960 would be void upon the creation of the new district on the precedent in Wood v. Loveless, 244 Iowa 919, 58 N. W. 2d 368. This would seem in the public interest as it would preclude hostile boards from hiring teachers in wholesale lots for a term to run entirely beyond the term of office of such boards.

However, it is ordinarily presumed that the legislature has some purpose in mind in adopting a statute. We are, therefore, forced to the conclusion that the legislature, in adopting section 275.33, must have intended some result other than that which would have obtained had it remained silent. On this basis, I conclude that the phrase "current school year" as used in the said statute means, in the situation you describe, the school year commencing July 1, 1959 and ending June 30, 1960. This leaves the new board somewhat at the mercy of the old boards for the said year but, as was said in the decision of our Supreme Court in the case of State ex rel Harberts v. Klemme Community School District, 247 Iowa 48, 72 N. W. 2d 512, 515, "They are usually composed of persons of integrity and high purpose."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

kr

Enclosure:

CONSERVATION: ~~COMMISSION:~~ Hunting License -- "Children" as used in Sec. 110.17, Code of Iowa, refers to first degree descendants and therefore it is not necessary for any son or daughter of an owner to obtain a license in order to hunt on their father's land. (Fulton to Brown, Mitchell Co. Atty., 12/29/58) #59-1-18

December 29, 1958

Mr. Loren N. Brown
County Attorney
Osage, Iowa:

Dear Sir:

This will acknowledge your request for an opinion as to whether or not under the provisions of Sec. 110.17, Code of 1958, a son of the owner of land needs to procure a hunting license to hunt on land owned by his father, when that son does not live upon or occupy any portion of the land where he was hunting.

That portion of Section 110.17, Code of 1958, which is relevant, provides as follows:

> "Owners or tenants of land, and their children, may hunt, fish, or trap upon such lands and may shoot ground squirrel or woodchucks upon adjacent roads without securing a license so to do."

The sole problem then is whether the word "children" in this section refers to minors or descendants of the first degree.

There is an absence of authority in Iowa on the definition of the word "children" except in dealing with inheritance. However, in other jurisdictions this problem has been met and a well-defined solution given.

59-1-18

In Miller v. Finegan, 7 So 140, 26 Fla 29 in 1890, the rule is concisely stated:

> "The word 'children' when used irrespective of parentage, may denote that class of persons under the age of twenty-one years as distinguished from adults, but its ordinary meaning with respect to parentage is sons and daughters of whatever age."

Courts throughout the nation are in harmony holding that the common meaning of "child" is a descendant in the first degree and it should be construed as such unless its context evidences a contrary intention.

Section 4.1 (2), Code of 1958, provides:

> "Words and phrases shall be contrued according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning."

It is my opinion that the word "children" in Sec. 110.17, Code of 1958, refers to first degree descendants and therefore it would not be necessary for any son or daughter of an owner or tenant of land to obtain a license in order to hunt on their father's land.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG: RHH: MMS

~~BOARD OF CONTROL OF STATE INSTITUTIONS:~~
STATE OFFICERS AND DEPARTMENTS: Central Board--.

The authorization and approval of claims for purchase of all articles and supplies needed at the institution under its control is not delegable to a subordinate but must be exercised by the Board of Control of State Institutions.

However, those duties going to mode and form may be delegated to a subordinate, for example, the clerical work to prepare that which is substance which the Board must approv and authorize.

December 19, 1958

(Reach to Bd of Control, 12/19/58) # 59-1-19

Board of Control
of State Institutions
LOCAL

Attention: Esther Wright, Secretary.

Dear Mrs. Wright:

This will acknowledge receipt of your letter set out as follows:

"The question has recently arisen in our office relative to the legality of the approving of claims for merchandise purchased for the institutions under the supervision of the Board of Control.

"Section 8.14, paragraph two, of the 1958 Code of Iowa, requires that all claims for merchandise purchased by the institutions under the jurisdiction of the Board of Control of State Institutions be "authorized by an officer or official body having legal authority to so authorize", and Section 218.52 requires said Board to "afford all reasonable opportunity for competition" on these purchases. Section 218.56 permits the Board "from time to time to adopt and make of record, rules and regulations governing the purchase of all articles and supplies needed at the various institutions".

"We feel that this last Section of the Code; namely 218.56, permits the Board to designate by such rules and regulations adopted by them, the manner and form of such approval as required

59-1-19

In Section 8.14, paragraph two, so that this particular action may be performed by a Board Member or one of their subordinates as their representative when so delegated by the Board.

"Will you please give us an opinion as to whether or not all acts in the purchase of supplies for institutions under their jurisdiction must be performed by a Board Member personally, or whether Section 8.14 is complied with by assigning certain regulated duties in connection with the authorizing and buying of such supplies to a subordinate employee under the watchful eyes of the Board Members."

Section 8.14 (2), Code of Iowa, 1958, provides that:

"The state comptroller before approving a claim shall determine:

"2. That the claim has been authorized by an officer or official body having legal authority to so authorize and that the fact of such authorization has been certified to said comptroller by such officer or official body."

Section 218.52, Code of Iowa, 1958, provides that:

"The board shall, in the purchase of supplies, afford all reasonable opportunity for competition, and shall give preference to local dealers and Iowa producers when such can be done without loss to the state."

Section 218.56, Code of Iowa, 1958, provides that:

"The board shall, from time to time, adopt and make of record, rules and regulations governing the purchase of all articles and supplies needed at the various institutions, and the form, verification, and audit of vouchers for such purchases."

The Board of Control of State Institutions is constituted under Section 217.1, 1958 Code of Iowa which in pertinent part provides:

> "The board of control of state institutions shall be composed of three electors of the state, * * * * . Each member shall devote his entire time to the duties of his office, * * * *."

The Legislature has conferred upon the Board of Control the power to enact rules and regulations, the binding effect being derived from the sanction of the Legislature itself. 42 Am. Jur., Public Administrative Law, §49.

Additionally in 42 Am. Jur., supra, §73, it is stated:

> "It is a general principle of law, expressed in the maxim 'delegatus non potest delegare', that a delegated power may not be further delegated by the person to whom such power is delegated."

And in 73 C.J.S., Public Administrative Bodies and Procedure, §57, it is stated:

> "In general administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, and they cannot legally confer on their employees or others authority and functions which under the law may be exercised only by them or by other officers or tribunals. Although mere ministerial functions may be delegated, in the absence of permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment; and subordinate officials have no power with respect to such duties."

Authorizing a claim is an act involving discretion and is not merely ministerial. Thus we come to the primary question: Does Section 218.56, supra, permit the board of control to delegate its discretion to a subordinate by the establishment of rules and regulations pertaining to the same?

Your attention is again directed to the statutes, specifically: Section 8.6 (10), 1958 Code of Iowa,

which provides in pertinent part as follows:

> "For the purpose of performing the duties of the comptroller provided in this chapter as applied to the state board of control, the comptroller shall assign an employee of his office to check and audit all claims against the state board of control before such claims are approved by the board. * * * * ." (Underscoring added).

In view of the foregoing, you are, therefore, advised as follows:

The power bestowed upon the Board of Control of State Institutions to adopt and make of record rules and regulations governing the purchase of articles and supplies for the various institutions under its jurisdiction and control and the form, verification and audit of vouchers for such purchases is a limited power going only to the mode and form and not to the substance. To hold otherwise would be out of harmony and inconsistent with the legislative expression of intent prevailing in the sections of the code heretofore referred to and set out in this opinion.

It is therefore the opinion of this writer that:

1. The authorization of claims and the approval of same is not delegable to a subordinate but must be exercised by the Board of Control of State Institutions.

2. Those duties going to mode and form may, however, be delegated to a subordinate, for example, the clerical work entailed in the preparation of the vouchers and claims, in other words, the mechanics of preparation of that which the Board of Control, as a board, must approve and authorize.

Very truly yours,

CARL H. PESCH
Assistant Attorney General.

CHP:js

State Commission--

CONSERVATION: ~~COMMISSION~~ - Disposal of equipment to be made pursuant to Section 19.23 with the method and means of sale within the discretion of the Executive Council. (Fritton to Stiles, Comm. Dir., 1/13/59) #59-1-.

January 13, 1959

Mr. Bruce F. Stiles, Director
State Conservation Commission
East 7th and Court Avenue
Des Moines 8, Iowa

Attention: Mr. H. W. Freed, Chief

Dear Sir:

Your letter of December 2, 1958 is as follows:

"In past years the State Conservation Commission has held an annual sale of surplus and worn-out equipment by advertising the items to be sold and receiving sealed bids here in the Central Office.

By disposing of our worn-out and surplus equipment in this manner there were times when we received a fairly good price for the items and other times it was practically a give away.

We have had several discussions in the office as to the advisability of changing our method of disposing of this equipment.

In the past all of this equipment, such as outboard motors, boats, chain saws, etc., were brought into the State Fairground Building in Des Moines, where the items were open for inspection for anyone interested. By doing this we incurred some expense in transporting many of these items from the far corners of the state to Des Moines.

Sometime turing the months of January or February 1959, we would like to hold a public auction in a centrally located place in each of our three districts throughout the state. We feel that through advertising and possibly the posting of hand bills that by holding a public auction and have the prospective buyers bid on the various items the department might realize a better return on the disposal of this equipment.

59-1-20

We are requesting an opinion from you as to whether there is anything in the law which states that we cannot hold a public auction for the purpose above described. Will you please, at your earliest convenience, let us know if we can hold a public auction legally."

In reply thereto, I wish to advise you that after our examination of the Code 1958, I find no authorization for the Conservation Commission to dispose of the property outlined in your letter. However, the disposal of this property would be handled under the general statutes relating to disposal of state property found in Section 19.23, Code 1958.

That Section reads as follows:

"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.

The method and means of this sale would be within the discretion of the Executive Council.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:kt

STATE OFFICERS AND DEPARTMENTS: Accountancy Board --

~~ACCOUNTANCY, BOARD OF~~ - Disposal of records. Disposal of bank statements and cancelled checks within discretion of the curator with the chairman of the Board of Accountancy and Board of Trustees as provided for in Section 303.10, Code of 1958.

January 13, 1959

(Gritton to Hansen, Bd. Secy., 1/13/59) #59-1-21

Mr. George H. Hansen, C.P.A.
Secretary-Treasurer
927 Davenport Bank Building
Davenport, Iowa

Dear Sir:

Your letter of January 6 reads as follows:

"We will appreciate your advising us for how many years back we should keep old bank statements and cancelled checks for the Iowa Board of Accountancy.

We will obtain proper 'disposal form' from the Iowa State Department of History and Archives and list thereon the contents we wish (and have permission) destroyed."

I find no specific provision contained in Chapter 116 relating to the disposal of the records of your department.

Pursuant to the provisions of Section 303.10, Code of 1958, the matter of disposition of these records would be within the discretion of the curator after consultation with the chairman of the Board of Accountancy, with the approval of the Board of Trustees as therein provided.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:kt

59-1-21

State Commission ---

CONSERVATION ~~COMMISSION~~ - Transfer funds. Monies of the Fish and G ame Protection Fund can not be transferred and used for the operation of the Division of Lands and Waters. (Frittom to Frudden, Comm'r., 1/13/59) #59-1-22

January 13, 1959

Mr. C. M. Frudden
State Conservation Commissioner
Green, Iowa

Dear Sir:

On a recent visit to this office you inquired of General Erbe whether the commission could take fish and game money and use it for the expenses of the Lands and Waters Division.

In reply thereto, I wish to advise you that Section 107.19, Code of 1958 in pertinent part provided as follows:

> "107.19 Expenditures. All funds accruing to the fish and game protection fund, except the said equitable portion, shall be expended solely in carrying on the activities embraced in the division of fish and game."

And in addition thereto, Section 107.21 provides in pertinent part as follows:

> "107.21 Divisions of department. The department of conservation, herein created, shall consist of the following divisions:
>
> 1. A division of fish and game which shall include matters relating to fish and fisheries, waterfowl, game, fur-bearing and other animals, birds, and other wild life resources.
> 2. A division of lands and waters which shall include matters relating to state waters, state parks, forests and forestry, and lakes and streams, including matters relating to scenic, scientific, historical, archaeological, and recreational matters.

59-1-22

I am therefore, of the opinion that the fish and game protection fund can be used only on activities embraced in the division of fish and game as set out in 107.21(1).

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:kt

WELFARE: County relief--

Applicant for poor relief who is qualified as a poor person within the terms of §252.1, Code 1958, is entitled to relief irrespective of the cause of the improvidence, including unemployment by reason of the applicant being on strike. Such fact may be an element in determining whether the applicant is a statutory poor person. (Erbe to Leir, Scott Co. Atty., 1/5/59) # 59-1-24

January 5, 1959

Leir

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

Dear Sir:

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

> "I find it necessary to request the opinion of your office with respect to the following problem which has been presented to the Board of Supervisors of this county.
>
> "The Board of Supervisors has been approached by the representatives of the United Auto Workers relative to the possibility of the County giving assistance to their members who are currently engaged in a strike against the International Harvester Company of Rock Island, Illinois.
>
> "The Board desires to know whether public funds can be expended for the purpose of furnishing relief to individuals who actually have jobs, but are prevented from working because of the decision of the Union to call a strike.
>
> "As the matter is of urgent concern to the individuals affected, your early reply will be much appreciated."

In reply thereto I advise as follows. Poor relief is bestowed under the provisions of Section 252.33, providing as follows:

> "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,

59-1-24

> 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."

And who is a poor person entitled to make such application is defined in Section 252.1, Code 1958, providing as follows:

> "'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."

Clearly the cause of the improvidence is neither expressly nor impliedly made a reason for denial of relief, and such ground for refusal of relief has not been recognized by the courts. Significant statements of the rule follow.

In the case of Amherst v. Hollis, 9 N. H. 109, it is stated:

> "The statute, relative to the support and maintenance of the poor, provides, that 'when any person in any "town in this state shall be poor and unable to maintain him "or herself, such person shall bs relieved and maintained by 'the overseers of the poor of the town where such person "shall happen to be.' There is no exception because the inability may have arisen from the improvidence of the party, or from any other cause; and imprisonment for debt certainly does not furnish a reason why a person should not be relieved, if poor and unable to maintain him-

self. It is true that, in such case, so long as the imprisonment lasts, the pauper cannot be removed; and the town where he has his settlement may thus be compelled to provide for his support under more unfavorable circumstances than they might do if they could make provision for his support within their own limits. But this will not warrant us in making an exception to the broad language of the statute, if the person thus imprisoned can be regarded as a pauper."

The case of St. Johnsbury v. Waterford, 15. Vt. 699, states:

"3. We think the charge, in regard to Rowell's ability to support his wife, correct. He had effectually disposed of all his property; and the movde was unimportant, as it was binding upon him, and upon all others, unless done to defeat their rights, which it does not appear was attempted to be shown in the present case.

"4. The declarations of Rowell, the husband of the pauper, were mere hearsay.

"5. As to the sums paid to Kirby, and at the insane asylum, they cannot be objected to, as they did not increase the expense of her maintenance. And if the expense had been positively increased, by sending an insane pauper to the asylum, I have no doubt, it would, under the present enlightened views, upon the most judicious and humane mode of treating such cases, be considered necessary expense of comfortable support. I trust, indeed, the state is not prepared to establish a system of treatment of insane paupers, which would be esteemed disgraceful in the case of relatives of sufficient ability.

"6. The expense of clothing, destroyed by the pauper, was not only necessary, but indispensable to decency. This expense must be borne somewhere. Of course it must come where the principal burden of expense of maintenance falls."

The Supreme Judicial Court of Maine, in Hutchinson v. Inhabitants of Carthage, 73 A. 826, stated:

" * * * it is immaterial whether the person in need is brought into that condition by quarantine, neglect of the board of health, or otherwise, inasmuch as it is the fact of the situation, not the

method of producing it, that requires the action of the officers."

In the case of Town of New Hartford v. Town of Canaan, 52 Conn. 160, the Court said:

"There was another suggestion made during the argument in behalf of the defendant which we cannot accept, and that is, that want occasioned by intemperance and improvidence does not create such a necessity as calls for relief from the town. Our laws for the relief of the poor, whether considered in their letter or their spirit, take no cognizance of the origin and causes of poverty, but only of its existence."

The Supreme Court of Missouri, in Jennings v. City of St. Louis, et al, 58 S. W. 2d 979, 87 A. L. R. 369, stated:

"Taxes - for what purpose - unemployment relief.

"The good of society demands that when a person 'is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood,' he is entitled to be supported at the expense of the public. 'It is immaterial how the alleged pauper is brought into need, as it is the fact of the situation and not the method of producing it that is important.' 'So the fact that a person's want is the result of gross intemperance does not prevent him from securing relief as a pauper.' 'An able-bodied man, who can, if he chooses, obtain employment which will enable him to maintain himself and family, but refuses to accept employment, is not entitled to public relief, though relief may be properly extended to the wives and children of such men.'"

And the rule is stated in Vol. 41, page 693, Am. Jur. title Poor and Poor Laws, as follows:

"It is immaterial how the alleged pauper is brought into need, for it is the fact of the situation and not the method or producing it that is important. So, the fact that a person's want is the result of gross intemperance does not prevent him from securing relief as a pauper."

And there is reasonable implication that this is the rule in Iowa in the following statement from the case of Polk County v. Owen, 187 Iowa 220, 174 N. W. 99:

> "The defendant Mrs. Robt. Owenwas asked whether there had been any need of the son's making application for charity because of her refusal to assist the son to all the necessities of life. Objection that this was incompetent, irrelevant, and immaterial, and called for the conclusion of the witness, was sustained. We hold that the question called for a nonpermissible conclusion, and was an attempt to usurp the province of the jury."

A search of legal authorities discloses no precedent holding that a person on strike under the conditions set forth in your letter is a poor person entitled to poor relief. In this state of the law and in answer to your question, I therefore advise that public funds can only be expended for relief to persons who qualify under the provisions of Sec. 252.1, repeated here as follows:

> "'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."

as Chapter 252 and specific sections herein mentioned have been interpreted by our Court. See Polk County v. Owen, 187 Iowa 220, 174 N. W. 99, and Hamilton County v. Hollis, 141 Iowa 477, 119 N. W. 978.

Whether unemployment resulting from a strike called by a union is an element to be considered in determining whether the applicant is such a poor person as to fall within the terms of the statute is a question of fact for determination by the County Board of Supervisors.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NAE:MKB

Dairy and Food, Frozen Products --

AGRICULTURE: ~~DAIRY AND FOOD: FROZEN PRODUCTS:~~

An edible frozen product resembling ice cream made exclusively from vegetable oils is not an adulteration within the contemplation of Section 190.5, and if not sold under the name of one of the defined articles of food in Chapter 190 is saleable in Iowa if not adulterated within the meaning of 190.3 but is labeled within the provisions of Section 189.9, Code 1958. (Forrest to Liddy, Ag. Dept., 1/19/59) # 59-1-25

January 19, 1959

Mr. L. B. Liddy, Chief
Dairy and Food Division
Iowa Department of Agriculture
L O C A L

Dear Mr. Liddy:

We have yours of January 14 as follows:

"This department is in receipt of a letter of inquiry from a major manufacturer of dairy products requesting information as to the legality of a frozen product in the semblance of ice cream manufactured entirely from vegetable oils which they expect to manufacture and offer for sale in the State of Iowa.

"We direct your attention to Section 190.5 of the 1958 Code of Iowa which states as follows:

'Adulteration with fats and oils. No milk, cream, skimmed milk, buttermilk, condensed or evaporated milk, powdered or desiccated milk, condensed skimmed milk, ice cream, or any fluid derivatives of any of them shall be made from or have added thereto any fat or oil other than milk fat, and no product so made or prepared shall be sold, offered or exposed for sale, or possessed with the intent to sell, under any trade name or other designation of any kind.

"We would also like to call your attention to Section 190.9 of the 1958 Code which states as follows:

59-1-25

'Sale by false name. No person shall offer or expose for sale, sell, or deliver any article of food which is defined in this chapter under any other name than the one herein specified or offer or expose for sale, sell, or deliver any article of food which is not defined in this chapter under any other name than its true name, trade name, or trade-mark name.'

"Would you kindly advise us at your earliest possible convenience if either of these Sections would, in your estimation, preclude the manufacture and sale in the State of Iowa of a product made in the semblance of ice cream from vegetable oil, x x x x.

In response thereto, I advise as follows. Since the facts of your letter indicate that the frozen product to which you refer, while resembling ice cream, does not contain any of the milk products indicated in 190.5, Code of 1958, we feel that same could in no way be considered an adulteration.

Additionally, since the product referred to is not one "defined in this chapter" (that is, Chapter 190) and presumably will be sold under its true name, trade name, or trade-mark name, it is our opinion that the same is not in violation of Section 190.9 either.

It would appear that if the product mentioned is wholesome, it meets the requirements of Section 191.1 and as a result is marketable in Iowa, if it meets the labeling requirements of Section 189.9.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:kr

Fuel tax--
MOTOR VEHICLES: ~~FUEL TAX~~ Persons licensed as distributors under Division I of Chapter 324, Code 1958, are not subject to the permit provisions contained in §§ 324.52, 324.53.

The test is not whether a truck is licensed (registered) as an Iowa vehicle but rather whether the owners of said trucks are distributors licensed under Div. I Chapter 324, Code 1958.
(Peschke to Abrahamson, St. Treas., 1/26/59)

#59-3-1

January 26, 1959

M. L. Abrahamson
Treasurer of State
L O C A L

Attention: Charles R. Dayton,
Deputy Treasurer

Dear Sir:

This will acknowledge receipt of your letter under date of January 22, 1959, set out as follows:

"An Iowa licensed Distributor has requested an Indentification Card to carry on his cab to permit him to come into the State with more than twenty gallons of fuel. The question is,--is it legal to grant the Iowa licensed Distributor permission to enter the State with more than twenty gallons of fuel by permitting him to purchase an Identification Card or in your opinion does the law require that he obtain a Permit as defined under Division III of the Motor Vehicle Fuel Tax Law.

In your opinion is it legal for all Iowa licensed trucks to be permitted to enter the State without a Permit as defined under Division III of the Motor Vehicle Fuel Tax Law."

Section 324.52, Code 1958, provides:

"Fuels imported in supply tanks of motor vehicles. No person shall bring into this state in the fuel supply tanks of a motor vehicle, or any other container, regardless of whether or not the supply tanks are connected to the motor of the vehicle, any motor fuel or special fuel to be used in the operation of the vehicle in this state unless he has paid or made arrangements in advance with the treasurer for payment of Iowa fuel taxes on the gallonage consumed in operating the vehicle in this state; except that this division shall not apply to a private passenger automobile.

59-3-1

Any person who brings into the state in the fuel supply tanks of a motor vehicle more than twenty gallons of motor fuel or special fuel in violation of the provisions of the preceding paragraph is guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or shall be imprisoned in the county jail not more than thirty days."

Section 324.53, Code 1958, provides:

"Permit--Bond. The advance arrangements referred to in the preceding section shall include the procuring of a permit and may in the discretion of the treasurer include the posting of a suitable indemnity bond in a sum to be fixed by the treasurer to assure the required reporting, tax payments and the keeping of required records.

Permit may be obtained upon application to the treasurer. The treasurer shall charge a fee of one dollar for each permit issued. The holder of a permit under this division shall have the privilege of bringing into this state in the fuel supply tanks of motor vehicles any amount of motor fuel or special fuel to be used in the operation of the vehicles and for that privilege shall pay Iowa motor fuel or special fuel taxes.

Each vehicle operated into or through Iowa in interstate operations using motor fuel or special fuel acquire in any other state shall carry in or on each vehicle a duplicate or evidence of the permit required in this section. A fee not to exceed twenty-five cents shall be charged by the treasurer for each duplicate or other evidence of permit issued by him."

Section 324.56, Code 1958, provides:

"Not applicable to distributors. The provisions of this division shall not apply to distributors licensed under division I of this chapter. Distributors so licensed shall report and pay the tax on motor fuel and on special fuel consumed in propelling vehicles on the public highways of this state as provided for respectively in divisions I and II."

As you are well aware, the foregoing code sections appear within and under Division III of Chapter 324, Code 1958. Said division is otherwise known as the "Interstate Fuel Use Tax Law".

In reply to your first question I would advise you as follows. The permission for a distributor licensed under Division I of Chapter 324, Code 1958, to enter the state with more than twenty gallons of motor fuel or special fuel in the fuel supply tanks of a motor vehicle, without prepayment of the tax or making arrangements for payment thereof in advance, is expressly granted by statute. Section 324.56, supra. The law does not require that a distributor licensed under Division I of Chapter 324, Code 1958, obtain a permit as defined and provided for under Section 324.53, supra.

In reply to your second question I would advise you that it is not a question of whether the trucks are licensed (registered) in the State of Iowa but rather, whether the owners of said trucks are distributors licensed under Division I of Chapter 324, Code 1958.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kt

Member of County Conservation Board unauthorized to also be a member of the State Conservation Commission. §111A.4(3), 1958 Code, makes these positions incompatible.

January 13, 1959

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

My dear Martin:

Referring to your oral request as to whether a member of the County Conservation Board may also be a member of the State Conservation Commission, I would advise you that in my opinion occupancy of these two offices at the same time is unauthorized. If such a situation existed the member of the County Board when a member of the State Conservation Commission would be sitting in review of his own acts. Section 111A.4, subsection 3, 1958 Code, providing as follows:

> "The county conservation board shall file with and obtain approval of the state conservation commission on all proposals for acquisition of land, and all general development plans and programs for the improvement and maintenance thereof before any such program is executed."

makes these positions incompatible.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

BANKS AND BANKING: Branch Banks -- Power of Superintendent to deny or grant applications. (Strauss to Nolan, St. Sen., 2/24/59) #59-2-1

February 24, 1959

Senator D. C. Nolan
Senate Chamber
B u i l d i n g

My dear Cliff:

Concerning yours of the 21st inst. with respect to the discretion, if any, possessed by the Superintendent of Banking or the Bank Board in issuing or denying applications for state bank chapters if the applicants have otherwise fully complied with the statutory requirements, I would advise you informally the following.

The 38th General Assembly, by Section 1 of Chapter 236, expressly conferred such power on the Superintendent of Banking. Upon his rejection of an application, according to the statute, the applicants had the right to appeal to the Committee on Retrenchment and Reform, whose order was final and conclusive. However, this section of Chapter 236 was provided not to be in force and effect after December 31, 1920. This statute was the subject of an opinion of this Department appearing in the Report for 1919-1920 at page 196. The headnote to the opinion stated this:

> "The Superintendent of Banking is to determine whether a new bank is necessary or its officers or stockholders proper persons to conduct a bank under the provisions of chapter 236, acts of 38th General Assembly."

59-2-1

The present power of the Superintendent of Banking over banks and their organizations is provided in Section 524.10, 1958 Code, which now provides as follows:

> "Duties and powers. The superintendent of banking shall be the head of the banking department of Iowa and shall have general control, supervision, and direction of all banks and trust companies incorporated under the laws of Iowa, and shall be charged with the execution of the laws of this state relating to banks and banking. The organization and reorganization of state and savings banks and trust companies shall be subject to the approval of the superintendent of banking.
>
> "He shall have power to adopt and promulgate such rules and regulations as in his opinion will be necessary to properly and effectively carry out and enforce the provisions of this section."

This provision for the Superintendent's approval of banking organizations is commented upon by a note appearing in Volume 33, Iowa Law Review, page 380, where it is stated:

> "The licensing power of the department is delimited by a rather broad standard with respect to credit unions and small loan companies, and certain findings must be made before the grant or refusal of a license. But current statutes provide merely that the licensing of state and savings banks and cooperative banks 'shall be subject to the approval of the superintendent of banking.' At one time such a provision was seriously questioned as an invalid delegation of legislative power to an executive department. However, the tendency has been to recognize the need for ever greater administrative discretion and power as the functions of government have become more complex. Iowa, in sustaining broad grants of licensing power, seems to have been a leader in recognizing this need. The validity of preannounced principles,

> whether in the form of rules or administrative standards, employed by the licensing official himself to guide his determinations has been denied in some jurisdictions as the exercise of a legislative function. Iowa has taken the opposite view on this question, and it should be proper for the banking department, so long as it acts within the confines of the broad legislative delegation, to prescribe rules and regulations by which all applications for certificates of authority to organize state or savings banks shall be tested."

And see Noble v. English, 183 Iowa 893, 167 N. W. 629. With respect to the rule-making power provided in Section 524.10, it is stated in Volume 33, Iowa Law Review, page 379, the following:

> "The broad power given the department under Iowa Code §524.10 (1946) to issue rules of general applicability and future effect does not appear to have been extensively utilized. The only apparent evidence of its exercise is a publication of the department, Iowa Department of Banking, Rules of Sound Banking for Iowa Chartered Banks (1942). These 'rules' are not couched in mandatory terms. The foreword states: 'The following well-establishes Rules of Sound Banking are offered as guides to better management of Iowa banks. Full cooperation by voluntarily adopting them as sound workable suggestions for successful management is expected.' (Italics supplied.) If the rules are not followed, however, the bank may be found to be 'conducting its business in an unsafe manner,' Iowa Code §528.29 (1946), which the superintendent shall order stopped. If his demand is not complied with, the result may be the closing and liquidation of the bank. Id. §528.32.

And it is also observed with respect to that power on page 382 of such annotations the following:

> "Such regulations have been outlined in Iowa Department of Banking, Rules of Sound Banking for Iowa Chartered Banks 3-4 (1942). New bank charters will be approved only 'after due consideration of public necessity and convenience; character and ability of proposed management;

> potential earning power . . . and only when capital structure is sufficient to qualify the proposed bank for membership in the Federal Deposit Insurance Corporation.' Whether this standard will be inflexibly followed is a question admitting of some doubt in view of the informal nature of this publication. "

It does not appear that this Department has ever issued an opinion addressed to this particular question. I hope this is helpful.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

CONSTITUTIONAL LAW: Mobile food establishments -
A proposed bill (58 G. A., House File 142) adding "vehicles used for delivering and selling foods directly to the consumer" as an additional definition of "food establishment" in Section 170.1 (6), does not place such a burden upon interstate commerce as to render the dame unconstitutional. (Forrest to Doyle, St. Rep., 2/24/59) # 59-2-2

February 24, 1959

Representative Donald V. Doyle
House of Representatives
L O C A L

Dear Sir:

I am in receipt of your inquiry concerning House File 142 as follows:

> "I am on the sub-committee of House File 142; enclosed herewith is a copy of said bill. On Section one of said bill provides a license on vehicles is clearly referred to as direct selling and in many cases it will fall under the direct provisions of the Interstate Commerce.
>
> "I understand the United States Supreme Court and higher State Courts have repeatedly decided that no state or city has the right to collect license fees from any person engaged in direct selling under the provision of Interstate Commerce. (Real Silk Hosiery Mills vs. City of Portland 268 U.S. 325, Brennan vs. Titusville 153 U. S. 289, Robbins vs. Taxing District 120 U. S. 489, Rearick vs. Pa. 203 U.S. 507, Crenshaw vs. Arkansas 227 U.S. 389).
>
> "I would appreciate an Attorney General's opinion on Section one of House File 142."

In response thereto, I would advise that, as your letter points out, the general rule is that any burden placed upon goods in interstate commerce by a state statute interferes with the free flow of commerce so as to render the same invalid.

59-2-2

Of equal recognition is the rule that if a statute can fairly be called an exercise of the police power upon a subject which the states have the right to legislate, the fact that it puts a limitation on what is otherwise interstate commerce does not necessarily render it invalid. (See 11 Am. Jur. page 1003 and numerous cases cited thereat).

The proposed legislation would amend chapter 170 of the 1958 Code of Iowa. This chapter concerns itself with hotels, restaurants, and food establishments and is clearly concerned with a topic which generally may be the subject of state police power regulation.

More particularly, the bill provides that "vehicles used for delivering and selling foods directly to the consumer, or vehicles displaying and selling food for delivery at a future date shall be included in the definition of "food establishment" Section 1701 (6), and as such require licensing.

You ask whether or not this would constitute a burden upon interstate commerce so as to make such a provision invalid.

Since the Real Silk Hosiery Mills case, cited in your letter, dramatic changes have taken place in leading court decisions concerning state regulation of interstate commerce. These are well summarized in the recent case of Meyers v. Matthews, 71 N. W. 2d 368 at 373, 4 as follows:

> "It is to be noted that, with the development of the law, in determining questions arising under the Constitution as to the spheres in which the police power of the states and federal government are permitted to operate, the courts have been more and more mindful of the possible disturbance of the mixed and complicated balance of our political system and the dangers of removing a protective authority too far from the locality needing protection. The more recent cases of the U.S. Supreme Court have abandoned the rule seemingly imposed by earlier cases, requiring states to maintain a "hands off" policy with respect to attempted state regulation if it even so much as touched interstate commerce. The more recent cases adopt the rule that in the absence of discrimination or undue burden resulting from state regulation, where Congress has not already legislated, a state may exact licenses and reasonable fees as well as conformance with

provisions designed to assure the responsibility of out-of-state concerns and their integrity in dealing with the residents of the state, even where such concerns are engaged in interstate commerce. A case in point is Di Santo v. Commonwealth of Pennsylvania, 1927, 273 U.S. 34, 47 S. Ct. 267, 71 L. Ed. 524, formerly relied on by interstate commerce businesses in claiming immunity from state regulation, but since overruled with the result that it is no longer controlling authority:

> "The decision in the Di Santo case was a departure from this principle which has been recognized since Cooley v. Board of Port Wardens (12 How. 299, 13 L. Ed. 996), supra. It cannot be reconciled with later decisions of this Court which have likewise recognized and applied the principle, and it can no longer be regarded as controlling authority." People of State of California v. Thompson, supra, 313 U. S. at page 116, 61 S. Ct. at page 934.

"In holding as it did in the present case, the trial court apparently followed the now discarded doctrine of the earlier cases that if a person or corporation was engaged in interstate commerce, that fact of itself rendered such person or corporation immune from state regulation. In its decision it relied heavily upon Real Silk Hosiery Mills v. City of Portland, 268 U.S. 325, 45 S. Ct. 525, 69 L. Ed. 982 and Memphis Steam Laundry Cleaner, Inc., v. Stone, 1952, 342 U. S. 389, 72 S. Ct. 424, 96 L. Ed. 436; and cited the so-called 'drummer cases.' These cases are clearly distinguishable from the present case, because the holding of unconstitutionality of attempted state regulation in such cases was based upon discrimination and undue burden. In the Real Silk Hosiery case, it was not a state statute but a city ordinance which was involved. Manifestly if every municipality in the state were allowed to exact a license, then the total sum of such licenses could prove so prohibitive as to put an undue burden upon interstate commerce and impede its free flow."

Additionally, it appears that a state may require a license, and the payment of tax therefor, from hawkers, peddlers, agents, and other persons selling goods which are within the state at the time of the sale although such licensees bring their food in from another state or buy from, or act in behalf of, nonresident manufacturers. Caskey Baking Company v. Commonwealth of Virginia, 61 S. Ct. 881, 313 U. S. 117, 85 Lawyers Edition 1223. Under the provisions of Section 170.5 (6), the license required for food establishments is taxed in the amount of $3.00. Returning to the Meyers case, cited supra, we find this language on page 371 therein, "It is obvious that an annual license fee of $2.00 is not a tax, as it barely covers the administrative costs of issuing such licenses."

In expanding on the doctrine of the Caskey case, the Virginia Supreme Court of Appeals said in Thompson v. County Board, 90 S. E. 2d 810 at 812:

> "Little need be said of appellant's first contention. It is true that the transportation of its products and commodities across the State line to fill orders previously taken is interstate commerce which the county may not lawfully tax under Article I, Sec. 8, of the Federal Constitution. Nippert v. City of Richmond, 327 U.S. 416, 66 S. Ct. 586, 90 L. Ed. 760, 162 A.L.R. 844, and cases there cited. But that is not the activity which is taxed under the provisions of the ordinance. As applied to appellant, the ordinance levies taxes on it for the privilege of selling or peddling its products from its trucks in Arlington county. Such sales are purely local in character. They are consummated in the county after the commodities have been brought there. It has long been settled by the decisions of the Supreme Court that such a statute imposes no forbidden burden on interstate commerce. Caskey Baking Co. v. Commonwealth of Virginia, 313 U.S. 117, 119, 61 S. Ct. 881, 85 L. Ed. 1223, and cases there cited. The fact that a part of appellant's activities is interstate commerce which may not be taxed locally does not mean that its purely local activities may not be taxed locally."

See also Memphis Steam Laundry v. Stone, 96 L. Ed. at 440, note 12, and the annotation in 97 L. Ed. at 573 quoted in part as follows:

"there exists no infallible rule of thumb for ascertaining the validity of a state taxing measure affecting motor vehicles as such measure relates to the constitutional bar against state interference with interstate commerce. This is not to say that there are no well-defined principles which are applicable in any case; it is clear, for example, that a state tax affecting motor vehicles cannot stand if it obstructs, or discriminates against, or places an unduly heavy burden upon, interstate commerce.

"On the other hand, it is equally clear that a state or local tax affecting vehicles moving in interstate commerce is not per se invalid, X X X."

Whether or not the license imposed by the proposed statute is an exercise of the police power so as to be exempt from the restriction of the interstate commerce clause of the federal constitution, or, whether the license is merely a privilege to solicit food sales by vehicle, that is, whether it falls under the Thompson-Caskey doctrine is allowing licensing an activity, which is purely local in character, irrespective of the overall interstate nature of the transaction, this office does not decide.

But irrespective of which catagory it falls into, it would not appear to constitute a burden on interstate commerce so as to render the proposal unconstitutional.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:kr

GENERAL ASSEMBLY: Interim Committee vacancies --
1) Where a vacancy occurs in the Senate membership of the Budget and Financial Control Committee it is the duty of the President of the Senate to fill the vacancy and pursuant to a legal presumption that the duty has been performed, one approved for a full term on the ~~termed~~ deemed Committee which office did not exist will be to be appointed to fill the unexpired term due to the vacancy; 2) which is the majority or minority party as mentioned in §2.41, Code 1958, is determined by the composition of the several bodies of the Gen. Assembl

February 23, 1959 (Erbe and Strauss to McManus, Lt. Gov., 2/23/59) # 59-2-3

Hon. Edward J. McManus
Lieutenant Governor
B u i l d i n g

Dear Mr. McManus:

This will acknowledge receipt of yours of the 16th inst. in which you submitted the following:

> "Section 2.41, Code 1958, provides in part as follows:
>
> "'2.41 Committee created. There is hereby created a committee to be known as the budget and financial control committee, which shall have ten members. Five of said members shall be members of the house or representatives and appointed by the speaker; three of these members shall be from the majority party and two from the minority party. Five of said members shall be members of the senate and appointed by the president of the senate; three of which shall be from the majority party and two from the minority party; * * *" (Italics mine)
>
> "Section 2.42, Code 1958, provides in part as follows:
>
> "'The terms of office for the committee members shall be four years beginning February 1 after the convening of the general assembly in regular session. Any vacancies occurring on the committee shall be filled by appointment for the unexpired term made in the same manner as original appointments. A vacancy shall exist whenever a committee member ceases to be a member of the general assembly.' * * *
>
> "In the 1955 Session of the Legislature (56th General Assembly) the President of the Senate appointed S. na-

59-2-3

tors Washburn (R), Byers (R) and Burton (D) to regular four year terms. Senator Washburn was not a member of the 57th General Assembly which convened in January of 1957 and consequently a vacancy existed for his unexpired term. At 1957 Senate Journal Page 1194 is the notation that President Nicholas appointed for regular terms Senator Putney (R), Scott (R) and Gillespie (D) without otherwise qualifying the appointments.

"At 1959 Senate Journal Page 55 the official canvass of the total vote cast for Governor at the election held November 4, 1958 showed that Herschel C. Loveless (D) received 465,024 votes and that William G. Murray (R) received 394,071 votes. On Thursday, February 12, 1959, Mr. L. L. Jurgemeyer, Iowa State Chairman of the Republican Party, declared 'The Republican Party in Iowa now is the minority party after two decades of political domination in the State.'

"In view of the foregoing, I respectfully request your opinion on the following two questions:

"1. Which of the two Republican Senators appointed to the Budget and Financial Control Committee by Lieutenant Governor Nicholas in the 57th General Assembly was appointed to fill the unexpired term of Senator Washburn?

"2. For the purpose of the President of the Senate's appointments to the Budget and Financial Control Committee in the 58th General Assembly as provided in Section 2.41, Code 1958, do the words 'majority party' in said section mean democratic party or republican party?"

In reply thereto we advise as follows.

1. The record of appointments to the Budget and Financial Control Committee under the authority of Sections 2.41 and 2.42, Code of 1958, from the Senate Journal shows the following:

Senate Journal, 54th G. A., 1951, page 1216:

"In accordance with Senate File 1, President Nicholas announced the following Senators as members of the budget and financial committee: Senators Knutson, Fishbaugh and Colburn for the four year terms and Senators O'Malley and Augustine for the two year terms."

Senate Journal, 55th G. A., 1953, page 1292:

"President Elthon announced the appointment of the following Senators on the part of the Senate on the budget and financial control committee, Senator Prentis to fill the unexpired term caused by the resignation of Senator Fishbaugh, Senator Lynes and Senator O'Malley."

Senate Journal, 56th G. A., 1955, page 1205:

"President Elthon, in accordance with Section 2.41, Code 1954, announced the appointment of the following on the part of the Senate, on the budget and financial control committee for regular terms: Senators Washburn, Byers, and Burton."

Senate Journal, 57th G. A., 1957, page 1194:

"President Nicholas, in accordance with Section 2.41, Code 1954, announced the appointment of the following on the part of the Senate, on the budget and financial control committee for regular terms: Senators Putney, Scott & Gillespie."

It appears from this record that on January 1, 1957, there was a vacancy in the Committee on the part of the Senate appointees due to the fact that Senator Washburn was not a member of the 57th General Assembly and an appointment was authorized to fill his unexpired term. It appears also that on February 1st of that year there were two appointments to be made for the full term. It is therefore clear that the appointment of three members of the Senate to the Committee for three full terms exceeded the power of the Lt. Governor in that there were only two full term offices to be filled. Sec. 2.42 provides that any vacancies occurring on the Committee shall be filled by appointment for the

unexpired term made in the same manner as original appointments. It was the duty of the President of the Senate to fill this vacancy and there is a legal presumption that the presiding officer of the Senate has performed this duty. Pursuing this legal presumption, it would appear that as between filling the office of the full term and the vacant office, that the Senator first named was intended to be appointed to fill the vacancy for the unexpired term. This presumption is paralleled by the record shown in the Senate Journal for the 55th General Assembly on page 1292, heretofore quoted, showing an appointment of Senator Prentis for an unexpired term and appointment of two Senators for full terms. In that view on the basis of the Senate Journal of the 57th General Assembly on page 1194, Senator Putney would occupy the office for the unexpired term of Senator Washburn.

2. Insofar as your question #2 is concerned, it is clear that the statement quoted by you of Mr. L. L. Jurgemeyer, Iowa State Chairman of the Republican Party, is a voluntary view by a private citizen who happens to be a party official. A party official is not a public officer and in making this statement in the performance of his other duties was not performing any statutory duty and has no bearing upon the situation. However, the General Assembly itself and its two constituent bodies have by legislative action defined the meaning of majority party as contained in Sec. 2.41, Code 1958. In making up committees in

both branches of the Assembly each has acted and made of record that the majority party in both the Senate and House is the Republican Party. It would seem anomalous to impute to the Legislature or either house thereof any intent to define the majority party and the minority party upon the voluntary statement of a private citizen holding a party office. If such a voluntary statement were to control these party appointments the question is presented as to how the division between the majority and minority parties was or could have been previously determined.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
First Assistant Attorney General

NAE:OS:MKB

Emergency vehicles --

MOTOR VEHICLES: ~~AUTHORIZED EMERGENCY VEHICLES:~~ A driver of an authorized emergency vehicle assumes a special privilege when such vehicle is operated in the immediate pursuit of an actual violator of the law. (Pesch to Timmons, Ass't Dubuque Co. Atty.) 2/20/59) # 59-2-5

February 20, 1959

Mr. William E. Timmons
Assistant Dubuque County Attorney
701 Bank and Insurance Building
Dubuque, Iowa

Dear Sir:

Your request by telephone on February 18, 1959, for an opinion from this office relative to a certain legal problem, is as follows:

> "A city police officer, driving a city police squad car and engaged in immediate pursuit of an actual violator of the law collided with an on-coming vehicle. While thus engaged the officer was sounding signal by siren and the red light mounted on said squad car was flashing. The question does not go to civil liability, but rather as to whether criminal charges will lie against the driver of the city police squad car. The aforesaid collision occurred when said squad car attempted to pass another vehicle, and both vehicles (the squad car and the on-coming vehicle) were speeding."

Section 321.1 (26), Code 1958, defines authorized emergency vehicle to mean:

> " * * vehicles of the fire department, police vehicles, ambulances and emergency vehicles owned by the United States, this state or any subdivision of this state or any municipality therein, and such privately owned ambulances, rescue or disaster vehicles as are designated or authorized by the commissioner." (Emphasis added).

In reply to your question, as submitted I advise you as follows. I am of the opinion that the answer thereto is found in the provisions contained in Section 321.232, Code 1958:

59-2-5

"No driver of any authorized emergency vehicle shall assume any special privilege under this chapter except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law." (Emphasis added).

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kt

SCHOOLS: Federal statutes - Application of Public Law 85 Chapter 836. (Rehmann to Davis, Dept. Pub. Instr., 2/20/59.)

#59-2-6

February 20, 1959

Mr. Joseph S. Davis
Legal Adviser
Department of Public Instruction
L O C A L

Dear Mr. Davis:

Reference is made to your letter of February 17 that sets out the following:

"We have had many requests pertaining to the nature and content of public law 85-863 enclosed herein.

Specifically, we would like to know:

1. Is this law and the reporting form enclosed applicable to Iowa schools?

2. If so, to what schools does it pertain?"

In reply thereto:

In answering your first question your attention is directed to Section 4 subsection (b) of public law 85 Chapter 836, 72 stat 997 which provides to wit:

"(b) This Act shall not apply to an employee welfare or pension benefit plan if --

(1) such plan is administered by the Federal Government or by the government of a State, by a political subdivision of a State, or by an agency or instrumentality of any of the foregoing;" (Emphasis ours)

The answer to the first question makes the answer to the second question unnecessary.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kt

59-2-6

Use Tax --

[redacted] Sales by an out-of-state seller to Future Farmers of America chapters in Iowa are subject to use tax.
(Brinkman to Cunningham, St. Tax Comm., 2/16/59)
59-2-7

February 16, 1959

Mr. D. E. Cunningham
Director
Sales & Use Tax Division
Iowa State Tax Commission
Local

Dear Mr. Cunningham:

This is to acknowledge receipt of your letter of December 22, 1958, in which you request the opinion of this office as to whether sales by an out-of-state seller who sells Future Farmers of America supplies, such as jackets, jewelry, station markers, and metal identification signs to Future Farmers of America chapters in Iowa, are subject to Iowa use tax. The items are purchased either out of the chapter's own funds or out of the high school activity fund.

Two theories may be advanced in favor of exemption this kind of transaction from the imposition of the Iowa use tax. (1) That the imposition of the tax is prohibited by the Constitution of the U. S. or by laws of Congress. (2) That the sale is to a political subdivision of a tax levying or a tax certifying body.

The following provisions of the Code of Iowa (1958) are pertinent to your inquiry:

> "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:

59-2-7

"* * *.

"6. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of section 422.45."

"422.45 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:

"1. The gross receipts from sales of tangible personal property which this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state.

"* * *.

"3. 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, * * *.

"The exemption provided by this subsection shall also apply to 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 which are subject to use tax under the provisions of chapter 423."

The first theory of exemption can be disposed of by examining the statutory provisions creating the Future Farmers of America. On August 30, 1950, in Public Law 740, 81st Congress, 64 Stat. 563, the Future Farmers of America Corporation was chartered by Congress. Its announced purpose was, inter alia, "to strengthen the confidence of farm boys and young men in themselves and their work, to encourage members in the development of individual farming programs, and to encourage their permanent establishment in farming by (a) encouraging improvement in scholarship; (b) providing prizes and awards to deserving students who have achieved distinction in vocational agriculture, including farm mechanics activities on a local, state, or national basis; and assisting financially, through loans or grants,

deserving students in all-day vocational agricultural classes and young farmers under thirty years of age who were former students in all-day vocational agricultural classes in becoming satisfactorily established in a farming occupation; ".

No provision is found in the Acts of Congress exempting the Future Farmers of America from state taxation; nor can it be said that the Constitution of the United States prohibits taxation by states of this or similar organizations. As expressed in McCulloch v. Maryland, 4 Wheat. (U.S.) 316 (1819), the states have no authority to tax any of the constitutional means employed by the government to execute its constitutional powers. The imposition of a state use tax on the use of tangible personal property federally chartered corporations cannot be said to be per se a violation of the doctrine laid down in McCulloch v. Maryland. Certainly, it cannot be argued that taxing sales to the Future Farmers of America impedes the government in exercising its constitutional powers.

Therefore, this leaves to be considered the question of whether section 422.45 (6), supra, exempts the sales herein involved. This section provides that sales to any tax certifying or tax levying body of the state of Iowa or governmental subdivision used for public purposes are exempt from sales and use tax. The question then to be determined is whether the sales to the Future Farmers of America are sales to either the schools or the school districts. The Future Farmers of America is largely a self sustaining organization. They derive their funds through a variety of programs such as the growing of crops in test plots, sales of garden seeds, earnings from work projects such as picking corn, donations for landscaping work, gifts to the various chapters, and fund raising projects such as banquets, programs, etc.

Although the individual chapters work in cooperation with the schools, and the school board will, in some instances, make up a chapters deficit, it cannot be said that the organization is part of or a subdivision of the school district. It is well to keep in mind in dealing with tax exemption statutes that the Supreme Court of this state has without exception, adopted the general rule of statutory construction that exemption statutes are to be strictly construed. The court has often repeated that in order to receive the benefits of the exemption the taxpayer must show himself to come clearly within the confines of the exemption, and any doubts must be construed in favor of the taxing authority. Dain Mfg. Co. of Iowa vs. Iowa State Tax Commission 237 Iowa 331, 22 N.W.2d 786, Lamb v. Kroeger 233 Iowa 739, 8 N.W.2d 405.

Therefore, you are advised that no exemption exists on the sales by an out-of-state seller to chapters of the Future Farmers of America.

Very truly yours,

Richard J. Grinkman
Special Assistant Attorney General

RJB/GWR/bjf

CRIMINAL LAW: CONSTITUTIONAL LAW: LABOR LAW: Federal reservations – (1) Violation of Chapter 736A, 1958 Code of Iowa, is a crime. (2) The provisions of Chapter 736A, supra, do not apply to the Iowa Ordnance Plant at Burlington since the federal government has exclusive jurisdiction except for service of civil and criminal process; (3) Where an offense, under 736A, supra, occurred is a fact question dependent upon where the collective bargaining agreement was executed. (Faulkner to Dodds, St. Rep.) # 59-2-8

Representative Robert H. Dodds
House of Representative
L O C A L

Dear Sir:

Your inquiry of February 11, 1959, is as follows:

"As the representative of Des Moines County in the General Assembly, I have to determine the application of the Iowa law in regard to labor union membership as set out in Chapter 736A of the 1958 Code, in title XXXV–"Criminal Law" thereof. It seems to me that this chapter appears to be primarily a criminal law.

"The Iowa Ordnance Plant is a federal area situated in Des Moines County, and it is my understanding as a general proposition that state criminal laws do not apply within a federal reservation. In order to pass upon the need or necessity of mere definitive provisions in regard to Chapter 736A of the Code, I respectfully request your opinion in regard to the following proposition:

"If and in the event the criminal laws of the State of Iowa are not applicable to a federal reservation used for military purposes and Chapter 736A is among the criminal statutes of the State of Iowa, are the provisions of Chapter 736A applicable or not application to a collective bargaining agreement executed between a union and an operating company located on the federal premises used for military purposes and operating the facilities thereon under contract of the federal government?

"Inasmuch as the present legislative session is now well under way, I would appreciate your opinion at your earliest convenience."

Section 736A.6, 1958 Code of Iowa, provides:

> "Any person, firm, association, labor organization, or corporation or any director, officer, representative, agent or member thereof, who shall violate any of the provisions of this chapter or who shall aid and abet in such violation shall be deemed guilty of a misdemeanor. (Emphasis added).

It is, therefore, established that a violation of Chapter 736A, 1958 Code of Iowa, is a crime.

Now, as to whether the state criminal law applies to a crime committed on land owned by the federal government, Wharton's Criminal Law and Procedure, Volume 4, Section 1504, page 32, states:

> "It is provided by the United States Constitution that states have exclusive jurisdiction over crimes committed within their respective territorial limits except such lands as are purchased by the United States with the consent of the state, for the erection thereon of forts, arsenals, dockyards, or other needful buildings, which lands so purchased are within the exclusive jurisdiction of the United States. If a crime is committed within the boundaries of such land, the federal courts have jurisdiction of a prosecution therefor to the exclusion of the state courts. Hence, any statute of a state that attempts to confer on its courts jurisdiction over such territory must necessarily be unconstitutional and void.

The federal constitutional provision referred to in Article I, Section 8, Clause 17, wherein it is stated:

> "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 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."

In order for exclusive jurisdiction to be in the federal authorities, the land must have been acquired for an enumerated purpose and, in addition, the state must have ceded exclusive jurisdiction to the federal government. In the absence of such cession, the federal government is acting as an ordinary proprietor. Orme v. Atlas Gas & Oil Co., 217 Minn. 27, 13 N.W.2d 757; State v. Shepard, 239 Wis. 345, 300 N.W. 905.

It is, of course, true that the "Iowa Ordnance Plant" is an arsenal and hence one of the enumerated purposes within the above quoted clause of the federal constitution.

In addition, the purchase of the arsenal site was with the consent of the Iowa Legislature which, in the 1900 Laws of Iowa, Chapter 182, page 133, enacted the following:

> "That whenever the title to any real property, situated within the state of Iowa, shall become vested in the United States of America, to be used as a barracks, drill-ground, or fort, or for other military purposes, the full, exclusive, and complete jurisdiction is hereby granted and ceded to the United States of America over such real property, and full consent to the acquisition of such real property is hereby given and granted by the state of Iowa to the United States, and all jurisdiction of the state of Iowa over such real property is hereby ended and surrendered...."

Further provision in this connection is contained in the 1902 Laws of Iowa, Chapter 213, p. 165:

> "Section 1. That the consent of the state of Iowa is hereby given, in accordance with the seventeenth clause, eighth section of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for ... arsenals, or other public buildings whatever, or for any other purposes of the government
>
> "Sec. 2. That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby ceded to the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands." (Emphasis added).

Thus, except for service of civil or criminal process, jurisdiction appears to be in the federal government. However, Section 1.4, 1958 Code of Iowa, extends the state's jurisdiction in this way:

> " * * *
>
> "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 navel or military purposes, over all offenses committed thereon against its laws and regulations and ordinances adopted in pursuance thereof." (Emphasis added).

Inasmuch as your letter specified that the premises are used for "military purposes" the ordnance plant is within the exception to the reservation in Section 1.4 supra. Therefore, the state does not, by virtue of the said section, reserve jurisdiction over an offense committed on the federally owned premises.

There remains, however, the fact question concerning where the offense is committed. In your letter it is not stated where the collective bargaining agreement is executed and, although not specifically mentioned, it is assumed that you have reference to violation of either Section 736A.1 or 736A.3, 1958 Code of Iowa, which provides:

> "It is declared to be the policy of the state of Iowa that no person within its boundaries shall be deprived of the right to work at his chosen occupation for any employer because of membership in, affiliation with, withdrawal or expulsion from, or refusal to join, any labor union, organization, or association, and any contract which contravenes this policy is illegal and void.
>
> "It shall be unlawful for any person, firm, association, corporation or labor organization to enter into any understanding, contract, or agreement, whether written or oral, to exclude from employment members of a labor union, organization or association, or persons who do not belong to, or who refuse to join, a labor union, organization or association, or because of resignation or withdrawal therefrom.

Under Sections 736A.3, supra, the prohibited act is entering into an understanding, contract, or agreement such as that specified in the above underlined wording. The crime is then committed wherever the collective bargaining agreement is entered into by the union and the operating company referred to in your inquiry. If then the understanding, contract, or agreement is entered into on property within the boundaries of Iowa, other than the federally owned premises of the Iowa Ordnance Plant, the prohibited act has occurred in Iowa and is subject to the state criminal law and the provisions of Chapter 736A, supra.

On the other hand, if the fact be that the agreement is entered into on the federally owned premises then, as before stated, the state of Iowa, having ceded jurisdiction except for the service of civil and criminal process, cannot impose its criminal law. But, the federal authorities may, under the Assimilative Crimes Act, prosecute the offense as a federal offense if not otherwise provided for by federal statute. Thus, the state law may remain applicable as the federal law and is enforceable in federal courts.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

CITIES AND TOWNS: Health officer -- A veterinarian specially trained in public hygiene and sanitation may be appointed health officer under Code sections 137.4 and 368A.1 (7).
(Abels to Ford, Des Moines Co. Atty., 2/5/59) #59-2-9

February 5, 1959

Mr. T. K. Ford
County Attorney
Des Moines County
Burlington, Iowa

Dear Sir:

Receipt is acknowledged of your letter of February 4 as follows:

> "An opinion is respectfully requested as to whether or not a town may appoint a licensed veterinarian as a health officer under the provisions of Chapter 137.4, 1958 Code of Iowa.
>
> It might be further explained that this is a small town which is experiencing difficulty in finding a physician to perform these duties."

Section 137.4, Code 1958, to which your letter refers, provides as follows:

> "Each local board shall have a health officer who shall be a physician, or one specially trained in public hygiene and sanitation. In cities and towns the health physician shall be such health officer. In every other case the local board shall appoint said health officer who shall hold office during its pleasure."

At first glance it might seem that the second sentance of the quoted provision might prevent one other than a "health physician" from holding the office of local health officer in a city or town. The office of "health physician" formerly existed in cities and towns under section 363.13, Code 1950, which provided in pertinent part:

59-2-9

"The officers to be appointed by the mayor shall be:

* * * * *

2. A health physician."

This provision was repealed in 1951 by the 54th General Assembly. The pertinent section of city and town law, section 368A.1, Code 1958, now provides:

" . . . the council shall:

* * * * *

7. Have power to appoint an . . . health officer . . ."

Thus the office of "health physician" referred to in section 137.4, supra, no longer exists in cities and towns and, under the first sentence thereof, a city or town health officer may be either "a physician or one specially trained in public hygiene and sanitation". If a veterinarian can produce evidence that he has, in fact, been "specially trained in public hygiene and sanitation" I know of no legal obstacle which would prevent appointment of such veterinarian as health officer by a city or town council.

Very truly yours,

LEONARD C. ABELS.
Assistant Attorney General

LCA:kt

Registration--
ACCOUNTANCY: Temporary registration of firms is not permited under 116.19. (Gritton to Hansen, Acc. Bd., 2/4/59)

59-2-10

February 4, 1959

Mr. George H. Hansen
Secretary-Treasurer
Board of Accountancy
524 Insurance Exchange Building
Des Moines 9, Iowa

Dear Mr. Hansen:

Your letter of January 19, 1959 reads as follows:

"In accordance with our telephone conversation, I am enclosing a copy of the two forms (they are a little old) presently being used by the Iowa Board of Accountancy for the temporary registration of non-resident practitioners under the terms of Section 116.19 of the 1958 Code of Iowa.

As we discussed, a large percentage of the present public accounting practice is conducted by partnerships consisting of 2 or more certified public accountants. Therefore, the Board would like to know whether firms, as well as individuals, can be registered for temporary engagements under the Iowa Accountancy Law. If this is the case (and we hope it is), it will be necessary to revise our application and power of attorney forms to provide for the registration of firms along with individuals -- as well as bring them up-to-date."

Section 116.19, Code 1958, provides in pertinent part as follows:

"Nothing contained in this chapter shall be construed to prevent:
1. The holders of certified public accountant certificates granted by other states from practicing in this state in connection with temporary engagements incident to their professional practice in the states of their domicile but, who have neither office nor legal address in this state; provided they file with the board of accountancy, and with the auditor of state, at least five days before commencing work for a client, the written appointment of a registered practitioner in this

state to act as agent upon whom legal service may be had in all matters which may arise from such temporary professional engagements."

This exemption clearly applies to a "holder" of a certified public accountant certificate granted by another state. It is my impression that only an individual could be a holder of a certificate and, therefore, this exemption could apply only to individuals.

As you have more familarity with the laws of the other states relating to certified public accountants, if I am mistaken in my assumption in the above paragraph, please advise me.

Pursuant to this opinion no revision of your application or power of attorney seems to be indicated at this time.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:kt

~~BOARD OF CONTROL OF STATE INSTITUTIONS:~~ The board of control, having acted as a board in approval of a claim for merchandise purchased the same being reflected in the minutes of said board, may designate and delegat, said designation and delegation also having been made of record, to a subordinate the ministerial duty of signing for the board of control indicating board approval. (Pesch to Board, 2/6/59) # 59-2-12.

February 6, 1959

STATE OFFICERS: Board of Control--

Board of Control
L O C A L

Gentlemen:

This letter is sequel to the opinion of this office under date of December 19, 1958, and directed to above board to the attention of Esther Wright, Secretary. Following the release of the aforementioned opinion a conference was held in the board conference room at which time procedures were established for board approval of claims for merchandise purchased for the institutions under the supervision of the board of control. Still wanting at that time was an answer as to whether all members of said board must sign the claim forms once they had been approved and such approval made of record in the minutes of the board meeting at which the same were approved.

The opinion of December 19, 1958 heretofore referred to was in substance as follows:

1. The authorization of claims and the approval of same is not delegable to a subordinate but must be exercised by the Board of Control of State Institutions.

2. Those duties going to mode and form may, however, be delegated to a subordinate, for example, the clerical work entailed in the preparation of the vouchers and claims, in other words, the mechanics of preparation of that which the Board of Control, as a board, must approve and authorize.

Pertaining to the instant problem, it is my further opinion that the board, having acted as a board in approving a claim and such approval made of record in the minutes, the board may designate a subordinate to sign such approval for the board of control, said designation or delegation of this ministerial duty having also been made of record in the minutes of the board meeting at which said designation or delegation was made by the board acting in concert.

Very truly yours,

59-2-12

CARL H. PESCH
Assistant Attorney General

CHP:kt

COUNTIES: ZONING -- Townships as "areas" under section 358A.4; Payment of election costs governed by sections 345.4, 39.7, 49.1, and 49.118. (Abels to Werling, Cedar Co. Atty.; 2/11/59)
#59-2-13

February 11, 1959

Mr. Max R. Werling
Cedar County Attorney
108 West Fifth Street
Tipton, Iowa

Dear Sir:

Receipt is acknowledged of your letter of January 22 as follows:

> "Cedar County has just adopted a zone ordinance under the provisions of Chapter 358A of the 1958 Code of Iowa. In the Ordinance it is provided that the rules, regulations and restrictions shall not apply until the Ordinance is approved by a majority of the real property owners in the district. Districts are established as townships, i.e., each township is a separate district. This gives rise to the following questions which I would like to have an Attorney General's Opinion upon.
>
> 1. May each township establish the method of approval to be used within the township or must the Board of Supervisors establish the method for the whole County?
>
> 2. If the method of approval used is by an election rather than petition who pays the costs thereof when (a) the township sets the method of approval and (b) when the method of approval is set by the Board of Supervisors?"

In answer to your first question you are advised that the mere coincidence of area boundaries with township boundaries confers no powers relative to zoning questions upon the township, as such, or the township trustees under Chapter 358A of the Code. This also disposes of part (a) of your second question.

59-2-13

In answer to part (b) of your second question, it appears the type of question to which you refer falls within the meaning of the provision, "other local or police regulations may be submitted at the same election" contained in Code section 345.4; that where such question is submitted at a special election, Code section 39.2 is applicable; and that payment of costs would be governed by Code section 49.118 as made applicable to such elections by section 49.1.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kt

SCHOOLS: Reorganization -- Effect of blanket legalizing act, S.F. 74, 58th G.A. (Abels to Dewel, St. Sen., 2/16/59)
#59-2-15

February 16, 1959

Honorable Duane E. Dewel
Senate Chamber
L O C A L

Dear Mr. Dewel:

Receipt is acknowledged of your letter of February 13, as follows:

> "I am enclosing a copy of Senate File 74 which passed and has been approved by the Governor.
>
> A question has arisen in my county as to whether this bill legalized the boundaries of a school district organized prior to July 1, 1958.
>
> Will you please give me an opinion on this."

In answer thereto you are advised S.F. 74, 58th G. A. appears, except for the date specified, identical with H.F. 68, 56th G. A., which appears as chapter 262, Acts of the 56th G. A. Assuming publication is made in the manner specified in section 3, S.F. 74 appears adequate to legalize the boundaries of any school district organized prior to July1, 1958, unless the deviation from statutory procedure in a given district were so material as to make operation of the Act in contravention of Article VIII, section 1, Constitution of Iowa, in such district.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kt
cc: Paul Johnston

59-2-15

GENERAL ASSEMBLY: Election Contests--
The statement of contest filed in the contest of Cecil V. Lutz v. Stanley Watts for a seat in the House of Representatives is deemed sufficient within the principles laid down in the contest of Wooldridge v. Robinson, 57th General Assembly, and the provisions of §62.14, Code 1958. (Strauss to Kluever, St. Rep., 2/3/59)

#59-2-14

February 3, 1959

Hon. Lester L. Kluever, Chairman
Contest Committee in Cecil V. Lutz,
Contestant, vs. Stanley Watts,
Incumbent
B u i l d i n g

Dear Sir:

Reference is herein made to the request of the above mentioned committee as to the legal sufficiency of the Statement of Contest filed by the Contestant in the above entitled contest now pending before the House of Representatives. I would advise you that I have examined this statement and find that applying the principles of law set forth in the opinion of this Department in the matter of the contest of Wooldridge v. Robinson, 57th General Assembly, and appearing in the House Journal of that Assembly on page 124 to the statement made herein that such statement is legally sufficient and complies with the provisions of Section 62.14, Code 1958, to the effect that:

> "Sufficiency of statement. The statement shall not be dismissed for want of form, if the particular causes of contest are alleged with such certainty as will sufficiently advise the incumbent of the real grounds of contest."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

59-2-14

SCHOOLS: Reorganization-- The proper method for determining how to proceed directly under a decree or decrees of a Court is by applying to the Court for a supplemental decree or order. (Abels to Graham, Audubon Co. Atty., 2/13/59) #59-2-16

February 13, 1959

Mr. Mel Graham
County Attorney
Audubon, Iowa

Dear Sir:

Receipt is acknowledged of your letter of February 7. With the said letter you enclosed copies of decrees in two school cases pertaining to the boundaries of a certain proposed school district. You inquire whether the reorganization may now proceed under the terms thereof. Were your questions directed to the meaning of some statute or to the words of the Court in some prior similar case sought to be applied as precedent for your case, I would be pleased to attempt to figure out the answer to your question. However, the two cases enclosed with your letter directly, rather than merely as precedent, effect the subject matter of your question.

The proper manner of arriving at the answer would, therefore, seem to be to apply to the Court for a supplementary decree if there be doubt as to how to proceed under the decrees it has rendered. This was the procedure followed in the case of State v. Community School District of St. Ansgar, 78 N.W. 2d 86, supplemental opinion at 78 N.W. 2d 94.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kt
cc: Paul Johnston

59-2-16

Motels, regulation - -

CITIES AND TOWNS; ~~HOUSING LAW.~~

"Motels" fall within the definition of "multiple dwellings" referred to in Section 413.3, subsection 3. "Motels" must be built where sewer and water is accessible. (Rehmann to Houser, Health Dept., 2/19/59, #59-2-17

February 19, 1959

Mr. Paul J. Houser, M.S., Director
State Department of Health
Division of Public Health Engineering
L O C A L

Dear Mr. Houser:

Reference is made to your letter of February 13 that sets out the following:

> "A question arises in the interpretation of the Housing Law which requires connections to a public sewer, and we request your opinion.
>
> "Section 413.33 prohibits the erection of a multiple dwelling unless a public sewer or private sewer connected directly with a public sewer is accessible and specifies that no cesspool or similar means of sewage disposal shall be used where connection to a public sewer is practicable.
>
> "Section 413.8 provides that the provisions of the entire chapter with reference to sewer connections shall be deemed to apply only where connection with a public sewer is or becomes reasonably accessible, and that all questions of the practicability of such sewer connections shall be decided by the health officer or such other official as the board of health may direct.
>
> "Section 413.3 defines a multiple dwelling of Class B as a dwelling occupied as a rule transiently including hotels, lodging houses, etc.
>
> "The question is raised specifically in regard to the proposed construction of a motel in a city with population of more than 15,000 where a public sewer or private sewer connected directly with a public sewer is not accessible. Is a motel in the category of a multiple dwelling? If so, does Section 413.33 prohibit the construction or does Section 413.8 permit the health officer or other

59-2-17

local official directed by the board of health decide that the public sewer is not reasonably accessible and can then permit the installation of a cesspool or similar means of sewage disposal?"

In reply thereto:

The Supreme Court of the State of Iowa has never defined the word, "motel". The word, "motel" is not to be found in the Webster's New International Dictionary. However, some of our sister states defined "motel" as the amalganation of the words, "motor" and "hotel". (Davis vs State, ____ FIA ____, 87 Southern 2d 416; Pierro vs Baxendale, 20 New Jersey 17, 118 Atlantic 2d 401). The word, "motor" in this instance is an adjective used to describe the noun, "hotel." "Hotel" is defined as a multiple dwelling in Section 413.3, subsection 3, Code 1958. It is immaterial to your question in hand to designate what class of multiple dwelling a "motor hotel" or "motel" would be classified.

The regulation of "multiple dwellings" with regard with sewer and water is clearly stated in Section 413.33, Code 1958, which provides to wit:

"Accessibility to city water and sewers. No multiple dwelling shall hereafter be erected unless there is accessible city water and a public sewer, or a private sewer connected directly with a public sewer. No cesspool or similar means of sewage disposal shall be used in connection with any dwelling where connection with a public sewer is practicable."

Your reference made to Section 413.8, Code 1958, has no bearing on the problem because we are specifically interested in multiple dwellings. The specific law, namely Section 413.33, Code 1958, supersedes any general provisions such as Section 413.8, Code 1958. (Yarn vs City of Des Moines, 243 Iowa 991, 54 N. W. 2d 439).

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kr

TAXATION: Moneys and Credits --

Provisions of Ch. 358, Code 1958, directing the moneys and credits levy used to pay the principal and interest of the Korean Bonus bond constitutes a contract and so long as there are outstanding bonds that provision may not be repealed. (Strauss to Schroeder, St. Sen., 2/9/59)

59-2-18

February 9, 1959

Hon. Jack Schroeder
State Senator
Senate Chamber
B u i l d i n g

My dear Jack:

This will acknowledge receipt of yours of the 5th inst. addressed to the Attorney General in which you state:

> "I respectfully request an opinion from your office on the possibility of modifying or repealing the Iowa Moneys and Credits tax.
>
> "The Korean War Bonus Bonds were sold and pledged as security the moneys and credits and property of the State of Iowa.
>
> "A question has arisen as to the vested interest of purchasers of those bonds in the continued collection of the tax.
>
> "Would you please give me an opinion in the legality of the repeal or modification of this tax?"

In reply thereto I would advise you that the pledge contained in Sec. 35B.11, Code 1958, of the tax levied upon moneys and credits which, among others, is to provide for the payment of principal and interest of the Koran veterans bonus bonds, constitutes a contract with each and all holders of these bonds and repeal or modification of the avails of such levies upon monies and credits would constitute a violation of Article I, Section 10, of the national constitution which provides that, "No State

shall . . . pass any . . . Law impairing the Obligation of Contracts, . . ." And Article I, Section 21, of our own Constitution provides:

> "Attainder - ex post facto law - obligation of contract. No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

The moneys and credits tax is provided for in Chapter 429, Code 1958. Insofar as prospective repeal of such provisions of that chapter as is concerned with the moneys and credits tax, it would appear that any bill providing for the repeal of such provisions concerning the moneys and credits tax should provide specifically for the preservation of the existence of such moneys and credits provisions for the purpose of paying the principal and interest of the Korean Bonus bonds until the last of such bonds are paid. In my view, such provisions of Chapter 429 is by implied reference, a part of the contract with the bondholders.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB:mmh

CONSTITUTIONAL LAW: Civil Defense --
In existing emergency arising out of enemy attack, the General Assembly under its police power may act appropriately, and insofar as legislating concerning a futureemergency, the written constitution contains no such powers and such power to be exercised with caution. (Erbe and Strauss to Ringgenberg, Res. Bur., 2/9/59) #59-2-19

February 9, 1959

Mr. Clayton L. Ringgenberg, Director
Iowa Legislative Research Bureau
B u i l d i n g

Dear Sir:

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

"A legislator has asked this office to draft several bills to provide for continuity in state and local government in Iowa in case of disaster caused by enemy attack. We have been directed to pattern these bills after the suggested bills prepared by the United States office of Civil and Defense Mobilization.

"Several of these bills provide for emergency interim successors for key state officials who might be disabled by enemy attack. These successors would hold office only until the vacated office could be filled in the usual manner, and they would not have title or tenure.

"A preliminary study of these bills has revealed that there may be some constitutional questions on some of them. One basic question is, can the Iowa General Assembly provide for emergency successors in case of disaster caused by enemy attack for any or all of these offices: Governor, Lt. Governor, legislators, supreme court judges, district judges, and heads of state departments?

"A second question is, can the Iowa General Assembly provide for emergency interim successors for county, municipal and school district officials and for the emergency location of these governments in case of such disaster?

59-2-19

"A third question is, can the Iowa General Assembly give designated state officials emergency powers to deal with any disaster if the laws do not provide for dealing with disaster?

"Please advise me whether the Iowa General Assembly can enact laws to do these things under our present constitution. Thank you."

In reply thereto we advise as follows:

1. In answer to your question #1 regarding emergency successors in case of disaster caused by enemy attack for the offices of Governor, Lt. Governor, legislators, Supreme Court Judges, District Court judges, we would advise that these are all constitutional offices (except the office of Secretary of Agriculture) whose terms of office and method of election are therein provided. In that situation provision for succession in each of those offices arising out of enemy attack requires appropriate constitutional amendment.

2. Insofar as your question #2 is concerned, it is to be said that the county is a public corporation subject to legislative control; that the State makes a county and in its discretion can unmake it in administering its property and revenue through other instrumentalities; that it is a political corporation vested with certain limited and specified powers which are divided among and to be exercised by agents of county officers appointed for that purpose. See Hull v. Marshall County, 12 Iowa 142, Slutts v. Dana, 138 Iowa 244, 115 N.W. 115; Rogers Locomotive Mach. Works v.

American Emigrant Co., 164 U. S. 559. In view of the foregoing we are of the opinion that the General Assembly could provide and establish automatic lines of succession and insofar as school districts in cities and towns are concerned the power of control of the Legislature over such political subdivisions is substantially comparable to the status of counties in that respect. In that view we are of the opinion that the General Assembly could provide for interim standby succession in county, municipal and school district offices and for the relocation of these several governments in case of such attack or disaster arising therefrom. This opinion is subject to views set forth in #4 hereof.

3. In answer to your question #3 as to whether the emergency powers to deal with disaster can be conferred upon State officials, this likewise is to be considered in the light of the views expressed in paragraph 4 hereof.

4. Insofar as legislative power in the respects treated in paragraphs 2 and 3 hereof is concerned, it is to be said that legislative action in emergencies, whether occasioned by enemy attack or otherwise, may be considered in two aspects: (a) whether legislative action is taken with respect to an existing attack or emergency, or (b) whether legislative power may be currently exercised with respect to future attack or emergency.

(a) Insofar as the legislation concerning existent emergencies is concerned, there is prior legislative action for guidance. Illustrative thereof is the following: 45th General Assembly, extra session, Chapter 112 thereof, recognized a public emergency

arising out of the abnormal disruption in economic and financial processes in the following terms:

> "Section 1. That it is hereby declared that a public emergency has existed affecting the welfare of the people of Iowa growing out of the abnormal disruption in economic and financial processes; that because of this, a large number of banks and trust companies in this state have been and still are unable to carry on in an ordinary and normal manner; and depositors of many of the banks and trust companies of Iowa have entered into depositors' agreements and pursuant thereto and to the laws of this state, a number of such banks and trust companies have reorganized and/or recapitalized, and a number are in the process of reorganization and/or recapitalization."

and provided under that declared emergency for the reorganization of banks. And in Chapter 113 of the foregoing extra session provided for the protection of depositors under a declared legislative emergency. The 47th General Assembly, Chapter 182, enacted an emergency act relating to the foreclosing of real estate loans and deeds that touched on real estate and other choses in actions, which act provided in Sections 1 and 6 thereof the following:

> "Section 1. The governor of the state of Iowa having declared that an emergency now exists, and the general assembly having determined that such emergency does exist, which is general throughout the state, and that the safety and future welfare of the state as a whole is endangered thereby, the general assembly acting under the power reserved by the people of Iowa, does hereby enact the following:
>
> " * * *
>
> "Sec. 6. This act being brought forth to meet an emergency through the police power of the state and being deemed of immediate importance shall be in full force and effect after its passage and publication in the Fort Dodge Messenger, a newspaper published at Fort Dodge, Iowa, and the

Sibley Gazette-Tribune, a newspaper published at Sibley, Iowa."

Certain phases of these acts were litigated. See Johnson v. Keir, 220 Iowa 69, and Hell v. Schult, 238 Iowa 511. But see the case of Des Moines Joint Stock Land Bank v. Nordholm, 217 Iowa 1319, 253 N. W. 701, where it was held that Chapter 182, Acts of the 47th General Assembly, extending the redemption period for mortgages to be extended until March, 1935, was a constitutional exercise of legislative power to meet an economic emergency.

Insofar as the enactment of legislation under the police power is concerned due to the impact of war, the case of Guttag v. Shatzkin, 130 N. E. 929, said this:

> "While the states are subject to the contract clause of section 10, article 1, and section 1, article 14, of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Conceding the health, safety, and morals of its citizens to be involved, and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way. Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420. These sections of our Federal Constitution and the police power of the states harmonize and never conflict. The only question here is one of fact, not one of law: Do the facts call into existence the power reserved to the states to legislate for the safety and health of the people? Within its sphere the police power of the states is not unlike the war power of the nation. Both are rules of necessity, impliedly or expressly existing in every form of government; the one to preserve the health and morals of a community; the other to preserve sovereignty.

> "When, therefore, by reason of disordered conditions due to war and the federal war powers, the people of New York City could find no other homes than those they possessed, and were threatened with ejectment or dispossess except upon payment of exorbitant rents, the state Legislature had the power to stay any and all proceedings for a reasonable time, that is, while the danger or peril lasted, and until readjustment took place, the owner receiving fair compensation meanwhile.
>
> "This is not a case, in my judgment, where the Legislature has undertaken to regulate housing rates because such a business has become charged with a public interest. We are not called upon to express any opinion upon such a power. Circumstances due to war conditions have created a peril to life and health, and with this the state has attempted to deal until the peril be passed. The laws are not effectual any longer than the necessity demands, which may be less than the two years prescribed.
>
> "Similar laws for emergencies have been passed before. American Land Co. v. Zeiss, 219 U. W. 47, 60, 31 Sup. Ct. 200, 55 L. Ed. 82; Bertrand v. Taylor, 87 111. 235; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980; Breitenbach v. Buch, 44 Pa. 313, 84 Am. Dec. 442; Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; Hoffman v. Charlestown Five Cts. Sav. Bank, 231 Mass. 324, 121 N. E. 15; Hasbrouck v. Shipman, 16 Wis. 296."

It would appear that such emergency legislative exercise of police power can exist only so long as the emergency exists. In Chastleton Corp. v. Sinclair, 264 U. W. 543, 68 L. ed. 841, 44 S. Ct. 405, the court held that "a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed."

And see the case of Guttag v. Shatzkin, supra.

(b) Insofar as legislative action taken respecting future contingencies and emergencies, it is to be borne in mind that under the Constitution the effective dates of legislative acts are provided for by Article III, Section 26, as follows:

> "Time laws to take effect. No law of the General Assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next after the passage thereof. Laws passed at a special session, shall take effect ninety days after the adjournment of the General Assembly by which they were passed. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the State."

Obviously, making an act effective upon a disaster or an emergency, including enemy attack, is not covered by the foregoing provision. Whether legislation concerned with a future emergency is an exercise of constitutional power appears to have no precedent in Iowa.

Search, although not exhaustive, in Iowa and other states finds no precedents for guidance in this situation. It would therefore seem that bestowing future emergency powers upon the executive branch of the government without at least constitutional definition of emergency would be of questionable constitutionality. This is especially so in view of the broad extent of legislative

power over taxation, personal rights and duties, contracts, police power and other powers equally important. Caution should be exercised in enacting such legislation for future emergencies. The lack of provision for such emergency powers in the written Constitution would seem plainly to imply such caution.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
First Assistant Attorney General

NAE:OS:MKB

~~MAINTENANCE OF GRAVES~~: Chapter 250, Code 1958, makes mandatory the payment for maintenance of graves of service men and women; the amount thereof is fixed by Sec. 250.18, but recovery of such costs is not recoverable from relatives of the deceased, nor can they be compelled to provide care; nor may the city be compelled to levy a tax sufficient to pay the costs of maintenance, nor may a lump sum contract be made for such maintenance. (Erbe and Strauss to Wilson, Muscatine Co. Atty.; 2/16/59)
59-2-20

COUNTIES: Veterans' Graves--

February 16, 1959

Robert H. Wilson, County Attorney
110½ East Second Street
Muscatine, Iowa

Dear Sir:

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

"I am herewith requesting an informal opinion arising out of the following:

"On November 29, 1958, there was presented to the Muscatine County Board of Supervisors the enclosed communication, Affidavit and listing of graves. As you will note from the attached photo copy of a part of the claim, there are lots varying in size from 4' x 10' to 20' x 20' and the claim for the care of the lots varies as to size. Obviously, the lots of size larger than 4' x 10' are lots providing for multiple burials.

"My questions under the provisions of Chapter 250.17 and 250.18 of the 1958 Code of Iowa are as follows:

"1) Is it mandatory that payment be made for maintenance of graves of service men and women?

"2) Does the Board of Supervisors have any discretion as to the amount to be paid for care of service men and women's graves?

"3) Can the Board of Supervisors by any proceedings compel the tax certifying body, in this instance, the City of Muscatine, Iowa, to buy sufficient tax to cover the expense of upkeep in these graves.

"4) Does the County have an enforceable claim against any of the relatives of deceased service men and women for care of the graves?

"5) Is there any provision or remedy available to the County to force or compel service men and women's relatives to provide for this care?

59-2-20

"6) Does the Board of Supervisors have authority to enter into a lump sum contract with the City to provide for the annual care for these graves?

"I would greatly appreciate your returning the enclosed claim when it has served its purpose."

In reply thereto, I advise the following:

Sections 250.17, 250.18, Code 1958, provide the following:

"250.17 Maintenance of graves. The board of supervisors of the several counties in this state shall each year, out of the general fund of their respective counties, appropriate and pay to the owners of, or to the public board or officers having control of cemeteries within the state in which any such deceased service man or woman of the United States is buried, a sum sufficient to pay for the care and maintenance of the lots on which they are so buried, in any and all cases in which provision for such care is not otherwise made.

"250.18 Payment--how made. Such payment shall be made at the rate charged for like care and maintenance of other lots of similar size in the same cemetery, upon the affidavit of the superintendent or other person in charge of such cemetery, that the same has not been otherwise paid or provided for."

These statutes bestow power in the Board of Supervisors to maintain and to pay for such maintenance of graves of honorably discharged soldiers and sailors.

Insofar as other powers in the Board in respect to the maintenance for such personnel is concerned, it would appear that the Board has the same rights as other interested persons in such maintenance, and none other. I therefore answer your questions as follows:

1. In answer to your question #1, I would advise that in my opinion payment for the maintenance of the graves of service

men and women is mandatory.

2. In answer to your question #2, I am of the opinion that the method of payment is provided by section 250.18, and discretion as to the amount would be excluded therefrom.

In answer to questions #3, #4, #5, and #6, I am of the opinion that no such statutory power vested in the Board of Supervisors to compel the City of Muscatine to levy a sufficient tax to cover the expense of the upkeep of these graves; that the county does not have a statutory and enforcible claim against the relatives of the deceased service men and women for the care of the graves; nor is there statutory provision or remedy in the county to face or compel such relatives to provide for this care; nor is there authority in the Board to enter into a lump sum contract with the City of Muscatine to provide for this care.

Helpful opinions in this connection, appear in the Report of the Attorney General for 1944, page 73; Report for 1934, page 510; Report for 1928, page 386; and Report for 1925-1926, page 373.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
First Assistant Attorney General

NAE:OS:MMH5

Ebc: 4 pages

~~PAYMENT FOR WATER EXTENSIONS~~ in undeveloped areas of cities is made by assessments and not by use of accumulated revenue funds, and the municipal Utility fund may not be used for that purpose. (Strauss to Mensing, St. Rep., 2/18/59) # 59-2-21

CITIES AND TOWNS: Water extensions--

February 18, 1959

Hon. A. L. Mensing
House of Representatives
L O C A L

My dear Mr. Mensing:

Reference is herein made to your memorandum respecting the powers in cities dealing with extensions of water mains through undeveloped areas. Upon investigation I find that the statutory provisions with respect to extension of water mains are contained in Chapter 401, Code of 1958. And these appear to be the only statutes bearing upon that authority. Such statutes do not authorize the use of accumulated revenue funds to finance such extensions. Payment appears to be limited to assessments.

In addition, I am of the opinion that the Utility fund provided by Section 404.12, Code of 1958, cannot be used for the payment of such extensions. There is no express authority therefor, and the specific manner in which these extensions and payment thereof are authorized by Chapter 401 would seem to me to exclude any implication of such use of the Utility fund.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh5

59-2-21

MOTOR VEHICLES: Department defined--

~~DEPARTMENT OF PUBLIC SAFETY:~~ The department of public safety under the commissioner constitutes the motor vehicle department
(Pesch to Brown, Pub. Saf. Comm., 1/29/59) # 59-2-22

January 29, 1959

Mr. Russell I. Brown, Commissioner
Department of Public Safety
L O C A L

Dear Sir:

Your letter under date of January 29, 1959 is at hand wherein you ask for an opinion on the following question:

"In Section 321.146, Code 1958, does not the term 'motor vehicle department' mean 'the department of public safety'?"

Section 321.146, Code 1958, provides:

"The treasurer of state shall at the end of said fiscal year ascertain the cost of maintenance of the motor vehicle department and transfer to the road use tax fund the ascertained difference between the amount retained in the general fund under the provision of this chapter and the maintenance cost of said department, together with any unexpended balance in the reimbursement fund."

In answer to your question as submitted we would advise you that the same appears in Section 321.2, Code 1958, which provides:

"The department of public safety, under the commissioner thereof, shall constitute the motor vehicle department for the administration and enforcement of this chapter."

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kt

59-2-22

WELFARE: Legal Settlement--

~~LEGAL SETTLEMENT--MINORS WHO ATTAIN THEIR MAJORITY--~~ NOTICE

A minor who attains majority and continuously resides in a county, as a permanent place of abode, without any present intention of removing therefrom, and who has not been served with a notice to depart within two years after attaining majority, establishes a legal settlement in such county; notwithstanding that the parents of said minor were served with notice to depart during the time of the minority of such child. (Bianco to Flander, Bremer Co. Atty.; 2/24/59) #59-2-23

February 24, 1959.

Mr. Mervin J. Flander
County Attorney
Bremer County
Waverly, Iowa

Dear Mr. Flander:

In your absence, Miss Florence E. Dix, County Director for the County Board of Social Welfare, addressed the following letter to this office requesting an opinion which reads in pertinent part as follows:

> "Black Hawk County served notice on Mr. and Mrs. Herman Rosenow on September 23, 1948 and Bremer County accepted settlement for the family. There were three minor children at that time.
>
> "On this date the oldest child, Jean, born 10/27/29 is 29 years of age. No notice has been served since 1949 and since that time the parents have died. Jean Rosenow has never married and has lived continuously in Black Hawk County since 1948.
>
> "1. Has Jean Rosenow now acquired settlement in Black Hawk County because no notice to depart was served after she became 21 years of age?
>
> "2. When does a female minor become of legal age?
>
> "3. Can a child of parents who have been served notice by a county gain settlement in that county if a notice is not served on them after they reach twenty-one years of age and prior to 23 years of age?"

We direct our opinion to you and in reply, beg to state:

We will answer the second question first, and state that a female minor, of course, obtains her majority on reaching the age of 21 years or by marriage, and the statute governing the period of minority is Section 599.1 of the Code which reads as follows:

> "Period of minority. The period of minority extends to the age of twenty-one years, but all minors attain their majority by marriage, and females, after reaching the age of eighteen years, may make valid contracts for marriage the same as adults."

Questions 1 and 3 are inter-related and can be treated and discussed as one question.

Section 252.16 of the Code provides:

> "A legal settlement in this state may be acquired as follows:
>
> "1. Any person continuously residing in any one county of this state for a period of two years without being warned to depart as provided in this chapter acquires a settlement in that county.* * ** "

From the facts as we understand them, Jean Rosenow reached her twenty-first birthday on October 27th, 1950 and has been residing continuously in Black Hawk County since 1948 to the present time.

Having attained her majority, the said Jean Rosenow became emancipated on her twenty-first birthday and was thereafter free to establish her own domicile or place of residence. It would appear that by her continuous residence in Black Hawk County, after reaching her twenty-first birthday, that she intended to establish permanent residency in Black Hawk County.

Upon this question, we quote from opinion of Attorney General dated November 23, 1955 and found in the Reports of the Attorney General, 1956, at page 121:

> "As to the 'continuously residing' requirement of Section 252.16, Subsection 1, supra, the Iowa Supreme Court has ruled that essential elements of residence in the acquiring of legal settlement in a given county by a poor person are:
>
> 'First, personal presence in a fixed and permanent abode, or permanency of occupation as distinct from lodging, boarding or temporary occupation; and second, an intention to there remain, without any present intention of removing therefrom. Audubon County v. Vogessor, 228 Iowa 281, 285; Cass County v. Audubon County, 221 Iowa 1037, 1041; Cerro Gordo County v. Wright County, 50 Iowa 439; Hinds v. Hinds, 1 Iowa 36.'"

One other question occurs to us at this point in view of the fact that the parents of Jean Rosenow were receiving public aid and in view of the fact that Bremer County accepted settlement for the family. If Jean Rosenow has been receiving public support herself from Bremer County, she may be disqualified from acquiring a legal settlement in Black Hawk County under the provisions of sub-paragraph 3 of Section 252.16, which reads as follows:

> "3. Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county."

If the answer to my question is in the negative, then it would appear that Jean Rosenow may have established a legal settlement in Black Hawk County by reason of having continuously resided in Black Hawk County since reaching her majority.

Therefore, based upon the facts as stated in the basic letter, it is our opinion that in answer to question 1, Jean Rosenow has acquired a legal settlement in Black Hawk County; and in answer to question 3, although the parents of Jean Rosenow were served with a notice by Black Hawk County during the time she was a minor, said notice does not preclude Jean Rosenow from acquiring a legal settlement after reaching the age of 21 years and having resided in a county for at least two years thereafter without being served with a notice.

Yours very truly,

Frank D. Bianco
Assistant Attorney General

FDB/sp

COUNTIES: Hospital Trustees:
§347.13 (1), 1958 Code, does not authorize condemnation by hospital trustees for parking site attached to an established county hospital; township trustees have no power to purchase a site or build a building for a polling place at its own expense or the expense of the County. (Strauss to Main, St. Rep., 2/24/59) #59-2-24

February 24, 1959

Hon. Franklin S. Main
House of Representatives
B u i l d i n g

Dear Sir:

Respecting your questions propounded I would advise, first, that Section 347.13(1), Code 1958, providing as follows:

> "Powers and duties. Said board of hospital trustees shall:
>
> "1. Purchase, condemn, or lease a site for such public hospital, and provide and equip suitable hospital buildings."

does not authorize condemnation by hospital trustees for a parking site attached to an established county hospital; and, second, township trustees have no power to purchase a site or build a building for a polling place at its own expense or the expense of the County.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

59-2-24

CRIMINAL LAW: Indictments --
~~BOARD OF CONTROL - INDICTMENTS:~~ An indictment has performed its function upon trial and conviction, the judgment of conviction being sustained by sufficient evidence and in accordance with the law. Pesch to Bd. of Control, 2/19/59) #59-2-25

February 19, 1959

Board of Control of State Institutions
L O C A L

Attention: George W. Callenius,
Member

Dear Sir:

This will acknowledge receipt of your letter under date of February 5, 1959, as follows:

> "We would like to have a formal opinion, if possible, on these cases where the boys have been indicted by the Grand Jury. The case started in District Court and then transferred to Juvenile Court and the boys committed to Eldora. The question is what becomes of the indictment in these cases?"

Section 232.20, Code 1958, provides that:

> "When there is an indictment or a conviction in the district court of any delinquent child of an indictable offense, the district court may, before judgement, if the punishment be not imprisonment for life, or death, transfer the cause to the juvenile court. The juvenile court shall have power to proceed with such child under the alternative or mandatory commitments provided in this chapter; but if the results, in the opinion of the court, be not conducive to the public interest and the welfare of the child, it may at any time revoke such orders of commitment and enter such judgment of conviction as the district court might have entered."

Section 232.21, Code 1958, provides as follows:

> "The juvenile court, in the case of any neglected, dependent, or delinquent child, may:
> 1. Continue the proceedings from time to time and commit said child to the care and custody of a probation officer or other discreet person.

59-2-25

2. Commit said child to some suitable family home or allow it to remain in its own home.
3. Commit said child to any institution in the state, incorporated and maintained for the purpose of caring for such children.
4. Cause the child to be placed in a public or state hospital for treatment or special care, or in a private hospital which will receive it for such purpose, when such course seems necessary for the welfare of the child.
5. At any time, terminate the proceedings and order the child released from the control of the court."

And Section 232.27, Code 1958, provides for mandatory commitment's as follows:

"If commitment of any child is not made under the foregoing provisions of this chapter, or if made thereunder and the results, in the opinion of the court, are not conducive to the welfare of the child, the court shall proceed as follows:
1. If the child is neglected or dependent and is not delinquent, it shall be committed either to The Iowa Annie Wittenmyer home or to the Iowa juvenile home; provided, however, that any child not mentally normal, or who is incorrigible or who has any vicious habits, or whose presence in the home would be inimical to the moral or physical welfare of the children therein, shall not be committed to said homes.
2. If the child is over the age of ten years and, in the opinion of the court or judge is seriously delinquent or so disposed, it shall be committed to the state training school for boys or for girls, as the case may be; but married women, prostitutes, and girls who are pregnant shall not be committed to the training school."

The term of commitment is provided in Section 232.30, Code 1958, to wit:

"Commitments shall be until the child attains the age of twenty-one years, but the board of control may release or discharge the child at any time after it has attained the age of eighteen years if such action will, in the judgment of the board, be best for the child.

A warrant of commitment shall consist of a copy of the order of commitment, certified to by the clerk,

> and shall be in duplicate, one of which shall be delivered to the executive head of the receiving institution and shall constitute sufficient authority to hold in custody the party committed."

Section 242.6, Code 1958, provides:

> "When a boy or girl over ten and under eighteen years of age, of sound mind, is found guilty in the district court of any crime except murder, the court may order the child sent to the state training school for boys, or girls, as the case may be."

The factual situation, relevant to the above question you submit, as presented-related to this office by R. L. Logan, State Parole Agent, Board of Control of State Institutions, is as follows:

> "Five (5) boys ranging in age from sixteen (16) to seventeen (17) years were indicted by the grand jury for assault with intent to commit rape. The district court before judgment transferred the cause to the juvenile court and said court committed the above boys, as delinquents, to the state training school for boys at Eldora, Iowa. It is now proposed to parole said boys and return them to the county from which commitment was made. The county attorney of such has indicated to me that said county in no way desires that said boys be returned to said county and if they are so paroled and returned the said boys are still under indictment in such county. The question is then: Is such indictment still effective?"

In answer thereto you are advised as follows:

An indictment is a written accusation of a crime submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. (42 C.J.S., Indictments and Informations, Section 7; State v. Engler, 217 Iowa 138, 251 N.W. 88). In 42 C.J.S., supra, it is further stated:

> "The object of an indictment is fairly to inform accused of the charge against him, so as to enable him to prepare his defense and avail himself of his conviction or acquittal as a protection against further

> prosecution for the same cause; and to inform the court of the facts alleged so that it may decide whether they are sufficient to support a conviction, if one is to be had."

this statement finds support in the case Hass et. al v. United States, C.C.A., Eighth Circuit (Iowa), 128 F.2d 427, loc. cit. 429 as follows:

> "The purpose of this indictment was to apprise the defendants of the crimes charged against them with such reasonable certainty as to enable them to make their defenses; to prevent their being taken by surprise by the evidence of the government; and to protect them, after judgment, from another prosecution for the same offenses. (Citing cases)." (emphasis ours).

An indictment is the basis of the prosecution. (42 C.J.S., supra, p. 836). "It may be said that an indictment has performed its function when an accused has been tried and convicted and the judgment of conviction is sustained by sufficient evidence and is otherwise in accordance with the law." (People v. Nitzberg, 289 N.Y. 523, loc. cit. 529; 47 N.E. 2d 37). (Emphasis ours).

The Supreme Court of Iowa in the case of State ex rel. Shaw v. Breon, 244 Iowa 49, loc. cit. 54; 55 N.W. 2d 565, said:

> " * * . Where there is a charge of crime and a conviction of the child by plea of guilt or jury verdict the court may (if the punishment be not imprisonment for life, or death), instead of entering judgment of conviction, commit the child to the training school. Section 232.20, Code, 1950. * * * . If the issue is to be the child's guilt or innocence of a certain offense the charge of that offense must be made and the case must proceed as other criminal prosecutions to the point where the child is found guilty or not guilty. * * * . If the child pleads guilty he can be sent forthwith to the training school without the entry of the judgment of conviction. If the child pleads not guilty no commitment to the training school can be made until a jury finds him guilty."

And in the case of State v. Reed, 207 Iowa 557, 218 N.W. 609, Justice Albert speaking for our supreme court, said:

> " * * . Criminal courts determine the guilt or innocense of a person accused of crime, and pronounce a penalty if he is found guilty. Juvenile courts are generally intended as a part of the system for dealing with delinquent, neglected, or dependent children, under the theory that they are wards of the state, and, under proper circumstances, to save them from the stigma of conviction for crime. In other words, the purpose of this court is not to punish, but to protect. This seems to be the general theory of the advocates of the juvenile court system. * * * * . * * , and after the trial on a return of a verdict of guilty, then, in the prescribed cases, the district court has discretion to determine whether or not the punishment shall be inflicted, or whether the matter shall be returned to the juvenile court for disposition in accordance with the proceedings therein. Under such circumstances, the guilt of the defendant is already adjudicated by the verdict of guilty, and the duty of the juvenile judge is to proceed under the alternative or mandatory commitment * * * * * ." (Emphasis ours).

In an opinion of this office, the same appearing in the 1928 Report of the Attorney General 309, loc. cit. 310, it was said:

> "We are, therefore, forced to the conclusion that in a case where the grand jury has indicted a child under the age of eighteen years, the district court should proceed with the trial in the regular procedure established for the trial of criminal cases and upon conviction either enter judgment accordingly or transfer the case to the juvenile court * * * * ." (Emphasis ours).

In view of the foregoing statutory provisions and authorities it is the opinion of this office that the indictment, in this

case for assault with intent to commit rape, has served and performed its function of accusation and conferrance of jurisdiction inasmuch as the accused parties were tried and convicted, all being in accordance with the law as provided. The subsequent function of the indictment is that it becomes a part of the record and cannot serve as a further accusation when the persons convicted as charged in the indictment are discharged or paroled. To hold otherwise would be to subject such persons to double jeopardy.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kt

SCHOOLS: Elections: Polling places outside director districts but within the school district. (Abels to Buchheit, Fayette Co. Atty., 2/20/59) #59-2-26

February 20, 1959

Mark Buchheit
Fayette County Attorney
West Union, Iowa

Dear Sir:

This is in answer to your telephone inquiry of February 19. Your question relates to election of directors in a community school district in which the directors are elected from board-of-directors districts as provided for in section 275.12, subsection 2, paragraph b, Code 1958. As I understand your question such board-of-director-districts exist in a certain community school district but that in two of such director districts there is no available polling place. You inquire whether the election for such directors may be conducted in a polling place within the community district but outside of said director districts.

Chapter 275, Code 1958, contains no express provisions on the subject of polling places for board-of-director districts. It, therefore, becomes necessary to refer to chapter 277, Code 1958, which deals with the subject of school elections generally and has application to districts created under chapter 275 by virtue of the reference provisions in section 275.27.

Section 277.7 provides in pertinent part as follows:

> " . . . In subdistricts a suitable polling place shall be selected by the person authorized by law to post the notices of such elections." (Emphasis supplied)

In this connection it is noteworthy that section 275.12 (2b), under which the board-of-director districts were created, refers to the process of their creation as, "Division of the entire school district into designated geographical subdistricts, to be known as director districts . . .". However, no annotations appear under section 277.7 and it becomes necessary to search further for precedent.

59-2-26

Sections 49.21 et seq. relate to polling places and also appear applicable to school districts by virtue of the reference provisions in section 277.33. Under section 49.22 appears an annotation to a prior opinion of this office rendered in connection with a problem not dissimilar to the one you describe. At page 282 of the 1932 Report of the Attorney General appears the following:

> "ELECTIONS--POLLING PLACES: The fact that a polling place is not located within the ward where the voters reside would not vitiate an election, the voters having had the opportunity to vote and generally knowing where the polling place for their particular ward or precinct was located.
>
> November 18, 1932. County Attorney, Humboldt, Iowa: We acknowledge receipt of your letter dated November 16, 1932, requesting an opinion of this department on the following question:
>
> The Town of Humboldt is divided into two wards. Each of the wards vote separately and have separate election boards. The polling places for both wards have always been in the City Hall at Humboldt, one ward of the town voting in one room and the other ward voting in another room. The City Hall is located in the west ward to cast their votes. This has been the practice in Humboldt for many years.
>
> One of the candidates for county supervisor is asking that the ballots of the whole east ward be thrown out on the grounds that it was not legal for them to vote outside of their ward.
>
> Would the fact that the people living in the east ward of Humboldt voted at a separate polling place for east ward voters, which polling place was located in the west ward, invalidate the election?
>
> We are of the opinion that inasmuch as an election was held and that the qualified electors living in the east ward of Humboldt generally knew where the polling place was, and all who desired to vote had an opportunity to do so, that the fact that the polling place for the east ward voters happen to be located across the street in

the west ward would not in any way invalidate the election.

Our Supreme Court has generally held that the voice of the people is not to be rejected for a defect or even a want of notice if they have in truth been called upon and have spoken. Certainly the fact that the polling place was located across the street in the west ward would not prevent anyone from voting at the election.

For your information see Dishon vs. Smith, 10 Iowa, 212 at page 218."

I would, therefore, advise you that although I am unable to discover any provision of statute directly authorizing a polling place to be set up outside the geographical limits of the director districts in question, I am of the opinion that if such polling places be established outside such director districts but within the school district and proper notice be given and the election be held, the result of the election could not be overturned for the sole reason that the polling place was outside the director district.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kt
cc: Paul Johnston

CONSERVATION: ~~COMMISSION~~ Fishing -- wholesale fish license and Bait Dealers license - Both license are required for one operation under applicable factual situations. (Gritton to Bedell, Dickinson Co. Atty., 2/24/59) # 59-2-27

February 24, 1959

Mr. Jack H. Bedell
County Attorney
Dickinson County
Spirit Lake, Iowa

Dear Mr. Bedell:

Your letter of October 1, 1958 is as follows:

"I respectfully request your opinion on the following proposition:

Is a person or corporation who is selling bait at wholesale required to have a wholesale fish license as provided in Section 109.117 of the 1958 Code of Iowa in addition to a bait dealer's license as provided in Section 109.63?

The definition as set out in Section 109.44 would appear to include bait in the use of the word 'fish' in Section 109.117. However, in the normally accepted terms of the trade, a person selling bait is not considered as a person operating a wholesale fish market, nor is he considered to be marketing fish as such. It should be pointed out that in Section 109.63 referring to bait dealers' licenses, the licensee is permitted to take sufficient minnows, frogs, and clams to carry on and supply his customers for hook and line fishing."

In pertinent part of the statutory applicable to your problem is as follows:

"109.117 It shall be unlawful for any person, firm or corporation to peddle fish or to operate a wholesale fish market, jobbing house, or other place for the wholesale marketing of fish, or distribution of fish, without first procuring a license."

"109.44 The term 'fish' as used in this chapter shall mean any fish of the class Pisces."

59-2-27

"109.63 Any person may be authorized to sell minnows, frogs, and clams for fish bait upon the payment of a license fee of five dollars to the commission. Minnow and bait boxes and tanks shall be open to inspection by the director and conservation officers at all times. They shall have tanks and bait boxes of sufficient size, with proper aeration to keep the bait alive and prevent heavy loss.

Such license shall authorize the licensee to take from the lakes and streams in the state that are not closed to the taking of minnows, clams and frogs, sufficient minnows, frogs and clams to carry on and supply his customers with bait for hook and line fishing."

I am of the opinion that these statutes (109.117 and 109.63) are not in pari materia. Although there is a small area where a person may be required to have both licenses, there is a much wider area wherein a person would be required to have one license or the other. I know of no rule of law that exempts a person having one license from having other licenses required by the state.

I am of the opinion that both license would be required under the applicable factual situations.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:kt

SCHOOLS: Tuition -- Under Code sections 279.18 and 282.20 "bond principal" properly enters into the computation. (Abels to Rigler, St. Sen., and Cunningham, St. Rep., 2/26/59) # 59-2-28

February 26, 1959

Senator Robert Rigler
Senate Chamber, LOCAL

The Honorable Ray C. Cunningham
House Chamber, LOCAL

Gentlemen:

Receipt is acknowledged of your respective communications transmitting identical letters from one Frank Rollins, President, Center Tp. Schools, relative to whether tuition charges paid by a district which does not operate schools but rather uses the schools of another district, properly include items for both principal and interest on schoolhouse bond issues. Mr. Rollins's inquiry refers to sections 279.18 and 282.20, Code of Iowa.

Section 279.18 reads in pertinent part:

" . . . Such tuition rates shall include . . . interest paid for debt service and retirement of bonds . . ." (Emphasis supplied)

Section 282.20 reads in pertinent part:

" . . . Such tuition rates shall include . . . interest paid for debt service and retirement of bonds . . ." (Emphasis supplied)

The apparent point of disagreement between Mr. Rollins and the Department of Public Instruction is whether the words "retirement of bonds" describe a separate item or merely refer to "interest paid for debt service".

I have discussed the matter with the Division of Administration and Finance in the Department of Public Instruction and am advised the Department has consistently taken the view that the words "retirement of bonds" refer to principal, not interest, for as long as the said words have been a part of the aforesaid

59-2-28

sections. As one member of that Department very logically put it, "You don't retire bonds by merely paying interest.". I was further advised that the duplication of charge between the "retirement" and "depreciation" items has been pointed out by that Department to the members of the schools committees of the respective houses of the General Assembly at several prior sessions and that the continued retention of the "Retirement" clause in the quoted sections would appear to manifest some degree of legislative acquiescence in the alleged duplication. It is quite obvious that no necessity for the words "and retirement of bonds" exists in the statute unless they describe a distinct item of tuition, the words, "interest paid for debt service" being fully adequate in themselves to completely describe the interest item.

Our Supreme Court has said, in the case of Minneapolis and St. L. R. Co. v Board of Supervisors, 198 Iowa 1288, 201 N.W. 14 at page 15, "We cannot, by judicial interpretation, eliminate from the statute the plain and express requirements that were inserted therein by the legislature." What the Supreme Court has declined to do by judicial interpretation, this office is not inclined to attempt by opinion.

The phrase "retirement of bonds" undeniably appears in the quoted statutes and is not essential for the purpose of describing interest alone, which is already adequately and fully described by the other quoted language. Its deletion by interpretation would work considerable hardship upon tuition-receiving districts which have budgeted for the current school year in reliance on the administrative interpretation of long standing placed upon the words in question by the Department of Public Instruction. I am advised that, in general, even with the duplication of items on "bond principal" and "depreciation", the tuition cost to districts paying tuition is substantially less than the receiving districts would realize were they permitted to tax the property comprising the sending districts at the current millage rates imposed on property within the receiving districts own boundaries in lieu of collecting tuition. I am further advised by the Department of Public Instruction, by way of actual example based on statistics of record, that the Community School District of Ames would lose $23.29 tuition dollars per pupil per year were the "bond principal" item eliminated from

authorized tuition charge and that the loss would then necessarily have to be made up by increased school taxes within the Ames District.

Administrative construction by departments charged with the administration of a particular law have been given great weight by the Courts. School District of Soldier Tp. v. Moeller, 247 Iowa 239; 73 N.W. 2d 43, Patterson v. Iowa Bonus Board, 246 Iowa 1087, 71 N.W. 2d1; Yarn v. City of Des Moines, 243 Iowa 991, 54 N.W. 2d 439. Since the Department of Public Instruction is the department charged with administration of the school law and the administrative construction placed by it upon the provisions of law in question is of as long standing as the law itself, I am not inclined to disagree with the aforesaid construction, but concur in that Department's view that "bond principal" is a proper and lawful item for consideration in computing tuition charge under code sections 279.18 and 282.20.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kt

cc: Paul Johnston - Department of Public Instruction
Ivan Seibert, " " " "

HEALTH: Stream Pollution -- Power of local board of health to abate nuisances is measured by sections 137.13, 657.1 and 657.2, Code of Iowa. (Atls to Stephens, St. Rep. 3/2/59)

#59-3-2

March 2, 1959

The Honorable Richard Stephens
House Chamber
L O C A L

Dear Sir:

Receipt is acknowledged of the memo which you recently left on my desk in which you inquire:

> "What authority has the County Board of Health in a situation where waste from a town's sewage is polluting a stream?"

I assume the county board to which your letter refers is the ex officio board consisting of the County Auditor, County Superintendent, and Chairman of the Board of Supervisors created under Code section 137.1. Further assuming the pollution condition to which you refer has manifested itself in the form of obnoxious odors, deposits of filth on property situated along the stream, or destruction of the value of the stream for watering livestock, I believe section 137.13 may be relevant. It provides:

> "The local board may order the owner, occupant, or person in charge of any property, building, <u>or other place,</u> to remove at his own expense any nuisance, source of filth, or cause of sickness found thereon, by serving on said person a written notice, stating some reasonable time within which such removal shall be made, and if such person fails to comply with said order, the local board may cause the same to be executed at the expense of the owner or occupant."

Further relevant is section 657.1 which defines "nuisance" as follows:

> "Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to

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> the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof."

Further see section 657.2 subsection 4, which provides in pertinent part:

> "The following are nuisances:
> * * * * *
> "4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others . . . "

The power to abate nuisances conferred upon local (county) boards of health read in the light of the definitions of nuisances contained in sections 657.1 and 657.2, hereinabove quoted, furnishes the answer to your question.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:KVR

officers--

SCHOOLS: ~~OFFICERS.~~ The office of board of directors of community schools and board of supervisors of a county are incompatable.
(Rehmann to Poston, Wayne Co. Atty., 3/25/59)
#59-3-26

March 25, 1959

Mr. T. C. Poston
Wayne County Attorney
Corydon, Iowa

Dear Sir.

This is to acknowledge receipt of your letter of March 24 which poses the following question:

> "Are the offices of Board of Directors of a community school district and Board of Supervisors of a county incompatible under the rule of State of Iowa exrel Crawford vs. Anderson, or any other more recent ruling?"

In reply thereto:

Enclosed please find thermofax copies of letter opinions, with specific reference made to a letter from Abels to the Mitchell County Attorney dated April 26, 1956 which states:

> "I would advise you that incompatability between offices exists where one is subordinated to the other or where the duties of the two are inherently inconsistent with regard to public interest."

Therefor, the answer to your question is affirmative. In support of this condition your attention is directed to Section 298.2, Code 1958, which provides:

> "In all school districts where the maximum statutory allowances provided in section 298.1 are not sufficient to meet the budget requirements, upon proper showing by any such school district the state comptroller may authorize such district to levy an additional amount above the said maximum statutory allowance for each person of school age in the district, up to but not in excess of thirty-five percent; provided that the comptriller may, upon recommendation of the county board of education, or the county board of supervisors of the county in which the school is located, authorize such district to levy an amount in excess of thirty five percent."

59-3-26

You will note that the board of supervisors has discretionary powers over the board of directors thereby making the two positions incompatable with one another.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
Encl.

STATE OFFICERS: National Guard--

National Guard property losses constituting state liability to the federal government for the liquidated amount are payable by the Comptroller under Section 8.13 (1) only if demand is made within three months from the time that all events have occurred which fix the liability. (Forrest to Croft, St. Comp. O., 3/3/59)

59-3-3

March 3, 1959

Mr. Harold E. Croft
Office of State Comptroller
L O C A L

RE: National Guard Claim Payments

Dear Sir:

In response to your recent inquiry concerning payment of certain claims for loss of federal property by the Iowa National Guard, we return herewith reports of survey in six such claims and advise as follows.

From the facts gathered from your office plus that of the Adjutant General, the status of these claims appears to be that they were incurred in the early 1950's, and after administrative proceedings subsequent to the discovery of the losses by property audit, recommendation was made on varying dates during 1953 to the Commanding General of the Fifth United States Army acknowledging pecuniary liability in certain Iowa National Guard officers held accountable for the property. It further appears that the bonds required of these responsible officers under Section 29.37, 1954 Code of Iowa, were defective in that they tolled the time for payment of claim losses running from the discovery of the missing article rather than from the administrative determination that liability existed.

Upon finding himself unable to account for the losses under the individual bonds, the Adjutant General files these claims for payment with the auditor on or about February 11, 1959.

You ask whether or not such claims are payable in view of Section 8.13 (1), 1958 Code, as follows:

> "The state comptroller shall be limited in authorizing the payment of claims, as follows:
>
> 1. Three months limit. No claim shall be allowed by the state comptroller's office when such claim is presented after the lapse of three months from its accrual." (Emp. added.)

59-3-3

In considering claims ascertained in the face of a similar statute, the Supreme Court of New York, in Edlux Const. Corp. vs. State, 300 N. Y. S. 509 at 511, distinguishes between an accrued claim and an accrued cause of action. "The claim accrues when it matures, x x x." In ascertaining the value of the claims herein, army regulations require that certain procedures be gone through to determine the value of the property loss. In considering a similar situation, the United States Court of Claims, in Griffin vs. United States, 77 F. Supp. 197, the court made clear that where the amount of the claim was not ascertainable until a final determination had been made as to its amount "that the claim did not accrue until then, x x x." The same court in Levine vs. United States, 137 F. Supp. 955, makes clear again that a claim accrues at the time that all events have occurred which fix the liability.

In view of the foregoing, it is the opinion of this office that if the administrative requirements, fixing the amount of the claim, are complete more than three months before request for payment is made, the State Comptroller is without authority to issue his warrants.

In the instant case it appears that the final determination as to both liability and the amount thereof were determined during the year 1954 as shown by the attached reports of survey, and hence, demand for payment would have to be made within three months from the Fifth Army determination date on each claim in order for the Comptroller to make payment thereon.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:kr

Enclosures:

TAXATION: Use tax --

~~[illegible]~~ Where Iowa resident sold his automobile to a nonresident dealer, and at some future date repurchased the identical automobile from the nonresident dealer for use in Iowa, the purchaser must pay use tax on said purchase and use. (Brinkmann to Hindt, Lyon Co. Atty., 3/3/59) # 59-3-4

March 3, 1959

Mr. Harvey W. Hindt
Lyon County Attorney
Rock Rapids, Iowa

Dear Mr. Hindt:

This is to acknowledge your letter of February 2, 1959, in which you request the opinion of this department as follows:

> "I respectfully request your opinion on the following question:
>
> "A resident of Lyon County, Iowa, in 1955 purchased a new automobile in Rock Rapids, Iowa, and paid the use tax upon the same when registering said car required by law. In 1958, he traded this car with an automobile dealer in Sioux Falls, S.D., and transferred the title to him. In 1959, this original owner of the automobile re-purchased the same identical automobile from the same car dealer in Sioux Falls that he had transferred it to on the trade. The car dealer had not sold the car to anyone else in the interum, so it was a case of the original buyer buying it back from the same dealer without any intervening ownership. The County Treasurer refuses to license this car in Iowa now for the original owner until a sales tax is paid upon the purchase price of this car as a used car."

The following provisions of the 1958 Code of Iowa are pertinent to your inquiry:

> "423.2 Imposition of tax. An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this chapter for use in this state, at the rate of two percent of the purchase price of such property. Said tax is hereby imposed upon every person

using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided."

"422.64 Assistants -- salaries -- expenses -- bonds.

" * * *.

"5. The commission may utilize the office of treasurer of the various counties in order to administer this chapter and effectuate its purposes, and may appoint the treasurers of the various counties its agents to collect any or all of the taxes imposed by this chapter, provided, however, that no additional compensation shall be paid to said treasurer by reason thereof."

Section 423.2, supra, requires the occurence of at least two events before the tax may be imposed, (1) a purchase for use in this state, and (2) use in this state. Under the facts submitted, both requirements have been met. There was a purchase for use in this state at the time the Iowa resident purchased the auto from the South Dakota dealer, and also a use in the state when the auto was brought into the state for use by the buyer. The mere fact that the buyer purchased the identical car which he previously owned is incidental so long as the statutory requirements for imposition of the tax have been met.

Section 422.64, supra, which is made part of the use tax law by reference thereto in section 423.23, Code of Iowa (1958), provides a means of collection of the tax on used automobiles, and pursuant to this authority, the county treasurer is acting properly in requiring payment of the tax imposed by section 423.2, supra, before licensing the automobile in this state.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/[illegible]/bjf

Reinsurance--
INSURANCE: ~~REINSURANCE~~-- County mutual association premium tax exemption. (Rehmann to Bennett, Ins. Comm., 3/10/59)

59-3-5

March 10, 1959

Oliver P. Bennett
Commissioner of Insurance
Insurance Department
L O C AL

Dear Mr. Bennett:

Reference is made to your letter of February 16 which sets out the following:

"There are approximately one hundred and fifty county mutual assessment associations operating in Iowa under the provisions of Chapter 518 of the Code.

Chapter 432 imposes a premium tax against fire and casualty insurance companies and associations but exempts casualty mutuals therefrom.

Although county mutuals are authorized by statute to write windstorm coverage, they are reluctant to do so because of the catastrophy exposure resulting from the geographic limitations of their operations. However, a number of them have entered into a plan under which they write the windstorm coverage but immediately reinsure it 100% under a contract with a company organized under the provisions of Chapter 515.

We might add that the latter company's operation is primarily for the reinsurance of county mutual business and that its board of directors is made up of county mutual representatives. However it writes some direct business through county mutual agents. We refer to its method of operation because of the provisions of Section 518.1(3).

You will note from the provisions of Section 515.24 that no premium tax is paid on reinsurance premiums. The result is that the latter company is escaping the payment of a premium tax on business which it is reinsuring 100% for the county mutuals.

We wish to request your opinion as to whether or not such an arrangement is legal."

59-3-5

In reply thereto:

Our insurance statutes appear to give great latitude to county mutual assessment associations duly organized and operating in the State of Iowa. County mutual assessment associations are exempted from statutes relating to "consolidation and reinsurance" such provisions are found in Chapter 521, Code 1958, when "Company" is defined in Section 521.1 as follows:

> "The word 'company' or 'companies' when used in this chapter shall mean any company or association organized under the provisions of chapters 508, 510, 511, 515, 518, or 520, except county mutuals."

In addition to this, Section 432.1, Code 1958, specifically exempts county mutual assessment associations from paying a tax on gross premiums. Also, the purposes for which county mutual assessment associations are organized, were broader by the 57th General Assembly which in effect gave the county mutual assessment associations power to give broader coverage than they could prior to July 4, 1957. The legislature realizing the territorial limitation of the county mutual assessment associations, enabled county mutual assessment associations to spread their risk by the provision of Section 518.1 subsection 3, Code 1958, which reads as follows:

> "Such associations may insure risks of their members or may reinsure risks of other associations or companies; or may organize reinsurance associations for the reinsurance of risks."

The definition of two words should be kept in mind. The word, "insurance" as defined by Black's Law Dictionary, 4th Edition, page 943, means:

> "A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specific subject by specific perils." (cases cited)

The word, "reinsurance" is defined by Black's Law Dictionary, 4th Edition, page 1452, means:

> "A contract by which an insurer procures a third person to insure him against loss or liability by

> reason of original insurance. A contract that an insurer makes with another to protect the latter from risk already assumed. It finds the reinsurer to pay to the insured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured." (cases cited)

The method by which a county mutual assessment association can reinsure is not set out by statute nor is it covered by the rules and regulations of the Insurance Department. Therefore reinsurance by a county mutual assessment association must be governed by the general law of contracts. Thus the term "Reinsurance" could be "a contract between two insurers by which the one assumes the risks of the other and becomes substituted to its contract so that, on the assent of the original policyholder, the liability of the first insurer ceases and the liability of the second is substituted." (46 C.J.S. 195) Ordinarily, the reinsurer indemifies the reinsured and basic liability lies between the insured and insurer. Thus the insured can not maintain an action against the reinsurer upon the reinsurance contract, for the reason that the insured "is neither a party thereto nor in privity therewith." Globe N. F. Ins. Co. vs. American B. & C. Co., 198 Ia 1072, 195 N.W. 728. However, "an insured, in the case of loss, may maintain an action against an insurance company which has, by contract, taken over and assumed the obligation of the original insurer." Baird & Sons vs. Kaskaskia L.S. Ins. Co., 198 Iowa 905, 200 N.W. 575.

Originally a policy for reinsurance was not given until indemity was needed by the insurer. However, by contract, two insurance companies can agree in advance that each would reinsure a part of any line of insurance, one agrees to cede and the other to accept reinsurance business pursuant to the provisions of a compact or treaty. The Supreme Court of Iowa never has been presented with the problem relating to contracts for reinsurance. However, in Delaware, in the case of Maurer vs. International Re-Insurance Corp., 31 Del. Ch 352, 74A 2d 822, the court said, the term, "reinsurance" may be "applied to the ceding by one insurance company to another, of all or a portion of its risk for a stipulated part of the premium and an agreement to indemify it in case of loss." The Supreme Court of Illinois in the case of Pioneer Life Insurance Co. vs. Alliance Life Insurance Co., 374 Ill. 576, 30 N.E. 2d 66, indicated there was a difference between a contract for reinsurance and a contract of reinsurance,

by saying "treaties are contracts for reinsurance and reinsurance policies and sessions are contracts of insurance."

There is nothing illegal about an agreement for reinsuring. The question is whether tax liability can be avoided through reinsuring certain perils of a county mutual assessment association. This is largely a factual question which is primarily for your determination.

The facts revealed by your letter is that county mutual assessment associations reinsure certain perils 100% with another insurance company. There was no indication whether reinsurer only indemified the reinsured or did assume direct liability with the assent of the policyholder. Nor does it appear that the reinsurer rewrites a policy directly with the assent of the insured.

Your question therefore must be answered hypothetically.

(1) If the reinsurer contracts to indemify the reinsured and the reinsured cedes to the reinsurer a portion of the premium for the specific peril to be reinsured, but the reinsured remains basically liable or if the policyholder assents to shifting the basic liability to the reinsurer, then thus reinsurance is exempt from tax.

(2) On the other hand, if the reinsurer under the agreement with the reinsured is issuing a reinsurance policy ceded to the reinsurer on specific perils thereby in effect dealing directly with the policyholder, then this reinsurance may not fall within the exemption in question.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

COUNTIES: Health Insurance--
Deduction from payroll of premiums to profit hospital service corporations is unauthorized under §514.16, Code 1958. (Strauss to Prichard, Monona Co. Atty., 3/10/59)
#59-3-6

March 10, 1959

Mr. Robert D. Prichard
Monona County Attorney
Onawa, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 4th inst. in which you submitted the following:

> "Section 514.16 of the Iowa Code permits a county employee to authorize the deduction from his salary a payment or premium toward and insurance policy if the same is issued by a 'non-profit hospital service plan or medical service plan'.
>
> "The National Fidelity Life Insurance Company of Kansas City, Missouri has signed up twenty-four county highway and bridge crew employees in a group hospital insurance plan. This is a normal group insurance plan where the employee can join if he wants to, but does not have to join if he does not want to do so. The employee pays the entire premium.
>
> "The insurance company has asked the county if it would withhold the premiums from the subscribing employees and remit the total premium to the company. Each employee has signed a payroll deduction order authorizing the county to deduct the premium from his wages and a copy of such order is herewith enclosed. The Board of Supervisors and the County Auditor are willing to cooperate with this plan if the same can be done legally.
>
> "I, therefore, respectfully request your opinion as to whether the county can participate in such a withholding plan, or whether Section 516.16, by its specific incorporation into the law, necessarily prohibits an em-

59-3-6

> ployee authorizing deductions to any other type of hospital insurance plan. I find no law on the subject one way or another, but wish to call your attention to an attorney general's opinion dated April 19, 1927 which held that a city should not adopt a plan whereby both the city and the employee were to contribute to the premium."

In reply thereto I advise as follows. It is the long-standing view of the Department that the provisions of Section 514.16, Code 1958, by its terms applies only to non-profit hospital service corporations and that it automatically excludes its application to a profit corporation operating a hospital service plan. Deductions for payment of premiums to profit corporations is unauthorized.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

STATE OFFICERS: Employee's vacations --
Vacation rights arise after one, two, etc. years of employment and are not prorated to any time of employment less than a year. (Strauss to Brinkman for Tax Comm 3/11/59) #59-3-7

March 11, 1959

Mr. Richard J. Brinkman
Special Assistant Attorney General
State Tax Commission
L o c a l

Dick,

Reference is made to your office memo of the 4th inst. enclosing a copy of a request made by Lewis E. Lint dated July 10, 1958, to which an oral opinion was given but which now Mr. Lint desires to have in writing. His request follows:

> "The question has come up in regard to earned vacation time as set forth in Section 79.1, of the 1958 Code of Iowa. In reading this section, it would appear that one must have completed at least one full year's employment before any vacation time or portion thereof would be earned.
>
> "A specific question has come up in regard to an employee who has had approximately twenty-five years' service with the State; however, he was recently unemployed for several months before his return to active duty with the State. He has now served eight months since his return to work and is now retiring permanently. According to Section 79.1 of the 1958 Code, it would appear that had he served one full year after his re-employment, he would be entitled to three weeks earned vacation because of his previous service. However, since he has not completed a full year since his re-employment, would he be entitled to two-thirds of the vacation time he would have earned at the end of one full year's service"
>
> "In answering this question, I would appreciate further if it could be answered in regard to

59-3-7

> persons who have had less than the ten years, but more than one year's service and who do not complete a full two years' service, whether or not they would be entitled to a portion of an anticipated earned vacation on the completion of the second year.
>
> "It is my understanding that possibly the Attorney General has ruled previously on this problem. I would appreciate it if you could secure the answer to this question at your earliest convenience."

In reply thereto I advise as follows. Under the statute, Section 79.1, Code 1958, under which vacation rights are accorded, a year is the unit of time by which such rights are measured and this only after one year or two years or ten years, as the case may be, of employment. There is no such thing as a vacation prorated to any time of employment less than one year or two years, etc. The answer to both of your questions is in the negative.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS: Teachers' retirement pay --

Appropriation of $450,000 for the purpose of paying teachers' retirement allowance during each year of any biennium includes payments made after the effective date of the Act in the current year of the biennium. (Strauss to Sarsfield, St. Comp., 3/12/59)

59-3-8

March 12, 1959

Mr. Glenn D. Sarsfield
State Comptroller
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours of the 5th inst. in which you submit the following:

> "House File 67, Acts of the 58th General Assembly, has been published, and Section 1 of this Act reads as follows:
>
> "'Section 1. Section two hundred ninety-four point fifteen (294.15), Code 1958, is hereby amended by adding thereto the following paragraph:
>
> "'For the purpose of paying the teachers' retirement allowance payments granted under this section, there is hereby appropriated out of any funds in the state treasury not otherwise appropriated, a sum sufficient therefor, provided, however, that the total claims paid for each year of any biennium shall not exceed four hundred fifty thousand ($450,000.00) dollars.'
>
> "The appropriation for the current biennium ending June 30, 1959, for Teachers' Retirement Allowance payments is provided by Chapter 135, section 2, Acts of the 57th General Assembly, which has been augmented by allocations of the Budget and Financial Control Committee during this biennium. From this appropriation, during the fiscal year 1958-59, we have thus far disbursed approximately $284,655.62, of which $248,396.50 was for Teachers' Retirement Allowance payments applicable for this fiscal year. House File 67, Acts of the 58th General Assembly, provides that the total claims paid for Teachers' Retirement Allowance payments for

each year of any biennium shall not exceed $450,000.00, which results in a difference of $201,603.50.

"I respectfully request an opinion as to the following:

"1. Based on House File 67, Acts of the 58th General Assembly, may we set up in our records an appropriation for $450,000.00 for Teachers' Retirement Allowance payments in addition to the appropriation provided by Chapter 135, section 2, Acts of the 57th General Assembly.

"2. Assuming that your answer to Item 1 above is in the affirmative, the question then arises as to the amount of such claims as we may pay for this fiscal year as to whether or not it is restricted to the $201,603.50, explained above, or is it restricted only to the $450,000.00 provided in House File 67, Acts of the 58th General Assembly."

In reply thereto I advise as follows. Attention is directed to the following provision of the foregoing amendment to Section 294.15, to-wit: "provided, however, that the total claims paid for each year of any biennium shall not exceed four hundred fifty thousand (450,000.00) dollars." The foregoing underscored language of this amendment evidences an intent of the Legislature to make the appropriation provided for therein available for the purposes of Section 294.15, Code 1958, from the effective date of the Act. It being clear that the current year, to-wit: 1958-59 is a year of any biennium therefore the payment from the appropriation from the effective date to July 1, 1959, is a payment in a year of any biennium and may legally be

made. Therefore, in answer to your questions I advise:

1. In answer to your question #1, the answer is in the affirmative.

2. In answer to your question #2, the amount available between now and July 1, 1959, is restricted to the sum of $201,603.50.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

~~HEADNOTE: HOMESTEAD CREDIT, CONSTRUCTIVE OCCUPANCY MAY BE SUFFICIENT.~~ Where a person is committed to the penitentiary, the County Board of Supervisors may allow his property a homestead exemption if it finds that his family is in actual occupancy of the property upon which he formerly resided and that he intends in good faith to return to said premises upon his release from prison. (Brinkman to Sacks, Pottawattamie Co. Atty. 3/12/59) # 59-3-9

TAXATION: homestead credit--

March 12, 1959

Mr. Kenneth Sacks
Pottawattamie County Attorney
Court House
Council Bluffs, Iowa

Dear Mr. Sacks:

This is to acknowledge receipt of your letters of January 30 and March 4, in which you request the opinion of this department as to whether an inmate of the state prison at Fort Madison is eligible for homestead tax credit on his home. You indicate in your letters he is the sole owner of the property and that his family is occupying the home during his absence.

The pertinent statutory provision is section 425.11, Code of Iowa (1958), which reads in part as follows:

> "425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:
>
> "1. The word, 'homestead', shall have the following meaning:
>
> "a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application and said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed, * * *."

The question resolves itself as to whether the legislature intended to deny the benefits of the homestead tax credit to persons whose involuntary absence prevents them from physically occupying the premises.

59-3-9

Prior to 1941 the applicable statutory provision (6943.152, Code of Iowa 1939) required actual residence by the person claiming the credit. Chapter 240, Acts of the 49th General Assembly, deleted the provision requiring actual occupancy and substituted the present language (425.11, supra) which provides that the owner must "live" in the dwelling house for which the credit is claimed.

No Iowa Supreme Court cases appear which relate to this particular point, however, the Attorney General on December 13, 1951, wrote an opinion which can be found in 1952 OAG 78, which has a bearing on this question.

After reviewing the statutory history of the statute, and giving weight to the above mentioned change in the statutory language, the opinion reads as follows:

> " * * *. One could live in a dwelling or occupy it by being physically present therein or under certain circumstances a person might be constructively living in or occupying a place. We do not believe that the legislature intended that the statute should be so strictly construed, even though a tax exemption statute, as to deprive an owner of credit where he was in good faith actually or constructively living in or occupying the premises as a home. One who occupies premises and has established therein his homestead, but who, due to illness or some other valid reason, leaves his premises temporarily, cannot be denied a credit because he is not physically present there at the time of making application or during the statutory period. * * *. We do not mean to say that one can constructively occupy premises and obtain the credit under every circumstance, and each and every case must be determined on its facts, which facts, of course, include the good faith of the applicant. * * *.
>
> " * * *. If a person, who is qualified and has made application, absents himself from the premises in good faith and for valid reasons and with a bona fide intention and right to return and occupy his home on the premises at any time when his temporary absence has ended, then in that event he is within the terms of the statute and entitled to the credit. * * *."

It is the opinion of this office that the above language of the Attorney General is applicable to the facts herein submitted. Assuming all other statutory requirements are met, and the claimant's family is in actual occupancy, and assuming further the claimant intends in good faith to return to the premises on which the credit is claimed upon the termination of his incarceration (all questions of fact to be determined by the Board of Supervisors when they pass upon the claim), the homestead credit could be allowed.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:WWR:fs

Tuition--

SCHOOLS: Independent and Consolidated School Districts cannot send students on a limited basis to another school district part-time for special courses. Under Section 273.2 to maintain a four-year high school all courses must be taught within the school district itself. (Rehmann to Hasbrouck, Guthrie Co. Atty.; 3/17/59) #59-3-10

March 17, 1959

Mr. Jay J. Hasbrouck
Guthrie County Attorney
Guthrie Center, Iowa

Dear Mr. Hasbrouck:

Reference is made to your letter of March 12, that poses the following questions:

> "Is it legally permissable for an independent or consolidated district to send students on tuition basis to another school part time for special courses such as homemaking, chemistry, and manual arts? These are courses which need special laboratory facilities which make sharing instructors by the two schools of no value.
>
> "Does a consolidated or independent school cease 'to maintain a four-year high school', if the courses are not all taught within the school itself?"

In reply thereto:

Any school district may discontinue any or all of its educational facilities and contract with any school district maintaining approved schools to furnish such facilities. Section 274.15, Code 1958. By case decision, "educational facilities" or "school facilities" refer to the facilities relating to one or more grades as a unit and not to specific courses of instruction. Dean vs. Armstrong 246 Iowa 412, 66 N.W. 2d 51, Independent School District vs. Christiansen, 242 Iowa 963, 49 N.W. 2d 263. In each instance, in the above mentioned cases, the pupil was attending school in another district in a specific grade and was not attending school in another district for a specific course. To further substantiate this position, Section 282.20, Code 1958, relates to tuition fees charged for pupils attending schools in another district on a year to year basis for a specific grade or level of education. Op Atty. Gen. 1950 p 155. Such an arrangement can only be accomplished by the board of directors who discontinue any or all of its elementary or highschool grades.

59-3-10

> It is fundamental that school districts are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as to exercise of a power or performance of a duty expressly conferred or imposed by statute. (cases cited) If, therefore, the district in question has the power concerning which you inquire, it must derive from the express provisions of some statute.
>
> From the express provisions of the plain language of the * * * statutes it is thus evident that the power to "designate" or when "facilities" have been "discontinued" or, in the case of high school pupils, where the high school has been closed, discontinued, or never existed. Op. Atty. Gen. 1956, page 195.

Therefore, in answer to your first question, it is not permissible to send pupils on a tuition basis to another school part time for special courses, because (1) pupils can only go to another district on a tuition basis when the facilities for a grade or level of education has been discontinued and (2) there is no statutory provision for the payment of tuition on a part-time basis.

The word "maintain" as defined by Webster's New International Dictionary Second Edition as:

"to keep possession of; not to surrender or relinquish."

Therefore, in Section 273.2, Code 1958 consolidated or indepedent school districts are excluded from the county school system if such districts keep possession of four yearhigh school or namely the 9th, 10th, 11th and 12th grades or levels of education. Op. Atty. Gen. 1912. page 667.

In answer to your second question, all the courses on each level of education for a four year period must be taught within the school district itself in order "to maintain a four-year high school." For required courses see Chapter 280, Code 1958.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
cc: Paul Johnston
Dept. of Public Instruction

SCHOOLS: Reorganization -- Enlargement of boundaries by county board of education under Code Sections 275.15 and 275.16 rendered risky by Brooker v Ludlow. 192 Iowa 760, 179 N.W. 145 in view of clause stricken by Sec. 14, Ch. 129, 57th G.A. (Opinion to Van Ginkel, Cass Co. Atty., 3/16/59)

#59-3-11

March 16, 1959

Mr. James V an Ginkel
Cass County Attorney
Atlantic State Bank Building
Atlantic, Iowa

Dear Sir:

Receipt is acknowledged of your letter of March 2 in which you ask the following question:

> "The question is this: May the joint Boards of Education acting as a single board at a hearing for objections to a proposed reorganized district include additional territory in the proposed district as a result of said hearing or can they only delete territory already included in the proposed district or dismiss the petition."

Formerly, section 275.15, Code 1954, provided:

> " . . . If such boundaries are neither those petitioned for nor those fixed by the county plan, the hearing shall be adjourned and notice for the adjourned hearing shall be given in the same manner as hereinabove provided and upon the final hearing the board shall fix the bounderies or dismiss the petition . . . "

The above provision was repealed by section 14, chapter 129, Acts of the 57th G.A. and no corresponding provision was enacted in its place. This leaves the hearing provisions of the reorganization law in a condition quite similar to that of the old consolidation law at the time of the decision in the case of Brooker v Ludlow, 192 Iowa 760, 179 N.W. 145. Although the rule of stare decisis no longer has the vitality it once possessed, until some new decision overrules it, ignores it, or says it is not in point, I believe our best advice to County Boards of Education is to avoid enlargement

59-3-11

of petitioned-for-boundaries when fixing boundaries at reorganiaation hearings held under sections 275.15 and 275.16 of the 1958 Code.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

cc: Paul Johnston
Dept. of Public Instruction

COUNTIES; Board of Supervisors--
In counties having a city of 35,000 therein and a Board of Supervisors of 5 or 7 members and composed of 2 townships, such townships are each entitled to one member and not two members on the Board of Supervisors. (Strauss to Balch, St. Rep., 3/17/59)

#59-3-12

March 17, 1959

Honorable Bernard R. Balch
Fifty-eighth General Assembly
House of Representatives

My dear Mr. Balch:

Reference is herein made to your letter of March 16 in which you stated the following:

> "Calling your attention to Code Section 39.19, is it possible for either East Waterloo Township or West Waterloo Township in Black Hawk County to have more than one member residing in said Township on the Black Hawk County Board of Supervisors?"

In reply thereto I advise as follows:

The statutes to which you refer, Section 39.19 provides the following:

> "No person shall be elected a member of the board of supervisors who is a resident of the same township with any of the members holding over, except that:
> 1. A member-elect may be a resident of the same township as a member he is elected to succeed.
> 2. In counties having five or seven supervisors two members may be residents of a township which embraces a city of thirty-five thousand population."

This Section if applicable at all to the situation set forth, is contained in the Subsection 2 of Section 39.19.

Waterloo according to the census of 1950 is a city having a population of 65,198. However, the city of Waterloo embraces two townships, in neither one of which is there a city of the

population of 35,000. In other words in both townships there exists a city of the population of 65,198, but neither township embraces a city of 35,000 population. The answer to your question is in the negative.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:kvr

~~HEADNOTE:~~ CIGARETTES: Issuance of Retail Cigarette Permits -- County Board of Supervisors has no authority to issue temporary retail cigarette permits. (Brinkman to Miller, St. Tax. Comm., 3/18/59, #59-3-13

March 18, 1959

Mr. Leon N. Miller, Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Miller:

Receipt of your letter of March 11, 1959 is hereby acknowledged, in which you state that you had received a call from Senator Earl Elijah of Clarence, Iowa, who inquired whether the Cedar County Board of Supervisors had authority to issue a temporary retail cigarette permit for use at the 1959 National Plowing Contest to be held in Cedar County. The event is expected to last about two days with an expected attendance of approximately two hundred thousand persons.

You are advised that no authority exists in the laws of this state which permits the County Board of Supervisors to issue retail cigarette permits on a temporary basis.

It is possible, however, to apply for a regular retail permit under Section 98.13, Code of Iowa (1958), and claim a refund on the permit fee for unused quarters. Also, if the application is filed in the months of April, May, or June, only one-fourth of the annual fee may be exacted; or, if filed in other months, a proportionate reduction is provided in Code Section 98.13, and provisions are also made for refunds on the unused

59-3-13

quarters where less than the full permit fee is paid.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:WWR:fs

CRIMINAL LAW: Dogs --

~~HEADNOTE:~~ A dog is not a "domestic beast" within the meaning of Section 717.1. (Faulkner to Winkel, Kossuth Co. Atty, 3/19/59) #59-3-14

March 19, 1959

Mr. Gordon Winkel
Kosuth County Attorney
Algona, Iowa

Dear Sir:

This will confirm your oral request of March 18 for an opinion regarding the following question:

Is a dog a "domestic beast" as used in Section 717.1, 1958 Code of Iowa?

According to a 1919, 1920 Attorney General Opinion, page 810, a dog is not a "domestic beast" within the meaning of Section 4818 of the Code which is the very same wording as now codified in Section 717.1, supra.

State v. Getty, 273 S.W. 2d 170 (Mo.) was a prosecution charging defendant with leaving exposed meat and meat scraps containing poisonous substances accessible to dogs. It was held that a dog was not a "domestic animal" within the statute creating an offense for any person to maliciously expose any poisonous substance, with intent that such substance should be taken or swallowed by any cattle, hog, sheep, goat, horse, mule, ass or other domestic animal or domestic fowl.

The same reasoning was used in the Getty opinion as that utilized in the 1920 Attorney General Opinion.

A dog was reasoned not to be within the same class of animals as those specified in the statute in that a dog had no intrinsic value in law.

59-3-14

Furthermore, two principles of statutory construction were observed in the Getty case which are applicable here. It was first noted that criminal statutes must be strictly construed against the state. And secondly, the Court commented that no one is to be subjected to criminal prosecution by implication.

It is, therefore, concluded that a dog is not a "domestic beast" within the meaning of Section 717.1, supra.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:kr

CONSTITUTIONAL LAW: Religious tests--
Barring from qualifying for office by reason of religious training and belief being opposed to war is a religious test and barred by Art. I, Sec. 4, of the Constitution. (Strauss to Gilmour, St. Sen., 3/19/59) #59-3-15

R

March 19, 1959

Hon. C. Edwin Gilmour
Senate Chamber
B u i l d i n g

My dear Senator:

This will acknowledge yours of the 16th inst. in which you submitted the following:

> "I am a sponsor of Senate File 122, which could repeal the first paragraph of subsection seven (7) of Section three hundred sixty-five point seventeen (365.17), Code 1958.
>
> "Senator Miller is considering presenting an amendment to Senate File 122. A copy of this proposed amendment is enclosed, together with a copy of Senate File 122.
>
> "I would appreciate from you an opinion as to whether or not this proposed amendment is consistent with Section 4 of Article I of the Iowa Constitution. Moreover, I should like to have your opinion as to whether or not Section 365.17, Code 1958, is consistent with Section 4 of Article I of the Iowa Constitution.
>
> "I do hope you can complete these opinions at an early date, for Senate File 122 is presently before the Senate as unfinished business and will have to be deferred day by day until your rulings are available."

Accompanying your letter is a proposed amendment by Senator Miller in terms as follows:

> "Amend Senate File 122 by striking all after the enacting clause and inserting in lieu thereof the following:
>
> "Section 1. Section three hundred sixty-five point seventeen (365.17), Code 1958, subsection seven (7), is hereby amended to read as follows:

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> 'Has not (in the case of appointment or employment in the police department) claimed exemption from any military service on account of being a conscientious objector; or has not (in the case of any other appointment or employment) claimed exemption from non-combat military service on account of being a conscientious objector.'"

Section 365.17(7), Code 1958, which Senate File 122 amends by striking, is this:

> "7. Has not claimed exemption from military service on account of being a conscientious objector."

The question which you propound does not appear to have had the consideration or opinion of this Department, nor do we find specific judicial precedent either in Iowa or otherwise.

Section 4, Article I, of the Constitution of Iowa, to which you refer, provides the following:

> "Religious test - witnesses. Sec. 4. No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law."

And related thereto is Sec. 2 of Article VI of the Constitution providing:

> "Exemption. Sec. 2. No person or persons conscientiously scrupulous of bearing arms shall be compelled to do military duty in time of peace: Provided, that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens."

And a violation of the religious test provided by Section 4 of Article I is created by Sec. 735.3, Code 1958, which states:

> "Religious test. Any violation of section 4, Article I of the constitution of Iowa is hereby declared to be a misdemeanor."

The impact of these provisions on the class of persons designated as conscientious objectors is exhibited by the Selective Training and Service Act of 1940, being 50 USCA, appendix paragraph 301, where to be classified as one is such, he "by reason of religious training and belief is conscientiously opposed to war in any form." Religion as used therein was defined in the case of United States v. Kauten, 133 F. 2d 703, 708, as follows:

> "It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of inadequacy of reason as a means of relating the individual to his fellow-men and to his universe - a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. * * *"

With that background of the part religion plays in respect to occupancy of public office in connection with the legislative power to enact subsection 7 of Section 365.17, Code 1958, it is interesting to note the following from the case of Morgan v. Civil Service Commission, 36 A. 2d 898, 900:

> "It is not within the province of the appointing authority to deny prosecutor his statutory right to the appointment in issue on the ground that he entertains religious scruples against the patriotic exercise of saluting the flag. The Legislature has not ordained that the right to hold a public office or position may be conditioned upon observance of a compulsory flag-salute ritual. Nor would such a regulation be within its competency. It is not merely a question of the right to an exemption, on religious grounds, from a general legal duty to give the salute. The legislative body does not possess the power thus to control the mind of the individual. The supreme arbiter of the meaning of Federal constitutional limitations has lately ruled that such a precept directed to public school pupils by the local regulatory body invades the sphere of intellect and spirit reserved from all official control by the First and Fourteenth Amendments of the Nation's organic law. Freedom of religious conscience and belief, and of speech and of press, secured by these Amendments is susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is not within the power of officialdom to coerce individual affirmation of a belief and an attitude of mind - to compel the individual to give utterance to what is not in his mind. The flag salute is a form of utterance. Coerced acceptance of a patriotic creed is beyond official authority. The conscience of the individual may not thus be trammeled. The Bill of Rights enjoins such assertions of official authority. * * *"

And as bearing upon the quoted constitutional provisions may have on a municipal office, see the case of Jones v. Sargeant, 145 Iowa 298, where, while dictum, it is stated:

> "It must be remembered, in this connection, that we have no constitutional provision fixing the qualifications for municipal office. The Constitution does provide, however, that no religious test shall be required as a qualification for any office of public trust. See Section 4 of article I of the Bill of Rights. In this respect it differs from the fundamental law of many of the other states, which provide that no religious or political test shall be required. There is no absolute right to hold office or to be a candidate therefor; and the Legislature, in the absence of constitutional prohibition, has plenary power in fixing the qualifications therefor. * * *"

In undertaking opinion of the constitutionality of the proposed statute, the Department is mindful of the presumption of the constitutionality of acts of the Legislature, to which rule the Department seeks to adhere. Steinberg-Baum & Co. v. Countryman, 247 Iowa 923, 77 N. W. 2d. However, in view of the constitutional provision involved herein, to-wit: Article I, Section 4, and such authority as is available, it is my opinion that if one who conscientiously, by training and belief, is opposed to war were denied his right to hold office by reason thereof, the same would constitute a religious test within the meaning of the foregoing constitutional provision.

I call your attention to the fact that the prohibition contained in Article I, Section 4, under discussion here, is

concerned with "qualifications for office"; Civil Service Chapter 365 concerns qualifications for "officers and employees". Whether the prohibition of Article I, Section 4, is effective of qualification of employees as well as officers is not considered or concluded herein.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Reorganization--
SCHOOLS: ~~REORGANIZATION.~~ The residents of the entire school district votes on the proposition of reorganization as provided in Section 275.20 even though a prior election was voted on, the same residents with relation to another portion included in another district. Chapter 491-504 inclusive, inapplicable to school reorganization. ~~except to the end that they help accomplish reorganization of school districts as provided in Section 275.12 to 275.23 inclusive~~. (Rehmann to Sturges, Plymouth Co. Atty.) March 19, 1959 3/19/59) #59-3-16

Mr. William S. Sturges
Plymouth County Attorney
24g Plymouth Street S.W.
LeMars, Iowa

Dear Mr. Sturges:

This is to acknowledge receipt of your letter of March 16, that states the following:

"FACTS: Under Chapter 275, 1958 Iowa Code, a petition for the reorganization of a 'Hinton Community School District' was filed with the Plymouth County Superintendent of Schools. Hearing thereon was held January 19, 1959, the Order fixing boundaries, etc. was entered January 24, 1959, published January 29, 1959 and the election held February 25, 1959. The proposition carried by a substantial majority and in 100% of the school districts, or portions thereof, voting. No election of directors for the new district has been called nor held as yet.

Liberty Consolidated School District, comprising 20 sections of land was partially included in the above new district; 15.1 sections including the school buildings were included in the boundaries of the new school district, when the proposition was submitted to the voters and carried. Liberty Consolidated is operating a twelve-grade high-school and was formed many years prior to May 10, 1957. The entire Liberty Consolidated School District voted on the 'Hinton Community School District' proposition.

On February 17, 1959 a petition was filed with the County Superintendent, under Chapter 275, 1958 Iowa Code, for the reorganization of a 'Le Mars Community School District', which petition seeks the inclusion of the remaining portion of Liberty Consolidated (4.9 sections) in addition to other areas. On March 12, 1959 hearing was held thereon and on March 14, 1959 the Plymouth County Board of Education entered its order fixing the boundaries to be submitted to the voters, and which includes the 4.9 remaining

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sections of Liberty Consolidated School District. The questions of territory in two different counties and joint board planning is not involved."

QUESTIONS:

1. "Does the entire Liberty Consolidated School District vote on the proposition to establish the 'Le Mars Community School District'?"

2. Does only that portion not reorganized in the Hinton Community School District vote to be included within the proposed bounderies of the Le Mars Community School District?

3. "Would our statutes (491-504) and case decision relating to the dissolution of corporations or reasonings therein contained, have any applicatin to the above facts?"

4. "Having voted itself into dissolution primarily into the Hinton Community School District, does Liberty Consolidated School District have any further entity or authority other than to complete its business?"

5. "Would the portion not reorganized into the Hinton Community School District, be the only legal entity and would it be deemed to be 'operating a high school'?"

In reply thereto:

In answer to your first question, I am enclosing a letter opinion issued from Mr. Abels to Senator Harbor dated March 20, 1958. Your attention is specifically directed to the following paragraph.

"Thus, by its own terms, Section 275.12 defines for its purposes the word 'affected' as being synonymous with 'included'. By such definition, a petition including only a portion of an existing district need be signed only by twenty percent of the voters residing within such included portion. However, it should be noted that should the petition be granted and should such 'portion' be part of 'an existing school district operating a high school, or a rural independent school district of eight sections or more formed prior to May 1[illegible], 1957', all of the qualified voters of the

school district are entitled to vote at the election upon the proposal contained in such petition under the provisions of Section 275.20, Code 1958, even though only those residing in the included portion were eligible to sign the petition under the provisions of Section 275.12, Code 1958."

The affirmative answer to your first question makes the answer to your second question unnecessary.

"It is fundamental that school districts are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as to exercise of a power or performance of a duty expressly conferred or imposed by statute. (cases cited)" Op. Atty Gen. 1956, page 195. Section 275.11, Code 1958, provides:

"Subject to the approval of the county board of education contiguous territory located in two or more school districts may be united into a single district in the manner provided in sections 275.12 to 275.23 hereof."

Sections 275.12 to 275.23, Code 1958, prescribe the method by which a school district can enlarge, reorganize or change its boundary. Section 275.24, Code 1958, provides:

"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."

The reorganization of school districts is prescribed by the statutes. The effect of such reorganization is not a dissolution but like a merger. The fact that the electors of two districts have elected to reorganize, the plan can not be effectuated until July 1 following such election. Until that date, they remain an entity. After July 1 and before July 15, following the election, a new board will complete the reorganization in accordance with the provisions of Section 275.28 to 275.31, Code 1958.

Therefore your reference to Chapters 491 to 504, Code 1958, inclusive, are inapplicable because school districts do not fall within the purview of private corporations.

The answer to the third question makes the answer to the fourth question affirmative.

The affirmative answer to the fourth question makes the answer to the fifth question negative.

It is our conclusion, that all the electors of the Liberty Consolidated School District should vote on the reorganization of the Le Mars Community School District, even though, only those electors residing in the portion to be included, were the ones eligible to sign the petition.

Yours very truly,

THEODOR L. REHMANN, JR.
Assistant Attorney General

TLR:skvr
Encl.
cc: Paul Johnston
Dept. of Public Instruction

C. W. Down
Lawyer
Le Mars, Iowa

Spencer Day
Lawyer
Sioux City, Iowa

Charlie Woolery
Lawyer
Sergeant Bluff, Iowa

HEALTH: Funeral Directors. No license is required to make the name of the owner of a funeral home or chapel part of the name of such funeral home or chapel but any funeral directing or embalming done on such premises within the meaning of Code section 156.1 must be done by licensed personnel. (Ltr to Brandt, Embalmer Bd. 3/23/59) #59-3-17

March 23, 1959

Mr. August Brandt Jr., Chairman,
Board of Funeral Director and Embalmer Examiners
Dallas Center, Iowa

Dear Mr. Brandt:

Receipt is acknowledged of your letter of March 12 as follows:

> "The Board would like an opinion from your office if any person has a right to use his name in advertisements and on a funeral home with out he, himself, being licensed. Funeral directors in his neighborhood feel that he is holding himself out to be in the way his name is tied into the presentation of Funeral Service to his community. The contention is that this is exactly what he hopes to accomplish, and that the general acceptance of the reader will be that he is a Funeral Director."

Upon examination of the clipping referred to, it appears the only place the name in question is used in the advertisement is in the name of the funeral home which appears in the form _____ & _____ Funeral Home.

Section 156.1, subsections 2 and 3, Code 1958, provide:

> "2. A 'funeral director' is a person engaged in or conducting, or holding himself out, in whole or in part, as being engaged in:
>
> a. Preparing, other than embalming, for the burial or disposal, or directing and supervising the burial or disposal of dead human bodies.
>
> b. Furnishing, in connection with the disposition or sale of any casket, vault or other burial receptacle, any funeral services, or embalming, directly or indirectly, by himself, or in conjunction with another.

59-3-17

c. Who shall, in connection with his name or funeral establishment, use the words, 'funeral director', 'mortician' or any other title implying that he is engaged as a funeral director as defined in this subsection.

3. An 'embalmer' is a person engaged in, or holding himself out as engaged in, the practice of disinfecting or preserving dead human bodies, entire or in part, by the use of chemical substances, fluids or gases in the body, or by the introduction of same into the body by vascular or hypodermic injections or by direct application into the organs or cavities for the purpose of preservation or disinfection."

Since there is nothing in the clipping enclosed with your letter to indicate the individual in question considers himself an embalmer or funeral director, I am of the opinion the clipping evidences no violation of the law. The individual's name appears only as part of the name of the home and would seem intended to indicate nothing more than ownership. There is nothing, in fact, in the clipping to suggest that either of the partners actually engages in funeral directing or embalming. The text of the advertisement reads:

"THE GATE OF TIMES OPENS
INTO LIFE ETERNAL
"There is deep comfort in the thought that earthly parting but marks the passing of the spirit into a new and brighter realm. We aim to make every funeral beautifully expressive of this abiding faith.

"_____ & _____
FUNERAL HOME"

Above the text is portrayed "the gate of time". The advertisement goes on to say the partnership offers "24-Hour Ambulance Service" (not "hearee" service).

The language "we aim to make every funeral beautifully expressive of this abiding faith", might indicate intention to offer funeral service to the public but it could also merely indicate an intention to furnish a suitable chapel-type building where licensed directors might, for a suitable charge, conduct services. In other words, the clipping furnishes no evidence, one way or the other, as to whether or not the individual in question is engaged in any practice for which license is required.

The name of the home is of no relivance. He could just as well have called it the "Shady Rest" Funeral Home, the George Washington Chapel, or any other name that suited his fancy. Of course, any actual funeral directing (or embalming) done on the premises will have to be done by licensed personnel. See State v. Winneshiek Co-op Burial Ass'n., 237 Iowa 556, 22 N.W. 2d 500 and statutes quoted above.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

cc: L. E. Wilson

HEALTH: Nursing. The wearing of a pin bearing the designation R.D.N. or use of such designation in signing correspondence violates Code sections 147.72 and 152.5 if such use is madein connection with services performed or offered under the exemption from licensure contained in Code Section 152.2(5), but not if used in social activity not related to performance of such services. (Atelo to Sage, Nurse Ex., 3/23/59)

59-3-18

March 23, 1959

Vera M. Sage, R.N.
Executive Secretary
Iowa Board of Nurse Examiners
L O C A L

Dear Madam:

Receipt is acknowledged of your letter of March 13 as follows:

> "Recently it came to the attention of this Department that a receptionist in a doctor's office in Fairfield, Iowa had been chosen as a member of the American Registry of Doctor's Nurses.
>
> We would like to have an opinion on the following question;
>
> > 'May a private group or association authorize a member thereof who is employed or offers to become employed in the practice of nursing care and who is not a registered or licensed practical nurse to wear or display a caduceus with the initials R.D.N. embossed thereon, and to use such letters after such person's name?'"

Section 152.5, Code 1958, provides as follows:

> "No person shall practice nursing as a registered nurse as defined in this chapter or assume the title of registered nurse, or use the abbreviation 'RN' after his name or in any manner hold himself out or profess to be a registered nurse in this state without first procuring a license under the provisions of this title.
>
> No persons shall assume the title of Licensed practical nurse or use the abbreviation 'LPN' after his name or in any manner hodl himself out or profess to be a licensed practical nurse without first procuring a license under the provisions of this title.
>
> Nothing in this chapter shall be construed to prohibit any person not registered or licensed hereunder

from performing nursing services with or without pay; provided such person does not hold himself out or profess to be a registered nurse or licensed practical nurse."

Section 152.2 (5), Code 1958, excludes from the definition of the practice of nursing the following:

"The performance of services by nonprofessional workers in offices, hospitals or nursing homes under the direct supervision of a physician or nurse licensed under this title provided such person does not hold himself out or accept employment as a person licensed to practice nursing under this title."

In addition, Section 147.72, Code 1958, provides as follows:

"Any person licensed to practice a profession under this title may append to his name any recognized title or abbreviation, which he is entitled to use, to designate his particular profession, but no other person shall assume or use such title or abbreviation, and no licensee shall advertise himself in such a manner as to lead the public to believe that he is engaged in the practice of any other profession than the one which he is licensed to practice."

The quoted statutes appear quite similar in content to certain sections of the Florida Statutes under which the Attorney General of Florida, in considering the identical question, issued an opinion on April 8, 1958, hereinafter set forth as follows:

"Miss Hazel M. Peeples
Secretary-Treasurer
State Board of Nursing
230 West Forsyth Street
Jacksonville, Florida

Re: Nursing Practice Act; construction of () 464.081, 464.24(4), and 464.24(6), Florida Statutes

Dear Miss Peeples:

"This is in response to your recent letter requesting my opinion on questions propounded by the Florida State Board of Nursing at the March 25 meeting, which questions are substantially as follows:

> May a private group or association authorize a member thereof who is employed in the practice of medical care or treatment and who is not a registered nurse to wear or display a caduceus with the initials 'R.D.N.' or 'R.P.N.' embossed thereon, and to use such letters after such persons's name?
>
> Is a private association or group in violation of the Nursing Practice Act when in relation to the nursing practice and without certification or approval of the State Board of Nursing it offers its members an 'educational program' which is in essence a type or kind of Nurses' training that impinges upon the field of Nurses' training contemplated or regulated by Chapter 464?

It should be noted at the outset that laws enacted for the purpose of regulating a profession in the interest of the public health and for the protection of the public have been uniformly upheld and sustained. See 25 AM. Jur., Health, (§26.

Chapter 464, Florida Statutes, regulating the practice of nursing in Florida, reflects the authority of the legislature, in the exercise of its sovereign duty, to provide, when it considers such necessary, safeguards for the preservation of the public health, and to prescribe such restrictions and regulations as will fully protect the public from ignorance, incapacity, deception and fraud. See 1941 Atty. Gen. Op. 608, 610 (041-666).

Included within these restrictions is Section 464.081, Florida Statutes, which provides:

> 'Any person who holds a license to practice as a registered nurse in this state shall have the right to use the title "Registered Nurse"

> and the abbreviation "R.N." No other person shall practice or advertise as or assume the titles of registered, certified, trained or graduate nurse or to use abbreviation of "R.N.," "C.N.," "T.N.," "G.N.," or any other words, letters, signs or figures to indicate that the person using same is a registered nurse.'

In similar regard, paragraph (4) of Section 464.24, Florida Statutes, provides that it shall be a misdemeanor for any person to:

> 'Use in connection with his or her name any designation tending to imply that he or she is a registered professional nurse or a licensed practical nurse unless duly licensed so to practice under provisions of this chapter.'

It is apparent from a reading of the above provisions that the use of the abbreviations of 'R.D.N.' or 'R.P.N.' by any person other than a person who holds a license to practice as a registered nurse in this state is in violation of the Nursing Practice Act; and any association attempting to authorize and promote the use of such initials by persons other than registered nurses is likewise in conflict with the Nursing Practice Act.

As reflected in Section 464.18, 464.19 and 464.20, Florida Statutes, the legislature also considered the importance of assuring persons interested in advancing themselves in the field of nursing that any institution or association offering an educational program for training in this endeavor be properly qualified for such purposes.

In addition to the foregoing provisions of Chapter 464, which established the requirements and provided for a survey of such institutions and their educational programs, paragraph (6) of Section 464.24, Florida Statutes, provides that it shall be a misdemeanor for such association to:

> 'Conduct a nursing education program for the preparation of professional or practical nurses unless the program has been accredited by the board.'

It appears, from a reading of the aforementioned provisions of Chapter 464 relating to institutions offering educational programs in nursing practice, that the association referred to in your second question would be in violation of the Nursing Practice Act, and that such question should therefore be answered in the affirmative.

If, however, the 'educational program' as advertised and offered by such association is not in fact an educational program, the association, although not in conflict with the Nursing Practice Act in this regard, may nevertheless be in violation of Section 817.06, Florida Statutes, relating to misleading advertisements, and which reads in part as follows:

> 'No ....association....shall, with intent to offer or sell or in anywise dispose of....certificates, diplomas, documents, or other credentials purporting to reflect proficiency in any trade, skill, profession, credits for academic achievement, service or anything offered by such,....association...directly or indirectly, to the public, for sale or distribution or issuance,....or with intent to induce the public in any manner to enter into any obligation relating thereto,...knowingly or intentionally make, publish, disseminate, circulate or place before the public, or cause, directly or indirectly, to be made, published, disseminated or circulated or placed before the public in this state in a newspaper or other publication or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter or in any other way, an advertisement of any sort regarding such certificate, diploma, document, credential, academic credits, ...service or anything so offered to the public, which advertisement contains any assertion, representation or statement which is untrue, deceptive or misleading.'

Your questions are answered accordingly.

Sincerely,

//Signature

Richard W. Ervin
Attorney General"

In addition to the sections of the Iowa Code hereinabove quoted, the Florida statutes have further counterpart in section 152.4, 1958 Code of Iowa, which provides as follows:

> "No school of nursing for registered nurses shall be approved by the board of nurse examiners as a school of recognized standing unless said school is affiliated with a hospital and requires for graduation or any degree the completion of at least a three years course of study in subjects prescribed by the board.
>
> No school of nursing for licensed practical nurses shall be approved by the board of nurse examiners as a school of recognized standing and requires for graduation the completion of at least a one year course of study, integrated in theory and practice, as prescribed by the board.
>
> Nothing in this section shall be construed to prohibit the establishment or maintenance of a school of nursing for practical nurses and a school of nursing for registered nurses within the same hospital."

And in Section 504.12, Code 1958, which provides as follows:

> "Any corporation of an academical character may confer the degrees usually conferred by such an institution. No academic degree for which compensation is to be paid shall be issued or conferred by such corporation or by any individual conducting an academic course unless the person obtaining the said degree shall have completed at least one academic year of resident work at the institution which grants the degree."

Violation of section 504.12 is punishable under section 504.13 as follows:

> "A violation of section 504.12 by a corporation shall be punished by a fine of not more than one thousand dollars. A violation of section 504.12 by an individual conducting an academic course or by an officer or managing head of a corporation shall be punished by imprisonment in the penitentiary or men's or women's reformatory not more than seven years; or by fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding one

year, or by both such fine and imprisonment."

In addition to the opinion expressed by the Attorney General of Florida, an opinion on the identical question, under similar statutes, was rendered on October 24, 1958, by the Attorney General of Arizona. Said opinion is hereinafter set forth as follows:

"Mrs. Zona B. Brierley, R.N.
Executive Secretary,
Arizona State Board of Nurse Registration
and Nursing Education,
1740 West Adams Street,
Phoenix, Arizona.

Dear Madam:

This is in reply to your letter of August 18, 1958, in which you ask the following question:

> 'May a private group or association authorize a member thereof who is employed or offers to become employed in the practice of nursing care and who is not a registered nurse to wear or display a caduceus with the initials "R.D.N." or "R.P.N." embossed thereon, and to use such letters after such person's name?'

The answer to this question is, no. The following provisions of the Arizona Code are pertinent to the resolution of this question.

> ' § 32-1636. Use of title or abbreviation by professional nurse
>
> A person who holds a valid and current license to practice professional nursing in this state may use the title "registered nurse", "graduate nurse" or "professional nurse" and the abbreviation "R.N.". No other person shall assume or claim any such titles or use such abbreviation or any other words, letters, signs or figures to indicate that the person using it is a registered, graduate or professional nurse.

> ' § 32-1641. Use of title by practical nurse
> A person who holds a valid and current license to practice as a licensed practical nurse in this state may use the title "licensed practical nurse". No other person shall assume or claim such title, or use such abbreviation or any other words, letters, signs or figures to indicate that the person using it is a licensed practical nurse.'

These provisions of the Arizona Nurses' Practice Act are so similar to those of the Florida Nurses' Practice Act that we are persuaded to conclude that the opinion of the Attorney General of Florida on the same question, is correct. That opinion concluded:

> ' . . . that the use of the abbreviations of "R.D.N." or "R.P.N." by any person other than a person who holds a license to practice as a registered nurse in this state is in violation of the Nursing Practice Act; any any association attempting to authorize and promote the use of such initials by persons other than registered nurses is likewise in conflict with the Nursing Practice Act.'

We trust this information is helpful and if we can be of further service, please let us know.

Yours very truly,

ROBERT MORRISON
The Attorney General

(Signed) H. B. DANIELS
Assistant Attorney General"

Under the statutes of Iowa one need not be licensed as a registered or practical nurse to perform services <u>under the supervision of a doctor</u>. From your letter it appears the individual in question works for a doctor and presumably performs none of the services within the definition of nursing except under his supervision. However, by <u>excluding</u> nursing

services in such circumstances from the definition of nursing, Section 152.2 means that one performing services in such circumstances does so as an exempt or statutorily-privileged person and not as a nurse. Therefore, I concur in the opinion reached by the Attorneys-General of Florida and Arizona to the extent that it is my view a person performing such duties in exempt status would violate the quoted Iowa statutes by display of the pin or use of the degree or designation R.D.N. in connection with the performance or offer for performance of the aforesaid services. I do not believe, however, that wearing of the club pin to meetings of the club, not open to the general public, or use of the designation R.D.N. correspondence with the club offices or with other members of the club would amount to such "holding out to the public"as to amount to a violation of the statutes. Were this true, then a musician with the degree B.M. might be found guilty of passing himself off as a "Bachelor of Medicine" or a minister with the degree D.D. of holding himself out as a "Doctor of Drugs". I would, therefore, advise you the circumstances set forth in your letter may describe a violation of the statutes of Iowa depending on the circumstances surrounding the display of the pin and use of the designation R.D.N.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

~~HEADNOTE~~:
TOWNSHIPS: Cemeteries--

Township trustees are not reversionary owners under Section 566.20 1958 Code of Iowa, and cannot validly sell or convey title to the abandoned cemetery lots under 566.25, 1958 Code of Iowa. (Faulkner to Strand, Winneshiek Co. Atty., 3/23/59) #59-3-19

March 23, 1959

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

Dear Sir:

This question is posed in your letter of February 14, 1959:

> "The law relating to cemeteries and abandoned lots is in Section 566.20 and Section 566.27 inclusive of the Iowa Code 1958. No where does it appear to give the right to the township trustees the authority to sell an entire abandoned cemetery only does it relate to cemetery and subsequently abandoned lots.
>
> "My question is, can the trustees who are in charge of and control of a cemetery that has been abandoned for at least ten years, possibly up to 25 years, can said trustees convey said cemetery to some third party where as the trustees the record title is not in them and said record title is not known or recorded as to the person who has record title? Therefore in conclusion, can the township trustees convey a title as to an abandoned cemetery or a part thereof which might include several lots to some third party and if so under what circumstances and what form of notice etc. is required to make said lot or deed valid?"

At the outset, it is assumed that the property in question is susceptible of abandonment and, as a fact, has been abandoned.

59-3-19

Under Section 566.20, 1958 Code of Iowa, it is provided:

> "The ownership or right in or to an occupied cemetery lot or portion thereof shall upon abandonment revert to the person or corporation having ownership and charge of the cemetery containing such lots." (Underscoring added)

While the township trustees have charge of the cemetery they do not, as you state, have ownership. Thus, the cemetery cannot, under the statute, revert to the township trustees.

For this reason, the said trustees are not the reversionary owners of the cemetery, and, even if the record owners were ascertainable, there could be no valid notice given. Therefore, no valid sale or conveyance of title could be made by the said trustees under Section 566.25, 1958 Code of Iowa.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:kr

~~HEADNOTE:~~
CRIMINAL LAW: Gambling --

The fact that new members in the organization pay a membership fee means that some of the participants pay for the chance to win a prize and this constitutes a consideration to support a lottery. (Faulkner to Garretson, Henry Co. Atty.; 3/23/59) # 59-3-20

March 23, 1959

Mr. Charles O. Garretson
Henry County Attorney
110½ South Main Street
Mt. Pleasant, Iowa

Dear Sir:

This is in answer to your inquiry of February 26, 1959:

It is apparent, initially, that there is present a prize and a chance. The question is whether there is consideration to constitute the drawing a lottery. As you know, Article III, Section 28 of the Iowa Constitution states:

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

This is implemented by provisions contained in Chapter 726, 1958 Code of Iowa.

An examination of the facts shows that participants need not register since the names of all members will be included in the drawing. In addition, there is no requirement that the winner of the drawing be present to claim the prize. The only requirement for participating in the drawing is membership in the organization.

It is stated in your letter that "the reason for the drawing will be to increase the sale of memberships in order to provide more money for financing the reunion." Since the names of all members are entered in the drawing, obviously then, the new members will have paid a price for the opportunity to participate in the drawing.

59-3-20

The two cases of State v. Mabrey, 244 Iowa 415, 56 N. W. 2d 888, and 245 Iowa 428, 60 N. W. 2d 889, establish that it is not necessary for all participants to pay a price to participate. The fact that some participants' pay is sufficient to constitute the element of consideration.

Therefore, the three elements of a lottery, consideration, chance, and prize, are present.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:kr

HEALTH: Cities and Towns–May not build, operate, or license a nursing home as such but may accomplish the same result in a division or department of a municipal hospital. (Erbe to Blue, ex. Gov., 3/24/59) #59-3-21

March 24, 1959

Blue & Blue
Attorneys and Counselors at Law
Security Savings Bank Building
Eagle Grove, Iowa

Attention: Robert D. Blue

Dear Sir:

Receipt is acknowledged of your letter of February 28 in which you submit the following:

> "I have two questions which I would appreciate the opinion of your office for the benefit of the committee.
>
> "Can a city or town under the provisions of sections 368.27 and 135.65 when construed together be found to have statutory authority to operate a nursing home? And if city can operate a nursing home, or an infirmary, whichever you may call it, under what authority can levy taxes to build such an infirmary.
>
> "My next question pertains to Section 135.C 6 which provides that no governmental unit shall operate a nursing or custodial home in this state without a license for such home. Under the provisions of section paragraph 4 of section 135C.1 'governmental unit' is defined to mean 'the state, or any county, municipality or other political subdivision, board or other agency of any of the foregoing.' I think that there can be no question but what the board of control is operating a nursing home as defined in paragraph one of section 135 C.1. My question is whether as a matter of law the board of control must get a license for a nursing home, the same as the board of health is demanding of county homes, and whether or not they must meet the health and safety regulations established under the provisions of chapter 135 C of the code"

In answer to your first question, the statutes you cite confer no such authority. However, you are referred to code sections 135B.1 and 404.10(6 and 7). The latter section authorizes levy and expenditure, "for the purpose of purchasing sites for hospitals or sites with buildings thereon for hospital purposes, and constructing, reconstructing, rebuilding, remodeling or enlarging

buildings to be used for hospitals" and also, "to improve, operate, and maintain a municipal hospital". The former section defines "hospital" to include, "any institution, place, building or agency in which any accommodation is primarily maintained, furnished, or offered for the care over a period exceeding twenty-four hours of two or more nonrelated aged or infirm persons requiring or receiving chronic or convalescent care". As you will note, this is practically identical with the definition of a "nursing home" contained in section 135C.1. In view of the statutory limitation on expenditure of funds by cities and towns, coupled with the almost axiomatic rule that creatures of statute have only those powers conferred by statute, it follows that the only way a city or town can acquire or operate anything amounting to a nursing home is as a department or division of a municipal hospital. When accomplished in this manner, no nursing home license would be necessary as the hospital license, being of higher dignity, would include authority to do everything that could be done under a nursing home license. This opinion is arrived at without reference to certain pending legislation and is, of course, subject to change on the basis thereof.

Your second question requires preliminary answer to the fact question as to whether or not the board of control operates anything falling within the statutory definition of a nursing home. Answers to questions of fact are not properly within the scope of legal opinions of this office.

Very truly yours,

NORMAN A. ERBE
Attorney General

SCHOOLS: ~~SITES~~ Sites -- School board can not pay for test well before purchase. (Reference to Van Ginkel, Cass Co. Atty., 3/24/59. #59-3-22

March 24, 1959

Mr. James Van Ginkel
Cass County Attorney
Atlantic State Bank Building
Atlantic, Iowa

Dear Mr. Van Ginkel:

Reference is made to your letter of February 20, in which you state the following:

> "The Board of Education of the C. & M. Community School District located in Cass County have asked me the following question concerning a new site which they have an option on for the location of a new school building.
>
> They took the option on this forty acre tract as they are in the process of preparing to vote on a bond issue for the building of a school on this site. There is no certainty that the bond issue will be accepted by the voters and if it is not then where does the money come from to pay for the test well that will be drilled. Also, if the test well indicates that there is no water there then the site will not be acceptable and a new site will have to be chosen but where will the funds come from to pay for drilling the test well?"

In reply thereto:

There is not expressed statutory provisions which covers expenditures of money for drilling a well on a speculative basis. Enclosed please find a letter from Oscar Strauss to the Assistant Dubuque County Attorney dated September 2, 1954. However, in the situation covered by the letter, we were of the opinion that money could be spent in order to drill a well for water on property alrsady owned by the school board so long as it was in the sound discretion of the directors.

59-3-22

Schools are creatures of statute with only those powers expressly conferred by statute. Op. Atty. Gen. 1956, page 195. Therefore the doctrine of "expressio unius est exclusio alterius", applies. Drilling a well in a speculative venture and the expense of drilling such a well, can not be borne by the school district.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
Encl.

CITIES AND TOWNS: Waterworks -- Not a "profit-making organization". (Erbe to Loveless, Gov., 3/24/59) #59-3-23

March 24, 1959

Honorable Herschel C. Loveless
Governor of Iowa
B u i l d i n g

Dear Governor Loveless:

In your recent letter you state:

"It would be of assistance to the Iowa Disaster Coordination Committee if you would render an opinion on the following question: Is the Municipal Electric and Water plant in Atlantic, Iowa, a profit-making business?

"The facts so far as I can ascertain them are as follows: The City of Atlantic established a Municipal Election and Water Plant in 1890. About 1933 it was placed under a trusteeship and has been so operated ever since. To my knowledge, the profits, if any, of this business are used: Replacement of worn outequipment, improvement of facilities, and retirement of Bonded Indebtedness.

"At present, the Municipal Electric and Water Plant is bonded until 1965 in such a way that actually precludes payment of profits to the city. I am enclosing a copy of their most recent financial statement and will be happy to secure for you any evidence you may need in this decision."

In response thereto I would advise that the Municipal Electric and Water Plant in Atlantic, Iowa, is organized under and by authority of Chapter 397 of the Code of Iowa. Existing bonded indebtedness and contractual obligations entered into in connection therewith preclude a diversion of the proceeds from such municipal electric and water plantto other than paying off existing obligations, which obligation will continue until 1965.

In answer, therefore, to your question, "Is the Municipal Electric and Water Plant in Atlantic, Iowa, a profit-making

59-3-23

business?" I would advise that the answer is no. The financial statement of the Municipal Electric and Water Plant is herewith returned.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NAE:MKB
Enc.

Reorganization - -
SCHOOLS: ~~REORGANIZATION~~ Portion of land formally a part of another school district is not relieved of prior tax levy. Portion of land included in new school district is liable for tax levy of new school district. (Pekinaw to Norelius, Crawford Co. Atty., 3/24/59) #59-3-24

March 24, 1959

Mr. William Q. Norelius
Crawford County Attorney
Court House
Denison, Iowa

Dear Mr. Norelius:

Reference is made to your letter of March 16 which states the following:

> "Community School District 'A' was reorganized pursuant to the provisions of Sections 275.12 - 275.23, of the 1954 Code of Iowa, and became effective as a reorganized Community School District on July 1, 1956. Subsequent thereto, a petition was filed describing the boundaries of proposed Community School District 'B', whose boundaries included a portion of Community School District 'A'. The proposed boundary of School District 'B', which included a portion of School District 'A', was approved by the County Board of Education, but its decision was appealed and said decision was only recently sustained by the Iowa Supreme Court. An election for the establishment, Community School District 'B', has never been held.
>
> During the interval from the filing of the petition for the establishment of Community School District 'B', and the present time, the Iowa General Assembly by act legalized and validated the proceedings for the reorganization and establishment of Community School District 'A' and the voters of said school district approved the issuance of bonds for the purpose of carrying out a School building program. The bonds were issued and sold and the building has been erected.
>
> We now respectfully request your opinion on the following questions pertaining to the aforesaid situation.

59-3-24

1. If Community School District 'B' should, after a special election, called pursuant to the provisions of Chapter 275, of the 1958 Code of Iowa, include a portion of Community School District 'A' is said portion of land which was formerly a part of Community School District 'A' relieved of the tax which has been levied to retire the aforesaid bonding indebtedness of Community School District 'A'?

2. If said portion of land is not relieved of of the tax levied to retire the aforesaid bonding indebtedness, could Community School District 'B', levy a tax thereafter to retire its own bonding indebtedness for the establishment of a school building against the said portion of land, and if said Community School District 'B' could levy such a tax, would the amount of the combined tax levy against the aforesaid portion of land be limited by the provisions of Section 298.18, of the 1958 Code of Iowa, or would the provisions of that particular section refer only to the maximum amount each separate School District could levy against this particular parcel of land?"

In reply thereto:

The questions you propounded are hypothetical in nature because Community School District "B" has not come into being; so, therefore, your question must be answered theoretically.

1. The portion of land which was formerly a part of Community School District "A" is not relieved of the tax which has been levied to retire the aforesaid bonding indebtedness of Community School District "A". This doctrine is set out in the case of the Independent District of Sheldon vs. The Board of Supervisors, 51 Iowa 658, 2 N.W. 590, wherein the court said, where a school district is organized and embraces certain common territory of a district which is subsequently organized, the common territory would be included in the limits of the district whose organization was first commenced, and that it is the duty of the board of supervisors to levy the tax in its favor. The doctrine is clearly stated in 51 Iowa 658, loc. cit. 660,

"By the proceedings taken by the plaintiff it had obtained jurisdiction over the disputed territory before any steps were taken to organize Grant.

> The right to complete its organization, as provided by law, followed. It could not be ousted of its jurisdiction over the disputed territory by anything done subsequent to the commencement of the proceedings to organize the plaintiff, unless an attempted organization was abandoned, or was not completed within the time required by law."

This doctrine was reaffirmed in the case of State vs. Klemme School District, 247 Iowa 48, 72 N.W. 2d 512. The doctrine was followed in Bohrofen vs. Dallas Center Independent School District, 242 Iowa 1070, 49 N.W. 2d 514. and State v. Town of Crestwood, 248 Iowa 627, 80 N.W. 2d 489.

2. The included portion of Community School District "A" into Community School District "B" would be liable for the tax levy Community School District "B" could levy. Enclosed please find a copy of a letter from Mr. Abels to Scott County Attorney dated November 22, 1957, which covers this subject. In addition, your attention is directed to Op. Atty. Gen. 1956, page 74, which discusses the distribution of assets in accordance with the provision of 275.28 to 275.31 inclusive, Code 1958.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
Encl.
cc: Mr. Paul Johnston

CIGARETTES: Vending machines -- A machine vending cigarettes which is capable of transacting the sale itself, without the element of human intervention and control, falls within the purview of the words "vending machine" and the prohibition of Code section 98.36 (6). (Filed to Dietz, H. Rep. 3/24/59)

March 24, 1959

Honorable Riley Dietz
House of Representatives
L O C A L

Dear Sir:

We have your inquiries of March 23 as follows:

(1) Is a cigarette register a vending machine under Section 98.36 (6), Code of Iowa?

(2) Could a cigarette vending machine be used behind the counter by a permit holder, if the public did not have access to the machine?

(3) Could a cigarette vending machine with a remote control feature be used in Iowa without violating Section 98.36 (6)?

In response thereto, we advise concerning the first question that it is our understanding that such machines are equipped with two locks, one locking the compartment where cigarette packages are stored, and the other locking the cash drawer at the bottom of the machine and that the only way cigarettes may be gotten from the machine is by unlocking one of the locks. We further understand that the merchant concerned has exclusive control of the keys and when the cash drawer is unlocked a pack of cigarettes is ejected from the machine, the cash draw opens, and the sale is made by the attendant. There is no depository where a customer can operate the machine with coins.

In construing similar language appearing in a Federal Revenue Act, the United States District Court for the Eastern District of Pennsylvania, in the case of American Meter Company vs. McCaughn, 1 F. Supp. 753, at 754, held that to constitute a "vending machine" a machine must sell or vend by itself. The court distinguished between machines which "automatically, and of themselves accomplished the whole transaction so far as it may be accomplished--that is receive the money and deliver the goods" and machines which required

something more to be done in order to effectuate the sale. Therefore, in response to your first question it seems clear that "something more is required" and a "cigarette register" is not a vending machine within the meaning of the statute here in issue.

Similarly, your question numbered (3) requires intervention of a human agency in order that the sale may be completed, since as we understand it, the machine must be activated by an attendant unlocking it. The fact that he unlocks it through an electric device rather than unlocking the machine itself does not alter the basic principle that the machine cannot sell "by itself". Hence, in answer to your question numbered (3), it is the opinion of this office that such a device is not a vending machine within the meaning of the statute.

However, in response to your question numbered (2) it is necessary to refer to the subsection in question:

> "6. It shall be unlawful to sell or vend cigarettes by means of a device known as a vending machine."

As I understand your question, the cigarette machine referred to is admittedly a vending machine within the contemplation of the statute, but that the machine is ostensibly to be operated by an attendant on behalf of the purchaser. Here the element of control appearing in your first and third questions is not necessarily present. This is a vending machine which can be operated by anyone and in the absence of an attendant, the law could be easily violated in view of the fact that the machine is capable of selling "by itself" cigarettes to one having and depositing in it the necessary monies. For this reason it is the opinion of this office that such a machine is a vending machine contemplated by the statute and prohibited by it.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:kr

Property Tax --

~~Revenue~~ Taxation ~~Personal Property Tax~~ Sections 445.42 through 445.46 do not apply when the owner of the personal property upon which a tax is sought to be collected is a resident of this state. (Brickhouse to Barlow, Palo Alto Co. Atty., 3/26/59) # 59-3-27

March 26, 1959

Mr. Charles H. Barlow
County Attorney
Palo Alto County
Emmetsburg, Iowa

Dear Mr. Barlow:

This is to acknowledge receipt of your recent letter concerning the Military Service Tax Credit and the collection of personal property taxes.

In the situation outlined in your letter, it would appear that X is entitled to the Military Service Tax Credit upon 1958 taxes due in 1959. Applying the reasoning of an opinion of the Attorney General dated November 14, 1957, a copy of which is enclosed, it is clear that X is not entitled to the Military Service Tax Credit upon 1959 taxes due in 1960.

Your question relative to personal property taxes is stated as follows:

> "Assessor assesses 'X' 's personal property for 1959 taxes due in 1960, in January 1959. 'X' intends to leave the state prior to March, 1959. The question is whether 1959 taxes due in 1960 could become immediately due and collectible upon 'X' 's attempt to remove the property from the state under migratory property sections 445.42 to .45, when 'X' was a resident of this state at the time of assessment."

The writer has examined the sections of the Code above cited and finds that sections 445.42 through 445.46, Code of Iowa (1958), were all included in one section under the Code of Iowa (1897) and have been divided

59-3-27

into the present separate sections by the Code editor. Section 445.42 serves to define the type of property referred to in the subsequent sections of the Code above cited. Under this section, it is only personal property the owner of which is a nonresident of the state that is covered. Therefore, these sections would not apply in the example which you cite.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/bjf

SCHOOLS: Reorganization -- (1) Extraterritorial bus routes subject to approval of county board under Code section 285.9 (2) Voluntary dismissal of action without prejudice under R.C.P. 215. (Opelo to Stephens, Lt. Rep. 3/26/59)

59-3-28

March 26, 1959

The Honorable Richard L. Stephens
House Chamber
L O C A L

Dear Representative Stephens:

Receipt is acknowledged of your letter of March 24 as follows:

> "I respectfully request information regarding the following school questions:
>
> 1. Community school district. A community school desires to traverse another community school district with certain loaded school busses. Is this permissable?
>
> 2. An injunction petition questining the validity of a school bond election was lifted the day prior to the case coming to court. Can this petition be re-filed at the will of the objector?
>
> Your consideration and reply on these questions would be appreciated."

In answer to your first question I quote section 285.9, Code 1958, which provides in pertinent part:

> "The powers and duties of the respective county boards of education shall be to:
>
> * * * * * * *
>
> "3. Approve all bus routes outside the boundary of the school operating the busses."

Such operation, therefore, appears permissible if accompanied by the requisite approval.

In answer to your second question I quote rule 215, Rules of Civil Procedure, which provides:

59-3-28

"A party may, without order of court, dismiss his own petition, counterclaim, cross-petition or petition of intervention, at any time before the trial has begun. Thereafter a party may dismiss his action or his claim therein only by consent of the court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counterclaim against the movant, unless that will still remain for an independent adjudication. A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against him on the merits, unless otherwise ordered by the court, in the interests of justice."

Thus, a litigant may voluntarily dismiss an action one time without prejudice to again commencing it.

I return herewith the papers which accompanied your letter.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr
Encl.

HEADNOTE: Schools - Reorganization: Distinction between Consolidated Districts and Independent Districts in view of Des Moines Independent Community School District v. Board of Supervisors. (Reinmann to Cooper, Buena Vista Co. Atty., 3/30/59)

#59-3-29

March 30, 1959

Mr. Richard W. Cooper
Buena Vista County Attorney
Porath Building
Storm Lake, Iowa

Dear Mr. Cooper:

This is to acknowledge receipt of your letter of March 26, which states the following:

> "The Highview District is a consolidated district consisting of 27 sections. Their elementary school is still in operation, but they no longer operate a high school. There are indications that about seven to nine sections of land out of said district may petition for reorganization into a newly organized community school district adjacent thereto. Anticipating this move, the Highview Board and its attorney wish to be advised as to what part of the district would vote in such a re-organization plan.
>
> The consolidated district was originally composed of rural independent school districts and is located entirely in a rural area with no cities or towns within its boundaries. The question then resolves itself as to whether or not the entire district would vote on a re-organization proposal by interpreting the words 'a rural independent school district of eight sections or more' to include such a consolidated rural district?"

In reply thereto:

The status of a "school district" has been litigated through the courts frequently. In the case of Claussen v. Perry, 248 Iowa 100, 79 N.W. 2d 778, the court distinguished between a "rural independent", "independent urban", and "consolidated district". The court further distinguished "school districts" in the case of Grant v. Norris 249 Iowa, 85 N.W. 2d 261, loc. cit. 268, by saying, "our school districts were, sub-districts; school township; independent; rural independent; consolidated; (provision as to consolidated districts (being) repealed * * * its successor is commonly called 'community')".

59-3-29

In view of these decisions, we took the position that a "consolidated school district" is not one and the same type of "school district" as a "rural independent school district". Subsequently, in view of these decisions, an opinion relating to Section 257.20, Code 1958, was issued from Abels to Senator Harbor, dated March 20, 1958. In essence, the opinion says, all the voters of a "rural independent school district" were entitled to vote on reorganization even though the petition was signed by only those to be included in the reorganization. School districts are creatures of statute and only have those powers expressly conferred by statute. Op. Atty. Gen. 1956, page 195. Thus under the doctrine of "expressio unius est exclusio alterius," all the voters of a "consolidated school district" would not vote on the reorganization but only those to be included in the reorganization would vote.

However, the opinions were based on decisions prior to the most recent case of Des Moines Independent Community School District v. Board of Supervisors, Case Number 261/49674, filed March 10, 1959, in which the court held, "a consolidated school district classifies for some purposes as an independent district." The court did not elaborate as to what type of "independent district" to which they refer, whether it is an "independent urban" or "rural independent" or both. It would be purely conjectural on our part if we were to make a designation.

Therefore, until the split can be resolved, we can only advise you that there are two possible answers to your question.

1. If the school district is considered a consolidated district, then the entire school district would not vote on the reorganization.

2. However, if the consolidated school district could be classified "for some purposes," such as reorganization, "as an independent district", if it is rural, then the entire school district would vote on the reorganization.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

§51.9, Code 1958, concerned with counting of ballots by counting boards, with accompanying §51.16, Code 1958, is a mandatory statute. §51.8, Code 1958, provides a ministerial duty and failure to comply ~~WX~~ therewith will not invalidate an election.

March 30, 1959

Hon. Gene L. Hoffman
Senate Chamber
B u i l d i n g

My dear Senator:

Acknowledgment is made of yours of the 27th inst. in which you submitted the following:

> "With regard to our telephone conversation this morning and my oral request for interpretation and construction of Sections 51.8 and 51.9 in connection with election contest committees of the current legislature, I would like to make that request in this formal manner.
>
> "In reviewing the statutory provisions relative to this matter I would like to add a request that Sections 51.8 and 51.9 also be construed and ruling or opinion given by your office on whether those two sections are also mandatory provisions.
>
> "We would like the same consideration given these sections as given Section 51.12 and would also request that the opinion on these two sections be given at the same time if at all possible. I am certain that you realize that time is of the essence in this matter and will appreciate your very early and prompt attention."

In reply thereto we would advise you as follows.

(1) We regard Section 51.9 to be controlled by the principles set forth in opinion issued to the Senate Contest Committee of this date, copy of which is attached hereto and by this reference made a part hereof.

59-4-1

(2) Insofar as Section 51.8 is concerned, which provides as follows:

> "Ballot boxes. It shall be the duty of the board of supervisors to provide the judges of election with such ballot boxes and other election supplies as may be required to be furnished in duplicate to accomplish the purpose of this chapter."

there are two controlling observations to be made. (a) According to the case of State v. Lockwood, hereinbefore referred to, the duty imposed by the foregoing statute is a ministerial one and failure to perform the duty does not invalidate the election, and (b) the criminal statute involved herein, to-wit, Sec. 51.16, imposes a penalty upon any judge or clerk violating the provisions of the chapter. Obviously this criminal penalty is not imposed upon the Board of Supervisors.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
First Assistant Attorney General

NAE:OS:MKB
Enc.

§51.12, Code 1958, concerning the duty of counting judges in relation to ballots with the accompanying §51.16, 1958 Code, is a mandatory statute. #59-4-2

March 30, 1959

Senate Contest Committee:
Senate Chamber
Building

Hon. D. C. Nolan
Hon. W. C. Stuart
Hon. J. D. Shoeman
Hon. J. J. O'Connor
Hon. G. L. Hoffman

Gentlemen:

This will acknowledge receipt of yours of the 26th inst. in which you submitted the following:

> "We, the undersigned, members of the Senate Contest Committee wherein Blythe Conn is the contestant and Carl Hoschek is the incumbent, respectfully request you to advise us whether or not Section 51.12, Code of Iowa 1958, is a mandatory statutory provision."

In reply thereto we advise as follows. The statute, Section 51.12, Code 1958, to which reference is made, provides the following:

> "County quarters - guarding ballots. Boards of supervisors shall provide suitable places for the counting of ballots, but when it becomes necessary to remove the ballot box from one room to another, or from one building to another, and at all times when they are in possession of the county board, they shall be under constant observation of at least two counting judges."

In this affirmative form as opposed to a prohibition against doing the acts therein directed, it would seem that the statute would be deemed directory, especially as the question arises after the election. However, the statute in this affirmative form is made the basis of a criminal penalty for its violation. Section 51.16, Code 1958, provides the following:

> "Violations. Any judge or clerk violating the provisions of this chapter shall be guilty of a misdemeanor, and, upon conviction thereof, shall be liable to a fine of not to exceed five hundred dollars, or imprisonment in the county jail not to exceed six months. Any person so convicted shall be disfranchised for five years thereafter."

Authority in that statutory situation concludes the statute to be mandatory. Section 27 of 50 Am. Jur., title Statutes, states the rule as follows:

> "Imposition of Penalty. It is a general rule of construction that where a legislative provision is accompanied by a penalty for a failure to observe it, the provision is mandatory. Even though there are no negative or prohibitory words in the statute, a prohibition is usually implied from the imposition of the penalty. In this connection, it has been declared that the legislature creates a criminal offense whenever it prescribes that a certain act shall be punishable either by fine or imprisonment or forbids it generally and, by implication, impowers the court to impose either fine or imprisonment. However, the imposition by statute of a penalty for the doing of an act does not always imply such a prohibition as will render the act void."

Citing in support thereof are precedents from California, Indiana, Mississippi, Ohio, South Dakota and Michigan, and the following Iowa case hereafter considered, Pennypacker v. The Capital Ins. Co., 80 Iowa 50, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395, and the following more recent cases: Territory v. Fasi, 40 Hawaii 478; State ex rel. Taylor v. Wade, 360 Mo. 895, 231 S. W. 2d 179; Worachek V. Stephenson Town School District, 270 Wis. 116, 70 N. W. 2d 657.

And addressing itself to the same rule, Sutherland Statutory Construction, 3rd Edition, Section 5818 stated the following:

"Whether a mandatory or directory construction should be given to a statutory provision may often be determined by an expression in the statute of the result that shall follow noncompliance with the provision. This may be true whether the result expressed concerns the validity of acts or proceedings to which the statute relates, provides criminal penalties, or lays down other noncriminal sanctions. A rule for determining whether a statute is mandatory or directory has even been formulated in terms of the stated consequences as the test. 'If (statutes are) mandatory, in addition to requiring the doing of the things specified, they prescribe the result that will follow if they are not done; if directory, their terms are limited to what is required to be done.' Of course, if the statute prescribes in terms that acts or proceedings shall be void if they are not done in the manner set out in the statute, the statutory prescription is obviously mandatory. And where the consequence stated is one from which the directions of the statute must be fatal to the action taken thereunder, the statute is mandatory.

"It may be observed that the problem here is one of determining whether the legislature intended to impose sanctions to secure compliance, and if so, what sanctions were intended. With respect to statutes imposing criminal sanctions or penalties, the rule has been stated with particular clarity that 'Where a legislative provision is followed by a penalty for failure to observe it, the provision is mandatory.' This may be seen as a part of the general problem of implied consequences of legislation."

" * * * *."

And the supplement thereto at page 27 thereof states the following:

> "Gowanlock v. Turner, 41 Cal. (2d) 296, 267 P. (2d) 310 (1954); Rosenfield v. Vosper, 70 Cal. App. (2d) 217, 160 P. (2d) 842 (1945). 'The general rule in determining whether a statute is mandatory or advisory is as follows: "Where the terms of the statute are preemptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory."' Tuthill v. Rendleman, 387 Ill. 321, 56 N. E. 2d 375 (1944); State ex rel. Dietrich v. Schade, 167 S. W. (2d) 135 (Mo. App., 1943).
>
> "'It seems to be obvious that the legislature deliberately and clearly intended the statutes to which we have referred . . . to be mandatory, because penalties are specifically prescribed for failure to proceed in accordance therewith.' State ex rel. Dietrich v. Schade, 167 S. W. (2d) 135 (Mo. App., 1943)."

And insofar as Iowa authority is concerned, as early as Bacon v. Lee and Gray, 4 Iowa 490, it was held that a penalty provided by statute against the doing of an act, renders the act illegal, though not expressly prohibited. The penalty amounts to a prohibition.

And Lumber Co. v. Board of Review, 161 Iowa 504, 507, states:

> "* * * This depends on whether the statute shall be construed as directory or mandatory. We know of no general rule by which to test a statute in this respect. The issue does not depend on the form of the statute, but upon the intention of the Legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the

other. 36 Cyc. 1157. Ordinarily statutes which are for the guidance of officers in the conduct of business devolving upon them, designed to secure order, system, and dispatch in the proceedings, and in the disregard of which the rights of persons interested cannot be injuriously affected, are held to be directory. Easton v. Savery, 44 Iowa 654; Hubbell v. Polk County, 106 Iowa 618.

"If, however, the language of such a statute is accompanied by negative words importing that the act or acts required shall not be done in a manner or at a time other than that prescribed, it must be construed as mandatory. Judge Cooley, after reviewing the decisions, lays down the rule as follows: 'Those directions which are not of the essence of the thing to be done, but which are given with a view merely to a proper, orderly, and prompt conduct of business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and, if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient if that which is done accomplished the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time, or in any other manner than as directed.' Cooley, Constitutional Limitations (5th Ed.), page 92.

* * * *.

"Negative terms are quite generally treated as indicative of a legislative intent that the provision shall be imperative (State v. Russell, 90 Iowa 572; Sterling v. Bedford, 94 Iowa 194), * * *."

And in Pennypacker v. The Capital Ins. Co., supra, it is stated:

"'The well-settled general rule is that, when a statute prohibits or attaches a penalty to the doing of an act, the act is void, and will not be enforced, nor will the law assist one

> to recover money or property which he has expended in the unlawful execution of it. Or, in other words, a penalty implies a prohibition, though there are no prohibitory words in the statute, and the prohibition makes the act illegal and void. * * * But, notwithstanding this general rule, it must be apparent to every legal mind that, when a statute annexes a penalty for the doing of an act, it does not always imply such a prohibition as will render the act void.' Pangborn v. Westlake, 36 Iowa 548. * * * 'Where a statute prohibits or annexes a penalty to its commission, the act is made unlawful; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. Where a statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined in order to decide whether or not it does contain anything from which the contrary can be properly inferred. There is no penalty pronounced against a person for obtaining a policy from or doing business with the company that has not complied with the requirements of those statutes.' * * *."

It is to be observed that the statutes here under discussion, Sections 51.12 and 51.16, do not appear to have been passed upon either by opinion of this Department or by court adjudication. The mandatory rule of statutory construction, to which address is made, has been the subject of adjudication insofar as elections are concerned by the Supreme Court of Iowa but none of them appears to adjudicate a comparable statutory situation, to-wit, an affirmative duty imposed on an election official together with a criminal penalty for its violation. In Marsh v. Huffman, 199 Iowa 788, 796, it was said:

"It is admitted in the record that the statutory requirement that the ballots shall be folded, wired, and sealed in the method marked out by statute, was wholly neglected in this matter. We have said, in Murphy v. Lentz, 131 Iowa 328, that this statute is only directory, and that a failure to comply therewith will not defeat the will of the electors."

In State v. Lockwood, 181 Iowa 1233, 1240, it was said:

"* * * We think that the duty of the election officers to furnish two ballot boxes was a ministerial duty, and that their failure to perform such duty does not invalidate the election. Many authorities are cited to sustain this proposition, and we shall not attempt a review of the cases or the reasoning. The rule is stated in 15 Cyc. 316, 352, 372, 373. See also Younker v. Susong, 173 Iowa 663; Hope v. Flentge, (Mo.) 47 L. R. A. 806, 821; Gilleland v. Schuyler, 9 Kans. 569; Perry v. Hackney, (N. D.) 90 N. W. 483; District Twp. of Lincoln v. Independent Dist. of Germania, 112 Iowa 321; State v. Alexander, 129 Iowa 538; Chapman v. State, (Tex.) 39 S. W. 113; Allen v. Glynn, (Colo.) 15 L. R. A. 743; Independent School Dist. v. Independent School Dist. 153 Iowa 598; State v. Shanks, (S. D.) 125 N. W. 122; Cook v. Fisher, 100 Iowa 27; State v. Russell, (Neb.) 15 L. R. A. 740, 5 Encyc. of Evidence, 69."

Only in the case of State v. Creston Mutual Telephone Company, 195 Iowa 1368, does it appear that the Iowa court has considered an election irregularity along with a criminal provision. The Court, while holding that the expressed will of the voters should not be thwarted because of "irregularities, or even illegalities," which are not shown to have effected the result, referred to Section 4927 of the Code (presently Section

Dairy and frozen food products:

AGRICULTURE: ~~DAIRY AND FOOD: FROZEN PRODUCTS;~~

Sale in Iowa of an edible frozen product resembling ice cream made exclusively from vegetable oils is not precluded by Sections 190.9 or 190.5, 1958 Code. (Formal to Liddy, Ag. Dept. 3/30/59)

59-4-3

March 30, 1959

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

Dear Sir:

This opinion reconsiders your question of January 14 as follows:

"This department is in receipt of a letter of inquiry from a major manufacturer of dairy products requesting information as to the legality of a frozen product in the semblance of ice cream manufactured entirely from vegetable oils which they expect to manufacture and offer for sale in the State of Iowa.

"We direct your attention to Section 190.5 of the 1958 Code of Iowa which states as follows:

'Adulteration with fats and oils. No milk, cream skimmed milk, buttermilk, condensed or evaporated milk, powdered or desiccated milk, condensed skimmed milk, ice cream, or any fluid derivatives of any of them shall be made from or have added thereto any fat or oil other than milk fat, and no product so made or prepared shall be sold, offered or exposed for sale, or possessed with the intent to sell, under any trade name or other designation of any kind.'

"We would also like to call your attention to Section 190.9 of the 1958 Code which states as follows:

'Sale by false name. No person shall offer or expose for sale, sell, or deliver any article of food which is defined in this chapter under any other name than the one herein specified or offer or expose for sale, sell, or deliver any article of food which is not defined in this chapter under any other name than its true name, trade name, or trade-mark name.'

59-11-2

"Would you kindly advise us at your earliest possible convenience if either of these Sections would, in your estimation, preclude the manufacture and sale in the State of Iowa of a product made in the semblance of ice cream from vegetable oil, or if there might be another Section which we have not noted which would prohibit the manufacture and sale of a product of this nature under a distinctive trade name."

and affirms and takes the place of our response thereto dated January 19, 1959:

"In response thereto, I advise as follows. Since the facts of your letter indicate that the frozen product to which you refer, while resembling ice cream, does not contain any of the milk products indicated in 190.5, Code of 1958, we feel that the same could in no way be considered an adulteration.

"Additionally, since the product referred to is not one 'defined in this chapter' (that is, Chapter 190) and presumably will be sold under its true name, trade name, or trade-mark name, it is our opinion that the same is not in violation of Section 190.9 either."

The only other statutes which appear related to the subject under discussion are 190.1 (34), (35), and (36b). The former two sections are statutory definitions of ice cream and flavored ice cream. They contain provisions establishing marketing minimums. Section 190.11 (36b) deals with substandard frozen dessert. However, like the other two subsections, the dessert there contemplated is a product containing milk or a milk derivative and as such prescribes no requirements bearing on the product you mention.

These conclusions are reinforced by a long-standing rule of statutory construction to which the Iowa Supreme Court has adhered. The court, endorsing the view of Jones vs. Thompson, 240 Iowa 1024, 38 N.W. 2d 672, in Hindman vs. Reaser, 246 Iowa 1375, at 1379, said:

'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.'

Thereafter follow a number of further refereuces to prior cases and other legal authorities substantiating the same proposition.

It is, therefore, the opinion of this office that these statutes do not presently comprehend the product referred to, and that under the rule of statutory construction set out above we may not search for meanings beyond their language.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:kr

Auditors as employees - -

DEPARTMENT OF SOCIAL WELFARE - ~~MEDICAL & REMEDIAL CARE~~ - PUBLIC WELFARE - ~~MEDICAL & REMEDIAL CARE~~ - ~~MONITORS~~ - As employees -

The employment of a professional pharmacist to audit drug bills under the medical and remedial care program does not constitute such auditor as employee of the State under the provisions of Sections 234.12 and 234.13 of the Code of Iowa, 1958. (Bearce to Getscher, Fremont Co. Atty., 3/31/59) # 59-4-4

March 31, 1959.

Mr. Edwin A. Getscher
County Attorney
Fremont County
Hamburg, Iowa

Dear Mr. Getscher:

With reference to your favor of recent date requesting opinion which reads as follows:

> "(1) that the State Social Welfare Department sent out to the Fremont County Director a Medical and Remedial Care Employee's Manual, bearing #VI-16 at page 6 thereof appears the following
>
> "If payment for services of the members of the Committee are approved by the County Board of Social Welfare, such claims shall be reported as local administrative expense on Form AA-4103-0, Report of Local Administrative Expense. (See III-2-33a)
>
> "Payment to the designated pharmacist for services rendered, in connection with auditing drug bills, shall be on the basis of payment approved by County Board of Social Welfare. Such claims shall be reported as indicated in the preceding paragraph.'
>
> "Pursuant thereto the Fremont County Social Welfare Director Merton W. McKinley requested the Fremont County Board of Supervisors to bear the expense of a local pharmacist to audit the medicine claims. Since Chapter 234.13 of the Code of Iowa, 1958, provides that compensation of County Board employees shall be paid by the State Board; and
>
> "(2) Whereas, the 1948 Op Att Gen page 88 stated that employees of County Boards of Social Welfare are State and not County employees, I advised the Fremont County Board of Supervisors that the Pharmacist employed to audit these claims would be an employee of the State, and would consequently have to be paid by the State.
>
> "Since these two views are contradictory, it is impossible to advise appropriate procedure for the payment of the local auditing pharmacist."

59-4-4

we beg to advise as follows:

Under the provisions of the Employees Manual, re: medical and remedial care as issued by the State Department of Social Welfare, provision is made therein for the County Board of Social Welfare to select a pharmacist to review drug bills on a monthly basis.

The monthly audit of drug bills shall be made in the office of the County Department of Social Welfare.

We believe that the employment in question is not employment such as is contemplated under the provisions of Section 234.12 of Chapter 234 which establishes the State Department of Social Welfare and prescribes the powers and duties of the State Board of Social Welfare acting for the State Department.

To become an employee within the provisions of said statute as interrelated with the federal regulations under the provisions of the Federal Social Security Act, a person must qualify under what is called a Merit System as set forth in the Iowa Departmental Rules - 1958, pages 231 to 249 inclusive.

We think it is quite clear that the auditors contemplated in said manual VI-16, do not qualify as either county or state employees. See opinion of Attorney General, August 1, 1938, copy of which is enclosed herewith.

We feel that these auditors as contemplated, come within the common law conception of employer-employee-independent contractor-relationship. The small amount of compensation paid for the auditing services furthermore does not qualify such an employee under the Iowa Public Employees Retirement System. The County Board exercises no control over the physical efforts of said auditors, nor the time, place, method or character of his work, other than the audit shall be made in the office of the County Department of Social Welfare. These auditors, like certified public accountants, certainly are free from any control or supervision of the method or character of their work.

The relationship which these auditors in question bear to the County Board of Social Welfare, viz, employer-employee- independent-contractor-relationship, is analyzed and discussed fully in the case of Meredith Publishing Company vs. Iowa Employment Security Commission, in 232 Iowa, page 666. Judge Bliss, speaking for the Supreme Court, said on page 677:

> "If such an individual is subject to the control of the one for whom the services are performed,

> merely as to the result to be accomplished by the work and not as to the means, methods and manner of accomplishing the result, he is an independent contractor and not an employee."

These auditing services might well be compared to any other type of personal services that are contracted for from time to time such as services for maintenance of office equipment, or even janitor services, and as such, are chargeable as administrative expenses as set up in the manual.

Therefore, it is our opinion that the employment of a professional pharmacist to act as auditor in connection with the auditing of drug bills does not constitute such auditor an employee of the State, under the provisions of Sections 234.12 and 234.13 of the Code of Iowa, 1958.

Very truly yours,

Frank D. Bianco
Assistant Attorney General

FDB/ap

MOTOR VEHICLES: Sunday laws constitutional -- H. F. 311, 58th General Assembly, amending §322.3, prohibiting the buying or selling at retail of new or used motor vehicles on Sunday is presumptively constitutional. (Burke and Strauss to Loveless, Gov., 4/1/59) #59-4-5

April 1, 1959

Hon. Herschel C. Loveless
Governor of Iowa
B u i l d i n g

My dear Governor:

Reference is herein made to yours of the 27th ult. in which you submitted the following:

> "Your attention is invited to H. F. 311, which amends Section 322.3, Code 1958, to prohibit the buying or selling at retail of new or used motor vehicles on 'the first day of the week, commonly known and designated as Sunday'.
>
> "I respectfully request an opinion from your office on the following question:
>
> "Does the proposed amendment to Section 322.3 violate Article I or other pertinent provisions of the Constitution of Iowa?
>
> "In view of the three day limit on the period in which I must reach a decision to approve or disapprove the bill, it would be appreciated if you could give this request your immediate attention."

A number of statutes and ordinances concerning the prohibition of the operation of stores or the sale of goods and merchandise on Sunday have been adjudicated. Such statutes and ordinances appear in various forms. Some are prohibitory of business generally on Sunday with exception; some are prohibitory of the operation of establishments for the sale of new or

used cars on Sunday; some prohibitory of the keeping open or exhibiting articles for sale, such as clothing stores, grocery stores, drug stores, on Sunday; some prohibiting the operation of certain specified stores on Sunday with the exception of certain other specified stores; some prohibiting the sale of commodities generally on Sunday; some prohibiting the sale of commodities with certain exceptions; each depending for a determination of constitutionality upon the wording of the particular statute or ordinance under consideration.

For a number of these precedents see Annotation, 57 A. L. R. 2d 975. The problem to which address is made in that annotation and present in H. F. 311 is stated in such annotation in the following words:

> "Attacks have been made on the validity of laws regulating the operation of stores, or the sale of commodities, on Sunday, on numerous grounds, both constitutional and otherwise. The courts have upheld such attacks in some cases and denied them in others, depending on the particular provisions presented, the surrounding circumstances, and also, under what legal theory the court views the question of discrimination generally.
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> "The question whether a Sunday law is discriminatory as the result of an unreasonable classification of stores or commodities therein is one of the principal issues in regard to the validity of such laws. This, of course, brings into play the constitutional issues of equal protection of the law, and due process of law.
>
> "Sunday closing ordinances have sometimes been held invalid on the theory that the discrimina-

> tions contained therein between different kinds of stores or different kinds of commodities varied from the discriminations permitted by an applicable statute."

As so presented, we exhibit here the terms of H. F. 311 as follows:

> "Section 1. Section three hundred twenty-two point three (322.3), Code 1958, is hereby amended by adding thereto a new subsection as follows:
>
> "No person licensed under this chapter shall, either directly or through an agent, salesman or employee, engage in this state, or represent or advertise that he is engaged or intends to engage in this state, in the business of buying or selling at retail new or used motor vehicles on the first day of the week, commonly known and designated as Sunday."

It will be noted that the Bill provides (1) a prohibition against engaging in the business of buying or selling at retail new or used motor vehicles on Sunday; (2) it prohibits the representation or advertising that the licensee is engaging in or has the intention of engaging in such business on Sunday.

1. Insofar as the provisions of the Bill are concerned prohibiting engaging in the buying or selling of automobiles on Sunday and limiting precedent thereon to statutes comparable to H. F. 311 as controlling the sale of a specific commodity or goods, in Gundaker Cent. Motors v. Gassert, 23 N. J. 71, 127 A. 2d 566, the New Jersey court upheld the validity of a statute which prohibited the dealing in new or used cars on Sunday and provided a penalty for violations, it being reasoned that the statute was within the Legislature's police powers and not violative of the equal protection or due process clauses of the state

or Federal constitutions. However, the Missouri Supreme Court, in McKaig v. Kansas City, 363 Mo. 1033, 256 S. W. 2d 815, held that an ordinance that prohibited any dealer in new, used or second-hand motor vehicles from keeping open, operating or assisting in keeping open or operating any place of business on Sunday and certain designated holidays was a special law and violated a provision of the Missouri Constitution that the General Assembly should not pass any local or special law where a general law could be applicable. Quoting from the annotation referred to it was there stated:

> " * * * The court approved the rule that the test of a special law was the appropriateness of its provisions to the object it excluded, noting that the ordinance in question excluded all persons engaged in businesses of selling all commodities and all merchandise except automobiles. The court said there was no reasonable basis for singling out those people who were engaged in the business of selling automobiles and excluding those who sold all other commodities, who were permitted to keep open their places of business on Sunday and the holidays named. * * *"

In this connection we would call attention to the following provision contained in Article III, Section 30, of the Iowa Constitution, to-wit:

> "Local or special laws - general and uniform - boundaries of counties. Sec. 30. The General Assembly shall not pass 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 on 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.
>
> "In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State; * * *."

In the case of Mosko v. Dunbar, 309 P. 2d 581, the Colorado court held the following statute:

> "'Section 2. - Sunday closing - No person, firm or corporation, whether owner, proprietor, agent or employee, shall keep open, operate or assist in keeping open or operating any place or premises or residences whether open or closed, for the purpose of selling, bartering or exchanging, or offering for sale, barter or exchange, any motor vehicle or motor vehicles, whether new, used or second hand, on the first day of the week, commonly called Sunday; and provided, however, that this act shall not apply to the opening of an establishment or place of business on the said first day of the week for other purposes, such as the sale of petroleum products, tires, automobile accessories, or for the purpose of operating and conducting a motor vehicle repair shop, or for the purpose of supplying such services as towing or wrecking."

as valid and not violative of the equal protection provision of the Federal Constitution or violative of a state constitutional provision prohibiting class legislation. And the Supreme Court

of Michigan in the case of Irishman's Lot v. Cleary, 62 N. W. 2d 668, held the following act:

> "'Sec. 1. It shall be unlawful for any person, firm or corporation to engage in the business of buying, selling, trading or exchanging new, used or second-hand motor vehicles or offering to buy, sell, trade or exchange, or participate in the negotiation thereof, or attempt to buy, sell, trade or exchange any motor vehicle or interest therein, or of any written instrument pertaining thereto, on the first day of the week, commonly called Sunday. * * *'"

constitutional in the following terms:

> "In our opinion the statute in question is within the police power of the state and not in conflict with any express provision of the constitution. The decree dismissing plaintiff's bill of complaint is affirmed, but without cost as the construction of a statute is involved."

And the Supreme Court of Indiana in Tinder v. Clarke Auto Co., 149 N. E. 2d 808, where in considering the following act:

> "'Any individual motor vehicle retail dealer, any member of a partnership or a firm which operates a motor vehicle establishment, or any officer or director of a corporation which operates a motor vehicle establishment, or any agent or employee of such individual, partnership, firm or corporation, who shall carry on or engage in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles, or who shall open any motor vehicle retail establishment wherein he attempts to or does engage in the business of buying, selling, exchanging or trading in new or used motor vehicles, or who does buy, sell, exchange or trade in new or used motor vehicles on the first day of the week, commonly called Sunday, is hereby declared to be a disorderly person. * * *' (Our italics.)"

stated:

> "Only in Missouri has such an ordinance been held unconstitutional. McKaig v. Kansas City, 1953, 363 Mo. 1033, 256 S. W. 2d 815, 816. Also, in Florida in cases involving a general Sunday closing law, F. S. A. §§ 855.01, 955.02 not limited to the sale of motor vehicles but in which cases motor vehicle dealers were involved, the law has been held invalid. Henderson v. Antonacci, Fla. 1952, 62 So. 2d 5, Kelly v. Blackburn, Fla. 1957, 95 So. 2d 260.
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> "For an extensive discussion regarding the decisions of the various states on the subject of the action, see 57 A. L. R. 2d 969.
>
> "Under the principles heretofore discussed and recognized in the majority of the other courts which have considered the question, we conclude that § 10-4305, supra, which imposes an additional penalty upon the already generally unlawful business of selling automobiles at retail on Sunday, does not violate Art. 1, § 23, or Art. 4, §§ 22 and 23, supra, of the Constitution of Indiana."

A statute comparable to H. F. 311 or an adjudication thereof does not appear to have been adjudicated in Iowa. In view of the foregoing we are disposed to the view that so far as the problem treated in section 1 hereof is concerned, the Bill presumptively does not violate pertinent constitutional provisions of Iowa. Whether such constitutionality will result where facts are presented for court adjudication we do not forecast.

2. Insofar as the prohibition referred to in paragraph 2 hereof is concerned, we would call attention to the fact that search reveals no precedent pertaining to such provisions in a Bill of the character herein reviewed. Presumptive unconstitutionality does not appear therein.

We would advise you again that facts may present constitutional questions not apparent from the terms of the Bill itself.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
First Assistant Attorney General

NAE:OS:MKB

COMPATIBILITY OF OFFICE: Highway Commission, Hospital Trustee

No incompatibility between the offices of a member of the Highway Commission and a member of the board of trustees of a county hospital.

(Strauss to Stong, Mar., 4/2/59) # 59-4-7

April 2, 1959

Mr. Jo S. Stong
Attorney at Law
Keosauqua, Iowa

My dear Sir:

This will acknowledge receipt of yours of the 31st ult. in which you advise that you have been appointed to serve on the Highway Commission beginning July 1, 1959, and that you are presently a member and chairman of the Board of Trustees of the Van Buren County Memorial Hospital which is an elective office. You ask for an opinion as to whether you can hold both offices or should resign one. In reply thereto I would advise you that I find no incompatibility or other disqualification that would prevent you from holding both of these offices.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

WORDS AND PHRASES: "Contiguous" --
The word "contiguous" as used in §528.51, Code 1958, means "actual contact", "meeting at the surface". Touching at the corners is not "contiguous". (Strauss to Gronstal, Bkng. Supt., 4/3/59)
F 59-4-8

April 3, 1959

Mr. Joe H. Gronstal
Superintendent of Banking
L o c a l

Dear Sir:

This is in reference to your oral request as to the meaning of the word contiguous as used in Section 528.51, Code 1958, where it is provided:

> " * * * No banking institution may establish any office beyond those counties contiguous to the county in which said banking institution is located * * *."

As related to school legislation the Supreme Court in State v. Community School District of St. Ansgar, 247 Iowa 1167, 78 N. W. 2d 86, defined the word as follows:

> "On various occasions in the past we have discussed the applicable meaning of the word 'contiguous' as it relates to school legislation. Smith v. Blairsburg Independent School Dist., 179 Iowa 500, 506, 159 N. W. 1027, 1028. We said there:
>
> "'All essential is that the boundaries of the proposed district be indicated, and that the territory therein be contiguous. According to Webster's Dictionary, "contiguous" means: "In actual contact; touching; also near, though not in contact; neighboring; joining." And the Century Dictionary defines the word as: "Touching; meeting or joining at the surface or border; hence, close together; neighboring, bordering or joining; adjacent; as to two certain objects; houses or estates." The evident design of the Legislature was that the 16 or more sections composing the consolidated district should together constitute an undivided or solid body of land.' (Emphasis supplied.)

59-4-8

> "We held that if the territory included constituted 'one body of land' the contigous requirement of the legislation was met. Also see Zilske v. Albers, 238 Iowa 1050, 1058, 29 N. W. 2d 189; 3 Drake L. Rev. 57, 69; and 1925-26 Attorney General's Opinions, page 70, where it was held only contiguous territory could form a school corporation."

I regard such definition as equally applicable to the use of the word in the statute quoted. In addition and specifically by opinion of this Department appearing in the Report for 1925-26 at page 70 it was the holding that territories touching only at the corners were not contiguous. This opinion was cited with approval in the State v. Community School District case cited herein.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS: Reorganization -- Void petition no jurisdictional bar to subsequent petition under Code Section 275.12. (Cases cited)
(Reinmann to Hoover, Clay Co. Atty. 4/6/59)
#59-4-10

April 6, 1959

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Mr. Hoover:

Reference is made to your letter of March 27, which states the following:

> "I would request an official attorney general's opinion upon the following set of facts, to-wit: School area no. 1 files petition for reorganization under Chapter 275. Subsequently, area no. 2 files a petition for reorganization and the boundary lines of the two areas overlap so that some of the area in district no. 1 is included in the boundaries of the petition in district no. 2. Subsequently, area no. 3 files a petition for reorganization with boundaries overlapping with respect to area no. 2 only. Subsequently, petition no. 1 is dismissed and abandoned.
> My questions are as follows:
>
> 1. Taking into consideration the case of State ex rel Harvey Harberts et al., appellants, v. Klemme Community School District (Hancock County) et al., appellees, 247 Iowa 46, and the recent case of Hohl vs. Board of Education, Poweshiek County, 94 NW 2nd 787, is petition for area no. 2 void because part of its territory is already included in petition no. 1, not yet completed at the time of the filing of petition no. 2?
>
> 2. If the petition for reorganization in area no. 2 is void, should the board in area no. 2 call a meeting and dismiss said petition?
>
> 3. If the petition for area no. 2 is void, then does this render petition no. 3 a valid and effective one although it includes land described in petition for area no. 2?
>
> 4. Does petition for reorganization of area no. 2 revive and become effective upon the dismissal of the petition in area no. 1."

59-11-10

In reply thereto:

School districts are creatures of statute with only those powers expressly conferred or reasonably implied. (cases cited therein) Op. Atty. Gen, 1956 page 195. In order to promote growth and development of the school districts, the legislature provided the method of reorganization which is found in Section 275.11, Code 1958, that provides to wit:

> "Subject to the approval of the county board of education contiguous territory located in two or more school districts may be united into a single district in the manner provided in sections 275.12 to 275.23 hereof."

In accordance with Section 275.12, Code 1958, a petition must be filed with the superintendent of schools containing all the requirements set out therein. However, the mere filing of the petition does not give the county board or boards of education (referred to as board) jurisdiction to hear the petition, if there has not been substantial compliance with the statutes. State ex rel Cox v. School District of Readlyn, 246 Iowa 566, 68 N.W. 2d 305. In addition, the board can not acquire jurisdiction in those cases where an area included in the petition is an area included in a prior-pending reorganization. State ex rel Harberts v. Klemme Community School District, 247 Iowa 58, 72 N.W. 2d 512, Hohl v. Board of Education, ___ Iowa ___, 94 N.W. 2d 787. When there are petitions with conflicting or overlaping territory, the first petition has precedence over the subsequent petition and the subsequent petition should be considered as a substantial or material departure from the statutory requirements. A departure from statutory requirements would be a defect in the petition and as such would be fatal to reorganization. State ex rel Warrington v. Community School District of St. Ansgar, 247 Iowa 1167, 78 N.W. 2d 66.

Therefore, in answer to your first question, a petition filed with the superintendent of schools, which contains fatal defects so as to prevent the board from acquiring jurisdiction, is void ab initio and should be dismissed by the board on the ground that when the subsequent petition was filed (which contained a fatal defect) the board lacks jurisdiction to hear the petition.

The definition of the word, "void" is discussed at great length in the case of Van Shaack v. Robbins, 36 Iowa 201. The court held in the V an Shaack case, supra, "The word 'void' (in its narrowest limit) * * * means, 'of no legal force or effect whatsoever', null and incapable of confirmation or radification" and in its broadest limit, "the word 'void' (could have) the meaning of voidable." (parenthasis added). In view of the Klemme case, supra, an untimely filing of a petition with the superintendent of Schools, which the board can not take jurisdiction, is "of no legal force or effect" and therefore must be void as a matter of law.

A petition that is void, can not be considered by the board at a subsequent date because at the time of filing they acquire no jurisdiction over the matter which is essential to the reorganization of a school district. St. Ansgar Case, supra. In the case of De Berg v. County Board of Education, 248 Iowa 1039, 82 N.W. 2d 710, the court held that the Readlyn case, supra, the procedure of reorganization in Chapter 276 (now repealed) was very similar to the procedure in Chapter 275, Code 1958, thus the case should be followed as controlling with regard to the procedure of reorganization. Based on the reasoning in the Readlyn Case, supra, that once the board acquires jurisdiction, they have authority to correct any "fatal defects in the subsequent procedure" but they must be able to acquire jurisdiction in the beginning. However, as pointed out in the Klemme case, supra, jurisdiction is never conferred when the petition is "void" at the outset because of a prior-pending reorganization because of including territory of a subsequent petition. By the same line of reasoning, there is nothing to prevent the petitioners from refiling their petition after the final determination of the prior petition.

Thus the answer to your second question is negative, because any action taken by the petitioners in area #2 with regard to the petition they have filed would be superfluous, for the reason, the petition is void at the outset. I have indicated above what the proper procedure should be with regard to the subsequently filed petition.

The answer to your third question is affirmative, because there is no prior-pending reorganization before the board. The petition of area #2 has no effect on the petition of area #3 because the petition of area #2 being void ab initio, in essance, never lawfully existed.

There is no statutory authority for the filing made at one time but later perfected by operation of law on the happening of a condition subsequent. Therefore, the answer to your fourth question is negative because of the doctrine of expressio unius est exclusio alterious as applied in the De Berg case, supra.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
cc: Paul Johnston

Property tax liens —

~~HEADNOTE~~ TAXATION: ~~PROPERTY TAX. LIENS OF PERSONAL PROPERTY TAXES~~: Lien of personal property tax provided by Section 445.29, Code of Iowa (1958), is not a prior and superior lien to liens existing at the time the personal property tax becomes delinquent. (Brenhaman to Van Ginkel, Cass Co. Atty., 4/8/59) # 59-4-11

April 8, 1959

Mr. James Van Ginkel
Cass County Attorney
Atlantic State Bank Building
Atlantic, Iowa

Dear Mr. Van Ginkel:

This is to acknowledge receipt of your recent letter in which you request an opinion as to whether or not the lien of personal property taxes upon personal property has priority over the lien of a chattel mortgage. Your request indicates that you desire to know the answer to this question in two instances, the first being when the chattel mortgage was executed and recorded prior to the time that the personal property taxes became delinquent and the second being the situation where such chattel mortgage was executed and recorded subsequent to the time that the personal property taxes became delinquent.

The assumption is made that the personal property to which you are referring does not fall within the classification contemplated by Section 445.31, Code of Iowa (1958), and Sections 445.42 through 445.46, Code of Iowa (1958).

The lien of personal taxes upon taxable personal property is stated in Section 445.29, Code of Iowa (1958), which reads as follows:

> "445.29 Lien of personal taxes. All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person

59-4-11

> or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect. Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer whose personal property tax is delinquent."

The status of the lien created by Section 445.29, Code of Iowa (1958), is discussed in an official opinion of the Attorney General found at page 106 of the 1956 Report of the Attorney General, wherein it is held that this section does not create a first and prior lien on taxable personal property. This opinion further quotes from the Iowa Supreme Court decision of Bibbins v. Clark, 90 Iowa 230, 57 N.W. 884, wherein it was held that with respect to liens of this nature the priority of the lien is left to be determined by the rules of law applicable to all liens in the absence of special provisions.

Your questions are, therefore, answered as follows:

1. When the chattel mortgage was executed and recorded prior to the time the personal property tax became delinquent, the lien of the mortgage is prior.

2. When the chattel mortgage was executed and recorded subsequent to the time the personal property tax became delinquent, the lien for personal property taxes is prior.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/bjf

TAXATION: Tax deeds --
[redacted]: A tax sale certificate holder may procure a tax deed without paying anything to holder of prior tax sale certificate. (Benkenneto Strand, Winneshiek Co. Atty.; 4/9/59) # 59-4-12.

April 9, 1959

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

Dear Mr. Strand:

This is to acknowledge your letter of February 17, 1959 in which you request an opinion of this office as follows:

> This letter is in regard to certain questions concerning Chapter 446 and Chapter 447 of the Iowa Code.
>
> "The problem simply stated is this: Say Mr. X purchased a tax certificate under the provisions of the Code, chapter 446, in December of 1951 and paid the 1950 taxes and said Mr. X, the holder of the tax certificate, continued to pay the 1951 taxes and the 1952 taxes.
>
> "Mr. Y then purchased a tax certificate for the same parcel of land in 1954, for the 1953 taxes which were due, and subsequently Mr. Y paid the 1954 and 1955 and 1956 taxes.
>
> "Then in 1958 Mr. Z purchased a tax certificate for the 1957 taxes.
>
> "None of the parties, Mr. X, Mr. Y, or Mr. Z, have tried to redeem and get a tax deed. Mr. Z is inquiring as to how much it will cost him--in other words is Mr. X entitled to interest from the time of the original purchase and payment of subsequent taxes for the years 1951 and 1952 to the present day or is the interest figured only for the years up to and including the next tax sale on the 1953 taxes due--in other words, did his failure to pay subsequent taxes due in 1953 void any further interest due in this sale? As for this reason, property was again placed on tax sale in 1954 and purchased by Mr. Y.
>
> "The same question and procedure is relevant as to the interest due Mr. Y if Mr. Z were to redeem."

59-4-12

Your question is predicated upon the assumption that Z will, in some manner, be required to reimburse Mr. X and Mr. Y prior to procuring a tax deed for the property in question. This assumption is not in accordance with the laws of the state.

In the case of White v. Hammerstrom, 224 Iowa 1041, 277 N.W. 483, the Supreme Court of Iowa said at page 1046:

> "It is true that before a tax deed has been issued under a tax sale certificate for taxes delinquent after the first tax sale was made, a person may have a right to redeem before a tax deed is issued under a tax sale certificate for subsequent delinquent taxes; but no statute has been called to our attention giving the holder of a prior tax sale certificate the right to redeem from the holder of a tax deed acquired under a subsequent tax sale certificate.
>
> "The most that can be claimed for appellant is that, under his prior tax sale certificate, he had a right to redeem from a subsequent tax sale certificate before it ripened into a deed. * * *."

A further statement to the effect that a subsequent holder of a tax certificate may procure a tax deed from the treasurer without paying the taxes paid by a prior certificate holder is contained in Hubbard v. Hammerstrom, 231 Iowa 1316, 2 N.W.2d 658, which statement is as follows:

> "* * *. Plaintiff, as the holder of his tax-sale certificates, had the right to redeem from the tax sales, the certificates for which were held by Lohr. White v. Hammerstrom, 224 Iowa 1041, 1046, 277 N.W. 483. It is conceded that notices of the expiration of redemption, required by statute, were duly and legally served upon all persons entitled to such notice under the statute, and that such services were made and completed within the time and in the manner required by statute, in all respects. It is also conceded that no redemption was made within the time required by statute, by the plaintiff or by anyone else. The statutes provide a method for redemption by which the plaintiff could have protected his rights under his certificates of tax sale. But he failed to take advantage of these statutory provisions.

> After he procured these certificates, he served notices of the expiration of the redemption periods, but he did nothing further. Neither he nor anyone else paid the taxes for any of the years subsequent to the issuance of his tax certificates. Because of such failure, it was the duty of the County Treasurer to again sell the properties at tax sale. The properties were bid in for the delinquent taxes, and the certificates of such sales became the property of Lohr, who thereafter fully complied with the statutory provisions with respect to redemption, so that it was the duty of the County Treasurer to issue tax deeds to him. * * *."

The answer to your question, therefore, is that Z need not pay any amount to X or Y and may procure a tax deed without making any such payment. X or Y may redeem from Z, however, prior to the time Z procures a tax deed.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

TAXATION: City Property --
Property owned by City and used for public purpose does not lose exempt status because income is derived by City for incidental use of property. (Brinkman to Dunn, Hardin Co. Atty., 4/10/59) #59-4-13

April 10, 1959

Mr. William N. Dunn
Hardin County Attorney
Eldora, Iowa

Dear Mr. Dunn:

This is to acknowledge receipt of your recent letter in which you request an opinion of this office upon the status for real property tax purposes of property owned by the City of Iowa Falls and used as an airport.

This is to advise you that the fact that crops are grown between the runways of said airport and that the City of Iowa Falls realizes a profit from the sale of those crops does not change the exempt character of said property under the rule announced in City of Osceola v. Board of Equalization, Clarke County, 188 Iowa 278, 176 N.W. 284 (1920). An Attorney General's Opinion dated May 14, 1926, appearing at page 349 of the 1926 Report of Attorney General, is further authority for this proposition.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

59-4-13

SCHOOLS: Tuition-- Attendance outside of county. ~~In view of~~ Novak vs. Oneida Township School Board, ___ Iowa ___, 95NW 2d 291 cited. (Rehmann to Gray, Calhoun Co. Atty., 4/13/59.

59-4-14

April 13, 1959

Jack R. Gray
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Gray:

Reference is made to your letter of April 10 in which you state the following:

"It appears that one of our schools of Calhoun County is contemplating doing away with facilities to educate the tenth, eleventh and twelfth grades, and only maintaining school for those children up through the ninth grade.

"The issue that is at point is whether or not the local school board, who is contemplating doing away with school facilities of the tenth, eleventh and twelfth grades, has the exclusive discretion as to the attendance of these pupils when request has been to attend another highschool outside of the County, making the local school district responsible for the tuition and transportation.

"The Superintendent of Schools of Calhoun County desires to know whether or not they have any right or authority to object and override the local school board when they designate such pupils to attend a highschool outside of Calhoun County, rather than attending another highschool in the County of Calhoun.

"According to Section 282.7 it implies that the said pupils may attend the school of their choice, but to obtain transportation must attend the district as designated by the local school board.

"Section 285.4 appears to apply mainly to grade children and states that the same must have the approval of the County Board of Education. Thereby leaving us in a quandary as to the problem which should be applied in dealing with highschool pupils and their attendance and whether or not the Superintendent of Schools and the County Board of Education can override the designation of the local school board."

59-4-14

In reply thereto:
Section 282.7, Code 1958 provides:
"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." (Emphasis ours)

Your attention is directed to the recent case of Novak vs. Oneida Township School Board, ___ Iowa ___, 95 NW 2d 291. The Court said in essence, the school board shall make a designation of the school for the attendance of its pupils, when not maintaining their own facilities. The designation by the school board has to be reviewed and approved by the county board of education. An appeal can be made to the State Superintendent from the decision of the county board and the State Superintendent's decision will be final.

After the designation is made, a high school student has a choice whether to attend the designated school or a school of his choice. In either event, the school district will be liable for the tuition of that student. However, if the student chooses the later school for attendance, then the school district need not furnish transportation to that student. (Op. Atty. Gen. 1936, 185.)

Yours very truly,

THEODOR W. REIMANN, JR
Assistant Attorney General

TWR:mmh5

STATE OFFICERS AND DEPARTMENTS: Industrial Commissioner -- Attorneys fees -- Subrogation. Under S.F. 428 the total attorneys fees would be deducted from the total recovery and only the proportionate amount, as allowed by the district court, would be deducted from the amount of the subrogation recovery. (Hutton to Fischer, St. Rep., 4/14/59)
59-4-15

April 14, 1959

Hon. Harold O. Fischer
House of Representatives
Statehouse
Local

Dear Mr. Fischer:

Your letter of April 13, 1959, is as follows:

"I have gotten into quite an argument with one of our attorney house members regarding the innocence of this particular bill. It is my opinion, and I am not an attorney, that if this bill was passed, the attorney's fees would be deducted from the amount subrogated rather than from the entire amount allowed out of the recovery of the damages. In other words, in the event an employee was paid $2,000.00 under the workmens compensation law and subsequently sued a third party for $10,000.00 and collected, the attorney's fees for the entire case would be deducted from the $2,000.00 prior to payment to the workmens compensation insurance carrier."

85.22 in pertinent part, with the amendment S.F. 428, would read as follows:

"85.22. * * *
" 1. If compensation is paid the employee * * *, the employer by whom the same was paid, * * *, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed, by the district court, to the injured employee's or his personal representative's attorney, * * *."

Although the statute as amended may appear somewhat ambiguous, it is clear that the amount of attorney fees, at least as to the amount to be deducted from the subrogation claim, is within the discretion of the district court. Therefore, as a practical matter I do not believe the result pointed out in your letter would occur even if such may be a possibility.

59-4-15

The problem to which this amendment is addressed was pointed up in the recent case of Tucker vs. Mason. In that case the employer recovered in full the workmen's compensation paid without any reduction for the proportionate amount of the attorneys fees incurred in the recovery. The only claim made was that the proportionate amount be deducted. The problem to which this amendment is addressed would thus appear to be limited to the proportionate amount of attorneys fees to be deducted.

The Court in the Tucker case suggested that the employee was seeking to have the Court add the words "less attorneys fees incurred by employee." The Court appears clearly to be of the opinion that with the addition of these words the proportionate amount of attorneys fees as claimed by the employee could be deducted. The words suggested by the Court would appear to be subject to the same interpretation which you suggest in your letter.

It is also to be noted that the section amended is concerned with the amount of the subrogation claim of the employer and not with the over-all amount of the recovery. It, therefore, could logically be argued that the attorneys fees as contemplated in this section by the amendment S.F. 423, relate to the attorneys fees incurred in connection with the recovery of the amount of the subrogation claim and not with the total attorneys fees incurred for the total amount of the recovery.

I am therefore of the opinion that with the passage of S.F. 423 the total attorneys fees would be deducted from the total recovery and only the proportionate amount, as allowed by the district court, would be deducted from the amount of the subrogation recovery.

Yours very truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh5

NATIONAL GUARD: Lease of Armory --

~~HEADNOTE~~: Real property owned by the state of Iowa cannot be leased in the absence of express legislative authority.

(Forrest to Tandy, Adj. Gen., 4/14/59)

59-4-16

April 14, 1959

Maj. Gen. Fred C. Tandy
The Adjutant General
PO Box 616
Des Moines 3, Iowa

Sir:

In response to your oral request concerning the possibility of leasing land held in the name of the State of Iowa and presently in use for the Humbolt National Guard Armory, I must advise that the power to dispose of state property is vested in the Legislature which must make transfer of the same by statute. In Reports of the Attorney General, 1919, at page 56, the opinion states in pertinent part as follows:

> "The title to said property was thereby vested in the state of Iowa, and there is no authority for the sale of such property belonging to the state of Iowa except by legislative enactment.
>
> "The power to dispose of state property is vested in the legislature, which must make provision for the transfer of same by statute.
>
> " * * *
>
> "The same rule would obtain with reference to the matter of the leasing of said land."

We return herewith your file entitled Leases-Title Documents (Humbolt) and letter from Col. Lindhart concerning the above referred to action.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:kj
Enc.

59-4-16

TAXATION: Homestead Credit – Where a contract purchaser of real estate assigns his purchaser's equity as security for a loan he is deemed equitable owner and is entitled to homestead tax credit. (Brinkman to Miller, Tax Comm'n 4-14-59) #59-4-17

April 14, 1959

Mr. Leon N. Miller
Chairman
State Tax Commission
Building

Dear Mr. Miller:

This will acknowledge receipt of your letter of February 17, 1959, in which you request the opinion of this department on the following described problem:

> B purchased certain property from A on contract. Thereafter, B assigns his interest in the contract and transfers his equity in the realty to X, a loan corporation, as security for receipt of a loan. This "assignment" provides that upon repayment of the loan, the purchasers equity in the contract for sale of real estate is to be returned to B. Both the contract of purchase and the assignment were duly executed and properly recorded. The question of whether B is entitled to a homestead tax credit is now at issue.

Courts have uniformly held that the type of transaction herein involved shall be treated in equity as a mortgage. This rule is set forth in 59 C.J.S. 45, as follows:

> "The assignment of the interest of the purchaser in a contract for the sale of land or bond for title as security for the payment of money due by him constitutes as equitable mortgage and gives the assignee the interest of a mortgagee therein, even though the assignment is absolute in form and even though the assignee acquires a deed from the vendor."

The Supreme Court of Iowa has on several occasions considered this problem and has concluded that where there is a transfer intended as security for a debt, it will be treated in equity as a mortgage. Parry v. Reinertson, 208 Iowa 739, 224 N.W. 489, Vigars v. Hewins, 134 Iowa 683, 169 N.W. 119.

Thus, it is evident that by virtue of their assignment, the X corporation received only bare legal title, and equitable title remains in B. In Johnson v. Board of Supervisors, 237 Iowa 1103, 24 N.W. 449, the court held that one who holds equitable title to real estate, holds fee simple title for purposes of determining whether he qualified as an owner within the terms of the Homestead

Tax Credit Act. In this case, as in the instant case, a conveyance was made for purposes of security only. The court in allowing the homestead credit to the property of the transferor, stated:

> "Rivey holds the naked legal title to an undivided half interest for the sole purpose of securing liens for that part of the purchase price he loaned the plaintiffs. But under repeated holdings, as the petition alleges, Rivey's interest is only that of mortgagee. Plaintiffs not only hold the 'title', in the sense that they are owners, but they hold the equitable title – that is, the right to have the legal title transferred to them by discharging their debt to Rivey.
>
> "* * * The homestead surely need not be unencumbered to be entitled to the credit.

It is, therefore, the opinion of this office that, assuming B has met all other statutory requirements, he is entitled to a homestead credit even though he has transferred his purchaser's equity as security for the loan.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

HEALTH: Vital Statistics -- In case of unattended self-delivery where mother refuses to sign birth certificate and coroner determined cause of death as "suffocation . . . after self delivery", coroner should sign birth certificate under Code sections 144.16 and 144.18. (Wila to Chancellor, Reg. Vit. Stat., 4/14/59)

#59-4-18

April 14, 1959

Mr. L. E. Chancellor, Director
Division of Vital Statistics
State Department of Health
L O C A L

Dear Sir:

Receipt is acknowledged of your letter of March 2 as follows:

> "I am enclosing our correspondence and photo copies of the birth and death certificates filed for a set of twin girls. These events occurred on January 11, 1959 at Davenport, Iowa.
>
> The births occurred at home and the delivery was by the mother. Since the twins apparently died shortly after birth the mother refused to sign the certificates as it would be an admission that could be used against her in the court action pending.
>
> Our question is who should sign the birth certificates?
>
> The return of the correspondence and photo copies with your reply will be appreciated."

Since the situation described is so unique considerable research has been engaged in by our research clerks to determine whether case precedents exist. No precedents in point were discovered, but the cases indicate the real problem is one of evidence rather than substantive law; the essential fact to be established being that there actually were live births.

59-4-18

This eseential bit of evidence would determine not only the question as to the execution of the birth certificate but also whether there exists a question of criminal law paralleling the administrative law question. It is noted from the correspondence attached to your letter that the hospital records librarian advised you on February 18:

> "There is litigation pending regarding the death of these infants, and for this reason the doctor who accepted the case on admission to the hospital does not wish to sign these certificates. He states he did not see these babies alive, and in signing these certificates he would be certifying these babies were born alive."

The correspondence file also reveals the local registrar wrote you on February 20:

> "In reference to your letter of February 19, it will be impossible to have the mother of the . . . twins sign the birth certificates because in so doing she would be admitting to the double murder of her two children."

Section 144.15, Code 1958, requires with respect to reporting births the following:

> "In case there is no physician, or person acting as midwife, in attendance upon the birth, a report of the same shall be made within ten days thereafter to the local registrar of the district in which the birth occurred. It shall be the duty of the following persons, in the order named, to make such report:
>
> 1. The father or mother of the child,
> 2. The householder or owner of the premises where the birth occurred.
> 3. The manager or superintendent of the public or private institution in which the birth occurred."

Also pertinent is section 144.16 which provides as follows:

> "When the report of a birth is received under section 144.15, the local registrar shall secure from the person so reporting, or from any other person having the required knowledge, such information as will enable him to prepare the proper certificate of birth."

And section 144.18 which provides as follows:

> "Every person making a return of a birth or reporting the same, or who may be interrogated in relation thereto, shall answer correctly, and to the best of his knowledge, all questions put to him by the local registrar which may be calculated to elicit any information needed to make a complete record of the birth as provided in this chapter, and the informant, as to any statement made in accordance herewith, shall verify such statement by his signature, when requested to do so by the local registrar."

It is noted that death certificates have been signed by the coroner with the cause of death given as "suffocation due to neglect after self-delivery". Now, obviously, in order to arrive at the quoted cause of death, the Coroner must have concluded in some manner that the children were born alive, otherwise he could hardly have specified "after self-delivery". In any event, had the coroner determined that death preceded delivery, the proper certificate would have been a stillbirth certificate under sections 144.20 and 141.7 rather than a death certificate, further indicating the coroner had officially determined to his own satisfaction there had been live births.

Therefore, it appears the Coroner comes within the meaning of the phrase, "other person having the required knowledge" in section 144.16 and is the proper person to sign the statement on the birth certificate as provided in section 144.18, such knowledge being based upon the same evidence as enabled him to establish the cause of death as "suffocation due to neglect after self-delivery". His testimony as to the source of his said knowledge would, of course, be the key to any parallel inquiry as to criminal aspects of the case by the Grand Jury or County Attorney.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr
Encl.

CONSTITUTIONAL LAW: Legislation -- Under Art III, Sec. 29, subject matter of sec. 1, H.F. 684, appears within scope of title to S.F. 532 for purposes of offering an amendment. (Abels to Burtch, St. Rep. 4/16/59) #59-4-19

April 16, 1959

The Honorable Charles R. Burtch
House Chamber
L O C A L

Dear Sir:

Receipt is acknowledged of your inquiry of April 15 as to whether the contents of Section 1, H.F. 684, may properly be incorporated by means of amendment into the text of Senate File 532, as germane to the title thereof.

I am of the opinion such amendment would be germane to the title of Senate File 532 which contains the language:

> "An Act to appropriate . . . funds for the various departments and various divisions thereof, of the state of Iowa, for the purposes provided by law . . ."

Section 1 of H.F. 684, provides in pertinent part:

> "There is hereby appropriated . . . to the state conservation commission the sum of . . .(which) . . . shall be allocated . . . as determined by the state conservation commission to those counties of the state which have organized a county conservation board under the provisions of Chapter 111A. . ."

The quoted provision makes an appropriation to a department (the conservation commission) for a purpose provided by law (county conservation boards). Its subject matter, therefore, appears within the scope of the language of the title to S.F. 532.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

59-4-19

CONSTITUTIONAL LAW: Appropriations, Private ends. --
The appropriation of $250,000 to the Iowa Great Lakes Sanitary District is not a local or private purpose and does not violate Art. III, Sec. 31, of the Constitution of Iowa. (Strauss and Fouract to Getting, St. Rep., 4/16/59) # 59-4-20

April 16, 1959

Hon. LeRoy Getting
Senate Chamber
B u i l d i n g

My dear Senator:

Reference is herein made to your oral request as to whether the proposed amendment to S. F. 532 providing for a contingent appropriation of $250,000.00 for assistance by the State in paying a portion of the cost of completing the construction of secondary sewer facilities, not including enlargements and additions, to the disposal plant at the Iowa Great Lakes Sanitary District is a local or private purpose, requiring a two-thirds majority of the elected members of the Senate. In reply thereto on the authority of the following from the case of Dickinson v. Porter, 240 Iowa 393, 416:

> "Courts are extremely reluctant to hold a tax statute invalid on the ground a tax is laid, an exemption granted or an appropriation in connection therewith made, for a private purpose. 'It has been quite uniformly held by the courts that the determination of such questions inheres largely in the legislative power. Within the zone of doubt, that is * * * a public purpose which the legislature deems to be such.' Grout v. Kendall, 195 Iowa 467, 477, 192 N. W. 529, 533, which unanimously upholds a Soldiers Bonus Act under which it was proposed to issue $22,000,000 of state bonds and levy a tax to retire them in order to pay a 'bonus' to Iowa soldiers and sailors of World War I.
>
> "The authorities agree not only that the legislature has the broadest discretion as to what is

59-4-20

> a public purpose but also that such question is a changing one. See for example State ex rel. Wisconsin Dev. Auth. v. Dammann, 228 Wis. 147, 280 N. W. 698, 709; Laughlin v. City of Portland, 111 Maine 486, 90 A. 318, 320, 51 L. R. A., N. S., 1143, Ann. Cas. 1916C 734; City of Tombstone v. Macia, 30 Ariz. 218, 245 P. 677, 46 A. L. R. 828, 832; 1 Cooley, Taxation, Fourth Ed., section 183, page 394. The tendency of later cases is toward greater liberality in characterizing taxes or appropriations as public in purpose. State v. Dammann, supra, and citations."

It is the opinion of this office that the foregoing proposed appropriation does not violate Article III, Section 31 of the Constitution of Iowa.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

FREEMAN H. FORREST
Assistant Attorney General

OS:MKB

WELFARE: Unemployment Benefits -- Section 96.5(5) as amended by S. F. 420, 57th G.A. effect upon supplemental unemployment benefit clauses in contracts between employer-employee. (Statement to Mincks, Sen.) 4/17/59) #59-4-21

April 17, 1959

Honorable Jake B. Mincks
Fifty-eighth General Assembly
Senate Chamber
L O C A L

My dear Senator:

Reference is made to your letter of April 10 which sets out the following:

> "The question of Supplemental Unemployment Benefits was raised and I offered an amendment to spell out specifically that these people would not be disqualified because of S.U.B. payments due him. This amendment was defeated. My question is: Would the wording in Senate File 420 disqualify people who are covered under agreements carrying the S.U.B. clause, specifically the John Deere and Maytag Co. contracts? Trusting you will give this your earliest attention, I remain."

In reply thereto:

A like question was submitted to the department in 1956, and on July 13, 1956, an opinion was issued to the Iowa Employment Security Commission holding that the receipt of supplemental unemployment benefits would not affect elgibility to receive unemployment compensation of Chapter 96, Code 1954. A copy of this opinion is hereto attached.

59-4-21

Examination of Senate File 422 does not disclose any material or substantial change in Section 96.5 (5), Code of 1958, that would have any effect upon the previous opinion, and that opinion is now confirmed.

I would further advise you that in reaching the previous opinion the department had before it the Ford and General Motors agreements, and I am assuming in this opinion that the Maytag and John Deere contracts contain substantially the same provisions.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:kj

Enclosure:

SCHOOLS: Distribution of Assets and Liabilities: Only tribunals created by law can make distribution under Section 275.29 and 275.30, if equitable, such distribution is binding. (Reference to Bruner, Carroll Co. Atty., 4/17/59) #59-4-22

April 17, 1959

Mr. Robert S. Bruner
Carroll County Attorney
212 W. 5th Street
Carroll, Iowa

Dear Sir:

Reference is made to your letter of April 15 which sets out the following:

"Referring to your opinion of March 24, 1959 addressed to Wm. Q. Norelius, County Attorney of Crawford County, Iowa, may I have your additional opinion on the following questions:

1. Assuming that that part of District A taken into District B had assets over and above its liabilities, could not and would not those assets be used by District A toward the payment of the share of the bonded indebtedness of District A owed by the part leaving District A?

2. If that part of District A taken into District B had liabilities which exceeded its assets, would the one year tax levy by District B, to pay off this indebtedness, be levied on all of District B or simply that portion taken over from District A?"

In reply thereto:

The problems advanced by your letter are primarily one of administrative determination and application of Section 275.29, Code 1958, which provides to-wit:

"Within twenty days after the organization of the new boards, they shall meet jointly with the several boards of directors whose districts have been affected 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 school corporations."

59-4-22

As pointed out in Op. Atty. Gen., 1956, page 74 when distribution of assets are made, it should be done "equitably" keeping in mind the interest of all those effected by the distribution. The method as to how distribution is made, is purely discretionary with those charged to make the distribution based upon existing facts.

The actual fact determination is made by the boards and distribution made based upon the existing facts; if the boards can not agree as to the distribution of assets than Section 275.30, Code 1958, becomes effective which provides to-wit:

> "If the boards cannot agree on such division and distribution, the matters on which they differ shall be decided by disinterested arbitrators, one selected by each board having an interest therein, and if the number thus selected is even, then one shall be added by the county superintendent. The decision of the arbitrators shall be made in writing and filed with the secretary of the new corporation, and any party to the proceedings may appeal therefrom to the district court by serving notice thereof on such secretary within twenty days after the decision is filed. Such appeal shall be tried in equity and a decree entered determining the entire matter, including the levy, collection, and distribution of any necessary taxes."

The Supreme Court has on many occassions said that the distribution of assets must be made by the special tribunal created by law and has often quoted from the case of District Twp. of Viola v. District Twp. of Audubon, 45 Iowa 104, the following, "Courts have no authority to make this settlement or adjustment." Franklin v. Wiggins, 110 Iowa 702, 80 N.W. 432; Independent District of Jewell v. Consolidated District of Ellsworth, 232 Iowa 992, 6 N.W. 2d 873. In the Jewell case, supra, the court said, it will not interfere with adjustment of finances thereunder unless extreme hardship is imposed upon the taxpayer. As a result of this position (and rightly so because each reorganization is completely different from one another) the Supreme Court has never set a guide because all to often a guide becomes the standard.

To help effectuate the "equitable" distribution of assets and liabilities, Section 275.31, Code 1958, provides to-wit:

> "If necessary to equalize such division and distribution, the board or boards may provide for the levy of additional taxes upon the property of any corporation or part of corporation and for the distribution of the same so as to effect such equalization."

Here as in the previously mentioned Sections, there is no limitation placed upon the boards as to the amount of tax to be levied if the levy is equitable. Op. Atty. Gen., 1956, page 74.

In addition to the above cited cases, your attention is directed to the following citations which have proved to be helpful in instances similar to yours.

> District Twp. of Williams v. District Twp. of Jackson, 36 Iowa 216
> Williams v. School District, 124 Iowa 213, 99 N.W. 732
> Peterson v. Swan, 231 Iowa 745, 2 N.W. 70
> Taylor v. School Dist of Garfield, 97 F 2d 753
> Everett v. Independent Dist. of Rock Rapids, 109 F. 697
> Gamble v. Rural Independent Dist. of Allison, 146 F 113.
> Op. Atty. Gen., 1925-1926, page 282

The questions propounded in your letter in addition to being hypothetical, fail to make reference as to what type assets or liabilities you are concerned. Another point should be brought out, we are not in the position to determine the legality of the distribution so long as it is agreeable to all of those concerned and does not generally transgress any other statutes which may become involved.

Therefore, at this time, it would be purely conjectural on our part to suggest any answers to the questions because they are matters which are legally only to be considered by the boards in determing the distribution of assets.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

TAXATION: Income, nonresident's --
~~HEADNOTE:~~ Filing and payment by nonresident does not relieve withholding agent from his statutory primary responsibility. (Condensed & modified, St. Tax Comm., 4/17/59) TL 59-4-23

April 17, 1959

Mr. Leon N. Miller, Chairman
Iowa State Tax Commission
State Office Building
Des Moines 9, Iowa

Dear Mr. Miller:

This is in reply to your request for an opinion relative to Section 422.16 of the 1958 Code of Iowa.

Section 422.16, subsection 1, of the 1958 Code of Iowa states in part:

"* * *, every withholding agent shall deduct and withhold in each calendar year * * *."

Subsection 2 further states in part:

"Withholding agents shall make returns upon the basis of each calendar year * * *."

Subsection 3 also states in part:

"At the time of making such returns, the withholding agent shall pay to the commission the entire amount required to be withheld * * *."

Subsection 4 states in part:

"Each nonresident shall make his returns and pay his tax upon the basis of the calendar year, * * *."

Subsection 5 states in part:

"In addition to all other income subject to the tax herein

59-4-23

> imposed, each nonresident shall report in his return all income a portion of which is required to be withheld pursuant tothis section, including the portion so withheld.
>
> (Underlining by writer)

It is definitely the intent of the Legislature to hold the withholding agent primarily responsible for the collection of the tax. This statute was copied from those of the states of New York and California and, at the time it was enacted, the proponents' reason for its passage was to provide for the collection of the tax at the source to insure payment of the tax.

The only way in which a withholding agent may be relieved from the withholding provisions have been set out in Section 422.17 of the 1958 Code of Iowa. This section provides for the filing of bonds and securities with the State Tax Commission.

WHEREAS, Section 422.21 of the 1958 Code of Iowa provides that the taxpayer shall file and remit to the Commission on or before the last day of the fourth month after expiration of the tax year. It is to be noted that this section specifically refers to the taxpayer.

Section 422.16, subsection 2, of the 1958 Code of Iowa, refers specifically to withholding agents and provides that the Commission may fix such times for the making of returns and the payment of the amounts withheld.

THEREFORE, we hold that the primary duty under the statute is that the withholding agent must withhold and that payment by the taxpayer does not in of itself relieve the withholding agent of his statutory obligations.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/ERF/fs

Bonds - -

~~HEADNOTE: CIGARETTES: BONDS.~~ The State Tax Commission may require bonds of longer than annual duration to be filed with the cigarette permit issuing bodies. (Bankman & Miller, St. Tax Comm., 4/20/59) # 59-4-24

April 20, 1959

Mr. Leon N. Miller, Chairman
Iowa State Tax Commission
State Office Building
Des Moines 9, Iowa

Dear Mr. Miller:

This is to acknowledge receipt of your letter of April 13, 1959, in which you request the opinion of this department on the following problem:

> "On February 20, 1958 the Iowa State Tax Commission adopted a resolution approving the present cigarette bond forms with the addition of the following paragraph to the present forms.
>
> "To the santance 'This bond shall be effective for the license year ending June 30, 19__' add the following, 'and each successive license year until cancelled.'
>
> "We have met with compliance to this resolution by all licensing authorities with the exception of the City of Des Moines, which has adopted the position that the Commission is without authority to require other than annual bonds to be filed.
>
> "Would you kindly obtain an Attorney General's Opinion on the above stated problem"

The relevant statutory provisions of the 1958 Code of Iowa are as follows:

> "98.13 Distributor's, wholesaler's, and retailer's permits.
>
> "* * *.
>
> "3. Fees--expiration. All permits provided for in this chapter shall expire on June 30 of each year. No permit shall be granted or issued until the applicant shall have paid for the

59-4-24

period ending June 30 next, to the state tax commission or the city, town or county granting such permit, the fees provided for in this chapter. * * *.

"* * *.

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

"98.14 Bonds.

"1. No retail permit, state permit, or manufacturer's permit shall be issued until the applicant therefor shall file a bond, with good and sufficient surety, to be approved by the commission or the body granting the permit, which bond shall be in favor of the state and for the benefit of the county, city, or town, as the case may be, and conditioned upon the payment of taxes, damages, fines, penalties, and costs adjudged against the permit holder for violation of any of the provisions of this chapter.

"Said bonds shall be on forms prescribed by the commission and in the following amounts:

"* * *."

The only question to be determined is whether the Iowa State Tax Commission, acting pursuant to the authority given it by the above quoted statutes, may require applicants for cigarette permits to file with the issuing authorities, bonds which are to remain in effect for longer than one year.

The State Tax Commission, being an administrative body, has only such power as is given it by statute; it can do no act unless authority for it exists in the law. In the instant case, section 98.14(1), supra, gives the Commission authority to prescribe the form of the cigarette permit bond. In the exercise of such authority, the Commission is necessarily

given discretion as to the contents of such bond. So long as the Commission in the exercise of such discretion acts within the statutes above set forth, no objection may be raised.

It is true that section 98.13(3), supra, provides that a new permit shall, upon application, be issued each year. It does not, however, require that a new bond must accompany each application. No purpose is served by requiring a new bond to be filed each year, nor is any statute violated by allowing an indefinite bond to be filed with the issuing body.

It is, therefore, the opinion of this department that the State Tax Commission acted properly in adopting the resolution of February 20, 1958, to which you refer in your letter.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:WWR:fs

Property Assessments -
~~TAXATION; PROPERTY TAX, Date of Assessment.~~
The term "greater part of the year" as used in Section 420.8, Code of Iowa (1958), means more than half of the year. (Beardsmore to Morr, Lucas Co. Atty., 4/21/59) #59-4-25

April 21, 1959

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

Dear Mr. Morr:

This is to acknowledge your letter of March 4, 1959 in which you request an opinion from this office as follows:

"Contractor, an Iowa corporation with its principal place of business without Lucas County, moved construction equipment into Lucas County about four or five months prior to January 1, 1959. The construction equipment was not within the County of the contractor's principal place of business during the year preceding January 1, 1959, nor has there been any showing by the contractor that this specific machinery was assessed in the County of the principal place of business in 1958 or 1959, nor in any other County of Iowa.

"The Lucas County assessor assessed this construction equipment as it was within Lucas County on January 1, 1959. Contractor's equipment consists of machinery purchased and moved directly into Lucas County and construction equipment owned for more than one year preceding January 1, 1959.

"Contractor has assented to the Lucas County assessment of the new construction equipment, but has challenged the assessment of the used equipment, maintaining that this equipment is assessable only in the County of the contractor's principal place of business, or that if in the event the equipment was in some other Iowa County more than six months of 1958, then the used equipment would be assessable in that County, but in no event would it be assessable in Lucas County as it was not within Lucas County for six months of the year preceding January 1, 1959.

"It is the contention of Lucas County that the used equipment is assessable in Lucas County because the actual situs was Lucas County on January 1, 1959 and because the equipment was within

59-4-25

Lucas County a greater part of the year 1958 than in any other Iowa County, no showing being made to the contrary. * * *."

The problem which you present is essentially one of interpretation of the provisions of Section 428.8, Code of Iowa (1958), which reads as follows:

"Place of listing. Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided, and except that, if personal property not consisting of moneys, credits, corporation or other shares of stock, or bonds, has been kept in another assessment district during the greater part of the year preceding the first of January, or of the portion of that period during which it was owned by the person subject to taxation therefor, it shall be taxed where it has been so kept."

The Supreme Court of Iowa has had occasion to construe this section in the case of Capital Construction Company v. City of Des Moines, 211 Iowa 1228, 235 N.W. 476 (1931). In this case it was found that certain paving machinery was located in Jackson and Clinton Counties in 1928 until about July 1st of that year, at which time the machinery was shipped to Illinois and kept there until returned to Iowa. The corporation had its principal place of business in Des Moines. The Court stated: "There is no showing that this machinery was in any particular taxing district of this state (or even in the State of Illinois) during the greater part of the year preceding the first of January, 1929."

In order to make this statement, the Court must have construed the "greater part of the year" to mean more than six months rather than the greater period of time as between the various counties in which it was physically located during the year. The Court held in this case that the

property was properly assessable in the city where the home offices were located in spite of the fact that it had never been there during the year preceding the first of January of the year of assessment.

In ordinary language, the term "greater part" means more than half of the total; thus, where the term "greater part of the year" is used in Section 428.3, Code of Iowa (1958), you are advised that this means the major part of or more than half of the year. In the situation outlined in your request, the used construction equipment is properly assessable only in the assessment district in which is located the contractor's principal place of business.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

CONSERVATION: Leases --
(1) Conservation Commission - Authority to lease - The Commission has the authority to lease concessions in state park areas.
(2) County Conservation Board - Authority to lease - The Board does not have the authority to enter into contracts for commercial operations. (Gratton to Rush, Cons. Comm., 4/21/59) # 59-4-26

April 21, 1959

Mr. Wilbur A. Rush, Chief
Division of Lands & Waters
State Conservation Commission
L C C A L

Dear Sir:

Your letter of April 10, 1959 is as follows:

"A County Conservation Board has made application to the State Conservation Commission for a contract to operate a concession serving miscellaneous refreshments and the sale of miscellaneous merchandise at a state park area in the County. At the meeting of the State Conservation Commission held April 7th the State Conservation Commission approved this request provided that the State Conservation Commission had legal authority to enter into such contract with the County Conservation Board and provided that the County Conservation Board had legal authority to operate such a concession.

The State Conservation Commission now respectfully requests your opinion as to whether or not the State Conservation Commission has legal authority to grant a concession contract to a county conservation board.

The State Conservation Commission also respectfully requests your opinion as to whether or not a county conservation board is authorized under Chapter 111A, Code of Iowa 1958, to operate a commercial operation such as a state part concession in an Iowa state park."

Section 111.25, Code of Iowa is as follows:

"111.25 Leases. The commission may, with the approval of the executive council, lease for periods not exceeding five years such parts of the property

59-4-26

> under its jurisdiction as to it may seem advisable. All leases shall reserve to the public of the state the right to enter upon the property leased for any lawful purpose."

There is no restriction contained in the above section and therefore I am of the opinion that the State Conservation Commission has the authority to lease the concession to a county conservation board.

I have examined Chapter 111A pertaining to County conservation boards, paying particular attention to Section 111A.4 (7) which provides as follows:

> "7. To charge and collect reasonable fees for the use of such facilities, privileges and conveniences as may be provided and for admission to amateur athletic contests, demonstrations and exhibits and other noncommercial events."

This, however, is only authority to charge and collect fees and is not authority for the boards to enter contracts for commercial operations. Because of the unusual nature of the authority here contemplated by the board, it would be necessary that such authority be granted in the most clear and direct manner. I find no such grant and therefor am of the opinion that a county conservation board can not enter into contracts for commercial operations.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:kvr

COMPATIBILITY OF OFFICE: County Conservation Board - ~~COUNTY CONSERVATION BOARD~~ -- Membership on board and the position of executive officer are incompatible. (Gritton to Cady, Franklin Co. Atty., 4/21/59)

59-4-27

April 21, 1959

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

This is to acknowledge receipt of your letter of April 17, 1959, which reads as follows:

> "I am requesting an opinion from your office concerning Sections 111A.2 and 111A.4, subsection 6, of the 1958 Code of Iowa.
>
> "Section 111A.2 provides that members of the county conservation board are to serve without compensation, and Section 111A.4, subsection 6, provides that the county conservation board is authorized to employ and fix the compensation of an executive officer who shall be responsible to the county conservation board for the carrying out of its policies. The county conservation board of Franklin County has appointed one of its members as temporary executive officer, and it is my understanding that they intend to compensate him for his services. I would like to have an opinion from your office as to whether or not one of the board members can serve as an executive officer and receive compensation for his services in view of 111A.2 of the Code."

In reply to your question I am of the opinion that membership on the county conservation board provided for in Section 111A.2 and the position of executive officer of said board provided for in Section 111A.4(6) are incompatible, and that due to the supervisory capacity which the board must have over its executive officer, one person cannot serve in both capacities.

I am further of the opinion that a member of the county conservation board can receive only his actual and necessary expenses incurred in the performance of his official duties, as provided for in Section 111A.2.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh

59-4-27

SCHOOLS: Reorganization -- A petition under Section 275.17, Code 1958, should not contain statement showing the proposed school house site. (Rehmann to Skiver, Osceola Co. Atty.) 4/22/59) # 59-4-28

April 22, 1959

Mr. D. E. Skiver
Osceola County Attorney
Sibley State Bank Building
Sibley, Iowa

Dear Mr. Skiver:

This is to acknowledge receipt of your letter of April 18, in which you informed us that you advised the County Board of Education that it would not be proper under Section 275.12 to include in the petition a statement showing the proposed school site.

In reply thereto:

It is fundamental that school districts are creatures of statute and the statutes must be strictly construed (cases cited therein) Op. Atty Gen. 1956, page 195. A departure from the manditory statutory requirements as set out in Section 275.12, Code 1958, would be a defect in the petition and such defect might be considered substantial and material departure from the statute, thus fatal to the school reorganization. State ex rel Warrington v. Community School District of St. Ansgar, 247 Iowa 1167, 78 N.W. 2d 86.

As to the persons who seem to object to the fact that the school site location is not included in the petition, it has been a matter of long administrative standing by appeals under Chapter 290, Code 1958, that the "geographical location" referred to in Section 297.1, Code 1958, shall mean approximately the geographical center of the school district. Thus as a matter of law the school house has to be in the approximate center of the district and such a statement in the petition would be useless and as indicated fatal to reorganization.

Therefore, we are substantially in full accord with the advice you gave the County Board of Education.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
cc: Paul Johnston

CH-11-28

CONSTITUTIONAL LAW:
Determination of constitutionality of an act of the Legislature is a judicial function. (Strauss to Miller, Sen., 4/22/59) # 59-4-29

April 22, 1959

Hon. Jack Miller
Senate Chamber
B u i l d i n g

My dear Jack:

This will acknowledge receipt of yours of the 9th inst. in which you wrote the following:

> "I acknowledge your opinion dated April 6, 1959, with respect to the Miller and Prentis amendment dated February 18, 1959.
>
> "As I read the opinion, I interpret it to mean that any proposed contraction of the base for monies and credits tax would constitute an 'impairment' of contract insofar as the Korean bonus bondholders are concerned.
>
> "If this be true, then I would refer you to Senate File 453 of the 1957 legislature, which changed Chapter four hundred twenty-nine by adding the following new section:
>
> "'All non-interest bearing moneys and credits and accounts receivable shall be exempt.'
>
> "This would appear to represent a substantial contraction of the base for the moneys and credits tax, somewhat like the Miller and Prentis amendment dated February 18, 1959. Accordingly, I would appreciate your opinion on the validity of the 1957 amendment above referred to."

In reply thereto I would advise you that in consideration of constitutional questions I differentiate as between a bill for an act and the act itself. What may have been my view of the

59-4-29

constitutionality of the proposed Senate File 453 is now submerged and controlled by the following from the case of State v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 683:

> "Every law found on the statute books is presumptively constitutional until declared otherwise by the court . . . The right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution.

This applies to Senate File 453 as it now exists as an act of the Legislature.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TAXATION: Property tax exemptions – (1) Killed, processed and frozen turkeys are not exempt from taxation under the provisions of Section 427.1(13), Code of Iowa (1958). (2) Property held by a warehouseman is to be assessed to the owner thereof unless the warehouseman fails to furnish the statement provided for in Section 428.18, Code of Iowa (1958), in which event said property is to be assessed to the warehouseman. (Brinkman to Neuzil, Johnson Co. Atty., 4/23/59) #59-4-30

April 23, 1959

Mr. Ralph L. Neuzil
Johnson County Attorney
603 Iowa State Bank & Trust Building
Iowa City, Iowa

Dear Mr. Neuzil:

This is to acknowledge receipt of your letter of March 27, 1959, in which you inquire whether an opinion dated January 26, 1959, directed to you, is applicable to the following:

> "Question No. 1. Frozen turkeys, title to which has never left the person (or entity) who harvested and stored the turkeys, which such turkeys are stored in a public warehouse under receipts and records specifically evidencing the fact that title is held by such a person?
>
> "Question No. 2. Frozen turkeys, while the turkeys are stored in a public warehouse, after title has been transferred from such a person as described in Question 1 to another person such as a wholesale or retail grocer?"

I take your question to be whether killed, processed and frozen turkeys stored in a public warehouse, title remaining in the person who raised such turkeys, constitute "agricultural produce harvested by or for the person assessed within one year previous to the listing" within the meaning of Section 427.1(13), Code of Iowa (1958). I further assume your question to be that: If such property is taxable, to whom is it assessable?

Section 427.1(13), Code of Iowa (1958) reads as follows:

> "427.1 Exemptions. The following classes of property shall not be taxed:
>
> "* * *.
>
> "13. Agricultural produce. Growing agricultural and horticultural crops and products, except commercial orchards and

vineyards, and all horticultural and agricultural produce harvested by or for the person assessed within one year previous to the listing, all wool shorn from his sheep within such time, all poultry, ten stands of bees, honey and beeswax produced during that time and remaining in the possession of the producer, all swine and sheep under nine months of age, and all other livestock and fur-bearing animals under one year of age."

As stated in the opinion of this office dated January 26, 1959, to which you refer in your request, one concept which is to be kept in mind when construing statutes which provide for a tax exemption is that such statutes are to be construed strictly in favor of taxation and, if there is any doubt upon a particular question, it must be resolved in favor of taxation and against the exemption.

It is the opinion of this office that the killed, processed and frozen turkeys to which you refer are not exempt from taxation as "horticultural and agricultural produce harvested" within the meaning of the term as used in Section 427.1(13), Code of Iowa (1958), for tax reasons.

Initially, in accordance with Section 4.1(2), Code of Iowa (1958), words are to be construed according to the context. It is to be noted that Section 427.1(13) supra, provides an exemption for "growing agricultural and horticultural crops and products, * * *, and all horticultural and agricultural produce harvested by or for the person assessed within one year previous to the listing", and that such section also provides for an exemption for poultry, swine and sheep under nine months of age, and other livestock and fur-bearing animals under one year of age. If it was the intention of the legislature to include animals of any type within the meaning of the terms "agricultural products" and "agricultural produce", the further exemptions for poultry, swine, sheep, etc., would mean nothing and would be pure surplusage. In addition, if such a construction was placed upon the terms "agricultural products" and "agricultural produce", swine and sheep over nine months of age and other livestock and fur-bearing animals over one year of age would be exempt, a construction which would obviously violate the intentions of the legislature. It is elementary that statutes must be construed in such a manner so as not to attribute a useless act to the legislature. Crawford v. Iowa State Highway Commission, 247 Iowa 736, 76 N.W.2d 198; Leversee v. Reynolds, 13 Iowa 310.

Secondly, the Iowa State Tax Commission ruled on November 15, 1948, that an exemption under Section 427.1(13), supra, ceases when the exempt item has been processed. Your letter of January 7, 1959 indicates that the turkeys in question have been processed. The 1948 ruling is of long standing and has not been overruled.. As stated in the opinion of this office dated January 26, 1959, relating to this subject, "It is a well known principle that administrative interpretations are often entitled to and are given much weight, particularly when they have been in force for a considerable time. School District of Soldier Township, Crawford County v. Moeller, 247 Iowa 239, 73 N.W.2d 43."

It is not necessary to consider whether ordinary and approved usage of the words "agricultural produce harvested" includes the killing, processing and freezing of turkeys, since it

is obvious from the context in which the words are used that the exemption is not meant to apply to animals.

Having determined that the killed, processed and frozen turkeys to which you refer are taxable, it is now necessary to determine to whom they are assessable.

The following sections of the Code of Iowa (1958) are relevant to this problem:

> "728.16 'Merchant' defined. Any person, firm, or corporation owning or having in his possession or under his control within the state, with authority to sell the same, any personal property purchased with a view to its being sold, or which has been consigned to him from any place out of this state to be sold by him within or without this state, except a warehouseman as defined in section 542.58, shall be held to be a merchant for the purposes of this title."
>
> "542.58 Definitions. In this chapter, unless the context or subject matter otherwise requires:
>
> "* * *.
>
> "'Warehouseman' means a person lawfully engaged in the business of storing goods for profit."
>
> "428.18 Warehouseman to file list. A warehouseman as specified in section 428.16 shall, upon request, file with the assessor a written statement showing all property in his possession belonging to another subject to taxation, and the name and address of the person, firm, corporation, or estate to which it belongs."
>
> "428.19 Warehouseman deemed owner. If said warehouseman fails to furnish such statement all property in the possession of the warehouseman belonging to another subject to taxation, shall be deemed to be owned by the warehouseman for the purpose of taxation, and he shall be liable for taxes thereon."
>
> "428.4 Personal property–real estate–buildings. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *."

It is apparent from the above sections that if the cold storage plan to which you refer is a warehouseman within the meaning of Section 542.53, Code of Iowa (1958), the assessor should ask for the list of owners of the property in the warehouse as provided in Section 428.18, Code of

Iowa (1958), and, if such list is furnished, the property would be taxable to the owners. If no list is furnished, the warehouseman is deemed to be the owner for purposes of taxation.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

SCHOOLS; Reorganization - - Board of Directors of old school districts can exercise their power under Section 297.15 until July 1, following the election of reorganization under Chapter 275. (Reimann to Garretson, Henry Co. Atty.; 4/28/59)

#59-4-31

April 28, 1959

Mr. Charles O. Garretson
Henry County Attorney
100½ South Main Street
Mt. Pleasant, Iowa

Dear Sir:

Receipt is acknowledged of your letter of April 21 which sets out the following:

> "'A rural independent school district has not been holding school for some time. A proposed new community school district was approved by the voters on March 31, 1959, and included all of the rural independent district. The Board of Directors of the newly reorganized community district was elected on April 20, 1959.'
>
> I have the following questions:
>
> 1. Can the Board of Directors of the rural district dispose of the site, building and contents prior to July 1, 1959, on their own motion when the school has been closed for over two years.
>
> 2. Under the above facts could the directors of the rural district dispose of the site, building and contents prior to July 1, 1959, when the school has been closed for only one year without a special election between now and July 1, 1959, in the old rural district.
>
> 3. In other words, when a new district has been approved by the voters on March 31, 1959, is there anything in the reorganization laws to prevent a rural district included in the newly reorganized district from doing any act authorized by statute for sale of school house sites prior to July 1, 1959, when the new Board of Directors of the community school district organizes."

In reply thereto:

59-4-31

It is fundamental, the reorganization of school districts is prescribed by Sections 275.12 to 275.23, Code 1958. The fact that the electors of two districts have elected to organize, the plan cannot be effectuated until July 1, following such election. Until that date, the two districts remain separate and complete as entities. (Rehmann to Sturges, March 19, 1959)

In accordance with Section 297.15, Code 1958, the school board has the authority to sell a school building and site provided the school was permanently closed by action of the board more than two years prior to the sale, and was not temporarily closed on account of small attendance. Maxwell v. Custer, 238 Iowa 1306, 30 N.W. 2d 177.

The answer to your first question is affirmative provided the prerequisites as set out above are met.

Your attention is directed to Section 278.1, Code 1958, which provides to-wit:

> "The voters at the regular election shall have power to:
>
> * * * *
>
> 2. Direct the sale, lease, or other disposition of any schoolhouse or site or other property belonging to the corporation, and the application to be made of the proceeds thereof."

There is nothing to prevent the sale of a schoolhouse or site prior to the expiration of the two year period provided, it is sold under the provisions of Section 278.1 Subsection 2, Code 1958, subject to the statutory right of the owner to exercise his option to repurchase. Op. Atty Gen., 1954, page 38. (cases cited therein).

The answer to your second question, therefore is negative.

There is nothing in Chapter 275, Code 1958 dealing with reorganization that prevents the now existing school district to exercise the powers it now has. Thus under the doctrine of expressio unius est exclusio alterius, the answer to your third question is negative.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

Military Service Tax Credit --

~~TAXATION: military service tax credit~~: where veteran dies prior to the time the Board of Supervisors passes on the claim, the claim must be denied. (Brinkman to Miller, St. Tax Comm'n, 4/28/59)

59-4-32

April 28, 1959

Mr. Leon N. Miller
Chairman
Iowa State Tax Commission
Local

Dear Mr. Miller:

This is to acknowledge receipt of your letter of March 9, 1959, in which you request the opinion of this department on whether a military service tax credit may be allowed to a Spanish-American War veteran who died in May, prior to the time when the Board of Supervisors passed on the claim.

Your attention is directed to the following provisions of the 1958 Code of Iowa:

> "427.3 Military service--exemptions. The following exemptions from taxation shall be allowed:
>
> " * * *.
>
> "2. The property, not to exceed eighteen hundred dollars in taxable value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine insurrection.
>
> " * * * *."
>
> "427.5 Reduction--discharge of record--oath. Any person named in section 427.3, provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption, to be made from any

59-4-32

property owned by such person and designated by him by proceeding as hereafter provided. In order to be eligible to receive said exemption or reduction the person claiming same shall have had recorded in the office of the county recorder of the county in which he shall claim exemption or reduction, the military certificate of satisfactory service, order transferring to inactive status, reserve, retirement, or order of separation from service, or honorable discharge of the person claiming or through whom is claimed said exemption; in the event said evidence of satisfactory service, separation, retirement, furlough to reserve, inactive status, or honorable discharge is lost he may record in lieu of the same, a certified copy thereof. Said person shall file with the city or county assessor, as the case may be his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section 427.3, and give the volume and page on which the certificate of satisfactory service, order of separation, retirement, furlough to reserve, inactive status, or honorable discharge or certified copy thereof is recorded in the office of the county recorder, and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein. The assessor shall tabulate and deliver or file said claims with the county auditor, having his recommendations for allowance or disallowance indorsed thereon. In case the owner of the property is in active service in any of the armed forces of the United States or of this state, including the nurses' corps of the state or of the United States, said claim may be executed and delivered or filed by the owner's spouse, parent, child, brother, or sister, or by any person who may represent him under power of attorney. No person may claim a reduction or exemption in more than one county of the state, and if no designation is made the exemption shall apply to the homestead, if any."

"427.6 Allowance--continuing effectiveness. Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption only for the year in which such exemption is filed.

"Any person whose claim is denied under the provisions of this chapter may appeal from the action of the board of supervisors in the district court of the county in which said claimed military service tax exemption is situated by giving written notice of such appeal to the county auditor of said county within twenty days from the date of mailing of notice of such action by the board of supervisors."

It is seen from the above statutory provisions that certain requirements must be met by a veteran before the exemption provided for in section 427.3 supra, may be allowed.

The claimant must be a person whose military service comes within the terms of section 427.3 supra, he must be a resident and domiciled in the state, he must have recorded a military certificate of service or discharge record, and, unless the exemption is on the homestead, must designate the property on which the exemption is claimed, and he must be either the legal or equitable owner of the property.

In the absence of any one of the above requirements, the claim must be denied.

The Board of Supervisors, from July 1 to August 1, acts in the nature of a finder of fact on all claims for exemption. If the Board finds that the facts stated in the application do not exist at the time it reviews the claim, it must then disallow it.

According to the facts submitted, the veteran claiming the exemption died prior to the time the Board of Supervisors reviewed his claim. The Attorney General has previously held in an official opinion dated November 14, 1957, that the controlling date in determining whether a claimant meets all statutory requirements is the date on which the Board of Supervisors passes on the claim, or should have passed on the claim.

It is evident that the veteran herein did not meet the statutory requirements at the time the Board considered the claims inee at that time he was deceased.

You are advised, therefore, that in the opinion of this office, the veteran to whom you refer in your letter is not entitled to the Military Service Tax Exemption.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/WWR/bjf

STATE OFFICERS AND DEPARTMENTS: Investigation --
Expense of ~~XXX~~ commissioners appointed by the Governor under the provisions of Chap. 67, Code 1958, is not payable out of the $50,000 appropriated by S. J. R. 8 nor is any money available under Chap. 67 for such expenses. (Strauss to Sarsfield, St. Comp. 4/29/59)

April 29, 1959

#59-4-33

Mr. Glenn D. Sarsfield
State Comptroller
B u i l d i n g

Dear Sir:

This will acknowledge yours of the 14th inst. in which you submitted the following:

> "Section 67.12, Code of Iowa, 1958, reads as follows:
>
> "'67.12 Compensation of commissioners. Said commissioners shall each receive for the time actually employed in the performance of their duties the sum of ten dollars per day, which sum shall be paid out of any unappropriated funds in the state treasury.'
>
> "Senate Joint Resolution 8, Acts of the 58th General Assembly, provides an appropriation of $50,000.00 from the Motor Vehicle Fuel Tax Fund to carry out the purpose and intent of said Act. This Act was approved by the Governor on February 18, 1959, and published February 26, 1959.
>
> "One of the commissioners referred to under section 67.12 of the code has submitted an expense account for the period January 26, 1959 through March 10, 1959 in connection with his duties under Chapter 67.
>
> "I respectfully request an opinion as to whether this expense account, or any part of it, may be paid by Senate Joint Resolution 8, Acts of the 58th General Assembly, or if it may be paid under the authority vested in Section 67.12, Code of Iowa, 1958, or from any other state funds."

59-4-33

In reply thereto I would advise as follows. Section 67.12, Code 1958, quoted by you, was not repealed by Senate Joint Resolution 8. It provides that commissioners appointed under Chapter 67 for time employed shall receive the sum of $10.00 per day for the performance of their duties. The claim involved here isthat of a commissioner appointed under the provisions of Chapter 67. No provision is made in that chapter for payment of expenses incurred thereunder. The only payment authorized to be made to the commissioners so appointed is that provided by Section 67.12, to-wit, $10.00 per day.

The appropriation of $50,000.00 made by Senate Joint Resolution 8 was made by plain implication to the committee created by the Joint Resolution for such expense as such committee authorizes or such as may be authorized by the Budget and Financial Control Committee after July 1, 1959. The claim of the commissioner here in review does not arise of any authorization made under S. J. R. 8 and the legislative committee thereunder. Thus, the appropriation of $50,000.00 is not available for the payment of the claim made.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

MOTOR VEHICLES: ~~LICENSES - MINORS:~~ Licensing Requirements - A minor, notwithstanding the fact that such minor is married, must secure the required signatures on an application for a student's permit, operator's license or instruction permit, all as required by Section 321.184, Code 1958. (Peschel to Brown, Safety Commissioner, 4/14/59) 59-5-1

April 14, 1959

Mr. Russell I. Brown
Commissioner
Department of Public Safety
L O C A L

Attn: Brian J. Connell

Dear Sir:

Reference is made to the letter referred to this department over the signature of Mr. Raphael R. R. Dvorak, Administrative Assistant under date of September 24, 1951, set out as follows:

"Section 321.184, Code of Iowa 1950 reads as follows:

'"Application of minors. The application of any person under the age of eighteen years for an instruction permit, operator's license, or permit issued under section 321.194 shall be signed and verified before a person authorized to administer oaths by both the father and mother of the applicant, if both are living and have custody of him, or in the event neither parent is living then by the person or guardian having such custody or by an employer of such minor."'

"A careful reading of the above cited statute will disclose that the age of 18 years is set without any exceptions. The mere fact that a person 17 years of age may be married does not relieve that person from presenting an application signed by one of the persons named in said statute prior to the receipt of an operators license."

59-5-1

Under the present 1958 Code of Iowa, Section 321.184, reads the same as above set out.

Therefore, the opinion above set out remains the opinion of this office.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

~~COUNTY CONSERVATION BOARD~~ -(1) The board is not authorized to enter into a cooperative agreement with a private organization for the establishment of a recreational area.

~~COUNTY CONSERVATION BOARD~~ -(2) Financial aid. The board may not financially aid a town in the establishment of a recreational area upon property in which the board has no interest.

COUNTIES: Conservation Board -- (Gratton to Cady, Franklin Co. Atty.) 4/22/59) # 59-5-2

April 22, 1959

Mr. G. A. Cady
Franklin County Attorney.
Hampton, Iowa

Dear Mr. Cady:

Your letter of April 17, 1959, is substantially as follows:

> "Our county has a county conservation board, established under the provisions of Chapter 111A of the 1958 Code. A proposal has been made by a civic organization in the county, whereby the organization and the county conservation board would unite for the purpose of building a tennis court and skating area in a park in the county. The proposal was that the organization would pay one-half of the cost thereof, and that the county conservation board would pay one-half the cost.
>
> "I would like to know whether or not under Chapter 111A the county conservation board is authorized to enter into a cooperative agreement with a private organization for the establishment of a recreation area, and whether or not the county conservation board may aid a town in the establishment thereof, since the property in question is owned by the town, and, of course, the county conservation board would have no legal title thereto.
>
> "I would appreciate it if you would advise this office to the questions stated above."

For proper understanding of these questions, it is necessary that parts of various statutes and their relationship to each other be considered. These statutes are set out below.

> "111A.1 Purposes. The purposes of this chapter are to create a county conservation board and to authorize counties to acquire, develop, maintain, and make available to the inhabitants of the couty, public parks, preserves, parkways, playgrounds, recreational centers, county forests, wildlife and other conservation areas, and to promote and preserve the health and general welfare of the people, to encourage the orderly development and conservation of natural resources, and to cultivate good citizenship by providing adequate programs of public recreation."

59-5-2

"111A.4(2) and 111A.4(5). Powers and duties. The county conservation board shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for public parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes and is authorized and empowered:

1. * * *

" 2. To acquire in the name of the county by gift, purchase, lease, agreement or otherwise, in fee or with conditions, suitable real estate within or without the territorial limits of the county areas of land and water for public parks, preserves, parkways, playgrounds, recreation centers, forests, wildlife and other conservation purposes. The state conservation commission, the county board of supervisors, or the governing body of any city, town or village may, upon request of the county conservation board, designate, set apart and transfer to the county conservation board for use as parks, preserves, parkways, playgrounds, recreation centers, play fields, tennis courts, skating rinks, swimming pools, gymnasiums, rooms for arts and crafts, camps and meeting places, community forests, wildlife areas and other recreational purposes, any land and buildings owned or controlled by the state conservation commission or such county or municipality and not devoted or dedicated to any other inconsistent public use. In acquiring or accepting land, due consideration shall be given to its scenic, historic, archaeologic, recreational or other special features, and no land shall be acquired or accepted which in the opinion of the board and the state conservation commission is of low value from the standpoint of its proposed use.

3. * * *

4. * * *

" 5. To accept in the name of the county gifts, bequests, contributions and appropriations of money and other personal property for conservation purposes."

"111A.6 Funds -- tax levy -- gifts. * * * Gifts, contributions and bequests of money and all rent, licenses, fees and charges and other revenue or money received or collected by the board shall be deposited in the county conservation fund to be used for the purchase of land, property and equipment and the payment of expenses incurred in carrying out the activities of the board, except that moneys given, bequeathed, or contributed upon specified trusts shall be held and applied in accordance with the trust specified."

"111A.7 Joint operations. Any county conservation board may co-operate with the federal government or the state government or any department or agency thereof to carry out the purposes and provisions of this chapter. Any county conservation board may join with any other county board or county boards to carry out the provisions of this chapter, and to that end may enter into agreement

with each other and may do any and all things necessary or convenient to aid and to co-operate in carrying out the provisions of the chapter. Any city, town, village or school district may aid and co-operate with any county conservation board or any combination thereof in equipping, operating and maintaining any parks, preserves, parkways, playgrounds, recreation centers, and conservation areas, and for providing, conducting and supervising programs of activities, and may appropriate money for such purposes."

(Emphasis added)

To repeat, your first question is whether or not under Chapter 111A the county conservation board is authorized to enter into a cooperative agreement with a private organization for the establishment of a recreational area. Authority for the county conservation board to enter into agreements of this nature is found in 111A.7 but pertains to agreements between county conservation boards. Under the doctrine of expressio unius est exclusio alterius, I am of the opinion that the county conservation board does not have the authority to enter into an agreement of this nature with a private organization. However, it would appear that nearly the same end result could be achieved by a gift or gifts by the private organization to the county conservation board of moneys upon specified trusts as authorized by Section 111A.6, Code of 1958.

Your second question is whether or not the county conservation board may financially aid a town in the establishment of a recreational area upon property in which the board has no interest of ownership. After an examination of the statutes set out above and with particular attention to the underlined portions thereof, I am of the opinion that the manifest intent of the legislature is that the county conservation board must acquire an interest in the property prior to the expenditure of non-specified trust funds in the county conservation funds in the development of the area. The board must employ specified trust funds in accordance with the trust. Pursuant to the authority contained in Section 111A.4(2) the county conservation board may acquired by agrement, in fee or with conditions, the real estate in question. Again, it would seem that nearly the same end result may be achieved by a properly-drafted agreement with conditions to transfer the real estate.

Yours very truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh4

Fees by Checks

MOTOR VEHICLES: ~~SUSPENSION OR REVOCATION OF REGISTRATION OR CERTIFICATE OF TITLE~~: When payment has not been made of the required registration fee due to a "bad check", the department may suspend or revoke all evidences of such registration if upon reasonable notice and demand for payment, payment is not made. (Peach to Brown, Safety Comm., 4/24/59)

#59-5-3

April 24, 1959

Mr. Russell I. Brown
Commissioner,
Department of Public Safety
L O C A L

Attn: J. F. Carlson, Director
Motor Vehicle Registration Division

Dear Sir:

Receipt is acknowledged of your letter under date of April 9, 1959, set out as follows:

"Section 321.171 provides that number plates issued shall be and remain the property of the state.

Section 321.101, Paragraph 4 provides that a registration or a certificate of title can be suspended or revoked if the required license fee has not been paid.

The question is, 'Does the Department of Public Safety have the authorization under Section 321.171, and Paragraph 4 of Section 321.101 to pick up the license plates and registration receipt where a check has been given by the owner payable to the County Treasurer which is not honored by the bank on which it is drawn because of insufficient funds or no account?'

'Can the registration be revoked when the fee is paid by check payable to the County Treasurer which is not honored by the bank on which it is drawn because of insufficient funds or no account when it is impossible for the department to pick up the registration receipt and license plates issued due to the fact that the owner has temporarily left the State?'"

59-5-3

Section 321.101(4), Code 1958, reads as follows:

"The department is hereby authorized to suspend or revoke the registration of a vehicle, registration card, registration plate, or any nonresident or other permit in any of the following events:

"4. When the department determines that the required fee has not been paid and the same is not paid upon reasonable notice and demand."

Section 321.16, Code 1958, provides:

"Whenever the department is authorized or required to give any notice under this chapter or other law regulating the operation of vehicles, unless a different method of giving such notices is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by restricted certified mail addressed to such person at his address as shown by the records of the department. Return acknowledgment is required to prove such latter service.

"Proof of the giving of notice by personal service may be made by the certificate of any officer or employee of the department or affidavit of any person over eighteen years of age, naming the person to whom such notice was given and specifying the time, place and manner of the giving thereof."

And, Section 321.103, Code 1958, reads as follows:

"Whenever the department as authorized hereunder cancels, suspends, or revokes the registration of a vehicle, or certificate of title, or registration card, or registration plate or plates, or any nonresident or other permit or the registration of any dealer, the owner or person in possession of the same shall immediately return the evidences of registration, certificate of title, or plates so canceled, suspended, or revoked to the department."

Section 321.104(3), Code 1958, provides:

"It is a misdemeanor, punishable as provided in section three hundred twenty-one point four hundred eighty-two (321.482) for any person to commit any of the following acts:

"3. Any person who shall fail to surrender any certificate of title or registration card or license plates upon cancellation, suspension or revocation of the same by the department and notice thereof as prescribed in this chapter."

Section 321.14, Code 1958, provides:

"The department is hereby authorized to take possession of any registration card, certificate of title, permit, or registration plate upon expiration, revocation, cancellation, or suspension thereof, or which is fictitious, or which has been unlawfully or erroneously issued."

In answer to your first question I would, therefore, advise as follows:

In a situation where a check has been given in payment for registration of a motor vehicle and such check is returned marked "insufficient funds" or "no account", payment has not been made. In such instance the department is authorized to suspend such registration, if upon reasonable notice and demand for payment, payment is not made. The notice so provided being governed by Section 321.16, supra. Upon such suspension or revocation, the department may take possession of the evidences of registration all as provided in Section 321.14, supra. It is not mandatory, that the department take possession of said evidences of registration, but may notify the owner of the motor vehicle or person in possession of the registration that the registration has been suspended or revoked and upon such notice, the said owner or person in possession must return said evidences of registration so revoked or suspended to the department. Failure to so return, is a misdemeanor punishable as provided in Section 321.482, Code 1958.

The answer to your second question pivots on the matter of "reasonable notice and demand" for payment. A person who has not paid the required fee, due to a "bad check", and is absent temporarily from the state, nevertheless must be notified and a demand for payment made. Your second inquiry poses a question, the answer to which depends on the facts and circumstances of each situation as the same arises.

However, upon reasonable notice and demand for payment, payment is not made, revocation or suspension may take place as a matter of record even though the plates, registration, etc., cannot be picked up.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

STATE INSTITUTIONS: Parolees -- Board of Control has no authority to permit a person to stand trial outside the state. (Reference to Lappen, Control Bd., 5/4/59) #59-5-4

May 4, 1959

Mr. Robert C. Lappen, Chairman
Board of Control of State Institutions
L O C A L

Dear Mr. Lappen:

Reference is made to your letter of April 13 in which you raised questions with regard to a Minnesota detainer against one Donna Lee Mason #2003, presently incarcerated at the women's reformatory. The questions raised are quoted as follows:

"1. Would the Board of Control, under law, be justified in permitting this woman to stand trial in Minnesota?

"2. If the Board of Control consented to let her go to Minnesota, could she (even if she signed a waiver) then forward all her rights and refuse to return to Iowa?

"3. Would an agreement by the Minnesota officials that they would agree that she be returned to Iowa be valid, rather than their keeping her there if she once arrived? "

In reply thereto:

Section 247.5 Code, 1958 provides:

" * * * *

"The parole may be to a place outside the state when the board of parole shall determine it to be to the best interest of the state and the prisoner, under such rules and regulations as the board of parole may impose." (Emphasis added)

The question with regard to detainer and parole of a person incarcerated in the women's reformatory is answered in Section 247.5, Code 1958. The Board of Parole is the only

59-5-4

administrative body that can determine whether or not a person should be paroled outside the state. The Board of Control has no statutory authority to permit this person to stand trial without the proper parole by the Board of Parole. Therefore, the answer to your first question is negative. With negative answer to your first question, the second and third questions are moot.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWRkvr

MOTOR Weight--
~~OVERWEIGHT~~ VEHICLES: Garden plants or nursery products are not "raw farm products" entitled to 25% tolerance under Sec. 321.466. Lyman to Schach 5/4/59. Lyman to Schach, Highway Comm., 5/4/59) #59-5-5

Ames, Iowa

May 4, 1959

Mr. Carl F. Schach
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Schach:

I have your memo of April 22 requesting an opinion on whether or not boxes of various garden plants from a nursery to be sold in retail store outlets constitute "raw farm products" or "processed products". The question involved is whether or not an overload of such products comes within the twenty-five per cent tolerance allowed by Section 321.466 for raw farm products.

Section 321.466 of the 1948 Code allows a twenty-five per cent tolerance in excess of the gross weight for which it is registered for raw farm products and other products enumerated therein. Chapter 321 of the Code does not define the meaning of raw farm products. In State vs. Bauer 326 Iowa 1020, 20 NW 2431 the court stated in relation to this subject: "Repeated use of the words raw and live clearly indicates the legislature intended the proviso to apply to such products as originally produced and in their natural unprocessed states only."

In Moore vs. Farmers Mutual Manufacturing and Ginning Company (Arizona) 77 Pacific 2209 the Arizona court said in relation to processed products, "The word 'process' means to subject, especially raw material, to a process of manufacturing, development, preparation for market, etc., and to convert into marketable form...".

Webster defines the word "raw" as "in or nearly in the natural state; unprepared for use or enjoyment; crude; unprocessed." It would appear that the Legislature intended to limit the twenty-five per cent tolerance in those cases of farm products which are unprocessed and in/or nearly in their natural state.

I am of the opinion that the transporting of boxes of various garden plants to be sold at retail outlets does not constitute a raw farm product which entitles it to twenty-five per cent tolerance under section 321.466. However, I want to call to your attention that for the purposes of enforcement of a penalty for violation of this statute, any reasonable doubt as to whether or not a farm product is "raw" will be resolved in favor of the accused.

59-5-5

May 4, 1959

In this particular case, the original product has been partially processed. In most instances I would assume that the original product was some type of seed which was planted in the various greenhouses to start a growing plant, such as tomato plants. Nursery stock comes within the classification of processing or preparation for retail marketing. I think it is also clear that the Legislature, by use of the word "raw", had in mind some type of unprocessed farm product so that under the penalty provided in 321.466 the obvious intent of that language could not be defeated by subjecting it to unnatural or strained constructions.

See also the opinion of the Attorney General 1952 on page 28.

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

llh

CITIES AND TOWNS: Police Judge -- Can't serve two cities at same time. (Abels to Hultman, Black Hawk Co. Atty., 5/5/59) #59-5-6

May 5, 1959

Mr. Evan L. Hultman
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Dear Sir:

Receipt is acknowledged of your letter of May 4 in which you ask the following question:

> "Can the same person act as police judge for two separately incorporated cities within the same county?"

In section 367.1, Code 1958, appears the following pertinent language with reference to the police court:

> ". . . It shall be held in suitable rooms to be provided by the city, and shall always be open for business . . ." (Emphasis supplied)

Since it is physically impossible for the Court to "always" be open if its judge spends half his time elsewhere, the answer to your question is in the negative.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

59-5-6

CONSTITUTIONAL LAW: Shoplifters, unwarranted search--
S. F. 3, 58th G. A., will probably withstand attack under Sec. 8, Article I, Iowa Constitution, and Section 6, Article I, Iowa Constitution does not appear to be violated. (Strauss to Loveless, Gov., 5/6/59) #59-5-7

May 6, 1959

Hon. Herschel C. Loveless
Governor of Iowa
B u i l d i n g

My dear Governor:

Your question of May 1, 1959, is as follows:

"Do the provisions of Senate File 3 violate Article I, Constitution of Iowa, particularly Sections 6 and 8?"

Sections 6 and 8 of Article I, Iowa Constitution, provide:

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

"Personal security - searches and seizures. Sec. 8. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized."

Sections 3 and 4 of Senate File 3 are as follows:

"Sec. 3. Persons so concealing such goods may be detained and searched by a peace officer, merchant, or a merchant's employee, provided that the detention is for a reasonable length of time and that the search is conducted in a reasonable manner by a person of the same sex.

59-5-7

> "Sec. 4. No search of the person shall be conducted by any person other than someone acting under the direction of a peace officer except where permission of the one to be searched has been first obtained."

In reply thereto I advise as follows. A detention as used in Sec. 3 is, under the authorities cited in 4 Words and Phrases, Arrest, the equivalent of arrest. It will be further noted that Sec. 4 provides a search may be made only under the direction of a peace officer. And, a search incident to a legal arrest is not considered an unreasonable search. Therefore, it is my opinion that Senate File 3 will probably withstand attack under Section 8, Article I, Iowa Constitution. Section 6 does not appear to be violated.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Fuel tax reciprocity --

MOTOR VEHICLES: ~~FUEL TAX LAW — RECIPROCAL AGREEMENTS~~: The Treasurer of State may not enter into reciprocal agreements with other states concerning motor fuel and special fuel use tax for interstate motor vehicle operations. (Peschi to Abrahamson St. Jones, 5/11/59) # 59-5-8

May 11, 1959

Honorable M. L. Abrahamson
Treasurer of State
L O C A L

Dear Sir:

Your letter under date of May 8, 1959, is at hand in which you submit the following question:

> "Does the Iowa statute provide for the Treasurer of State to enter into reciprocal agreements with other states concerning motor fuel and special fuel use tax for interstate motor vehicle operations?"

In reply thereto:

We are primarily concerned with Division III of Chapter 324, Code of Iowa, 1958. Division III is otherwise known as, "Motor Fuel and Special Fuel Use Tax for Interstate Motor Vehicle Operations" and may be cited as the "'Interstate Fuel Use Tax Law'".

The present Motor Vehicle Fuel Tax Law was enacted into law by the Fifty-Seventh General Assembly See: Acts of the Fifty-Seventh General Assembly, specifically chapter 164, thereof Said chapter 164, makes reference to H.F. 440. H.F. 440 was a Companion Bill and for a complete text we must refer to S.F. 311.

A study of S.F. 311 reveals that said bill provided in Section 324.56 thereof the following:

> "The treasurer in his discretion may be reciprocal agreement with the appropriate officials of any other state, or by regulation, exempt from compliance with all or any part of this division interstate

59-5-8

> operators coming into this state from any other state with motor vehicles fueled tax-paid in the other state, provided that the laws of the other state contain no requirements similar in effect to this division or if they contain requirements similar in effect that the other state exempts therefrom the operation in that state of vehicles fueled tax-paid in Iowa. In exercising his discretion under this section, the treasurer may take into consideration any condition or circumstance likely to encourage inordinate fueling of vehicles in the other state for operation in Iowa."

Such provision made operative Section 324.51 of S.F. 311 which provided:

> "The purpose of this division is to provide an additional method of collecting fuel taxes from interstate motor vehicle operators commensurate with their operations on Iowa highways; and to permit the treasurer to suspend this collection as to transportation entering Iowa from any other state where it appears that Iowa highway fuel tax revenue and interstate highway transportation moving out of Iowa will not be unduly prejudiced thereby." (Emphasis added)

However, when the bill was enrolled, the aforesaid Section 324.56, supra, was not contained therein. (See: Senate amendment, division 10 thereof, which provided: "10. Further amend section 1 by striking all of 324.56 and renumber the remainder in numerical order" Adopted, S.J., 57th G.A., April 12, 1957, p. 776).

Before the then Section 324.56 was amended out, Section 324.51, supra, could be likened to a chemical reaction, which to be carried out to finality, depended on a positive catalyst, to wit: Section 324.56 of the original bill. As the law now stands, the positive catalyst has been removed.

Therefore, in view of the foregoing, we are able to arrive at but one conclusion: The Treasurer of State may not enter into reciprocal agreements with other states concerning motor fuel and special fuel use tax for interstate motor vehicle operations.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

COUNTIES: Road machinery

County owned machinery is not available for use by other public bodies without statutory authority bestowed upon the Board of Supervisors therefor. Use of such machinery on soil conservation projects is not authorized. (Strauss to Morrow, Allamakee Co. atty.; 5/13/59) #59-5-9

May 13, 1959

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Sir:

This will acknowledge yours of the 6th inst. in which you submitted the following:

"I request an opinion on the following question:

"Can the County Board of Supervisors authorize and direct the use of County owned machinery, such as bull dozers and maintainers, to be used at the County farm in the construction of ponds, terraces, and other Soil Conservation work?"

In reply thereto I advise you that it is the view of the Department that County owned machinery is not available for use by other bodies without statutory authority bestowed on the Board of Supervisors therefor. I find no statutory authority for making such County owned machinery available to the Soil Conservation Board.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

P. S. See attached copy of opinion dated June 22, 1956, issued to Mr. Charles M. Roe, Assistant Pottawattamie County Attorney.

59-5-9

COURTS: Justice of the peace --

Under §601.131(4), 1958 Code, the allocation of a portion of the civil fees of a justice of the peace and constables to the County Treasurer for expenses of their offices applies to the fees of such offices in both ~~XX~~ townships having a population of 10,000 and over and 50,000. (Stramaste Akers, St. Auditor, 5/13/59)

#59-5-10

May 13, 1959

Hon. Chet B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. Earl C. Holloway

Dear Sir:

This will acknowledge receipt of yours of the 6th inst. in which you submitted the following:

> "We have received the following inquiry in regard to Section 601.131(4), 1958 Code:
>
> "'The subject subsection sets up two classifications of townships, ie:
>
> "'1. All townships having a population of ten thousand and over--" in which the Board of Supervisors may allow Justices and Constables $500 in civil fees (not in excess) per annum.
>
> "'2. In townships having a population over fifty thousand not in excess of $1000.00 per annum for expenses actually incurred.
>
> "'Does the clause "for expenses actually incurred" become a condition of the first class as well as the second class?'"

In reply thereto I would advise as follows. Section 601.131(4) Code 1958, in terms provides as follows:

> "4. Justices and constables in all townships having a population of ten thousand and over shall retain such civil fees as may be allowed by the board of supervisors, not to exceed five hundred dollars per annum, and in townships having a population over fifty thousand, not to exceed one thousand dollars per annum for expenses of their offices actually incurred, and shall pay into the county treasury all the balance of the civil fees collected by them."

59-5-10

It seems clear that the provision for use of the sum not exceeding $1,000.00 of civil fees for expenses is equally applicable to the provision authorizing a retention of civil fees to the amount of $500.00 in townships having a population of 10,000 or over. This conclusion seems justified in view of the fact that if the provision for expenses is limited to the townships having a population of over 50,000, then the provision made for allocating civil fees collected in such townships over the sum of $1,000.00 would likewise be so limited. The legislative intent obviously was that the sums named in the foregoing section were allocated for expenses to the amount stated and the excess directed to be paid into the County treasury. It seems clear that the Legislature did not intend that civil fees in townships over 10,000 exceeding $500.00 should belong to the justice or constable.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES: Education Board--

Bills of the County Board of Education may be paid by warrant authorized by the County Board of Education without approval of the Board of Supervisors. (Strauss to Morrow Allamakee Co. Atty.: 5/13/59) # 59-5-11

May 13, 1959

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Sir:

This will acknowledge yours of the 6th inst. in which you submitted the following:

> "I request an opinion on the question which follows the next paragraph.
>
> "Section 333.2 of the 1958 Code of Iowa, states that except in certain cases of witness and jury fees, the auditor will only issue a warrant after a bill has been duly approved by the Board of Supervisors, Section 273.13(11) of the 1958 Code of Iowa, states that the County Board of Education will approve all bills which will be paid by warrant of the County Auditor.
>
> "I have seen a mimeographed copy of informal opinion signed by Mr. Oscar Strauss addressed to Chet Akers dated June, 1948, which states in effect that the Auditor may issue such warrants without the approval of the County Board of Supervisors. Inasmuch as 11 years has elapsed and the Iowa Code has not been changed, and such an opinion does not show in your bond opinions or in the annotations to the Code, I would like an answer to this question:
>
> "Can the Auditor of a County issue warrants for bills duly approved by the County Board of Education, which are not approved by the County Board of Supervisors?"

59-5-11

In reply thereto I would advise you that the views expressed in the opinion referred to are still the views of the Department.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

P. S. See attached copy of opinion issued June 28, 1949, to Mr. Chet B. Akers, Auditor of State.

TAXATION:- ~~PROPERTY TAX - ASSESSORS.~~ Property tax assessors -
The salary of an individual appointed to fill a vacancy in the office of County Assessor for the balance of the term of the prior County Assessor must be fixed at the same amount as that of the prior County Assessor.
(Strauss to Miller, St. Tax Comm., 5/14/59) #59-5-12

May 14, 1959

Mr. Leon N. Miller, Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Miller:

This is to acknowledge receipt of your letter of April 1, 1959, in which you request a legal opinion from this office stated as follows:

> "A county assessor was appointed by his county conference board for a four-year term starting January 1, 1958, at a salary that is in excess of the salary of the county auditor of his county, the county board of supervisors having expressly approved his salary as provided for in section 441.6, 1958 Code of Iowa. After serving a little more than one year of his present four-year term said county assessor has indicated to members of his county conference board that he is dissatisfied with the amount of his present salary and is considering resigning his position at the close of the year 1959. Assuming that he does so, and an examination is held to fill the vacancy, then under the provisions of section 441.3, the appointment of a successor shall be effective only for the balance of the term of the present assessor which runs until December 31, 1961. The statute is not clear as to whether in appointing a successor the county conference board must fix the salary of such successor at the same amount as was fixed for the assessor being succeeded in office. However, in an Opinion of the Attorney General found in the 1950 Report of Attorney General at page 180, it was held that the county conference does not have legal authority to fix the salary of the county assessor on any basis except on a term basis, and the county conference may not increase the salary of the county assessor at the beginning of any year of his term or at any time during the year. The first question is:- Must the salary of the successor assessor whose appointment is effective only for the balance of the term of the assessor who is succeeded in office be fixed at the same amount as that of the assessor succeeded for the remaining portion of the term of that assessor, or may the county conference board in fixing the salary of the successor assessor for the remaining portion of that "

59-5-12

term fix a different amount, and could that amount be increased if the county board of supervisors approved the increase where the salary exceeded that of the county auditor?

"The second question is:- Assuming that the ruling in question 1 is that the salary could be raised upon the appointment of a successor assessor, would the present assessor be eligible to take the examination for the position, and if he attained a passing grade and was certified as an eligible candidate, could the county conference board appoint him as the 'successor assessor' under the provisions of section 441.3?. If so, could he then be allowed an increase in his salary for the remaining portion of his present term?"

The first question which you present has been answered by a letter opinion of the Office of the Attorney General dated December 17, 1956, a copy of which is enclosed. This opinion is to the effect that the salary cannot be increased during the term.

An answer to your second question is unnecessary since that question is based upon the assumption that the salary could be raised during the term.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs
Encl.

C
O
P
Y

December 17, 1956

Mr. Rober S. Bruner
Carroll County Attorney
Carroll, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 14th inst. in which you submitted the following:

> "Our County Assessor died several weeks ago. His four (4) year term expires January 1, 1958.
>
> "The necessary steps are being taken to fill the vacancy in this office as provided by chapter 141 of the Code.
>
> "At the time of his death the Assessor's salary was $5,000.00 per year. I have been asked whether or not the Conference Board may, with the approval of the Board of Supervisors, increase this salary for whomsoever shall be selected to serve out the remainder of the term."

In reply thereto I would advise you that pursuant to opinion of this Department appearing in the Report for 1950 at page 180, copy of which is enclosed, the salary of the County Assessor cannot be increased during the term.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB
Encl.

BANKS AND BANKING: Savings and Loan Ass'ns. --
The authority granted to building and loan associations by Chapter 528A, Code 1958, to destroy records of such associations applies only to dead files and records. (Strauss to Akers, St. Auditor, 5/14/59) # 59-5-13

May 14, 1959

Mr. C. B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. George T. Carson

Dear Sir:

This will acknowledge receipt of yours of the 29th ult. in which you submitted the following:

> "We hand you herewith a copy of a letter from Mr. Kenneth F. Neu, Executive Vice President of the Iowa Savings and Loan League, requesting an Attorney General's opinion on Sections 534.111-113, Code of Iowa, specifically on the following question.
>
> "In the numerous instances where an association has a current and active savings account or loan account, but where the history of transactions on the particular account is more than eleven years old, can the association properly destroy that part of the old records pertaining to such savings or loan account which is over eleven years old?
>
> "We will appreciate your consideration of the matter at your earliest convenience."

with accompanying letter of Mr. Kenneth Neu, Executive Vice President, exhibited as follows:

> "This office has been requested by one of the State chartered savings and loan associations to ask for an Attorney General's opinion on the interpretation of the above reference sections, pertaining to preservations of records, which was enacted by the 56th G. A.
>
> "The question is specifically as follows:

59-5-13

> "In the numerous instances where an association has a current and active savings account or loan account, but where the history of transactions on the particular account is more than eleven years old, can the association properly destroy that part of the old records pertaining to such savings or loan account which is over eleven years old?
>
> "We feel it is clear that this section allows the destruction of such records that are over eleven years old in the case of accountswhich have been cancelled. We also believe it was probably the intent that the answer to the above question be affirmative, but before taking the step of recommending actually destroying such records of current or active accounts we would like more assurance."

In reply thereto I advise as follows. The 52nd General Assembly enacted what is now designated as Chapter 528A devoted to regulations respecting the destruction and preservation of bank records. This chapter, with the exception of Section 528A.3 respecting photographic reproductions, is in the exact terms of Sections 534.111-113, Code 1958. Administrative construction of the Banking Act insofar as the question you propound here is concerned appears in a pamphlet designated The "Iowa Schedule" for destroying obsolete bank records and files issued by the Iowa Bankers Association and on page 16 thereof it is stated:

> "The purposes of the bill are (a) to relieve banks from the necessity of retaining throughout unlimited years, dead files and records, thus relieving them from unnecessary expense for storage, maintenance and care, (b) to protect customers by fixing a minimum period of eleven years during

> which time the bank must retain all records and files, (c) to protect depositors by requiring banks to permanently retain unpaid deposit ledger sheets, (d) to simplify the production of bank records and files as evidence in legal proceedings and (e) to provide a period of eleven years during which causes of action may be brought on claims arising from such records and files."

This administrative construction of the banking bill is equally applicable to the act as it applies to savings and loan associations and, therefore, by reason thereof I am of the opinion that Sections 534.111-113, Code 1958, are applicable only to dead files and records.

I would call your attention to the fact that Ben J. Gibson, then an attorney for the Bankers Association, issued an opinion interpreting this act as it relates to the banks. This opinion appears on page 16 of the previously described "Iowa Schedule" and is hereto attached. This opinion, you will note, does not pass upon the exact question propounded by you.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

COUNTIES: Courthouse grounds--
There is no authority in the Board of Supervisors to lease or sell part of the court house grounds currently used for county purposes to the city. (Strauss to Cady, Franklin Co. Atty., 5/15/59)
59-5-14

May 15, 1959

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 20th ult. in which you submitted the following:

> "As Franklin County Attorney, I do hereby request an opinion from your office as to the rights of the Franklin County Board of Supervisors to do an act as hereinafter stated.
>
> "The Franklin County Court House is situated on a county square in the heart of the business district of Hampton. The City Council is interested in widening the street along the west side of the court house and intends to widen the street by taking a strip of ground eight feet in width along the west side of the court house grounds. This strip is solely on city property, since it has been determined that the eight foot strip of sidewalk lies on property owned by the city of Hampton. However, the Council also intends to widen by eight feet the street along the north side of the city square, four feet of which is already on city property, and they would like to have the Board of Supervisors deed to them, or lease to them, a strip of ground four feet in width along the entire north side of the city square, which area will be used for street purposes. If this were done, the city would then have to place on county property the parking meters which are now on city property.
>
> "I would like an opinion from your office as to the two questions hereinafter stated: (1) Under Section 332.3, subparagraph 13 or 17, does the Board of Supervisors have the right, under the circumstances related above, to sell or lease to the county the strip of real estate four feet in width

59-5-14

which runs along the court house grounds, which is to be used for street purposes? (2) Do the Board of Supervisors for Franklin County have the authority, under Section 332.3 of the 1958 Code of Iowa, to permit the city of Hampton to erect parking meters on county ground, which meters will receive money for parking vehicles on city owned property?

"I would appreciate an opinion as to the above enumerated items as soon as it is convenient for you to do so."

In reply thereto I would advise you that the question submitted in the foregoing was considered in an opinion issued April 24, 1953, to Mr. K. L. Kober, Black Haw County Attorney, where a like situation existed. Copy of this opinion is hereto attached.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

Personal property exemptions - -

[redacted]: TAXATION: ~~PROPERTY TAX EXEMPTIONS~~: Mink pelts held by the producer are not exempt as agricultural produce. (Reinhemer to Charleston, Wright Co. Atty., 5/19/59) 1959-5-15

May 19, 1959

Mr. Newt Draheim
Wright County Attorney
Clarion, Iowa

Dear Mr. Draheim:

This will acknowledge receipt of your letter of March 25, 1959, in which you request the opinion of this department on whether mink pelts or peltry held by the producers of such pelts are exempt from taxation.

Your attention is directed to Section 427.1 (13), Code of Iowa (1958), which reads as follows:

> "427.1 Exemptions. The following classes of property shall not be taxed:
>
> " * * *.
>
> "13. Agricultural produce. Growing agricultural and horticultural crops and products, except commercial orchards and vineyards, and all horticultural and agricultural produce harvested by or for the person assessed within one year previous to the listing, all wool shorn from his sheep within such time, all poultry, ten stands of bees, honey and beeswax produced during that time and remaining in the possession of the producer, all swine and sheep under nine months of age, and all other livestock and fur-bearing animals under one year of age."

If the mink pelts in question are to fit within the terms of the above set out statute, the basis for exemption must be that they are "agricultural produce harvested". This is so, since they cannot fairly come within any other terms of the statute.

59-5-15

In applying exemption statutes, it must be remembered that the Iowa Supreme Court has directed that such statutes are to be construed strictly. Readlyn Hospital vs. Hoth, 223 Iowa 341, 272 N.W. 90; Boss v. Polk County, 236 Iowa 384, 19 N. W. 2d 225.

Notice should also be taken of Section 4.1 (2), Code of Iowa (1958), which requires that in construing statutes of this state the words contained therein should be given their common and approved meaning unless the context of the statute requires otherwise.

Taking these basic principles into consideration, attention must be given to the words "agricultural produce". As these words are commonly used and understood, they mean the products or fruit of the soil and in their broadest sense include such domestic animals as are usually found on a farm.

It cannot be fairly said that mink pelts can be included in this definition. Further evidence of the legislature's intention not to include such items as mink pelts in Section 427.1 (13), supra, is found by the use of the term "harvested". This word in its common connotation refers to the gathering of grain, fruits, or other crops.

It is, therefore, the opinion of this office that mink pelts are not such property as were intended to be included in the exemption found in Section 427.1 (13).

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/WWR/bjf

CONSERVATION ~~COMMISSION~~ -- Appropriation -- Storm Lake -- Entire $170,000 to be used for the sole and only purpose of lake dredging
(Gitton to Stiles, St. Cons. Dir., 5/19/59) #59-5-16

May 19, 1959

Bruce F. Stiles, Director
State Conservation Commission
East 7th and Court Avenue
Des Moines 8, Iowa

Dear Sir:

Your letter of May 12, 1959, reads as follows:

"During the 58th General Assembly an appropriations bill (H.F.548) was passed, carrying an appropriation for Storm Lake. This is set out in Section 3 of the bill.

"This appropriation carried an amount of $120,000.00 state funds contingent on an additional $50,000.00 to be contributed by the Storm Lake community.

"The Conservation Commission respectfully requests your opinion as to whether or not one or both of these funds can be spent for any activity other than for dredging of said lake."

Sec. 3, House File 548, is as follows:

"Sec. 3. There is hereby appropriated to the state conservation commission for lake dredging at Storm Lake the sum of one hundred twenty thousand (120,000) dollars, said appropriation shall be contingent upon and be supplemented by an additional fifty thousand (50,000) dollars to be raised in contributions, from other than state funds, by the community around said lake."

The Iowa Supreme Court, in the case of Herman M. Brown Company v. Johnson, 82 N.W. 2d 134, 143 states as follows:

"As defined by Webster, the words 'complementary' and 'supplemental' mean 'serving to fill out or complete', 'mutually supplying each other's lack', 'to fill deficiencies'."

59-5-16

In the case of State v. Wyandot County, 16 Ohio Cir. Ct. R. 218, it is stated:

> "A 'supplement' is that which supplies a deficiency; that which fills up, completes, or makes an addition to something already organized, arranged, or set apart; a part added to or a continuation of. It is used sometimes as a synonym of 'appendix'."

It is clear from the wording of section three, that the appropriation of one hundred twenty thousand dollars was for the sole and only purpose of lake dredging at Storm Lake. It would have been impossible for the legislature to have more clearly stated this.

Since the legislature clearly provided that the fifty thousand dollars to be raised in contributions is to supplement the appropriated sum, and in view of the definitions of "supplement" set out above, it was the intent of the legislature to provide that the entire sum of one hundred seventy thousand dollars be used for the sole and only purpose of lake dredging at Storm Lake.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh4

SCHOOLS: Reorganization -- Lame-Duck contracts. Conflicts in statutes discussed and Declaratory Judgment procedure recommended. (Atla to Davis, Pub. Instr. Dept., 5/22/59)

59-5-17

May 22, 1959

Mr. Joseph S. Davis
Administrative Assistant
Department of Public Instruction
L O C A L

Dear Sir:

Receipt is acknowledged of your letter of May 7 as follows:

> "Recently we have had a series of questions pertaining to the status of a superintendent's contract in the event of a newly reorganized district.
>
> Assuming the following typical situation:
>
> A proposed amalgamation of high school districts 'A', 'B', and 'C' was approved by the voters on April 2, 1959.
>
> Approximately one week later high school district 'A' gave their superintendent a three-year contract. He has been employed in said district nine years.
>
> We are wondering what the legal status of this contract is.
>
> Your opinion on this will be appreciated."

The situation you describe has, in part, been considered in two letter opinions of this office dated April 10, 1958 and January 7, 1959. In view of possible additional complications in the subject brought about by certain Acts of the 58th General Assembly, it now appears desirable to review the two prior opinions and the newly-enacted legislation as applicable to your question.

59-5-17

The basic problem arises under section 275.33, Code 1958, which provides as follows:

> "The terms of employment of superintendents, principals, and teachers, for any current school year shall not be affected by the formation of the new district."

The difficulty with the quoted provision is the ambiguity inhering in the phrase "current school year". In our letter opinion of April 10, we said, with respect to a similar situation:

> "According to the facts stated in your letter, the board of directors of a certain school district entered into a three-year contract with a superintendent. After the said superintendent had served one year under such contract the school district with which he had contracted ceased to exist and the territory it had formerly served became part of a new school district under the provisions of Chapter 275 of the Code, However, the contract in question was not a contract to serve as superintendent of the new corporation nor was the new corporation a party to the contract. The position which the said superintendent had contracted to fill ceased to exist on the date that the old corporation ceased to exist. The office of superintendent of the consolidated district was abolished by operation of law.
>
> To elaborate, since no privity of contract existed between the superintendent in question and the new community district, it would seem to logically follow that said superintendent had no claim to any right of employment in a similar capacity by the new district by virtue of his employment by the old district unless such right be conferred by statute. Ordinarily, right to public employment, even in a position protected by Civil Service terminates when the position held is abolished. See Wood v. Loveless, 244 Iowa 919, 58 N.W. 2d 368 and cases cited therein. If such be true of a position protected by Civil Service, it must be true to an even greater degree

of a position not protected by Civil Service. It seems quite obvious that when a school corporation ceases to exist, all positions of employment under such corporation ipso facto are abolished by operation of law.

Thus, the problem with which you are confronted is easily disposed of unless the provisions of Section 275.33, to which your letter refers, impose an obstacle. It provides as follows:

> 'Contracts not affected. The terms of employment of superintendents, principals, and teachers, for any current school year shall not be affected by the formation of the new district.'

Reference to annotations contained in both the Annotations to Code of Iowa and in the West Publishing Company's I. C. A. fails to reveal any decision of our Supreme Court or prior staff opinion of this office construing either Section 275.33 of the current code or its identical predecessor which appeared as Section 274.31 in the 1950 and prior codes and prior to that under various section numbers set forth in the historical analysis following the text of the provision appearing in the current code.

Under most fact situations necessitating application of Section 275.33, supra, the meaning of the word 'Current' would provide a vexatious and troublesome problem. The school year runs from July 1 to June 30. Districts 'formed' under Chapter 275 become effective on July1. Contracts with teachers and superintendents are ordinarily made in April but for the 'ensuing' rather than 'current' school year. Although the new district becomes 'effective' on July 1, all of the procedural steps incident to its 'formation' must take place prior to July 1. Thus, the problem arises as to what reference point in chronology one must use in determining whether the word 'current' applies to the school year ending June 30 of a given calendar year or July 1 of the same calendar year. It could be plausibly argued that the 'formation' took place in the school year ending June 30 although the end product of such formation did not become effective until July 1.

> Whichever year be considered 'current', one thing appears clear. It is that Section 275.33 applies only to the 'current' year. The express provision that the 'formation' has no effect upon contracts 'for any current school year' implies that the 'formation' does affect such contracts with respect to years subsequent to the 'current' year. 'Inclusio unius est exclusio alterius'. The manner in which 'formation' affects contracts for such subsequent years would, of course, be the same manner that abolishing a position generally affects such position as hereinabove discussed.
>
> Since the facts of your letter are that the superintendent in question has been permitted to continue to serve as superintendent for one year beyond the effective date of the new district obviate necessity for resolving the apparent ambiguity surrounding the use of the word 'current'. Of the possible constructions of that word, the most favorable to the superintendent would permit him only one year of employment beyond the effective date of the new district. In other words, it could delay the automatic abolition of his position by virtue of the cessation of existence of his employer for only one year, the 'current' year."

In our letter opinion of January 7, 1959, we further considered the problem as it related to contracts with teachers. we said:

> "Because of the ambiguity inhering in section 275.33 by reason of its failure to fix a chronological reference point with respect to the word 'current,' it is impossible to conclude with any degree of certainty whether 'current' in the fact situation you describe means the school year 1958-59 or the school year 1959-60. In the absence of section 275.33 it would seem that contracts made with the old boards prior to July 1, 1959, for the school year 1959-1960 would be void upon the creation of the new district on the precedent in Wood v. Loveless, 244 Iowa 919, 58 N.W. 2d 368. This would seem in the public interest as it would preclude hostile boards from hiring teachers in wholesale lots for a term to run entirely beyond

the term of office of such boards.

However, it is ordinarily presumed that the legislature has some purpose in mind in adopting a statute. We are, therefore, forced to the conclusion that the legislature, in adopting section 275.33, must have intended some result other than that which would have obtained had it remained silent. On this basis, I conclude that the phrase 'current school year' as used in the said statute means, in the situation you describe, the school year commencing July 1, 1959 and ending June 30, 1960. This leaves the new board somewhat at the mercy of the old boards for the said year but, as was said in the decision of our Supreme Court in the case of State ex rel Harberts v. Klemme Community School District, 247 Iowa 48, 72 N.W. 2d 512, 515, 'They are usually composed of persons of integrity and high purpose.'"

Subsequent to the quoted opinions, the 58th General Assembly enacted Senate File 1 which further complicates the picture by adding to section 279.13, Code 1958, the following:

"The term 'teacher' as used in this section shall include all certificated school employees including superintendents."

One of the provisions of "this section" (section 279.13), for purposes of which the word "teacher" is defined as "including superintendents" is as follows:

"Contracts with teachers . . . may include employment for a term not exceeding the ensuing school year."

This raises two complications: (1) With respect to the three-year contract heretofore authorized in section 279.14 will the Courts follow the rule, "implied repeals are not favored" or will they apply the rule, "the later enactment prevails"?

(2) Is the "ensuing" school year to which section 279.13 refers the same as the "current school year" to which section 275.33 refers? If the first question could be answered, with assurance, that the "later enactment" rule would be followed, the question stated in your letter could be disposed of by saying under the new law there is no longer such thing as a three-year superintendent's contract. This, however, although quite in line with the older cases, does not seem assured in view of the numerous and more recent cases applying the "implied repeals are not favored" doctrine.

Similarly, if we could say with assurance that the phrase "ensuing year" as used in section 279.13 describes the year after the "current year" to which section 275.33 refers, then it would follow all contracts end on July 1, thereby eliminating any problem the new district might have with surplus teachers. The trouble with this is, as pointed out in our letter of January 7, it would make section 275.33 meaningless.

Senate File 529, also enacted by the 58th General Assembly, has bearing on your question. It amends section 275.25 of the 1958 Code, relating to the election of a board for the new district and its powers. Prior to amendment, the new board could be elected as soon as the proposition for a new district carried but could not organize prior to July 1. Under the provisions of Senate File 1:

> "The new board shall organize within fifteen 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."

The underscored language would completely dispose of the question submitted in your letter had section 275.33 been repealed. However, it wasn't, and we are left with the same two complications as hereinabove set forth with respect to the amendment to section 279.13.

The uncertainties which existed in the statutes as construed in the quoted letter opinions continue under the amendments to chapter 275 enacted by the 58th General Assembly. Although it is now clear that the board of a new district may hire personnel for such district prior to July 1, it is by no means clear that the new district is not bound under section 275.33 by contracts made by the old boards, especially if made before the organization of the new board.

We incline to the view that in sound public policy, contracts entered into by an old board, at a time it knows its days are numbered, with a teacher or superintendent who also knows that the board with whom he is contracting and the district in which he contracts to instruct or supervise will cease their

official existence before time for performance under the contract arrives, should be held void. This seems clearly supported by Senate File 529 but, nevertheless, seems contrary to section 275.33 which was not repealed.

We, therefore, recommend that any new school district confronted with such problem retain counsel as provided in section 279.35 and, by and though such counsel, obtain a declaratory judgment, provided in Rules of Civil Procedure 261 et. seq., declaring its rights, status, and legal relations under such contracts and resolving the conflicts in the statutes as heretofore pointed out.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

SCHOOLS: Ballots--
Directing ballots in school elections to be printed does not include therein mimeographing or other form of impression of such ballots.
(Strauss to Pierce, St. Rep., 5/25/59) # 59-5-18

May 25, 1959

Hon. Neal Pierce
State Representative
Russell, Iowa

My dear Neal:

Reference is herein made to your oral request respecting the use of mimeographed ballots at a school election. I advise as follows. In the view that Chapter 277, Code 1958, being the statute controlling school elections, makes no provision for providing of ballots therein and, therefore, under the provisions of Sec. 277.33, Code 1958, the general election laws concernad therewith will apply. In that aspect the statute pertaining to the submission of public measures is found in Sec. 49.49, Code 1958, providing as follows:

> "Printing of ballots on public measures. All of such ballots for the same polling place shall be of the same size, similarly printed, upon yellow colored paper. On the back of each such ballot shall be printed appropriate words, showing that such ballot relates to a constitutional or other question to be submitted to the electors, so as to distinguish the said ballots from the official ballot for candidates for office, and a facsimile of the signature of the auditor or other office who has caused the ballot to be printed."

Mimeographing such ballots is not expressly authorized and therefore if authorized the authority must be found in the definition of the word "print" as used in such statute. The word insofar as printing ballots is concerned appears in the

59-5-18

1897 Code, Section 1107. It is a fair inference that the term as there used was not broad enough to include mimeographing or other forms of duplication now existing. It is to be said in that respect, according to the case of Alpers v. United States, 175 F. 2d 137, as follows:

> "'Printing means the impress of letters or characters upon paper or upon other substance * * * (and) implies a mechanical act.' Daly v. Berry, 45 N. E. 287, 178 N. W. 104, 106.
>
> "'The word "print" has a wide range of signification; but its ordinary meaning is to impress letters, figures, and characters, by types and ink of various forms and colors, upon paper of various kinds, on some such yielding surfact.' Forbes Lithograph Mgf. Co. v. Worthington, C. C., 25 F. 899, 900."

And its long use and existence in numerous statutes in the Code without qualification of definition other than as defined above seems to preclude any intention of the Legislature to include therein mimeographing. Among the many statutes using the word "printing" are Chapters 15, 16 and 17, one devoted to the establishment of the State Printing Board and prescribing its powers and duties and another providing for the office of Superintendent of Printing and prescribing his powers and duties and providing for legislative printing. It is to be observed that the word "printing" therein stands unqualified or broadened by other terms of impressions. Long administrative construction of the word "printing" in the many places of the Code does not include any

other method of impression and leads to the conclusion together with the provisions of Sec. 15.42, providing as follows:

> "Permissive use of duplicators. Either mimeographs, similar duplicators or machines of the offset type may be used in departments or agencies located in the city of Des Moines provided that no more than five thousand copies of any one master copy or original are made, and provided that a cost system be kept and reported as provided for in section 15.39. The master copy or stencil used on these machines shall be prepared by a typewriter means of composition only, and no photographic master of aluminum, metal, zinc, paper or stencil of any type shall be purchased or used without the approval of the state superintendent of printing."

that mimeographing of ballots for school elections is not authorized. In that situation it seems clear that if the Legislature intended printing to mean mimeographing it would have so stated. This was the observation of the Court in the case of Wiggins v. Kerby, 38 P. 2d 315, 319, where it was stated:

> "Whether the typewritten, mimeographed copies of the laws in question, which respondent caused to be made and distributed, constitutes a printing within any sense of that term it is unnecessary to determine, for even though it does, it is perfectly plain that it was not a printing within the meaning of the Legislature, as expressed either in the above excerpt from section 23, or in the expression 'printing the session laws,' as used in the general appropriation bill of 1933. There cannot exist the slightest doubt as to what the Legislature had in mind when it used the term 'printer' in the first and 'printing' in the second. The session laws have been printed and published in ordinary convenient book size and form and carrying an index since Arizona became a state and long prior thereto,

and no question of any nature can arise as to the fact that the members of the Legislature had this in mind in both of these instances. If by the term 'printing,' as it appears in the appropriation bill of 1933, the Eleventh Legislature had meant mimeographing it would undoubtedly have said so, and, in addition, would have appropriated a very much smaller sum for this purpose. Nothing can be clearer than the fact that mimeographing the laws in question does not constitute a printing within the meaning of this word as used in subdivision 45 of section 1 of the general appropriation bill passed by the Eleventh Legislature."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

HEALTH: County unit --

A county health unit plan may be established by mutual agreement between the Boards of Health of every city, town and township in the county with the Board of Supervisors, and such written agreement should be executed by the Board of Supervisors and these several boards and the agreement made of record in the proceedings of such boards. (Strauss to Hultman, Blackhawk Co. Atty. 5/26/59) #59-5-20

May 26, 1959

Mr. Evan L. Hultman
Black Hawk County Attorney
Waterloo, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 25th inst. in which you submitted the following:

> "In accordance with our previous conversations, I wish to submit the following matter concerning the adoption of a County Health Unit Plan.
>
> "According to Section 138.1 of the 1958 Code of Iowa 'The County Board of Supervisors of any county may, by mutual agreement of Boards of Health of cities, towns and townships of their county, adopt the County Health Unit Plan.' The Black Hawk County Board of Supervisors are investigating the possible adoption of such a plan and have requested the following information from me which I have been unable to find after a search of the annotations.
>
> "1. Must the Black Hawk County Board of Supervisors enter into a mutual agreement with every Board of Health of every city, town and township in Black Hawk County to adopt a County Health Unit Plan?
>
> "2. What formal action is necessary by the county, cities, towns and townships in order to adopt a county health unit plan?
>
> "The only information that I can find indicating that every city, town and township would have to enter into this mutual agreement is the supposition made by the writer in 36 Iowa Law Review at page 101 in 1950."

59-5-20

In answer to the foregoing I advise as follows.

1. Section 138.1, Code 1958, quoted by you, supersedes the same numbered section in the 1946 Code. That section, as it there existed, provided the following:

> "Adoption of plan. The county board of supervisors of any county in Iowa may, by their own resolution, or by mutual agreement with any local board or boards of health of their county, adopt the county health unit plan."

The repeal of that section by the 52nd General Assembly, Chapter 93, subsection 9, providing that a county health unit plan can be established by mutual agreement with any local Board or Boards of Health and the substitution of the section as it now exists shows a legislative intent that such health unit plan can be adopted only by agreement with the Boards of Health of every city, town and township in Black Hawk County.

2. Insofar as your question #2 is concerned, I am of the opinion that a written agreement be executed between the Board of Supervisors and the Boards of Health of all of the cities, towns and townships of the county, which agreement and its execution should be authorized by each of the Boards of Health and the Board of Supervisors and the agreement and its authorization made of record in the proceedings of such Boards of Health and the Board of Supervisors.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COMPATIBILITY OF OFFICES:
A duly elected and qualified State Senator is ineligible to hold the office of inheritance tax appraiser. (Strauss to Hultman, Black Hawk Co. Atty., 5/26/59) #59-5-21

May 26, 1959

Mr. Evan L. Hultman
Black Hawk County Attorney
Waterloo, Iowa

My dear Evan:

This will acknowledge receipt of yours of the 25th inst. in which you submitted the following:

> "The District Judges in and for the Tenth Judicial District of Iowa have requested an official opinion from me concerning the appointment of an inheritance tax appraiser to fill the vacancy created by the recent death of one of the members here in Waterloo. The specific question is: Is it illegal for an elected State Representative or Senator to be appointed and serve in the capacity as an inheritance tax appraiser?
>
> "It is important that I get as early an answer as possible to this question in that inheritance tax appraisements are quite numerous in Black Hawk County, and this vacancy needs to be filled as early as possible."

In reply thereto I advise you that on December 14, 1954, it was ruled that a duly elected and qualified State Senator was ineligible to hold the office of inheritance tax appraiser. Copy of this opinion is attached.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

59-5-21

COUNTIES: Road machinery --
County road equipment can be used in a County Soil Conservation project at the County Home. (Strauss to Morrow, Allamakee Co. Atty., 5/26/59) #59-5-22 also see #59-5-9

May 26, 1959

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Sir:

This will acknowledge yours of the 18th inst. asking for a reconsideration of my letter to you of May 13th, and you add by way of explanation of the request the following:

> "In an effort to explain what I want, I will state that Allamakee County, Iowa owns and operates the Allamakee County Home and Farm. That said County has joined the Soil Conservation program and there is a certain amount of terracing that needs to be done. Now the County can contract with a private contractor to come in and do this work, or it can use its own machinery on its own farm at a lot less expenditure of money. I merely wanted to know if the county could use its own road building equipment on its own farm."

Upon reconsideration hereof, I am disposed to the view that the opinion appearing in the 1952 Report of the Attorney General at page 116 would permit the use of this equipment as proposed. Copy of this opinion is attached.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

59-5-22

Credit Unions --

~~HEADNOTE~~ -- TAXATION: ~~CREDIT UNIONS.~~ Furniture, Fixtures and Equipment of Credit Unions are not subject to personal property taxes. Dividends payable are not assessable to credit unions as moneys and credits.

(Brinkman to Miller, St. Tax Comm., 5/28/59)

#59-5-24

May 28, 1959

Mr. Leon N. Miller, Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Miller:

This will acknowledge receipt of your letter of May 12, 1959, in which you ask the opinion of this office on a problem concerning the taxation of credit unions. Your questions are as follows:

"1. Assessment of Furniture, Fixtures and Equipment of Credit Unions

"The assessment of personal property is not mentioned in Section 533.22, Code of Iowa. We would appreciate an opinion as to whether personal property of credit unions is exempt from taxation in as much as no mention is made of it in this section or does the rule of taxation apply whereby all property is taxable unless specifically exempt.

"2. Assessment of Money and Credits of Credit Unions

"State Tax Commission Memorandum #80 of January 12, 1959, pertaining to the assessment of Credit Unions, states that under a 1940 Attorney General's opinion the taxation of Moneys and Credits is limited to the sum of reserves, surplus and undivided earnings. Does 'Dividend Payable' fall into the catagory of undivided earnings and thereby become assessable as Moneys and Credits?

"3. What rate of Moneys and Credits is applicable?"

In answer to your first question, your attention is directed to Section 533.22, Code of Iowa (1958), which reads as follows:

"A credit union shall be deemed an institution for saving and

59-5-24

shall be subject to taxation only as to its real estate, moneys and credits. The shares shall not be taxed."

Section 427.1, Code of Iowa (1958), lists certain classes of property which shall be exempt from taxation. No provision is found therein which would exempt the furniture, fixtures and equipment of credit unions. The general rule in this regard is that, unless the property claimed to be exempt can be shown to fit within the terms of a statutory exemption, it is subject to tax.

Section 533.22, supra, by omission exempts the personal property of a credit union. In view of this, it appears that Sections 533.22 and 427.1 are in conflict on this point, since Section 427.1 by omitting this type of property makes it taxable under the general rule as above outlined, and Section 533.22 by omitting mention of personal property exempts such property.

Where two statutes conflict, one general and one specific, it is a basic principle of statutory construction that the specific statute will prevail. Story County v. Hansen, 178 Iowa 452, 159 N.W. 100. This rule is particularly applicable where the specific statute was enacted into law after the general statute, as is the situation in the instant case.

As to your second inquiry, you are advised that dividends payable cannot be said to come within the term undivided earnings. After a dividend has been declared in good faith, and not merely as subterfuge to avoid the payment of taxes, the money is not taxable to the credit union as part of its undivided earnings, surplus or reserves. Pollard v. First National Bank of Newton, 47 Kan. 406, 28 Pac. 202.

In response to your third inquiry, the six mill rate is applicable to

moneys and credits of credit unions.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:WWR:fs

CORONERS--Fees-- Subsection 1, Section 340.19, and subsection 2, Section 340.19 are mutually exclusive; also discussion of fee to be charged for death occurring under suspicious circumstances. (Fitton to Hasbrouck, Guthrie Co. Atty., 5/20/59) # 59-5-25

COUNTIES: Coroners fees--

May 20, 1959

Hasbroucke in Red Book

Mr. Jay Hasbroucke
Guthrie County Attorney
Guthrie Center, Iowa

Dear Mr. Hasbroucke:

You will find enclosed a thermo-fax copy of a letter this office recently received from Mr. E. A. Starling, your Guthrie County Coroner. You will also find a copy of my letter of reply. Not too long ago I had occasion to examine some of the authorities in this matter, and I thought that I might assist you by setting out several of what I considered to be pertinent previous opinions of this office.

In considering related problems, this office has had occasion to write as follows:

> Opinions of the Attorney General, 1938, page 218: "It is to be necessarily implied that the situations contemplated by Section 5237, subsection 1 (currently Section 340.19(1)) and the italicized quoted portion of Section 5237 (currently Section 340.19(2)), are ones requiring an investigation. Beyond this we refrain from venturing, it being our opinion that where the coroner's duty begins and ends is largely a matter within the sound discretion of the coroner."

In a related opinion, dated April 30, 1937, we had occasion to state:

> "Many cases may come before the coroner in which it would not be suspected that death was by unlawful means or that the person had met death while connected with the working of, or in, any mine. In such cases the duty is imposed upon the coroner to make an investigation; that is, he is called upon to view the body and the circumstances, so far as may be learned, causing the death and to make a report thereof to the clerk of the district court and to the state bureau of investigation. In such instances, the work and duties of the coroner are in the nature of an inquisition; * * *"

In another opinion relating to this matter (Opinions of the Attorney General, 1938, page 138), we stated as follows:

59-5-25

"The question of the compensation of the county coroner for his services in connection with the matters recited in the above statute must rest and be determined upon the peculiar facts presented in each instance. The payment of the fees is not within the discretion of the board of supervisors. The obligation of the board of supervisors is a mandatory one. Likewise, the duties required of the coroner are to a large extent mandatory.

"In the first instance recited in the statute heretofore quoted, the coroner is called upon to view a dead body where there was no medical attendant present at the time of the death in order that the proper death certificates required by law may be executed by the coroner. For this service he is entitled to the sum of $5.00. Under the second provision of the quoted statute, the coroner is clothed with a discretion. He may call an inquest. If he does, he is entitled to receive $10.00. On the other hand, the circumstances might be such that it would be useless to hold an inquest, yet there might be present such suspicious circumstances as to make it advisable to investigate the facts with a view of ascertaining whether there was present any evidence of such foul play. Also if the decedent be unknown whether there are any marks of identification upon the body or clothing. Such cases might be classed as emergencies and call for the prompt action and attention of the coroner. It is a matter in which the utmost good faith is required of the coroner. It is also one in which he is given a discretion of holding an inquest or making the investigation himself."

After reading the two subsections of 340.19, Code of Iowa, it is my tentative conclusion that the two subsections are mutually exclusive.

I hope that you find the above material useful in advising Mr. Starling.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh3
CC to Mr. Starling
Enc: Copy Starling letter
Copy reply thereto

Commerce Commission is without authority to refund fees paid to the Commission under an order issued by it under Sec. 327.9, Code 1958.

May 28, 1959

Hon. Herschel C. Loveless
Governor of Iowa
B u i l d i n g

My dear Governor:

Reference is herein made to your letter of the 26th inst. in which you stated the following:

"With further reference to my letter of February 2 requesting an opinion on the interpretation to be placed on Section 327.9, Code of Iowa 1958, and my letter of May 7 withdrawing the request for that opinion, I respectfully submit that the enactment of Senate File 519 has left unanswered onequestion on which your opinion is now sought.

"On August 6, 1958 the Commerce Commission issued an order which, in effect, required the payment of fees on truck-tractors as well as semi-trailers. This order was to have become effective immediately, i. e., August 6, 1958. As a result of rather vigorous complaints that the order was in violation of the intent of Section 327.9, the order was rescinded with respect to the date of effectiveness and reissued to be effective January 1, 1959. Subsequently the Commerce Commission received approximately $23,000 in fees for tractors, which represents an estimated fifty percent of the total fees that probably are due if the order issued August 6 as amended is to be carried out.

"I am informed that prior to 1958 no attempt had been made to apply the fee to truck-tractors; Senate File 519, Acts of the 58th General Assembly, makes it clear that this will not be the case after July 4, 1959. However, this still leaves unanswered the question as to what should be done with respect to the fees already collected and the estimated fees

59-6-2

> due under the interpretation contained in the order of August 6. Your opinion, therefore, is respectfully requested on two points:
>
> "(a) Should the fees collected in the amount of approximately $23,000 be refunded to the persons who have paid in compliance with the order issued?
>
> "(b) If the answer to (a) above is in the affirmative, should the refunds be made by the Commerce Commission, or should the entire amount collected be transferred to the General Fund and the checks for refunds processed through the regular channels for General Fund disbursements?
>
> "In view of the fact that this entire matter has been pending for some five months while an effort has been made to determine the proper steps to be taken, it would be greatly appreciated by the members of the Commerce Commission as well as the Governor's office, if you could give this request your early attention."

In reply thereto I advise as follows. The situation and points you desire clarified present only the question of refund of fees collected by the Commerce Commission under order of the Commission issued under the authority of Chapter 327, Code 1958. The question arises whether the Commission in the issuance thereof acted legally or erroneously. In that aspect, in the view that constitutionally money may not be "drawn from the treasury but in consequence of appropriations made by law" (see Art. III, Sec. 24, Constitution) authority so to withdraw money for the purpose of refunding does not appear. Chapter 327, Code 1958, contains no such express authority and lacking such express power

it will not be implied. It was said in this regard in the case of Chicago, Rock Island & Pacific Railroad Company v. Iowa State Commerce Commission, 248 Iowa 207, that "the commission has only those powers expressly granted to it by statute and those reasonably incidental to and implied therefrom."

In this view it makes no difference so far as this rule is concerned whether the fee money be in the treasury or otherwise be in the custody of the Commerce Commission. It is public money, the title to which is in the State of Iowa. See 42 Am. Jur., pages 718-719, title Public Funds. Section 327.12, Code 1958, in that respect provides the following:

> "Accounting. The commission shall, on the last day of each month, remit to the treasurer of state all moneys collected under this chapter during such month."

Therefore, you are advised that the Commission is without authority to make refund of the money described in your letter and it becomes unnecessary to consider the question whether or not such refunds would be merited in the absence of further legislation.

Again, my respects.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS: Reorganization -- County superintendent of schools may call for the organization of a newly-elected board prior to July 1, which is the effective date of the reorganized school district. (Reference to Mather, Sac Co. Atty. 5/21/59)

#59-6-1

May 21, 1959

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Mr. Mather:

Reference is made to your letter of May 15 which poses the following question:

> "The Lake View-Auburn board was elected in April of this year. Shall the county superintendent call now for the organization of this board, or shall the prior law govern so as to as to require the call for organization between July 1 and July 15?"

In reply thereto:

Senate File 529 of the 58th General Assembly amends Section 275.25, Code 1958. The bill was signed by the Governor on May 5 and sent by the Secretary of State for publication in the New Hampton Tribune in New Hampton, Iowa and the Pleasantville News in Pleasantville, Iowa. Pursuant to the emergency clause found in Senate File 529, the bill was published in both papers on May 14, which the Secretary of State varified this morning. Therefore, as of May 15 Section 275.25, Code 1958, as amended by Senate File 529 of the 58th General Assembly provides as follows:

> "If the proposition to establish a new corporation carries under the method hereinabove provided a special election shall be called by the county superintendent by giving notice by one publication in the same newspaper in which the former notices were published and he shall appoint judges who shall serve without pay. At such election, two directors shall be elected to serve until the next regular election, two until the second, and one until the third regular election thereafter, except in districts which include all or part of a city of fifteen thousand or more population, three directors shall be elected to serve until the third regular election thereafter, all of whom to serve until such time as their successors are elected and qualified. Provided, however, that in all community

school districts which include a city of fifteen thousand or more population and which became effective prior to July 4, 1955, and in all community school districts containing a city which has attained a population of fifteen thousand or more as shown by the most recent decennial federal census, the board of directors shall consist of seven members. Where it becomes necessary to increase the membership of any such board under the provisions hereof, new directors shall be elected at the next regular school election for such initial terms as will conform to the staggered terms hereinabove provided for directors in newly formed districts. The judges of election shall make return to the county superintendent who shall enter the return of record in his office and notify the persons who are elected directors. The new board shall organize within fifteen 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."

Therefore, in answer to your question, the county superintendent of schools should call for the organization of the newly elected board.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

STATE OFFICERS AND DEPARTMENTS: Truck permit refunds--
Commerce Commission is without authority to refund fees paid to the Commission under an order issued by it under Sec. 327.9, Code 1958. (Strauss to Loveless, Gov., 5/28/59)

59-6-2

May 28, 1959

Hon. Herschel C. Loveless
Governor of Iowa
B u i l d i n g

My dear Governor:

Reference is herein made to your letter of the 26th inst. in which you stated the following:

> "With further reference to my letter of February 2 requesting an opinion on the interpretation to be placed on Section 327.9, Code of Iowa 1958, and my letter of May 7 withdrawing the request for that opinion, I respectfully submit that the enactment of Senate File 519 has left unanswered one question on which your opinion is now sought.
>
> "On August 6, 1958 the Commerce Commission issued an order which, in effect, required the payment of fees on truck-tractors as well as semi-trailers. This order was to have become effective immediately, i. e., August 6, 1958. As a result of rather vigorous complaints that the order was in violation of the intent of Section 327.9, the order was rescinded with respect to the date of effectiveness and reissued to be effective January 1, 1959. Subsequently the Commerce Commission received approximately $23,000 in fees for tractors, which represents an estimated fifty percent of the total fees that probably are due if the order issued August 6 as amended is to be carried out.
>
> "I am informed that prior to 1958 no attempt had been made to apply the fee to truck-tractors; Senate File 519, Acts of the 58th General Assembly, makes it clear that this will not be the case after July 4, 1959. However, this still leaves unanswered the question as to what should be done with respect to the fees already collected and the estimated fees

> due under the interpretation contained in the order of August 6. Your opinion, therefore, is respectfully requested on two points:
>
> "(a) Should the fees collected in the amount of approximately $23,000 be refunded to the persons who have paid in compliance with the order issued?
>
> "(b) If the answer to (a) above is in the affirmative, should the refunds be made by the Commerce Commission, or should the entire amount collected be transferred to the General Fund and the checks for refunds processed through the regular channels for General Fund disbursements?
>
> "In view of the fact that this entire matter has been pending for some five months while an effort has been made to determine the proper steps to be taken, it would be greatly appreciated by the members of the Commerce Commission as well as the Governor's office, if you could give this request your early attention."

In reply thereto I advise as follows. The situation and points you desire clarified present only the question of refund of fees collected by the Commerce Commission under order of the Commission issued under the authority of Chapter 327, Code 1958. The question arises whether the Commission in the issuance thereof acted legally or erroneously. In that aspect, in the view that constitutionally money may not be "drawn from the treasury but in consequence of appropriations made by law" (see Art. III, Sec. 24, Constitution) authority so to withdraw money for the purpose of refunding does not appear. Chapter 327, Code 1958, contains no such express authority and lacking such express power

it will not be implied. It was said in this regard in the case of Chicago, Rock Island & Pacific Railroad Company v. Iowa State Commerce Commission, 248 Iowa 207, that "the commission has only those powers expressly granted to it by statute and those reasonably incidental to and implied therefrom."

In this view it makes no difference so far as this rule is concerned whether the fee money be in the treasury or otherwise be in the custody of the Commerce Commission. It is public money, the title to which is in the State of Iowa. See 42 Am. Jur., pages 718-719, title Public Funds. Section 327.12, Code 1958, in that respect provides the following:

> "Accounting. The commission shall, on the last day of each month, remit to the treasurer of state all moneys collected under this chapter during such month."

Therefore, you are advised that the Commission is without authority to make refund of the money described in your letter and it becomes unnecessary to consider the question whether or not such refunds would be merited in the absence of further legislation.

Again, my respects.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

CONSERVATION: State Commission: Appropriations --

Allocation of appropriation made to Conservation Commission by H. F. 548, 58th G. A., may be made in accordance with the provisions thereof, notwithstanding some contradictions therein.

(Strauss to Sarsfield, St. Comp., 6/1/59)

59-6-3

June 1, 1959

Mr. Glenn D. Sarsfield
State Comptroller
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours of the 25th ult. in which you submitted the following:

> "Article III, Section 24, Constitution of the State of Iowa, reads as follows:
>
> "'Appropriations. Sec. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.'
>
> "Section 8.22, subsection e, reads in part as follows:
>
> "' * * * Part III shall embrace a draft or drafts of appropriation bills having for their purpose to give legal sanction to the appropriations recommended to be made in Parts I and II. Such appropriation bills shall indicate the funds, general or special, from which such appropriations shall be paid, but such appropriations need not be in greater detail than to indicate the total appropriation to be made for:
>
> "'1. Administration, operation, and maintenance of each department and establishment for each fiscal year of the biennium.
>
> "'2. The cost of land, public improvements, and other capital outlays for each department and establishment, itemized by specific projects or classes of the same general character.'
>
> "H. F. 548, Acts of the 58th General Assembly, is 'An Act to Appropriate Funds from the General Fund of the State of Iowa to the Conservation Commission for Construction Replacement, Repairs, Acquisition of Land, Development, Forestry, Watershed Area Improvements, Siltation and Boundary Surveys, and Dredging.'

59-6-3

"Section 1 of said Act reads in part as follows:

"'There is hereby appropriated to the State Conservation Commission from the general fund of the state the sum of $1,492,650.00 for * * *'

"Section 2 reads in part as follows:

"'Said sum shall be allocated in the following amounts: * * *.'

"Sections 3 and 4 both read in part as follows:

"'There is hereby appropriated to the state conservation commission for * * *.'

"Section 5 reads in part as follows:

"'There is hereby appropriated from the general fund to the state conservation commission the sum of fifty thousand ($50,000.00) dollars to be used as a contingent fund, * * *'

"The amounts shown in Section 2 of this bill amount to $1,229,150.00, and the amounts shown in Sections 3, 4 and 5 are $263,000.00, which makes a total amount of $1,492,650.00.

"I respectfully request an opinion as to the following:

"1. What is the total amount of the appropriation provided for by this Act?

"2. In the event that you should rule that only Section 2 is an allocation of Section 1, would the amount shown in Sections 3, 4 and 5 be in addition to the $1,492,650.00? Also, would Sections 3 and 4 constitute an appropriation in view of the fact they do not state from what fund the appropriation is made?"

In reply thereto I would advise you that while the foregoing act, H. F. 548, Acts of the 58th General Assembly, has some apparent contradictions, the obvious intent of the Legislature

is contained in Section 1 of the Act wherein there is appropriated to the State Conservation Commission from the General Fund of the State the sum of $1,492,650 to be allocated in accordance with the provisions of Sections 2, 3, 4 and 5. In other words, the allocation shall be made of the appropriation of $1,492,650 in accordance with the directions of the act, notwithstanding these apparent contradictions.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES: Drive-in theater license --

The fee provided for payment under §361.1, Code 1958, for a drive-in theater is a license fee and not a tax and not recoverable from the Board of Supervisors either as a tax or as a fee, and likewise not recoverable against Township Trustees as being a voluntary payment. (Strauss to Hultman, Black Hawk Co. Atty.) June 2, 1959 6/2/59) # 59-6-4

Mr. Evan L. Hultman
Black Hawk County Attorney
Waterloo, Iowa

My dear Evan:

This will acknowledge receipt of yours of the 25th ult. in which you submitted the following:

> "One of the townships in Black Hawk County has been collecting a license fee for a drive-in theater pursuant to Section 361.1 of the 1958 Code of Iowa for a number of years. Some of these license fees were paid by the township clerk to the Black Hawk County Treasurer, and in two other years, said funds were never paid into Black Hawk County but remained with the township trustees.
>
> "On October 19, 1954, in the case of Central States Theater vs. Sar, 245 Iowa 1254, 65 N. W. 2d 450, the Supreme Court of Iowa declared Section 361.1 et seq. unconstitutional. The tax payer is now demanding that Black Hawk County return all license fees paid by him in previous years under Section 361.1. I wish to submit the following questions:
>
> "1. Must Black Hawk County return all license fees paid by the tax payer and which in turn was paid by the township clerk to the County Treasurer of Black Hawk County?
>
> "2. Is Black Hawk County to return the license fees which were paid by the tax payer to the Township Clerk but which sums were never paid to the Black Hawk County Treasurer?
>
> "3. In the event the answer to question 2 is in the negative, what procedure is used by the township to repay the license fees which were col-

59-6-4

> lected and used by the township but never paid to the Treasurer of Black Hawk County?"

In reply thereto I advise that in the view I take of this situation I am of the opinion:

1. That the fee provided in Section 361.1 is a license fee issued under the police power conferred upon the Township Trustees and is not a tax. The fee is imposed as a matter of regulation and not for revenue. See Central States Theatre Corp. v. Sar, 245 Iowa 1254; Solberg v. Davenport, 211 Iowa 612; 33 Am. Jur. 17.

2. Insofar as recovery against the Board of Supervisors is concerned, that is, to the extent of the fees delivered to the Treasurer, it is not recoverable because (1) it is not a tax and therefore not included in the tax that may be recoverable under Sec. 445.60, Code 1958, providing as follows:

> "Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

and (2) as a fee it is a voluntary payment not recoverable within the rule hereinafter stated.

3. As against Township Trustees, refund is not authorized because the payments were voluntary and are not recoverable absent a statute so authorizing. In 33 Am. Jur., paragraph 88, title License, the ruling is stated as follows:

"Recovery Back of License Fees or Taxes Illegally Exacted. In accordance with the general rule governing voluntary payments, and the general rule in respect of voluntary payments of illegal taxes, license taxes, if voluntarily paid, cannot be recovered back on the ground of the illegality of the tax; if there be no coercion or mistake of fact, the case falls within the general rule of voluntary payments, and this is generally held to be true by the weight of authority although the payment is made under a mistake of law. Under this rule the illegality of the demand paid constitutes of itself no ground for relief, but there must be, in addition, some compulsion or coercion attending its assertion which controls the conduct of the party making the payment. However, many jurisdictions refuse to follow the more general rule into its labyrinth of rigid and often unjust technicalities. And so it has been asserted that where a city council exceeds its authority in making a tax assessment, and demands and receives more than the charter permits, which was paid under pressure of the summary remedies prescribed for collection, and of a heavy penalty for nonpayment, it is against good conscience to retain the money, and an action will lie to recover it back."

Compare the cases of Scottish Union & Nat. Ins. Co. vs. Herriott, 109 Iowa 606, where compulsion was present and the payment deemed involuntary.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

STATE OFFICERS AND DEPARTMENTS: Korean Bonus Board --
Under §35B.4, Code 1958, Korean bonus is available to persons on active duty in Armed Forces between June 27, 1950, and July 27, 1953, aggregating 120 days prior to July 27, 1953. Active service prior to June 27, 1950, should not be counted in determining qualification for such bonus.
(Strauss to Kauffman, Ex. Secy., 6/1/59) # 59-6-5

June 1, 1959

Mr. Ray J. Kauffman
Executive Secretary
Service Compensation Board
L o c a l

Dear Sir:

This will acknowledge receipt of yours of the 25th inst. in which you submitted the following:

> "A question has arisen in connection with the administration of Chapter 35B, Code of Iowa, 1958, as to whether or not time spent in the Armed Forces prior to June 27, 1950, should be counted to qualify a veteran for Korean Service Compensation, whose total period of service after June 27, 1950, and prior to November 25, 1953, was less than 120 days.
>
> "For example: Veteran A entered the Armed Forces September 6, 1947, and was separated therefrom on July 19, 1950, thus having a total period of service of 2 years, 10 months, and 13 days - of which only 23 days of such service was during the compensable period as stated in Section 4 of Chapter 35B, Code of Iowa, 1958. Obviously, however, the veteran has more than 120 days' service prior to November 25, 1953.
>
> "Your opinion is respectfully requested as to whether or not all or any part of the period of veteran's service prior to June 27, 1950 should be counted as qualifying him for Korean Service Compensaion, for time less than 120 days served during the compensable period."

In reply thereto I advise as follows. Section 35B.4, Code 1958, designates the persons who are entitled to the benefits of the Korean Bonus, to-wit:

59-6-5

> "Persons entitled - basis of compensation. Every person, male or female, who served on active duty, in the armed forces of the United States, at any time between June 27, 1950 and July 27, 1953, both dates inclusive, and who at the time of entering into such service was a legal resident of the state of Iowa, and who had maintained such residence for a period of at least six months immediately prior thereto, and was honorably separated or discharged from such service, or is still in active service in an honorable status, or has been retired, or has been furloughed to a reserve, or has been placed on inactive status, shall be entitled to receive from the service compensation fund * * *."

Clearly, under the foregoing statute such benefit is available to persons on active duty in the Armed Forces between June 27, 1950, and July 27, 1953, aggregating 120 days prior to July 27, 1953. Active service prior to June 27, 1950, also clearly should not be counted in determining qualification for such bonus.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

LABOR: Employment Agencies:

~~LICENSED EMPLOYMENT AGENCIES:~~ Fee Limitation. Section 94.6, Code of Iowa 1958 construed. "Annual gross earnings" means the actual earnings realized on a per annum basis. (Reach to Lowe, Labor Comm., 6/2/59) #59-6-6

June 2, 1959

Mr. Don Lowe, Commissioner,
Bureau of Labor
L O C A L

Dear Sir:

Receipt is acknowledged of your recent request for an opinion, interpreting the provisions of Section 94.6, Code of Iowa 1958, as follows:

> "I particularly would like to know if there can be a fee schedule in excess of five per cent of the annual gross earnings and what in your opinion is meant by annual gross earnings under Section 94.6 of the Code?
>
> Many fee schedules for temporary employment call for ten per cent of the total amount of earnings during such period of employment. Temporary employment ranges from thirty to ninety days inasmuch as there is no definition set out in the Code defining temporary employment.
>
> A number of employment agencies feel their fee is based on the anticipated annual salary and if the job is terminated after six months there should not be a refund. On the other hand, they feel that for summertime employment they should be allowed to charge a fee of ten per cent, the same as for permanent employment.
>
> I would like this opinion at your earliest convenience."

In reply thereto:

Section 94.6, Code of Iowa 1958, reads as follows:

59-6-6

> "No such person, firm or corporation shall charge a fee for the furnishing or procurement of any situation or employment paying less than two hundred fifty dollars per month which shall exceed twenty-five percent of the wages paid for the first month of any such employment or situation furnished or procured, but in no event shall the charge for the furnishing or procurement of any situation or employment be in excess of five percent of the annual gross earnings. The provisions of this section shall not apply to the furnishing or procurement of vaudeville acts, circus acts, theatrical, stage or platform attractions or amusement enterprises."

Your first question, to wit:

> " * * can (there) be a fee schedule in excess of five percent of the annual gross earnings?"

is answered by that part of Section 94.6, supra, which provides:

> "but in no event shall the charge * * be in excess of five percent of the annual gross earnings."

Your second question, to wit:

> "what in your opinion is meant by annual gross earnings under Section 94.6 of the Code?"

is answered as follows:

The question pivots on what meaning is to be ascribed to the words: "annual gross earnings".

In the case of Accurate Employment Service v. Rowell, 126 N.E. 2d 81, the defendant was placed for employment as a secretary by a private employment agency. Under the terms of the contract the defendant agreed to pay the plaintiff-employment service a fee based upon a certain percentage of the first month's salary (Gross Earnings). The Court of common Pleas held that "gross earnings" within the provision of the parties' contract meant entire earnings received. Said court stated at page 84 of the N.E. report:

> "'Gross Earnings' means entire earnings received. (citing cases)."

To the same effect see cases cited in 18A Words and Phrases,

Gross Earnings, p. 482 et seq.

The statute, to wit: 94.6, supra, provides that as to "the furnishing or procurement of any situation or employment paying less than two hundred fifty dollars per month (the fee charged) shall (not) exceed twenty-five percent of the wages paid for the first month of any such employment or situation furnished or procured". The word "paid" appears in the past tense, indicating that the compensation must have been received to afford a base for the percentage fee computation. A fortiori, " annual gross earnings", in view of the entire statutory provision and the above adjudicated case, means the actual earnings realized on a per annum basis as a result of employment or a situation being secured by a licensed employment agency.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

MOTOR VEHICLES: CERTIFICATE OF TITLE--Transfer by operation of law.

1. When a vehicle is sold to satisfy a storage lien (Ch. 579, Code 1958) the treasurer of the county in which the last certificate of title was issued, upon satisfaction of the conditions set forth in Section 321.47, Code 1958, may issue a certificate of title.

2. Such certificate of title must contain a statement of existing liens unless proper evidence shows their satisfaction or extinction. (Peach to Timmons, Asst Dubuque Co. Atty.)

June 2, 1959 6/2/59) #59-6-7

Mr. William E. Timmons
Assistant Dubuque County Attorney
701 Bank & Insurance Building
Dubuque, Iowa

Dear Sir:

Receipt is acknowledged of your letter under date of May 1, 1959, wherein you request an opinion on the following matter:

> "An automobile, title in Dubuque County, was stored in a garage in Clinton, Iowa. The automobile at the time of storage was subject to a lien by a Finance Company. The storage garage attached the automobile under Chapter 579 and it was sold at a Sheriff's sale. The owner could not be located, notice was mailed to her last known address and a notice was sent to one lien holder that the garage knew of. The automobile was sold by the Sheriff and the new owner now requests that title be placed in the new owners name without any liens attached. The question is - Can the Treasurer of Dubuque County issue a new title to this automobile to the purchaser and secondly, if the title can be issued, is it necessary to put on the unpaid lien that was on the car prior to the Sheriff's sale?"

In reply thereto:

Section 321.47, Code of Iowa 1958, in pertinent part reads as follows:

> "In the event of the transfer of ownership of any vehicle by operation of law as * * * whenever a vehicle is sold to satisfy * * * a storage lien as provided in chapter 579, * * * the treasurer of the county in which the last

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> certificate of title to any such vehicle was issued, upon the surrender of the prior certificate of title or the manufacturer's or importer's certificate, or when that is not possible, upon presentation of satisfactory proof to the county treasurer of ownership and right of possession to such vehicle and upon payment of a fee of seventy-five cents and the presentation of an application for registration and certificate of title, may issue to the applicant a registration card for such vehicle and a certificate of title thereto. * * * * * . If, from the records in the office of the county treasurer, there appear to be any lien or liens on such vehicle, such certificate of title shall contain a statement of such liens unless the application is accompanied by proper evidence of their satisfaction or extinction. * * * * * * * * * ."

As the statute provides, whenever a vehicle is sold to satisfy a storage lien, the treasurer of the county in which the last certificate of title was issued, when those conditions set forth in Section 321.47, supra, have been satisfied, may issue to the applicant a registration card and a certificate of title. Therefore, your first question is answered in the affirmative.

In answer to your second question, the certificate of title must contain a statement of existing liens unless the application is accompanied by proper evidence of their satisfaction or extinction. Section 321.47, supra.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

AERONAUTICS: Aircraft registration--

1. Under Code Section 328.12(1) State Commission may procure and pay for decals and stickers if they, in fact, assist in the promotion of aeronautics in Iowa.

2. Such decals or stickers may not be issued in lieu of regular registration certificates.

3. Promotional stickers may by regulation be required to be displayed on aircraft if so designed as to serve a dual purpose in aid of enforcement. (Arlo to Wolverton, Enf. O., 6/2/59) # 59-6-8

June 2, 1959

Mr. L. W. Wolverton
Air Enforcement Officer
Iowa Aeronautics Commission
L O C A L

Dear Sir:

Receipt is acknowledged of your letter of May 29 as follows:

> "The members of the Iowa Aeronautics Commission on May 1, 1959 and in a regular meeting, voted to investigate the use of identification stickers, either in conjunction with registration certificates or in lieu of registration certificates.
>
> An opinion is requested as to the Commission's authority to purchase these stickers for issuance with the registration certificate and the enforceability in requiring display of said stickers, in a place on the aircraft to be selected by the Aeronautics Commission.
>
> If the Commission cannot purchase stickers or cause them to be displayed seperate of the aircraft registration certificate, an opinion is requested as to whether they may be issued in lieu of the registration certificate, and if so, whether or not the Commission has the authority to make the stickers be displayed for visual recognition, at a location on the aircraft as the Commission may determine.
>
> If the stickers can be used in the place of the regular aircraft certificates, what information must be shown thereon, as a minimum to meet the certificating standards as set down in Chapter 328?"

59-6-8

Your first inquiry is whether the Commission has authority to purchase stickers or decals for display on aircraft. Apart from such authority as may exist to make the certificate of registration in the form of a sticker, subsection 1 of section 328.12 confers power upon the Commission as follows:

> "It is empowered and directed to encourage, foster and assist in the general development and promotion of aeronautics in this state, and to make disbursements from the state aviation fund for such purposes."

If it be determined by the Commission, as a matter of fact, that display of a distinctive identifying sticker or decal on aircraft registered with the Commission will in any way, "encourage, foster and assist in the general development and promotion of aeronautics in this state" it appears entirely proper for the Commission, "to make disbursements from the state aviation fund for such purposes".

As to whether the registration certificate itself may be issued in the form of a sticker or decal, the form of such certificate is prescribed in section 328.27, Code 1958, as follows:

> "The commission shall forthwith cause to be issued, upon receipt of proper application and fee for registration, a certificate of registration which shall be numbered and recorded by the Commission, shall state the name and address of the person to whom it is issued, shall be entitled with the designation of the class of registrant covered thereby and shall contain such other information as the commission may prescribe including, in the case of aircraft, a description thereof . . . "

Since the statute does not specify the material upon which the certificate shall appear but only its content there appears no legal obstacle in section 328.27 to the issuance of such certificate in the form of a sticker or decal but there appears a practical obstacle in that it would be difficult to place all of the required content of such certificate on a sticker or decal. A legal obstacle presents itself in section 328.43, which provides, in pertinent part:

> "Upon the transfer of ownership of any registered aircraft, the owner shall immediately give notice to the commission upon the form on the reverse side of the certificate of registration . . ."

Thus, preparation of the certificate as a sticker or decal would make compliance with the transfer provisions impossible.

A further legal obstacle to making a sticker or decal for display on the exterior of the aircraft serve in lieu of the certificate of registration appears in section 328.28, which provides in pertinent part:

> "The certificate of registration . . . shall . . . as to an aircraft be conspicuously displayed therein . . ." (Emphasis supplied)

You are, therefore, advised that the certificate of registration for aircraft cannot be lawfully issued in the form of a sticker or decal.

As to the authority of the commission to require external display of a promotional sticker issued in conjunction with the regular certificate of registration and serving the additional purpose of enabling Commission inspectors to visually identify registered aircraft, as an aid to enforcement of the registration law, the authority for such requirement appears in subsection 2 of section 328.12, which provides:

> "It (the commission) shall have power to make such rules and regulations, consistent with the provisions of this chapter, as may be deemed by the commission to be necessary and expedient for the administration of the affairs of the commission, and the administration and enforcement of this chapter, and to amend the said rules and regulations from time to time."

Thus, if it is deemed by the Commission "to be necessary and expedient . . . for the administration and enforcement" of the registration provisions of chapter 328, that stickers or decals found by it to serve a promotional purpose under subsection 1 of section 328.12 also serve the dual purpose of identifying registered aircraft, it may adopt reasonable rules requiring display of such stickers or decals on the exterior of registered aircraft.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

COUNTIES: Words and Phrases -- For purposes of Code Chapter 351, "dogs kept in kennels and not allowed to run at large" means dogs kept under such degree of restraint as to make it virtually impossible for such dogs to kill or injure any domestic animal or fowl owned by another than the owner of the dog. (Asela to Hudson Pocahontas Co. Atty., 6/5/59) #59-6-9

June 5, 1959

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Sir:

Receipt is acknowledged of your letter of June 2 as follows:

"I would like an opinion from your office relative to the taxation of dogs under Section 351.24 of the 1958 Code of Iowa. I have particular reference to kennel dogs as referred to in said section. You will note that the first sentence of said section states as follows, 'Dogs kept in kennel and not allowed to run at large shall be taxed as personal property'.

"Section 368.8 Subsection 4 in the last sentence of the first paragraph thereof, 'Kennel dogs are defined as those dogs kept or raised for the bonified purpose of sale and are under constant restrain'.

"My particular question is whether or not the kennel dogs referred to in Section 351.24 must also be kept for purpose of sale as defined in the last cited code sections in order that they be taxed as personal property or whether it is sufficient for purpose of this section that they are only not allowed to run at large.

"I would also like to have your opinion as to whether or not there is a requirement in the law for the licensing of a kennel or kennel dogs either in a city or outside the corporate limit of a city or town."

Code section 351.24, to which you refer, provides as follows:

"Dogs kept in kennels and not allowed to run at large shall be taxed as personal property. Dogs licensed

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as herein provided shall not be so taxed. Cities and towns may license dogs in addition to the license required."

Also relevant is section 351.1 which provides:

"The owners of all dogs three months old or over, except dogs kept in kennels and not allowed to run at large, shall annually obtain license therefore, as herein provided."

The "license" fees collected under Chapter 351 are placed in the domestic animal fund (section 351.6) and used to pay claims for "killing or injury of any domestic animal or fowl by wolves, or by dogs". This particular "license" fee is, in a sense a tax, as its design is to produce revenue for a particular purpose, i.e. payment for damages done by dogs (canis) running at large. Since dogs "kept in kennels and not allowed to run at large" are unlikely to give rise to such claims, they are exempted from the special license tax and taxed as personal property under section 351.24. Dogs that are licensed are similarly exempted from the personal property tax. There is nothing unique about this arrangement. A similar statutory exemption exists with respect to motor vehicles: Every motor vehicle using the highway is subject to registration (section 321.105). The proceeds are placed in the road use tax fund and used to build and maintain highways (section 321.145). Motor vehicles that are registered are exempt from personal property tax (section 321.130) but motor vehicles not required to be registered are subject to such tax.

Relating this to your question, it is apparent that there exist various classes of property which have been subjected to a special tax in the form of license or registration fees, the proceeds of which are devoted to special purposes. The intent of the legislature in such cases appears to be to impose certain burdens upon the instrumentalities bearing some relation to the existence of the burden, i.e.; in the case of injury to livestock, dogs running at large; in the case of wear and tear on the highways, motor vehicles using the highways.

The intent of the legislature may be ascertained from the evil sought to be remedied or object sought. Jones v. Dunkelberg, 221 Iowa 1031, 265 N.W. 157; Smith v. Thompson, 219 Iowa 888, 258 N.E. 190; Peverill v. Dept. of Agriculture, 216 Iowa 534, 245 N.W. 334. As applied to Code Chapters 351 and 352, an evil sought to be remedied was loss to owners of livestock caused

by dogs running at large, and the object of the Chapters was to place the financial burden of such evil on the general class of owners of such dogs.

Therefore, it follows that for purposes of Chapter 351, the phrase "dogs kept in kennels and not allowed to run at large" refers to dogs consistently kept under such degree of restraint on the premises of the owner as to make it virtually impossible for them to kill or injure "any domestic animal or fowl" owned by another.

Section 368.8(4), to which your letter also refers, relates only to Chapter 368, the scope and applicability of which is restricted to cities and towns by the terms of section 368.1, as follows:

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

The term "municipal corporations" does not embrace counties. Olson v. District Court, 243 Iowa 1211, 55 N.W. 2d 339.

Chapter 351 makes reference to Chapter 368 only indirectly in section 351.24 where it says, "Cities and towns may license dogs in addition to the license herein required". All these words signify is that the licensing powers of cities and counties, with respect to dogs, are mutually exclusive. It does not follow that special definitions in the licensing statutes pertaining to cities have any application to County licensing powers. Section 4.1, Code 1958, provides:

> "Words and phrases shall be construed according to the context and approved usage of the language . ."

Webster defines "kennel" as

> "A house for a dog or dogs. Also an establishment where dogs are bred."

I, therefore, conclude that for purposes of Chapter 351, the further requirement that a kennel dog be kept for sale, as set forth in the special definition in Chapter 368, has no application.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

CORPORATIONS: Rebates to stockholders -
In profit corporations organized under Ch. 491, Code 1958, a money rebate to stockholders in proportion to the volume of business that the individual stockholder does with the corporation is unauthorized. (Strauss to Synhorst, Secy. of State, 6/15/59)
#59-6-10

June 15, 1959

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

Attention: Berry O. Burt
Corporation Counsel

Dear Sir:

This will acknowledge receipt of yours of the 2d inst. in which you submitted the following:

> "May corporations organized for profit under Chapter 491 of the 1958 Code make a money rebate to stockholders in proportion to the volume of business that the individual stockholder does with the corporation?"

In reply thereto I advise you as follows:

The foregoing proposal is comparable to a patronage dividend. Such dividend by statute and authority is individual to corporations organized as cooperatives. The statute concerned is Section 499.30, Code 1958, and provides as follows:

> "The directors shall annually dispose of the earnings of the association in excess of its operating expenses as follows:"
> (After providing for the use of such earnings, it provides with regard to the remainder:)
> "All remaining net earnings shall be allocated to a revolving fund and shall be credited to the account of each member including subscribers described in section 499.16 ratably in proportion to the business he has done with the association during such year. Such credits are herein referred to as 'deferred patronage dividends'."

Sections 499.31, 499.32, 499.33, 499.34, and 499.35 Code 1958, provide for the administration of this patronage revolving fund.

59-6-10

As far as case authorities are concerned, reference is here made to the Farmers Union Co-operative Company v. Commissioner of Internal Revenue, 90 Fed 2d 488-493, where the place of patronage dividends in the corporate structure is set up. There, the statutes of Nebraska defined a cooperative company as one which authorizes the distribution of its earnings, in part, or wholly, based on the ratio of total earnings to the amount of property bought from, or sold to, members, or labor performed, or other services rendered by the shareholders to the corporation. Among its statutory powers the corporation was authorized to make by-laws for the management, and provide therein terms and limitations of stock ownership, and for the distribution of its earnings. The Articles of Incorporation of the company provided, among other things, that:

> "all remaining net profit shall be prorated to stockholders in proportion to the amount of business they have done with the corporation during the business year."

With respect to the distribution of these profits: the difference between such a dividend and the dividend in an ordinary stock corporation is set forth in the following language:

> "The argument that petitioner is merely a bailee of this money and not the owner thereof is unsound. Although organized for cooperative purposes, petitioner is a separate legal entity -- a corporation. Its relation to this money must be determined by the law under which it was organized and operates. Among the statutory powers are 'to make by-laws for the management of its affairs, and to provide therein * * * for the distribution of its earnings.' Such by-laws were made. Those earnings might be (under the statute) and were (under the by-laws) usable to pay dividends of not exceeding 8 per cent. on corporate stock and usable for other

> corporate uses before being subject to distribution as patronage dividends. Also, such corporations can sue and be sued and hold such real and personal property as necessary for their legitimate businesses. R.S. Neb. 1913, p. 261, § 735. In fact, such corporations seem to possess all of the main attributes of an ordinary business corporation except as to the basis of distribution of their net earnings, which instead of being distributed on some stock share basis must 'in part,' at least, be distributed 'on the basis of, or in proportion to the amount of property bought from or sold to members, or of labor performed, or other service rendered to the corporation.' R.S. Neb. 1913, p. 260, § 733. Clearly this money is property of the corporation as genuinely and truly as is the grain elevator or the stock of merchandise owned by it. While those who might be entitled to patronage dividends have, in a sense, an interest in the money, it is a character of interest not greater, if as great, as that of a stockholder in an ordinary corporation. Such interest never ripens into an individual ownership or right of ownership until and if a patronage dividend be declared. Fruit Growers' Supply Co. v. Commissioner, 56 F.(2d) 90, 93 (C.C.A.9); and see Penn Mutual Life Ins. Co. v. Lederer, 252 U.S. 523, 40 S.Ct. 397, 64 L.Ed. 698. Until such declaration, the money is the property solely of the petitioner."

The characteristic of all profit corporations is a ratable sharing of all stock either in earnings or profits or assets on distribution. Section 646, Title, CORPORATIONS, 13 American Jurisprudence states this rule. And Section 645 of the same volume and title states:

> "It is characteristic of a dividend that all stockholders of the same class share in it in proportion to the respective amounts of stock which they hold; and if the transaction lacks this characteristic, it may be held not a dividend. For example, where the stockholders of a corporation are also its customers, a distribution made to them in proportion to business done with the corporation is regarded not as a dividend, although made from net earnings, but as a rebate or refund."

See Uniform Printing and Supply Company v. Commissioners, 88 Fed 2d 75; 109 A.L.R. 966, and subsequent annotations.

Applicability of the rule of expressio unius appears pertinent. Under that rule, express authority for the distribution of earnings on a patronage basis excludes, by implication, its applicability to profit corporations. This difference between cooperatives and profit corporations, insofar as patronage dividends are concerned, is confirmed by the statutory definition of a cooperative in Section 499.2, Code 1958, which is as follows:

> "A "co-operative association" is one which, in serving some purpose enumerated in section 499.6, deals with or functions for its members at least to the extent required by section 499.3, and which distributes its net earnings among its members in proportion to their dealings with it, except for limited dividends or other items permitted in this chapter; and in which each voting member has one vote and no more."

No such provision exists in Chapter 491, Code 1958, providing for the organization of a profit corporation.

By reason of the foregoing, I am of the opinion corporations organized under Chapter 491, Code 1958, may not make a money rebate to stockholders in proportion to the volume of business that the individual stockholder does with the corporation.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh5

LABOR: Child labor;
~~CHILD LABOR:~~ Street trades permits. Duties imposed on public school personnel by Code Sections 92.6 and 92.13, relative to physical inspection, exist irrespective of whether applicant be enrolled in public or private schools. (Opinion to Samore, Woodbury Co. Atty., 6/17/59) #59-6-11

June 17, 1959

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

Dear Sir:

Receipt is acknowledged of your letter of June 12 relative to physical examination of an applicant for a street trades permit under child labor form #2, and duties of public school personnel with respect thereto.

Section 92.13, Code of Iowa, provides:

"No boy between eleven and sixteen years of age shall be employed or permitted to work in any such city in connection wity any of the occupations mentioned in section 92.12 unless he complies with all the requirements for the issuance of work permits as described in this chapter except the filing of an employer's agreement, but the school record so required shall certify only that the boy is regularly attending school and that the work in which he wishes to engage will not interfere with his progress at school. Upon compliance with these requirements such boy shall be entitled to receive from the officer authorized to issue work permits a badge which shall authorize such boy to engage in the above-mentioned occupations at such time or times, between four a.m. and seven-thirty p.m. each day, as the public schools of the city or district where such boy resides are not in session, but at no other time, except that during the summer school vacation such boy may engage in such occupation until the hour of eight-thirty p.m. All such badges issued in the same calendar year shall be of the same color, which color shall be changed each year, and shall become void upon the first day of January following their issuance."

59-6-11

Section 92.6 provides in pertinent part:

"A work permit shall be issued only by the superintendent of schools or by a person authorized by him in writing, or, where there is no superintendent of schools, by a person authorized in writing by the local school board in the community where such child resides, upon the application of the parent, guardian, or custodian of the child desiring such permit. The person authorized to issue work permits shall not issue any such permit, except as provided in sections 92.12 and 92.13, until he has received, examined, approved, and filed:

" * * *
" * * *
"3. A certificate signed by a medical inspector of schools, or if there be no such inspector, then by a physician appointed by the board of education, certifying that the applicant for the work permit has reached the normal development of a child of its age and is in sufficiently sound health and physically able to perform the work for which the permit is sought."

Since the additional duties imposed upon the public school personnel by the above statutes relate to the protection of the health and morals of a certain segment of the people generally, rather than to the operation of the public schools, whether the applicant is enrolled in public or private school has no bearing upon the duty to give the physical inspection required, but the aforesaid duties exist without reference thereto.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

COUNTIES: ~~County~~ Attorney - Free services to township defined by Code sections 336.2(7) and 359.18. (Ltr. to Strand, Winneshiek Co. Atty., 6/18/59) # 59-6-12

June 18, 1959

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

Dear Sir:

Receipt is acknowledged of your letter of June 17 as follows:

> "This is in regard to whether or not as county attorney I can charge an attorney's fees to a certain fire district and hence the township trustees who have organized a fire district under Chapter 359. The services rendered would be helping them to float a bond issue to raise money toward the purchasing of fire equipment. Thank you very much, I remain yours,"

Section 336.2 provides in pertinent part as follows:

> "It shall be the duty of the county attorney to:
>
> " * * *
>
> "7. Give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers and to school and township officers, when requested so to do by such board or officer, upon all matters in which the state, county, school, or township 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.
>
> " * * *
>
> "11. Perform other duties enjoined upon him by law."

Section 359.18 provides as follows:

59-6-12

> "In counties having a population of less than twenty-five thousand, where the trustees institute, or are made parties to, litigation in connection with the performance of their duties, as provided in this chapter, the county attorney, as a part of his official duties, shall appear in behalf of the township trustees, except in cases in which the interests of the county and those of the trustees are adverse."

It thus appears that you could bill for attorneys fees for anything that goes beyond mere opinion and advice but falls short of actual litigation. However, according to an opinion appearing at page 197 of the 1942 Report of the Attorney General, township trustees have no authority to pay attorneys fees except in the circumstances described in section 359.19. This being the case, such billing would be a meaningless exercise. Also see 1940 Report of the Attorney General at page 426.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

BEER: ~~Prohibits~~ prohibited -- Interests between permittees. Loan of a Clock by Class "A" permittee to Class "B" permittee for use in place of business is not violative of Section 124.22, Code 1958 (Forrest to McCleary, Jax Comm., 6/18/59)

59-6-13

June 18, 1959

Mr. Neal J. McCleary, Director
Cigarette & Beer Revenue
L O C A L

Dear Sir:

In your recent oral questions of this department you ask whether or not an "advertising clock" installed in the premises of a Class "B" permittee by a Class "A" permittee on a loan basis is violative of Section 124.22, 1958 Code.

For convenience we set the referred section out:

> "No person engaged in the business of manufacturing, bottling or wholesaling beer nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving or dispensing of beer or food within the place of business of another permittee authorized under the provisions of this chapter to sell beer at retail; nor shall he directly or indirectly be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter."

In view of the language "used in the storage, handling, serving or dispensing of beer or food within the place of business * * *". It does not appear that the loan of such a clock would violate the statute.

Clearly the clock is not a furnishing or fixture used in the handling etc. of beer and food and as such would be

exempt from the statutory provisions.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:kvr

publicized --

BEER: ~~Prohibits~~ Interests between permittees. The placing of premium stamps by a Class "A" permittee in six packs of beer is violative of the provisions of Section 124.22, Code 1958 (Forrest to Carpenter, Bd. Secy., 6/18/59)

#59-6-14

June 18, 1959

Ms. Virginia Carpenter, Sec'y
State Permit Board
L O C A L

Dear Madam:

Receipt of your recent inquiry as follows is acknowledged:

> "Can a brewery put premium stamps in cases of beer (with no extra charge) which is first sold to the wholesaler and then to the retailer?"

In response thereto for convenience we set out the provisions of Chapter 124.22:

> "No person engaged in the business of manufacturing, bottling or wholesaling beer nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving or dispensing of beer or food within the place of business of another permittee authorized under the provisions of this chapter to sell beer at retail; nor shall he directly or indirectly pay for any such permit, nor directly or indirectly be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter."

and advise that in view of prior opinions of this office that such activity violates the above cited Code section.

59-6-14

From the 1952 Report of the Attorney General at page 141 the following pertinent parts are cited:

"The pertinent part of the foregoing section is 'nor directly or indirectly be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail'.

One of the primary rules of construction is to seek the legislative intent and give it effect where possible. A careful examination of the statute discloses that it was designed to keep 'A' permittees from promoting and assisting the 'B' permittee; first, in obtaining furnishings, fixtures and equipment, secondly in paying for the permit and, lastly, in conducting or operating the business. The Legislature designed the statute to effect a complete prohibition by use in each of the foregoing instances of the words, 'nor directly or indirectly'.

The Attorney General in 1942 Attorney General's Opinions at Page 78 did opine that the loaning of money by a wholesaler ('A' permit holder) to any other permit holder to enable him to enter the retail beer business would be 'indirectly furnishing or paying for the supplies and equipment and it would seem that he would be directly interested in the ownership of the business'.

* * * *

No one would argue with any hope of persuasion that the cashing of payroll checks was not indirectly connected with the operation of a business.

The Class 'B' permittee is not running a financial institution and only cashes checks with the hope of some ultimate gain because of this business convenience. The Class 'A' permittee furnishes the weekly bankroll to assist the 'B' permittee to conduct or operate his business.

It is our opinion that the Legislature designed to prevent this indirectly conducting or operating the business of a Class 'B' permittee by means of the financial aid of the Class 'A' permittee and such practice is a violation of section 124.22, Code of Iowa 1950."

To a similar effect see the 1954 Report of the Attorney General at page 170. In view of the foregoing opinions it appears that the facts in the situation described by you are sufficiently similar in nature as to fall within these opinions.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:kvr

CORPORATIONS: ~~COOPERATIVES — DISSOLUTION:~~ Under Section 499.47(3) County Recorder is required to record dissolution of cooperative association at the usual fee charged for such recordings. (Release to Gray, Calhoun Co. Atty., 6/22/59) #59-6-16

June 22, 1959

Mr. Jack R. Gray
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Gray

This is to acknowledge receipt of your letter of June 17, which states the following:

> "This is to advise you that the County Recorder of Calhoun County has requested the undersigned to obtain an official opinion as to whether or not the report of the three trustees who have been designated to wind up their affairs of a voluntary dissolution of an association merely has to be filed with the County Recorder or whether the County Recorder is required to record the same at the usual rate of recording.
>
> Under Section 499.47 (3), the last sentence in the paragraph states as follows,
>
> 'The trustees shall make, sign and acknowledge a duplicate report of such dissolution, filing one with the Secretary of State and one with the County Recorder of the County where the Articles were recorded.'
>
> Would you please give this your prompt attention and let us hear from you."

In reply thereto:

In order to arrive at a proper decision it will be necessary to define the word "filing" as it appears in Section 499.47(3), Code 1958. The Supreme Court of Iowa specifically defines the word "filing" in the case of Fox v. McCurnin, 210 Iowa 429, 226 N.W. 582. In the above mentioned case it was necessary that certain papers were to be filed with the Clerk of Court in accordance with the instructions of the lower

59-6-16

Court. The Supreme Court at page 432 said "the deposit of a separate paper with the clerk, * * * is not of the essence of 'filing.' It is the actual entry, in proper phraseology, and by proper authority, on proper execution; it is the making of a properly executed remittitur a record of the court, that is of the essence."

In view of this case it would appear that merely leaving with the County Recorder a duplicate of a report of a dissolution is not a sufficient requirement. The dissolution should be made of public record and the County Recorder would be required to record the same at the usual rate of recording.

Yours very truly,

THEODOR W. BEHMANN, JR.
Assistant Attorney General

TWB:kvr

COOPERATIVES - DISSOLUTION: Under Section 499.47(3) County Recorder is required to record dissolution of cooperative association at the usual fee charged for such recordings.

June 22, 1959

Mr. Jack R. Gray
Calhoun County Attorney
Rockwell City, Iowa

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In reply thereto:

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Court. The Supreme Court at page 432 said "the deposit of a separate paper with the clerk, * * * is not of the essence of 'filing.' It is the actual entry, in proper phraseology, and by proper authority, on proper execution; it is the making of a properly executed remittitur a record of the court, that is of the essence."

In view of this case it would appear that merely leaving with the County Recorder a duplicate of a report of a dissolution is not a sufficient requirement. The dissolution should be made of public record and the County Recorder would be required to record the same at the usual rate of recording.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

~~SECONDARY ROAD EXTENSIONS~~

HIGHWAYS: Secondary road extensions --

In determining the average distance between houses or business houses with reference to §314.5 of the 1958 Code of Iowa, all the houses along the proposed extension are considered. It does not matter whether all the houses are on one side, or (~~the houses are~~) part on one side and part on the other. (Lyman to Ford, Opn. Memo, Co. Atty., 6/23/59)

Ames, Iowa
June 23, 1959

59-6-17

Mr. T. K. Ford,
County Attorney
Burlington, Iowa

Dear Mr. Ford:

Your letter of March 20, 1959 addressed to Attorney General Erbe has been referred to me. In your letter you asked the following five questions with reference to a proposed extension of a Secondary road within the city limits of Burlington, Iowa.

1. Can the County legally use secondary road funds or farm to market road funds within the city limits of Burlington which have a population of more than 2500 persons under the circumstances as outlined above?

2. Would the 2 houses above mentioned which face on the paved city street be counted in computing the average distance between houses on the unpaved street?

3. Would the fact that one of the houses is not on a lot adjoining the street make any difference in view of it's being built on a 2 lot plot owned by the same person when one of the lots does border on the street?

4. Does it matter in computing the average distance between houses whether the 13 houses on the 2100 foot strip are all on one side of the street or whether they are part on one side and part on the other?

5. In the event that the County road can be extended with County funds are there any specific requirements relating to width of said road within the city limits?

Your questions call for an interpetation of Section 314.5 of the 1958 Code of Iowa. Your questions actually call for an interpetation as to how the Act should be administered from the standpoint of determining the average distance between houses. I have made an extensive survey of the Law in this regard and cannot find any authority in which a formula has been set down for determining the average distance.

59-6-17

With reference to your first question, we feel that the answer is no, for the reason that in the situation you present the houses would average less than 200 feet apart on the proposed 2100 foot extension, there being 13 houses along this extension.

With reference to question 2, it is our opinion that the two houses which face the paved city street and also the proposed extension should also be counted in the computation of the average distance between houses.

With reference to question 3, the fact that one of the houses sits further back from the extension than the other houses, would not make any difference in computing the average distance between houses. In other words, the answer to question 3 is no.

With reference to question 4, we feel that it does not matter whether the houses are all on one side of the road or part on one side and part on the other in computing the average distance between the houses along the proposed extension.

In light of the answer to question 1, it is not necessary that question 5 be answered, and therefore we have not attempted to answer it.

As stated before, we could find no authority that specifically deals with the computation of the average distance between houses, and have answered your questions trying to keep in mind the intent of the statute as derived from the four corners of the statute.

Very truly yours,

C. J. Lyman,
Special Assistant Attorney General
for Iowa State Highway Commission

JLMcK:mj
cc: Mr. Larson

LABOR: Child labor, restaurants —
~~CHILD LABOR — LABOR COMMISSIONER — RESTAURANTS:~~ Drive-in establishments selling ice cream and soft drinks, as a principal business, is a "restaurant" within the meaning of Section 92.11, Code 1958. (Faulkner to Lowe, Labor Comm., 6/23/59)
#59-6-18

June 23, 1959

Mr. Don Lowe, Commissioner
Bureau of Labor
L O C A L

Dear Sir:

For the purpose of clarification it is necessary to supplement the opinion of this office dated April 28, 1958. This is the result of an opinion written August 5, 1958, which held that an ice cream establishment, where only ice cream, sundaes, popcorn, etc. are sold, is not a "restaurant" under Section 445.31, 1958 Code of Iowa. In the latter opinion the definition of "restaurant" in Section 170.1 (4), 1958 Code of Iowa, was held not applicable to "restaurant" as used in Section 445.31, supra.

Your question, as stated in the letter opinion dated April 28, 1958, aboved referred to, is as follows:

> "Under the Child Labor Laws, Chapter 92, 1958 Code of Iowa, is a self-service drive-in establishment dispensing only ice cream and soft drinks for consumption in automobiles on the premises a 'restaurant' within the meaning of Section 92.11, 1958 Code of Iowa?"

Section 92.11, 1958 Code of Iowa, provides in part:

> "No person under sixteen years of age shall be employed at any work or occupation which, by reason of its nature or the place of employment, the health or morals depraved, . . . or in or about any . . . cafe, restaurant, . . ."

This statute is codified under Title V, 1958 Code of Iowa, and is therefore, an exercise of the police power. As stated in 43 C.J.S., Infants, Section 12, statutory regulations for the protection of health and morals are construed as follows:

59-6-18

> "General rules governing the construction of statutes are applicable to statutes regulating the employment of minors. Accordingly, such regulations in so far as they provide remedies for infants employed in violation thereof, should be liberally construed to effectuate their purpose; but the criminal violations of the regulations, which are considered as mala prohibia and not mala in se, should be strictly construed. However, in the final analysis the meaning of the statute depends on the intention of the legislature as manifested by the language employed and the purpose for which it was enacted."

Considering the wording of the Iowa statute, Section 92.11, supra, the intent is clearly expressed therein. The statute is for the protection of persons under sixteen years of age. Specifically, the statutory protection prohibits employment which may injure health or deprave morals of such persons. This construction is supported by State v. Erle, 210 Iowa 974, 232 N.W. 279, 72 A.L.R. 137, where, in discussing what is now Section 92.1, 1958 Code of Iowa, the court said:

> "The legislative intent in the enactment of the law under discussion is obvious. It was to prevent a child under 14 years from being employed by the owner or operator of the defined and prohibited establishments, in which, by the nature of the work or the place of employment, his health or moral welfare might be impaired. . ."

Since the aforesaid statutory definition of "restaurant" is inapplicable, resort must be made to the usual and commonly understood meaning. Patterson v. Iowa Bonus Board, 246 Iowa 1067, 71 N.W. 2d 1. Such meanings are annotated in 122 A.L.R. 1399. Among these definitions is that referred to in Webster's New International Dictionary, Second Edition:

> "an establishment where refreshments or meals may be procured by the public; . . ."(Emphasis added)

In addition, Black's Law Dictionary, Fourth Edition, defines "restaurant" as follows:

> "An establishment where refreshments or meals may be obtained by the public. Donahue v. Conant, 102 Vt. 108, 146 A. 417, 419. It includes cafes, lunchrooms, dairy lunch rooms, cafeterias, tea rooms, waffle houses, fountain lunches, sandwich shops and many others. People, on complaint of Canniano v. Kupas, 13 N.Y.S. 2d 488, 490, 171 Misc. 480."

The definition of the word "restaurant" was considered in the case In Re Applications of Henery, 124 Iowa 358, 100 N.W. 43, wherein the following comments are found:

> "It was shown that some or all of the applicants were in the habit of selling soda water and ice cream during the season for such refreshments, and it is contended by the county attorney that this brings such places of business within the description of 'eating houses, restaurants, and saloons,' keepers of which cannot be lawfully granted permits. We think this would be a strained and unreasonable interpretation of the statute. The sale of soda water and ice cream is ordinarily carried on as a mere incident in connection with some other business or occupation, and it would be a wide departure from the usual and accepted meaning of the words to hold that every place in which such refreshment is found is to be classed as restaurant, eating house, or saloon. Such is not the practical interpretation which the people generally have placed upon the law, and we are not justified in establishing any such extreme precedent. The distinction between places provided solely or principally as resorts for food or drink and those which are devoted to other legal business is recognized by the Michigan court in Kitson v. Mayor, 26 Mich. 325, cited by the appellant."

In the Henery case, an establishment selling ice cream and soda water, incident to another business, was considered not to be a restaurant. This case, however, clearly distinguishes an establishment selling ice cream and soda water as a sole or principal business. And, in the Henery case ice cream and soda water are considered "refreshments".

It is important to note that the above quoted definition of restaurant, with reference to the word "refreshments", is couched in the disjunctive. Therefore, an establishment where refreshments are sold is a restaurant. Such definition has been adopted in the following cases: Jackson v. Lane, 59 A 2d 662 (N.J.); In re Bowers, 33 F. Supp. 965. Appeal of Langal, 104 A 2d 343, (Pa); Ford Corp. V. Zoning Board of Adjustment of City of Philadelphia, 121 A 2d 94 (Pa.).

Furthermore, the last cited case states:

> "A restaurant is defined in Webster's International Dictionary as 'An establishment where refreshments or meals may be procured by the public; a public eating house,' and while this no doubt assumes that the refreshments are to be eaten on the premises, the qualification is here complied with since the food will be consumed there even though it be in automobiles stationed thereon. The applicant was clearly entitled to a permit for the erection and the use of a building as and for a 'restaurant, cafe, or catering.'"

Thus, for the purpose of civil litigation, a liberal construction prevails. And in that view, and as a matter of definition, you are advised that a drive-in establishment selling ice cream and soft drinks, as a principal business, is a "restaurant" within the meaning of Section 92.11, supra.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:kj

COURTS: Juvenile Probation officers --

Under Senate File #115, Acts of the 58th G.A., the judge or judges of the juvenile court may appoint one or more probation officers and where one such probation officer is appointed, the judges may fix the salary of such officer, but in no case exceeding 70% of the salary of the District Court Judge.

(Strauss to Wilson, Muscatine Co. Atty.; 6/24/59)

#59-6-20

June 24, 1959

Mr. Robert H. Wilson
Muscatine County Attorney
110½ East Second Street
Muscatine, Iowa

Dear Mr. Wilson:

This will acknowledge receipt of yours of the 22d inst. in which you submitted the following:

"Muscatine County, along with several other Counties in the State of Iowa, employs only one Probation Officer who is appointed by the Judge of the Juvenile Court. The Iowa Legislature recently enacted Senate File #115 which repealed Section 231.8 of the 1958 Code of Iowa which Section provides among other things that a County having a population of more than thirty thousand and less than fifty thousand such as Muscatine County, a Chief Probation Officer may be appointed at a salary not to exceed $4,900.00 and such Deputy Probation Officers may be appointed as may be necessary to carry out the work of the Court. At this time it is necessary to ascertain the pay status of the Probation Officer in and for Muscatine County.

"I would appreciate your office rendering an Opinion as to whether or not in Muscatine County, a County with one Probation Officer, the Court under the terms of Senate File #115, is authorized to fix the salary of the Probation Officer at an amount not to exceed seventy per cent of the salary of the District Court Judge. In the event that your opinion is that the salary cannot be set at a per centage of the District Court Judge's salary, please advise as to what salary may be paid to the Probation Officer in and for Muscatine County.

"Your Opinion in respect to the salary authorized for payment to the Probation Officer of this County would be greatly appreciated."

59-6-20

In reply thereto I advise as follows:

While the terms of the statute referred to are not as clear as might be desired, the intent of the Legislature in enacting the foregoing statute seems apparent. Senate File #115, Acts of the 58th General Assembly, provides as follows:

> "Section 1. Section two hundred thirty-one point eight (231.8), Code 1958, is hereby repealed and the following enacted in lieu thereof:
>
> "The judge designated as judge of the juvenile court in any county, or where there is more than one (1) judge designated such judges acting jointly, may appoint such probation officers as may be necessary to carry out the work of the court. In counties where more than one (1) officer is appointed one (1) of such officers shall be designated as chief probation officer. The salaries of such officers shall be fixed by the judge or judges making the appointments but in no case shall the salary of a chief probation officer exceed seventy (70) percent of the salary of the district court judge nor shall the salary of a deputy probation officer exceed sixty (60) percent of the salary of such judge.
>
> "Probation officers may be appointed to serve two (2) or more counties. The salaries of such officers and their deputies, if any, shall be fixed by the judges of the judicial district containing such counties and such salaries and the expenses of the probation officer shall be prorated among the counties served in such proportion as may be determined by said judges who shall in making such determination, consider the volume of work in the several counties. Such officers may be paid not to exceed sixty (60) percent of the salary of a district court judge.
>
> "Such secretarial and clerical help as may be needed in the administration of any probation office may be appointed by the judge or judges of the juvenile court who may fix their salaries at not more than forty (40) percent of the salary of a district court judge."

While the words "probation officers" are used in the foregoing statute, it plainly implies therein authority for the employment of one probation officer. And further in providing for authority in the appointing judge for the fixing of the

salary of the probation officer, likewise by plain implication it implies authority not only to fix, but to pay the amount thereof. While the appointing judge has the discretion to fix the amount of the salary of the one probation officer, it is plainly implied that such salary should not be fixed at an amount exceeding the seventy (70) per cent of the salary of the District Court Judge.

The foregoing would control the fixing of the salary of one probation officer in Muscatine County.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh5

COUNTIES: Fair Associations --
In spite of general non-profit corporate powers awarded County Fair Societies by Sec. 174.2, Sec. 174.15 restricts authority in such bodies as to erection of fairground building to erection of buildings on lands acquired under provisions of Sec. 174.14, Code 1958. (Forrest to Oeth, Dubuque Co. Atty., 6/24/59)
#59-6-21

June 24, 1959

Mr. Robert L. Oeth
Dubuque County Attorney
Dubuque, Iowa

Dear Sir:

Receipt of your letter of June 8th is acknowledged and the same set out hereunder:

> "The Dubuque County Fair Association Inc. desires to immediately erect a new building on the Dubuque County Fair Grounds upon the premises owned by Dubuque County, which structure will cost approximately twenty-five thousand ($25,000.00) Dollars. The Fair Association has enough cash available to pay for the contemplated labor and it proposes to procure all building materials upon open accounts from suppliers calling for future annual payments made from the fairground fund without carrying charges until fully paid.
>
> "The question proposed is whether the Dubuque County Fair Association Inc., a corporation, can, under the provisions of Chapter 174 and particularly Section 174.15 of the 1958 Code of Iowa, have the full and exclusive power and authority to procure the construction of a new building costing in excess of ten thousand ($10,000.00) Dollars upon the existing County Fairgrounds under their own credit arrangements without in any manner legally affecting the County or whether the procurement of desired new improvements by the Dubuque County Fair Association upon existing County owned Fair Grounds is the act of the County and as such comes under and is controlled by Chapter 345 and particularly Section 345.1 of the 1958 Code of Iowa?"

For convenience we set out the Code sections above referred to:

> "174.15 Purchase and management. If a majority of the votes cast are in favor of such proposi-

59-6-21

tion, the board shall make the authorized purchase and pay for the same out of the general fund, or accept as a gift from the owner a county or district fair ground already in existence. Title shall be taken in the name of the county, but the board of supervisors shall place such real estate under the control and management of an incorporated county or district fair society. Such society is authorized to act as agent for said county in the erection of buildings, maintenance of grounds and buildings or any improvements constructed on such grounds. Title to new buildings or improvements shall be taken in the name of the county but the county shall not be liable for such improvements or expenditures therefor."

"345.1 Expenditures - when vote necessary. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a courthouse, jail, county hospital, or county home when the probable cost will exceed ten thousand dollars, or any other building, except as otherwise provided, when the probable cost will exceed ten thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections."

as well as Section 2907, Code 1939:

"2907 Purchase and management. If a majority of the votes cast are in favor of such proposition, the board shall make the authorized purchase and pay for the same out of the general fund, or accept as a gift from the owner of a county or district fair ground already in existence. Title shall be taken in the name of the county, but the board of supervisors shall place such real estate under the control and management of an incorporated county or district fair society. Such society is authorized to erect

> and maintain buildings and make such other improvements on the real estate as is necessary, but the county shall not be liable for such improvements nor the expenditures therefor."

A review of House File 295, Acts of the 51st General Assembly, which amended among other county and district fair statutes Section 2907, supra, reveals this pertinent explanation therefor:

> " * * *
>
> "Section 2907. The desire of this amendment is to place the ownership and management of county fair grounds that the same will meet Government demands should federal aid become possible in the near future.
>
> " * * *."

It will be noted that the phrase "Such society is authorized to erect and maintain buildings and make such other improvements on the real estate as is necessary, but the county shall not be liable for such improvements nor the expenditures therefor." was deleted and the following substituted in lieu thereof: "Such society is authorized to act as agent for said county in the erection of buildings, maintenance of grounds and buildings or any improvements constructed on such grounds. Title to new buildings shall be taken in the name of the county but the county shall not be liable for such improvements or expenditures therefor." (Emphasis supplied)

That statutes are to be given a practical and reasonable construction (Byers v. Iowa Emp. Sec. Comm., 247 Iowa 830, 76 N. W. 2d 892, State v. Perry, 246 Iowa 861, 69 N. W. 2d 412), and, that in seeking the meaning of a statute the courts will consider the statute being reviewed in the light of others relating thereto (City of Nevada v. Slemmons, 244 Iowa 1068, 59 N. W. 2d 793) and seek to give effect to all (Iowa Farm Serum Co. v. Bd. of Pharm. Ex., 240 Iowa 734, 35 N. W. 2d 848) are cardinal principles of statutory construction.

While it appears that the legislative amendment took away the authority of the society to erect buildings and instead reduced it to the role of agent of the county for such purposes

the part of the statute making the county not liable for such improvements was reinforced by adding the words "or expenditures therefor" in place of "nor expenditures therefor".

However, it must also be noted that the society is given this agent authorization only for "said county" (see Sec. 174.15, supra). 'Said county' appears to be a county which has acquired property under the provisions of Section 174.14:

> "174.14 Additional county aid. The board of supervisors may upon a petition signed by twenty-five percent of the qualified voters of the county as shown by the pollbooks of the last preceding general election, submit to the voters of the county, at a general election, the proposition to purchase or accept as a gift, for county or district fair purposes, real estate exceeding one thousand dollars in value. Notice of such election shall be published in the official newspapers of the county for four weeks previous to such election."

Hence, if there is authority in the society to erect fair ground buildings it would be in relation to grounds acquired under the last above quoted Code section, there appearing no other reference to building authority in such societies.

Since the prior law clearly gave authority to such societies to erect buildings (1942 OAG at p. 89) and since the non-liability clause was left in and even strengthened by the amendment of the 51st General Assembly, and it appearing by legislative explanation that the change was made only for the purpose of enabling language to accommodate potential federal aid, the only reasonable conclusion giving effect to those Code sections involved is to find authority in such society to erect appropriate buildings on county lands used for fair ground purposes and acquired under the Code section last above referred to.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

Permits--

BEER: ~~PERMITS~~: Violation of State liquor law by corporate president does not make mandatory the revocation of corporations beer permit under the provisions of Section 124.30 whether defendant is convicted in his personal, non-corporate capacity. (Forret to Ford, Des Moines Co. Atty., 6/24/59)

#59-6-22

June 24, 1959

Mr. T. K. Ford
Des Moines County Attorney
220 Tama Building
Burlington, Iowa

Dear Sir:

Receipt of your recent inquiry concerning revocation of beer permits is acknowledged as follows:

"Early this month some of the Sheriff's officers assisted by State Agents conducted a raid on an establishment known as the Suburban Club located outside the City of Burlington.

"The resident of that club, Roscoe Scott was charged with, and entered a plea of guilty to, the sale and possession of alcholic beverages under the provisions of Section 124.30 of the 1958 Code of Iowa. The Suburban Club was not charged. Mr. Scott has been sentenced and has paid his fine.

"The permit issued to the Suburban Club was signed by Roscoe Scott, it's president.

"Under these circumstances, are the provisions for Mandatory Revocation of the Class B Club license applicable?

"We are unable to find prior Iowa cases in point.

"The Board of Supervisors of Des Moines County request the earliest possible answer as the Suburban Club is still operating under it's Class B permit and the board, naturally, would prefer to base any action it takes on the Mandatory Provisions of the Code rather than on discretionary provisions."

59-6-22

In response thereto, we presume that the defendant Scott was convicted on some Section other than 124.30 indicated in your letter, but that your question is as to whether or not such Section in fact makes mandatory the revocation of the permit holder.

As is apparent from the language in Section 124.30:

"124.30 Mandatory revocation. If a permit holder, under the provisions of this chapter, is convicted of a felony or is convicted of a sale of beer contrary to the provisions of this chapter or is convicted of bootlegging, or who is guilty of the sale or dispensing of wines or spirits in violation of the law, or who shall allow the mixing or adding of alcohol to beer or any other beverage on the premises of class 'B' permittees or who shall be guilty of the violation of this chapter as amended, or of any ordinances enacted by any city or town as provided for in this chapter, his permit shall be revoked by the authorities issuing same, * * *"

The mandatory revocation is upon the permit holder.

In the instant case the permit holder was in fact a corporation. However, the defendant, although president of the corporation, was charged and convicted on a liquor violation in his personal capacity. It is the opinion of this office that this violation does not make mandatory the revocation of the corporation's permit.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:kvr

STATE OFFICERS AND DEPARTMENTS; Truck permit fees --
The Order of the Commerce Commission issued August 6, 1958, and in force January 1, 1959, exceeds its powers in providing for fees to be paid on both tractors and trailers. Their legal authority exists only to the extent of imposing the fee upon the tractor. (Strauss to Loveless, Gov., 6/24/59)
59-6-23

June 24, 1959

The Honorable Herschel C. Loveless
Governor, State of Iowa
Statehouse
L O C A L

My dear Sir:

This will acknowledge receipt of yours of the 5th inst. in which you submit the following:

"Thank you very much for your prompt reply to my letter of May 26 answering certain questions with respect to the operations of the Commerce Commission.

"Although your letter deals quite specifically with the authority of the Commerce Commission to make refunds, there is still one aspect of the matter on which I respectfully request a further opinion.

"This question has to do with the legality of the order issued by the Commerce Commission. I have been informed that the money collected to date represents only about half the amount truck operators would be required to pay if the full collection of fees imposed by the order in question is made. As an administrative mater the present Commerce Commission needs to know whether they have the authority to enforce the order issued by the Commission on August 6, 1958.

"In order that this matter may be finally disposed of, it would seem to be necessary to have an official statement on whether the order issued on August 6, 1958 was a valid order under Chapter 327, Code 1958. Your opinion, therefore, is requested on the following point:

"Is the order issued on the above date legal and binding, or not?"

In reply thereto, I advise the following:

In the opinion of this department, the order of August 6, 1958, in force January 1, 1959, is in excess of the powers of

59-6-23

The Commission. The reason for this is found in the terms of the statute, Section 327.9, Code of 1958, providing as follows:

> "No permit shall be issued nor continued in force until the holder thereof shall have paid to the commission for the administration of this chapter an annual permit fee for each motor truck operated thereunder in the amount of five dollars."

and as interpreted by an unissued memorandum, this department held that the fee therein provided for is legally imposed upon the tractor and not upon the trailer. Therefore, under the Order in force January 1, 1959, providing as follows:

> "TO ALL CONTRACT CARRIERS:
>
> "This is your notice that the 1959 permit fee of five dollars ($5.00) for each
>
> TRUCK
> TRUCK TRACTOR
> TRAILER
> SEMI-TRAILER
>
> which you propose to operate in 1959, under the provisions of Chapter 327, Code of Iowa 1958, is due and payable on or before January 1, 1959.
>
> "You will note that truck tractors used under a permit are now included in the list of equipment on which fees will be paid. The Iowa Commerce Counsel has ruled that this equipment should be included."

the imposition of the fee extending to July 4, 1959, is legally upon the tractor and not upon both the tractor and the trailer. Subsequent to that date, July 4, 1959, Senate File #519, Acts of the 58th General Assembly, becomes effective, which provides as follows:

> "Section 1. Section three hundred twenty-five point thirty-five (325.35), Code 1958, is hereby amended by inserting following the word 'dollars' in line eight (8) the following: 'provided, however, that the fee herein provided shall not be imposed on any tractor or truck-tractor'.

> "Sec. 2. Section three hundred twenty-seven point nine (327.9), Code 1958, is hereby amended by inserting following the word 'dollars' in line six (6) the following: 'provided, however, that the fee herein provided shall not be imposed on any tractor or truck-tractor'.
>
> "Sec. 3. For the purposes of this Act the terms 'tractor or truck-tractor' shall mean every self-propelled vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn."

Such fee is legally imposed upon the trailer. Fees paid under the Order, or otherwise under the previous statute, are not refundable on the authority of the previous opinion issued to you of date May 28, 1959. However, these fees may be recovered by and through the State Appeal Board, and the 59th General Assembly.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh5

Buildings and grounds --

SCHOOLS: ~~SCHOOL SITES AND SCHOOL HOUSES:~~ 1. Under sec. 296.2 before indebtedness, school house sites being contracted for must be in all instances submitted to the electors.

2. School districts cannot purchase on real estate contract. Under Sec. 297.3 a school can acquire 30 acres plus 2 blocks exclusive of street for the school house site.

(Ribmanse to Willett, Tama Co. Atty., 6/25/59)

June 25, 1959

#59-6-24

Mr. Walter J. Willett
Tama County Attorney
215 West Third Street
Tama, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of June 5, which states the following:

"The following are some school problems which have presented themselves in our County and for which I have been asked to obtain an Attorney Generals opinion. The questions deal with a school house site and the indebtedness to be incured therefore as follows:

"Question 1. Section 296.2 of the 1958 Code of Iowa states that before such indebtedness of a school house site can be contracted in excess of one and one-fourth per cent of the assessed value of the taxable property a petition must be signed by at least twenty-five per cent of those voting at the last election. The question then is, how much can a school district spend for the purchase of a school house site without bringing it to a vote of the people?
If the assessed value of the taxable property of the school district is three million dollars can that school district spend up to one and one-fourth per cent of the assessed value of the taxable property without a vote of the people for the purchase of a school site or athletic field?

59-6-24

"Question 2. Does a school district have the right to sign an option for the purchase of land for a school house site or athletic field and if so what are the limitations on how much can be spent on the option?

"Question 3. Can a school district purchase a school house site or land for an athletic field on contract covering a period of years and if so what would the limitations on payments be per year if any?

"Question 4. How many acres of land can be purchased by a school district for a school site and for an athletic field? Under Section 297.2 the Statutes sets forth a ten acre limitation for a school house site and Section 297.3 the Statutes speak's of an area equal to two blocks exclusive of the streets for a school house site and not exceeding thirty acres for an athletic field. Does this mean that a school district could purchase forty acres of land for a school house site and athletic field? If not, what are the limitations for a school house site and an athletic field?"

In reply thereto:

The answer to your first question is clearly stated in Section 296.2 Code 1958 which provides:

"Before such indebtedness can be contracted in excess of one and one-quarter percent of the assessed value of the taxable property, a petition signed by a number equal to twenty-five percent of those voting at the last regular school election shall be filed with the president of the board of directors, asking that an election be called, stating the amount of bonds proposed to be issued and the purpose for which the indebtedness is to be created, and that the necessary schoolhouse or schoolhouses cannot be built and equipped, or that sufficient land cannot be purchased to add to a site already owned, within the limit of one and one-quarter percent of the valuation."

A petition does not have to be filed with the president of a school board if the proposed indebtedness to be contracted for, is less than one and one-quarter percent of the assessed value of the taxable property, before the board submits the proposition to the electors. If the proposed indebtedness is to exceed one and one-quarter percent of the assessed value of the taxable property, then a petition signed by twenty-five percent of those voting at the last regular school election must be filed with the president of a school board, asking that an election, and the board must submit the proposition to the electors. In either event, before such indebtedness can be contracted for, it must be brought to the vote of the people. Op. Atty. Gen. 1938, page 210

Therefore the answer to your first question is "nothing".

It is fundamental that schools are creatures of statute with only those powers expressly conferred by statute. Silver Lake Consol. School District v. Parker 238 Iowa 984, 29 N.W. 2d 214; Ind. School District of Danbury v. Christiansen 242 Iowa 963, 49 N.W. 2d 263. Under Section 297.6, Code 1958, the school board has the power to negotiate with a landowner and come to terms as to price to be paid or if they can not agree, then the land can be taken by condemnation. The school board lacks specific statutory authority to take an option for the purchase of land.

Thus the answer to your second question is "nothing may be spent".

The method by which the expenditures from school house fund can be accomplished is discussed at length in Op. Atty. Gen. 1938, page 210, Op. Atty Gen. 1948, page 5.

The answer to your third question is negative.

In answer to your fourth question Section 297.2, Code 1958 provides:

> "Except as hereinafter provided, any school corporation may take and hold so much real estate as may be required for such site, for the location or construction thereon of schoolhouses, and the convenient use thereof, but not to exceed ten acres exclusive of public highway." (Emphasis added)

Section 297.3, Code 1958 provides:

"Any school corporation including a city, town, or village, may take and hold an area equal to two blocks exclusive of the street or highway, for a schoolhouse site, and not exceeding thirty acres for school playground, stadium, or field house, or other purposes for each such site."

Section 297.2 is the limitation on the amount of real estate which a school corporation may acquire for only school houses. If the school corporation desires to have a playground, stadium or field house in connection with the proposed school house, then Section 297.3 is the applicable section. In no event may a school board acquire more than two blocks, exclusive of streets, for a school house and thirty acres for school playground, stadium or field house. Op. Atty. Gen. 1934, page 223.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

SCHOOLS; REORGANIZATION-- Under Section 275 27 as amended by H.F. 104, 4 Community school districts ahall be a part of the county school system of the county in which the greatest number of electors of said district reside at the time of the special election. (Rehmann to Getscher, Fremont Co. Atty., 6/25/59) #59-6-25

June 25, 1959

Mr. Edwin A. Getscher
Fremont County Attorney
Zutz Building
Hamburg, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of June 4 which states the following:

"Facts: A community school district will go into existence on July 1, 1959, maintaining an approved 4-year high school in an adjoining county but including considerable area of land in Fremont County. A member of the County Board of Education of Fremond County was elected in March 1959 to represent the County school system, commonly known as director at large has his residence in that area which will become a part of the Shenandoah Community School District on July 1st, 1959.

"Section 275.27 states 'That such community school districts become a part of the county school system.'

"Section 273.2 of the Code states 'In the event an independant 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 independant or consolidated district maintaining an approved 4-year high school in the County school system.

"The attorney-general's opinion of February 15, 1957, states (the ruling on the right of the residents of an area to vote for a member at large) 'The exception in Section 273.2 (a different exception) is specifically limited to 'independent' and 'consolidated' districts. Since

59-6-25

the district you described is neither but is a 'community' district by virtue of having been enlarged (formed) under Chapter 275, it is part of the County school system under the express wordage of Section 273.2 as well as Section 275.27.

"Section 273 relating to election of members of the County Board of Education and providing for the filling of vacancies thereon states: 'A vacancy shall be defined as in Section 277.29 which in turn states 'The incombent ceasing to be a resident of the district or subdistricts ..... shall constitute a vacancy.'

"Question: Does the area in Fremont County becoming a part of the community school district maintaining an approved 4-year high school in an adjoining county cease to be a part of Fremont County school system as described in Section 273.2 of the Code of Iowa on the said community school district coming into existence on July 1, 1959?

"Corollary question: In the event of an area ceasing to be a part of the County school system of Fremont County as provided in Section 273.2 of the Code, does a member of the County Board of Education serving as a member at large residing in that area create a vacancy on the removal of that area from the County school system?"

In reply thereto:

Section 275.27 Code 1950, as amended by House File 104 of the 58th G.A., which became law on May 15, 1959, provides:

"School districts created or enlarged under the provisions of this chapter shall be known as community school districts and shall be part of the county school system of the county in which the greatest number of electors of said district reside at the time of the special election called for in section two hundred seventy-five point eighteen (275.18), and this provision pertaining to greatest number of electors shall be in full force and effect any statute to the contrary notwithstanding, and all provisions of the law applicable to the common schools generally shall be applicable to such dist-

ricts in addition to the powers and privileges conferred by this chapter."

If the area included from Fremont County, in the Shenandoah Community School reorganization, had fewer electors than the school system involved in Page County, then that area so included becomes part of Page County School System and is no longer a part of the Fremont County School System, on July 1, 1959. In this particular instance, Section 273.2, Code 1958, is inapplicable to your question because the said section is referring to independent or consolidated school districts voluntarily joining the county school system, not reorganization.

Your attention is directed to Section 277.29, Code 1958, which provides:

"* * * * the incumbent ceasing to be a resident of the district or subdistrict, * * * shall constitute a vacancy."

If the member of the County Board of Education serving as a member-at-large is in an area included in a reorganization which is no longer in the Fremont County School System, then there would be a vacancy, if it is determined that a member at large is still needed.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:skvr

SCHOOLS: Division of assets -- County Superintendent has no duty nor may he aid in division of assets under Section 275.29. (Rehmann to Boeye, Montgomery Co. Atty.) 6/30/59) # 59-6-26

June 30, 1959

Mr. John F. Boeye
Montgomery County Attorney
305-A Reed Street
Red Oak, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of June 18, 1959 which states the following:

"Please advise as to the interpretation given by your office in connection with Section 275.29 of the 1958 Code of Iowa relative to the duties that are imposed upon the County Superintendent of schools in aiding a newly organized community school district in the settlement of the assets and liabilities after reorganization.

"The Villisca Community School District #2, being reorganized, is composed of all of the school property consisting of 10 acres and buildings thereon belonging to the Nodaway Consolidated School system, but not all of the territory which was included in the Nodaway Consolidated School District was included in the reorganization. It therefore becomes necessary to have the school buildings and land appraised and settlement made between the new Villisca Community School District #2 and the remaining part of Nodaway Consolidated School District.

"Inasmuch as the entire school buildings were formerly a 12 year school and are included in the new reorganized school district, the financial problem involved in the settlement is expectdd to leave the new community school district without sufficient cash assets to pay the old Nodaway school board.

"Does Section 275.31 allow an increase in revenue so that a cash settlement can be made with the old school board?

59-6-26

"How long can this levy be imposed and what is the extent of the millage allowed by said levy?"

In reply thereto:

Section 275.29, Code 1958, is the section dealing with the division of assets and liabilities after reorganization. The proper parties to the division of assets are only the several boards of the districts affected by the reorganization. This is the "local tribunal as appointed by law" and the County Superintendent of schools has no duties nor may aid in any way in the division of assets and liabilities. Dist. Twp. of Viola v. Dist. Two. of Audubon, 45 Iowa 104.

The answer to your second and third inquiries is discussed at length in 1956 Ops. Atty. Gen. page 74, a copy of which is herewith enclosed.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
Encl.
cc: Paul Johnston

SCHOOLS - Reorganization The school district to which a "left-over portion" of a reorganization, less than four sections, ~~which~~ was attached ~~to the district~~ by the county board is an affected district in terms of Section 275.29. (Reinmann to Murray, Webster Co. Atty.; 6/30/59) #59-6-28

June 30, 1959

Mr. John J. Murray
Webster County Attorney
611 Snell Building
Fort Dodge, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of June 16 which states the following:

"On the 5th day of March, 1959, an election was held pursuant to the petition filed and hearing held to determine the formation of a new proposed community school district to be known as the Prairie-view Community School District. The election carried and a new district was formed composed of all of the present Community School District of Gowrie and all of the present Lanyon Consolidated School District except approximately 3½ sections of land therein. Subsequent to this election but prior to this present date, the County Board of Education of the County of Webster, State of Iowa, attached the remaining 3½ sections more or less (less than 4 square miles) to the present Dayton Community School District in connection with the provisions of paragraph 275.1 and 275.5 Code of Iowa, 1958, as amended by the 58th General Assembly.

"The question now under consideration is as follows: Does the term affected referred to in the above paragraph include the board of the Dayton Community School District, along with the boards of the Prairie-view Community School District and the Consolidated School District of Lanyon, or is it to be interpreted that the Dayton board is not affected by the organization of the new corporation but only remotely concerned due to the action of the County Board of Education. Stating the same question in a different and more general manner, is the school board of a district to

59-6-28

to which a left over portion of a reorganization procedure consisting of less than 4 sections and attached by the County Board of Education an affected district in terms of the provisions of Chapter 275.29 of the Code of Iowa?"

In reply thereto:

Normally where a reorganization takes place, the directors of the several boards of the districts affected by the reorganization shall determine the distribution of assets and liabilities. Section 275.29, Code 1958. There is no question as to the distribution of the assets and liabilities of the Community School District of Gowrie, the newly organized Prairie-view Community School Districts has to assume all of the assets and liabilities of the Community School District of Gowrie. Peterson v. Swan, 231 Iowa 745, 2 N.W. 2d 70. Though the Peterson case was decided under Chapter 276 (now repealed), the basic principal of the case is still applicable due to the similarity of the distribution of assets.

With respect to the Lanyon Consolidated School District, after the election approving the Prairie-view Community School District, and after May 15, 1959, Section 275.5 as amended by S.F. 53 of the 58th G.A. made a mandatory requirement to attach the remaining 3½ Sections of land to another school district by resolution. In the case of Dist. Twp. of Viola v. Dist. Twp. of Audubon, 45 Iowa 104, the court laid down the basic principal as to the division of assets and liabilities where a territory of one school district is attached to that of another. The court held, "the division should be made by the local tribunal appointed by law." While under Section 275.29, Code 1958, the proper "tribunals appointed by law" are those old boards which are directly affected by the reorganization. However, by operation of law, the Dayton Community School District becomes a district affected by the organization because they are under a legal obligation to administer the affairs of the portion attached to the school district because that portion has no authority to do it for themselves.

Therefore the answer to your question is affirmative.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

COUNTIES! Supervisors--

~~BOARDS OF SUPERVISORS:~~ Boards of supervisors cannot authorize the purchase of real estate costing more than $10,000 without first submitting to voters. (Lyman to Pappas - May 27, ~~1959~~); 57-6-30

Ames, Iowa
May 27, 1959

Mr. William Pappas
Cerro Gordo County Attorney
Mason City, Iowa

In re: Acquisition of Gravel Deposits

Dear Mr. Pappas:

Your letter of April 28, 1959, addressed to the Attorney General has been referred to this office. You ask whether or not the Cerro Gordo County Board of Supervisors has the authority to purchase a tract of land for a consideration of more than $10,000, the tract of land to be used as a gravel pit by the county.

Section 309.63 of the Iowa Code states in part:

> "The board of supervisors of any county may .....purchase or condemn any lands for the purpose of obtaining gravel or other suitable material with which to improve the secondary highways of such county...."

Section 306.13 of the Iowa Code states in part:

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

57-6-30

May 27, 1959

Mr. William Pappas

Page 2 -

In re: Acquisition of Gravel Deposits

These two sections provide the board of supervisors with the power to obtain land for necessary gravel. However, Section 345.1 provides, among other things, that the board of supervisors cannot purchase real estate for county purposes exceeding $10,000 in value until a proposition therefor has been first submitted to the legal voters of the county.

Section 309.63 was interpreted in the Attorney General's Opinion, 1919-20, page 266. In that opinion it was held that the section similar to Section 345.1 of the Iowa Code limits the power of the board of supervisors to acquire gravel pits for more than $10,000 unless the issue is first submitted to the voters.

It is our opinion that the limitations set forth in Section 345.1 of the Iowa Code are valid today and that in your situation the matter would have to be submitted to the voters since the purchase price exceeds $10,000.

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:MS

Ames, Iowa

May 29, 1959

Mr. William Pappas
Cerro Gordo County Attorney
Mason City, Iowa

Dear Bill:

I recently sent you an opinion on the purchase of real estate in excess of $10,000 which must be first submitted to the voters.

In running through the house files of the 58th General Assembly, I note that House File 92 amended Section 345.1 by adding the following:

> "Except, however, such proposition need not be submitted to the voters if any such erection, construction, remodeling, reconstruction or purchase of real estate may be accomplished without the levy of additional taxes and the probable cost will not exceed $20,000."

The act contained a publication clause. The bill was approved by the Governor on April 15, so I am assuming that it has been properly published and is now law. This can be verified with the Secretary of State.

I do not know if this will help you with the problem, but I did want to call it to your attention.

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:MS

~~MOTOR VEHICLE FUEL TAX LAW -- REFUND PERMITS -- CANCELLATION FOR NON-USE:~~ The Treasurer of State has a specific statutory duty to revoke a refund permit when no claim for refund has been made by the permit holder for a period of one year from the date of issuance of such permit. Section 324.19, Code 1958. Peck to Abrahamson, At. Gen., 5/11/59) #59-5-1

MOTOR VEHICLES: Fuel tax permits --

May 11, 1959

Honorable M. L. Abrahamson
Treasurer of State
L O C A L

Attn: C. E. Borg, Superintendent
Motor Vehicle Fuel Tax Refund
Division

Dear Sir:

Reference is made to your letter requesting an opinion from the Attorney General as follows:

"It is necessary that we obtain a ruling in connection with the above Section of the Motor Vehicle Fuel Tax Law.

Referring to Section 324.19 under Paragraph 3 it states 'A refund permit under which no refund is claimed for a period of one year from date of issuance shall be revoked by the Treasurer subject to reinstatement or issuance of a new permit upon application as provided in Section 324.18'.

The writer has presumed that the purpose of a cancellation for non-use was actually intended to cover a full one year period in which no claims were submitted on any given permit number and that if the claimant did not file within the yearly limit that his permit could be cancelled for non-use.

This was to enable the department to keep the files cleared of inactive permits. However in studying the wording of this law, it would appear that if there had been even one claim filed after the issuance of the permit, then the permit could not be cancelled no matter how long a period of time it was unused.

FDP-MT-1

Further than this, there was about 160,000 new permit numbers issued at the time the law was changed in 1957 to the new permanent permit numbers and these were issued to permit holders who held old numbers then currently in effect.

The permanent numbers were given the issuance date of July 1, 1957 even though the numbers upon which they were issued upon would have been applied for within two years previous to that time as they were issued for a two-year period.

The question then is, would the issuance date be July 1, 1957 or the date the original application was made for the old type number?

The department has many permit numbers inactive that have not been used since July 1, 1957. The writer will be pleased to discuss this with you in the event you need more information."

In reply thereto:

Section 324.19, Code 1958, reads as follows:

"Any refund permit issued under this chapter may be revoked by the treasurer for any of the following violations, but only after the holder of the permit has been given reasonable notice of the intention to revoke the permit and reasonable opportunity to be heard:

1. Using in support of a refund claim a false or altered invoice.
2. Making a false statement in a claim for refund or in response to an investigation by the treasurer of a claim for refund.
3. Refusal to submit his books and records for examination by the treasurer or his authorized representative.

A person whose refund permit is revoked for cause (except nonuse) may not obtain another refund permit for a period of one year after the revocation. A refund permit under which no refund is claimed for a period of one year from date of issuance or a refund permit whose holder has moved from the county wherein he resided at the time of application for said permit shall be

revoked by the treasurer subject to reinstatement or issuance of a new permit upon application as provided in section 324.18." (Emphasis added).

The foregoing section of the Code, to wit: 324.19, indicates a legislative intent to create two methods of revocation of refund permits. One method pertains to revocation for violation of the following:

"1. Using in support of a refund claim a false or altered invoice.

"2. Making a false statement in a claim for refund or in response to an investigation by the treasurer of a claim for refund.

"3. Refusal to submit his books and records for examination by the treasurer or his authorized representative."

Such revocation for cause, cannot however, take place until after reasonable notice of the intention to revoke and reasonable opportunity for the permit holder to be heard on the matter.

The other method, and of which we are directly concerned in this opinion, is absolute, certain, and imperative, and involves merely execution of a specific duty on the part of the treasurer, such specific duty arising from a fixed and designated fact, to wit: nonuse of a refund permit for a period of one year from the date of issuance.

The same 160,000 new permit numbers of which you make mention were given the issuance date of July 1, 1957. Section 324.19, makes mandatory revocation of those refund permits under which no application for refund has been made during the period of one year from such date of issuance, such date of issuance being, July 1, 1957.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr
Encl.

~~MOTOR VEHICLE FUEL TAX: H. F. 4, Acts, 58th G.A.~~

1. H.F. 4 does not extend the refund for taxes paid on motor fuel used in operation or propelling of truck mounted feed mixers and pelleting machines. (Peach to Abrahamson, St. Insp., 6/25/59) # 59-7-2

MOTOR VEHICLES: Fuel tax refunds--

June 25, 1959

Honorable M. L. Abrahamson
Treasurer of State
L O C A L

Attn: C. E. Borg, Superintendent
Motor Vehicle Fuel
(Tax Refund Division)

Dear Sir:

Receipt is acknowledged of your letter under date of June 9, 1959, attached to which is a letter from the Honorable Harold O. Fischer, State Representative, Grundy County, Iowa under date of June 3, 1959.

The question propounded for our opinion is as follows:

"House File 4 extends the refund of motor fuel tax to include corn shellers, truck mounted feed grinders and roller mills. Does this also include truck mounted feed mixers and pelleting machines?"

In reply thereto:

House File 4, Acts of the 58th General Assembly, entitled "An Act to permit the refund of Motor Fuel Tax paid on Motor Fuel used in corn shellers and roller mills and truck mounted feed grinders" amends Sections 324.17 and 324.57, Code 1958.

With these amendments inserted the aforesaid sections will read as follows:

Section 324.17, Code 1958 as amended (amendatory language underscored) will read:

59-7-2

> "Any person other than a licensee who shall use motor fuel for the purpose of operating or propelling farm tractors, corn shellers, roller mills, truck mounted feed grinders, * * * and having paid the motor fuel tax on the fuel * * *, upon presentation to and approval by the treasurer of a claim for refund be reimbursed and repaid the amount of the tax which the claimant has paid on the gallonage so used. * * * * * * *."

Section 324.57, Code 1958 as amended (amendatory language underscored) will read:

> "3. 'Mobile machinery and equipment' shall mean and include vehicles self-propelled by an internal combustion engine but not designed or used primarily for the transportation of persons or property on public highways and only incidentally operated or moved over a highway such as corn shellers, truck mounted feed grinders, roller mills, * * * * *. The foregoing enumeration shall not operate to exclude other vehicles which are within the general terms of this definition. 'Mobile machinery and equipment' shall not however include dump trucks or self-propelled vehicles originally designed for the transportation of persons or property on public highways and to which machinery such as truck mounted transit mixers, cranes, shovels, welders, air compressors, well boring apparatus, or lime spreaders, has been attached."

We are, in this opinion, primarily concerned only with Section 324.17, Code 1958 as amended, since this is the section directly bearing on the matter of refund.

The Legislature has declared in direct terms that refund is available for fuel taxes paid on motor fuel used in operating or propelling corn shellers, roller mills and truck mounted feed grinders. Nothing is left to inference or implication.

Therefore, the refund is not extended to persons other than licensees for fuel taxes paid on motor fuel used in operating or propelling truck mounted feed mixers and pelleting machines.

This construction finds further support in the case of Hindman v. Reaser, 246 Iowa 1375, loc. cit. 1379, wherein our Supreme Court, endorsing the view of Jones v. Thompson, 240 Iowa 1024, 38 N.W. 2d 672, stated:

> "'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.'"

As previously stated, nothing has been left to inference or implication. The statute is clear and admits only to that machinery and equipment therein enumerated.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

~~MOTOR VEHICLE FUEL TAX LAW~~ Special Fuel Distributor License--
The Motor Vehicle Fuel Tax Law contains no provisions pertaining to Special Fuel Distributors. No license required. (Peach to Abrahamson, 6/26/59) #59-7-3

MOTOR VEHICLES:

June 26, 1959

Honorable M. L. Abrahamson
Treasurer of State
L O C A L

Attn: Carl H. Krause
Director,
Motor Vehicle Fuel Tax Division

Dear Sir:

Receipt is acknowledged of your letter under date of June 15, 1959, wherein you request a written opinion on the following matter:

> "If we have issued a Gasoline Distributor's License, is it mandatory that we also issue the said party a Special Fuel Distributor License."

In reply thereto:

The only reference to a distributor of special fuel is that which appears in Section 324.38(1), Code 1958, to wit:

> "* * , * if a special fuel dealer or user is also a <u>wholesale distributor of special fuel</u> at a location where special fuel is delivered into the supply tank of a motor vehicle, the monthly return to the treasurer covering the location need not include inventory control data covering bulk storage from which wholesale distribution of special fuel is made." (Emphasis added).

However, no provision is made for issuance by the treasurer of a "Special Fuel Distributor License". Division II of the Motor Fuel Tax Law, such division otherwise known as the "Special Fuel Tax Law" establishes and requires licenses only for those persons acting as a special fuel dealer or special fuel user as defined therein.

59-7-3

Although a license is required for a person to act as a distributor of motor fuel, special fuel does not include motor fuel as defined under Division I of the Motor Fuel Tax Law, and the distributor license requirements are not applicable to Division II of said law.

Therefore, your question is answered in the negative.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

INSURANCE: Policy Cancellation -- Under H. F. 210, 58th G.A. the phrase "receipt of certified or registered mailing" refers to the entry made by the post office in the company's certified or registered mail book when the cancellation notice is mailed and does not refer to a return receipt obtained by the post office from the addressee upon delivery of such notice. (Ltr. to Bennett, Ins. Comm., 6/30/59) # 59-7-5

JUNE 30, 1959

Mr. Oliver P. Bennett
Insurance Commissioner of Iowa
L O C A L

Attn: Samuel C. Orebaugh
First Deputy

Dear Sirs

Reference is made to our recent conversation relative to House File 210, Acts of the 58th General Assembly, An Act relating to the cancellation of insurance policies, which will become effective on July 4 of this year. The aforesaid act amends section 515.81 relating to cancellation by the company of policies of insurance other than life, and also amends section 516.29 relating to cancellation of fire, tornado and hailstorm assessment policies. With respect to the manner in which the insurance company shall notify the insured of cancellation of such policies, the act provides:

> ". . . service of notice in writing upon the insured which notice shall fix the date of cancellation which shall be not less than five days after service of such notice. Such service of notice may be made in person, or by mailing the notice to the insured at his post office address as given in or upon the policy, or to such other address notice of which the insured shall have given to the company in writing. A post office department receipt of certified or registered mailing shall be deemed proof of receipt of such notice . . ." (Emphasis supplied)

C 7-5

The question arises whether the "post office receipt of certified or registered mailing" to which the act refers means the entry in the company's certified or registered mail book made by the post office at the time the notice is mailed or whether it means a return receipt obtained for the company by the post office from the insured at the time of delivery of the notice.

Ordinarily, a change in the language of a statute indicates an intention to change its meaning. Hansen v. Iowa Employment Sec. Comm., 54 N.W. 2d 203. In construing an Act, the evil sought to be remedied is to be considered. Jones v. Dunkelberg, 221 Iowa 1031, 265 N.W. 157, Elks v. Conn, 186 Iowa 48, 172 N.W. 173.

The meaning of the statutes in question before amendment by the 50th General Assembly was considered on May 6, 1958, by the Supreme Court of Iowa, in the case of Silken v. Northland Insurance Company, 90 N W. 2d 29, in which it was held the provision for "giving of notice" contained in the statute prior to amendment meant, as to the word "giving", that the insured shall personally receive the notice and, as to the word "notice", he shall receive it so as to become aware of its content, and that such could not be accomplished by depositing a document in the mail directed to the insured's last known address when

he had actually thereafter changed address without notice to the company. Such, then, is the meaning the legislature intended, by amending the statute, to change. Were the amendment construed to refer to the return receipt obtained by the post office from the assured there would be no change in meaning accomplished by the amendment. It follows that the phrase "post office receipt of certified or registered mailing" refers to the entry made in the company's certified or registered mail book at the time of mailing.

That the General Assembly was aware of the evil is evidenced by the explanation appearing on the printed House File, as follows:

> "All fire and casualty insurers, including county mutual insurance associations, have had difficulty on occasion in securing an effective cancellation of an undesirable risk.
>
> This was made more difficult last year by a court interpretation of Code section 515.81 and 518.29. Under this ruling an insurer has an almost impossible burden of proving that a notice of cancellation, although duly mailed to a policyholder, was received by him.
>
> The proposed amendment provides the manner of cancelling and proving cancellation by the insurer and protects the policyholder by requiring the insurer to take note of any change of address which the policyholder gives to it in writing. The amendment tends to conform section 515.81 with section 515.80, which has been in force for many years."

Although the printed explanation is not conclusive of the interpretation of the law, its existence on the bill is evidence

that the members of the legislature were advised of the nature of the evil sought to be remedied. That the Supreme Court relies to some extent on such explanations appears from its statement in Des Moines Ind. Dist. v. Armstrong, 95 N.W. 2d 215 at page 522:

> "Our views on the effect of this new law are consistent with the explanation printed thereon when introduced in the 58th G.A."

It is further noteworthy that, although the meaning of the phrase in question would be clearer had the legislature employed phraseology permitting use of the word "mailed" rather than "mailing"; by the same token, an intention contrary to making the notice effective when mailed could have been much more clearly expressed had the legislature used the phrase "receipt of delivery".

We are, therefore, of the opinion the receipt to which House File 210 refers is the entry made in the certified or registered mail book at the time the notice is mailed.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

CITIES AND TOWNS: Police retirement--
Policemen in cities with established Policemen's Pension Fund are not within the coverage afforded by Chapter 85, Code of 1958, and specifically Section 85.62. (Gittleson to Jones, Ind. Comm. 7/2/59) 59-7-6

Comm.

July 2, 1959

Mr. Earl R. Jones
Iowa Industrial Commissioner
State Office Building
L O C A L

Dear Mr. Jones:

You have submitted the following inquiry to this office:

"City 'A' has a policemen pension fund under the provisions of Chapter 411, Code of 1958.

"Are City 'A's' policemen, who are temporarily disabled, within the exception contained in Section 85.62, Code of 1958?"

Section 85.62, is in pertinent part as follows:

"85.62 Peace officers. Any policemen (except those pensioned under the policemen's pension fund created by law), ... and any and all other legally appointed or elected law-enforcing officers, who shall sustain an injury while performing the duties of a law-enforcing officer and from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer, because temporarily or permanently physically disabled . . . . and where the officer is paid from public funds said compensation shall be paid out of the general fund of the state."

This section of the Code first appeared as Chapter 17, Acts of the 40th G.A. (1923). At that time the policemen's pension fund was substantially as provided for in present Chapter 410, Code of 1958. Chapter 410, Code of 1958 was superseded by present Chapter 411, Code of 1958, in 1934 by action of the 45th G.A. (See Acts of the 45th G. A., Extra Session, Chapter 75.)

59-7-6

Other pertinent Code sections are set out below:

"65.1 To whom not applicable. This chapter shall not apply to:
1. . . .
2. . . .
3. . . .
"4. As between a municipal corporation, city, or town, and any person or persons receiving any benefits under, or who may be entitled to benefits from, any 'firemen's pension fund' or 'policemen's pension fund' of any municipal corporation, city or town, except volunteer firemen and except as otherwise provided by law."

"410.18 Hospital expense. Cities and towns shall provide hospital, nursing, and medical attention for the members of the police and fire departments of such cities, when injured while in the performance of their duties as members of such department, and the cost of such hospital, nursing, and medical attention shall be paid out of the appropriation for the department to which such injured person belongs; provided that any amounts received by such injured person under the workmen's compensation law of the state, or from any other source for such specific purposes, shall be deducted from the amount paid by such city or town under the provisions of this section."

In 1931, the Supreme Court of Iowa had occasion to discuss these sections in the case of Ogilvie v. City of Des Moines, 212 Iowa, 117. An extended quotation from that case would seem to be warranted.

"' Appellant's position is that from July 4, 1923, at which time the above act became effective, under the plain and ordinary meaning of the language involved, Harry Ogilvie and his dependents came under the operation of the Compensation, because he was not a pensioned policeman and not within the excluded class.'

. . . . . .

"With these rules of construction for our guidance, let us examine the statutes in question to ascertain whether there is an irreconcilable conflict and whether, under a reasonable construction, effect can not be given to both. The statutory law relative to the Policemen's Pension Fund applies only to cities, and only to such cities as have an organized Police Department. See Section 6310, Code, 1927 (Section 410.1, Code of 1950).

Under Section 1361, Code, 1927, (Section 85.1(4), Code of 1958) a policeman in such a city is excluded from receiving compensation under the Workmen's Compensation Act. Section 1422, Code, 1927 (Section 85.62, Code of 1958 as amended), mentions policemen of all cities and towns but excludes from its provisions 'those pensioned under the policemen's pension fund created by law.' There are many cities and towns within the confines of the state which do not have an organized police department, and which do not have a policemen's pension fund to which the policemen are compelled to contribute, and from which they can receive any benefit. To illustrate, it is the duty of the mayor, under Section 5634, Code, 1927, to appoint such police officers as may be provided by ordinance. A police officer is necessarily a policeman. From a careful reading of Section 1422, Code, 1927 (Section 85.62, Code of 1958 as amended), it is clear that any police officer or policeman other than those coming within the parenthetical exception therein are entitled to compensation, under the provisions of said section. The exception refers only to those pensioned under the Policemen's Pension Fund created by law; that is, those policemen in cities which have an organized police department and a policemen's pension fund, under Section 6310, et seq of the Code. (Section 410.1, Code of 1958). It is quite apparent that it was the legislative intent, by the enactment of Section 1422, Code, 1927 (Section 85.62, Code of 1958 as amended), and by the language therein used, to include within the provisions of said statute those policemen in cities and towns not having an organized police department and a policemen's pension fund, and to exclude from the provisions of said statute those policemen in cities having an organized Police Department and a resultant Policemen's Pension Fund to which they are required to contribute, and are beneficiaries thereunder. By this construction there is no conflict or inconsistency between Paragraph 4 of Section 1361 (Section 85.1, Code of 1958), and Section 1422 (Section 85.62, Code of 1958 as amended), and the effect to be given to both.

"Appellant also relies, in support of his contention, on Section 6326 of the Code, 1927 (Section 410.18, Code of 1958), which gives cities and towns authority to provide hospital, nursing, and medical attention for the members of the police and fire departments of such cities when injured while in the performance of their duties, etc.; and which provides 'that any amounts received by such injured person under the workmen's compensation law of the state * * * shall be deducted from the amount paid by such city or town under the provisions of this section.'

The original enactment of such section is found in Chapter 133, 40th G. A. Laws. It neither purports to amend nor repeal any part of the Policemen's Pension Fund Law nor the Workmen's Compensation Act. Since, as we have seen, there are policemen in cities and towns not having an organized Police Department and Policemen's Pension Fund, the provisions of this section are not in conflict nor inconsistent with Paragraph 4 of Section 1361 of the Code, 1927 (Section 85.1, Code of 1958).

"We conclude that the deceased policeman during his lifetime was not entitled to compensation under the Workmen's Compensation Act, and that his dependent children are not now entitled to an award under said act."

The 52nd G. A. in 1947 amended Section 85.62 to provide as set out above. Subsequent to this in 1957, in the case of City of Emmetsburg et al v. Gunn, et al, 86 N.W. 2d 829, the Supreme Court considered the effect and intent of this amendment. The Court said:

"The latest legislative change was made by the 52nd General Assembly in 1947. Section 1422 had now become Section 85.62, 1946 Code. The previous Section 85.62 was repealed and a complete new section was enacted in lieu thereof. It is not necessary to requote the full section because there was only one change made. For purposes of clarity we will quote the repealed provision and the new provision. The provision repealed was: 'appointed or elected law-enforcing officers who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment,'. The new provision is: 'appointed or elected law-enforcing officers, who shall sustain an injury while performing the duties of a law-enforcing officer and from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer,'. This is the provision now effective as to the cases at bar." (Emphasis added)

The question which you raise and the question in the Oullvie case, supra, was not raised in the Emmetsburg case, supra for the reason that neither the City of Emmetsburg nor the City of Estherville had established a Policemen's Pension Fund pursuant to Chapter 411 or Chapter 410, Code of 1958.

There is nothing in the Emmetsburg case, supra, to indicate an intent to overrule the Sylvia case, particularly since the statutes and parts thereof considered in the Emmetsburg case, supra, were not affected by the "one change" considered in the case.

In the case of Hansen v. State, 91 N.W. 2d 555, the Supreme Court again considered Section 85.62, Code of 1958, and the Emmetsburg case, supra. The Court there said:

> "The question of the intent of the legislature as to liability of the State of Iowa concerning injury or death of law enforcing officers was not again raised until 1957 when the consolidated cases of City of Emmetsburg v. Gunn (City of Estherville v. Hackett), 249 Iowa ____, 86 N.W. 2d 829, came before this Court. We held that in view of the action of the 51st General Assembly in striking the above quoted words as to arrest, pursuit, peril and hazard it was the intention of the legislature that any injury or death of a law enforcing officer arising out of and in the course of the officer's employment created workmen's compensation liability on the part of the State.
>
> "Although there is no relationship of employer and employee between the State and the peace officer, the legislature by special statutory provision has established liability on the part of the State as to injury or death in line of duty. Chapters 85 and 86 and the pronouncements of this court as to workmen's compensation in private industry and municipalities apply with equal force in connection with liability of the State. (Emphasis added.)

I am well aware that part of the problem involved in your question was the seemingly inadequate coverage of policemen injured in the performance of official duties but sustaining injuries only temporary or partially permanent in nature. This problem, at least to the extent of temporary incapacity, was recognized by the 58th G. A. in Senate File 264, Acts of the 58th G. A. (Chapter 293, Acts of the 58th G. A.) Temporary

incapacity is now within the provisions for benefits under Chapter 411. The legislature thus has recognized the difference in coverage between Chapter 411 and Chapter 85, Code of 1958.

I am therefore of the opinion that policemen in cities with established Policemen's Pension Fund are not within the coverage afforded by Chapter 85, Code of 1958, and specifically Section 85.62.

Yours very truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh5

COUNTIES: Levies --
H. F. 125, 58th G. A., authorizing an increase in levy for the county ordinary fund and limiting the extent of the increase, and S. F. 104, 58th G. A., removing the limitation to the court expense fund levy, are not in conflict and both statutes are operative. (Strauss to Hanrahan, Polk Co. Atty., 7/6/59) # 59-7-7

July 6, 1959

Mr. Ray Hanrahan
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 30th ult. in which you submitted the following:

> "The last session of the Legislature passed a bill known as H. F. 125 which provides that counties whose ordinary operating expenses could not be covered by a two mill tax levy, could increase that levy for the years 1959 and 1960 by levying an additional tax of two mills.
>
> "The bill also provides that counties with an assessed valuation of $26,000,000 or more wherein said additional tax is levied could not increase the total levy in dollars for all county purposes by more than two per cent of the greater of the two preceding total annual levies for all county purposes.
>
> "The Legislature also passed a bill known as S. F. 104 pertaining to the Court Expense Fund, which bill removed the 3/8 mill limitation on the Court Expense Fund, and provides that counties may levy as needed for the operation of its courts.
>
> "We would like for you to analyze the two bills in conjunction with each other and give us your opinion on the following question:
>
> "Does the 2% limitation prevail regardless of the provisions of S. F. 104 which removes the ceiling from the Court Expense Fund or may the county levy the necessary millage to operate the courts without regard to H. F. 125?"

59-7-7

In reply thereto I advise as follows. Without an exhibit of H. F. 125 in terms, it is sufficient for the conclusion here reached to refer to Section 1 of the House amendment to the foregoing named file which amended Section 444.9(2), Code 1958, as follows:

> "Should the levy fail to provide adequate funds for ordinary county revenue, then the board of supervisors of any county may, for the years 1959 and 1960 only, levy an additional tax for ordinary county revenue not to exceed two (2) mills, * * *."

And such is the language of the enrolled bill. That the addition of the two mill tax therein provided for was to increase the ordinary county revenue as plainly stated in the enrolled bill is confirmed by the explanation attached to H. F. 125, in terms as follows:

> "This bill would permit counties to levy an additional tax not to exceed 2 mills for ordinary county revenue if insufficient funds are produced for such purpose by the maximum levy presently permitted under the provisions of section 444.9 of the Code. However, no such additional levy could be made unless advance approval for such levy is secured from both the state comptroller and the state auditor. The bill also repeals the provision permitting counties with a population between 35,000 and 40,000 in which a United States Government ordnance plat is located to levy an additional 2 mills for ordinary county purposes if such levy be approved by the state comptroller. This provision is now unnecessary."

H. F. 122, 58th General Assembly, which struck by amendment the levy limitations contained in Sec. 444.10, Code 1958, contains this explanation:

> "In most counties the funds available from ordinary county revenue (county general fund) are not adequate to take care of even the normal court expense. When an expensive trial occurs in a county, the three-quarter mill allowed for court expense likewise proved inadequate to cover the additional expenses incurred. The county is required to pay these costs so they must issue bonds which only add additional expense to the county. By removing the three-quarter mill limitation it will allow the county to levy sufficient funds to meet their court expense."

S. F. 104 is the same as H. F. 122, and was on April 7, 1959, substituted for H. F. 122 (see House Journal, page 1176), and S. F. 104 contains the same explanation as was attached to H. F. 122. Clearly from this record the intent of the Legislature is clear that it distinguished between H. F. 125 and S. F. 104; that H. F. 122 was concerned and was a limitation imposed upon the increase of the ordinary county revenue; while at the same time by the removal of the limitation for the court expense fund it recognized that the funds available from the ordinary county revenue, being the County General Fund, might be inadequate and therefore the removal of the limitation of the court expense fund was intended and so confirmed by the adoption of S. F. 104. Thus it would appear that neither ambiguity nor conflict between the two acts exists. In that situation the rule that when the legislative intent is clearly expressed, it is the duty of the court to so construe the statute as to give force and effect to such intent

is applicable. See Callaghan's Iowa Digest, title Statutes, paragraph 72, and Callaghan's Supplement, title Statutes, likewise paragraph 72.

Even without the plain intent of the Legislature as expressed by these separate statutes, it would seem that they both would be operative under the following rule announced in the case of Eckerson v. City of Des Moines, 137 Iowa 452, 489, where it is said:

> " * * * Repeals by implication are not favored, and only where we are driven thereto by the necessities of the situation do we hold that a repeal has taken place. Railroad v. Supervisors, 67 Iowa 199; Lambe v. McCormick, 116 Iowa 169. Especially where the two acts supposed to be in conflict were enacted by the same General Assembly, they should be so construed as to give effect to each if that is reasonably possible. White v. Meadville, 177 Pa. 643 (35 Atl. 695, 34 L. R. A. 567); Hawes v. Fleighler, 87 Minn. 319 (92 N. W. 223); 1 Lewis Statutory Construction, section 268. * * *"

And the same rule was stated in the following language in the Hawes case cited in support of the Iowa rule, to-wit:

> "This is in harmony with the rule that repeals by implication are not favored, and reconciles a seeming conflict between two legislative acts passed so close together that it would seem as if they were intended to harmonize with each other."

I am therefore of the opinion that both H. F. 125 and S. F. 104 are operative and that therefore the County may levy the necessary millage to operate the courts in accordance with

S. F. 104 without regard to the provisions of H. F. 125.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES: Hospital Claims--

S. F. 118, 58th G. A., revising Ch. 347, Code 1950, interpreted to intend (1) county hospital payrolls are not required to be published in official county newspapers; (2) official signatures upon warrants may be imposed by stamp or other mechanical device; (3) employees of the hospital who handle funds are required to be bonded; (4) there appears to be no limitation on the amount of depreciation that can be taken for a depreciation fund; (5) claims of trustees for personal expenditures and all other unliquidated claims and claims for fees and compensation are required to be duly verified by oath or affidavit of the claimant; (6) there is no statutory requirement for filing duplicate claims in the county court house. Claims of trustees are required to be filed with the secretary of the board; (7) S. F. 119, 58th G. A., is not retroactive and property previously accepted by city hospital by gift, etc., is not subject to sale as provided in the foregoing act. (Stamus to Akers, St. Aud., 7/7/59) #59-7-1

July 7, 1959

Hon. Chet B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. Earl C. Holloway

Dear Sir:

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

"We have received the following questions submitted by Attorney Ray Johnson who is legal advisor for the hospital association, regarding the new county hospital laws, Senate File 118:

"I. COUNTY HOSPITAL LAW

"1. Is there any requirement that payrolls be published in the official county newspapers.

"2. May a rubber stamp or some other mechanical device be used for the signing of warrants to simplify the mechanical procedures involved therein.

"3. Is there any authority for bonding employees of the hospital who handle funds.

"4. Is there any limitation on the amount of depreciation that can be taken.

"5. Is it necessary that all claims and bills be notarized.

"6. Is there a necessity to file duplicate claims at the county court house.

"II. CITY HOSPITALS

"1. May city hospitals now dispose of gifts which were given to the trustees prior to the

59-7-8

time that they had authority to accept the gifts without the approval of the city council.

"We would like to have an opinion covering these questions as the hospitals will be asking for the legal procedure."

In reply thereto I advise as follows.

1. (1) In answer to your question #1 I would advise you that in my opinion there is no requirement that the payroll of the county hospital be published in the official county newspaper. A prior opinion of the Department requiring such payrolls to be published was based upon Section 347.12 which provided that the funds of the county hospital should be paid out only upon warrants drawn by the County Auditor by direction of the Board of Supervisors. The foregoing method of disbursing county hospital money was changed by the 58th General Assembly and now Section 347.12 provides that the County Treasurer shall receive and disburse all funds under the control of the board of trustees, the same to be paid out only upon warrants drawn by the secretary of the Board of Trustees and countersigned by the chairman of the Board of Trustees after the claim for which the same is drawn has been certified to be correct by the said Board of Trustees.

(2) In answer to your question #2 I would advise you that according to an opinion of this Department issued January 21, 1946, and appearing in the Report for 1946 at page 133, the signature of the secretary of the Board of Trustees and the countersignature of the chairman of the Board of Trustees upon warrants

payable by the County Treasurer may be affixed by stamp or other mechanical means so long as the instrument used is in the general possession and control of the secretary or the chairman of the Board and such stamp or other mechanical means is applied by the secretary or the chairman by himself or by another with the authority of the secretary and of the chairman and is intended by the secretary and the chairman to constitute their separate signatures.

(3) In answer to your question #3 I would advise you that according to Section 64.15, Code 1958, as amended by S. F. 201, 58th General Assembly, clerks and cashiers of county hospitals are required to be bonded. This would include the bonding of employees who handle hospital funds.

(4) In answer to your question #4 I would advise you that according to Section 347.14 as amended by Section 6 of S. F. 118, Acts of the 58th General Assembly, a fund for depreciation may be established by the Trustees but there appears to be no limitation on the amount of depreciation that can be taken.

(5) In answer to your question #5, claims of Trustees for expenditures made for his personal expenditures shall be itemized and verified by oath by each such Trustee. In addition, according to Section 331.21, Code 1958, all unliquidated claims against counties and all claims for fees or compensation are required to be duly verified by the affidavit of the claimant.

(6) In answer to your question #6 there appears to be no statutory requirement for filing duplicate claims in the County court house or with any official thereof. Claims of the Trustees are required to be filed with the secretary of the Board.

II. (1) In answer to your question #1 I would advise you that according to S. F. 119, 58th General Assembly, authority is granted to the Board of Trustees of a city hospital to accept property by gift, devise, bequest, or otherwise; and, if said board deems it advisable, may, at public sale, sell or exchange any property so accepted upon a concurring vote of a majority of all members of the board of hospital trustees, and apply the proceeds thereof, or property received in exchange therefor, to any legitimate hospital purpose. I am of the opinion that the foregoing is prospective and not retroactive, and for that reason the answer to your question is in the negative.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

HIGHWAYS; Statutory width -
Dedication of 60 foot roadway while statute fixing width thereof at 66 feet unless otherwise fixed, as provided in §§ 515 and 516, in the 1851 Code, was a dedication of a roadway of 66 feet, notwithstanding the 60 feet terms of the dedication. (Strauss to Roggensack, Clayton Co. Atty., 7/8/59) 59-7-9

July 8, 1959

Mr. H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

My dear Roggy:

I have yours of the 7th Inst. in which you submitted the following:

> "In 1856 a 30 ft. strip was deeded, from what is now * * * farm, for a wagon road. Later in 1865 a road was established and still later re-located and established again in 1867 and in both establishments of the road, there was no width specified. In the previous Codes of Iowa was a section of the law which stated that when a road is established and no width is specified, the road is 66 ft. wide. I have had occasion to trace this through the various codes, clear back to 1860. The same, however, is not longer in the two most recent Codes of Iowa and for some reason or other, the Legislature has apparently repealed this section.
>
> "The owners are taking the position that since the original deed off of their property was for a 30 ft. roadway, the road is therefor either 30 ft. wide or if another 30 ft. was taken from the adjoining tract, that the road would then be 60 ft. wide. The County Engineer feels that this road is 66 ft. wide since no width was mentioned at the time of the establishment of this road.
>
> "Will you kindly give us your opinion as to whether or not this is a 60 ft. road or a 66 ft. road."

In reply thereto I would advise you that in my opinion this road is 66 feet wide. My reason for this conclusion is

59-7-9

based upon the fact that the statute to which you refer,

> "306.2 Width. Roads hereafter established unless otherwise fixed by the board, shall be at least sixty-six feet wide, and in no case less than forty; within these limits they may be increased or diminished in width, altered in direction, or vacated, by pursuing the course prescribed in this chapter."

last appeared in the 1950 Code but was repealed by the 54th General Assembly, Chapter 103. At the time of the establishment of this road, nowhere appearing in your letter that the road had been otherwise specially directed, as a matter of statute it was a road 66 feet wide at the time it was established. See the case of Dickson v. Davis County, 201 Iowa 741, 205 N. W. 456, which adopted the reasoning of the foregoing as follows:

> "The record in this case shows that, when the new road was established, no reference was made to its width. It is unnecessary, in the establishment of a road under our law, to recite the width of the road, for the reason that the width of the road is determined by statute, unless otherwise fixed by the establishing body. Quinn v. Baage, 138 Iowa 426, 114 N. W. 205; Biglow v. Ritter, 131 Iowa 213, 108 N. W. 218. Under this rule it follows that this new road, having been established after the Code of 1851 went into operation, is 66 feet in width. The plaintiffs, however, insist that through the bygone years the parties in the neighborhood and some of the engineers have treated this road as a 60-foot road; that fences have been constructed by various landowners along the road, with a less width than 66 feet at other places, and that by reason thereof the public authorities have acquiesced in his narrowing of the road, and are estopped from now claiming the road to be 66 feet in width. This question has

been before this court so often that we deem it unnecessary to do more than cite some of the cases. Quinn v. Baage, supra; Biglow v. Ritter, supra; Lacy v. Oskaloosa, 143 Iowa 704, 121 N. W. 542, 31 L. R. A., N. S., 353; Johnson v. Shenandoah, 153 Iowa 502, 133 N. W. 761; Kuehl v. Town of Bettendorf, 179 Iowa 1, 161 N. W. 28; Bidwell v. McCuen, 183 Iowa 633, 166 N. W. 269; Pine v. Reynolds, 187 Iowa 379, 174 N. W. 257, 6 A. L. R. 1206; Webster County v. Wasem Plaster Co., 188 Iowa 1158, 174 N. W. 583; Langle v. Brauch, 193 Iowa 140, 185 N. W. 28. The holding of these cases is that no encroachment on a highway by fences or by other means is legalized by the lapse of time. The use of less than the full width of the road does not deprive the public of its right to use of the entire width when the exigency makes it necessary or desirable, and the fact that there may be ample room for the present travel will not prevent the proper authorities from removing fences or other obstructions from within the legal limits of the highway."

Very truly yours,

OSCAR STRAUBS
First Assistant Attorney General

OS:MKB

INSURANCE: County Vehicles--

Ch. 517A, Code 1958, does not authorize covering by insurance liability of the county arising out of accident in the performance of its duties by its agents. County motor vehicle liability insurance on vehicles owned by the county may not be increased to the limits of ~~the~~ Ch. 517A but if the ~~owned~~ vehicle is used liability insurance to the limit of Ch. 517A may be purchased. (Strauss to Leir, Scott Co. Atty., 7/8/59.)

July 8, 1959 # 59-7-10

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

Dear Sir:

Reference is herein made to yours in which you submitted the following:

> "The opinion of your office is requested as to the extent that the recently enacted Section 517A.1 of the 1958 Code of Iowa permits a county board of supervisors to procure and pay for liability insurance.
>
> "1. Does said Section 517A.1 allow the county board of supervisors to procure liability insurance within the limits set forth in said section insuring the county as well as its officers and employees against liability in connection with all county operations; i. e., court house, jails, other county structures and premises, road building, bridges, automobiles, trucks, graders and other machinery. It would seem that the words 'proprietary functions' in said section are all inclusive and would include all county operations and property.
>
> "2. It is to be noted that said section also includes the words 'not otherwise authorized'. Section 332.3(18) previously enacted provides for the county to purchase liability insurance against liability on the part of certain county employees but does not provide for insuring against liability of the county. If the answer to paragraph 1 is in the affirmative is the authority contained in Section 517A.1 in any manner limited by reason of Section 332.3(18). In other words can the county now raise the

59-7-10

limits on insurance previously purchased pursuant to Section 332.3(18) to that provided for in Section 517A.1 and also in connection therewith extend the coverage of said policies to include and insure against liability on the part of the county.

"3. In connection with the purchase of liability insurance and in view of the general law of governmental immunity should liability policies so procured contain waiver of governmental immunity clauses."

"Your opinion in connection with the above matter will be greatly appreciated.

In reply thereto I advise as follows:

1. Insofar as your question #2 is concerned, I enclose herewith copy of official opinion issued June 28, 1957, to Mr. William S. Sturges, Plymouth County Attorney, which provides answer thereto.

2. Insofar as your question #1 is concerned, I would advise that Section 517A.1, Code 1958, provides the following:

"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 amount of insurance that said commissions, departments, boards and agencies may purchase shall not exceed ten thousand dollars for property damage or twenty-five thousand dollars for personal injury or death of one person, and subject to said limit for one person, fifty thousand dollars for personal injury or death of more than one person, arising out of a single accident."

This does not authorize the covering of the liability of the County arising out of County operations by insurance. However, by its terms it does cover the liability of County officers and employees of a County arising out of accidents in the performance of any or all duties, including accidents arising out of the operation of an automobile. I do not regard the fact that the insurance will cover proprietary functions would indicate that coverage of the liability of a County itself was intended to be included in this act. As a matter of fact, the County has few proprietary functions. Its functions for the most part are governmental. Including the County in the protection of its liability was not intended. The explanation of H. F. 364 attached to the bill stated the following:

> "Officers and employees of commissions, departments, boards and agencies oftentimes suffer harassment and hardships by claims of liability and property damage filed against them arising from accidents suffered by such claimants.

> "This bill allows such employers to purchase insurance to insure, cover and protect against individual personal legal liability of such public employees."

3. In answer to your question #3 I would say that in view of the foregoing the question of waiver of governmental immunity is not involved, but if it be involved it seems clear that agents of the County would have no power to waive it.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

COURTS: Judicial retirement--
A former judge who served a term on the municipal court, such term expiring Dec. 31, 1934, cannot qualify for the increased annuity provided by H. F. 151, 58th G. A., by reason of such service because the qualification for the benefits of such act must be made while he is serving as such judge. (Strauss to Sarsfield, St. Comp., 7/10/59) # 59-7-11

July 10, 1959

Mr. Glenn D. Sarsfield
State Comptroller
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours of the 7th inst. in which you submitted the following:

> "We have the present time a former judge who left office as a district court judge on December 31, 1958. I am now informed by the former judge that in addition to his district court service, he also served as a judge of the municipal court in Des Moines from January 5, 1931, until December 31, 1934. During December of 1958, he qualified for retirement under the provisions of Section 605A.4, Code of Iowa, 1958, and at that time requested that his retirement start on May 29, 1959, which was his 67th birthday.
>
> "Section 605A.6, Code of Iowa, 1958, as amended by H. F. 151, Acts of the 58th General Assembly, now reads as follows:
>
> "'Sec. 5. Section six hundred five A point six (605A.6), Code 1958, is hereby repealed and the following adopted in lieu thereof: "Any person who shall have become separated from service as a judge of any of the courts included in this chapter and who has had an aggregate of at least six years of service as a judge of one or more of such courts and shall have attained the age of sixty-five years or who has had twenty-five (25) years of consecutive service as a judge of one or more of said courts, and who shall have otherwise qualified as provided in this chapter, shall be entitled to an annuity as hereinafter provided."'

59-7-11

> "I respectfully request an opinion as to the following:
>
> "1. Is this judge entitled for his annuity to be increased by an amount determined in accordance with Section 605A.7, as amended (which would include credit for municipal court service), assuming that he complies with Section 605A.4, as amended, which would be an addition to his annuity as computed under Chapter 605A when he first became eligible for an annuity on May 29, 1959."

In reply thereto I would advise as follows. I am of the opinion that the former judge referred to is not entitled to the increase in annuity determined in accordance with Section 605A.7 as amended by H. F. 151, Acts of the 58th General Assembly, because the judge referred to will be unable to qualify for such increase as required by Section 1 of House File 151, 58th General Assembly. Such Section 1 provides the following:

> "Section 1. Section six hundred five A point three (605A.3), Code 1958, is hereby repealed and the following adopted in lieu thereof:
> "'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 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 withon one year after any date on which he takes oath of office as such judge."

Obviously the judge referred to will be unable to comply with the requirement therein set forth in order to get the benefit of the Chapter to give the notice in writing <u>while</u>

serving as a judge to the State Comptroller and Treasurer of State of his purpose to come within its purview. In the statement of the facts, the judge referred to retired from the Municipal Court of Des Moines on December 31, 1934. Insofar as any applicability of Section 5 of H. F. 151 to this situation is concerned, I am of the opinion (1) that Sec. 605A.6, Code 1958, as amended by H. F. 151, Acts of the 58th General Assembly, conditions the time when and the circumstances which ripen the right to the annuity provided by Sec. 605A.7 as amended by H. F. 151. In other words, this statute determines as to who, whether he be a Supreme, District, Municipal or Superior judge, is entitled to such annuity. And (2) that such Section is not available for the purpose of claiming prior credit for additional amount of annuity for service upon the municipal bench because the judge in question will be unable to comply with the requirements for qualification provided in Sec. 605A.6 in that he cannot comply with the condition that in order to avail himself of the annuity "he shall have otherwise qualified as provided in this chapter". In order to so qualify for such credit on the municipal bench the qualification therefor is attained by notice in writing while serving as a Judge.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

JHENS

Nursing homes - -

COUNTIES: ~~BOARD OF SUPERVISORS: NURSING HOMES:~~
County Boards of Supervisors have only such powers expressly conferred by statute or necessarily implied therefrom, and such power does not include the authority to operate a nursing home and charge for the care of its patients. (Peterson to O'Malley, St. Sen., 7/10/59)

July 10, 1959.

#59-7-12

Senator George E. O'Malley
430 Royal Union Life Bldg.
Des Moines 9, Iowa

Dear Senator O'Malley:

This will acknowledge receipt of your letter of July 18th in which you submitted a request for an opinion on the following question:

> Can the Board of Supervisors operate a nursing home and charge patients for their care and keep? This question, of course, assumes that the individual is not under commitment.

In answer to your inquiry, we would point out that the Board of Supervisors of a county are creatures of statute and have only such powers as are expressly conferred by statute or necessarily implied from the power so conferred. (See Hilgers v. Woodbury County (1925) 200 Ia. 1318; 206 N.W. 660; OAG 1942, p. 78; 1918, p. 452; 1932, p. 132; and 1950, p. 158)

The general powers of the Board of Supervisors are expressly set out in Chapter 332, Code of Iowa, 1958. No expressed authority to operate a nursing home and charge for the care and keep of patients, is granted to the Board of Supervisors by this chapter, and it is our opinion that no power of the Board is broad enough to imply such authority. In order that the power may be implied, it is essential that the exercise of the power accomplish the object of the express power from which it is sought to be inferred. (20 C.J.S. 803)

We conclude, therefore, that the Board of Supervisors has no authority to operate a nursing home and charge patients for care and keep.

Yours very truly,

Carl E. Peterson
Special Assistant Attorney General

CEP/sp

59-7-12

LABOR: Union "Checkoff" —
H. F. 116, 58th G. A., amending Ch. 736A, Code 1958, authorizes the deduction of labor organization dues by order signed by the employee alone without the signature of the spouse. The foregoing H. F. 116 is not effective out of the provisions of §539.4, Code 1958, respecting assigning of wages upon the signature of both employee and spouse. (Strauss to Connor, Rep., 7/13/59)

59-7-13

July 13, 1959

Honorable Robert E. Connor
State Representative
L O C A L

My dear Bob:

This is in receipt of your letter of the 1st Inst. in which you submit the following:

> "Considerable apprehension has arose as to the effect of H.F. 116, 58th G.A.; therefore, as the principle sponsor of the Act, I would like an interpretation of the following questions:
>
> "1. In a previous opinion, dated October 17, 1947, your office differentiated between wage assignments and written orders. I would, therefore, assume that H.F. 116 made unnecessary the act of notarizing written orders for the collection of union dues and made unnecessary substantiating these orders with the signature of the spouse. Are these assumptions correct?
>
> "2. Some bargaining agents do not have a contractural obligation with the respective employer for the operation of check-off procedures. In these instances, bargaining agents rely upon the statutory provisions covering wage assignments for general purposes as authority for putting into operation a dues check-off procedure. I would assume since these are in reality wage assignments, rather than written orders, that these wage assignments must fulfill the provisions of 539.4, and the bargaining agents in this instance must continue to submit notarized assignments substantiated with the signature of the spouse. Are these assumptions correct?"

In respect to the foregoing I would advise you as follows:

House File 116, Acts of the 58th General Assembly provides the following:

> "Section 1. Section seven hundred thirty-six A point five (736A.5), Code 1958, is hereby amended by striking from lines eight (8), nine (9) and ten (10) the following: 'and by his or her spouse, if married, in the manner set forth in section 539.4,'."

Section 736A.5, Code 1958 as amended by House File 116 reads as follows:

> "736A.5 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."

I am of the opinion as of the result of the foregoing amendment:

1. That the written order providing, under Chapter 736A, for the deduction of labor organization dues, charges, fees, contributions, fines or assessments from the employee's earnings, wages or compensation, may be affected by the individual written order signed by the employee alone, the signature of the spouse is no longer required on the order in order to affectuate this deduction.

2. Wage assignments made under the provisions of Section 539.4, Code 1958, requires the signature and acknowledgment by both the husband and wife, before the assignment is of any

validity. The foregoing statute, Section 539.4, has application to wage assignments made with or without any contractual obligation with respect to check-off of union dues made between the employer and employee.

3. I would observe to you that while House File 116 heretofore exhibited shows knowledge in the legislature of the existence of Section 539.4, the rule of paria materia is applicable and there is no evidence of the intent of the legislature to repeal Section 539.4. Section 736A.5 as amended deals specifically with deduction of dues from wages, while Section 539.4 deals generally with assignments of wages.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:kvr

CONSERVATION: County Board - prohibited interests --
A member of the County Conservation Board may not be appointed to be an executive officer of the Board nor may a member of the County Conservation Board, as an individual, enter into construction contracts for the improvement of County parts with the Board. (Strauss to Blackburn, Hamilton Co. Atty., 7/15/59) #59-7-14

July 15, 1959

Mr. M. Gene Blackburn
Hamilton County Attorney
Webster City, Iowa

Dear Sir:

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

> "I have been asked by the County Board of Supervisors to request an opinion on the following question:
>
> "Pursuant to Chapter 111A of the 1958 Code, the question creating a County Conservation Board was submitted to the voters. The matter carried and the Board was appointed (Section 111A.2). One of the Conservation Board members was hired executive secretary at a salary of $600.00 per year plus expenses. Bids were asked for improvement to one of the county parks, and the executive secretary - who is also a member of the Conservation Board - was low bidder, and pursuant to public contract furnished labor and materials from his own lumber store.
>
> "Our queare is as follows:
>
> "1. May the executive officer contemplated in Section 111A.4(6) be a member of the Conservation Board?
>
> "2. May a member of the County Conservation Board submit his individual competitive bids and enter into public construction contracts for the improvement of county parks in his own right?"

59-7-14

In reply thereto I advise as follows.

1. Insofar as your question #1 is concerned, the answer is in the negative. The Section to which you refer, being Section 111A.4(6), Code 1958, providing as follows,

> "6. To employ and fix the compensation of an executive officer who shall be responsible to the county conservation board for the carrying out of its policies. The said executive officer shall have the power, subject to the approval of said board, to employ and fix the compensation of such assistants and employees as may be deemed necessary for carrying out the purposes and provisions of this chapter, but not in excess of those paid state conservation officers and employees for like services."

clearly shows such a member of the Board acting in an executive capacity would be capable of approving his own actions. Obviously there is a conflict of powers and duties between membership on the Conservation Board and such executive office.

2. In answer to your question #2, I would advise you that it has long been the policy of the State as evidenced by the following statutes so providing, to-wit: Sections 368A.22, 18.4, 262.10, 314.2, 86.7, 15.3, 372.16, 741.8, 741.10, all Code 1958, that public officers are barred from contracting in his or their individual capacity with the body in which he serves as a member. This specific rule has not been enacted into law so far as membership on the County Conservation Commission is con-

cerned. However, the following rule set forth in 43 Am. Jur., title Public Officers, pages 105 and 106 reaches the same result. Paragraph 297 on page 105 of the above citation states:

> "Private Interest In Public Contract. It is a rule, embodied in the statutes of some states, that public officers are debarred from contracting with the public agency which they represent or from having a private interest in its contracts. The rule is intended to be applied to all cases where there would be conflicting interests. In the absence of a statute on the subject, such a conflict of interest is the test of the disqualification of an officer by reason of his office to make a contract. Dealings between a public officer and himself as a private citizen that bring him into collision with other citizens equally interested with himself in the integrity and impartiality of the officer are against public policy. Clearly, an officer, in making a contract, may not, as agent, represent the conflicting interests of both parties. However, there is authority to the effect that the mere fact that a person is a ministerial officer of a public corporation does not debar him from making a contract with the officers controlling its affairs."

and Paragraph 299 states:

> "Contract with Member of Board. A contract entered into by a board with one of its own members is void, or at least voidable, even in the absence of a statutory prohibition. The reason is that in such case the member's public duty and his private interests are directly antagonistic. It matters not if he did in fact make his private interests subservient to his public duties. This rule would seem to be especially applicable where the member took part in the proceedings whereby the contract was let, although the con-

> tract has been held invalid in instances in which the member did not take part in the proceedings authorizing the contract, on the ground that his position upon the board gives him means of information not possessed by others, and enables him to exercise an undue influence over the other members of the board. But according to other decisions, such a contract is valid if free from fraud, and if the member with whom it is made does not vote on the proposition and takes no part in behalf of the public in making the contract. And even though the vote of the member is necessary to the authorizing of the contract, it has been held that the contract may be upheld, or at least can be ratified, if it is for a purpose authorized by law, if there is no showing that the contract is tainted with fraud, and if there is no statutory prohibition against the making of the contract."

I would therefore advise you that in view of the public policy of this state any member of the County Conservation Commission would be debarred in his individual capacity from entering into public construction contracts for the improvement of county parks.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COURTS: Municipal Judicial retirement -
The contribution under H. F. 151, 58th G. A., from the salary of Municipal Judge as his contribution to the Judicial Retirement Fund is based upon his basic salary unaffected by any compensation for services on the Juvenile Court, and likewise the contribution by County or City to such fund shall be made upon the same basic salary from the same source from which the salary is paid.
(Strauss to Carlsen, Clinton Co Atty., 7/15/59)

July 15, 1959 # 59-7-15

Mr. John W. Carlsen
Clinton County Attorney
Clinton, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 10th inst. in which you submitted the following:

"This office has been requested by the County Auditor to request an opinion on the following questions on House File 151, 58th G. A.:

"(1) Section 2 of House File 151 refers to the 'basic' salary of the Judge from which three per cent shall be deducted and withheld. If the Judge of the Municipal Court is also acting as Judge of the Juvenile Court, and receiving additional compensation as such, is the three per cent also withheld on the additional compensation, or only on the basic salary?

"(2) Section 3 of the bill specifies that the City and County shall contribute three per cent of the salary paid by them to the Judge.

"(a) Is the three per cent contributed by the city and county based on the basic salary or the total salary paid if additional compensation is paid for work as a Juvenile Judge?

"(b) Will it be necessary for the city and county to set up a special fund and a levy, in the same manner as IPERS is handled, for their share of the Judicial Retirement System Fund, or can warrants be drawn monthly on the same fund as the salary is drawn for the city and county share of the contribution?

"Judge McCullough has filed his intention for participation in the Judicial Retirement System

59-7-15

effective August 1, 1959, and this information is required for payroll purposes."

In reply thereto I advise as follows.

1. The term "basic salary" used in H. F. 151, Acts of the 58th General Assembly, from which 3% shall be deducted as the Judge's contribution to the Judicial Retirement Fund is the same language as used in the original act from which the deduction is to be made. Its use in the amended version of the Judicial Retirement Fund by the 58th General Assembly points up the intent of the Legislature that the basic salary from which this deduction is made is that provided by statute for the Supreme, District, Municipal or Superior Court judges, as the case may be. The fact that a Municipal Judge may serve on the Juvenile Court, for which he receives compensation, does not change the basis of his annuity. "Basic wage" means of or pertaining to the base or essence; fundamental, as a basic fact; constituting a basis. See Gowan Lock v. Turner, 256 P. 2d 662, 665, and State v. Stack, 199 S. W. 2d 701, 704. The compensation received by the Municipal Judge in serving on the Juvenile Court is not basic when his service there is dependent upon the action of the District Court Judges who may designate the Municipal Judge to act as the Judge of the Juvenile Court. See Sections 231.2 and 231.3, Code 1958. Therefore, in answer to your question #1 I would advise that the 3% shall be withheld on the basic salary without the additional compensa-

tion received for service on the Juvenile Court.

2(a). In answer to your question #2(a) I would advise that the 3% provided to be contributed by the County and City is likewise based upon the basic salary as herein defined without the addition of the compensation paid for service as Judge of the Juvenile Court.

2(b). In answer to your question #2(b) I would advise that there is no authority for the City and County to set up a special fund and a tax levy for their share of the Judicial Retirement Fund. Warrants for county and city share of the 3% to be paid by them shall be paid from the source from which the salary of the Municipal Judge is paid. The only retirement fund provided by statute is the Judicial Retirement Fund on deposit with the Treasurer of State.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

~~BUREAU OF~~ LABOR: Child Labor Laws--
A "shoe shine parlor" is a "shop" as contemplated by Section 92.1, Code 1958. (Peschke to Lowe, Solon County, 7/16/59

59-7-16

July 16, 1959

Mr. Don Lowe, Commissioner
Bureau of Labor
L O C A L

Dear Sir:

You have requested an opinion as to whether a "shoe shine parlor" is a "shop" within the meaning of the word as the same appears in Section 92.1, Code 1958.

In reply thereto:

Section 92.1, Code 1958, in pertinent part, reads as follows:

> "No person under fourteen years of age shall be employed with or without compensation in any * *, shop, * * ; but nothing in this section shall be construed as prohibiting any child from working in any of the above establishments * * when operated by his parents."

The legislature has not defined the word "shop" as the same appears in Chapter 92, Code 1958.

Webster defines the word "shop" to mean:

> "1. An artisan's place of manufacture and sale; as a boyer's, plumber's, or potter's shop.
>
> "2. A building or an apartment in which goods, wares, drugs, etc., are sold by retail.
>
> "3. A small establishment, or a room, department, or building devoted to a particular line in a factory or large establishment, in which mechanics or artisans work; as a shoe shop; a car shop; a machine shop."

59-7-16

The above definitions are indicative that the word "shop" is a term of broad significance.

Chapter 92, Code 1958, is an exercise of the police power by the State. As the Supreme Court of the State of Iowa stated in State v. Erle, 210 Iowa 974, 975, it is:

> "* * simply the exercise of the police power by the state, and so long as that power is not arbitrarily or unreasonably exercised, and not violative of constitutional provision, a court will not interfere. It must be conceded that the state may, in the exercise of its police power, prohibit the employment of such persons in defined occupations as are deemed dangerous either to the life or limb, or injurious to the morals or the future welfare of children of tender years; and by the same token, exceptions to the defined prohibition may be made."

And continuing at page 976, the Supreme Court stated:

> "It is readily seen that each and every one of these places derives its designation by the nature of the occupation or business carried on at the place, and it is for this reason that the places are so named. There would be no 'mine' if there were no mining; there would be no 'manufacturing establishment' if the occupation or business of manufacturing was not carried on at the place. All of the other specified places may receive the same analysis, and with the same result, except, perchance, the place 'garage;' but the occupation or business carried on at such a place is well known, and the meaning of the word is accepted generally. It is in such specified places that persons under 14 years of age are prohibited from being employed by the owner or operator thereof, respectively. It follows logically that, inasmuch as the places derive their names or designations from the occupations carried on at and in those places, the prohibition must necessarily attach to the occupations carried on therein and thereat."

The statute under consideration must be liberally construed with a view to promote its objects. Section 4.2, Code 1958. The object of said statute is "to prevent a child under 14 years from being employed by the owner or operator of the defined

and prohibited establishments, in which, by the nature of the work or the place of employment, his health or moral welfare might be impaired".

Many jurisdictions have, as far as judicial definition of the word shop is concerned, included as a necessary ingredient in determining what constitutes a shop, whether the goods manufactured therein are sold at retail therein. The Supreme Court of Oregon, however, in State v. Hanlon, 32 Or. 95, 48 P. 353, 354, stated that:

> "The sale of goods so manufactured is not necessarily an ingredient in determining what constitutes a shop".

We are prone to follow the latter construction for purposes of this opinion.

Therefore, in view of the foregoing, it is my opinion that a "shoe shine parlor" is within the purview of the prohibition defined and would constitute a "shop", subject of course to the proviso or exception which provides that a child under 14 years may work in those establishments or occupations when operated by such child's parents.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

CONSERVATION: ~~COMMISSION~~ Commercial Fishing --
1. No refund can be made of amount paid for gear tags purchased prior to July 4, 1959.
2. Owner's certificate required after July 4, 1959. (Letter to Brinck, Stop. 7/16/59) #59-7-17

July 16, 1959

Hon. Adrian Brinck
Lee County State Representative
West Point, Iowa

Dear Mr. Brinck:

Your letter of July 10, 1959, is as follows:

> "I have had a number of questions from commercial fishermen here in Lee County regarding various sections of the commercial fishing law passed by the last legislature. Since there are 462 commercial fishermen in Lee County the new law is of considerable importance to a considerable segment of Lee County's population.
>
> "Following are the questions on which I would like to have your opinion as Attorney General:
>
> "Whether or not fishermen can get a refund on gear tags that they purchased for their gear in excess of the now allowed one trotline and one basket? These people do not have enough gear to make it practical for them to pay for an owner's certificate and will cut back their fishing operations to that allowed by the ordinary fisherman's license.
>
> "Will those who wish to continue to fish commercially have to purchase an owner's certificate even though they complied with the law as it was set up prior to July 4 of this year?
>
> "I hope that you can give this your immediate attention since it is of considerable importance to a goodly number of people in this area.
>
> "Thank you for your cooperation."

In reply to your first question:

The Constitution of the State of Iowa provides that money may not be "drawn from the treasury but in consequence of appropriations made by law." (See Art III, Sec. 24, Constitution.)

59-7-17

Section 107.17, Code of 1958, provides that "all money accruing from license fees . . . arising under the division of fish and game" shall accrue to the state fish and game protection fund. Section 107.19, Code of 1958, provides that "all funds accruing to the fish and game protection fund . . . shall be expended solely in carrying on the activities embraced in the division of fish and game." Thus it can be shown that not only is there no appropriation to draw this money from the treasury, but that there is a prohibition (Section 107.19, Code of 1958) from expending this money as refunds.

In reply to your second question I would direct your attention to Section 3.7, Code of 1958, which is as follows:

> "3.7 Acts effective July fourth. All acts and resolutions of a public nature passed at regular sessions of the general assembly shall take effect on the fourth day of July following their passage, unless some specified time is provided in the act, or they have sooner taken effect by publication."

I have examined Chapter 127, Acts of the 58th General Assembly, and find no specified time provided in the Act; therefore the Act became effective July 4, 1959, and after that date all the legal requirements of that Act must be complied with.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh5

CRIMINAL LAW: Lotteries -- Under Code Section 726.8 proposed distribution of tickets to the public by county fair boards is in violation of the gambling laws. (Neely to Schroeder, Jackson Co. Atty 7/20/59) # 59-7-18

July 20, 1959

Mr. Asher E. Schroeder
Jackson County Attorney
South Prospect Street
Maquoketa, Iowa

Dear Sir:

This will acknowledge your letter of July 6, 1959, in which you have submitted a sample form to this office requesting an opinion as to whether the enterprise contemplated by the terms of the Rules and Regulations would constitute a lottery within the stipulations of the Attorney General's opinion issued on February 3, 1955.

An examination of the projected rules and regulations as set up by the Jackson County Fair Board reveal the following basic facts:

1. The Jackson County Fair Board will issue to the merchants of the community, for a stipulated amount, tickets to be used for a drawing of a prize.

2. The drawings will be held at specified times and places where the winner will be determined by lot.

3. The merchants will distribute the tickets which they have purchased to the general public without charge.

By referring to the Attorney General's opinion cited supra, you will note that the present facts are "on all fours" with the facts cited in that they also are being controlled. The opinion cited supra explains the reason for disallowing this type of lottery as follows:

> "The fact of distribution of tickets to the general public by the purchasers of the tickets without making a charge for the tickets thus distributed does not alter the fact that the tickets have been sold in the first instance

59-7-18

by the group conducting the drawing. This situation is analogous to one where "A" has purchased a lottery ticket and given it to a friend "B". The fact that "A" made no charge for the ticket and the reasons that motivated the gift do not affect the proposition that the matter was a lottery in the first instance. Under the facts submitted by you the merchants of the community purchase lottery tickets. There is a consideration paid for a ticket which constitutes a chance to win a prize. The three elements constituting a lottery are present."

After due examination of the submitted rules and regulations, this office finds no distinction to be made between the County Fair Board and a civic organization as such, therefore, you are advised that it is the opinion of this office that the arrangements submitted are in violation of the gambling laws of the state of Iowa.

Very truly yours,

MARION R. NEELY
Assistant Attorney General

MRN:kj

MOTOR VEHICLES: Re-examination of licensee --
Failure to submit to a re-examination under section 321.186, Code 1958, is a misdemeanor punishable as provided in section 321.482, Code 1958. (Peach to Brown, Safety Comm. 7/21/59) #59-7-19

July 21, 1959

Mr. Russell I. Brown
Commissioner,
Department of Public Safety
L O C A L

Dear Sir:

This will acknowledge receipt of your letter under date of July 8, 1959, wherein you request a legal opinion on the following matter:

"Under the provisions of Section 321.186, Code 1958, if the Department receives reliable but confidential information indicating that a particular driver of motor vehicles is mentally or physically imcompetent, are there any provisions in the Code whereby the Department can order the subject driver in for a re-examination, under legal complusion.

"In other words, if the Department using the authority of Section 321.186 orders a driver to be re-examined by the Department, and if the driver fails or refuses to comply with this order, what remedial or punitive measures can and should the Department take?"

In reply thereto:

Section 321.186, Code 1958, reads as follows:

"The department may examine every new applicant for an operator's or chauffeur's license or any person holding a valid operator's or chauffeur's license when the department has reason to believe that such person may be physically or mentally incompetent to operate a motor vehicle, or whose driving record appears to the department to

59-7-19

justify such an examination. Such examinations shall be held in every county within periods not to exceed fifteen days. It shall include a test of the applicant's eyesight, his ability to read and understand highway signs regulating, warning, and directing traffic, his knowledge of the traffic laws of this state, and shall include an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle and such further physical and mental examinations as the department finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways."

Section 321.482, Code 1958, reads as follows, in pertinent part:

"It is a misdemeanor for any person . . . to fail to perform any act required by any of the provisions of this chapter unless any such violation is by this chapter or other law of this state declared to be a felony . . . . .

"Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days." (Emphasis added).

Re-examination pursuant to the provisions of Section 321.186, supra, is discretionary on the part of the department. Exercise of this discretion, however, makes operative an act required by Chapter 321.

Failure to perform any act required by any of the provisions of Chapter 321, is a misdemeanor. Section 321.482, supra.

Therefore, if the department determines that re-examination is necessary and the licensee fails to submit to the re-examination, such failure is a misdemeanor punishable as provided in Section 321.482, supra.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

HIGHWAYS: Grade crossing safety fund -- H.F. 156, 58th G.A. directs the allocation from the Road Use Tax Fund of $10,000 per month to the Highway Grade Crossing Safety Fund beginning July 195

(Strauss to Abrahamson, St. Auto., 7/22/59) #59-7-20

July 22, 1959

Mr. M. L. Abrahamson
Treasurer of State
L O C A L

Attention: Charles R. Dayton, Deputy Treasurer

Dear Sir:

This will acknowledge receipt of yours of the 20th inst. in which you submit the following:

> "The office of the Treasurer of State respectfully requests a clarification of House File 156 of the 58th General Assembly regarding an apportionment to be made from the Road Use Tax Fund for the use of the Highway Grade Crossing Safety Fund.
>
> "More specifically, the writer requests to be informed as to whether an apportionment of $10,000 is to be made from the Road Use Tax Fund at the end of the month of July 1959 and each month thereafter for the biennium.

In reply thereto I will advise you that House File 156 to which you refer appears as Chapter 60 of the Laws of the 58th General Assembly, and constitutes an allocation for a period of two years following the effective date of said Chapter 60 of the sum of $10,000 each month as the Highway Grade Crossing Safety Fund. The first allocation, to comply with this Act, should be made at the end of the month of July, 1959, and on each month thereafter for the period of two years.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh

59-7-20

HIGHWAYS: Study Committee funds -- H.J.R. 12, 58th G.A. allocates $10,000 from the Road Use Tax Fund to pay expenses of the Highway Study Committee to be available before the end of July 1959, and thereafter subject to requisition therefor. (Strauss to Abrahamson, 7/22/59) #59-7-21

July 22, 1959

Mr. M. L. Abrahamson
Treasurer of State
L O C A L

Attention: Charles R. Dayton, Deputy Treasurer

Dear Sir:

This will acknowledge receipt of yours of the 20th inst. in which you submit the following:

> "The office of the Treasurer of State respectfully requests a clarification of House Joint Resolution 12 of the 58th General Assembly regarding an apportionment to be made from the Road Use Tax Fund for the use of the Cities and Towns Study Committee.
>
> "More specifically, the writer requests to be informed as to whether an apportionment of $10,000 is to be made from the Road Use Tax Fund at the end of the month of July 1959."

In reply thereto, I advise as follows:

The $10,000 to which you refer was by the above-numbered Joint Resolution appropriated from the Road Use Tax Fund to carry out the provisions of the Resolution. This $10,000 should be abstracted from the Road Use Tax Fund as soon as available therein, but not later than the end of the month of July, 1959, and thereafter the fund will be credited with such requisition that may properly be made therefrom under the authority of the foregoing-Numbered House Joint Resolution.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mh

59-7-21

COUNTIES: Business license -- Under Ch. 254, 58th G.A., a farmer operating a roadside stand where eggs and vegetables are sold to the public is exempt from licensure unless the eggs and vegetables are so prepared or other items or services are offered so that in fact his business establishment is similar in character or resembles a "theatre, moving picture show, pool or billiard room or table, dance hall, skating rink, amusement park, bowling alley, restaurant . . ." (Obler to Hultman, Beckman & Kelly, 7/22/59) #59-7-23

July 22, 1959

Mr. Evan L. Hultman
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Attn: John C. Beekman

Dear Sir:

The first question set forth in your letter of June 26 has been assigned to me for answer. Answer has been somewhat delayed by my absence from the office for military duty. Your letter states:

> "At recent Board of Supervisors meetings in Black Hawk County, several questions have been raised as to interpretation of certain laws passed by the last General Assembly.
>
> "Senate File No. 326, which amends Chapter 332 of the 1950 Code of Iowa, entitled 'An Act Relating to the Authority of the County Board of Supervisors to Regulate and License Certain Business Establishments' gives the County Board of Supervisors the power to regulate and license outside the limits of an incorporated city or town certain business establishments.
>
> "We request an opinion on the following matter:
>
> "Under said amendment, Section 1 thereof, are grocery stores, roadside stands or a farmer who sells eggs or vegetables at his farm included under business establishments open to the public and located on or accessible to a road or highway outside the limits of an incorporated city or town where entertainment, foodstuffs, prepared food or drink is furnished to the general public for hire, sale or profits?"

Section 1 of Senate File 326 (Chapter 254, Acts of the 58th G.A.) provides as follows:

> "For the purpose of promoting the health, safety, recreation, and general welfare of the people of the county, the county board of supervisors shall have the power to regulate and license outside the limits of an incorporated city or town any theatre, moving picture show, pool or billiard room or table, dance hall, skating rink, amusement park, bowling alley, restaurant or other business establishment open to the public and located on or accessible to a road or highway outside the limits of an incorporated city or town where entertainment, foodstuffs, prepared food or drink is furnished to the general public for hire, sale or profit."

Your question necessitates definition of the terms "business establishment open to the public" and "footstuffs". Specifically, your questions are whether roadside stands are "business establishment open to the public" and whether eggs and vegetables are "foodstuffs".

For definitions of a "business establishment" as well as examples of judicial construction of statutes using the term see 5 Words and Phrases 1026, where appear the following annotations:

> "Under Labor Law, § 2, providing that the term 'factory' includes any mill workshop, or other manufacturing or business establishment where one or more persons are employed at labor, the term 'business establishment,' is limited to establishments of a character similar to those enumerated, and does not include a butcher shop in which was installed a meat grinding machine driven by electric power. O'Connor v. Webber, 147 N.Y.S. 1053, 163 App.Div. 175.
>
> "A tugboat used in dredging operations is not a 'factory' or 'business establishment,' within the Labor Law (Consol.Laws 1909, c. 31), regulating the employment of minors in factories, providing that the term 'factory' shall include mills, workshops, and other manufacturing or business establishments, and requiring that shafting, set screws, etc., in factories be properly guarded; the term 'factory' being used to designate a structure or plant where something is made or manufactured from raw or partly wrought materials into forms suit-

able for use, and the term 'business establishment' meaning an establishment resembling a mill, workshop, or other manufacturing establishment. Shannahan v. Empire Engineering Corp., 98 N.E. 9, 10, 204 N.Y. 543."

On the basic of the quoted cases it appears entirely reasonable to say that the statute concerning which you inquire contemplates business establishments resembling or similar in character to a "theatre, moving picture show, pool or billiard room or table, dance hall, skating rink, amusement park, bowling alley, restaurant . . ." It follows that whether or not a given roadside stand is a business "establishment" within the meaning of the statute in question is a fact question to be determined by the supervisors in each individual case. Whether or not the vegetables or eggs were cooked and ready to eat when sold would appear to have some bearing on the determination.

A definition of "foodstuffs" appears at 5 Words and Phrases 313, citing Pardy v. Boomhower Grocery Co., 164 N.Y.S. 775, 776, 178 App. Div. 347 to the effect that the expression "foodstuffs" means food which has been subjected to "canning" or similar preparation. This would seem to bear out that a farmer's roadside stand selling raw eggs and vegetables not generally considered ready for immediate consumption would not be a "business establishment" where "foodstuffs . . . is furnished to the general public".

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

~~TAX: SPECIAL FUEL: PLACE AT WHICH DISPENSED:~~
MOTOR VEHICLES: Special fuel, dispensing--

Held: Illegal to dispense fuel directly from a mobile tank wagon into the fuel supply tank of a motor vehicle at any place other than the licensed place of business or location.

7/22/59) # 59-7-24 Brand to Abrahamson, Sec

July 22, 1959

Honorable M. L. Abrahamson
Treasurer of State
L O C A L

Attention: Mr. Carl H. Krause

Dear Sir:

Reference is made to your request of July 10 as follows:

"Please supply this department with a written opinion on whether or not it is legal for Special Fuel to be dispensed directly from a mobile tank wagon or transport truck into the fuel supply tank of a motor vehicle."

We beg to advise:

The pertinent statutes involved are as follows:

"324.36 Special fuel dealers' and special fuel users' licenses.

1. Required. It shall be unlawful for any person to act as a special fuel dealer in this state unless he holds an uncanceled special fuel dealer's license issued to him by the treasurer. Except for special fuel which is delivered by a special fuel dealer into a fuel supply tank of any motor vehicle in this state, the use (as herein defined) of special fuel in this state by any person shall be unlawful unless he holds an uncanceled special fuel user's license issued to him by the treasurer.

2. Application. Application for a special fuel dealer's license or a special fuel user's license shall be made to the treasurer. A special fuel dealer's license or a special fuel user's license, whichever is applicable, shall be required

59-7-24

for each separate place of business or location where special fuels are regularly delivered or placed into the fuel supply tank of a motor vehicle. Provided, that, if a special fuel dealer also operates one or more bulk plants from which the distribution of special fuel is primarily by tank vehicle, he need not obtain a separate license for any of these plants not provided with fixed equipment designed for fueling vehicles." (Emphasis added).

"324.37 Special fuel dealers' and special fuel users' records. For each location where special fuel is delivered or placed into the fuel supply tank of a motor vehicle, the special fuel dealer or user making the delivery shall prepare and maintain for a period of three years such records as the treasurer may reasonably require with respect to all these deliveries, and with respect to inventories, receipts, purchases, and sales or other dispositions of special fuel." (Emphasis added)

As stated in the law, (sic) a special fuel dealer's license or a special fuel user's license is required for each separate place of business or location where special fuels are regularly delivered or placed into the fuel supply tank of a motor vehicle.

This provision of the statute we believe contemplates a place of a more permanent nature, than picking a spot at random along the highway or anywhere else, which is not the "place of business" of the party dispensing the special fuel.

"Place of business or location" as used in the statute is not defined under Chapter 324 (Motor Vehicle Fuel Tax) and hence we must construe the meaning of these words according to the context and the approved usage of the language. (See Sec. 4.1(2) Code of Iowa 1958).

These words have been construed and defined in other jurisdictions, to-wit:

"PLACE OF BUSINESS

In general

Under statute providing that receipts from sales and other sources shall be assigned only to office, agency or place of business of corporation at which transactions giving rise to receipts are 'chiefly negotiated' for purpose of computing income tax, truck drivers of beverage company operating in

Indiana were not agencies who 'chiefly negotiated' sales of company's products in that state, and particular route assigned to each truck driver in Indiana did not constitute a 'place of business' of bottling company in Indiana within meaning of statute. Luckett v. Coca-Cola Bottling Co. of Louisville, Ky., 310 S.W. 2d 795, 797."

"A place of business is simply a location where business is transacted or more particularly a shop, office, warehouse, or commercial establishment. McCall v. State ex rel. Daniels, 23 So. 2d 492, 494, 156 Fla. 437."

"Each place or store maintained by dry cleaner for receipt and delivery of customers' clothes held subject to occupation tax upon 'place of business' of person engaged in dry cleaning, although actual dry cleaning was done elsewhere. Laws 1927, p. 57, Sec. 2, par. 49, as amended by Laws 1929, p. 65, Sec. 13. Goldstein v.State Revenue Commission, 178 S.E. 164, 50 Ga. App. 317."

"One of the proper meanings of the word 'location' is 'locality.' Miely v. Metzger, 156 P. 753, 755, 97 Kan. 804."

"Term 'locate,' within statute requiring county school board creating consolidated school district, to designate location of schoolhouse, means to designate site or place, and term 'location' is equivalent to site or place (Laws 1924, c. 283, Sec. 100). Board of Sup'rs of Marshall County v. Stephenson, 134 So. 142, 144, 160 Miss. 372."

"In ordinary and common usage, the word 'locality' is synonymous with the word 'place'. Conley v. Valley Motor Transit Co., C.C.A. Ohio, 139 F. 2d 692, 693."

It is therefore our opinion that any person, whether licensed or unlicensed, would be violating the statute, Chapter 324, and subject to the penalties prescribed, Sec. 324.73 if such person dispensed special fuel directly from a mobile tank wagon into the fuel supply tank of a motor vehicle at any place other than the licensed place of business or location.

Very truly yours,

FRANK D. BIANCO
Second Assistant Attorney General

FDB:kj

CITIES AND TOWNS: Naming Streets -- Under Section 409.17, the city or town has final determination in the name of a platted street. (Baumhover to Baumhover, Atty. Gen., 7/22/59 # 59-7-25)

July 22, 1959

Honorable John A. Baumhover
State Representative
Rural Route 2
Carroll, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of July 18, 1959 which states the following:

"Some few years ago Mr. Buchheit owner of a tract of land adjacent to the city of Carroll outside of the Incorporation started to develop this area into a residential district.

"At the time that this area was annexed to the city he asked the City Council for the privilege of naming the streets, this the Council agreed to and which Mr. Buchheit did and the same is of record in the annexation.

"Recently the City Council passed an ordinance to change the name of one street, which Mr. Buchheit objects to, since this particular street was named in memory of a very dear friend and the former owner of this property. It was at her request that when she sold this property that he dedicate something in her memory if the occasion ever presented itself.

" * * *

"Chapter 409.17 gives the City Council the authority to do so but is not there an obligation on their part to live up to an agreement."

In reply thereto:

There are two concepts to bear in mind. When a city or town acquires title in fee to streets within the incorporated area, the property is held in trust for the use of the public.

59-7-25

Clinton v. C.R. & M.R.R.Co., 24 Iowa 455. When a person is given a privilege by a city or town, such privilege cannot be permanent because of the very nature of municipal government which must consider the community as a whole and not the benefit which the individual obtained by virtue of the privilege. Lucy v. City of Oskaloosa, 143 Iowa 704, 121 N.W. 542.

Under Section 409.17, Code 1958, cities or towns are given statutory authority to determine the name of any platted street. In the facts stated a person was granted the privilege of naming the streets, this does not preclude the town from changing the name. Lucy case, supra.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

MOTOR VEHICLES: Temporary restricted licenses--Under 58G.A., Sec. 4, Ch. 322;

1. The word "convicted" appearing therein means a final conviction upon which a suspension of an operator's or chauffer's license was activated.
2. The original operator's or chauffeur's license remains under suspension during the effective period covered by the temporary restricted license.
3. Violation of the temporary restricted license is governed by Section 321.193, Code 1958.
4. Department may not require that a temporary restricted license be displayed on the vehicle. (Peach to Brown, Safety Comm., 7/22/59)
59-7-24

July 22, 1959

Mr. Russell I. Brown, Commissioner
Department of Public Safety
L O C A L

Dear Sir:

This will acknowledge receipt of your letter under date of July 20, 1959, as follows:

> "Senate File 463, Acts of the Fifty-eighth General Assembly, provides in part: 'The safety commissioner may, on application, issue a temporary restricted license to any person convicted whose regular employment is the operation of a motor vehicle or who cannot perform his regular occupation without the use of a motor vehicle, but such person shall not operate a vehicle for pleasure while holding such restricted license. However, this section shall not apply to any person whose license is revoked under the provisions of Section three hundred twenty-one point two hundred nine (321.209), Code of Iowa.'
>
> "With reference to above and existing statutes, I request your official opinion on the following:
>
> "(1) What is the meaning of the word 'convicted', as intended by the legislature?
>
> (2) Does the operators or chauffeurs license remain under suspension during the period a temporary restricted license is in effect?

"(3) Would a violation by an operator or chauffeur of the provisions of a temporary restricted license constitute the offense of operation of a motor vehicle while license is under suspension; or, in the alternative, would said violation be a violation of a restricted license as governed by Section 321.193, Code of Iowa, 1958?

"(4) Could the Department of Public Safety require that a temporary restricted license be prominently displayed on a designated part of the part of the vehicle driven - such as the windshield?

"(5) Does the Commissioner have the authority to issue a temporary restricted license for the only purpose of enabling the applicant to drive to and from work?"

In reply thereto:

The pertinent part of Chapter 222, Acts of the 58th General Assembly, relevant to this opinion reads as follows:

"Sec. 4. The safety commissioner may, on application, issue a temporary restricted license to any person convicted whose regular employment is the operation of a motor vehicle or who cannot perform his regular occupation without the use of a motor vehicle, but such person shall not operate a vehicle for pleasure while holding such restricted license. However, this section shall not apply to any person whose license is revoked under the provisions of section three hundred twenty-one point two hundred nine (321.209), Code 1958."

In order that the aforesaid section 4 reads with meaning insofar as the word "convicted" is concerned, it becomes necessary to think of the word "convicted" as meaning a final conviction which has resulted in a suspension of a person's operator's or chauffeur's license to operate a motor vehicle. Unless the final conviction has resulted in a suspension of such license, Section 4 of the aforesaid act would not become operative and no apparent need for a temporary restricted license would ever arise.

In reply to your second question, we advise as follows:

The right to operate a motor vehicle is a privilege granted by the sovereign. Doyle v. Kahl, 242 Iowa 153, 158, 46 N.W. 2d 52(1951) and cases cited therein; State v. Stehlek, 262 Wis. 642, 56 N.W. 2d 514 (1953). A valid operator's or chauffeur's license is evidence of this privilege so granted. It is a personal privilege and as such the granting sovereign may also prescribe under what conditions said license

may be suspended. When such license to operate a motor vehicle is suspended the privilege aforesaid is denied the licensee for the period of suspension imposed.

The legislative intent is obvious in Section 4 of Chapter 222, Acts of the 58th General Assembly. The legislature has provided that the commissioner may, in his discretion within the standards of guidance provided in Section 4, supra, upon application grant a temporary restricted license. Granting of such license by the commissioner is the granting of a privilege restricted as provided. The original license to operate a motor vehicle remains under suspension during the period for which the temporary restricted license is valid. Therefore, it is our opinion that the operator's or chauffeur's license remains under suspension during the period of time during which a temporary restricted license is valid.

In order that your third question may be answered it is necessary that we examine the provisions of Section 321.193, Code 1958. Said section reads as follows:

> "The department upon issuing an operator's or chauffeur's license shall have authority whenever good cause appears to impose restrictions suitable to the licensee's driving ability with respect to the type of vehicle or special mechanical control devices required on a motor vehicle which the licensee may operate or such other restrictions applicable to the licensee, including licenses issued, under section 321.194, as the department may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee.
>
> "The department may either issue a special restricted license or may set forth such restrictions upon the usual license form.
>
> "The department may upon receiving satisfactory evidence of any violation of the restrictions of such license suspend or revoke the same but the licensee shall be entitled to a hearing as upon a suspension or revocation under this chapter.
>
> "It is a misdemeanor, punishable as provided in section 321.482, for any person to operate a motor vehicle in any manner in violation of the restrictions imposed in a restricted license issued to him." (Emphasis added).

Under Section 4, Chapter 222, Acts of the 58th General Assembly is found the authority to issue upon application and within the commissioner's discretion, temporary restricted licenses to persons whose regular employment is the operation of a motor vehicle or who cannot perform their regular occupation without the use of a motor vehicle. An analysis of this particular statute would seem to indicate that such statute is not exclusive, but must be read in conjunction with Section 321.193, supra. In other words, the two statutes are in pari materia, and laws pari materia must be construed with reference to each other.

Therefore, this office is of the opinion that violation of the conditions of a temporary restricted license issued pursuant to Section 4, Chapter 222, Acts of the 58th General Assembly would be governed as to suspension, revocation and imposition of the criminal penalty provided would be governed by Section 321.193, Code 1958.

The answer to question four would seem to be governed by Section 321.190, Code 1958, which reads as follows:

> "Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same, upon demand of a justice of the peace, a peace officer, or a field deputy or examiner of the department. However, no person charged with violating this section shall be convicted if he produces in court, within a reasonable time, an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest." (Emphasis added).

The aforesaid words, "his immediate possession", are indicative that the license must not be separated in respect to place, the place being in this case, the person of the licensee. Therefore, your fourth question is answered in the negative.

In answer to your fifth and last question, we advise as follows:

The standard of guidance established by the legislature for issuance of a temporary restricted license is found in Section 4, Chapter 222, Acts of the 58th General Assembly. The person applying for such license must be a person (1) whose regular employment is the operation of a motor vehicle, or, (2) a person who cannot perform his regular occupation without the use of a motor vehicle. Issuance of such license is discretionary with the commissioner within, of course the standard of guidance as provided. Thus we have a statute which vests

discretionary power in an administrative officer. The statute is couched in general terms which outline its operation by providing the aforesaid standard of guidance. Left to the administrator is the determination of whether a particular factual situation comes within the terms of the law. This department cannot exercise the discretion placed in the administrator and for this reason we decline to answer the aforesaid question.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kj

SCHOOLS: Refund of Taxes -- Board of Education has no authority to distribute to the taxpayers on a pro-rata basis the surplus in the general fund where the school district goes out of existence.

(Rehmann to McGrath, Van Buren Co. Atty., 7/23/59)
#59-7-27

July 23, 1959

Mr. James W. McGrath
Van Buren County Attorney
Keosauqua, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of June 20 in which you state the following:

> "The Upton No. 6 School District in Van Buren County, Iowa, will, on July 1st, 1959, become a part of a reorganized school district. It has a surplus of over $4000.00 in its general fund and some eighteen or nineteen property owners and tax payers in the district. For several years now the district has made no levy for school purposes. It had originally, apparently through over taxation, acquired a tremendous surplus out of which it has paid the expenses for the past few years and still has the balance above referred to.
>
> "Can the Board of Education return to these residents and tax payers pro-rata the surplus as of the close of the district's existence?"

In reply thereto:

The Board of Education has no statutory authority to return to the residents in question the surplus that exists in the general school fund. It is fundamental that school districts are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as incident to exercise of a power or performance of a duty expressly conferred or imposed by statute. See Silver Lake Consol. Sch. Dist. v. Parker, 238 Iowa 984, 29 N.W. 2d 214; Ind. Sch. Dist. of Danbury v. Christiansen, 242 Iowa 963, 49 N.W. 2d 263; Lincoln Dist. v. Redfield Dist., 226 Iowa 298, 283 N.W. 881. If, therefore, the district in question has the power concerning which you inquire, it must derive from the express provisions of some statute.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

COURTS: Judicial retirement System--

Membership of Supreme, District, Municipal and Superioe Court judges in the Judicial Retirement System is not mandatory requirement. Membership therein, however, automatically terminates such judge's participation in the Iowa Public Employees Retirement System, and the tax imposed on the wages of such judges ceases on the effective date of such employee's membership in the Judicial Retirement System or the effective date of Ch. 356, 58th G. A., whichever is earlier.

(Stamats to Sarsfield, St. Comp., 7/23/59) # 59-7-28

July 23, 1959

Mr. Glenn D. Sarsfield
State Comptroller
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours of the 7th inst. in which you submitted the following:

> "H. F. 151, Acts of the 58th General Assembly, amended Chapter 605A, Code of Iowa, 1958, making certain changes in the Judicial Retirement System.
>
> "I particularly call your attention to Sections 1 and 8.
>
> "I respectfully request an opinion as to the following:
>
> "1. Does the tax on wages of each employee and his employer cease on the effective date of such employees' membership in the Judicial Retirement System, or the effective date of this Act, whichever is earlier, regardless of whether or not such employees actually become members of the Judicial Retirement System.
>
> "2. Is It mandatory for a judge who is eligible to join the Judicial Retirement System within one year after the effective date of this Act, or within one year after any date he takes oath of office as judge."

In reply to the foregoing I advise that there is no mandatory requirement that the judges of the several courts acquire membership in the Judicial Retirement System provided

59-7-28

by Chapter 605A, Code 1958, as amended by Chapter 356, Acts of the 58th General Assembly. It is not so expressly provided and implication to the contrary arises from the following among other provisions of the Act, to-wit, Section 1 of Chapter 356, provides:

> "Section 1. Section six hundred five A point three (605A.3), Code 1958, is hereby repealed and the following adopted in lieu thereof: 'This chapter shall not apply to any judges 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 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.'"

It is clear from the foregoing that before the Judicial Retirement System is effective of any judge, he is required to give notice of his purpose to join the System. In other words, it must be the judge's purpose to affiliate with the System and such purpose must be evidenced by the service of a notice he intends to come within its purview. A judge's purpose to affiliate implies his affiliation to be an act of his own will and not the will of the State. "Purpose" is something placed before the mind as an aim or desideratum. Sawter v. Shoenthal, 80 A. 101, 81 N. J. L. 197. Joining the System not being manda-

tory, answer to your first question is not required.

Membership of the judge in the Iowa Public Employees Retirement System as related to his membership in the Judicial Retirement System is provided by Section 8, subsections 1 and 2, of Chapter 356, Acts of the 58th General Assembly, which provide the following:

> "'1. Every person who is a member of the judicial retirement system on the effective date of this Act, or who thereafter becomes a member shall have his membership terminated in the Iowa public employees' retirement system.
>
> "'2. The tax on wages of each employee and his employer, as required by section ninety-seven B point eleven (97B.11) of the Code shall cease on the effective date of such employee's membership in the judicial retirement system, or the effective date of this Act, whichever is earlier.'"

However, these statutes have no application to one who was not a judge or otherwise publicly employed on the effective date of the Act. One who becomes a judge or other employee as defined in Chapter 97B, Code 1958, after July 4, 1959, becomes a member of the Iowa Public Employees Retirement System on the date he qualifies for office or otherwise becomes an employee.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TOWNSHIPS: Fire Protection -- The maximum amount a township may raise for fire apparatus is defined by Code section 359.45.
(Olds to Strand, Winneshiek Co. Atty. 7/23/59)
59-7-29

July 23, 1959

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

Dear Mr. Strand:

Receipt is acknowledged of your letter of June 24 as follows:

"This is in regard to raising money under Chapter 359 for the purposes of purchasing fire equipment. Our township trustees and townships have done and have met the various requirements of law up to the actual levying of any amount and the receiving of same. They are having a rather difficult time in finding a lending institution which will lend them money. The banking institution state that they want the trustees to float a bond issue and they, of course, will buy the bond and in a letter from Chapman and Cutler of Chicago they state that they would not approve such a bond issue because of the number of Iowa cases in which the Supreme Court of Iowa has held that civil townships in Iowa lack corporate capacity and cannot sue or be sued.

"I have just recently talked to a local banker and, of course, we are all in a dilemma as it appears that various opinions and statements contradict each other. Our dilemma is, -- How can we raise about $28,000.00 when the total revenue from the levy milage in the proposed fire district will be only about a $1000 per year?

"Question: If a loan can be made, how can it be made so that it will meet the requirements of the State Bank examiner and the F.D.C.?

"I would appreciate your opinion and statements to help us in our dilemma. Thank you very much."

59-7-29

The answer to your inquiry as to how $20,000 can be raised for the stated purposes when the total revenue from the maximum levy in the township will be only about $1,000 per year is simply that it can't be raised. This is a matter of simple arithmetic rather than law. Section 359.45, Code 1958, which provides the only method whereby a single township can raise funds for the stated purpose, provides:

> "359.45 Anticipatory bonds. Townships may anticipate the collection of taxes authorized by sections 359.43 and 359.44, and for such purposes may issue bonds payable in not more than ten equal annual installments and at a rate of interest not exceeding five percent per annum and payable at such place and be in such form as the board of trustees shall designate by resolution. Sections 23.12 to 23.16, inclusive, and chapter 408, so far as applicable, shall apply to such bonds."

By reference to the multiplication tables, 10 x $1000 = $10,000.

The problem you present is one which can be solved only by legislation, not by opinion of this office.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mmh5

COUNTIES: Sheriff -- Not entitled to fees for or required to make service in civil actions upon parties outside the state of Iowa. (Ahlo to Johnson, Lee Co. Atty., 7/23/59)

#59-7-30

July 23, 1959

Mr. Robert N. Johnson
Lee County Attorney
615½ Seventh Street
Fort Madison, Iowa

Dear Sir:

Receipt is acknowledged of your letter of June 27 as follows:

> "Rule of Civil Procedure #59 provides that a sheriff can make unsworn returns of original notices served by him in his own or a contiguous county. It provides further that if the notice is served in Iowa by a person other than a peace officer or in another state by a person other than a sheriff, no fees or mileage shall be allowed therefore.
>
> From time to time, the Sheriff of Lee County, Iowa, is requested by an attorney in a civil matter to serve notice in Hancock County, Illinois, which county lies directly across the Mississippi from Lee County. This situation gives rise to several questions, upon which an opinion would be appreciated.
>
> (1) Is the Sheriff of Lee County required to serve such notice?
>
> (2) If the Sheriff does serve such notice, are his fees and mileage allowed therefore?
>
> In this connection, it is my thinking that when a sheriff leaves the state, he is without the authority of a sheriff and acts only as an ordinary citizen. It is my further thinking that Hancock County, Illinois, would not be contiguous to Lee County, Iowa, by reason of the separation of the counties by the Mississippi River. I don't know whether such counties would be contiguous within the meaning of said Rule #59 if

59-7-30

they were separated only by a state line. Because of this reasoning, it appears to me the sheriff could not be allowed fees and mileage.

I suppose if Hancock County and Lee County are not contiguous, then the sheriff would not be required to serve such notices. I would, however, appreciate your opinion on both of these questions at your early convenience."

I concur in your thought that, as a general rule, when a sheriff leaves the state he is without the authority of a sheriff and acts only as an ordinary citizen. There appears to be a limited exception to the rule in the case of the extradition of criminals but I can find no authority for such exception in the matters to which you refer. The laws of Iowa do not reach beyond the boundaries of Iowa. See Rastide v. Chicago, St. P., M. & O. R. Co., 203 Iowa 431, 436 and Hendricksen v. Grandic Stages, 216 Iowa 643, 646. For this reason it is my opinion the answer to both of your questions is "no".

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

TOWNSHIPS: Fire Protection, Housing for equipment may be jointly owned. (Atls to Hudson, Pocahontas Co. Atty.)
7/24/59) # 57-7-31

July 24, 1959

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontac, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 20 as follows:

"I would like an opinion from your office relative to the above cited code section and the following fact situation.

"In Pocahontas County there are 4 townships adjacent to one town, and said 4 townships have entered into a written agreement for the operation of a joint fire department with said town. Under said agreement with the townships, the townships have purchased certain equipment, which equipment is operated by the town and the costs of maintenance is divided between the parties of this agreement. The town and township are now contemplating building a fire station for the purpose of housing the equipment owned and operated by the town and township under this agreement. All of the townships involved have had the levy authorized under Section 359.43 approved by the requisite election and are presently operating under said agreement.

My particular questions are as follows:
"1. Are the township trustees authorized to pay a portion of the costs of construction of such a fire station which would be located in the town and used to provide housing for the fire fighting equipment owned and operated jointly by the town and townships?
"2. If the answer to the first question is in the affirmative then should the title to said fire station and real estate be held in part by the townships involved?

59-7-31

> "The trustees involved are anxious to have an opinion at your earliest convenience as they would like to determine this matter as soon as possible."

Section 359.42, Code 1958, to which you refer, provides as follows:

> "The township trustees of any township may purchase, own, rent, or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires in said township, independently or jointly with any adjoining township or townships, likewise authorized as herein provided, or with any city or town." (Emphasis ours)

The answer to your first question is directly answered by the emphasized portion of the quoted statute. It is to be noted the statute does not restrict the location of the "housing".

The answer to your second question depends entirely upon the terms of the joint agreement between the participating townships and town. As you will note from the quoted statute the agreement may be either to "own" or to "provide services". Also see code section 368.12 which similarly defines the power of the town.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

COUNTIES: Courthouse parking --
1) The Board of Supervisors under the provisions of §332.3(19) Code 1958, has power to establish parking lanes in the court house grounds; 2) the Board woul have no authority to transfer any part of the court house grounds to the city as a gift without specific statutory authority; 3) there is no express or implied authority in the city to transfer property to the county by corrective deed; 4) an election to place this matter before the electors would be witho statutory authority and would constitute a mere voluntary referendum.
(Strauss to Cothern, Clarke Co. Atty., 7/27/59) #59-7-32

July 27, 1959

Mr. James H. Cothern
Clarke County Attorney
Osceola, Iowa

Dear Mr. Cothern:

We are in receipt of your letter requesting an opinion on the legality of placing parking lanes in the Clarke County Court House square.

Your letter sets out the following:

> "In 1907, upon a resolution of the city council, the City of Osceola conveyed the land upon which the Court House now stands, as well as the adjoining park, to Clarke County by quit claim deed. The deed was dated June 13, 1907, and was from Osceola City to Clarke County and was filed June 14, 1907. The deed conveyed 'The block or tract of ground known as the public square in the city of Osceola, Clarke County, Iowa. The said Clarke County hereby agrees to use said land for a public park and for Court House purposes.'"

You also state:

> "There is already existing a parking area for court house employees and other users of the court house situated on the court house park so that the proposed parking lanes would be for the use of the general public."

You submit four questions concerned with the problem as follows:

> "1. In view of the apparent restrictive clause in the quit claim deed from the City of Osceola

59-7-32

to Clarke County, can the Clarke County Board of Supervisors establish parking lanes in the County Court House park?

"2. In view of sections 332.3(13) and 332.3(17) and the fact that said Court House park is still being used for a public park and for Court House purposes, can the Clarke County Board of Supervisors deed back that portion of the Court House park needed for the proposed parking lanes to the City of Osceola so that the proposed parking lanes could be constructed by the City of Osceola?

"3. Can the Clarke County Board of Supervisors upon receipt of a corrective deed from the City of Osceola stating that the Court House park shall be used for 'Court House, park and parking facility purposes' construct the proposed parking lanes in the Court House park?

"4. Can the proposed parking lanes be authorized by a vote of the citizens at a general election?"

In reply thereto I would advise as follows.

1. Insofar as your question #1 is concerned, we call yourattention to Section 332.3(19), Code 1958, which provides as follows:

"General powers. The board of supervisors at any regular meeting shall have power:

" * * *

"19. To establish, publish, and enforce rules regulating and restricting the use by the public of all county buildings and grounds. Such rules when established shall be posted in conspicuous places about said buildings and grounds. Any person violating any such rule shall be guilty of a misdemeanor and upon conviction be punished by a fine of not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days."

Under the foregoing provisions I am of the opinion that your County Board of Supervisors would have power to establish parking lanes to be governed by the foregoing rules in the court house grounds.

2. In answer to your question #2 I would advise you that the Department has consistently held that your Board of Supervisors would have no authority to transfer any part of the court house grounds or other public property to the city as a gift without specific statutory authority. See the case of Gritton v. City of Des Moines, 247 Iowa 326, 338, 73 N. W. 2d 813. Section 332.3, subsections 13 and 17 are not available because the Board would first have to find that the land was no longer useful for county purposes and, second, the County would be required to receive adequate compensation for the property.

3. In answer to your question #3 I would advise that there is no express or implied authority in the city to make a transfer of this property to the county by corrective deed. The reason assigned in answer to your question #2 herein is applicable to this question.

4. In answer to your question #4 I would advise that an election for the purpose aforesaid would require statutory authority therefor. Such authority does not appear to exist.

An election without such authority would be a mere voluntary referendum.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES: Courthouse -- Expenditure for remodeling cannot exceed statutory limit irrespective of whether or not part of payment is deferred until subsequent year. (Atch to Hanrahan, 7/27/59) #59-7-33

July 27, 1959

Mr. Ray Hanrahan
Polk County Attorney
Des Moines, Iowa

Dear Sir:

Receipt is acknowledged of your letter of June 26 as follows:

> "The Legislature in its last session gave this district another judge. At the present time we do not have a court room for him.
>
> "One proposed remodeling plan will cost between $25,000 and $30,000 it is estimated. The Board of Supervisors has asked me to obtain from you the answers to the following questions:
>
> "1. Inasmuch as the remodeling project will exceed $20,000, is it permissible to do part of it in 1959 (in an amount less than $20,000), pay for it and complete the project in 1960?
>
> "2. Must the cost of furnishing and equipping the court room and judge's chambers be included in the limit of $20,000 placed on the Board under 345.1 or may that expense be incurred and paid from a separate fund over and above the $20,000 limit?
>
> "3. Consideration is being given to the air-conditioning of three of the present court rooms. Would this expense be classified as remodeling and the Board subject to the limitations of 345.1 or merely as a furnishing and equipment expense?"

It is assumed your first question has reference to section 345.1, Code of Iowa. Said section, as amended by the 58th G.A. provides in pertinent part:

59-7-33

> "The board of supervisors shall not order . . . the remodeling . . . of a courthouse . . . where the probable cost will exceed ten thousand dollars . . . until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections. Except, however, such proposition need not be submitted to the voters if any such . . . remodeling . . . may be accomplished without the levy of additional taxes and the probable cost will not exceed twenty thousand dollars." (Emphasis supplied)

Since the quoted statute is conditioned in terms of probable cost rather than annual expenditure the answer to your first question is, "no". As was said in the 1938 Report of the Attorney General II:

> "It would be but a subterfuge and an evasion of the statute to divide this purchase into parts in order that no one tract of land, even though contiguous to another that is to be purchased would exceed $10,000 in cost. State vs. Garretson, 207 Iowa 627."

Division of an expenditure in terms of time for the purpose of getting around a statutory limit seems no different in principle than division in terms of quantity in the quotation.

In answer to your second and third questions, I refer you to the enclosed opinion dated January 8, 1957, and addressed to Mr. Charles King, Marshall County Attorney, and to the enclosed opinion dated May 20, 1957, and addressed to Mr. Jack Frye, Floyd County Attorney.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr
Encl. 2

STATE OFFICERS AND DEPARTMENTS: Welfare Department

The appropriations made by the 58th General Assembly to the Social Welfare Department are amplified by the unexpended balances of the appropriation made by the 57th General Assembly to that Department remaining on June 30, 1959, subject to maximum limitation of such balances as described by Ch. 10, Acts of the 58th General Assembly. (Strauss to Smith., St. Welfare Bd., 7/28/59) #59-7-34

July 28, 1959

Mrs. Irene M. Smith, Chairman
State Board of Social Welfare
L o c a l

Dear Madam:

This will acknowledge yours of the 8th inst. in which you submitted the following:

> "In view of the possible conflict in Section 2 of Chapter 4 Laws of the Fifty-seventh General Assembly and House File 168 and Section 2 of House File 747 as passed by the Fifty-eighth General Assembly, we would like an interpretation as to the amount of state funds that may be retained as balances by the State Department of Social Welfare as of July 1, 1959."

In reply thereto I advise as follows. Chapter 4 of the Acts of the 57th General Assembly, as amended by Chapter 10 of the Acts of the 58th General Assembly, provides the following:

> "Section 1. For the social welfare department there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1957, and ending June 30, 1959, the sum of seventeen million three hundred thirty-five thousand dollars ($17,335,000.00) to be used in the following manner:

For aid to blind fund	$ 500,000.00
For aid to dependent children fund	2,950,000.00
For child welfare fund	350,000.00
For emergency relief fund	35,000.00
Old-age assistance fund	13,500,000.00

59-7-34

"Grand total of all appropriations for all purposes for each year of the biennium for the social welfare department $17,335,000.00

"In addition to said grand total of appropriations there is hereby appropriated for each year of the ensuing biennium to the social welfare department the sum of five hundred thousand dollars ($500,000.00) to supplement the above funds as needed, the expenditure of which supplemental appropriations shall be subject to the approval of the budget and financial control committee.

"Sec. 2. No more than the amount herein appropriated to each fund plus the unexpended balance in each fund on June 30, 1957, shall be expended from state funds for the purposes of each said fund during the biennium beginning July 1, 1957, and ending June 30, 1959. Any balance remaining in the funds, to which appropriations are made by this Act, at the end of the ensuing biennium shall revert to the general fund of the state, except that balances not to exceed the following specified amounts may be retained in each fund:

Aid to dependent children	$600,000.00
Old age assistance	500,000.00
Aid to the blind	80,000.00
Emergency relief	50,000.00"

The amendment which appears above as part of Chapter 4, Acts of the 57th General Assembly, appears separately as follows:

"Section 1. Section two (2), Chapter four (4), Acts of the Fifty-seventh General Assembly, is hereby amended by striking from line seven (7) the period after the word 'state' and inserting the following: ', except that balances not to exceed the following specified amounts may be retained in each fund.

Aid to dependent children	$ 600,000.00
Old age assistance	500,000.00
Aid to the blind	80,000.00
Emergency relief	50,000.00'

> "Sec. 2. This Act being of immediate importance shall be in full force and effect from and after its passage and publication in The Tipton Advertiser, a newspaper published at Tipton, Iowa, and the Lyon County Reporter, a newspaper published at Rock Rapids, Iowa."

The amendment provided by House File 168, now Chapter 10, Acts of the 58th General Assembly, became the law by publication on March 26, 1959.

Section 2 of Chapter 9, Acts of the 58th General Assembly, being House File 747, provides the following:

> "Sec. 2. No more than the amount herein appropriated to each fund plus the unexpended balance in each fund on June 30, 1959, shall be expended from state funds for the purposes of each said fund during the biennium beginning July 1, 1959, and ending June 30, 1961. Any balance remaining in the funds, to which appropriations are made by this Act, at the end of the ensuing biennium shall revert to the general fund of the state."

The appropriations made by the 58th General Assembly will be amplified by the unexpended balances in the appropriations made by the 57th General Assembly remaining on June 30, 1959, subject to the maximum limitation of the balances as described by Chapter 10, Acts of the 58th General Assembly. Such maximum balances on June 30, 1959, are these:

Aid to dependent children	$600,000.00
Old age assistance	500,000.00
Aid to the blind	80,000.00
Emergency relief	50,000.00

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES: Recorder -- Under 58th G.A., Ch. 225, sec. 2, amending Code Section 335 14, "page" means a piece of paper to be photostated, photographed, or similarly reproduced.
(Ltr to Leir, Scott Co. Atty., 7/28/59) # 59-7-35

Leir

July 28, 1959

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

Attn: Mr. Edward N. Wehr

Dear Sir:

Receipt is acknowledged of your letter of July 15 as follows:

> "The Scott County Recorder has requested an opinion relative to questions raised by the passage of an Amendment to Section 335.14 of the Code of Iowa (1958), and specifically subsection 2 thereof relating to the recording fees to be charged for recording instruments in the Recorder's office:
>
> (1) What is considered a 'page' for purposes of Section 335.14, and secondly what is the maximum length of a page.
>
> (2) If a page is submitted for recording which is longer than the established length limit, is that overage, whether a small or large amount, considered the same as a second page."

The amendment to which you refer is section 2, Chapter 255, Acts of the 58th General Assembly, hereinafter set forth as follows:

> "Section three hundred thirty-five point fourteen (335.14), subsection two (2), Code 1958, is hereby amended by striking the period (.) at the end thereof and inserting a semicolon (;) in lieu thereof and adding thereto the following: 'provided in those counties where photostatic, photographic or other similar processes are in use, the fees shall not exceed one dollar fifty cents ($1.50) for the first page or fraction thereof of any instrument and one dollar ($1.00) for each additional page."

59-7-35

In view of the fact that the word "page" is used only with reference to matter to be copied by "photostatic, photographic, or other similar process", it is my impression the legislature intended by use of the word "page" to refer to each separate piece of paper to be copied by such process. In other words, the work and cost of making a picture of a piece of paper is not affected by the number of typed or written lines on such piece of paper. The work and cost of making a written or typed copy would be affected by the number of typed or written lines to be copied. The fee, presumably, bears some relation to the work and cost involved in making the record. Therefore, the reference in the amendment is to pages (pieces of paper) rather than words or lines, where means of reproduction other than manual are used.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

CONSERVATION COMMISSION: -- Law-enforcing officers and matters may be transferred to the Division of Administration pursuant to §107.21, Code 1958. (Glen G. Powers, Conservation Director, 7/28/59) 59-7-36

State Conservation Organization

July 28, 1959

Glen G. Powers, Director
State Conservation Commission
East Seventh and Court
L O C A L

Dear Mr. Powers:

In your letter of July 23, 1959, you pointed out that at the meeting of the Conservation Commission held July 23, 1959, discussion arose as to the location of control of the Conservation officers as covered in Section 107.21 (3), Code of 1958. In subsequent personal conversations with you, you further explained th t the Commission wished you to obtain an opinion of this office upon the question as to the legal procedure to effect a transfer of various law-enforcing officers from the Division of Fish and Game to the Division of Administration within the organizational framework of the Conservation Commission.

Section 107.21, Code 1958, is as follows:

"107.21 Divisions of department. The department of conservation, herein created, shall consist of the following divisions:

1. A division of fish and game which shall include matters relating to fish and fisheries, waterfowl, game, fur-bearing and other animals, birds, and other wild life resources.

2. A division of lands and waters which shall include matters relating to state waters, state parks, forests and forestry, and lakes and streams, including matters relating to scenic, scientific, historical, archaeological, and recreational matters.

3. A division of administration which shall include matters relating to accounts, records, enforcement, technical service, and public relations."

In connection with your problem I find the 1936 Biennial Report of the Conservation Commission to be helpful. At page 141 of that report it is stated:

"While the law creating the Division of Administration places the enforcement of conservation laws, rules and regulations under the jurisdiction of this Division, the

59-7-36

direct management of this phase of the work has been delegated to the Chief of the Division of Fish and Game, which places Game Law Enforcement Officers, formerly Deputy Game Wardens, under the Division of Fish and Game, and Park Custodians under the immediate direction of the Chief of the Division of Lands and Waters. In this manner all duties of the Conservation Officers are correlated under the heads of their respective Divisions which effects economy and efficiency. The Division of Administration receives full reports of enforcement activities and tabulates and records all law enforcement duties and activities."

In the 1938 Biennial Report of the Conservation Commission at page 134 it is stated:

"Under the law creating the Division of Administration, enforcement of the laws is given over to this division. That all duties of Conservation Officers may be correlated, the management and supervision of Conservation Officers enforcing fish and game laws is placed under the Chief of the Division of Fish and Game. Supervision and management of State Park Custodians who are also Conservation Officers is given over to the Chief of the Division of Lands and Waters. The Division of Administration tabulates and records all law enforcement duties and activities."

I have, with the help of your office, searched the minutes of the Conservation Commission meetings for the period of time involved, but have been unable to locate the action of the Commission which effected this "delegation". However, if the Commission now desires to restore the supervision of various officers presently under the Division of Fish and Game, to the Division of Administration, they could, by motion, revoke their former action and place the supervision and control of the desired officers within the Division of Administration.

Any such action by the Commission should be coordinated with the fiscal management of the Commission, particularly as controlled by Section 107.19, Code of 1958.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:nmh5

TOWNSHIPS: Cemeteries -- Township trustees have no power to engage in the retail tombstone business. (Jack H. Bedell, Dickinson Co. Atty., 7/29/59) # 59-7-37

July 29, 1959

Mr. Jack H. Bedell
Dickinson County Attorney
Spirit Lake, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 24 as follows:

> "I have been asked by the township trustees of Silver Lake Township, Dickinson County, Iowa, to obtain your opinion as to whether or not it is legal for the township trustees of said township to offer for sale and sell at a profit grave markers, either in the form of bronze plaques or head stones."

Assuming your question refers to the board of trustees as such and not to the individual members in their private capacities, you are advised the powers of township trustees with respect to cemeteries are defined by statute, the pertinent statutes being sections 359.28 to 359.41. The power to engage in the business of selling tombstones is not among those enumerated in the said statutes. Under the well-known rules that "creatures of statute have only those powers conferred by statute" and "expressio unius est exclusio alterius" a negative answer must be given your question.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

59-7-37

LIQUOR CONTROL COMMISSION: Section 123.47, Code 1958 does not prohibit placing signs on the outside of state liquor stores.

STATE OFFICERS AND DEPARTMENTS: Liquor Commission --

(Gritton to Smith, Iowa Liquor Comm. 7/29/59) #59-7-38

July 29, 1959

Gerald W. Smith, Commissioner
Iowa Liquor Control Commission
East Seventh and Court Avenue
Des Moines 8, Iowa

Dear Sir:

Your letter of July 23, 1959 is as follows:

"The Iowa Liquor Control Commission has, since its beginning, used signs in the windows of the stores we rent, which read, 'Iowa Liquor Store'.

"Two buildings have been built to the specifications furnished by the Commission, and these buildings do not have sufficient space for these signs.

"The Commission has purchased a sign at considerable expense, to be placed across the front of one of these buildings, and we contemplate purchasing one or two more for similar stores.

"As these signs are quite expensive, we respectfully request an opinion. Will the placing of these signs as described above, be in conflict with Section 47 of the Iowa Liquor Control Act?"

Section 123.47 (2a), Code 1958, provides as follows:

"2. This section of the chapter shall not apply, however:

a. To the liquor control commission."

Thus, by the expressed statutory language, Section 123.47 Code 1958, does not apply to the Liquor Control Commission. The answer to your question, therefore, is negative.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh5

59-7-38

COURTS: Municipal, vacancies -- Chapter 351 Acts of 58th G.A. amending Sec. 602.6 provides for immediate appointment of a temporary acting clerk until the vacancy is filled by the mayor. (Coleman to Sacks, Pot. Co. Atty., 7/31/59)

#59-7-37

July 31, 1959

Mr. Kenneth Sacks
Pottawattamie County Attorney
Pottawattamie County Court House
Council Bluffs, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of July 23 which states in pertinent part:

> "The Clerk of the Municipal Court of the City of Council Bluffs, Iowa has recently notified the City Council that she plans to resign her position in the near future.
>
> "In your opinion, can the Deputy Clerk of the Municipal Court, who holds Civil Service rights as such, be appointed 'temporary acting clerk' under authority contained in House File 76 and hold such temporary appointment until the regular judicial election in the Fall of 1961 and retain his Civil Service rights as Deputy Clerk during such period of time, or is it, in your opinion, mandatory that the Mayor appoint an acting clerk as soon as possible under authority contained in Section 602.6?"

In reply thereto:

Section 602.6, Code 1958, as amended by Chapter 351 (H.F. 76) Acts of the 58th G.A., provides:

> "Whenever such court has been established, or whenever any city becomes entitled to an additional judge of such court, the govenor shall appoint a judge to fill the position until the beginning of the regular term of office succeeding the next election, or until his successor is elected and qualified. Under like conditions, or, if for any other reason a vacancy shall exist, the elective officers of the court shall be appointed by the mayor with the approval of the city council.

59-7-37

> "If the office of clerk or bailiff becomes vacant, the judge or judges shall immediately designate a temporary acting clerk or bailiff, as the case may be, who shall qualify forthwith and serve until the vacnacy is filled as herein provided. Such temporary appointment and service shall be without prejudice to any civil rights to which such appointee may be entitled by virtue of his regular employment."

The Mayor, with approval of the city council, shall appoint a person to fill the vacancy in any elective office of municipal court with the exception of judges. The appointment could be for the balance of the unexpired term of office or until his successor is elected or qualified. Prior to the 58th G.A., this was the only method by which a vacancy could be filled and until the mayor acted the vacancy remained.

However, Chapter 351 (H.F. 74) Acts of the 58th G.A. provides a method whereby the vacancy in the office of clerk or bailiff can be temporarily filled by the judge or judges of municipal court immediately. Such appointment will be for that period of time until the mayor appoints a permanent clerk or bailiff, as the case may be, to fill the unexpired term of office. Those persons who are temporarily appointed by the judge or judges of municipal court shall serve without prejudice to any civil rights to which he may be entitled.

The judge or judges of municipal court may appoint immediately a temporary acting clerk the very moment the vacancy is created. However, once the mayor appoints a person to fill the vacancy created in the office, such temporary acting clerk ceases to act as clerk. But first and foremost, before either the mayor or judge can appoint, there must be an actual vacancy in the office even though the date the vacancy is to occur is ascertained.

Therefore in answer to your question the mayor must appoint the acting clerk as soon as possible.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

TAXATION: Exemptions, Time For Claiming--
Educational institutions as defined in Section 427.1(11), Code of 1958, do not fall within the delayed claims provision of Section 427.1(24), Code of 1958. (Gill to Forsyth, Emmet Co. Atty., 7/22/59) # 59-8-2

July 22, 1959

Mr. Gordon J. Forsyth
County Attorney
Emmet County
Estherville, Iowa

Dear Mr. Forsyth:

This is to acknowledge your letter of June 26, in which you submitted the following question:

> "A question has arisen in the office of our local tax assessor and the Board of Supervisors concerning exemptions of colleges from the payment of real estate taxes under section 427.1 of the 1958 Code of Iowa.
>
> "Under Section 427.1(11) it is provided that the institution claiming the exemption shall file before February 1. Under Section 427.1(24) delayed claims are provided for which give the latest filing date as July 1. My question is, does Section 427.1(24) apply to educational institutions described in Section 427.1(11)?"

Subsection 24 of section 427.1, Code of Iowa (1958), was one of four subsections added to section 427.1 by the Fifty-second General Assembly, Acts 1947 (52 G.A.) ch. 234. Subsection 23 of section 427.1 was added at the same time by the same Act. For your information, the pertinent provisions of the aforementioned subsections and the title thereto are set forth below:

> "AN ACT to amend section four hundred twenty-seven point one (427.1), code 1946, and provising for the procedure to be followed in claiming of exemptions from taxation by certain societies and organizations. Emphasis added)

59-8-2

"Section 1. Section four hundred twenty-seven point one (427.1), Code 1946, is hereby amended by adding the following subsection:

"'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, * * *.'

"Sec. 2. 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 first (1st) of the year for which such exemption from taxation is claimed, * * *."
(Present Section 427.1(24), Code of 1958).

As these two subsections were part of the same Act, which established a procedure for the claiming of exemptions, as evidenced by the title, they must be construed together. Therefore, the phrase "such claim" as found in Section 427.1(24), Code of 1958, must refer back to the claim for exemptions that are covered in Section 427.1(23), supra. The claims covered therein, are those from societies and organizations found in subsections (6) and (9) of Section 427.1, Code of 1958, i.e., associations of war veterans, literary, scientific, charitable, benevolent, agricultural and religious institutions, etc.

Further evidence supporting this interpretation of Section 427.1(24), Code of 1958, is shown by the fact, the section on property of educational institutions, as found in subsection (11) of Section 427.1, Code of 1958, was added to by the General Assembly in which they provided the procedure for claiming an exemption under that section. The amendment as found in Chapter 195, Section 1, Acts of the 53rd G.A., 1949, (Present Section

427.1(11), Code of 1958), is set forth below:

"AN ACT to amend section four hundred twenty-seven point one (427.1), Code 1946, and providing for the procedure to be followed in claiming of exemption from taxation of real estate owned by educational institutions of this state as a part of their endowment fund.

"Section 1. Section four hundred twenty-seven point one (427.1), Code 1946, is amended by adding the following after the period at the end of subsection eleven (11):

"'Every educational institution claiming an exemption under the provisions of this subsection shall file with the assessor not later than February first of the year for which such exemption is requested, a statement upon forms to be prescribed by the state tax commission, describing and locating the property upon which such exemption is claimed.'"

From this one may draw the conclusion that if the legislators had intended to include educational institutions in Section 427.1(24), supra, they would have, when they set up the procedure under Section 427.1(11), supra, two years later.

From yet another source, this opinion is supported. In 1955, this department had opportunity to consider Section 427.1(24)--427.1(27), and it is apparent from the language used that educational institutions were not considered as falling within the purview of the aforementioned sections. For your information, part of that opinion follows (56 OAG 80, 81):

"* * *. In the opinion of this office, that ruling would be applicable to the problem before you, unless a different result is dictated by H.F. 67, 52nd General Assembly, now Iowa Code sections 427.1(24)--427.1(27).

"The effect of the sections referred to is to require associations of war veterans, and literary, scientific, charitable, agricultural, benevolent, and religious institutions and societies which desire to claim tax exemption for real property used by them solely for their

appropriate objects, to file a statement with the assessor by February 1, or the Board of Review or Auditor no later than July 1, of the year for which exemption is claimed. * * *."

My conclusion in answer to your question, "Does Section 427.1(24) apply to educational institutions described in Section 427.1(11)?", would be in the negative.

Yours truly,

Gary S. Gill
Assistant Attorney General

GSGrfs

CONSERVATION COMMISSION: State Conservation Commission cannot designate a city police officer to enforce the state law on the river within the city limits. (Gritton to Powers, St.Cons.Com., 7/29/59)
59-8-3

July 29, 1959

Glen G. Powers, Director
State Conservation Commission
East Seventh and Court Avenue
L O C A L

Attention: Wilbur A. Rush

Dear Sir:

In your letter of July 14, 1959, you request the opinion of this office on the question of whether or not the Commission could designate an officer or officers of the _____ Police Department as special agents or deputies of the State Conservation Commission for the enforcement of the state law on the river within the city limits.

Section 107.13, Code 1958, in pertinent part is as follows:

> "107.13 Officers and employees -- salaries. Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained state forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules, and regulations, the enforcement of which are herein imposed on said commission. Said officers shall be known as state conservation officers. . . ."

Sections 107.14 and 107.15, Code 1958, in part are as follows:

> "107.14 Conservation officers. No person shall be appointed as a conservation officer until he has satisfactorily passed a competitive examination, held under such rules as the commission may adopt, and other qualifications being equal only those of highest rank in examinations shall be appointed.

59-8-3

"167.15 Peace officers. Conservation officers shall have the power of, and be deemed peace officers within the scope of the duties herein imposed on them. . . . "

This office had occasion to consider these sections in an opinion found on page 275, AGO 1936. In part this opinion is as follows:

"Apparently, from a reading of these three sections, it was the intention of the Legislature to designate certain persons to enforce the laws, rules and regulations, which duties are imposed on the commission. These persons are designated as state conservation officers and a limitation is placed upon the salary to be paid to such officers, and provides for competitive examinations. Such officers are given the authority of peace officers within the scope of the duties imposed on them by the Legislature with respect to the subject matter under the jurisdiction of your department, which of course would be the enforcement of the fish and game laws of the state and the protection of public parks and forests. . . . .

"In accordance with the above, it is the opinion of this department that no person can serve as a peace officer in a capacity such as is designated under the conservation act for the enforcement of laws, rules and regulations pertaining to fish and game, public parks and forests, unless such person comes within the express grant of authority given and this, in the instant matter, pertains solely to conservation officers whose position is created in Sections 15, 16 and 17 of the conservation act.

"Therefore, in our opinion, it is limited to such officers and to no others."

In accordance with the above opinion, the answer to your question would be in the negative.

Yours truly,

JAMES H. GAITTON
Assistant Attorney General

JHG:mph5

COUNTIES: Hospitals -- Sale or lease of sites or buildings requires approval of voters and is restricted to property other than acquired under Code section 347.13 (11). (Abels to Harris, Greene Co. Atty., 7/31/59) #59-8-4

July 31, 1959

Mr. David Harris
Greene County Attorney
Jefferson, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 30 as follows:

> "I would appreciate your opinion on the following question:
>
> "Does a County Board of Hospital Trustees have the power or authority to lease on a long term basis land owned by the County Hospital to a private person?
>
> "The facts and circumstances are this. Our County Board of Hospital Trustees are interested in entering into an arrangement with a private person here in the County, whereby land at the hospital site would be leased to the private person - the private person would build a convalescent home at his own expense on the site, and would operate the convalescent home independently for his own profit. In the alternative, could the Hospital Board of Trustees sell a part of their hospital site to a private individual for the same purposes."

In answer thereto you are advised that the powers of county hospital trustees are defined by statute. Limited power to lease is conferred, subject to approval by the voters, in subsection 12 of section 347.13, Code 1958, which provides that the trustees may, "Submit to the voters at any regular or special election a proposition to sell or lease any sites and buildings except those described in subsection 11 hereof . . . ".

The requirement of submission of the proposition to the voters and restriction of such proposition to sites and buildings

59-8-4

other than those described in subsection 11 of section 347.13 would apply to both your principal and alternative question.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

MOTOR VEHICLES: Section 321.285, Code 1958, as affected by Section 321.291, Code 1958.

Speed--

An information, accusing a person of operating a motor vehicle upon a highway at a speed greater than will permit such person to bring such vehicle to a stop within the assured clear distance ahead, need not contain therein a specific allegation of speed in miles per hour. (Pesch to Winkel, Kossuth Co. Atty. 8/3/59) # 59-8-6

August 3, 1959

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Dear Mr. Winkel:

Your letter under date of June 29, 1959, is at hand in which you submit the following question:

> "If one is charged with operating a motor vehicle at a speed greater than will permit him to bring it to a stop within the assured cleared distance, is it necessary to comply with Section 321.291 and set out in the information the speed at which the defendant is alleged to have driven?"

In reply thereto you are advised as follows:

Section 321.285, Code 1958, as amended, reads in pertinent part as follows:

> ", * no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, * * * * ."

Section 321.291, Code 1958, reads as follows:

> "In every charge of violation of sections 321.285 to 321.287, inclusive, the information, also the notice to appear, shall specify the speed at which the defendant is alleged to have driven, also the speed limit applicable within the district or at the location."

Section 321.285, supra, the pertinent part set out above "is a speed regulation only. The statute, instead of fixing

59-8-6

a flat rate of speed of a certain number of miles per hour as the limit of lawful speed, adopts a flexible standard and permits the motorist to lawfully drive at any rate of speed which he chooses, provided that such rate of spped does not exceed that at which he can stop within the assured clear distance ahead". Jordon v. Schantz, 220 Iowa 1251, 264 N.W. 259, 261 (1936).

The statutory duty or act required of a motorist by Section 321.285, supra, is to drive his automobile at a speed not greater than that which will permit him to bring his automobile to a stop within the assured clear distance ahead. Swan v. Dailey - Luce Auto Co., 225 Iowa 89, 277 N.W. 580, rehearing denied 225 Iowa 89, 281 N.W. 504. In other words, the motorist is required to comply with the assured clear distance requirement as to speed. That the statute, supra, is essentially a speed regulation rather than one requiring a motorist to stop, see: Bonnett v. Oertwig, 234 Iowa 864, 14 N.W. 2d 739, 741 and cases cited therein.

Turning our attention now to Section 321.291, supra, such section requires that in every violation of section 321.285 the information and the notice to appear shall specify the alleged speed driven by the defendant and also the speed limit applicable in the district or at the location of the violation. That the rules as to the sufficiency of the charge in an information are in accord with those applying to statutory indictment, see: State v. Coppes, 247 Iowa 1057, 1061, 78 N.W. 2d 10.

The object of Section 321.291, supra, is to require a showing of what specific speed is the basis of the offense. But, as the Iowa Supreme Court pointed out in the case of Jordon v. Schantz, supra, the legislature has not fixed "a flat rate of speed of a certain number of miles per hour as the limit of lawful speed" in that part of Section 321.285, supra, under consideration in this opinion. The test is not an objective one but rather subjective depending on the circumstances and contingencies surrounding the offense charged and the facts inherent therein, such as the power of the vehicle's brakes and the celerity with which a driver can slacken the speed of the vehicle or stop such vehicle.

Therefore, based on the nature of the offense involved and the foregoing authorities, it is my opinion that Section 321.291, supra, does not, in the instant situation, require a specific allegation of speed in miles per hour in the information charging the accused of the offense committed.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

CONSTITUTIONAL LAW: Civil Defense interim government -- Appointment by a member of the Legislature of an interim successor as provided by Ch. 89, Acts of the 58th General Assembly, does not constitute an unconstitutional act and is not a violation of his constitutional oath. (Strauss to Hoschek, St. Sen., 8/3/59) # 59-8-5

August 3, 1959

Hon. Carl Hoschek
State Senator
Burlington, Iowa

Hon. Robert R. Dodds
State Representative
Danville, Iowa

Gentlemen:

This will acknowledge receipt of yours of the 27th ult. in which you submitted the following:

> "With the publication of the Session Laws of the 58th General Assembly, each of us have given further thought and study to Chapter 89 - Legislative Continuty in War - and its relationship to the Constitution of the State of Iowa. As we recall, we did not have the opportunity of reviewing this proposal with you during the session. We shall appreciate your opinion with respect to Chapter 89 and a possible conflict with our State Constitution.
>
> "Chapter 89 provides that each of us shall designate an emergency interim successor to our respective offices, namely, the office of State Senator and of State Representative from Des Moines County. In assuming our offices in the first instance, we did subscribe to an oath to uphold the Constitution of the State of Iowa, and in considering the requirements of Chapter 89, we do not wish to violate that oath of office.
>
> "Article III of the State Constitution provides for a distribution of powers of government and sets out the specific division of the legislative department. In numerous sections, such as Sec. 1, and 2, 3, 4, 5, and 7, among others, there is reference to 'election' of the members of the legislative department. Sections 3 and

> 5 provide the only way that a member may be chosen is 'by the qualified electors', and provides for the time and nature of the 'election'. Section 12 of Article III further provides that 'when vacancies occur in either house, the Governor, or the person exercising the functions of Governor, shall issue writs of election to fill such vacancies.'
>
> "There does not appear any provision for the selection of legislators other than by 'election'; further, there does not appear any provision for the suspension of the State Constitution under the circumstances set out in section 1 of Chapter 89. Please advise whether or not a compliance with Chapter 89 by the designation of emergency interim successors would constitute an unconstitutional act by us, and in violation of our oath of office."

In reply thereto I advise as follows. The questions which you submit have been the subject of textbook statement and adjudicated cases. 11 Am. Jur., page 790, title Constitutional Law, states the following:

> "Proceedings of Legislature. - The basis of the fundamental principle as to the existence of a presumption in favor of the legality of legislation has been placed on various grounds. The most important of these is the doctrine which forbids one branch of the state government to encroach on the duties and powers of another. For the purposes of sustaining the presumption in favor of the constitutionality of a statute, the courts have elaborated on the respect with which they regard the action of the other two departments of government. Accordingly, it has been said that the responsibility of upholding the Constitution does not rest on the courts alone, but that the legislature is the ultimate guardian of the liberties and welfare of the people, that its members and the governor are required to take an oath to support the Constitution, both Federal and state, and that the

> presumption is that they have obeyed this oath, have been careful to observe the requirements of the Constitution in enacting statutes, and have intended no violation of the Constitution. Therefore, every presumption is to be indulged in favor of faithful compliance by Congress with the mandate of the Constitution, and in determining the nature of a remedy given by an act of Congress, it must be presumed that Congress intended that it be constitutionally sufficient.
>
> "A statute enacted with the constitutional formalities comes before the courts sustained and authenticated by the sanction and approval of two of the three great departments of state government; hence the presumption in its favor. Unless a statute is clearly unconstitutional, the courts, in determining its validity, may not ignore the concurrence of opinion of validity by Congress and the legislatures of the various states.
>
> "A presumption producing an effect opposite to that herein announced - namely, that a legislative body is presumed to exceed its authority or is presumed to have intended a violation of the Constitution - is never indulged by the courts."

In support of the rule that the presumption is that members of the Legislature and the Governor have obeyed their respective oaths see the following cited cases: State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L. R. A. (N. S.) 188; Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425; State ex rel. Langer v. Crawford, 36 N. E. 385, 162 N. W. 710, Ann. Cas. 1917E, 955 (concurring opinion); Sutherland v. Miller 79 W. Va. 796,

91 S. E. 993, L. R. A. 1917D, 1040; Duncan v. Baltimore & O. R. Co., 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912B, 272. And in support of the second presumption that no violation of the Constitution was intended, among numerous cases cited is the following Iowa citations: Iowa Motor Vehicle Asso. v. Railroad Comrs., 207 Iowa 461, 221 N. W. 364, 75 A. L. R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151, Hunter v. Colfax Consol. Coal Co., 175 Iowa 245, 154 N. W. 1037, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803.

And treating generally of the status of claimed unconstitutional acts as related to the Legislature and courts, is the case of Des Moines Gas Co. v. City of Des Moines, 44 Iowa 505, 24 Am. Rep. 756, where it is said:

> "* * * it was sought to enjoin passage of an ordinance on the ground that the ordinance would impair the obligations of plaintiff's contract and, therefore, would be unconstitutional. The Supreme Court of Iowa held that the court had no power to interfere with the legislative body of the city in the enactment of the proposed ordinance. In its decision in the case, the court said:
>
> "'The General Assembly is a co-ordinate branch of the State government, and so is the law-making power of public municipal corporations within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. But the unconstitutional acts of either may be annulled. Certainly the passage of an uncon-

> stitutional law by the General Assembly could not be enjoined. If so, under the pretense that any proposed law was of that character, the judiciary could arrest the wheels of legislation. "'Had the ordinance under which the plaintiff claims been enacted by the General Assembly, and the plaintiff acquired thereunder the same rights as under the ordinance, and the General Assembly thereafter attempted to enact a law in substance like the ordinance sought to be enjoined, could the judiciary interfere and by injunction restrain the action of the General Assembly on the ground that the law if enacted would "impair the obligation of contracts?"'"

In view of the foregoing, it is my opinion that designation of emergency interim successors as provided by Chapter 89, Acts of the 58th General Assembly, by you would not constitute an unconstitutional act or be a violation of your constitutional oath.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

STATE OFFICERS AND DEPARTMENTS: Fire Marshal--Rules promulgated relating to Storage and Handling of Liquefied Petroleum Gases. Whether an insured has complied with the by-laws relating to storage of liquefied petroleum gases of the insurer is a private matter and of no concern to this department. (Pesch to VanGinkel, Cass Co. Atty.) 8/6/59) # 59-8-7

August 6, 1959

Mr. James Van Ginkel
County Attorney of Cass County
Atlantic State Bank Building
Atlantic, Iowa

Dear Mr. Van Ginkel:

Receipt is acknowledged of your letter under date of August 4, 1959, as follows:

> "A liquefied petroleum gas dealer here in Atlantic recently ran into a conflict between the rules and regulations of the State Fire Marshall and the by-laws of a fire insurance association. I would appreciate a letter as to your thinking on this question and it arose as follows:
>
> "As you can see the problem is where the law says 10 feet can an insurance companys by-laws provide for a greater distance. The petroleum gas dealer argues that the law was passed not only for the protection of the consumer but also for the benefit and protection of the petroleum gas dealer so that they would know what rules they were operating under and to make that rule uniform throughout the State of Iowa."

In reply thereto:

Rule B.6 (b), Iowa Departmental Rules 1958, relating to Storage and Handling of Liquefied Petroleum Gases, promulgated under authority of Chapter 101, Code of Iowa, and filed August 21, 1957, provides as follows:

> "(b) Each individual container shall be located with respect to the nearest important building or group of buildings or line of adjoining property which may be built on in accordance with the following table:

59-8-7

Water Capacity Per Container	Minimum Distances Containers Under-ground	Above-ground	Bet. Above-ground containers
Less than 125 gallons.....	10 feet	None	None
125 to 500 gallons.....	10 feet	10 feet	3 feet
501 to 2,000 gallons.....	25 feet	25 feet	3 feet
Over 2,000 gallons.....	50 feet	50 feet	5 feet"

Your letter imports two questions: (1) Has there been compliance with the rule aforesaid, and, (2) Has there been compliance with the by-laws of the insurance company?

From the facts presented in your letter, the answer to the first question above must be answered in the affirmative, and this is the only question of concern to this department and the State Fire Marshal. Compliance or non-compliance by the insured with the by-laws of the insurer is a matter of private concern between the insured and the insurer, therefore we decline comment thereon.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

HIGHWAYS:
~~BRIDGES~~: County Levy for secondary roads--cities controlling bridge levy included. County levies for secondary road construction do not include the taxable property in cities and towns since all cities and towns now control their own bridge levies. (Lyman to Anderson, Howard Co. Atty.; 8/12/59)
59-8-8

August 12, 1959

C. J. Anderson
Howard County Attorney
Cresco, Iowa

Dear Mr. Anderson:

Your letter of July 27, 1959 in substance asks our opinion on this question:

> "Can a county make the construction and maintenance levy as provided in Section 309.7(1) 1958 Code on towns, when the said towns do not control their own bridge levies?"

In answering this question, we make the assumption that the word "towns" in the question, refers to incorporated towns of less than 2000 population, as defined in Sections 4.1(16) and 363.4(2) 1958 Code. With this assumption made, the answer to the question is no. Section 404.7(8) 1958 Code gives to all municipal corporations the power to levy for bridge purposes and the power to control the said levy.

Thus towns control their own bridge levies, and are excluded from the provisions of section 309.7(1) 1958 Code. For further discussion of this question, you are referred to OAG 1954 Page 50.

Very truly yours,

JLM:mj

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

STATE OFFICERS AND DEPARTMENTS: Highway Study Committee expenses--
Expenses of the Highway Study Committee incurred prior to July 4, 1959, thus without statutory authorization, may not be paid. The appropriation of $25,000 to the Iowa Legislative Research Bureau by S. F. 521, now Ch. 8, Acts of the 58th G. A., may be used to pay the expenses of the three member advisory committee authorized by the statute and expense of nonresident consultant or consultants assisting the Bureau in the performance of the duty imposed. (Strauss to Ringgenberg, Leg. Res. Bur., 8/7/59) #59-8-9

August 7, 1959

Mr. Clayton Ringgenberg
Iowa Legislative Research Bureau
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours of the 6th inst. in which you submitted the following:

> "There are several questions regarding financing of some of the research during this interim which need to be clarified. Please advise me and the state comptroller on the following matters.
>
> "1. The Iowa Highway Study Committee was created by H. J. R. 12 of the 1959 legislative session. The resolution did not have a publication clause; so it became effective in July. To carry out the intent of the legislature to make this comprehensive study, this committee met twice in June. Expense vouchers to reimburse the committee members are now ready to be submitted for payment. Can these expenses now be paid since the law is now in effect?
>
> "2. Senate File 521 of the 1959 session appropriates $25,000 to this office to study the needs of higher education in this state. It authorizes me to appoint a 3-member advisory committee to advise this office in making this study. Can the expenses of these three persons be paid from this appropriation?
>
> "In planning this study it would be helpful to obtain advice from consultants who have made such studies in other states. Can we pay the expenses of a consultant to come to consult with the legislators who are assisting on this study and myself? Can we pay him a fee for his consultation services?

> "To complete this study it is quite certain that I will need to contract with a consultant or consulting agency to do at least part of the research. This was the legislative intent when it made this special appropriation. I thought this matter should be clarified and receive your approval before we employed a consultant."

In reply thereto I advise as follows:

1. In answer to your question #1 I would advise that in view of the fact that this expense was incurred prior to July 4 and prior to statutory authorization for incurring such expense, such expenses are not now subject to payment under the foregoing numbered Joint Resolution.

2. Insofar as your question #2 is concerned, I quote to you the provisions of Senate File 521, now Chapter 8, Acts of the 58th General Assembly, providing as follows:

> "Section 1. There is hereby appropriated from the general fund for each year of the ensuing biennium the sum of twelve thousand five hundred dollars ($12,500), or so much thereof as may be necessary, to the Legislative Research Bureau of the state of Iowa, for a comprehensive study of the needs and facilities available for higher education in Iowa.
>
> "Sec. 2. That in making the aforesaid study the director of said bureau may select an advisory committee of three (3) consisting of a representative from the publicly supported institutions of higher education in Iowa, the privately supported and endowed colleges and universities in the state of Iowa and Junior Colleges, both private and publicly supported in the state of Iowa.

"Sec. 3. That a report of such study shall be filed with the General Assembly on or before the 15th day of January, 1961."

Insofar as the payment of the expenses of the three member advisory committee provided for therein may be made from the appropriation of $25,000, I would advise that the rule relating to expenses of public officers generally incurred in the performance of their official duties is stated in 67 C. J. S., paragraph 91, title Officers, where it is stated that the right of an official to compensation for expenses incurred by him in the performance of an official duty must be found in the provisions of the Constitution or a statute conferring it either directly or by necessary implication, the rule having the support of these authorities: Goode v. Tyler, 186 So. 129, 131, 237 Ala. 106; Jefferson County v. Capanes, 179 So. 637, 235 Ala. 449; Madden v. Riley, 128 P. 2d 602, 53 Cal. App. 2d 814; Clayton v. Barnes, 16 P. 2d 1056, 1058, 52 Idaho 418; City of Fulton v. Shanklin, 122 S. W. 2d 733, 275 Ky. 772; State ex rel. Leis v. Ferguson, 80 N. E. 2d 118, 120, 149 Ohio St. 555; Mackenzie v. Douglas County, 159 P. 625, 1033, 81 Or. 442; Commonwealth ex rel. Duff v. McCloskey, Com. Pl., 56 Dauph Co. 331; Bayless v. Knox County, 286 S. W. 2d 579, 588, 199 Tenn. 268.

The rule would appear to be equally applicable to appointees to a committee such as the advisory committee provided in Chapter 8. No express provision is made therein for the pay-

ment of either compensation or expense of the members of the advisory committee and therefore such expenses could be paid only under the rule of necessary implication. This necessary implication, in view of the purpose of the appointment of the committee, would appear to be present in this situation and their reasonable expenses could be paid.

3. Insofar as your authority exists to secure advice from consultants who have made such studies in other states, it would seem that sound discretion is vested in the Legislative Research Bureau under this statute in performing the duty to make a comprehensive study of the needs and facilities available for higher education in Iowa. It would seem by necessary implication therefore that expenses and fees for the services can be paid from the appropriation.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES: Juvenile detention home -- Mandatory in counties pf 40,000 or more population. (Abels to Sacks Pot. Co. Atty., 8/10/59)
#59-8-10

August 10, 1959

Mr. Kenneth Sacks
Pottawattamie County Attorney
Pottawattamie County Court House
Council Bluffs, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 23 in which you inquire whether compliance with section 232.35 is mandatory upon counties having a population in excess of 40,000 where a private orphanage with "exceptionally good" facilities is located. Your letter is as follows:

> "The Pottawattamie County Board of Supervisors has requested that I write you asking for an opinion pertaining to Section 232.35 Code of Iowa, 1958. Under this section, counties having a population of over forty thousand, the Board of Supervisors shall provide and maintain separate, apart and outside the enclosure of any jail or police station, a suitable detention home and school for dependent and neglected and delinquent children.
>
> "In conformance with that Section, the Pottawattamie County Board of Supervisors has, for a number of years, maintained what is knows as the Parkview Home located in Council Bluffs, Iowa. This home has been used as a juvenile detention home for several years. The present cost of operation is approximately $550 per month. At present, and for more than the past year, there have been only two children living in that home at any one time. Because of these two children, a full time matron and supervisor are required and their salary coupled with the cost of upkeep, food and clothing has proved to be extremely expensive for the County. Please note that this Parkview Home has no detention quarters for delinquents.

59-8-10

"The reason for the lack of use of the Parkview Home is that the Juvenile Court in this jurisdiction have made it a policy to place dependent and neglected children in foster homes in the City of Council Bluffs or nearby, and as a second alternative, have made use of the Christian Home located here in Council Bluffs. The Christian Home is a local orphanage supported by charitable contributions from citizens of the surrounding area. Its facilities are exceptionally good and the Juvenile Court has felt that it is to the best interests of the juveniles concerned that they be placed in the Christian Home rather than the Parkview Home.

"The delinquent children, awaiting hearing or awaiting transportation to the training schools are kept in the juvenile ward of the City Jail.

"The County Board of Supervisors have had a meeting with the Judges of the Juvenile Municipal Court and the District Juvenile Court to discuss the advisability of retaining the Parkview Home as required by Section 232.35. At the meeting, it was decided that an opinion of the Attorney General be requested to determine if the requirements of the statute are met by having available the Christian Home and other private placement homes as well as the juvenile ward of the City Jail.

"We, therefore, would like to ask an opinion as to whether or not, under Section 232.35, the Pottawattamie County Board of Supervisors are required to retain ownership and active management of the Parkview Home in order to comply with the statute, or do they comply satisfactorily by having available the Christian Home and other facilities heretofore mentioned.

"I might add, that the Christian Home and private home placement charges are approximately fifty percent of the cost of management of the Parkview Home."

Section 232.35 provides as follows:

"In counties having a population of more than forty thousand, the board of supervisors shall, and in

> counties of over thirty thousand, said board may provide and maintain, separate, apart, and outside the inclosure of any jail or police station, a suitable detention home and school for dependent, neglected, and delinquent children."

With reference to use of the word "shall", it is generally construed as mandatory. This is particularly true when a statute uses the word "shall" in directing a public body to do certain acts--Hansen v. Henderson, 244 Iowa 650; 56 N.W. 2d 59. It follows that authority to discontinue the juvenile detention home in the circumstances described can only be conferred by further legislation.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

AGRICULTURE: County extension districts---

~~(AGRICULTURE): COUNTY AG. EXT. DISTS: EDUCATION FUNDS~~

County Agriculture Extension Districts may not invest overage extension education funds in time certificates. (Forrest to Willett, Tama Co. Atty.; 8/10/59) # 59-8-11

1959
10 August

Walter J. Willett
County Attorney of Tama County
215 West Third Street
Tama, Iowa

Dear Sir:

Receipt is acknowledged of your request for an opinion as follows:

> "'Does the Extension Council have any right under the law to invest the Agriculture Extension Education Fund in a time certificate as to draw interest?'
>
> I realize ordinarily governmental agencies derive money from taxation generally do not have this right but this law particularly provides for a carry-over of educational funds to the next year with said limitations."

In response thereto, we advise that while under Section 176A.8 (16) districts are authorized to carry over unexpended county agricultural extension education funds into their ensuing budget year, there appears to be no explicit authority for them to invest the same in a time certificate. Close examination of the powers and duties of the Council (176A.8) and the limitations on such powers (176A.9) do not reveal any authority, express or implied, which would authorize such investment.

Section 176A.8 (14) authorizes the council "to and shall deposit all funds received from the 'county agricultural extension education fund' in a bank or banks approved by it (council) in the name of the extension district". (emphasis supplied) Further, 176A.14 (4) reads in pertinent part as follows: Treasurer (of the council) shall receive, deposit and have charge of the funds of the extension council..." (emphasis supplied)

However, officers in control of public funds are governed by strict regulations with regard to deposits of such funds and they are generally held to be without power to deviate from the letter of the governing statutes except where such action appears to be justified by the necessities of the occasion. (104ALR622)

County education districts are creatures of statute. Under familiar rules of statutory interpretation, creatures of statute are limited to those powers expressly given them. In view of the general law regarding creatures of statute as well as the authorities limiting the depositing of public funds unless otherwise directed by statute, it is the opinion of this office that County Agriculture Extension Districts may not invest overage extension education funds in time certificates.

Very truly yours,

FREEMAN F. FORREST
Assistant Attorney General

FFF/1

TAXATION: Moneys and Credits; Trusts--That the securities held in trust by a foreign trustee out of the state are not assessable as moneys and credits to the resident settlor-beneficiary. The power of revocation retained by the resident settlor, despite the inability to exercise the power on tax day is subject to taxation. (Gill to Lier, Scott Co. Atty.; 8/10/59) # 59-8-12

August 10, 1959

Martin D. Lier
County Attorney
Scott County
Davenport, Iowa

Attention: H. T. Lewis

Dear Sir:

This will acknowledge receipt of your letter of July 9, 1959, wherein the following inquiry was submitted:

> "The opinion of your office is requested as to whether or not the Scott County Treasurer should assess moneys and credits tax in the estate of Bernard A. Spaeth, deceased, for certain securities which were held in trust at the time of and prior to the death of Mr. Spaeth.
>
> "Mr. Spaeth died on January 30, 1958. At the time of his death, and at all times pertinent hereto, he was a resident of Scott County, Iowa.
>
> "On December 1, 1937 Mr. Spaeth created a trust with the Northern Trust Company, an Illinois corporation, located at Chicago, as trustee. At that time Mr. Spaeth assigned, transferred and conveyed to the trustee certain securities together with other property. The trust is, and has been since said date in full force and effect and is, and was, administered by the Northern Trust Company. During all this period of time the securities in this trust are and have been in the trustee's possession and control at Chicago, Illinois.
>
> "According to the provisions of the trust instrument, the income from these securities held in trust was paid to the Settlor. I am setting out below three paragraphs from the trust indenture which I feel are important in determining whether or not these securities are subject to moneys and credits tax:

'Notwithstanding that the Settlor and any or all of the beneficiaries under this Indenture may now or at any future time be domiciled elsewhere than in the State of Illinois, this Indenture shall be regarded for all purposes as an Illinois document; the validity and construction thereof shall be determined and governed in all respects by the laws of the State of Illinois, and the trusts, powers, and provisions herein contained shall be administered, exercised, and carried into effect according to the laws of the State of Illinois, but this provision shall not prevent the Trustee from removing the trust property, or any part thereof, outside of the jurisdiction of the State of Illinois at any time and so often as it deems advisable.

'During the lifetime of the Settlor, the Trustee shall pay the entire net income from the trust estate in convenient installments to the Settlor or otherwise as he may from time to time direct in writing. The trustee shall also pay to him such part or all of the principal of the trust estate as he shall request in writing from time to time, provided that such request shall be made at a time when the Settlor has the power to alter, amend or revoke this Indenture of Trust under the provisions of Paragraph 36 hereof.

'The Settlor shall have the right during his lifetime to alter, amend or revoke this Indenture of Trust either in whole or in part at any time and from time to time between the 15th day of January and the 15th day of December in any calendar year or years, by instrument in writing delivered to the Trustee; provided, however, that if altered or amended, the duties, powers and responsibilities of the Trustee shall not be substantially changed without its consent. In case of revocation, the trust estate, or that part thereof as to which this Indenture may be revoked, shall be conveyed by the Trustee to the Settlor or in accordance with his written directions. The right herein reserved to the Settlor shall be deemed to be a personal right which shall not pass to his legal representative.'

"In addition to the above pertinent provisions, the trust Indenture also provided for an investment advisor. The Settlor, Mr. Spaeth, was named as this advisor and, as such, had the right to direct any investment changes to be made by the trustee in connection with the retention or sale of trust securities (but this

right did not permit the Settlor during the irrevocable period to obtain any part of the principal of the trust estate), and the right to vote stock held by the trustee. The powers of the investment advisor were for the entire year, subject to the Settlor's death, resignation or incapacity, and were not restricted during the irrevocable period between December 15 and January 15.

"The instrument further provided for an investment committee to be selected and appointed by the Settlor in the event that he was unable or did not wish to act as investment advisor. This investment committee was to be comprised of two members of his family and two disinterested parties.

"On December 11, 1957, Bernard A. Spaeth executed two powers of attorneys, one to his son, Bernard L. Spaeth and the other to his son, Carl J. Spaeth. A day or so after the execution of these powers, Mr. Bernard A. Spaeth become incapacitated and remained so until his death. He was, in fact, incapacitated on January 1, 1958. During the period of incapacity which preceded his death he could not and did not act as investment advisor, and the investment committee acted in his stead.

"Assuming that the securities in question were not otherwise exempt, would you please advise whether or not the above referred to securities could be considered as being under the control or management of Mr. Spaeth on January 1 , so that said securities would be required to be listed and subject to moneys and credits tax in accordance with Section 428.1 and 428.4 of the 1958 Code of Iowa."

In answering the problem set forth, sections 427.13, 428.1, 428.4, 428.9, 429.1, 429.2 and 429.10, Code of Iowa (1958), must be considered. The applicable provisions of the aforementioned sections are set forth below:

"427.13 What taxable. All other property, real or personal, is subject to taxation in the manner prescribed * * *."

"428.1 Listing--by whom. Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed:

" * * *.

"3. The property of a beneficiary for whom the property is held in trust, by the trustee.

" * * * ."

"428.4 Personal property--real estate--buildings. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *."

"428.9 'Owner' defined. Commission merchants, and all persons, other than warehousemen as defined in section 542.58 trading and dealing on commission, and assignees authorized to sell, and persons having in their possession property belonging to another subject to taxation in the assessment district where said property is found, when the owner of the goods does not reside in the county, are, for the purpose of taxation, to be deemed the owners of the property in their possession."

"429.1 'Credits' defined. The term 'credit', as used in this chapter, includes every claim or demand due or to become due for money, labor, or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage, or otherwise; * * *."

"429.2 Moneys--credits--annuities--bank notes--stock. Moneys, credits, and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks and not otherwise taxed in kind, shall be assessed and, excepting shares of stock of national, state, and savings banks, and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected <u>where the owner resides</u>." (Emphasis added)

"429.10 Deductions to fiduciary. In listing moneys and credits as provided in this chapter, any administrator, executor, trustee, or agent shall be entitled to deductions, as prescribed in sections 429.4 to 429.9, inclusive, of debts owing by the

> legatee, devisee, beneficiary, or principal to the same extent as such fund might be reduced if it were held by such legatee, devisee, beneficiary, or principal who may be entitled to the income on such trust or fiduciary fund."

From a reading of the foregoing sections, it is obvious that money and credits tax must be assessed and collected where the owner resides. Therefore, when certain intangible personal property has been appropriated to a revocable trust fund, who is the "owner" of such property for the purposes of collecting this tax? It is usually stated that the trustee has the "legal title" to the trust res, but merely for the performance of the duties imposed by the trust instrument, Ellsworth College v. Emmet County, 156 Iowa 52, 135 N.W. 594; or in other words, the trustee takes the estate necessary to execute the trust, Keck v. McKinstry, 206 Iowa 1121, 221 N.W. 851. It is apparent in construing sections 428.1 (3), 428.9 and 429.10, supra, together that it was contemplated that if moneys and credits were part or the whole of a trust res, that the trustee was to be considered the "owner" for purposes of assessing and collecting the tax on such intangibles as opposed to the "equitable title" of the beneficiaries. It may be stated that the general rule is that where personal property is in the hands of a trustee, in his official capacity, it is assessable and taxable to him at the place of his domicile. For cases recognizing this rule, see 172 A.L.R. 341 supplementing 127 A.L.R. 379, 67 A.L.R. 393. The Iowa Supreme Court in Hunter v. Board of Supervisors, 33 Iowa 376, 11 A.R. 132, stated:

> "We may concede that moneys and credits under the control or management of an agent in another state, belonging to a resident in this state, with a view to be invested, loaned or used for pecuniary profit by such agent, would not be the subject of taxation in this state."

The foregoing statement may be weakened in that the Court need not have considered that situation, since the facts of the case before them were different. This department in an opinion found in 1940 Report of the Attorney General, page 461, 462, cited the brief of the person requesting the opinion, wherein it states:

> "If money and credits are therefore to be taxed to the guardian where the guardian lives, rather than to the ward where the ward lives, it certainly would follow that moneys and credits would be taxable where the trustee lived, rather than to the beneficiary where the beneficiary lived and if the trustee was a non-resident, no Iowa moneys and credits tax could be levied."

The Attorney General at the close of his opinion approves the foregoing as follows:

> "You have given us the benefit of your brief and your conclusion that such intangible personal property is only subject to taxation at the place where the trustee lives and keeps the assets. We agree with that conclusion."

Another opinion of this office supports the above cited ruling, which is found in the 1911-1912 Report of the Attorney General, page 622:

> "If he has no legal residence elsewhere, then his temporary residence of a year should be considered his place of residence, and he should give in all moneys and credits, choses in action, and intangible property, unless the same is kept entirely without the state and not under his personal charge and also taxed in another state."

In further support of the aforementioned General Rule, an excerpt from the 1930 Report of Attorney General, page 226, is set forth:

> "We find no statute in this state which would require a foreign trustee to list in state for taxation any property in its possession in said foreign state, the situs of the property being the underlying principle governing the right to tax property for general purposes."

In response to your question, it would appear in view of the previously cited authorities, that intangible personal property, i.e., secutities in this case, held outside of the state by a foreign trustee, are not subject to assessment and taxation as moneys and credits in this state to the resident settlor-beneficiary.

Yet, this is not the end of the problem, for while the securities as such, are "owned" by the foreign trustee, the settlor of this revocable trust is also the owner of

"something". What is that "something"? Namely, a power of revocation, allowing the settlor to acquire the trust res. Although there is no apparent authority in Iowa on this particular point, because attention has been directed solely to the question, whom is the "owner" for purposes of taxation, of the property that makes up the trust res; the power of revocation reserved by a settlor is separate and distinct from the "rights" which are held in trust. This distinction appears to have been recognized in an opinion of this office found in the 1930 Report of the Attorney General, page 180, wherein the following problem is set forth:

> "Where a resident of the State of Iowa has purchased shares of interest in a revocable trust of which a resident of New York is sole trustee, and the Iowa resident is sole beneficiary, the body of the trust consisting of common stocks, are such shares of interest required to be listed for personal property taxation in Iowa?"

The Attorney General's conclusion follows:

> "We are of the opinion that, under the laws of this state, shares of interest in the revocable trust, such as set out in your question, are taxable as monies and credits." (Emphasis added)

Shares of interest are the written evidence of the holder's "rights" over a portion of the whole of the trust estate, or in other words, the holder's right to a certain part of the fund if he returns the shares to the trustee.

Then can it be said that the failure to have a writing, evidencing the same type of right in a revocable trust, cannot then be taxed as intangible personal property? It is felt not! That this power held by the settlor can be taxed is supported by cases from other jurisdictions, Curry v. McCanless, 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339 (1939); Bullen v. Wisconsin, 240 U.S. 625, 6 L. Ed. 830, S. Ct. 473 (1916); Wood v. Ford, 148 Fla. 66, 3 So. 2d 490 (1941). The two United States Supreme Court cases cited are concerned with inheritance tax, but except for the oretical differences between property and inheritance tax, the test for both is whether.

the property affected is within the jurisdiction; see Nossaman, Trust Administartion and Taxation, section 50.08 for cases cited therein. The power of revocation is a personal right of the settlor in the trust before us, and the situs of this intangible right must be the domicile of the settlor, i.e., Iowa; for he is the "owner" just as the trustee is the "owner" of the "rights" evidenced by the securities. It would appear that section 429.1 supra, defining "credits", can be construed broadly enough that a power of revocation is intangible personal property that would fall within the purview of section 428.1 and section 428.4, supra.

One more question must be answered before saying that in the particular case we are dealing with, the power of revocation can be taxed. That is, whether the fact the settlor cannot exercise this power between the dates of December 15, to January 15, keeps the power from being taxed? The problem arises because January 1, is tax day under section 428.4, supra, and must be assessed in the name of the owner. The words of Lord St. Leonard appear most apt here:

> "To make a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes." Sugden, Powers 8th Ed. 396; Gray, Perpetuities, section 526b, 1st Ed. pp. 334, 335.

It must be construed that the power of revocation is a continuing power in the settlor, but that the exercise of such is curtailed during the aforementioned period. For there seems, little doubt, that if the settlor requested the reconveyance of the trust res during this period to take place on January 16, that his wish would not be complied with, or that the court would not uphold the settlor.

In conclusion, it is advised:

1. That the securities held in trust by a foreign trustee out of the state are not assessable as moneys and credits to the resident settlor-beneficiary;

2. The power of revocation retained by the resident settlor, despite the inability to exercise the power on tax day is subject to taxation. The value of this intangible personal property, being the value of the trust res over which he has the power of revocation.

Very truly yours,

Gary S. Gill
Assistant Attorney General

GSG/bjf

BANKS AND BANKING: Small loan companies --

1. Under Code section 536.12 the Superintendent of Banking has discretion, upon making the factual determination therein described, to permit a small loan business to occupy joint quarters with a loan business operated on the Morris plan.

2. As an aid to making the said factual determination, the superintendent may require the would-be joint occupants to enter into an agreement to the end that the provisions of the small loan act may be kept inviolate. (Abels to Gronstal, St. Bank Supv. 8/10/59) # 59-8-13

Mr. Joe Gronstal
State Superintendent of Banking
500 Central National Bank Bldg.
Des Moines, Iowa

Attn: Walter Ewald, Supervisor
Small Loan Division

Dear Sir:

You have recently submitted the following inquiries:

(1) Does the Superintendent of Banking have the authority to permit the operator of a small loan business to take office space in the same offices where is housed a loan business under the Morris plan?

(2) May the Superintendent, as a prerequisite to granting such authority, require the operators of the respective businesses to enter into an agreement setting forth the restrictions upon which permission to operate a small loan business at such location will be conditioned?

Pertinent to your inquiry are sections 429.11 and 429.12, Code 1958, which relate to loan businesses conducted upon the Morris plan, and sections 536.12 and 536.20, relating to the licensing of small loan companies. Since Morris plan businesses are under the supervision of the Auditor of State, your decision in each case would be whether or not a small loan license should be issued to a given applicant and your primary source of guidance would be found in the provisions of chapter 536 of the Code. Likewise, the only concern of your department in entering into such agreements would be the enforcement of the small loan law against licensees thereunder. This much seems clear from the provisions of section 536.20, hereinafter set forth as follows:

"This chapter shall not apply to any person doing business under and as permitted by any law of this state or of the United States relating to banks,

59-8-13

> savings banks, trust companies, building and loan associations, credit unions or licensed pawnbrokers, nor shall it apply to any domestic corporation entitled to the benefits of sections 429.11 to 429.13, inclusive."

Thus, the operations of the Morris plan business would be of concern to your department only to the extent that its operations, considered together with the operations of an adjacent small loan licensee, might reveal violations of the law by the small loan licensee.

On the subject of location of a small loan business, section 536.12 provides in pertinent part as follows:

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

With respect to your first question it is clear from section 536.20 that a Morris plan business would commit no violation of the small loan chapter by officing with a small loan licensee. Section 536.20 plainly states that chapter 536 has no application to Morris plan businesses. Therefore, the matters of concern to you is whether the small loan licensee would violate the law by officing with such other business. Section 536.12, supra, states there is no violation where the joint officing arrangement is "authorized in writing by the superintendent". In answer to your first question you are, therefore, advised you have direct statutory authority to authorize such officing arrangements.

In answer to your second question you are advised that before you can authorize such joint officing arrangement you must, by the terms of the statute, satisfy yourself "that the character of such other business is such that the granting of such authority would not facilitate evasions of this chapter or of the rules and regulations lawfully made by him hereunder". If, in fact, the agreement described in your inquiry, will aid

you in making the finding in question, or in the general enforcement of the small loan chapter, it may properly be required by you of the applicant.

In arriving at the above conclusions we are in harmony with opinions appearing at page 63 of the 1948 Report of the Attorney General and at page 61 of the 1936 Report of the Attorney General. In the 1936 Report, it is said, at page 62:

> "It is apparent then, that the conduct of any business in the same place of business as the small loan business is expressly prohibited except where authorized by you and based upon your finding that the character of the business is such that its operation would not facilitate evasions of this act or of rules and regulations lawfully made . ." (Emphasis supplied)

The opinion continues on page 63:

> " . . . we would suggest that it is our opinion that the Legislature did not intend to allow a small loan company to operate another type of loan business in its office even though it be done by a separate department and a separate set of books and records kept."

The latter quotation is not inconsistent with the conclusions hereinabove stated in answer to your question for the reason that the situation concerning which you inquire does not refer to the operations of a Morris plan business by a small loan company nor does it refer to the maintenance of a Morris plan department by a small loan company. Your question contemplates the housing of separate businesses in the same office or building and the agreement form submitted with your file would appear designed to prevent the evils discussed in the 1935 opinion. It appears only logical that separate businesses housed in the same quarters under the terms of such an agreement would be less likely to indulge in the pernicious practices which the Legislature intended to curb, than would they be in the absence of such an agreement even though housed in separate buildings or separated by the width of the street or even the span of the business district.

The 1947 opinion quotes from the 1935 opinion need not be separately discussed.

It is noted from the file submitted by you that under similar statutes Wisconsin, Minnesota and Kentucky permit joint officing under such agreements. Of interest in connection therewith is an opinion of the Honorable Miles Lord, Attorney General of Minnesota, Harold J. Soderburg, Assistant Attorney General, dated January 29, 1959, which answers questions substantially similar to yours as follows:

"1. M.S. 56.12 provides in part as follows:

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

"The foregoing is the sole provision of the statutes applicable to this question. Your letter states that 'authority to allow the Industrial Loan and Thrift Company * * * * would not facilitate evasions of the Small Loan Law.' We assume that you have determined also that the character of this other business is such that it would not facilitate evasions of any rules and regulations made under the Small Loan Act. The responsibility for making the determination that its character would not 'facilitate evasions' is expressly imposed upon your office and we cannot pass judgment upon the validity of the determination. Given that determination, it is apparent from the statute that you have the power to permit the conduct of these businesses within the same office.

"2. If the restrictions contemplated relate to conditions necessary to the determination that 'the character of the other business * * * would not facilitate evasions', such conditions would first have to become a part of the character of the other business. Therefore, there would be no occasion to impose or agree to any such restrictions. Any restrictions not necessary to that determination but necessary for enforcement of the act would be imposed under the authority given to the commissioner in M.S. 56.21."

In summary, the answers to your two questions are as follows:

1. Yes, under the conditions prescribed in section 536.12, Code 1958.

2. Yes, for the purpose of aiding in the "finding" of fact prescribed in section 536.12 as well as for the purpose of aiding in the enforcement of chapter 536 of the Code and rules and regulations promulgated thereunder.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

HIGHWAYS: Width of - In the absence of any statute prescribing the width of a county road, there can be no presumptions of any specific width. (Lyman to Ford, Des Moines Co. Atty.; 8/12/59) #59-8-14

Ames, Iowa

August 12, 1959

Mr. T. K. Ford
Des Moines County Attorney
Burlington, Iowa

Dear Mr. Ford:

Inquiry is made concerning a road appearing on county plats prior to 1840. The plats do not show the width of this road. Specifically your question is:

> "Could you, therefore, advise us whether there is a statutory or other legal presumption as to the width of a county road laid out prior to 1840."

There appears to be no statute creating a presumption of width of a county road. However, Richardson vs. Derry, 226 Iowa 178, 284 NW 82, does establish the following:

> "The record is silent regarding the width of the highway as established in 1866. Section 820 of the Revision of 1860 provides that county and state highways thereafter established must be 66 feet in width, unless otherwise specially directed. As there is no evidence of any special direction otherwise, appellees contend that it must be presumed that the highway, when established, was established as 66 feet in width. We hold that the contention of appellees in this regard must be sustained."

Thus, the problem resolves itself into ascertaining the territorial law under which the county road was constructed.

59-8-14

August 12, 1959

Mr. T. K. Ford

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The territorial government of Iowa was established by act of Congress in 1838. Prior to that time the territory of Iowa constituted a part of the Wisconsin territory. On examination of both Iowa and Wisconsin territorial law, I find no provision establishing the width of a county road. The only width provision is that enacted by the first session of the legislative assembly of the territory of Iowa which was approved on December 17, 1838. This enactment established the width of territorial roads as 70 feet. See Dickson vs. Davis County, 201 Iowa 741, 205 NW 456.

In the absence of any statute prescribing the width of a county road, there can be no presumptions of any specific width.

Therefore, you are advised that there can be no presumption of width of a county road authorized in or prior to 1840.

Very truly yours,

HVF:MS

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

State of Iowa

Department of Justice

Des Moines

NORMAN A. ERBE
ATTORNEY GENERAL
JAMES H. GRITTON
ASSISTANT ATTORNEY GENERAL

August 13, 1959

Liquor Commission --

STATE OFFICES AND DEPARTMENTS: ~~LIQUOR CONTROL COMMISSION~~
No authority to permit sale in grocery stores. (Gritton to Leir, Scott Co. Atty., 8/13/59) # 59-8-15

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

Dear Mr. Leir,

Your recent letter is as follows:

> I have received a request for an opinion which I believe has state-wide interest and therefore I believe that your office might express an opinion.
>
> Apparently the Iowa Liquor Control Comission considered the matter but has not submitted any answer. A copy of their letter is enclosed herewith.
>
> I quote from the request for this opinion as follows:
>
> "Enclosed is a recipe booklet from _____ showing its many uses. _____, as you know, is used in mixing cocktails and is also used in preparing salads and food dishes. The alcoholic content of _____ is 45%; however, orange and lemon extract have an alcoholic content of 80% and even ordinary vanilla has an alcoholic content of 35%.
>
> "We would appreciate your giving us a ruling showing that this item can be stocked in grocery stores, providing the Iowa State Law permits it to be carried in grocery stores."
>
> Also enclosed is a recipe booklet which may or may not be of any value in this matter.
>
> Your early consideration will be very much appreciated.

This office has no authority to issue a permit to stock this product in grocery stores. I would suggest that a court action would be necessary to obtain such a ruling.

Yours truly,

JAMES H. GRITTON
ASSISTANT ATTORNEY GENERAL

59-8-15

State of Iowa

Department of Justice

Des Moines

NORMAN A. ERBE
ATTORNEY GENERAL

JAMES H. GRITTON
ASSISTANT ATTORNEY GENERAL

August 13, 1959

LETTER OF OPINION

CONSERVATION : State Conservation Commission Salaries --

~~STATE CONSERVATION COMMISSION:~~ ~~CONSERVATION OFFICERS SALARIES~~

1. Officers are entitled to additional compensation only after obtaining maximum basic salaries of $4,680
2. Years of continuous employment with the state applies only to the additional compensation.

(Gritton to Powers, St. Cons. Com., 8/13/59) #59-8-16

Mr. Glen Powers
Director
State Conservation Commission

Attention: H. W. Freed

Your letter of August 11, 1959 is as follows:

> The 58th General Assembly passed Senate File 287, which sets up a new salary schedule for our Conservation Officers. Attached is a memorandum which I sent to all Conservation Officers outlining Section 107.13, entitled "Officers and employees salaries". This section of the Code now reads according to the passage of Senate File 287.
>
> I explained to the Conservation Officers how I interpreted this law and thus arrived at their salary for the pay period beginning July 1959. My interpretation of this law was that a Conservation Officer had to go through the various salary steps which makes up the basic salary plan, starting at $3780 per year and reaching the top of $4680 per year. I felt that the law was specific in that anyone, regardless of where they had worked in previous years continuous employment with the State of Iowa would not effect the various steps that these men would have to go through.
>
> I further interpreted the law in that I allowed their $180.00 per year increase on the longevity pay schedule for each five years of continuous service rendered to the State of Iowa. I granted this increase regardless of where they were in the basic salary setup for the Conservation Officers.
>
> Since so many questions have arisen from the Conservation Officers, for they were informed by their supervisors that the law would read, "that all State employment regardless of which department they were working for would be accountable on both the basic salary plan and also the "longevity pay plan". My interpretation of the law would not permit this.

59-8-16

Since there has been many questions asked concerning the interpretation of this law we are requesting your opinion as to how it should be interpreted. In re-studying the law as it is written, there is a question in my mind weather my interpretation is accurate, due to one word in the law.

About the middle of the law as it is typed up in the memorandum there is the word "Thereafter" which is now causing me quite some concern. That part of the law states as follows - "Thereafter conservation officers shall be paid additional compensation in accordance with the following formula." This part of the law comes right after the section that explains the setup of the basic salary plan for Conservation Officers, and that part of the act that follows this statement covers that as setup for the longevity pay plan.

Due to the fact, that this word,"Thereafter" is in there it now appears to me that all Conservation Officers must reach the top of their basic salary plan, $4,680 per year, before they are entitled to any longevity pay plan.

Will you please give this matter your earliest possible consideration so that we can make any adjustments necessary prior to the time these men will receive their pay check for the August payroll period. This payroll will be made out in this office on or about August 20 for the pay period.

Section 107.13 Code of Iowa, 1958, as amended by Chapter 124, Acts of the 58th General Assembly is as follows:

Officers and employees-salaries. Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained state forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules, and regulations, the enforcement of which are herein imposed on said commission. Said officers shall be known as state conservation officers. The salaries of the state conservation officers shall be thirty-seven hundred eighty dollars ($3,780.00) per year for the first year of service. A salary increase of fifteen dollars per month shall be granted to each officer at the end of the first year and every six months thereafter until an annual salary rate of forty-six hundred eighty dollars ($4,680.00) is reached. Thereafter conservation officers shall be paid additional compensation in accordance with the following formula: When conservation officers have served for a period of five years their compensation then being paid shall be increased by the sum of fifteen dollars per month beginning with the month succeeding the foregoing described five-year period;

> when conservation officers have served for a period of ten years their compensation then being paid shall be increased by the sum of fifteen dollars per month beginning with the month succeeding the foregoing described ten-year period, such sums being in addition to the increases provided herein to be paid after five years of service; when conservation officers have served for a period of fifteen years their compensation then being paid shall be increased by the sum of fifteen dollars per month beginning with the month succeeding the foregoing described fifteen-year period, such sums being in addition to the increases previously provided for herein; when conservation officers have served for a period of twenty years their compensation then being paid shall be increased by the sum of fifteen dollars per month beginning with the month succeeding the foregoing described twenty-year period, such sums being in addition to the increases previously provided for herein. In order to receive the additional compensation herein provided, all years of continuous employment with the state shall be included in computing length of service."

Webster's New International Dictionary of the English Language unabridged, 2nd edition, defines thereafter as: "After that; after-ward; subsequently."

I am therefore of the opinion that a Conservation officer must have obtained the maximum annual salary of $4,680 before he is entitled to the "additional compensation" provided for in the Section set out above. I am further of the opinion that all years of continuous employment with the State to be included in computing the length of service applies only to the "additional compensation" provided for in this section.

Yours truly,

James H. Gritto
Assistant Attorney General

CONSERVATION: Mink license -- License required by Code section 109.60 not repealed by Chapter 138, Acts of 58th G. A. (Gritton to Strand, Winneshiek Co. Atty., 8/13/59) #59-8-17

C O P Y

Paul D. Strand
County Attorney
Utilities Building
Decorah, Iowa

Dear Mr. Strand:

Your letter of July 31, 1959 is as follows:

> We have had the question raised in this country as to whether or not a person who is engaged in the business of raising mink for the purpose of later selling the furs of said mink to be placed and made into mink coats, etc. needs to have a license as provided in Section 109.60 or whether or not the laws recently passed by the 58th General Assembly and in particular House File eighth, chapter 138 which states that perhaps that would be a domesticated fur-bearing animal and hence would take the fur-bearing animal away from the authority of the State Conservation Department for purposes of licensing.
>
> Question: No. 1 -- Because of this chapter would the raising of mink be held the production of domesticated fur-bearing animals and if so, because of Chapter 138 House File 8 are these people required to have licenses as proposed by Section 109.60 of the Iowa Code?
>
> I would appreciate your earliest correspondence on this matter, I remain,

The pertinent sections of the Code of Iowa are as follows:

> 109.60 Raising game. It shall be unlawful for any person to raise or sell game of the kinds protected by this chapter without first procuring a game breeder's license as provided by law.
>
> 109.40 Fur-bearing animals. The following are hereby declared to be fur-bearing animals for the purpose of regulation and protection under this chapter: Beaver, badger, mink, otter, muskrat, raccoon, skunk, opossum, spotted skunk or civet cat, weasel, coyote, wolf, ground hog, red fox, and gray fox.

159.2 OBJECT OF DEPARTMENT. The object of the department of agriculture shall be:

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. (Underscoring indicates words inserted by Chapter 138, Acts of 58th General Assembly.)

Although these Sections in part relate to the same subject matter, they are in no way inconsistent. The general rule is that implied repeal is not favored.

I am therefore of the opinion that a license pursuant to section 109.60, Code of Iowa, is still required.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

CITIES AND TOWNS: Special Assessment of State property --

State-owned property is subject to assessment under Sections 391.45 and 391.46, 1958 Code, and assessments, when levied, should be paid by the highway commission from the primary road fund as provided in Sections 2 and 4, Chapter 207, Fifty Eighth General Assembly. (Lyman to O'Connor, Ames, Iowa Highway Com., 8/17/59) # 59-8-18

August 17, 1959

Mr. Ed O'Connor
Maintenance Department
Iowa State Highway Commission
Ames, Iowa

Dear Mr. O'Connor:

According to the correspondence forwarded to this office on August 5, 1959, the State Highway Commission purchased right of way in Humboldt for the relocation of primary highway #3. Specifically, lots 1, 2 and 3, block 24, Second College Addition, were purchased. A portion of each of these lots was not needed for right of way purposes. Now, as a result of an asphaltic paving improvement in Humboldt, under Chapter 391, 1958 Code of Iowa, the unused right of way is being subjected to a proposed assessment.

The question is whether this proposed assessment, when levied, should be forwarded to the Excutive Council for payment.

Sections 391.45 and 391.46, 1958 Code of Iowa, provide:

> 391.45 Assessment. When the construction or repair of any street improvement or sewer, or such part thereof as under the contract is to be paid for when done, shall have been completed, the council shall within thirty days thereafter accept or reject the work, and after acceptance of the work shall within thirty days, ascertain the cost thereof, including the cost of the estimates, notices, inspection, and preparing the assessment and plat, and shall also ascertain what the proportion of such cost shall be, by law or the resolution of the council under which such improvement was made or sewer constructed, assessable upon private property, and shall within said time assess such portions upon and against such private property.

> 391.46 "Privately owned property" defined. All property except streets, property owned by the United States, and property owned by the city, shall be deemed privately owned property.

Section 308.5, 1958 Code of Iowa, contained the following authority:

> 308.5 Improvement by city or county. When a city, town, or county shall drain, oil, pave, or hard surface a road which extends through or abuts upon lands owned by the state, the state, through the executive council, shall pay such portion of the cost of making said improvement through or along such lands as would be legally assessable against said lands were said lands privately owned, which amount shall be determined by said council, or board. When payments are to be made by the state executive council they shall be from any funds of the state not otherwise appropriated.

However, the 58th General Assembly, Chapter 207, section 3, repealed chapter 308, 1958 Code of Iowa. Section 4 of this enactment provides:

> When a city, town or county shall drain, oil pave, or hard-surface a road which extends through or abuts upon lands owned by the state or constructs a bridge on any such road, the state, through the highway commission, shall pay such portion of the cost of making said improvements through or along such lands as would be legally assessable against said lands were said lands privately owned. The amount shall be determined by the highway commission and the city, town, or county concerned.

Further, section 2 of Chapter 207 provides that payment be made from the following fund:

> Section three hundred thirteen point four (313.4), Code 1958, is hereby amended by adding thereto the following:
>
> "Such fund is also appropriated and shall be used for the construction, reconstruction, improvement and maintenance of state institutional roads and state park roads and bridges on such roads as provided in section one (1) of this

Act and for the road improvement payments required in section four (4) of this Act."

A discussion of these sections is contained in 1938 Attorney General Report, page 794; 1932 Attorney General Report, page 126; 1928 Attorney General Report, page 373. It is clear from the statutes and the above opinions that land owned by the state is within the definition of private property as used in section 391.46 supra and therefore subject to assessment as provided in section 391.45 supra.

Since Chapter 308 has been repealed the proposed assessments against state-owned lands should not be forwarded to the Executive Council for payment. Such assessments are payable by the Highway Commission as set out in section 4 of Chapter 207 supra and to be paid from the primary road fund as provided in section 2 of Chapter 207.

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

HVF:lle

August 20, 1959

~~CONSERVATION: STATE COMMISSION~~

CONSERVATION: State Commission; Appropriation --
Appropriation of $17,000 found at line 183, Chapter 28, Act of 58th General Assembly may be used to acquire by purchase an existing residence. (Gritton to Powers, St. Cons. Com., 8/20/59) # 59-8-19

Mr. Glen G. Powers
Director
State Conservation Commission

Attention: Wilbur A. Rush

Your letter of July 29, 1959 is as follows:

> Chapter 28, Laws of the 58th General Assembly provides for an appropriation of $1,492,650 to the State Conservation Commission for construction, replacement, repairs, development and alterations to state parks and reserves, state forests and state waters, and for dredging, artificial lake development, erosion control, for stream and lake access, land acquisition, and for siltation and boundary surveys. Line 183 of Section 2 of Chapter 28, Laws of the 58th General Assembly provides for an allocation of $17,000 for a residence for Stephens State Forest.
>
> Mr. C. M. Frudden, Vice-Chairman of the Conservation Commission, is requesting an opinion as to whether or not this $17,000 can be used to purchase a residence for the Forester at Stephens State Forest instead of constructing a new residence on property now owned by the Conservation Commission.
>
> We would appreciate having your opinion as to the legality of purchasing an existing house and lot rather than using the $17,000 to Construct a new residence on state property.

Chapter 28, Acts of the 58th General Assembly in pertinent part is as follows:

> Section 1. There is hereby appropriated to the State Conservation Commission from the general fund of the State of Iowa the sum of one million four hundred ninety-two thousand six hundred fifty ($1,492,650.00) dollars for construction, replacement, repairs, development and alterations to state parks and reserves, state forests and state waters, and for dredging, artificial lake development, erosion control, for stream and lake access, land acquisition, and for siltation and boundary surveys.

59-8-19

Section 2. Said sum shall be allocated in the following amounts:

State Conservation Commission

182	Stephens State Forest	
183	residence	$17,000
	. . . .	
228	Stephens State Forest	
	land acquisition	6,000

A similar problem to one you present was considered by this office in an opinion found at page 185, 1946 O A G. Based upon that opinion and the authorities therein contained, I am of the opinion that the appropriation of $17,000 found at line 183, Chapter 28, Acts of the 58th General Assembly may be used to acquire by purchase an existing residence.

Yours truly,

JAMES H. GRIFFIN
Assistant Attorney General

JHG:amm

HEALTH: Barbers license, shop location --

Barbering cannot be practiced in the "living quarters" or "private home" of a licensee.

A license cannot be denied a part-time barber, if he qualifies otherwise. (Bianco to Kenyon, Health Dept., 8/21/59) #59-8-20

August 21, 1959

Mr. Clyde L. Kenyon
Director, Barber Division
State Department of Health
L O C A L

Dear Mr. Kenyon:

We have your recent favor which states:

"We respectfully request an opinion as to the legality of the policy of the Barber Board in refusing to approve the licensing of a barber shop in a private home, as referred to in Section 158.7 of the Code of Iowa.

"We would like an opinion as to the legality of refusing to renew the license of a part-time barber shop which, due to the hours it is operated, is unavailable for inspection during the work day hours of the state inspectors. Many such shops are not accessible, which results in no inspection being made of them for months and even years at a time."

Section 158.7 provides:

"The state department of health shall prescribe such sanitary rules as it may deem necessary, with particular reference to the conditions under which the practice of barbering shall be carried on and the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. Barbering shall not be practiced in the living quarters of any person. The department of health shall have power to enforce the provisions of this section and to make all necessary inspections in connection therewith. (Emphasis added).

59-8-20

The statute provides, "Barbering shall not be practiced in the living quarters of any person." It does not define what is meant by "living quarters" and we must therefore adopt the rule of construction that words and phrases shall be construed according to the context and approved usage of the language. (Sec. 4.1(2)).

In your letter you speak of a "private home" and I assume you refer to the words "living quarters" as used in the statute, which we think are synonymous as pointed out hereinafter.

Webster's International Dictionary defines the word "living" as "The state of one that lives"; and the word "quarter" as "Place of residence, shelter".

"Live" means to make ones abiding place or home, to dwell, or reside. Daugherty v. Nelson, 234 S.W. 2d 353, 241 Mo. App. 121.

The words "live" and "reside" are synonymous and relate to the domicile or place where a person is deemed in law to reside. Nelson v. Nelson, 24 N.W. 2d 327, 71 S.D. 342.

The word "live" is commonly used as a synonym for "reside". Curtis v. Curtis, 46 N.W. 2d 460, 330 Mich. 63.

Therefore it is our opinion that the intent of the legislature in using the words "living quarters" meant the private home or residence of the person to be licensed as a barber. The statute plainly prohibits the practice of barbering in the residence or private home of such person.

We note the following departmental rule with reference to this provision of the law:

> "Quarters. Barbering shall not be practiced in a residence unless the shop is completely separated from living quarters by a solid permanent partition. A direct outside entrance shall be provided."

We believe that under this rule the board may deny a license, if the shop is not entirely sealed off from the actual parts of the licensee's home, occupied and used as "living quarters" or residence. Also this rule would apply if the licensee's shop happened to be attached to the private home or living quarters of any other person.

With reference to your second question, we are unable to find any provision in the law which would deny a license to a part-time

barber, assuming he meets all the other statutory qualifications. Therefor the answer to your second question is "no". One cannot be denied a license simply because he practices his profession on a part-time basis.

Yours truly,

FRANK D. BIANCO
Second Assistant Attorney General

FDB:kj

COUNTIES: Assessor's salary--
Under the provisions of Chapter 291, Acts of the 58th G. A., the county assessor's salary fixed by the Conference Board, but reduced in amount at the budget hearing, authorized by Section 24.11, Code of 1958, the salary so reduced, after certification of the levy, is the legal salary of the county assessor. (Strauss to Norelius, Crawford Co. Atty., 8/26/59) #59-8-21

August 26, 1959

Mr. William Q. Norelius
Crawford County Attorney
Courthouse
Denison, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 17th inst. in which you submitted the following:

> "Because of the failure of the Conference Board created pursuant to Section 2, House File 709, Laws of the 58th General Assembly, to arrive at a County Assessor's salary, a special Conference Board meeting was called by the Chairman of the Board of Supervisors to fix and authorize the salary of the County Assessor. At said meeting on July 27, 1959, the salary of the Assessor was fixed at $5,400.00 to commence January 1, 1960, and said salary was incorporated in the consolidated budget. On August 10, 1959, a public hearing was held on said consolidated budget by the Conference Board, as provided for by Section 24.9 - 24.12, inclusive, of the 1958 Code of Iowa. At this meeting it was moved, seconded and carried to decrease the consolidated Assessor's budget by decreasing the Assessor's salary $400.00.
>
> "Because of the action of the Conference Board at the public hearing in decreasing the Assessor's budget by $400.00, the County Assessor is not sure as to the salary she is authorized to receive. We would therefore respectfully request your opinion as to whether or not the County Assessor is legally authorized to receive the salary as fixed on July 27, 1959, and as therein incorporated in the consolidated budget, or is she only authorized to receive the decreased salary as set by the budget as amended by the Board and then certified to the levying Board. We would also request your opinion as to the legality of paying the Assessor the salary as originally authorized by the Conference Board at their special meeting, if in so doing the total expenditures budgeted for the operation of the Assessor's office are not increased."

59-8-21

In reply thereto, Chapter 291, section 16, subsection 4, of the Acts of the 58th General Assembly with respect to levy arising out of budget of the Conference Board, provides the following:

> "All tax levies and expenditures provided for herein shall be subject to the provisions of chapter twenty-four (24) of the Code and the conference board is hereby declared to be the certifying board."

Accordingly, the Conference Board, being a certifying body, by the terms of the foregoing statute, its budget and levy are controlled by the provisions of Chapter 24, Code of 1958, and particularly by Sections 24.9, 24.11, and 24.12. These sections provide the following budget and levying procedures, to wit:

> "24.9 Filing estimates--notice of hearing--amendments. 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."

"24.11 Meeting for review. The certifying board or the levying board, as the case may be, shall meet at the time and place designated in said notice, at which meeting any person who would be subject to such tax levy, shall be heard in favor of or against the same or any part thereof."

"24.12 Record by certifying board. After the hearing has been concluded, the certifying board shall enter of record its decision in the manner and form prescribed by the state board and shall certify the same to the levying board, which board shall enter upon the current assessment and tax roll the amount of taxes which it finds shall be levied for the ensuing fiscal year in each municipality for which it makes the tax levy."

Applying these sections to the situation presented, in my opinion, results in:

I

In answer to your Question #1, the salary of the assessor, beginning in 1960, in the proposed budget adopted July 27, 1959, and reduced by $400 at the budget hearing on August

10, 1959, is fixed in the sum of $5000, being $400 less than that fixed by the Conference Board July 27, 1959, and as so fixed at the hearing, should be so certified to the levying board.

II

In view of the foregoing, an answer to your second question is unnecessary.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh5

COUNTIES: Recorder

County Recorder does not have the authority under §343.13, Code 1958, to microfilm instruments offered for recording at length under the provisions of §335.2, Code 1958. The authority to microfilm extends to records and files in his office.

August 27, 1959

Mr. Chet B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. Earl C. Holloway

Dear Sir:

This will acknowledge yours of even date in which you submit the following:

> "There has been a question raised among the recorders over the state regarding the meaning of Section 343.13. This section does not repeal Section 335.2 which provides that all instruments shall be recorded at length.
>
> "The question is, can daily records of deeds, mortgages, etc. be microfilmed and not be recorded in length."

In reply thereto I advise as follows. The answer to the question propounded, in my opinion, is found in the two statutes referred to by you, Section 335.2, Code 1958, which provides the following:

> "General duties. The recorder shall keep his office at the county seat, and shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law."

and Section 343.13, Code 1958, which provides:

> "Miniature photographic copies of records. Any county officer may, at his discretion, make photographic, photostatic, microfilm, microcard, or other accurately reproduced copies, on a durable medium for so repro-

> ducing the original, of records, reports and other papers either filed or recorded in his office. When such copies have been made and have been properly filed and indexed, the county officer may, on approval of a judge of the district court of the judicial district, destroy the original records, reports or other papers that are more than ten years old or place them in the possession of a museum or historical society willing to accept them.".

Section 335.2 above quoted imposes a duty upon the County Recorder to record at length all instruments in writing presented to him for recording. Obviously, this duty is not fulfilled by microfilming daily records of deeds, mortgages, etc. because the discretionary powers conferred on the County Recorder is not to microfilm these mortgages and other instruments, but the originals of records, reports and other papers either filed or recorded in his office. In short, what is required of the Recorder is to record at length instruments in his office, and he has the authority to microfilm records and files in his office.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TOWNSHIPS: Halls and polling places -- No power under Code section 359.28 to condemn site. (Abels to Buchheit, Fayette Co. Atty. 8/26/59) #59-9-2

August 26, 1959

Mr. Mark D. Buchheit
Fayette County Attorney
West Union, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 21 as follows:

> "A question has come up in our County on which I request an Attorney Generals' opinion. The question is as follows:
>
> 'May a township condemn land for the purpose of obtaining a site for a Township Hall and if so under what authority?'
>
> "A township located in Fayette County purchased a country school house for the purpose of having a Township Hall and a voting place, but it cannot obtain a site for said hall without paying a considerable amount of money for same.
>
> "I would appreciate a quick reply to this request insofar as we are being pressed to do something about the situation."

The condemnation powers of townships are defined in Code section 359.28 as follows:

> "The township trustees are hereby empowered to condemn, or purchase and pay for out of the general fund, or the specific fund voted for such purpose, and enter upon and take, any lands within the territorial limits of such township for the use of cemeteries, a community center or juvenile playgrounds, in the same manner as is now provided for cities and towns."

59-9-2

Creatures of statute have only those powers conferred by statute. Expressio unius est exclusio alterius. Township hall sites are not mentioned in the enumeration of things for which the power of eminent domain is granted in the quoted statute.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

MOTOR VEHICLES: Lien of registration fee.

The unpaid portion of a registration fee provided for in Chapter 321, Code 1958, is and continues as a lien on the vehicle irrespective of transfer to a new owner. (Pesch to Statton, Comr. Pub. Safety, 8/26/59)

59-9-4

August 26, 1959

Mr. D. M. Statton,
Commissioner
Department of Public Safety
L O C A L

Dear Sir:

Receipt is acknowledged of your letter under date of August 19, 1959, reading as follows:

> "Section 321.131, Code of Iowa, 1958, provides as follows:
>
> "'All registration or other fees provided for in this chapter shall be and continue a lien against the vehicle for which said fees are payable until such time as they are paid as provided by law, with any accrued penalties.'
>
> "A vehicle is licensed for the current year, and an incorrect fee has been paid in a lesser amount than the correct annual fee. Your opinion is respectfully requested as to whether the unpaid portion of the registration fee remains as a lien on the vehicle after it has been transferred to a new owner?"

In reply thereto:

In addition to Section 321.131, Code 1958, set out in the above letter, Section 321.132, Code 1958, provides:

> "The lien of the original registration fee shall attach, at the time the same is first payable, as provided by law, and the lien of all renewals of registration shall attach on January 1 of each year thereafter."

59-9-4

In an opinion of the Attorney General, the same appearing in the 1922 Report of the Attorney General at page 81, it is stated:

> "The lien of the registration fee attaches against the motor vehicle in the hands of anybody who may own it on January 1 of each year. * * * ."

And, in the 1922 Report of the Attorney General at page 89, it is stated:

> " * * registration and other fees required to be paid are declared to be a lien on the vehicles subject to registration from January 1 of each year after they have been first registered individually. * * * * * ."

Therefore, in view of the foregoing, your question is answered in the affirmative.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

MOTOR VEHICLES: Financial Responsibility. Failure to deposit security following an accident, and, failure to provide proof of financial responsibility not being crimes, the Department of Public Safety may not suspend, under Section 321.210 (6), Code 1958, the operating privileges of an Iowa resident who fails to deposit security following an accident or fails to provide proof of financial responsibility in a foreign state.
(Pesch to Statton, Comr. Pub. Safety, 8/26/59)

August 26, 1959 #59-9-5

Mr. D. M. Statton,
Commissioner,
Department of Public Safety
L O C A L

Dear Sir:

This will acknowledge receipt of your request for an opinion of the Attorney General relative to a certain legal problem therein stated as follows:

> "Under the provisions of Section 321.210, 1958 Code as amended, (or any other provisions of the law to your knowledge), does the Department of Public Safety have authority to suspend the driving privileges of an Iowa resident who has failed to comply with the security after accident provisions of a foreign state? We have reference to cases where there has been no judgment in any court. Also, we are interested in knowing whether or not the Department can suspend the driving privileges of an Iowa resident for his failure to comply with future financial responsibility provisions in foreign states; Again we have reference to those cases where no judgment has occurred in any court.
>
> "It is the Department's understanding that the word "offense" in sub-paragraph six of Section 321.210 has a much broader meaning than the word conviction, or driving offense. In other words, the Department's understanding is that a person who fails to comply with the security after an accident provisions contained in Chapter 321A, or the future financial responsibility provisions contained in the same chapter, has committed an "offense" within the meaning of that term as used in Section 321.210. Our inquiry here, then, is to the effect of whether or not such an offense being committed in another state would justify the Department in suspending the operating privileges of an Iowa resident driver."

59-9-5

In reply thereto:

Section 321.210 (6), Code 1958, reads as follows:

"The department is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

"6. Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation."

The generally accepted meaning of the word offense is a crime or misdemeanor; a breach of the criminal laws. See: People v. Brenta, 64 Cal. App. 91, 220 P. 447; State v. Hirsch, 91 Vt. 330, 100 A. 877; Ex parte Brady, 116 Ohio St. 512, 157 N. E. 69; State v. Johnson, 212 N. C. 566, 194 S. E. 319.

In the case of Rawson v. Dept. of Licenses, 15 Wash. 2d 364, 130 P. 2d 876, loc. cit. 878, the Court set out the pertinent part of the statute which provided:

'"the motor vehicle operator's license * * of any person shall be suspended forthwith without notice or hearing" whenever such person shall have been convicted of any offense which requires suspension or revocation of the license of such person, * * * ."'

In its comments on this particular statute the Washington Court said:

" * , * the section refers to a criminal offense by the driver, concerns him alone, and is not concerned with any damage to any third party."

From a close reading of Chapter 321A, Code 1958, it becomes apparent that failure to deposit security following an accident, and, failure to provide proof of financial responsibility for the future are not breaches of the criminal laws of this State. Such failure in either of the above situations results in suspension of certain of the driver-licensee's privileges.

Therefore, it is my opinion that failure to deposit security following an accident, and, failure to provide proof of financial responsibility not being crimes, the department may not suspend the operating privileges of an Iowa resident who fails to comply with financial responsibility requirements in a foreign state.

Very truly yours,

CARL H. PESCH
Assistant ...

CHP:jml

COUNTIES: Transportation to state institutions -- Compensation of County officers, (1) to university hospital and (2) to a mental health institute is governed by statute. (Ltr. to Hasbrouck, Guthrie Co. Atty., 8/26/59) #59-9-6

August 26, 1959

Mr. Jay J. Hasbrouck
Guthrie County Attorney
Guthrie Center, Iowa

Attn: R. Y. Taylor, Assistant County Attorney

Dear Sir:

Receipt is acknowledged of your letter of August 21 as follows:

> "From time to time, it is necessary that certain persons dependent upon Guthrie County, be transported from this County to the State University Hospital at Iowa City and to the Mental Hospital at Clarinda for treatment.
>
> "At various times, one or more of the members of the Board of Supervisors of said County may drive their personal cars in transportation of these persons and then charge the County for services as a member of said Board for the time of supervision and driving plus mileage at the rate of seven cents per mile, this account being submitted to and paid for by the County.
>
> "I have advised the Board that I find nothing in the Code to determine such practice contrary to law and that they may continue to follow such practice if they so desire.
>
> "Would you please advise me whether or not you are of the opinion that such practice is contrary to law in any respect."

As to transportation to the university hospital you are referred to Code sections 255.13, 255.14, 255.24, 255.25 and 255.26. Section 255.13 provides in pertinent part:

59-9-6

" . . . the court or judge may appoint an attendant who shall receive not exceeding two dollars per day for the time thus necessarily employed and actual necessary traveling expenses by the most feasible route to said hospital whether by ambulance, train or automobile; but if such appointee . . . receives a salary or other compensation from the public for his services, no such per diem compensation shall be paid him. . . "

However, Code sections 79.9 and 79.10 provide:

79.9 "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 "No law shall be construed to give to a public officer or employee both mileage and expenses for the same transaction."

Inasmuch as individuals acting as "attendants" by the court under section 255.13 would be performing as court appointees rather than supervisors, insofar as the transportation in question is concerned, section 331.22 on compensation of supervisors seems to have no direct bearing on the matter, particularly in view of the fact that under the 1950 census figures it appears your county is not one in which supervisors receive an annual salary.

Under the statutes quoted it appears the payment described in your question is proper insofar as transportation of indigent patients to the university hospital is concerned.

As for transportation to a mental health institute, the duty devolves upon the sheriff and the payment of expenses is governed by Code sections 337.11(14), 228.10 and 228.11, to which you are hereby referred.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

HEALTH: Public Hospitals -- To convert city hospital to county hospital under Code Chapter 347 as amended by the 58th G.A., electors of city and balance of county vote separately and a majority is required in both elections. (Atcls to Frye, Floyd Co. Atty., 8/26/59) #59-9-7

August 26, 1959

Mr. Jack W. Frye
Floyd County Attorney
Charles City, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 18 as follows:

"Last fall and pursuant to proper election results a County Hospital Board of Trustees was formed in Floyd County under Chapter 347. We do not have an existing county hospital, however. The City of Charles City in Floyd County, operates a municipal hospital and has operated the same for a number of years, under Chapter 380 of the 1958 Code of Iowa.

"On April 1, 1959, Senate File 118, being an act to amend Chapter 347, was approved and contained, among other provisions, an additional and new section being Section number 8. This section states that any city hospital may become a county hospital (and governed thereafter by the provisions of Chapter 347) if a majority of electors of both the said city and of the said county approve by proper election. The section also provides the form of the proposition to be submitted to these electors, to-wit: 'Shall the municipal hospital of the City of Charles City, Iowa, and known as Cedar Valley Hospital, be transferred to and become the property of and be managed by the County of Floyd, Iowa?'

"The trustees of the County Board have raised the following questions concerning this new legislation.

"First: The electors of the City of Charles City are also electors of Floyd County-- should this proposition be submitted to these electors as two separate

59-9-7

propositions on separate ballots so that they could vote as electors of the city and again as electors of the County?

"Second: Could one election be held on one day at which the proposition could be submitted to the city and county electors or should two elections be held, one for city electors and a second for city and county electors voting as county electors?

"Third: In determining the 'majority' necessary for approval does the statute require a majority of all votes cast, both city and county, or does it require a majority of county votes (excluding city votes) and a separate city majority of affirmative votes. Conceivably a large city 'yes' vote could override a large county 'no' vote if all votes were added as one majority and one minority.

"We would appreciate your opinion on these issues at your convenience."

The new Act to which you refer appears as Chapter 262, section 8, Laws of the Fifty-Eigth General Assembly.

In answer to your questions:

1. Chapter 262, section 8, Laws of the 58th G.A. specifically provides in pertenent part, ". . . A city . . . hospital may become a county hospital . . . upon a proposition for such purpose being submitted to and approved by a majority of both the . . . city . . . and of the county . . . ". If the legislature had not intended to treat the city and county as separate and independent entities, territorial and otherwise, for purposes of the statute in question, it would have been unnecessary for it to employ the word "both". The legislature is presumed not to indulge in meaningless acts. You are accordingly advised the statute contemplates electors of the city where the hospital is located will vote only once on the proposition and will do their voting as city electors and not as county electors.

2. Again referring to the word "both," as well as the presumption that the legislature did not intend to create a class of super-electors with twice the voting power of other electors, you are advised that the statute appears to contemplate the

electors of the city and of the balance of the county will vote separately. Whether the separate elections be held on the same day appears immaterial so long as an unreasonable length of time does not elapse between the two elections.

In answer to your third question, I quote from the statute: ". . . A city . . . hospital may become a county hospital upon a proposition for such purpose being submitted to and approved by a majority of the electors of <u>both</u> the . . . city . . . and of the county . . .". (Emphasis supplied)

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

MOTOR VEHICLES-Speed limits on secondary roads.

1. Before secondary road speed limits are effective, appropriate signs giving notice thereof must be erected by the county boards of supervisors.

2. As to the extent of such erection and posting, reference is made to the Manual of Uniform Traffic Control Devices for Streets and Highways, published by the Iowa State Highway Commission.

(Peach to Tow, Safety Dept., 8/27/59) # 57-9-9

August 27, 1959

Mr. A. Richard Tow
Deputy Commissioner
Department of Public Safety
L O C A L

Dear Sir:

Receipt is acknowledged of your letter under date of August 7, 1959, reading as follows:

> "With reference to Chapter 228, Acts of the Fifty-Eighth General Assembly, I request your official opinion concerning the following:
>
> > "1. Before the speed limits provided by this subsection shall be effective, is it mandatory for the board of supervisors to erect appropriate signs giving notice of the speed limits?
> >
> > "2. In the event your answer to question one (1) is "yes", what are the applicable speed limits on secondary roads where such appropriate signs have not been erected?
> >
> > "3. In general, to what extent must these signs be posted in order to meet the general statutory requirement of 'appropriate signs giving notice thereof... at such intersection or other place or part of the highway'."

In reply thereto:

Chapter 228, Acts, 58th G. A., reads as follows:

"Section 1. Section three hundred twenty-one point two hundred eighty-five (321.285), Code 1958, is hereby amended by adding thereto the following subsection:

57-9-9

> '"Reasonable and proper, but not greater than sixty (60) miles per hour at any time between sunrise and sunset, and not greater than fifty (50) miles per hour at any time between sunset and sunrise, on secondary roads. Whenever the board of supervisors of any county shall determine upon the basis of an engineering and traffic investigation conducted by the state highway commission when so requested by said board that the speed limit on any secondary road is greater than is reasonable and proper under the conditions found to exist at any intersection or other place or upon any part of a secondary road, said board shall determine and declare a reasonable and proper speed limit thereat. The speed limits provided and as determined in this subsection shall be effective when appropriate signs giving notice thereof are erected by the board of supervisors at such intersection or other place or part of the highway."' (Emphasis added).

Your first question is answered in the affirmative.

In answer to your second question the applicable speed limits on secondary roads where appropriate signs have not been erected would be those provided and as determined in the amendment aforegoing. Such speed limits would not, however, be effective until appropriate signs giving notice thereof had been erected as provided above.

In regard to your third and last question your attention is directed to the Manual of Uniform Traffic Control Devices for Streets and Highways, Iowa State Highway Commission, July 1950, at p. 14 thereof, wherein it is stated as follows:

> "Speed Limits (R-20 to R-27)
>
> "Speed limit signs indicating statutory speed limits shall, when used, be located at the point of change from one type of district to another, and at additional locations within the district where it is necessary to remind motorists of the limit that is applicable.
>
> "When a restricted speed zone has been established on any rural highway it is essential that an end speed zone sign be erected at the end of such restricted speed zone.

"It is frequently desirable to erect confirmatory speed limit signs at selected points within speed zones. Prevailing safe speeds should be taken into consideration when establishing a speed control zone, and, since a poorly enforced regulation is worse than no regulation at all, the question of proper enforcement should be well considered.

"Speed Limit signs shall be erected under the following conditions:

"a. To be used on streets within cities or towns at all points where speed regulations change as provided by state law or city ordinance.

"b. To be used to designate special speed districts on primary roads outside of cities or towns as established by the Highway Commission."

and to the Highway Commission's Directive under date of July 28, 1959, reading as follows:

"New Section to be Added to Sign Manual

"County Speed Limit Signs (R-33, R-34)

"The County Speed Limit signs shall be combined on the same post and shall be erected at the limits of special speed zones established on the secondary road system to serve notice of the statutory day and night speed limits.

"The signs should ultimately be erected on secondary roads carrying 100 vehicles or more per day at the following locations:

"a. Roads leaving municipalities.

"b. Roads intersecting primary roads.

"c. Roads entering the county from other states.

"These signs may be erected at other locations on the secondary road system as deemed necessary by the County Board of Supervisors and the County Engineer.

"On roads with a well defined shoulder line the signs should be erected with the near edge one foot outside of the shoulder line. On roads that do not have a well defined shoulder line or foreslope (no ditch or little if any fill) the signs should be erected with the near edge not less than 6 feet nor more than 10 feet from the edge of the traveled way. The minimum clearance from the edge of the pavement or traveled way to the bottom of the R-34 sign should be 3 feet."

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:JML

COUNTIES: Treasurer -- May deposit funds at interest so long as absolute right of withdrawal is preserved (Code sections 452.10 and 453.1) (Ltr. to Ford, Des Moines Co. Atty., 8/27/59) #59-9-10

CITIES AND TOWNS: Legal opinions -- City questions not properly subject of opinion by Attorney General or County Attorney unless of direct concern to and submitted by a state department (Code sections 13.2 and 336.2).

August 27, 1959

Mr. T. K. Ford
Des Moines County Attorney
220 Tama Building
Burlington, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 26 in which you submit the following:

> "The problem of the county is substantially this: The treasurer has on deposit in banks duly approved under the provisions of Chapter 453 between $250,000 and $300,000. at all times. This money is general fund surplus and this amount represents what the county officers believe to be a safe reserve of funds against unforeseen eventualities. The question is whether such funds can be invested in short term certificates of deposit drawing interest as provided by Section 453.6."

The distinction between the powers of local treasurers and the state treasurer with respect to the handling of public funds is revealed by the language of Code sections 452.10 and 453.1.

Section 452.10 provides as follows:

> "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 States government bonds and certificates, providing suitable issues are available; or make time deposits of such funds in banks as provided

59-9-10

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 at least ten percent of such time certificate of deposit money, insofar as he may be able so to do."

Section 453.1 provides 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 supervisors, city or town council, board of school directors, or township trustees, respectively. 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. The term 'bank' shall embrace any corporation, firm, or individual engaged in a general banking business."

Thus, although the state treasurer is empowered to "invest or deposit", the local treasurer may only deposit. The chapter as a whole further refers to "depositories" as places where "deposits" shall be kept.

A "depository" is a place of safekeeping or storage. Hull v. State, 20 O.A.L. 635; State v. U.S.F.&.G. , 254 N.W. 130, 215 Wis. 91; Commonwealth v. Tilley; 28 N.E. 2d 245, 306 Mass. 412; State v. Claypool, 28 P. 2d 882, 145 Or. 615; Jones v. Marrs, 263 S.W. 570, 114 Tex. 62. A depositor is one who pays money into a bank to be placed to his credit and to be subject to his order or check. Commonwealth v. Sponslor, 16 Pa. CC 116; Bassett v. West Haven Bank and Trust Co., 165 A 895, 116 Conn. 609.

In the case In re Estate of Moylan, 219 Iowa 624 at page 627 the Supreme Court of Iowa said:

> "The question as to whether a particular transaction between a fiduciary and a bank by which the fiduciary leaves funds in the bank is a mere deposit or an investment, as distinguished from a mere deposit has frequently been before this court . . . The court has held, however, through a long line of decisions, that the placing of funds in a bank for convenience to be paid out on the order of the fiduciary or returned to him on demand is not an investment . . . (citing cases) . . . On the other hand, it has been held the placing of funds by a fiduciary on time deposit at interest, where funds cannot be withdrawn until the expiration of a fixed period of time is an investment . . . The question as to whether the fund is to draw interest is not controlling. The absolute right to withdraw the fund upon demand seems to be the controlling situation . . ."

You are, accordingly, advised that the county treasurer may, subject to the statutory restrictions as to selection of depositories and rate of interest, place the public funds in question on deposit at interest, so long as the "absolute right to withdraw the fund on demand" is preserved in the terms of the deposit.

Your letter also submits a variety of questions along the same line which you relay on behalf of the city treasurer. In general what has been said above is equally applicable to all local governmental bodies. To the extent that the foregoing does not answer the city's questions, I regret to point out, there is no statutory channel through which opinions of this or your office may properly be rendered to city officials. Legislation to authorize rendition of opinions on such requests was considered in 1951 by the 54th General Assembly but did not pass. In view of the provisions of Code sections 13.2(4) and 336.2(7) the only proper source of legal opinion for city officials on most matters is the city attorney. Occasionally the activities of a city or town bring it into contact with some state department and questions inhering therein then become of concern to that department making them properly subject to treatment in opinions of this office at the request of the department. Such may be the case with respect to the matters not herein answered. If such be the case, the city officials should seek the advice of such administrative department (for

example the State Auditor if their accounts are examined by his office) and he will either render them an administrative construction of law or obtain our opinion.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

TAXATION: Destruction of Records -- The Tax Commission has authority to destroy all useless records and tax returns which have been in the Commission's custody for at least five (5) years and are no longer of value. (Gill to O'Connor, Tax Comm'r, 8/27/59) #59-9-11

August 27, 1959

John J. O'Connor
Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. O'Connor:

This will acknowledge receipt of your letter of August 19, 1959, in which you request the opinion of this department on whether the State Tax Commission is authorized to destroy the following records:

1952 County Treasurer's Receipts
1953 County Treasurer's Receipts

1952 Individual Income Tax Returns

1950 Fiduciary Tax Returns
1951 Fiduciary Tax Returns
1952 Fiduciary Tax Returns
1953 Fiduciary Tax Returns

1952 Nonresident Tax Returns

1953 Field Auditor's Daily Reports (Sales Tax)

1946-1953 Records from Accounts & Finance Department pertaining to Sales, Use and Income Tax

Your attention is directed to Section 422.61(3), Code of Iowa (1958), which provides as follows:

> "The commission shall have the power to destroy any and all useless records and all returns, reports, and communications of any taxpayer filed with or kept by the commission after such returns, records, reports, or communications shall have been in the custody of the commission for a period of not less than five years, provided, however, after the accounts of any person shall have been examined

59-9-11

> by the commission and the amount of tax and penalty due shall have been finally determined, then the commission may, in its discretion, order the destruction of any records previously filed by such taxpayer, notwithstanding the fact that such records shall have been in the custody of the commission for a period less than five years. Such records and documents shall be destroyed in such manner as shall be prescribed by the commission."

This provision was first enacted into law by the 49th General Assembly, which also passed what is now Section 422.63 (1), Code of Iowa (1958), giving the Commission authority to examine a taxpayer's books and records relating to any transactions completed not more than five (5) years prior to such examination for the purpose of estimating his taxable income or receipts.

At the time these provisions were enacted, Section 6943.057, Code of Iowa (1939), (presently Section 422.25, Code 1958), giving the Commission authority to examine individual income tax returns for purposes of assessing civil and criminal penalties, provided that the Commission had two (2) years from the date the return was filed to determine irregularities on the return and five (5) years from the date the return was due in case of failure to file and omission from income, 1955 O.A.G. 12.

The 56th General Assembly in Chapter 210, amended Section 422.25 to provide for a three (3) year period for discovering irregularities, and six (6) years to determine failure to file or omission from income. The legislature, in changing Section 422.25 in this respect, did not change Section 422.61 (3), supra.

The 58th General Assembly further amended Section 422.25 by providing in Section 4 of Chapter 298, that prosecutions for income tax evasion must be commenced within six (6) years after the commission of the offense. Again, the legislature did not extend the provisions for the destruction of records to conform with the six (6) year period.

It is apparent that conflicts could arise in the administration of the tax laws if all returns older than five (5) years were destroyed, since the Commission, in certain cases, has authority to go back six (6) years to impose civil or criminal penalties.

It is noted that the provisions contained in Section 422.61(3), supra, and Section 423.23, Code, 1958, making Sec. 422.61 applicable to use tax records, are not mandatory. The Commission is authorized to destroy such records and returns as in its discretion are of no further value. It may keep returns which are over five (5) years old where such returns are or could be of use to the Commission.

You are advised, therefore, that the Commission may destroy all useless records regardless of whether such records have been in the Commission's custody for five (5) years or not. As to the income, nonresident and fiduciary returns, it would seem advisable in view of the change in Section 422.25, Code of Iowa (1958), as amended, to retain custody for six (6) years rather than five (5).

Very truly yours,

Gary S. Gill
Assistant Attorney General

GSG/WWR/bjf

SCHOOLS: Attachment: Attachment by County Board of Education under §275.5 is in full force and effect until final determination of an appeal. ~~is taken and formed.~~ (Reinmann to Bruner, Carroll Co. Atty., 8/28/59) #59-9-12

August 28, 1959

Mr. Robert S. Bruner
Carroll County Attorney
118½ W. 5th Street
Carroll, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of August 25 in which you state the following:

> "On June 30, 1959, the Crawford County Board of Education assigned a portion of the Aspinwall Independent School District, lying wholly in Crawford County, to the Manilla Community School District. This was done because the Aspinwall School District had been reduced to less than four sections by the re-organization of the Manning School District, and was done purportedly under the provisions of Section 275.1 of the 1958 Code of Iowa.
>
> "This action by the Crawford County Board of Education was appealed by the Carroll County Board of Education to the State Board of Public Instruction which, in a ruling dated August 21, 1959, nullified the assignment. Attorneys for the Crawford County Board of Education have stated that this ruling will be appealed.
>
> "In the meantime, the portion of the Aspinwall school district is in the position of being unassigned to any school district.
>
> "What should be done and by whom so that this area may be affiliated with an organized school district, and the educational program of its students continued without interruption?"

In reply to the question propounded in your letter, it is necessary to determine what effect did the decision of the State Department of Public Instruction have upon the action of the Crawford County Board of Education.

59-9-12

The Crawford County Board of Education pursuant to the assumed authority vested in them by virtue of 275.5 Code 1958, did attach to another school district wholly within their county the territory in question. The Carroll County Board of Education contested this attachment by virtue of 275.8, Code 1958 on the grounds that the territory in question was involved in a joint plan between the two counties and are an apprised party accordingly. The State Board of Public Instruction held that the action of the Crawford County Board of Education was invalid. If the Crawford County Board of Education does in fact appeal the decision of the State Board, then such a decision of the State Board, then such a decision is not final and binding upon the parties in question. A decree in order to be final must decide and dispose of the whole merit of the cause and reserve no question for future determination, so that it will not be necessary to bring the cause before the court for its final determination. Beebe v. Russell 19 U.S. 283, 15 L. Ed 668.

Therefore the decision of the State Board is not final, if in fact the Crawford County Board of Education appeals to the Courts for final determination. Thus the action of the State Board has no effect upon the decision of the Crawford County Board of Education until it is finally determined by the court.

Thus the territory in question is still attached to the Manilla Community School District until the Court makes final determination. However, if the Crawford County Board of Education fails to make a timely appeal, then the decision of the State Board is final.

In support of the above conclusion, there is a striking similarity in the basic nature of this appeal and appeals under Section 285.12, Code 1958, which provides in pertinent part to-wit:

> "Pending final order made by the state superintendent of public instruction, or the district court, or the supreme court, as the case may be, upon any appeal prosecuted to such superintendent or to such courts, the order of the county board of education from which the appeal is taken shall be operative and in full force and effect."

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

INSURANCE: Mutual Benefit Societies -- Are not subject to insurance laws, do not sell insurance, and membership solicitors need not obtain insurance agent's license. However, a membership solicitor who misrepresents membership as insurance may be subject to prosecution under Code section 713.1.
(Opinion to Milani, Appanoose Co. Atty., 8/31/59)
#59-9-13

August 31, 1959

Mr. James G. Milani
Appanoose County Attorney
107½ West Van Buren Street
Centerville, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 28 with which you enclosed various printed matter of the "Iowa Benevolent Association". You inquire whether membership solicitors for such an organization must be licensed as insurance agents. Your letter is as follows:

> "I am writing you in the hope that you will be able to refer this matter to one of your assistants and help answer a question which has been raised in my office. A Mary Clinkenbeard of Centerville has been contacted by a group known as the Iowa Benevolent Association to sell memberships in this association. This association's home office being at 7405 Monroe Court, Des Moines 22, Iowa. Mrs. Clinkenbeard has inquired of me as to whether it will be necessary for her to be licensed as an insurance agent. I am enclosing applications for membership and literature about this association in the hope that you have previously investigated this organization, and will be able to tell me whether they come within the meaning of Chapter 522, or whether this association would be considered a mutual or fraternal beneficiary association.
>
> "I realize this is not much to go on, but I hope possibly this question had come up before, and that I was not aware of the ruling."

From an examination of the printed material it appears the "Iowa Benevolent Association" is a mutual benefit society rather than an insurance company. Such societies have been judicially defined as, "an aggregation of individuals known for convenience by a common name" and have no suable entity.

59-9-13

See 38 Am. Jur., Mutual Benefit Societies, § 7. Legislation to regulate such societies was introduced in both the 57th and 58th General Assemblies but not enacted. Such societies are, unfortunately, not within the scope of regulation of the insurance laws. They do not afford insurance but merely the promise to "pass the hat" among the other members, if there are any, should the paid-up member meet his demise. The membership solicitor, therefore, need not be licensed as an insurance agent for the reason that what he sells is not insurance. See State ex rel Kuble v. Capitol City Benefit Ass'n., 237 Iowa 363, 370, 375. However, if he represents what he sells to be insurance and obtains the payment of money by such representations it would seem such act would be sufficient to make out a case under section 713.1, Code 1958.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr
cc: Insurance Commissioner

COUNTIES:

~~County Officers:~~ Treasurer--Duty under 321.46, Code 1958.

When application is made to the County Treasurer for a new certificate of title and registration card, the legislative directive to forthwith issue same does not mean instanter but as soon as by reasonable exertion, confined to the object, it may be accomplished. (Peach to Statton, Comr Pub Safety.

2/3/59) #59-9-14

August 31, 1959

Mr. D. M. Statton
Commissioner
Department of Public Safety
L O C A L

Dear Sir:

Receipt is acknowledged of your letter under date of August 19, 1959, reading as follows:

> "Your opinion is respectfully requested on the following situation:
>
> "An individual must have a certificate of title and registration in his name before he can secure a refund on a dismantled vehicle.
>
> "An individual makes application for certificate of title and registration shortly before closing time on the last day of the quarter for which he is entitled to a refund. For this reason the County Treasurer is unable to process the application for title and registration on that date.
>
> "With reference to Section 321.46, Code of Iowa, 1958, is the County Treasurer required by law to issue a certificate of title and registration on the date of application assuming that due to circumstances the processing of the application cannot be made in the normal course of daily operations of his office?"

In reply thereto:

Section 321.46, Code of Iowa 1958, in pertinent part reads as follows:

> " * * * * *.
>
> "Upon filing the application for a registration transfer and a new title, the applicant shall pay a fee of seventy-five cents. The county treasurer, if satisfied of the genuineness and

59-9-14

> regularity of the application and that the applicant has complied with all the requirements of this chapter, shall forthwith issue a new certificate of title and registration card to the purchaser or transferee and shall forward the necessary copies to the department on the date of issuance, as prescribed in section 321.24."
> (Emphasis added).

You will note from the statute aforegoing that the county treasurer, when such treasurer is satisfied of the genuineness and regularity of the application, and that the applicant has complied with all requirements of chapter 321 pertaining thereto, shall forthwith issue a new certificate of title and registration card to the purchaser or transferee.

I am of the opinion that the directive of the legislature directing the treasurer to forthwith issue a new certificate of title and registration card does not mean instanter. Forthwith as used in Section 321.46, Code of Iowa, 1958, has a relative meaning to be construed as meaning within a reasonable time. In other words as soon as by reasonable exertion, confined to the object, it may be accomplished. The word must be given a reasonable construction.

I am of the further opinion that the word forthwith as used in the statute, supra means in the ordinary course of the business of the office of the county treasurer.

Therefore, your question is answered in the negative.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

TAXATION: Homestead Tax Credit -- Where applicant owns house on January 1, and prior to July 1, acquires the realty underlying house, the County Board of Supervisors, upon a finding that applicant meets statutory requirements, is authorized to allow homestead tax credit to the property. (Brenkman to Scholz, Mahaska Co. Atty.; 9/1/59) 59-9-15

September 1, 1959

Charles H. Scholz
Mahaska County Attorney
Lacey Block Building
115 North Market Street
Oskaloosa, Iowa

Dear Mr. Scholz:

I hereby acknowledge receipt of your letters of July 27, and August 22, in which you request the opinion of this department in the following matter:

> "A was the owner of a dwelling house constructed prior to January 1, 1959 upon real estate in which A owned only a leasehold interest and the dwelling house was, therefore, assessed by the Mahaska County Assessor for the year 1959 as personal property. About June 10, 1959, after the Mahaska County Board of Review had completed its work and had finally adjourned, fee title to the real estate upon which the dwelling house is situated was conveyed to A. Thereafter, and prior to June 30, 1959, A made application for a homestead exemption as applied to the real estate and the dwelling house, stating in his application that he was then occupying the property as his homestead, was the owner thereof and expected to so occupy said real estate for at least six months during 1959, and requested the County Assessor and the County Auditor to correct the assessment of the dwelling house so as to assess it as real estate and buildings located thereon, rather than as personal property, so as to become entitled to the homestead exemption thereon.
>
> "The County Board of Review having finally adjourned, does the County Assessor or the County Auditor have authority to correct the assessment as requested, and under such circumstances, does the County Board of Supervisors have authority to allow the homestead exemption applied for?"

According to the facts set forth, "A" owned the house in January 1, 1959, but did not own the real property at that time. Further, he acquired the real property

59-9-15

on which the house was situated prior to the time he made application for the homestead credit. The principal question involved is whether the fact that "A" did not own the realty on January 1, the assessment date, is a sufficient factor to deprive the property of the homestead credit.

The homestead credit is a credit to the homestead rather than to the owner thereof, Ahrweiler vs. Board, 226 Iowa 229, 283 N. W. 889; Eysink vs. Board, 229 Iowa 1240, 296 N. W. 376. In order that the homestead receive the benefit of the credit, it is necessary that the owner meet the requirements set forth by the statute. It would seem under the facts presented that "A" meets the requirements of Chapter 425, Code of Iowa (1958), (Homestead Tax Credit Act), in that he has made timely application and designation as required by Section 425.2, Code (1958), and qualifies as an owner under Section 425.11(2), Code (1958).

The fact that "A" did not own the real property on January 1, i.e., assessment date, will not deprive the property of the homestead credit since the credit is to the property and is to be applied on the real property taxes assessed against the property, 1942 A.G.O. 160.

The question arises as to which party is entitled to receive the economic benefit of the homestead credit in this situation. This would depend entirely upon the agreement of the parties with regard to the payment of the 1959 real property taxes payable in 1960.

Your letter also asks whether the County Assessor or County Auditor has authority to correct the assessment of the building from personal property to real property. Section 428.4, Code of Iowa (1958), provides that personal property is to be taxed each year in the name of the owner on January 1. In the present situation, the house was properly taxed as personal property in view of the fact that there was a divided ownership of the

realty and building on the assessment day. The January 1, date is determinative of the ownership and nature of the property. If then, the property is personal on the assessment day, no authority would exist either in the Assessor or the Auditor to change the assessment in this respect.

In view of the above discussion, the fact that no authority exists in the Auditor or Assessor to change the nature of the property from personal to real on the assessment roll, would seem of no significance in determining whether the homestead credit should be allowed or disallowed.

You are, therefore, advised that it is the opinion of this office under the facts above set out that the County Board of Supervisors is authorized to allow "A's" claim for a homestead tax credit.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/WWR/bjf

BANKS AND BANKING: Real Estate licenses--

The bank acting as trustee of property under a trust agreement or will, is exempt from the provision of Chapter 117, Code 1958, and broker's license is not required insofar as sale or lease thereof, is concerned. (Strauss to Hart, Real Est. Com., 9/3/59)

#59-9-16

September 3, 1959

Mr. Earl A. H art, Director
Iowa Real Estate Commission
B U I L D I N G

Dear Earl:

This will acknowledge receipt of yours of the 27th ult. in which you stated the following:

> "We attach hereto copy of a letter received today from the First National Bank of Dubuque which is self explanatory.
>
> An opinion is respectfully requested as to whether or not this case would come under the exemption provided in Subsection 4 of Section 117.7, Chapter 117, Code of Iowa 1958. Please note Section 117.6.
>
> Your prompt cooperation in this matter would be greatly appreciated."

The copy of letter referred to in your letter follows:

> "Thank you for your prompt reply covering our ques tions regarding broker's license.
>
> We would like to know further if the commission has a ruling covering the license requirement of property held in trust. The title of the property would be in the name of the bank as Trustee and the compensation would be only the general compensation outlined in the trus t agreement.
>
> It is not our practice or intention to act as an agent for the management, sale, or lease of property for compensation other than outlined above."

59-9-16

In reply thereto, I would advise you as follows: It would appear from the foregoing that the bank is a named trustee under a trust agreement or will, of property in the trust and, therefore, the activities of the bank as trustee in regard to the sale, exchange, purchase or otherwise of any real estate in the trust is exempt from the provisions of Chapter 117, Code of Iowa 1958, Section 117.7, Subsection 4, provides this exemption:

> "Acts excluded from provisions. The provisions of this chapter shall not apply to the sale, exchange, purchase, rental, or advertising of any real es tate in any of the following cases:
>
> " * * * *
>
> "4. The acts of one while acting as a receiver, trustee in bankruptcy, administrator, executor, guardian, or under court order ow while acting under authority of a deed of trust, trust agreement, or will."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKS
Encl.

COUNTIES: Vacancies -- Soldiers Preference not applicable to filling vacancy in elective office of county supervisor.
(Abels to Draheim, Wright Co. Atty., 9/3/59)
F 59-9-17

September 3, 1959

Mr. A. F. Draheim, Jr.

Wright County Attorney

Clarion, Iowa

Dear Sir:

Receipt is acknowledged of yours of August 31 as follows:

"This office is urgently requesting an Attorney General's opinion relative to the following matter:

FACTS: A member of the Board of Supervisors deceased. As provided by law, the County Auditor, Clerk and Recorder appoint an elector of the County to fill the vacancy.

QUERY: Does such appointment come within the purview of the Soldier's Preference Law, Iowa Code Chapter 70 (1958)?"

In answer thereto it is pointed out that Chapter 70 of the Code, by its terms, applies to the filling of appointive places and positions. It is elementary that the office of county supervisor is not appointive but elective. The mere fact that a vacancy in an elective office may be temporarily filled by appointment does not alter the elective character of the office. You are accordingly advised that the Soldiers Preference Law shows on its face that it was never intended to apply to filling vacancies in elective offices.

Yours very truly,

LEONARD C. ABELS
Assistant Attorney General

LCA:mmh4

59-9-17

~~EMPLOYMENT SECURITY COMMISSION - IPERS~~ - Regular Full-Time Employment - Criteria for determining when an employee retired under IPERS is entitled to receive a monthly retirement allowance when re-employed. (Craig to Carter, Empl. Sec. Com., 9/3/59) #59-9-18

~~State Officers and Departments~~

September 3, 1959

STATE OFFICERS AND DEPARTMENTS: I.P.E.R.S. --

Mr. Henry E. Carter
Vice-Chairman
Iowa Employment Security Commission
112-116 Eleventh Street
Des Moines 8, Iowa

Re: File No. GC7-DGA-d1

Dear Sir:

This will acknowledge yours of June 30, in which you submit the following:

"The Iowa Employment Security Commission respectfully requests your opinion with respect to certain phases of administration of Code section 97B.48 as amended by House File 23, Acts of the 58th General Assembly.

"The original Act provides that should a retired member of the Iowa Public Employees' Retirement System be at any time in regular full-time employment after his retirement, his retirement allowance payments shall cease as long as he remains in service. The amendment thereto reads:

'However, such re-employment shall not be regarded as full-time employment until such member has earned in excess of $1,200 from such re-employment during any calendar year.'

"Specifically, an opinion is sought on the following points:

"1. Application of the amendment for the last six months of 1959.

"2. Are benefits payable to a retired member for the month during which he exceeded the $1,200 earnings limit?

"3 Is a retired member in 'full-time Employment' for the remainder of a calendar year after

he has earned in excess of $1,200, even though he may not have had further employment or earnings?

"4. If a retired member who has exceeded the $1,200 earnings limit in one year continues his employment without break into the next year, is he entitled to receive retirement benefits during the second year until he has earned in excess of $1,200 in the second year?"

Section 97B.48, 1958 Code of Iowa, as amended by Chapter 115, Acts of the 58th General Assembly reads as follows:

"Anything in this chapter to the contrary notwithstanding, should a retired member be at any time in regular full-time employment after his retirement under any of the provisions of this chapter, his retirement allowance payments under this chapter shall cease as long as he remains in service. (However, such re-employment shall not be regarded as full-time employment until such member has earned in excess of twelve hundred dollars ($1200.00) from such re-employment during any calendar year.) Upon any later retirement under any of the provisions of this chapter such member shall receive a retirement allowance based upon (1) contributions, if any, under this chapter, of the member and his employer on his behalf due to his service while a member during his period of re-employment, plus (2) the amount of his retirement allowance payable prior to his re-employment, increased on an actuarial basis for the period between his date of re-employment and his date of later retirement." (The sentence in brackets was added by Chapter 115, Acts of the 58th General Assembly).

House File 23, the Act which added the amendment, attached this explanation:

"This amendment would clarify the Code so that public employees who have retired could return to work and continue to receive their retirement benefits providing they do not earn in excess of $100.00 per month The current interpretation of the bill forfeits retirement benefits if earnings are in excess of $66.67 per month.

This would make the Public Employees' Retirement

System regulation similar to Federal Social Security."

The original bill provided that any time an employee was in service covered by the Iowa Public Employees' Retirement System and earned in excess of one hundred dollars ($100.00) per month in said service, after his retirement, his benefits should cease The wording would have made the Iowa Public Employees' Retirement System somewhat similar to Federal Social Security. However, the bill was amended to its present form before enactment, stating that no benefits would be paid to a person in full-time employment, and defining full-time employment as service after a member has earned in excess of $1200.00 in a calendar year. This interpretation does not make IPERS similar to Social Security.

The pertinent provision of the Social Security law is Title 42, section 403(b): "Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this subchapter to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits under section 402 of this title for any month --

(1) in which such individual is under the age of seventy-two and for which month he is charged with any earnings under the provisions of subsection (e) of this section; . .

(e) For the purposes of subsections (b) and (c) of this section --

(1) . . .

(2) If an individual's earnings for a taxable year of twelve months are in excess of $1,200, the amount of his earnings in excess of $1,200 shall be charged to months as follows: The first $80 of such excess shall be charged to the first month of such taxable year, and the balance, if any, of such excess shall be charged at the rate of $80 per month to each succeeding month in such year to which such charging is not prohibited by the last sentence of this paragraph, until all of such balance has been applied. If an individual's earnings for a taxable year of less than twelve months are more than the product of $100 times the number of months in such year, the amount of such earnings in excess of such product shall be charged to months as follows: The first $80 of such excess shall be charged to the first month of such taxable year, and the balance, if any,

shall be charged at the rate of $80 per month to each succeeding month in such year to which such charging is not prohibited by the last sentence of this paragraph, until all of such balance has been applied . . . "

Obviously, the amendment of section 97B.48, 1958 Iowa Code, by Chapter 115, Acts of the 58th General Assembly, does not make the Iowa Public Employees' Retirement System similar to Social Security. It is impossible to interpret section 97B.48, 1958 Code of Iowa, as amended, in the same manner as the Federal Social Security law, because they are not similar or even approximately similar. Therefore, the statute must be construed according to its plain and ordinary meaning, and, because of its purpose, it must be construed liberally in favor of those seeking its benefits. Byers v. Iowa Employment Security Commission, 247 Iowa 830, 76 N.W. 2d 892 (1956).

The State of Wisconsin has a statute somewhat similar to Iowa's, Section 66.906 (4), Wisconsin Statutes Annotated. However, the Wisconsin statute spells out more explicitly its administrative application. It provides that any person receiving an annuity who re-enters service shall have his annuity terminated as of the end of the month prior to which he received total earnings in excess of $1,200 in any calendar year. It also states that the annuity shall not be so terminated until earnings exceed $1,200 in any calendar year. Upon subsequent retirement, the annuity is began after a lapse of a period following the termination date of his previous annuity equal to the aggregate of one month for each full $200 of earnings received in the month in which the $1,200 limitation was exceeded.

The Iowa statute, of course, is not so explicit. As hereinbefore stated, the Iowa statute can only be construed according to the plain and ordinary meaning of its words. On that basis, and the application, where possible, of cited authority, your questions are answered as follows:

Question 1, "Application of the amendment for the last six months of 1959."

Naturally, the amendment became effective July 4th, and must be applied after that date. Payment or suspension of benefits previous to that date are not affected by the amendment. However, for the purposes of computing the time when an employee has earned, in excess of $1,200 and is thus in "full-time employment", earnings from January 1st must be counted

The amendment states full time employment is employment wherein a employee has earned in excess of $1,200 "during any calendar year." "The words 'calendar year' have a recognized meaning, namely, the period from January 1st to and including December 31st," Application of Title Guarantee & Trust Company, 183 Misc. 490, 48 N.Y.S. 2d 374, 375

Question 2 "Are benefits payable to a retired member for the month during which he exceeded the $1,200 earnings limit?"

Retirement allowances payments are made on a monthly basis, 97B.49, 1958 Code of Iowa. Payments cease when a retired member is in regular full-time employment. Therefore, no payments should be made to a person at a time when that person is in regular full-time employment.

Question 3. "Is a member in 'full-time employment' for the remainder of a calendar year after he has earned in excess of $1,200, even though he may not have had further employment or earnings."

The statute makes it clear that a person is in "full-time employment" as soon as he has earned in excess of $1,200 during any calendar year. Since there are no exceptions provided, once a person has earned in excess of $1,200 during any calendar year, he is in "full-time employment" for all of that calendar year.

However, the statute provides that payment of the retirement allowance shall cease when a person is in "regular full-time employment" as long as he remains in service. When the person is no longer in service, he may be paid the retirement allowance even though he may have been in "full-time employment" during that same calendar year.

"Service" is defined by 97B.41(10), 1958 Code of Iowa, in these terms:

> "'Service' means uninterrupted service under this chapter by any employee from the date he last entered employment of the employer until the date his employment shall be terminated by death, retirement, resignation or discharge; . . . "

Question 4. "If a retired member who has exceeded the $1,200 earnings limit in one year continues his employment

without break into the next year, is he entitled to receive retirement benefits during the second year until he has earned in excess of $1,200 in the second year?"

A retired member is entitled to receive retirement benefits during any calendar year until he has earned in excess of $1,200 during that calendar year. Section 978.48, as amended, is unequivocal. It states that a retired member is not in "regular full-time employment" until he has earned in excess of $1,200 in <u>any</u> calendar year. No exceptions are made for earnings in previous years.

Yours very truly,

FRANK CRAIG
Assistant Attorney General

FC:kvr

COUNTIES:

Assessor's Salary -- The salary of the county assessor for the year 1959 is subject to the budget requirements of Chapter 441, Code of 1958, and such salary is not subject to change during the assessor's term, except as the salary might be increased to exceed the salary of the county auditor. (Strauss to Sarsfield, St. Comp., 9/8/59)

#59-9-19 September 8, 1959

Mr. Glenn D. Sarsfield
State Comptroller
State House

Attention: Mr. Rex Wilder

Dear Sir:

Reference is here made to the letter addressed to you by the County Assessor, of Tipton, Iowa, dated September 4, 1959, in which he submitted:

> "At the Cedar County budget hearing on July 14, 1959, the county conference set the assessor's salary in the following manner: Quote from the minutes:
>
> 'The salary of the assessor was taken up. Mr. Busching stated that he was asking for an increase of $500 per year. At this time the various bodies retired to separate chambers to caucus. After some discussion, it was moved by Mr. Bachus and seconded by Mr. Pelzer that H. L. Busching be paid $4800 per year -- an increase of $300, said salary to be retroactive to July 4, 1959, and that Mr. Busching could expect a possible raise in 1961. Motion carried."
>
> State auditor, Ray Fletcher, has advised me to ask the state comptroller if the conference, by resolution, can transfer within the budget from fieldmen's salary appropriation to assessor's salary appropriation to take care of this increase in the assessor's salary. Since the 1959 budget is $17,975 and the expected expenditures will be approximately $16,500 for the year 1959, there will be a balance of $1475."

In reply thereto I advise as follows:

1. Insofar as an increase in the salary of the county assessor, to be retroactive to July 4, 1959, is concerned, I would advise that the salary of the county assessor for the year 1959 is subject to the budget requirements of Chapter 441, Code

59-9-19

of 1958, and under the opinion of this department, is not subject to change during the term, except as the salary might be increased by the board to exceed the salary of the county auditor. (See Opinions of the Attorney General appearing in the Report for 1950, page 180, and in the Report for 1952, page 32.)

2. The budget adopted in July 1959, under the provisions of Chapter 291, Code of 1958, operative in the year 1960, would be ineffective to authorize this increase. And insofar as increasing the salary of the county assessor, after the salary has been fixed in the annual budget, Section 16, of Chapter 291, Acts of the 58th General Assembly, among other provisions, provides this:

> "The assessor shall not issue requisitions so as to increase the total expenditures budgeted for the operation of the assessor's office. However, for purposes of promoting operational efficiency, the assessor shall have authority to transfer funds budgeted for specific items for the operation of the assessor's office from one unexpended balance to another; such transfer shall not be made so as to increase the total amount budgeted for the operation of the office of assessor, and no funds shall be used to increase the salary of the assessor or the salaries of permanent deputy assessors."

Accordingly, the budgetary amount of the salary of the assessor may not be increased, nor funds used to increase that salary.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

COUNTIES:

Assessor's Pay Period -- Where the term of the county assessor does not expire until January 1, 1960, his salary may not be increased for the year 1959 because such salary is controlled by Chapter 441, Code of 1958, and is not subject to change during the term except the salary may be increased in excess of the salary of the county auditor. (Strauss to Akers, St. Aud., 9/8/59) September 8, 1959

#59-9-20

Mr. Chet B. Akers
Auditor of State
L O C A L

Attention: Earl C. Holloway
Supervisor of County Audits

Dear Sir:

This will acknowledge receipt of yours of the 24th ult. in which you submit the following:

"We found in one of the counties the conference board raised the salary of the county assessor, $1,000.00 to be effective the 4 day of August, 1959, however the term does not expire until January 1, 1960.

"As we understand the new law as found in Chapter 291 of the 1958 G.A., the salary is no longer based on the term but can be set each year when the budget is approved by the conference board, not later than July 1 for the ensuing year. If the salary can be changed in the middle of the year then the budget would be of no value as the current budget might not be large enough to pay the raise in salary.

"The question is, can the conference board change the salary of the county assessor in the middle of any year."

In reply thereto I would advise as follows:

The new law, Chapter 291 of the 1958 General Assembly, insofar as fixing the salary of county assessors is concerned, is effective as to salaries fixed by the budget for the year 1960. The salary of the assessor for the year 1959 is controlled by Chapter 441, Code of 1958, under which the salary of the county assessor is fixed for the term, (subject only to the power of the Board of Supervisors to fix the salary

59-9-20

in excess of the salary of the county auditor), and is not subject to change during the term. (See Opinions of the Attorney General appearing in the Report for 1950, page 180, and in the Report for 1952, page 32.)

In that view, therefore, the increase in the salary of the county assessor of one thousand dollars, to be effective on the 4th day of August, 1959, is ineffective and the increase is unauthorized.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS-mmh4

WELFARE: Legal settlement -- Under Code section 230.6 as made applicable to patients in the Woodward hospital by Code section 223.7 determination of legal settlement is for the Board of Control. (Akels to Barewald, Rel. Dir., 9/16/59)
59-9-21

September 16, 1959

Mrs. Ina Barewald
Director of Relief
Cedar County Relief Department
Court House
Tipton, Iowa

Dear Madam:

Your letter of September 11 has been referred to me by the Attorney General for answer. You inquire concerning the legal settlement of a certain family who have made frequent moves from county to county and particularly as to that of a minor member of the family who was admitted to the Woodward hospital for the mentally retarded while most of the family resided in Cedar County. However your letter indicates the family has moved quite frequently and, in your opinion, legal settlement might exist in either of two counties other than Cedar County. You request an opinion as to legal settlement and you particularly refer to subsection 4 of Code section 252.16. The provision to which you refer reads as follows:

> "4. A married woman has the settlement of her husband, if he has one in this state; if not, or if she lives apart from or is abandoned by him, she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state."

However, your letter also indicates that although the minor in question resided with his mother prior to being admitted to Woodward as a mental retardate, his father is living, the parents having been divorced. It thus appears subsection 5 of Code section 252.16 may be more relevant to the question of legal settlement than the provision to which you refer. Subsection 5 reads as follows:

" 5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother."

It is an elementary rule of the law of domestic relations that a divorce terminates only the relationship of husband and wife and not that of parent and child. Your inquiry, therefore, does not include sufficient facts upon which to base a conclusion. It, therefore, becomes an item of pertinent inquiry whether the divorce decree actually awarded custody to the mother. In this connection see 1942 Report of the Attorney General at page 127. Further see the opinion at page 181 of the same report.

However, since the minor with whom your inquiry is concerned is in an institution governed by the Board of Control, initial determination of legal settlement, in the last analysis a fact question itself, is a matter for that Board under the provisions of Code section 230.6 as made applicable to patients at the Woodward Hospital for the mentally retarded by Code section 223.7. It is therefore suggested that after further investigation of the facts in the light of Code section 252.16 (5) you communicate all of the available facts and your inquiry directly to the Board of Control for determination under the quoted section.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

WORKMEN'S COMPENSATION: Injury to County employee -- According to Code Section 85.2, the compensation provided by Code Chapter 85 is "exclusive". (Opin to Hasbrouck, Guthrie Co. Atty.; 9/9/59) # 59-9-22

September 9, 1959

Mr. Jay J. Hasbrouck
Guthrie County Attorney
Guthrie Center, Iowa

Attn: R. Y. Taylor

Dear Sir:

Receipt is acknowledged of your letter of September 8 as follows:

> "An employee of a Guthrie County road crew placed his hand upon a County dragline being operated by another County employee and instant prior to the time the boom of the dragline accidentally touched a high voltage line. By reason of being badly burned, the first employee later lost his hand by amputation and incurred medical and hospital bill in a sum in excess of $3200.00
>
> "The County had insurance in the form of workmans compensation, in the total liability sum of $2500.00 which has been fully expended, leaving a balance of medical and hospital bills unpaid of approximately $700.00.
>
> "In view of the recent decisions on County liability in such matters, the County is desirous of determining whether or not there is liability upon the County for damages herein and, if so, what is the proper procedure for assuming and paying the balance of such damages without Court action and judgment by the injured employee."

In view of your statement that workmen's compensation has been paid, it is my understanding that your question intends to refer to tort liability other and apart from workmen's compensation liability. The answer to this question appears directly furnished by use of the word "exclusive" in section 85.2, Code of Iowa, which provides:

"Where the state, county, municipal corporation, school district, or city under any form of government is the employer, the provisions of this chapter for the payment of compensation and amount thereof for an injury sustained by an employee of such employer shall be exclusive, compulsory, and obligatory upon both employer and employee, except as otherwise provided in section 85.1."

To like effect see Shirkey v. Keokuk County, 225 Iowa 1159 and, of more recent vintage, Stucker v. Muscatine County, 87 N.W. 2d 452 relative to the governmental immunity from liability of counties. Also see Wittmer v. Letts, 80 N.W. 2d 561 which holds a county may be sued in tort only in connection with its proprietary functions.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

HIGHWAYS: Secondary Roads -- County Boards of Supervisors have no jurisdiction to establish inside city limits.
(Arlo A. Burdette, Decatur Co. Atty., 9/9/59)
59-9-23

September 9, 1959

Mr. Robert W. Burdette
Decatur County Attorney
Box 61
Leon, Iowa

Dear Sir:

Your letter of September 8 has been referred to me for answer. In it you describe a situation in which it is desired to provide a means of ingress and egress from a landlocked farm. You indicate that your County Board of Supervisors is willing to establish a road but that the location of such road would be inside the corporate limits of Davis City. You inquire as to the authority of your Board of Supervisors to establish such a road within the corporate limits.

The jurisdiction of the Board of Supervisors is circumscribed by section 306.3, Code 1958, as follows:

> "Jurisdiction and control over the highways of the state are hereby vested in and imposed on . . . the county board of supervisors as to secondary roads within their respective counties . . . " (Emphasis supplied)

"Secondary roads" are defined in section 306.2, Code 1958, as follows:

> "The term 'secondary roads' . . . shall include all public highways outside of cities and towns, except primary roads and state park and institutional roads." (Emphasis supplied)

The quoted sections thus provide that County Boards of Supervisors have no jurisdiction to establish roads inside city limits.

59-9-23

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

SCHOOLS: Reorganization --

1. Chapter 192, Acts of the 58th G.A., amending Chapter 275, Code 1958, is an integral part of the reorganization laws.
2. A nonhigh-school district can petition only once for admission in a contiguous high school district under Chapter 192, Acts of the 58th G.A., in the absence of a material change in conditions. (Reasonable to Wright, Supt. Pub. Instr., September 9/10/59) # 59-9-24

Mr. J. C. Wright
Superintendent of Public Instruction
State Office Building
L O C A L

Dear Sir:

This is to acknowledge receipt of your letters of August 14 and September 2 in which you asked several questions concerning Chapter 192, Acts of the 58th G.A. The questions asked are as follows:

"1. Does the requirement of 300 persons as set forth in Section 275.3 apply to Senate File 336 (Chapter 192, Acts of the 58th G.A.)?

"2. Is the above-named statutory law to be interpreted as an integral part of Chapter 275, Code of Iowa 1958, or as an isolated unit?

"3. Is it possible for a nonhigh-school district to repetitively petition a contiguous high-school district for admission under the above statute after having been once rejected?

"4. Is a simultaneous filing of petitions under the above-named statute possible, and if so, is it possible to legally merge two nonhigh-school districts simultaneously with a contiguous high-school district?"

In reply thereto we advise as follows:

The only method of school reorganization provided in the Code of Iowa is found in Chapter 275. Chapter 275, Code 1958, was amended by Chapter 192, Acts of the 58th G.A. by adding an entirely new section to the chapter. The new section provides an alternative method of reorganizing under Chapter 275, Code 1958, which is secondary to the procedure set forth in Sections 275.12 to 275.23, Code 1958.

The amendment was an addition to the existing chapter and in no way repealed any of the foregoing provisions. An addition to a statute is to be construed as though it were a part of the statute when the statute was originally enacted. Disbrow v. Deering Implement Co., 233 Iowa 380, 9 N.W. 2d 378. It is quite clear that the

59-9-24

amendment was an addition because Chapter 192, Section 1, Acts of the 58th G.A., provides to wit:

> "Amend chapter two hundred seventy-five (275), Code 1958, by adding the following new section:" (Emphasis ours)

In determining the meaning of Chapter 192, Acts of the 58th G.A., the amending section must be considered in the light of the whole chapter and every section therein. Spencer Publishing Co. v. City of Spencer, ____ Iowa ____, 92 N.W. 2d 633. The applicability of Chapter 192, Acts of the 58th G.A., is limited by Section 1 thereof which provides in pertinent part:

> "In addition to the procedure set forth in sections two hundred seventy-five- point twelve (275.12) to two hundred seventy-five point twenty-three (275.23) inclusive, relating to the reorganization of a proposed school district, a school district not operating a high school that is contiguous to a high-school district may merge with said high-school district . . ."

Thus this act is only applicable when:

1. A school district is not operating a high school
2. The absorbing district operates a high school
3. The two districts are contiguous.

In addition to the specific provisions set out by Chapter 192, Acts of the 58th G.A., there remains the general provision on the minimum standards for reorganization found in Section 275.3, Code 1958, which provides to wit:

> "No new school district shall be planned by a county board of education nor shall any proposal for creation or enlargement of any school district be approved by a county board of education or submitted to electors unless there reside within the proposed limits of such district at least three hundred persons of school age who were enrolled in public schools in the preceding school year. Provided, however, that the state superintendent of public instruction shall have authority to grant permission to a county board to approve the the formation or enlargement of a school district containing a lower school population than above provided on the written request of such county board of education if such request is accompanied by evidence tending

> to show that sparsity of population, natural barriers or other good reason makes it impracticable to meet said school population requirement."

Under Section 275.3, Code 1958, it is mandatory that the provisions of this section be complied with and can be modified only as provided in the said section. O.A.G., March 7, 1958. In an Opinion of the Attorney General in June 11, 1957, it was pointed out that the mandatory prerequisite to effectuate a reorganization must comply with the provision of Section 275.3, Code 1958. The legislative mandate is clearly set out in Section 275.9, Code 1958, which provides in pertinent part:

> " . . .
>
> "The provisions of sections 275.1 to 275.5, inclusive relating to studies, surveys, hearings, and adoption of county plans shall constitute a mandatory prerequisite to the effectuation of any proposal for district boundary change. It shall be the mandatory duty of the county board or joint county boards to dismiss the petition if the above provisions are not complied with fully."

There is nothing in Chapter 192, Acts of the 58th G.A., which modifies or repeals the general provisions of Sections 275.1 to 275.5 inclusive, Code 1958. The contrary was intended, because if the merger fails as provided in Chapter 192, Acts of the 58th G.A., the method of reorganizing as provided in Section 275.12 is still available to the school districts by the wording in Chapter 192, Section 1, subsection 3, which provides in pertinent part:

> " . . . to effect said merger it shall be necessary to proceed as provided in section two hundred seventy-five point twelve (275.12)."

Therefore, the answer to the first and second questions, is, the requirements as set forth in Section 275.3, Code 1958, do apply to a merger under Chapter 192, Acts of the 58th G.A., because it must be considered in the light of the whole chapter as though the amendment was passed with the original act.

In order to answer the third question, it will be necessary to review the procedural steps needed in effecting the said merger. Chapter 192, Section 1, Subsection 1, Acts of the 58th G.A., provides:

> "(1) A petition signed by at least twenty percent (20%) of the qualified voters of such school district not operating

a high school, proposing that said district be included in said high school district, shall be filed with the county superintendent of the county which has jurisdiction over the high school district and a duplicate copy with the school board of the high school district."

Chapter 192, Section 1, Subsection 2, Acts of the 58th G.A., provides:

"(2) The school board of the high school district involved shall, after the filing of said petition, take action at the next regular board meeting or a special meeting called for that purpose, agreeing or refusing to accept said school district not operating a high school into said high school district and filing a record of such action with said county superintendent."

Chapter 192, Section 1, Subsection 3, Acts of the 58th G.A., provides:

"(3) If the said school board of the high school district agrees to accept said school district not operating a high school, said county board shall approve or disapprove said merger proposal. The county superintendent shall fix a time and place for filing objections, cause one notice thereof to be published at least ten (10) days prior thereto in a newspaper published within the high school district or if none is published therein then in a newspaper of general circulation in the high school district; and in the event of the filing prior to said time of a petition signed by voters in the high school district involved equal in number to at least twenty percent (20%) of the number of eligible voters or four hundred (400) voters, whichever is the smaller number objecting to such board action, the entire action shall be void and in order to effect said merger it shall be necessary to proceed as provided in section two hundred seventh-five point twelve (275.12). In case of a controversy over county plans which would affect a proposed merger, said merger must have the approval of the state board of public instruction which decision shall be final and no further action shall be taken until such approval is granted. Any county board of education affected or either local board of education involved may submit the controversy to the state department of public instruction within ten (10) days after the decision of the county board or county boards of education."

In order to initiate the merger, a petition as provided in Chapter 192, Section 1, Subsection 1 must be filed with the proper county

superintendent and the school board of the high school district. The school board of the high school district shall at the next regular or special board meeting approve or disapprove the petition. If the school board approves the petition, then the matter has to be submitted to the County Board of Education for their approval or disapproval. If the County Board of Education approves the merger proposal, taking into consideration all the provisions of Chapter 275, Code 1958, as they are applicable to the merger, the County Superintendent must set a date for filing objections as provided in Chapter 192, Section 1, Subsection 3, Acts of the 58th G.A. If prior to the date set for hearing the objections, petition is signed by the prerequisite number of voters objecting to the action of the County Board of Education, the entire action is void.

The effect of petition filed by the voters of the high school district objecting to the County Board of Education action, voids all further action under Chapter 192, Acts of the 58th G.A. The nonhigh school district, in order to effect said merger, must proceed under the provisions as found in Section 275.12, et seq., Code 1958, and is precluded from filing another petition under Chapter 192, Acts of the 58th G.A.

The effect of voiding the action of the County Board of Education prevents the nonhigh school district from filing another petition under Chapter 192, Acts of the 58th G.A., and in order to effect a merger, the nonhigh school district must then proceed under the provisions found in 275.12, et seq, Code 1958. The voters of the high school district can prevent the nonhigh school district from merging under Chapter 192, Acts of the 58th G.A.

As a rule, where the word "void" is used to secure a right on the public, it will "be held to mean null and incapable of confirmation." Van Shaack v. Robbins, 36 Iowa 201.

Whereas, the school board of the high school district, the county board of education and state board of education (in some instances) have only the power to disapprove the merger proposal under Chapter 192, Acts of the 58th G.A., the effect of disapproval by any of the aforesaid boards would be final and not subject to review. Board of Education v. Parker, 242 Iowa 1, 45 N.W. 2d 567. The question then becomes whether such a decision is res adjudicata as to subsequent petitions filed by the non high school district with the same high school district.

The Supreme Court of Iowa has consistently held that the procedural statutes with respect to reorganization are to be liberally construed. State ex rel Warrington v. School District of St. Ansgar, 247 Iowa 1167, 78 N.W. 2d 86. However, such construction must be

"reasonably done without violence to the manifest spirit and intent of the legislature." Wall v. County Board of Education, ____ Iowa ____, 86 N.W. 2d 231, citing from Ondler v. Rowe, 187 Iowa 1116, 175 N.W. 32. In view of the foregoing decisions, there is a doctrine that an administrative agency in the absence of a statute can not reverse a prior decision unless (1) there is a change of condition subsequent to its decision, or (2) other consideration materially affecting the merits have intervened. Davis on Administrative Law Section 18.03, page 564, citing Spencer v. Board of Zoning Appeals, 141 Conn. 155, 104 A. 2d 373. Also see Application of Union Pacific R.R. Co., 149 Neb. 575, 31 N.W. 2d 552. Some support of the above doctrine can be found in the case of Keller v. City of Council Bluffs, 246 Iowa 202, 66 N.W. 2d 113, which deals with rezoning in which the Court said:

> "A city council does not have the authority to amend a comprehensive zoning law . . ."

However, the Court went on to say:

> "the governing body of a municipality may amend its zoning ordinances any time it deems circumstances and conditions warrant such action, and such amendment is valid if the procedural requirements of the statute are followed. . . ."

Therefore, in answer to the third question, once a timely petition is filed by the voters in the high school district objecting to the proposed merger, the school district not maintaining a high school is precluded from filing another petition for a merger under Chapter 192, Acts of the 58th G.A. On the other hand, if the School Board of the high school district, the County Board of Education, or the State Board disapproves the proposed merger, then the school district not maintaining a high school can not file another petition for merger under Chapter 192, Acts of the 58th G.A., unless there has been a change in conditions, or other considerations materially affecting the merits of the merger have intervened.

The plan propounded by Chapter 192, Acts of the 58th G.A., can involve only two school districts, the school district maintaining a four-year high school and the whole school district which wishes to merge with it. Only one merger at a time can be effectuated under Chapter 192, Acts of the 58th G.A. Thus the School Board or the County Board of Education can not consider two proposed mergers involving the same school district which maintains a four-year high school. This principle is clearly stated in State ex rel Harberts v. Klemme School District, 247 Iowa 48, 72 N.W. 2d 512, in which the Court said:

"This principle is not new in law, for it is well settled that prior jurisdiction once obtained in any legal proceeding prevents any subsequent effort to interfere with the orderly disposition under the first proceeding."

Therefore in answer to your fourth question, it is not possible to merge two nonhigh school districts simultaneously with a contiguous high school district, under Chapter 192, Acts of the 58th G.A. In order to accomplish such a plan, the school districts involved should proceed under Section 275.12, et seq, Code 1958.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
cc: To Joseph S. Davis

SCHOOLS: Textbooks -- Disposal of textbooks by county board of education is a matter of administrative determination as limited by Section 273.13(4). County board of education can be the only depository. (Lehmann to Salisbury, Jasper Co. Atty.; 9/16/59) # 59-9-25

Code

September 16, 1959

Mr. Don C. Salisbury
Jasper County Attorney
Court House
Newton, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of August 14 which states the following:

"Chapter 301 and Section 273.13 of the 1958 Code of Iowa provides for purchase and sale of text books by the County Board of Education.

" * * *

"As school districts were being reorganized, the enrollment and the number of rural schools were gradually reduced until the school year 1957-1958. In that year there were forty-nine rural schools in operation, but that number was reduced to two rural schools in 1958-1959. Because of this rather abrupt change in enrollment, the inventories of some text books are quite large and a reduction in said inventory is desired at this time.

"It would be very helpful in deciding the manner of accomplishing said reduction in inventory if you could answer the following questions for me:

1. Could the prices of the books be radically reduced so they could be sold for library or reference purposes or any use the purchaser might desire to make of them?
2. If the books would not sell, even at a very reduced price, could they be given free of charge to the schools in Jasper County for whatever use they could make of same?

59-9-25

3. If either or both of the foregoing is permissable, who has the authority to fixed the reduced price or give the books away free of charge?
4. In order to save the fee paid to depositories, could the office of the County Superintendent of Schools be used as the sole depository and agent for the sale or gift of said books?"

In reply thereto we advise you as follows:

It is fundamental that the school system is a creature of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as incident to exercise of a power or performance of a duty expressly conferred or imposed by statute. Silver Lake Consol. Sch. Dist. v. Parker, 238 Iowa 984, 29 N.W. 2d 214; Ind. Sch. Dist. of Danbury v. Christiansen 242 Iowa 963, 49 N.W. 2d 263; Lincoln Dist. v. Redfield Dist, 226 Iowa 298, 283 N.W. 881. If, therefore, the county board has the power concerning which you inquire, it must be derived from the express provision of some statute.

The statutes authorizing the sale, rental, lending or disposition of books by the county board are Sections 273.13(4), 301.16 and 301.17, Code 1958, which provide in pertinent part:

Section 273.13(4) provides:

"Adopt textbooks * * * for rural school districts under the administration of the county superintendent, and * * sell, rent or loan them as provided in Sections 301.15 to 301.28, inclusive, and serve as * * * purchasing agent of books * * * for school districts under its jurisdiction * * * or the county board of education may, with its own funds, buy * * * books * * * and rent them to the pupils * * *."

Section 301.16 provides:

" * * * provide that no textbooks shall be sold * * * at a price or fee higher than that fixed by said county board of education * * *."

Section 301.17 provides:

" * * * the county board of education shall sell them to the pupils of the district * * *."

The questions propounded in your letter are primarily a matter of administrative determination. It should be noted in Section 301.16 that the county board of education has the authority to set the prices of the books. The book prices can not be higher than what the county board of education paid for them. Op. Atty. Gen. 1919-20, p. 557. However, the only disposition of the books is to school districts or directly to the pupils under the jurisdiction of the county board of education as provided in Section 273.13(4), Code 1958.

In answer to the last question it should be noted that Section 273.13(4), Code 1958 provides that the county board of education is the central depository for the books. In the case of State v. Elmore, 246 Iowa 1318, 70 N.W. 2d 166, the county superintendent acted as the administrative agent for the central depository of the county board of education. Section 301.15, Code 1958, provides that the county board of education "may arrange for such depositories as it may deem best.".

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
cc: Paul Johnston
Joe Davis
Department of Public Instruction

LABOR: CHILD LABOR: Employment of minors under sixteen years of age in restaurants. (Corres to Lowe, Labor Comr., 9/17/59)
#59-9-26

September 17, 1959

Mr. Don Lowe
Commissioner
Bureau of Labor
L O C A L

Dear Sir:

This will acknowledge receipt of your letter of August 27th, in which you submitted the following:

> "From time to time we are confronted with the situation wherein minors under age 16 are working in establishments where food and soft drinks are served, (restaurants) operated by a church, club, or fraternal organization.
>
> "It has been the opinion of the Bureau of Labor that nothing in Chapter 92 of the Iowa Code exempts minors under age 16 being employed in restaurants regardless as to who is the operator or employer.
>
> "I would like an opinion as to whether or not churches, clubs or fraternal organizations are exempt from complying under Chapter 92, and particularly Section 92.11."

Section 92.11, 1958 Code of Iowa, provides, in part: "No person under sixteen years of age shall be employed at any work or occupation which, by reason of its nature or the place of employment, the health of such person may be injured, or morals depraved, or at any work in which the handling or use of gunpowder, dynamite, or like explosive is required, or in or about any mine during the school term, or in or about any hotel, cafe, restaurant, bowling alley, pool or billiard room, cigar store, barber shop, or in any occupation dangerous to life and limb." (Emphasis ours).

59-9-26

The statute is phrased in the disjunctive, thus prohibiting the employment of a person under sixteen years of age in a restaurant, under any circumstances. Section 92.11, 1958 Code of Iowa, does not have the exceptions provided in 92.1, 1958 Code of Iowa. An Attorney General's Opinion, Report of the Attorney General, 1930, page 169, held there "is no exception" under section 92.11, even as to a child under sixteen years of age working in a restaurant owned or operated by his parents. Therefore, the answer to your question hinges upon whether the establishments, operated by a church, club, or fraternal organization, where food and soft drinks are served, are restaurants.

The word "restaurant" is not defined in Chapter 92, 1958 Code of Iowa. Section 170.1(4), 1958 Code of Iowa, provides, in part: "For the purposes of this chapter: . . .

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

However, a formal opinion issued by this office on August 5, 1950, a copy of which is enclosed herewith, held that the definition of the word "restaurant," contained in sections 170.1,1958 Code of Iowa, does not impose its meaning on another section of the Code.

When there is no statutory definition of a word, resort must be made to the usual and commonly understood meaning of the word. Patterson v. Iowa Bonus Board, 246 Iowa 1087, 71 N.W. 2d 1 (1955). The word "restaurant" is defined in Webster's New International Dictionary, Second Edition, thus:

> "An establishment where refreshments or meals may be procured by the public; . . . ."

Black's Law Dictionary, Fourth Edition, defines "restaurant" as follows:

> "An establishment where refreshments or meals may be obtained by the public. Donahue v. Conant, 102 Vt. 108, 146 A. 417, 419."

In answer to your question, I am of the opinion that churches, clubs, and fraternal organizations are not exempt from the provisions of section 92.11, 1958 Code of Iowa, in employing persons under sixteen years of age in a restaurant.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:kj

Enclosure:

STATE OFFICERS AND DEPARTMENTS:

Governor -- The Governor would have authority to issue patent for land sold by the State more than 75 years prior thereto, for which no patent had previously been issued.
(Strauss to Loveless, Gov., 9/17/59) # 59-9-27

September 17, 1959

The Honorable Herschel C. Loveless
Governor, State of Iowa
The State House
L O C A L

My dear Governor:

Reference is herein made to letter of Robert H. Johnson, then your Administrative Assistant, of July 14, in which he wished to be advised whether the information then submitted would constitute adequate grounds upon which you as Governor might direct the issuance of a patent. The accompanying letters, including one of July 10, 1959, addressed to you by Benedict J. Quillin, Harpers Ferry, Iowa, asked the issuance of a State Patent to the following described land:

> "The Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Sec. 23, Twp. 97 N., R. 3 W. of the 5th P.M., being 40 acres, more or less, in Taylor Township, in Allamakee County, Iowa."

It would appear that this contract of sale of this land between the State of Iowa and William H. Hall was made April 30, 1852, and that the seventy-five years have elapsed since the date of such sale. Therefore you would have authority, under the provisions of Chapter 70, laws of the 58th General Assembly, which provides as follows:

59-9-27

> Section 1. Section ten point six (10.6), Code 1958, is hereby amended by adding the following at the end of such section:
>
> '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 (75) years from the date of sale without issuance of a patent shall be conclusive proof that the purchase price has been paid.' "

to authorize the issuance of the patent applied for.

The letters accompanying Mr. Johnson's letter are herewith enclosed.

With renewed assurance of my respect, I am

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4
Enc:

~~LICENSES.~~ STATE OFFICERS AND DEPARTMENTS:
Real Estate -- A license to sell real estate is terminated by its voluntary surrender. (Strauss to Hart, Real Est. Com., 9/17/59)
#59-9-28

September 17, 1959

IOWA REAL ESTATE COMMISSION
Capitol Building
L O C A L

Attention: Earl A. Hart, Director

Dear Sir:

You advise that a holder of an Iowa broker's license has voluntarily surrendered his license, and you ask the power and authority of the Commission to accept this surrender. I would advise you as follows:

No express statute authorizes action of any kind by the Commission. Revocation of such license is authorized upon stated grounds by Section 117.34, et seq, Code 1958.

A like situation appeared in the case of Shemeth v. Selectmen of Holden et al., 58 N.E. Rep. 2d 6, where it was determined by the Court as follows:

> "The petitioner argues that his permit could not be revoked without a hearing after he had begun to act under it. General Baking Co. v. Board of Street Commissioners of Boston, 242 Mass. 194, 136 N.E. 245; Brett v. Building Commissioner of Brookline, 250 Mass. 73, 79, 145 N. E. 269; Inspector of Buildings of Watertown v. Nelson, 257 Mass. 346, 352, 153 N.E. 798. The trial judge found that the petitioner 'relinquished his rights under the original license (permit) when he turned back the license and thereafter elected to proceed as set out in the "agreed statement of facts."' Whatever effect the petitioner's act in returning the document in which his permit was embodied might have had in view of his appeal to the board of appeals a few days later, if his return of the document had been the only fact bearing upon surrender, his subsequent conduct in filing and pressing an application for a new pemit

> for the same location and for what might have been found to be either substantially the same or a substituted building had some tendency to show a waiver or surrender of any rights under the original permit. Besides, we do not know what oral evidence may have been introduced on the subject, since the evidence is not reported. The finding that the petitioner relinquished or surrendered his original permit cannot be pronounced erroneous. A license or permit granted by public authority to perform acts which would otherwise be illegal may be voluntarily abandoned or surrendered. See Wilde, J., in Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. 344, 467; Tracy v. Ginzberg, 189 Mass. 260, 75 N.E. 637; Jubinville v. Jubinville, 313 Mass. 103, 108, 46 N.E. 2d 533, 144 A. L.R. 1008."

See also Phoenix Insurance Co. Limited v. Ludwig, Secretary of State, 113 S.W. 34; Wolf v. Runnels, 38 At. 100.

53 C.J.S., §43 a., title LICENSES, states the following:

> "A license terminates by lapse of time on the date which is fixed by statute or ordinance or by the licensing authorities acting within their statutory powers, and the licensee may exercise the rights and privileges granted by the license only for the term specified. A license or permit may also be voluntarily abandoned or surrendered, and it may be terminated by the licensee abandoning the business for which he was licensed, in which case he may be compelled to procure a new license if he again engages in such business during the same year.
>
> "A license to pursue a given occupation or business is terminated by the holder's death."

In view of the foregoing, I would advise you that the foregoing surrender of broker's license is a wiaver of the licensee's rights thereunder, and should be accepted.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

SCHOOLS: Nominating Committee -- Under Section 257.5 there is no express authority for seating an alternate for a specific delegate. The Credential Committee can seat the alternate to fill a vacant alternate position. (Rehmann to Hardin, Marion Co. Atty., 9/22/59) # 59-9-29

September 22, 1959

Mr. William W. Hardin
Marion County Attorney
114½ S. Second Street
Knoxville, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of September 18 in which you state the following:

> "Marion County is entitled to two delegates to the Nominating Convention. Through inadvertence only one delegate and one alternate were named and certified by the Marion County Board of Education.
>
> "The Nominating Convention, as you know, was held on September 9 at which time a tie vote developed between two candidates. The Convention was then recessed until 9 O'clock Wednesday, September 23. Our question is this: Is it possible for the alternate, who is properly certified, to serve as the second delegate from Marion County and is it within the power of the Credential Committee of said convention to certify him as the second delegate from Marion County?"

In reply thereto I advise as follows:

Under Section 257.5, Code 1958 there is no provision for the filling of a vacancy in the Nominating Convention for the State Board of Public Instruction. In addition to Section 257.5 subsection 1-b-(2) provides the following:

> "The names of those chosen as delegates and alternates shall be certified to the secretary of state by the county board of education and boards of education of said school districts within the district within ten days after the election."

59-9-29

You will note in Section 257.5, Code 1958, no alternate was specifically designated to a particular delegate.

An alternate is one who is authorized to take the place of another in his absence. The alternate has no authority to act when the principle delegate is present and acting for himself. State v. Young, 160 Mo. 320, 60 S.W. 1086. In 18 Am. Jur. Elections 136 page 267-8 it states:

> "A convention has the inherent power incident to all deliberative bodies having the power to organize to judge of the election, qualifications, and returns of its own members, and its action in seating or rejecting delegates is not subject to judicial review. * * * When the convention has assembled, the committee takes charge of the meeting pending a temporary organization. If a dispute arises as to the persons entitled to participate in this proceeding, it is within the power of the committee to prepare a temporary or prima facie roll of delegates. When a temporary organization is effected, a committee on credentials is ordinarily appointed to pass upon the credentials of the delegates and to report back to the convention their findings, the final determination of disputed questions of title being left to the members upon the temporary convention roll. * * * "

In a convention for the nomination of candidates for public office the question as to whether certain delegates are able to vote is properly submitted to the Committee on Credentials. Rock vs. Board of Election Commissions, 103 Mich. 192, 61 N.W. 346.

Therefore, in answer to your question it is within the power of the Credential Committee of the said convention to certify the alternate as a second delegate. However, if there is a disputed question of title to act as a delegate, then the members as a whole should vote upon the measure.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
cc: Ralph Morris - Polk County Superintendent of Schools
Paul Johnston - Department of Public Instruction
Joe Davis - Department of Public Instruction

~~OLD AGE ASSISTANCE TAX:~~
TAXATION: Old Age Assistance - Repeal of the levy of the Old Age Assistance tax authorized by Section 249.36, Code of 1958, does not eliminate the duty to pay the tax, and such taxes, when offered, should be accepted by the County Treasurer and credited to the Old Age Assistance Fund. (Strauss to Sarsfield, Ltr. Comp., 9/22/59)
59-9-30

September 22, 1959

Mr. Glenn D. Sarsfield
STATE COMPTROLLER
State House
L O C A L

Attention: Mr. H. Dwaine Wicker, Assistant State Comptroller

Dear Sir:

Reference is herein made to letter to you of John C. McDonald, Dallas County Attorney, in which he states:

> "Mr. J. H. Hamiel, Treasurer of Dallas County, has handed me your letter to him dated September 4th suggesting that he not accept further old age pension fund taxes in view of the action of the legislature at the 58th General Assembly.
>
> "Is it the opinion of your office that treasurers should no longer accept payment of old age assistance taxes when the same are offered to be paid? I understand, of course, that such old age assistance taxes are no longer a lien against real estate. I shall appreciate your prompt reply."

I would advise as follows:

The statute, section 249.36, Code of 1958 providing for the payment of the tax referred to of two dollars, to and including December 31, 1936, was amended by Chapter 179, Section 1, 58th General Assembly, by striking all of said section except the first sentence thereof creating the Old Age Assistance Fund.

Section 249.38 providing, among other things, for the collection of the tax, was repealed by the same Act, Section 3 thereof. In this situation, the duty to pay the tax was a continuing one until the repeal provided by Chapter 179, Acts of the 58th G.A. came into effect. (See Report of Attorney General for 1938, at page 303.)

59-9-30

Although no method of collection remains, the duty of collection is still existent, and therefore payments of the tax may be accepted by the Treasurer and credited to the Old Age Assistance Fund.

Section 4.1 (1), Code 1958, provides:

> "1. Repeal -- effect of. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed."

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS mmh4

Real Property, tax deeds--

TAXATION: ~~REAL PROPERTY: TAX DEEDS:~~

A tax deed to the State Board of Social Welfare prior to July 4, 1959 is void. Property properly assessed during the period in which the State Board of Social Welfare held such a tax deed is a proper subject of taxation. (Peterson to Nelson, Story Co Atty, 9/22/59) #59-9-31

September 22, 1959.

Mr. Donald L. Nelson
County Attorney
Story County
Nevada, Iowa

Dear Mr. Nelson:

Reference is made to your letter of recent date in which you request an opinion on the following facts:

> "In 1935, "A" was the record owner of property in Story County, Iowa. In 1944, "B" purchased said property at a tax sale for $659.56, which amount represented delinquent taxes for the years 1935 to 1944. On December 9, 1947, the State Board of Social Welfare took an assignment of said tax certificate, paying $1104.93 therefor, and which amount includes the delinquent taxes for the years 1944 to 1947. On February 24, 1948, the State Board of Social Welfare secured a Treasurer's Tax Deed to said property. Thereafter, taxes continued to be assessed against the said property until the year 1951, at which time, assessment ceased at the specific request of the State Department of Social Welfare. On October 12, 1956, "A" conveyed said property to the State Department reserving a life estate. Now "A" has died; the six month redemption period reserved to the heirs of "A" has elapsed; and the State Board will soon sell the property."

Your specific question was:

> "Was the property taxed for the years 1947 to 1951 exempt from taxation because of the Treasurer's Tax Deed to the State Department of Social Welfare; or was such deed void so as to make the State of Iowa's exemption inapplicable in view of the case of IN RE ESTATE OF HOYT, 1954, 246 Iowa 292?"

59-9-31

Authority for exemption from taxes for property of the State of Iowa is found in Section 427.1, Code of Iowa, 1958:

> "The following classes of property shall not be taxed:
> "1. Federal and State Property. The property of the United States and this State. * *"

and Section 445.28, Code of Iowa, 1958:

> "Taxes upon real estate shall be a lien thereon against all persons except the State."

The problem involves the question of whether the property described in the factual situation was "The property of * * * the state" during the period from 1947 through 1951 to exempt it from taxation. In connection therewith, I refer you to the case of TUBBERING vs. CITY OF BURLINGTON, 1886, 68 Iowa 691, 24 N.W. 514, which states:

> "Taxation is the rule and exemption is the exception."

and also the case of CORNELL COLLEGE vs. BOARD OF REVIEW OF TAMA COUNTY, 1957, 248 Ia. 388, 81 N.W. 2nd 25:

> "While there are some jurisdictions that hold statutes granting exemptions, such as the one in question, should be liberally construed, the majority, including Iowa, adopt the view that all exemptions statutes must be strictly construed and if there is any doubt upon the question, it must be resolved against the tax exemption. 84 C.J.S., Taxation, Sec. 225; Readlyn Hospital v. Hoth, 223 Ia. 341, 272 N.W. 90; Board of Directors v. Board of Supervisors, 228 Ia. 544, 293 N.W. 38; Trustees of Iowa College v. Baillie, 236 Ia. 235, 17 N.W. 2d 1943, Jones v. Iowa State Tax Commission, 247 Ia. 530, 74 N.W. 2d 563."

In view of the attitude taken by the Court toward exemption from taxation, before the property described in your inquiry can be considered exempt from taxation, it must be clearly determined that it was property of the State of Iowa or the State Department of Social Welfare as an agency of the State of Iowa.

The case of IN RE ESTATE OF HOYT, 1954, 246 Iowa 292, 67 N.W. 2nd, 528, clearly emphasizes the lack of authority of the State Board of Social Welfare to take a tax deed. I refer you to several quotations from that case:

> "Few rules are more firmly settled in the law than that which holds a mortgagee or other lienholder may not acquire a tax title in derogation of the rights of the holder of the legal title or of holders of superior liens. A lienholder ordinarily may redeem from a tax sale to protect his own interests; but such action is a redemption only."
>
> * * *
>
> "If it was the intent of the legislature to abrogate the salutary rule which forbids a lienholder to acquire a tax title as against the lienor, we must assume it would have said so. But no such intent appears."
>
> * * *
>
> "If its tax deed were valid at all, it was valid when it obtained it; and if we should so hold, the effect would be that the beneficiaries might have been dispossessed at any time thereafter. Of course, the statute permits of no such interpretation."

The Supreme Court in this case affirmed the ruling of the Trial Court in determining that the tax deed acquired by the State Board of Social Welfare was void under the law then existing. It was only by this instrument that the Department could claim a property interest other than as a lienholder. An extensive summary of the rights of lienholders and mortgagees in regard to tax sales is found in KOCH VS. KIRON STATE BANK,1941, 230 Ia. 206, 297 N.W. 450. It was emphatically pointed out in this case that the purchase of the tax sale certificate by a lienholder or mortgagee amounted only to a redemption and did not place in such person the right of obtaining a tax deed.

Under the circumstances in your case, it is clear

that the State Board of Social Welfare or the State of Iowa had no property right as a result of their tax deed. The County Assessor acted in accordance with his duties as described in Sections 441.9 and 441.13, Code of Iowa, 1958 by causing the property to be assessed for the years 1947 through 1951. The property was in fact subject to taxation during the period designated by your question.

The statement of the facts indicates that the property in question was conveyed to the State Department of Social Welfare on October 12, 1956. It appears that such conveyance was made under authority of Section 249.20, Code of Iowa 1958, which provides that the State Board, when it deems it necessary to protect the interest of the State, may require "as a condition to the granting of assistance, the absolute conveyance or assignment of all, or any part" of the property of the recipient or applicant. The deed preserves a life estate to the grantor and his spouse and an option to the grantor or his heirs to repurchase the property by payment of the total amount of assistance paid to the recipient. The option exists in favor of the heirs for six months succeeding the death of the recipient or his spouse.

Section 249.20 , Code of Iowa, 1958, also requires the State Department, upon taking such a deed, to "pay any delinquent taxes." There were taxes properly assessed against the property in question and they were delinquent at the time the State Board acquired the property in 1956, Under Section 249.20, they must pay these taxes.

Upon taking such deed, the property becomes exempt from taxation under Code section 427.1 (1). See Attorney General's Opinions 1956, page 79.

Yours Very truly,

Carl E. Peterson
Special Assistant Attorney General

CEP/sp

AGRICULTURE:

Brucellosis Testing -- An approved veterinarian for testing brucellosis on an area plan, may test his own cattle located in that area. (Erle to Spry, Secy. Ag., 9/24/59) #59-9-32

September 24, 1959

Clyde Spry, Secretary
IOWA DEPARTMENT OF AGRICULTURE
State House
L O C A L

Attention: Dr. A. L. Sundberg, DVM
Chief of Animal Industry Division

Dear Doctor Sundberg:

Reference is made to your letter dated July 21, 1959, which requested the following information concerning one Dr. Warren E. Bowstead, DVM:

> "Please advise whether it is legal or proper for me to test my own cows or vaccinate my own calves in a county wide test for Brucellosis. I own some breeding cattle in such a county."
>
> (Signed: Warren E. Bowstead, DVM)

Brucellosis testing plans are governed by Regulation 15, 1958 Iowa Departmental Rules, page 11. Section II of Regulation 15, states:

> "In order to be recognized as being under a control plan for brucellosis it will be necessary for owners to sign an agreement form prescribed by the department ... "

> "Section IX, Brucellosis Tests and Reports.
> B. The Department shall approve a veterinarian as eligible to conduct brucellosis tests .... The Department shall specify the standards for maintaining such approval."

Section II states that owners under an area testing plan for brucellosis must sign an agreement. If the veterinarian has signed such an agreement then he is an "owner" within the rules and must have his cattle tested.

Section IX prescribes the procedure for reporting such tests and who may conduct them.

Section IX (B) provides for an approved veterinarian and that the Department shall state the standards for such approval. The rules do not preclude a veterinarian from testing his own cattle.

59-9-32

Therefore, a veterinarian may test his own cattle for brucellosis if such owner/veterinarian has signed an agreement and also is the approved veterinarian for the area in which his cows are located.

Yours very truly,

NORMAN A. ERBE
Attorney General of Iowa

NAE:JRM:mmh4

AGRICULTURE:
Swine Importation -- State Department is creature of statute and may regulate only for reasons specified in statute.
(Ertel to Spry, Ltr. Op., 9/24/59) #59-9-33

September 24, 1959

Clyde Spry, Secretary
IOWA DEPARTMENT OF AGRICULTURE
State House
L O C A L

Attention: Dr. A. L. Sundberg, DVM
Chief of Animal Industry Division

Dear Doctor Sundberg:

Reference is made to your letter dated September 11, 1959, in which you requested the following:

> "Does the Division of Animal Industry, Iowa Department of Agriculture under Chapter 163, (Section 163.1, 1958 Code of Iowa and the 1958 Iowa Departmental rules page 7, paragraph A.B. & C.) have the authority to regulate the bringing of feeding and breeding swine into Iowa, in conformance with Chapter 141, Acts of the 58th General Assembly, and to impose quarantine on animals which in our opinion may be detrimental to swine industry of Iowa."

The information requested involves two questions. First, if the Division of Animal Industry has the authority to regulate the bringing of breeding and feeding swine into Iowa, and second, if the Division may quarantine swine which in its opinion may be detrimental to the swine industry in Iowa.

> Section 163.1, 58 Iowa Code states:
> "In the enforcement of this chapter the department of agriculture shall have power to:
>
> 163.1(7) Regulate or prohibit the arrival in, departure from and passage through the State, of animals infected with or exposed to any contagious disease and in case of violation of any such regulation or prohibition, to detain any animal at the owner's cost."

The above section allows the department of agriculture to regulate the importation of any animal into the state when infected or exposed to any contagious disease. Therefore, the power of regulation is limited, that is, only if the animal is infected or exposed.

> Section 163.1(8) states:
> "Regulate or prohibit the bringing of animals into the state, which, in its opinion, for any reason, may be detrimental to the health of animals in the state."

59-9-33

Again, the department has authority to regulate importation of animals only when detrimental to the health of animals in this state. It does not provide for regulation when detrimental to the "industry."

Section 159.1 says that:

"'Department' shall mean the Iowa Department of agriculture and whenever such department is required or authorized to do an act, unless otherwise provided, it shall be construed as authorizing performance by an officer, regular assistant, or duly authorized agent of such department."

The Division of Animal Industry is an agency of the department of agriculture and as Chief of such Division, you are a duly authorized agent of such department. Therefore, the Division has authority to regulate, except within the limits of section 163.1(7) and 163.1(8).

However, the Division of Animal Industry is further restricted to regulate, because of the rules promulgated in 1958 Iowa Departmental Rules, page 7, section X (A), (B), and (C).

"Section X -- Swine. A. Healthy swine for feeding or breeding purposes may be imported into the state when accompanied by a health certificate issued by a licensed graduate veterinarian indicating that the animals are free from all contagious, infectious and transmittable disease and have been vaccinated by a veterinarian with anti-hog cholera serum and virus not less than thirty (30) days prior to date of entry.

"Healthy swine which have been vaccinated by a licensed graduate veterinarian when not less than eight (8) weeks of age with one of the vaccines recognized by the Chief of the Bureau of Animal Industry for the prevention of hog cholera not less than thirty (30) days and not more than twelve months may enter the state when accompanied by a health certificate issued by a veterinarian stating the above as facts."

This section provides for the importation of swine for feeding and breeding purposes and allows importation when the above procedure is followed. The Division, therefore, is bound by the department's rules regulating importation. In State ex rel Bierring v. Swearingen, 237 Iowa 1031, the Court stated in a specially concurring opinion that judicial notice should be taken of rules and regulations of an important state department. This in effect binds such department to its own rules and regulations. Therefore, when the requirements are met, importation is permitted.

Section X(B) further provides:

"Swine from public stock yards for purposes other than immediate slaughter may be imported or brought into the state only when shipped in compliance with the regulations of the

United States Bureau of Animal Industry, and when such shipments are made within twenty-four (24) hours after immunization and dipping provided a permit has been obtained from the Chief, Division of Animal Industry, Iowa Department of Agriculture, Statehouse, Des Moines 19, Iowa, Such shipments must be held in quarantine at destination for at least thirty (30) days."

Again, the regulation states when importation is allowed. The Division has authority, however, to deny importation by denying a permit, but only if there is noncompliance with the regulations of the United States Bureau of Animal Industry or failure to ship within twenty-four hours after immunization and dipping.

Section X (C) Permits.
"A permit must be secured from the Chief, Division of Animal Industry, Iowa Department of Agriculture, Statehouse, Des Moines 19, Iowa, to move hogs into the state under quarantine regulations, for feeding or breeding purposes, without having been immunized for hog cholera before shipment, if accompanied by proper health certificate and loaded in cleaned and disinfected cars or trucks to be vaccinated immediately at destination with anti-cholera serum and virus or one of the modified live virus vaccines recognized by the Chief, Bureau of Animal Industry for the prevention of hog cholera which the producer or manufacturer recommends an adequate dose of anti-hog cholera serum, at the expense of the owner, by a licensed graduate veterinarian, who shall also issue a quarantine on the hogs for thirty (30) days from date of vaccination."

Under this section, a permit may be obtained as an alternative method of importation. The Division may deny such permit only if the importer fails to (1) have a proper health certificate, or (2) to load in clean and disinfected cars or trucks, or (3) to vaccinate in accordance with said section.

By statute, chapter 141, Acts of the 58th General Assembly, a further limitation is placed on the regulatory power of the Division. That chapter states:

"Chapter 141 An Act to regulate and control importation of swine into Iowa.
"Section 1. After July 1, 1959, no swine other than purebred shall be imported into Iowa for feeding or breeding purposes without first having affixed in either ear of each animal a numbered tag and accompanied by a health certificate issued by a qualified veterinarian. A copy of the health certificate shall be promptly forwarded to the animal industry division of the Iowa department of agriculture. Such certificate shall include a statement showing that the swine have been inspected within ninety-six hours prior to the time of importation and that there are no symptoms of any infectious, contagious or communicable disease, and a statement that the swine have been vaccinated against hog cholera by the method described by

statute, not less than ten (10) days prior to the date of entry into Iowa, unless a permit allowing importation subject to immunization upon arrival has been obtained. The health certificate shall further include the ear tag numbers of all swine in the shipment. Provided, however, that if the name of the importer is shown on the ear tag the number of the ear tag need not be placed on the health certificate, if such importer keeps available for inspection by the secretary of agriculture, or his authorized agent, a record of the name and address of the producer of all such animals for a period of at least one year after the date of entry of the animals into Iowa.

Blanks for health certificates and ear tags shall be furnished by the department of agriculture at cost, when applied for by the importer."

This statute specifically provides for the importation of swine and allows importation when the above procedure is completed. The Division does not have the authority under this provision to further regulate, except when a permit is requested. In such case the Division will be governed by Section X(C) of the Iowa Departmental Rules.

It is our opinion that the Division may regulate importation of swine only within the limits provided by Chapter 141, Acts of the 58th General Assembly, and Section X(C), Iowa Departmental Rules, page 7.

Turning now to the problem whether the Division may impose quarantine on animals which in its opinion may be detrimental to swine industry of Iowa, reference is made to the previously stated sections of the '58 Iowa Code, Departmental Rules, and 58th General Assembly Acts.

Section 163.1(3)states that importation may be prohibited or regulated, only if detrimental to the health of animals within the state. As such, no provision provides for the detriment of the "industry."

The departmental rules which regulate importation can now be considered. The rules provide for importation when certain standards are met. Importation is either allowed or denied. The rules do not provide for the imposition of quarantine except as provided in Section X(B) and (C) of the rules.

Chapter 141, Acts of the 58th General Assembly either allows importation or denies it and does not provide for quarantine except where a permit is requested under section X(C) of the rules.

Therefore, the applicable statutes specifically state when importation is allowed and also when quarantine is allowed. As a result, the Division may not exercise its discretion or opinion as to when to quarantine the importation of swine.

In conclusion, the Division of Animal Industry may regulate the importation of swine but only within the limits established by the Departmental Rules, and Chapter 141, Acts of the 58th General Assembly. The Division may impose a quarantine but only in conformance with section X(B) and (C) of the Departmental Rules, or as provided in Chapter 141, Acts of the 58th General Assembly. As a result, regulation may be exercised only for reasons specified in the statute.

Yours very truly,

NORMAN A. ERBE
Attorney General of Iowa

NAE:JRM:mmh4

COURTS: Deposits under Code section 682.39 -- Auditor should comply with order issued under code section 682.41 unless he knows of some reason claimant was not "entitled thereto" in which event appeal should be taken. (Goodenberger, Madison Co Atty., 9/25/59) # 59-9-34

September 25, 1959

Mr. Emery L. Goodenberger
Madison County Attorney
Winterset, Iowa

Dear Sir:

Receipt is acknowledged of your letter of September 16 as follows:

> "I would like an opinion concerning the authority of the County Auditor to draw a warrant on the County Treasurer in the following situation:
>
> "'On January 6, 1951, a referee in a partition suit deposited certain funds due X, whose residence was unknown, with the clerk of the district court as authorized by Section 682.31 of the Code. Notice by publication was given of the contemplated deposit. Thereafter, the Clerk deposited the money with the County Treasurer as provided by Section 682.39. In 1959 A and B, children of X, filed petition for appointment of administrator of X, an absentee. The only assets of the absentee as shown by the Preliminary Inheritance Tax Report are the funds on deposit with the County Treasurer due X. The administrator of X's estate made application to the district court and obtained an ex parte court order directing the County Auditor to issue a warrant to the administrator of the estate of X for the funds due the absentee.'
>
> "My question is this:
>
> "Does Section 682.41 of the Code authorize the County Auditor to issue such a warrant payable to the Administrator of the estate of X where the court order was obtained within ten years from the date of the deposit with the clerk?"

In answer thereto, section 682.41 provides in pertinent part:

59-9-34

> "Whenever the claimant therefore . . . shall satisfactorily show to such court that he is the rightful owner of said funds . . . and entitled thereto, the court, by order entered of record, shall direct the county auditor to issue a warrant on the county treasurer for said money . . . and, upon such order, the said treasurer shall pay to the person named in such order the funds . . . to which the claimant shall have shown himself entitled." (Emphasis supplied)

Section 682.42 provides:

> "Any person . . . entitled to any funds which have been deposited with the clerk of the district court of any county in connection with the . . . partition suit . . . shall be deemed to have waived all right, claim or interest therein, and shall not be permitted to have or make claim therefore, unless proper demand and proof is made by the person . . . entitled to any of said funds within a period of ten years from the date of deposit of said funds with the said clerk. If said funds are not claimed within said ten-year period they shall become a part of the general fund of the county."

Since section 682.41 expressly provides, "the court . . . shall direct the county auditor to issue a warrant", the county auditor would seem to have three alternative courses open to him:

1. Comply with the order.
2. Appeal from the order.
3. Do neither and subject himself to contempt.

I believe we may eliminate alternative #3 without discussion. Unless the county auditor knows of some reason the claimant was not "entitled thereto", no basis for appeal appears to exist under alternative #2. This leaves alternative #1 as the apparent answer to your question.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

ELECTIONS:

Municipal; Changing terms -- The use of the word "staggered" in referring to a term of office of the city council and mayor, in changing by election the terms thereof to four years, and the subsequent election of the mayor to a four-year term concludes that the voters were not deceived by the use of the word "staggered" and the term of the mayor is fixed at four years. (Strauss to Akers, Lt. Aud., 9/28/59) # 59-9-35

September 28, 1959

Mr. C. B. Akers
Auditor of State
Statehouse

Attention: C. W. Ward, Supervisor

Dear Sir:

This will acknowledge receipt of yours of the 16th inst. in which you submitted the following:

> "During the course of an examination of the municipal accounts and records of the City of Sigourney, the following legal question came up, and we would appreciate your opinion.
>
> "The City Council held a special election changing the term of office for the municipal officials as provided for in Chapter 363, Section 363.9. The proposition at the special election reads as follows:
>
> > Shall the mayor and city council be elected to four year staggered terms of office?
>
> "Said electors approved the officers' terms. In November 1955, said officers were elected to a four year term. In said proposition in special election it would be impossible to stagger the mayor's term of office.
>
> "The question is, in November 1959, shall the term of office for the mayor be for two or four years?"

In reply thereto I would advise you in my opinion the question to be submitted to the electors in the November, 1959 election shall be that the mayor will be elected for a term of four years, and not for two. Support for this view is found in the following:

59-9-35

AMERICAN JURISPRUDENCE, Volume 18, § 180, title ELECTIONS

"However, an election will not be declared invalid if the ballots are in the form provided by law and there is no evidence that the voters were deceived, nor will immaterial variations from the statutory requirements vitiate an election."

The use of the word "staggered" in the previous election does not appear to have deceived the voters. Confirmation of this is found in the fact that in an election subsequent to the change in term of the mayor's office, the mayor was elected to a four-year term. See Pennington v. Sumner, 222 Iowa, 1005, 270 N.W. 629, 109 A.L.R. 355.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

CONSERVATION:

State Commission -- Expenditures of the Conservation Commission in connection with the state-wide clinic held September 8, 1959, are not reimbursable.

Strauss to Powers, Cons. Com., 9/30/59) #59-9-36

September 30, 1959

Mr. Glen G. Powers
Acting Director
STATE CONSERVATION COMMISSION
East Seventh and Court

L O C A L

Dear Sir:

Reference is herein made to letter addressed to you, dated September 1, from H. W. Freed, Chief of Division of Administration, which has been referred to me for opinion.

His letter states that material of the Conservation Department has been used in the calling and holding of the state-wide conservation clinic called by the Governor, held September 8, 1959, at Des Moines; that the value of such material is $131.40 and that the department seeks reimbursement therefor.

Review of this situation discloses no statutory method for the collection of the foregoing sum, and in the absence of such authority, the expenditure made by the department is voluntary and recovery may not be had.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

59-9-36

DRAINAGE: Tile lines-1The township trustees under section 465.1, 1958 Code of Iowa, determine whether or not a tile line must be projected across the right of way to a suitable outlet as provided in section 465.23, 1958 Code of Iowa. 2-If it is found that the tile line should be projected across the right of way then the board of supervisors, as to secondary roads, are responsible for materials and labor as provided in the second paragraph of section 465.23. (Lyman to Garretson, Henry Co. Atty., 9/4/59) #59-10-1

Ames, Iowa

September 4, 1959

Mr. Charles O. Garretson
Henry County Attorney
Mount Pleasant, Iowa

Dear Mr. Garretson:

The following questions are submitted in your letter of June 16, 1959:

> "I would like your opinion on questions arising under chapter 465.23 of the 1958 Code of Iowa. Paragraph 2 of said section reads as follows:
>
> > 'If a tile line must be projected across the right of way to a suitable outlet, the expense of both material and labor used in installing the tile drain across the highway and any subsequent repair thereof shall be paid from funds available for the highways affected.'
> >
> > 1. Who determines whether or not a tile drain must be projected across the right of way of a secondary road to a suitable outlet and how is the determination made?
> >
> > 2. Is it the responsibility of the Board of Supervisors to extend tile drains across the right of way when such drains have been in place for a number of years and have been drained to open ditches which at one time were suitable outlets but are now filled up and no longer provide a suitable outlet?"

In answer thereto you are advised:

1. Section 465.23, 1958 Code of Iowa, as amended by the 58th General Assembly, Chapter 313, section 1, states:

> "When the course of natural drainage of and land runs to a public highway, the owner of such land shall have the right to enter upon such highway for the purpose of connecting his drain or ditch

> with any drain or ditch constructed along or across the said highway, but in making such connections, he shall do so in accordance with specifications furnished by the highway authorities having jurisdiction thereof, which specifications shall be furnished to him on application. He shall leave the highway in as good condition in every way as it was before the said work was done.
>
> If a tile line or drainage ditch must be projected across the right of way to a suitable outlet, the expense of both material and labor used in installing the tile line or drainage ditch across the highway and any subsequent repair thereof shall be paid from funds available for the highways affected."

Section 465.1, 1958 Code of Iowa, provides:

> "Drainage through land of others--application. When the owner of any land desires to construct any levee, open ditch, tile or other underground drain, for agricultural or mining purposes, or for the purposes of securing more complete drainage or a better outlet, across the lands of others or across the right of way of a railroad or highway, or when two or more landowners desire to construct a drain to serve their lands, he or they may file with the township clerk of the township in which any such land or right of way is situated, an application in writing, setting forth a description of the land or other property through which he is desirous of constructing any such levee, ditch, or drain, the starting point, route, terminus, character, size, and depth thereof. (Emphasis added)

Under section 465.2, 1958 Code of Iowa, upon filing the application, the township clerk is required to fix a time and place for hearing before the township trustees. According to section 465.6, 1958 Code of Iowa, the trustees find that all necessary parties have been served notice and "proceed to hear the determine the sufficiency of the application as to form and substance...They shall also determine the merits of the application,..." This statutory language appears broad enough to empower the township trustees under section 465.23 supra to determine "if a tile line or drainage ditch must be projected across the right of way to a suitable outlet."

Mr. Charles O. Garretson

Such a statutory construction is in keeping with and does not infringe upon the authority granted in the first paragraph of section 465.23 supra inasmuch as that pertains only to the right of the landowner to enter upon a highway for the purpose of connecting his drain or ditch with any drain or ditch constructed along or across a highway.

In seeking the meaning of a section of a code chapter the entire chapter should be considered and every part given effect if reasonably possible. Board of Park Commissioners of City of Marshalltown vs. City of Marshalltown, 244 Iowa 844, 58 N.W. 2nd 394. A court should consider the entire act and other related statutes in arriving at the meaning of a statute. Davis vs. Davis, 246 Iowa 262, 67 N.W. 2nd 566.

Therefore, in answer to the first question you are advised that the township trustees, under the procedure of Chapter 465 supra, determine whether or not the tile line or drainage ditch must be projected across the right of way to a suitable outlet. The findings of the township trustees are, of course, subject to appeal to the district court.

In answer to question two, the responsibility of the board of supervisors is to comply with the findings of the township trustees, or the district court, as the case may be. If it is found that the tile line should be projected across the right of way then it is incumbent that the board of supervisors, having jurisdiction over secondary roads under section 306.3, 1958 Code of Iowa, carry out the statutory mandate evidenced in the second paragraph of section 465.23 supra.

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

HVF:lle

TAXATION: Sales Tax; Interstate Commerce --
Though goods are shipped directly to customers from out-of-state, the fact that out-of-state seller has retail division in the state, orders are taken in Iowa by salesmen, and remittances are mailed to the Iowa retail division, make the transations subject to Retail Sales Tax and not the Use Tax law.
(Gelf t. O'Connor, St. Tax Comm., 9/14/59) # 59-10-2

September 14, 1959

Mr. John J. O'Connor, Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. O'Connor:

This will acknowledge receipt of a letter dated September 8, 1959 from Mr. Don Cunningham, Director of the Retail Sales and Use Tax Division of the Iowa State Tax Commission, wherein the following inquiry was submitted:

> "We have been requested by J. F. Abely, Division Controller of the W. R. Grace and Company of Cedar Rapids, to furnish them with a specific tax ruling as to whether one phase of their operations is subject to the Sales or the Use Tax Laws.
>
> "The submitted facts indicate that:
>
> > "The main office of the W. R. Grace and Company is at Cambridge, Massachusetts, while a manufacturing plant is located at Cedar Rapids, Iowa.
> >
> > "Salesmen in Iowa accept orders for specialized packaging equipment and accessories and these orders are forwarded directly to Cambridge, Massachusetts and when filled the ordered material is shipped directly to the customer's plant. Invoices for the orders are also handled by the Massachusetts office.
> >
> > "All collections for the orders placed with the Cambridge, Massachusetts office are completed by the Cedar Rapids branch and the accounting records in Cedar Rapids reflect the Massachusetts transactions as Iowa sales.
>
> "Would you accordingly advise us as to your opinion which Law applies?"

59-10-2

The problem presented is whether the Iowa State Retail Sales Tax can be imposed on goods coming into this state in interstate commerce. You are referred to Rule No. 55, 1958 Iowa Departmental Rules, pp. 461 and 462, which, for your information, is set forth below:

> "When tangible personal property is purchased in interstate commerce for use or consumption in this state, where delivery is made in this state, and the seller is engaged in the business of selling such tangible personal property in this state for use or consumption, such sale is subject to the retail sales tax, regardless of the fact that the purchaser's order may specify that the goods are to be manufactured or procured outside this state and shipped directly from the point of origin to the purchaser. The seller is required to report all such transactions and to collect and remit to this state retail sales tax on all such sales.
>
> "If the above conditions are met, it is immaterial (1) that the contract of sale is closed by acceptance outside the state or (2) that the contract is made before the property is brought into the state.
>
> "Delivery is held to have taken place in this state (1) when physical possession of the tangible personal property is actually transferred to the buyer within this state, or (2) when the tangible personal property is placed in the mails or on board a carrier at a point outside the state (f. o. b. or otherwise) and directed to the buyer in this state."

The history of this rule begins with a group of cases decided by the United States Supreme Court early in 1940; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 Sup. Ct. 388 (1940); McGoldrick v. Felt & Tarrant Mfg. Co. and McGoldrick v. A. H. DuGrenier, Inc., 309 U.S. 70, 60 Sup. Ct. 404 (1940); Jagels "A Fuel Corporation" v. Taylor, 309 U.S. 695, 60 Sup. Ct. 469 (1940).

In the Jagels' case, supra, a fuel company having a sales office in New York City maintained a coal yard in Jersey City, New Jersey. Customers of the fuel company ordered coal by mail or telephoned directly to the New

Jersey office and thereupon the coal was delivered directly to the customer in New York City. The Supreme Court upheld the New York City's sales tax on this transaction evidently on the basis of doing business in New York City and having a sales office located there.

Rule 55, supra, is a result of the efforts of the Committee on Uniform Sales Taxation of the National Association of Tax Administrators in attempting to establish a uniform application of the sales tax laws in the different jurisdictions as applied to interstate commerce, in view of the aforementioned cases. Applying Rule No. 55, supra, which is an administrative interpretation of Retail Sales Tax Law, to the facts as presented above, it would appear that the sale of specialized packaging equipment shipped directly from Cambridge, Massachusetts, to the customer's plant is taxable in this state under sales tax statute Section 422.43, Code of Iowa (1958).

It was the intention of the Legislature in passing the use tax statute to supplement and complement the sales tax law, so as not to place the local retailer at a disadvantage in competition with an out-of-state seller. Peoples' Gas & Electric Co. v. State Tax Commission, 238 Iowa 1369, 28 N.W.2d 99; Dain Mfg. Co. of Iowa v. Iowa State Tax Commission, 237 Iowa 531, 22 N.W.2d 786; Report of Attorney General, 1940, p. 422. Therefore, in any sales transaction, the sales tax statute must be applied first; if it cannot be imposed, then the Use Tax Act comes into the picture.

In conclusion, since the W. R. Grace & Company has a retail division within the state and orders for this equipment are taken by salesmen in Iowa

and remittances are mailed to the Cedar Rapids branch, the sale of the specialized packaging equipment must be taxed under the sales tax law.

Very truly yours,

Gary S. Gill
Assistant Attorney General

GSG:fs

SCHOOLS: Transportation -- Under section 285.10(7) cannot arrange for outside financing for the purchase of busses but must deal directly with the dealer.
(Rehmann to Watts, Adams Co. Atty.; 9/17/59) # 59-10-3

September 17, 1959

P 1

Mr. Lee R. Watts
Adams County Attorney
407 Seventh Street
Corning, Iowa

Dear Sir:

This will acknowledge receipt of your letter of August 27 which states the following:

> "The board purchased some new busses on bids from local dealers to whom payment was made from the proceeds of a loan secured from the local bank in the sum of $15,000.00 on a note drawing four percent simple interest payable in five future annual installments of $3,000.00 each, signed in the name of the district by the President and Secretary upon authority of a resolution by the school board.
>
> "Section 285.10 (7-b) is the only authority I can find for the purchase of school busses on credit, and I do not find any general authority which permits a school board to incur an installment indebtedness of this kind. The amount of money borrowed was for the full purchase price of the busses, and was not used for any other purpose.
>
> "Does the above cited section require that the installments must be paid to and the contract made with the party from whom the bus is purchased? Such would seem to be indicated by the last sentence which provides that the bodies and chassis must be purchased on separate contracts."

In reply thereto, I advise:

- Section 285.10(7), Code 1958, provides as follows:

> "7. When a school qualifies to purchase busses, they may be purchased as follows:

59-10-3

" a. From such funds as may be available in the general fund.

" b. May purchase busses and enter into contract to pay for such busses over a five-year period as follows: One-fourth of the cost when bus is delivered and the balance in equal annual installments, plus simple interest due. The interest rate shall be the lowest rate available and shall not exceed four percent simple interest. The bus shall serve as security for balance due. Bus bodies and chassis shall be purchased on separate contracts."

The statute does not expressly state the administrative method to be employed when the school wishes to avail itself of the provisions of Section 285.10 (7-a). However, at the time the statute became law, the State Department of Public Instruction adopted certain rules and regulations concerning the administrative method to be used in the purchase of school busses.

Administrative interpretation, while not binding upon the courts, are often entitled to and are given much weight, particularly when they have been in force for a considerable length of time. School Dist. of Soldier Twp. v. Moeller, 247 Iowa 239, 73 N.W. 2d 43.

Your attention is directed to Regulation IX, Section 3 at page 282 of 1958 Iowa Departmental Rules, which provides:

"a. If the contract provides for buying the bus over a five-year period, the Board of Education will issue six copies of form TR-F-19-4911 per body, and six copies of form TR-F-19-4911 for chassis. One copy each of contract for body and chassis shall be kept for the secretary's files.

"b. Secretary shall issue necessary warrants for meeting terms of contract. At least one warrant must be drawn for the one-fourth down-payment on body and one for the one-fourth down-payment on chassis and not more than five equal warrants drawn for the annual payments on body and not more than five equal warrants drawn for annual payments on chassis.

"c. Said warrants must be drawn in favor of the firm or company selling the respective body and chassis."

You will note in subparagraph "c" above that the warrants must be drawn in favor of the firm or company selling the busses. There being no other authority, either statutorily or otherwise, for the purchase of school busses under chapter 285, under the doctrine of expressio unius est exclusio alterious the school boards have no power to arrange for other types of financing except as provided.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
cc: Paul Johnston
Joe Davis
Dept. of Pub. Instr.

HIGHWAYS: Inter-county drainage districts--

1. Under Code section 455.210 there is one engineer who need not be a county resident. 2. Freeholder appraisers may be from any county in district. 3. Engineer under Code Sections 455.30 and 455.203 may be same person. (Lyman to Newell, Atty., 9/18/59) # 59-10-4

September 18, 1959

Mr. Russell R. Newell
Attorney at Law
Columbus Junction, Iowa

Dear Sir:

Receipt is acknowledged of your letter raising certain questions involving the appointment, number and qualifications of appraisers selected under the provisions of Section 455.210 1958 Code of Iowa, as applied to inter-county levee and drainage districts.

Your questions are:

1. Should the engineer be a resident of either county, or should there be a separate engineer from each county?

2. Should there be one freeholder from each county, who, together with the engineer, shall constitute the three appraisers or should there be a separate set of appraisers from each county?

3. Can the engineer required by Section 455.30 be the same person who has already been appointed by the district under Section 455.203?

The answer to number one is that the law provides that one engineer be appointed. There is no statutory requirement that such engineer be a resident of one of the counties in which the district is located. It has been presumed that the inter-county district is managed by a "joint board" of supervisors. Section 455.210, 1958 Code, provides that the "board" shall appoint three appraisers, one of whom is an engineer. "Board" as used therein means "joint board" where a inter-county district is concerned. Section 455.4, 455.214 and 455.215, 1958 Code of Iowa.

59-10-4

September 18, 1959

Mr. Russell R. Newell

Page 2-

The answer to number 2 is that two of the "three" appraisers provided for by Section 455.210, 1958 Code of Iowa, are to be freeholders of one of the counties in which the district is located. Obviously, use of "county" in the singular does not make every part of the phrase "freeholders of the county" clear and meaningful under these circumstances. Therefore, Section 4.1(3), 1958 Code of Iowa, should be applied which states:

> "Words importing the singular number may be extended to several persons or things...".

Such phrase should be construed as "freeholders of the county (or counties)". The two freeholder appraisers may be from one or any of the counties in which the inter-county district is located. It is to be noted that an inter-county district may involve more than two counties. Section 557.1, 1958 Code of Iowa.

The answer to number 3 is that the engineer required by Section 455.30, 1958 Code of Iowa, may be the same person who has already been appointed by the district under Section 455.203, 1958 Code of Iowa. There is no requirement that the engineer required under Section 455.30 be a different engineer. Your attention is also invited to Section 5, Acts of the Thirty-third General Assembly (1909), page 111, which is the immediate predecessor of present Section 455.30, 1958 Code of Iowa, as to appraisers qualifications. It states as to the three appraisers that:

> "one of whom shall be the engineer theretofore appointed as above provided, or, in case of his absence or inability to act, some other engineer, and two freeholders of the county who shall not be interested in, nor related to any party interested in the proposed improvement."

It appears that the change to the present language of Section 455.30 was to remove the required preference for the engineer first appointed in connection with formation or improvement of a district.

Very truly yours,

C. J. Lyman

JET:mj

CORPORATIONS:

Articles Amended -- Those existent at the effective date of Chapter 338, Acts of the 58th G.A., in order to take advantage of the revision of building and loan law (Chapter 338, Acts of the 58th G.A.) are required to accept such revision by amendment.
(Strauss to Akers, St. Aud., 9/28/59) #59-10-5

September 28, 1959

Mr. C. B. Akers
Auditor of State
Building

Attention: Mr. Geo. T. Carson
Supervisor, Savings and Loan Department

Dear Mr. Carson:

This will acknowledge receipt of yours with a copy of request to you from the Savings and Loan League of Iowa for an opinion concerning the effect of Section 69 of the new savings and loan law, Senate File 320 (now Chapter 338, Acts of the 58th General Assembly) on associations already incorporated.

The request follows:

> "At the request of the Savings and Loan League of Iowa, I am writing you for an interpretation of the effect of Section 69 of the new savings and loan law (Senate File 320) on associations already incorporated.
>
> "Specifically, does that section amend all Articles automatically without further or additional ratification by the members of each association, so that their Articles as of July 4, 1959, will permit them to commence operating under the new law? Or is the section and intent broad enough to permit them to act under the new law commencing with July 4, 1959, and until they have a chance to amend with restated or conformed Articles at their new regular annual meeting."

In reply thereto, addressing myself to the proposition submitted, and particularly to the effect Section 69, Senate File 320 (now Chapter 338, Acts of the 58th General Assembly) has upon associations incorporated at the effective date, of Chapter 338, I would advise:

Section 69 of said Act provides the following:

"1. The name, rights, powers, privileges, and immunities of every such corporation heretofore incorporated under the laws of this state repealed and revised by this Act shall be governed, controlled, construed, extended, limited, and determined by the provisions of this chapter to the same extent and effect as if such corporation had been incorporated pursuant hereto, and the articles of association, certificate of incorporation, or charter, however entitled, bylaws and constitution, or other rules of every such corporation heretofore made or existing are hereby modified, altered, and amended to conform to the provisions of this chapter, as the same are inconsistent with the provisions of this chapter, except that the obligations of any such existing corporation, whether between such corporation and its members, or any of them, or any other person or persons, or any valid contract between the members of any such corporation, or between such corporation and any other person or persons, existing at the time this chapter takes effect, shall not be in any way impaired by the provisions of this chapter, and, with such exceptions, every such corporation shall possess the rights, powers, privileges and immunities and shall be subject to the duties, liabilities, disabilities, and restrictions conferred and imposed by this chapter notwithstanding anything to the contrary in its certificate of incorporation, bylaws, constitution or rules.

"2. All obligations heretofore contracted may be enforced. All obligations to any such corporation heretofore contracted shall be enforceable by it and in its name, and demands, claims, and rights of action against any such corporation may be enforced against it as fully and completely as they might have been enforced heretofore.

"3. Chapter controlling. Insofar as the provisions of this chapter are inconsistent with the provisions of any other law affecting savings association the provisions of this chapter shall control.

"4. Separability. If any provisions, clause, or phrase of this chapter or the application thereof to any person or circumstance is held invalid such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provisions or application, and to this end the provisions of this chapter are declared to be separable." (Approved April 9, 1959.)

Whether by virtue of this section, the revision of the building and loan law, Chapter 338, constitutes an automatic amendment to the Articles of corporations previously existing, and relieves the corporation of further action by way of adoption

of the revised and amended act, need not be determined because the rule of law does require of private corporations acceptance of legislative amendments to corporate charters, whether required by the terms of the amendment or not, or the right to continue to operate lacking such acceptance ceases to exist. This rule is adhered to by text writers and by adjudicated cases.

As far as texts are concerned, in Volume 18, page 475, section 81, C. J. S., titled CORPORATIONS, it is stated:

> "Amendments must be accepted or assented to, and such acceptance or assent must be sufficient.
>
> "In view of the rule that in the absence of consent by the corporation and its members where no power has been reserved by the state to alter, amend, or repeal a corporate charter this may not, ordinarily, be done by subsequent action of the state, see supra § 80, in order that an amendment by the state shall be effective, it is essential that such amendment be either expressly or impliedly accepted. The same rule applies, of course, where an amendment is of such a character as not to come within the reserved power to alter, amend, or repeal. Moreover, where a statute enacted for the benefit of a corporation expressly requires the filing or giving of an acceptance, an acceptance is essential to entitle the corporation to the benefit of the act. Notwithstanding the language in some of the cases is broad enough to imply that, when the legislature has reserved the power to alter, amend, or repeal a charter, it is immaterial whether the consent of the corporation is given or not, this is not strictly true in the case of a private corporation, except in the case of amendments or regulations in the exercise of the police power or the power of eminent domain; for even though the state may have reserved the power to amend or to repeal, it can no more compel corporators to accept an amended charter and to continue under it than it could compel them to accept the original charter. The true situation is this: Although the legislature may have reserved a power to alter, amend, or repeal a charter of a private corporation, and although under this reservation of power it can repeal the charter without regard to the consent or nonconsent of the corporation, and may impose an amendment as a condition of the corporation's continuing to exercise its franchise, it cannot, without its consent, compel it to continue under the charter as amended. On the other hand, a corporation cannot conduct its operations in defiance of the legislative

power; if it does not accept an amendment which the state has the power to impose, it must discontinue its operations as a corporate body; and if it continues to act as a corporation or otherwise acts under such an amendment, it will be regarded as having accepted the same."

FLETCHER's CYCLOPEDIA, Volume 7, page 895, section 3724, pertaining to the rule, states the following:

"To become effective, a legislative amendment to a corporate charter must first be unconditionally accepted by the corporation or its members and in the manner prescribed by law.

"The rules governing the acceptance of amendments to corporate charters are not essentially different from those pertaining to the acceptance of original charters. An original charter must be accepted whether the incorporation is under general laws, or by special act. This is because the charter is contractual in character, and until acceptance, it is a mere offer of no binding effect. The same is true of an amendment to the corporate charter. Before it can become effective and binding it must be accepted or consented to by the corporation or its members. It can make no difference that, in granting the orignal charter, the legislature reserved the power to revoke or amend it, for it has no more power to compel persons to continue as a private corporation under an amended charter than it has to create a private corporation in the first instance without the consent of the members.

"The amendment or modification of a charter, like the original charter, must be accepted unconditionally and as it is offered. The amendment does not become a part of the charter where the acceptance is qualified by a proviso introducing a new condition not authorized by the acts. Unless authorized by the act, the amendment must be accepted as a whole, and cannnt be accepted in part only, for, as was said in an earlier chapter, this would enable the corporation to reject the obligations imposed and retain the benefits conferred."

citing in support of the rule, the following:

"On this point it was said in a Virginia case:
'The power of the legislature "to repeal, alter, or modify the charter of any bank at its pleasure" must be limited to this extent. It may certainly repeal the charter of any bank, but it cannot compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank without its acceptance. Banks are private corporations, created by a charter, or act of incorporation

> from the government, which is in the nature of a contract, and therefore, in order to complete the creation of such corporation, something more than the mere grant of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be accepted. . . . Though the legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification than it could have forced upon them the acceptance of the original charter without their consent.' As was said, however, in this case, one of the consequences of refusal to accept the amendment is 'that the corporation cannot conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body.' Yeaton v. Bank of Old Dominion, 21 Gratt. (Va.) 593, per Judge Christian. And see Alexander v. Berney, 28 N.J. Eq. 90; Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S.W. 39, 20 L.R.A. 765."

Insofar as Iowa is concerned, the question is considered in the case of St. John v. Building & Loan Association, 136 Iowa 448, 113 N.W. 863, where under the reserve power of the State provided by Article VIII, Section 12 of the Constitution, the building and loan statutes of Iowa were amended to provide the maximum rate of interest and premium to be collected by such association whether applicable to both future or existent corporations, and to require such associations to amend their articles so as to conform with the provisions of the amendment.

To the claim that such amendment has prospective and not retrospective operation, in the absence of direct provision to the contrary, and that in no event may the legislature impair the obligations of the contract, the Court states:

> "Section 10. . . . In case any such association doing business in the State shall fail to amend its articles of incorporation in conformity herewith prior to July 15th, 1900, its authority to do business in this State shall be revoked by the executive council, and under the direction of the executive council application by the Attorney-General shall be made to the proper court for the appointment of a receiver to wind up the affairs of

the association, and in such proceedings the amount due from the borrowing member on mortgages shall be ascertained in the manner provided in section 7 of this act, and the balance due on such mortgages shall be treated and considered as due within a reasonable time to be fixed by the court after the appointment of a receiver. . . . . The general principles involved in these contentions are well understood. Unless otherwise stated, all laws are presumed to operate prospectively, and not retrospectively, and no act of the legislature may impair the obligations of a contract. But a corporation under our laws has no absolute right to do business in this State, and its articles of incorporation are at all times subject to amendment by the General Assembly. Conditions may at any time be imposed upon a corporation and enforcement thereof assured by revoking their privileges in the event of noncompliance. . . . . It will be noted that the act itself does not attempt to change the contracts of members, but it does provide that, if the association failed to comply therewith on or before July 15, 1900, its authority to do business should cease, and its affairs shbuld be wound up, and settlements made with all members according to the provisions of the act. Defendant then had the option of complying with the law and adjusting its outstanding contracts on the basis outlined in the act, or of going out of business and settling with its members upon the basis fixed in section 7 of the act. It had no constitutional or other right to continue in business indefinitely or for any other time than the Legislature might see fit to permit. This is a fundamental principle of corporate law under the reserved power now generally given to the Legislature. Bishop v. Brainerd 28 Conn. 289; In re Brooklyn R. R., 72 N.Y. 245 (75 N.Y. 335, 81 N.Y. 69). Of course, the relation between the corporation and its stockholders cannot be changed or disturbed against their will. All that the Legislature may do in this respect is to grant the power, and then it is for the corporation to accept or not as it pleases. Kenosha Co. v. Marsh, 17 Wis. 13.

"Whatever might be said as to the rights of the parties had the defendant not complied with the provisions of the act now before us, it did amend its articles and comply with the terms of the new law, and, having done so, it is bound thereby to all its members who seek to take advantage thereof. Defendant had two courses open to it: One to quit doing business and settle up its affairs, and the other to comply with the law, amend its articles, and give to its members the benefit of the new law. It chose the latter course, and, having done so, it is in no position to say that the act under which it did these things is unconstitutional and void. Durfee v. Old Colony R.R., 5 Allen (Mass.) 230. Greenwood v. Railroad Co., 105 U.S. 13 (26 L. Ed. 961). Union Pacific R. R. v. U. S., 99 U

700 (25 L. Ed. 496); Edworthy v. Ass'n, 114 Iowa 220; and Briggs v. Ass'n, 114 Iowa 232, are not in point on this proposition; for in neither case did the defendant comply or attempt to comply with the amendatory act. In other words, there was no acceptance thereof by the parties in interest. . . . . We are constrained to hold that the act in question, because of defendant's conclusion to take advantage thereof by filing its amended articles and continuing in business, became binding upon the defendant, and that plaintiffs are presumed to have accepted it or are estopped from denying that they did, and that the case is governed by chapter 69, Acts 28th General Assembly, and the defendant's amended articles. These provide, in substance, that the rate of interest shall not exceed the sum of eight per cent. per annum, payments to be credited on anniversary days and payments on stock to be treated as payments upon the mortgage."

While the St. John case has no precedential value, both argument and legislative policy there disclosed is confirmation of the rule here considered. Among others it is stated:

"Defendant then had the option of complying with the law and adjusting its outstanding contracts on the basis outlined in the act, or of going out of business and settling with its members upon the basis fixed in section 7 of the act. It had no constitutional or other right to continue in business indefinitely or for any other time than the Legislature might see fit to permit. This is a fundamental principle of corporate law under the reserved power now generally given to the Legislature. Bishop v. Brainerd, 28 Conn. 289, In re Brooklyn R. R., 72 N.Y. 245 (75 N. Y. 335, 81 N.Y. 69). Of course, the relation between the corporation and its stockholders cannot be changed or disturbed against their will. All that the Legislature may do in this repect is to grant the power, and then it is for the corporation to accept or not as it pleases. Kenosha Co. V. Marsh, 17 Wis. 13."

Note also such policy is exhibited by the provisions of Section 19, paragraph 14, of Chapter 338, Laws of the 58th General Assembly, providing as follows:

"14. Automatic authorization. Any association may have the right to participate in any new or additional powers or activities hereafter granted to such association under this chapter immediately upon the effective date of such additional authority, if authorized by the articles of incorporation of such association."

This presents clearly legislative intention insofar as it concerns any participation of any association in any new or additional powers or activities granted by Chapter 330, Laws of the 58th Genera Assembly. Exercise of any such powers is conditioned upon authorization therefor provided in the Articles of Incorporation.

I am of the opinion, therefore, that to take advantage of the revision of the building and loan laws by Chapter 330, Act of the 58th General Assembly, acceptance by way of amendment is required.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

CITIES AND TOWNS: Special Charter Cities -- Under code sections 420.160, 420.163 and 420.155, no power is conferred to erect buildings for the purpose of rental. (Ltr to Leir, Scott Co. Atty., 9/30/59) # 59-10-7

September 30, 1959

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

Dear Sir:

Your letter of September 8 has been referred to me by the Attorney General for answer. You inquire whether the Davenport Levee Improvement Commission has power to expend funds on hand in the Levee Improvement Fund for the purpose of constructing and maintaining a building on the levee for lease to private firms.

Levee Improvement Commissions in Special Charter Cities (of which Davenport is one) are authorized to exist by Code section 420.160 which provides as follows:

> "Any city acting under special charter may establish a levee improvement commission to consist of the mayor, who shall be its chairman, and not more than four other persons to be appointed by the mayor with the approval of the city council."

Thus, the Levee Improvement Commission is a creature of statute. Creatures of statute have only those powers expressly conferred by statute or reasonably and necessarily implied as incident to exercise of an expressly conferred power. In the case of doubt the power will be denied. See Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W. 2d 813 and cases cited therein. The powers conferred on the Levee Improvement Commission are set forth in Code section 420.163, which provides as follows:

> "The levee improvement commission shall have full charge and supervision of all improvements of the water front along any river within the corporate

59-10-7

> limits of the city. It shall have exclusive charge and control of the levee improvement fund and of all moneys derived from the sale of bonds issued by the city council for the purpose of carrying on the work of making water-front improvements. It shall pay out of these funds only for the purposes named."

The last sentence in the quoted statute is of particular significance, the "purposes" therein referred to being "named" in section 420.155.

> "Any city acting under special charter, which is bounded in part or divided by a river, may improve said water front by constructing retaining walls, filling, grading, paving, macadamizing, or riprapping the same and may improve and beautify its water front and the river bank and nearby uplands and made and reclaimed lands in such city; and to pay for such improvements the council of such city is empowered to levy a tax of not exceeding one-fourth mill on the dollar per annum on the taxable property thereof, the same when collected to be known as the levee improvement fund. The proceeds of such fund shall be used exclusively for said purposes."

Since the purposes for which the river front improvement fund may be used are expressly limited to "constructing retaining walls, filling, grading, paving, macadamizing, or riprapping the same and may improve and beautify its waterfront" the power to erect income-producing buildings is not included. The statute seems to contemplate purely flood and erosion control and aesthetic beautification.

In addition to the "creatures of statute" rule, application of the "expressio unius" rule tends to the same answer.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

CITIES AND TOWNS:

Compatibility of offices -- Offices of member of the city council and member of the park board cannot be occupied by the same person. #59-10-8

October 1, 1959

Mr. Robert W. Burdette
Decatur County Attorney
Leon, Iowa

My dear Bob:

Answering your telephone request as to whether the offices of member of the city council and member of the park board can be occupied by the same person, I would advise you informally that these offices are incompatible.

Section 370.12, Code 1958, provides, among other general powers, the following:

> "It may sell, subject to the approval of the city council, exchange, or lease any real estate acquired by it which shall in the discretion of the park commission be unfit, not desirable, unnecessary, or not required, for park purposes. ..."

Incompatibility arises out of this statutory provision because as a member of the city council, the member of the park board would be sitting in approving or disapproving a sale, exchange, or lease of park board real estate which he authorized as a member of the park board. This power obviously cannot be exercised by the same person.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:cmm

SCHOOLS:

Tax Levy -- Under Section 275.32, ~~Code 1958~~, a schoolhouse tax can be voted at the same time as a bond issue. However, bond issue is subject to the general provisions of Chapter 296. (Rehmann to Turner, Chickasaw Co. Atty.; 10/5/59) #59-10-9

October 5, 1959

Mr. Leslie P. Turner
Attorney at Law
Nashua, Iowa

Dear Sir:

This will acknowledge receipt of your letter of September 2 which states the following:

"I would like your opinion on the following question. A Community School District expects to hold an election for the purpose of bonding the District for the erection and equipment of a new high school building. At the same time they hold the election to determine the bond issue, they would like to hold a special election under Section 275.32 to determine the question of voting a tax to repair or improve the existing school building and grounds, where the cost will exceed $5,000.00. Originally they had planned to vote at the regular election for the 2½ mill school levy under the provisions of 278.1 Sub Section 7. However, the cost of conducting the 2 elections at one time would be a substantial saving.

* * * *

"In connection herewith, will you kindly render me an opinion on the following questions.

"1. Can the School Board submit to the tax payers the question of levying a tax for repair and improvement of existing school buildings under Section 275.32 of the 1958 Code of Iowa at the same time they present a question for the purpose of submitting a question on whether or not to issue bonds for erection of a new school building.

"2. Does Section 275.32 of the 1958 Code of Iowa permit a school board to submit a question of levying a tax for the purposes stated in No. 1 at any time instead of restricting said levy as is provided in Section 278.1 (7) of the 1958 Code of Iowa.

59-10-9

"3. If your answer is negative to No. 2 and Section 275.32 does not give the same powers as 278.1 Sub Section 7, does the words "the regular election" as used in 278.1 (7) refer solely to the regular March election for the school board."

In reply thereto, we advise as follows:

Section 275.32, Code 1958, is derived from Section 276.24, Code 1950. By reference to Section 276.24, Code 1950, we are able to establish some judicial precedent as to Section 275.32, Code 1958.

In Section 275.32, Code 1958, a school corporation, pursuant to a favorable result of an election, is authorized to tax or issue bonds or both for the following purposes:

"1. To secure sites, build, purchase, or equip school buildings.

"2. To build or purchase a superintendent's or teacher's house or houses.

"3. To repair or improve any school building or grounds, or superintendent's or teacher's house or houses, when the cost will exceed five thousand dollars."

Under Section 276.24, Code 1950, a consolidated school, pursuant to a favorable result of an election, was authorized to tax or issue bonds or both, for substantially the same purposes as found in Section 275.32, Code 1958.

In the case of James v. Consolidated Ind. District, 194 Iowa 1224, 191 N.W. 60, the court held that the special statutory authority found in Section 276.24 is given to a consolidated school district over and above any general authority set out elsewhere in the Code of Iowa.

In the case of Chappel v. Board of Directors, 241 Iowa 230, at page 236, 39 N.W. 2d 628, in the dicta of the court there is some evidence as to the meaning of the statutory authority found in Section 276.24, Code 1950. The court said the following:

"Code section 276.24 provides for the submission to a vote of the electors of a consolidated school 'the question of voting a tax or authorizing the board to issue bonds, or both, for any or all of the following purposes:

"1. * * *
"2. * * *
"3. * * *

(Italics supplied)

"There the legislature authorized the financing by a bond issue or by a schoolhouse tax or by a combination of both. Although that statute applies to consolidated districts it indicates the legislature appreciated the advantages of these optional separate or combined methods of raising money for the schoolhouse fund."

The Chappel case, supra, held that Section 278.1 authorizes a schoolhouse tax of two and one-half mills to be levied in any one year when voted by the electors of the district at the regular election or when authorized by statute at a special election, for a term of years. However, in the dissent, the fact was pointed out that Chapters 296, 297, and 298, were safeguards against financing over periods of time and that Section 278.1(7) should not be considered as a continuing general tax. Nevertheless, the majority of the court felt the schoolhouse tax was not limited to a one-year levy and the safeguards against financing over long periods of time were inapplicable because this was a tax, not a debt, authorized by the electors. The court did not elaborate as to whether or not a bond issue under Section 276.24 was still subject to the safeguards found in Chapter 296. Thus, with respect to a bond issue, in the absence of any authority to the contrary, the issuance of bonds is still subject to the general provisions of Chapter 296.

Therefore, based on the foregoing authority, the answer to your first question would be affirmative, subject to the limitation as pointed out with respect to the bond issue.

The answer to your second question would be affirmative, based upon the Chappel case, supra, and makes the answer to the third question unnecessary.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

cc to Paul Johnston
Joe Davis
Dept. of Pub. Inst.

Hunting,
CONSERVATION: ~~COMMISSION.~~ Pistol or revolver permit -- No person may carry a pistol or revolver in any vehicle operated by him, except on lands possessed by him, without a license therefor.
(Gritton to Powers, St. Cons. Comm., 10/7/59) # 59-10-10

October 7, 1959

Mr. Glen G. Powers
Director
State Conservation Commission

Attention: E. T. Rose

Your letter of September 30, 1959, is as follows:

> "Recently we have had several requests for an opinion concerning the use of pistols or revolvers in hunting and in their transportation in motor vehicles. Therefore, we would appreciate very much an official Attorney General's opinion concerning the legality of carrying a pistol or revolver in a motor vehicle without a permit."

Section 695.2, Code of Iowa, reads in part as follows:

> "695.2 Carrying concealed weapons . . . No person shall carry a pistol or revolver concealed on or about his person or whether concealed or otherwise in any vehicle operated by him, except in his dwelling house or place of business or on other lands possessed by him, without a license therefor as herein provided."

Therefore, I am of the opinion that no person may carry a pistol or revolver in any vehicle operated by him, except on lands possessed by him, without a license therefor.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:amm

59-10-10

COUNTIES:

Assessors -- The county assessor, under the provisions of Chapter 441, Code 1958, may not contract away statutory duties, and the county assessor may not be relieved of his obligation to pay taxes to the Iowa Public Employees Retirement System, and to the Federal Social Security System. (Strauss to Hanrahan, Polk Co. Atty.) 10/7/59) 59-10-11

October 7, 1959

Mr. Ray Hanrahan

Polk County Attorney

Room 406 Court House

Des Moines, Iowa

Dear Mr. Hanrahan:

This will acknowledge receipt of yours of the 30th ult. with attached letter to you of Ora F. Carman, County Assessor, with a request for answer to questions propounded.

The County Assessor's letter follows:

"I have a letter and statement from Mr. John D. Lukin, an accountant for the Employment Security Commission, in which it is claimed that this office or Polk County owes Social Security and IPERS taxes, some dating back as far as 1954.

"The parties on whom it is claimed the taxes are due did work for this office. When the work was done it was the agreement between this office and the parties doing the work that it was being done on a contract basis and that no taxes would be deducted. All of the parties were self-employed and it was understood that the work done for this office was to be done at such times as to not to interfere with their self-employment. The pay for the work was on a unit completed basis.

"I have contacted most of the parties involved and find that they have included the pay they received with their other earnings and have paid the self-employment Social Security Tax.

"Will you get us an Attorney General's opinion on the following questions:

#59-10-11

1. Since the work was done on a contract basis are the above mentioned taxes due?

2. If the above taxes are due from what fund should they be paid?

3. If the Ipers taxes are paid as requested, a portion of the tax will be credited to each individual's account, who is involved, and is refundable to him since he is no longer an employee. Can this amount be recovered by the office paying the tax "

I advise as follows:

1. Insofar as the answer to Question #1 is concerned, I am of the opinion that the taxes claimed are due. Such conclusion arises from the fact that no authority appears to be vested in the Conference Board, let alone in the County Assessor, to convert employees into independent contractors in the performance of statutory duties conferred upon the Assessor. As a matter of fact, no authority appears in either the County Conference Board or the Assessor to contract away statutory duties subject to its authority to employ expert appraisers to assist the County Assessor in determining the value of property for the purposes of taxation. That the persons so converted are employees, appears from the following statute, to wit: Section 441.8, Code 1958, providing as follows:

> "Compensation of deputies and assistants shall be fixed by the county conference and such deputies and assistants shall receive actual necessary expenditures as approved by the county assessor and their appointment shall be subject to the approval of the county conference."

While this does not provide express authority to employ deputies and assistants, provision for the approval of their appointment by the Conference Board implies the power to appoint. And implies further, that insofar as appointment of assistants is concerned, this constitutes employment and not appointment to an office. This conclusion is fortified by the lack of office status conferred upon the assistants of the County Assessor. The word "appointment" is often used to designate employment. (State ex rel Coffing vs. Abolt, 189 N.E. 131, 206 Ind. 218.) In that situation I am of the opinion that the contract concerned was in excess of the powers of the County Conference Board, as well as of the County Assessor, and is invalid, and the status of such persons, at least insofar as the Iowa Publice Employees Retirement System, and the Federal Social Security System are concerned, is not changed, and therefore the duty to pay the taxes required to be paid by the County agency under Chapters 97B and 97C, remains and the taxes are due.

2. Insofar as Question #2 is concerned, "from what fund should they be paid," I am of the opinion that payment thereof should be made from the County Assessor's Fund, if funds are available, or by levy, as provided by Section 97B.9 insofar as the Iowa Public Employee's Retirement System is concerned, and by Section 97C.10 insofar as the Federal Social Security tax is concerned.

3. In answer to Question #3: In view of the foregoing

conclusion, any tax paid and credited to each individual's account may not be refunded, and the amount may not be recovered by the County Assessor.

The reason for this conclusion is found in the statutory provisions which require withholding to be made from employees. The persons involved herein are no longer employees. And insofar as the Federal Social Security System is concerned, while withholding is not authorized because the persons are no longer employees, yet the failure to withhold does not relieve the employee from his liability for the tax. See §§ 97B.11 and 97C.6.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4
cc to Judge Allen

Boating--

~~STATE~~ CONSERVATION ~~COMMISSION~~: Concurrent Jurisdiction, Section 106.13, applies to the Mississippi River.
(Fulton to Carlsen, Clinton Co. Atty.; 10/7/59) 59-10-12

October 7, 1959

John W. Carlsen
Clinton County Attorney
Court House
Clinton, Iowa

Dear Sir:

Your letter of June 30, 1959, is as follows:

> "We have been having some difficulty with reference to the control of careless and reckless drivers of boats on the Mississippi River. The only section that appears to have any possible control insofar as the State of Iowa is concerned, is Section 106.13 of the 1958 Code of Iowa, which states:
>
> > "No person shall operate any boat on any of the waters of the state under the jurisdiction of the commission in such as manner as to endanger life and property ---"
>
> I would appreciate it if you would inform the writer whether or not it is your opinion that this part of the Iowa law has any effect or control of boating on the Mississippi River adjoining Clinton County.
>
> Also, in the event the State or local authorities have no jurisdiction over the Mississippi River proper, I would appreciate an opinion as to whether or not the above section does give control to state or local officers on sloughs and backwaters of the Mississippi River adjoining Clinton County."

In reply to your first question, your attention is directed first to Section 1.3, Code of Iowa. This section is as follows:

> "1.3 Concurrent jurisdiction. The state has concurrent jurisdiction on the waters of any river or lake which forms a common boundary between this and any other state."

This statute has been discussed by the Iowa Supreme Court in various decision. In the case of Iowa v. Moyers, 155 Ia. 678, it was held that:

> "The statutes conferring upon this state concurrent jurisdiction of the waters of the Mississippi River where the same form a common boundary with other states, contemplate that all jurisdiction which might otherwise have been exercised by the courts of this state within it's boundary shall be possessed by it with reference to transactions on any part of the river lying between it and another state, without regard to the navigable channel of the river: So that this state may prohibit fishing with a net on any part of the river forming a common boundary, without first procuring an Iowa license, though on the opposite side of the channel, and although the offender may have a license from the adjoining state."

Section 111.18, Code of Iowa, is as follows:

> "111.18 Jurisdiction. Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission. The exercise of this jurisdiction shall be subject to the approval of the Iowa natural resources council in matters relating to or in any manner affecting flood control. The commission, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

The Mississippi River has been meandered.

An examination has been made of the Rule and Regulations for Small Passenger Vessels, United States Coast Guard and nothing has been found relating to manner of operation of small vessels on the Mississippi River.

I am therefore of the opinion that Section 106.13, Code of Iowa, applies to the Mississippi River.

Separate answer to your second question is not required.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:amm

SCHOOLS: Special Education. Under Code section 281.9, county boards are entitled to be reimbursed directly from the state if all school districts participating are within the jurisdiction of the county board. (Rehmann to Martin, Keokuk Co. Atty., 10/7/59) #59-10-3

October 7, 1959

Mr. J. Lee Martin
Keokuk County Attorney
Sigourney, Iowa

Dear Mr. Martin:

Receipt is acknowledged of your letter of September 24 as follows:

> "Under the provisions of sections 281.9 and 281.5 of the 1958 Code of Iowa, as amended, our local County Board has established a school for handicapped children. Said school has been established in a rural schoolhouse which is no longer being used for school purposes by the local rural district. The question has now arisen as to whether or not, under the provisions of the actions referred to above, the participating school districts sending pupils to the handicapped school may pay the County Board of Education directly, and whether or not the State may reimburse, under the provisions of Section 281.5, directly to the County Board of Education, or whether the payments of tuition in reimbursement must be made to the school district in which the school is actually being held."

In reply thereto, we advise as follows:

Section 281.4, Code 1958, as amended by Chapter 196 Acts of the 58th General Assembly, provides in pertinent part:

> "The board of directors of any school district or any county board of education, with the approval of state department of public instruction * * * may establish and organize one or more suitable special classes * * * and special schools * * * as a part of the local or county school system for such children requiring special education as required for their effective education * * *. In the event that there are not enough children of any special type in any school district to warrant the establishment of a special class, such children may be instructed in any nearby school district in which such special classes have been established * * * or the county board of education may establish such special classes in cooperation with the local boards.

Under section 281.4, there are three ways of providing classes for children requiring special education. (1) The school district itself may establish classes; (2) if the school district

feels there are not enough children to warrant th establishment of a special class, the school district can make arrangements with another school district which maintains special classes, or (3) the county board of education may establish a special class in cooperation with local school districts that desire to have such a class.

After classes for children requiring special education are established, there appears to be only one method of reimbursement by the State of Iowa for the excess of the average cost of educating normal children. By virtue of Art. III, Section 29, Constitution of Iowa, your attention is directed to the Title of Chapter 131, Acts of the 51st General Assembly, the act now appearing as Chapter 281, which says:

> "An act to provide for the special education of handicapped children, to create a division of special education within the state department of public instruction, to enable school directors and boards of education to establish and maintain classes and schools for handicapped children, to provide for payments from state funds of the excess cost of maintaining and operating such classes and schools over the cost of maintaining and operating schools for normal children, and to establish controls for the distribution of such funds."

From the title, it appears that the act was to enable school districts and boards of education to establish these special classes and schools. The explanation found in H.F. 125 of the 51st General Assembly, the acting appearing as Chapter 281, with specific reference to the second paragraph, gives some insight as to the intent of legislature, stating:

> "This bill proposes that a division of special education for handicapped children be established in the state department with an experienced and well-trained person in charge. It is proposed that more assistance be given to local districts for the education of children who are not totally disabled but are handicapped to such a degree as to make it impossible for them to profit from regular educational facilities of their communities. It is proposed that the state reimburse the school district for the amount expended on special education of its handicapped children in excess of the average cost of educating its normal children"

It would appear from the original act that only school districts were entitled to receive reimbursement from the state under Chapter 281.

However, the 56th General Assembly made certain amendments to the original act. It will be noted that Chapter 141, Acts of the 56th General Assembly, specifically amended Chapter 281 to give a county board of education authority to establish special classes and schools for children requiring special education. The explanation given to H.F. 242, appearing as Chapter 141, Acts of the 56th General Assembly, gives light as to the intent of the act. It states:

> "This bill provides that if there is a need therefor, the county board of education may organize for the mentally retarded schools, classes or instruction

which shall be a part of the county school system."

Section 281.9, Code of 1958, in pertinent part reads as follows:

> Any * * * county board of education which has maintained an approved program of special education for handicapped children during any school year shall be entitled to and receive reimbursement from the state for the excess cost of instruction of the children in said program * * *, in the event the program of special education is established by the county board of education, the average cost of instruction of pupils in the participating districts, which shall be determined in the following manner. The cost of instruction of all pupils exclusive of those in special education shall be determined on a per pupil basis and the total cost of instruction of all pupils in special education shall be determined on a per pupil basis. The excess of cost per pupil in special education shall be the difference between the cost per pupil of all children exclusive of those in special education, and the cost per pupil in special education; the excess per pupil cost in special education multiplied by the yearly average unit of pupils in special education in the district or county program shall be the amount to which the district or county board shall be entitled and receive by way of reimbursement from the state. * * *

It would appear from Section 281.9, Code 1958, if a county board of education has established special classes or schools within the county, the county board of education is entitled to receive reimbursement directly from the state.

However, your attention is directed to a prior opinion of May 4, 1956, Abels to Gray, Calhoun County Attorney, which states that Section 281.4 authorizes cooperation between county boards and local boards under the county board. However, there is no authority for intercounty board cooperation under Section 281.4, nor any authority for a county board to cooperate with a school district outside its jurisdiction. If such an intercounty arrangement exits, then payment of tuition and reimbursement must be made to the school district in which the school is actually being held because only school districts are empowered to collect from other school districts when they are intercounty.

Therefore, your question must be answered in the following manner. If the county board of education has established special classes or schools for children requiring special education which is within its county school system, then the state may reimburse directly to the county board of education.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

INSURANCE: Automobile warranties - - Voluminous complaint file reviewed and, on the basis of the manner of doing business thereby revealed, it is concluded: 1. Certain "warranty" companies are engaged in writing insurance. 2. The insurance written is of a type subject to regulation under the existing statutes of Iowa. 3. Purchasers of such auto "warranty" insurance are entitled to the benefits of the Iowa Unauthorized Insurers Process Act. (Relative Timmons, Ins. Comm'r, 10/9/59) #59-10-14

October 9, 1959

The Honorable William Timmons
Commissioner of Insurance of the State of Iowa
L O C A L

Dear Commissioner:

On April 17 of 1958, your office submitted a request for an opinion as to whether certain auto companies operating in Iowa and engaging in the sale of so-called "Auto Warranty Contracts" were engaging in the business of insurance. A fragmentary file was furnished with your request together with specimen forms of the "Auto Warranty Contracts".

From the material then submitted it was difficult to make any certain determination as the "warranties" in question had been most artfully drawn to avoid, insofar as possible, the appearance of insurance. We advised at that time that the matter be delayed as certain pending litigation in California seemed likely to furnish a precedent. Time has elapsed and examination of the reported cases in Pacific 2d reveal no decision as yet by the Supreme Court of California.

You have now submitted a much more comprehensive file containing "briefs" of the "warranty" companies, opinions of attorneys general in other states, and a great number of complaints from "warranty" holders in Iowa and their attorneys indicating the "warranty" companies frequently do not perform as promised. The latter items are of considerable interest as they describe in minute and unflattering detail the business methods employed by and on behalf of the "warranty" companies. This is significant as the manner of doing business of such a company is a much more accurate basis for determining what it is than is what it calls itself. As Mr. Justice Thompson remarked in the case of State v. Zbornik, 248 Iowa 450 at pages 456, 457, "What looks like a duck, and walks like a duck, and quacks like a duck is probably a duck." It is another way of saying we may draw reasonable inferences from known facts without specific labels . . . Fraud has its badges and so do other forms of chicanery and evil-doing. As the sage from the foothills so succintly pointed out, a duck may be recognized as such even though it bears no specific words so naming it."

59-10-14

So is it with the business of insurance. Insurance has its badges and they have been recognized and defined in court decisions. That a company engaged in insuring certain risks chooses to call itself a warranty company is not of itself conclusive. To paraphrase Judge Thompson, "That which underwrites risks like an insurance company, and collects premiums like an insurance company, and adjusts claims like an insurance company is probably an insurance company."

Let us consider, therefore, the "badges" of insurance as recognized and defined in court decisions and see whether the manner of doing business, as revealed by the certificates and advertisements of the "warranty" companies and the complaints based on their actual operation in Iowa, amounts to a display of such "badges" within the regulatory scope of the Iowa insurance statutes.

General principles determining whether a business or contract is insurance are set forth at 29 Am. Jur. 49, par 4, as follows:

> "Whether a corporation or association is engaged in the insurance business must be determined by the particular objects which it has in view, and not by abstract declarations of general purposes; the business which the organization is actually carrying on, rather than the mere form of the organization, is the test for determining whether it is carrying on an insurance business. The name by which a company or association, or its certificates or policies, are designated is not determinative of the question whether the organization is an insurance company or association or its contracts are in the nature of insurance policies. It is immaterial, or at least not controlling, that the term "insurance" nowhere appears in the contract the nature of which is to be determined; indeed the fact that it states it is not an insurance policy is not conclusive, and a company may be found to be engaged in an insurance business even though it expressly disclaims any intention to sell insurance. The terms or mode of payment of the consideration are not determinative of the question whether the contract is one of insurance. The nature of a contract as one of insurance depends upon its contents and the true character of the contract actually entered into or issued -- that is to say, whether a contract is one of insurance is to be determined by a consideration of the real character of the promise or of the act to be performed, and by a consideration of the exact nature of the agreement in the light of the occurrence, contingency, or circumstances under which the performance becomes requisite."

Since Iowa has no general statutory definition of the word "insurance" it becomes pertinent to quote the general rule set forth at 29 Am. Jur. 47, Par. 3, which states in pertinent part:

> "The authorities are substantially agreed that insurance generally may be defined as an agreement by which one person for a consideration promises to pay money or its equivalent, or to perform some act of value, to another on the destruction, death, loss, or injury of someone or something by specified perils.
>
> "As a general matter, the essential feature of policies of insurance at the present time is substantially that of indemnity to the insured . . ."

In an opinion appearing at page 163 of the 1958 Report of the Attorney General is cited the rule that a contract which for consideration undertakes to do anything other than to pay a sum of money on destruction of or injury to something is not insurance. In considering facts surrounding the type of warranty here in question this seems a good starting point. Two "briefs" which were furnished your office by the "warranty" companies in support of the proposition that their product is not insurance are of interest in this connection. In one of them it is stated:

> "It will also be noted by reference to Exhibit A (the 'Certificate of Warranty') that _____ Warranty Company does not agree to pay to the holder of the warranty, in the event of the breach thereof, any money, but that the contract is for _____ Warranty Company to pay any costs of repairs which the holder of the contract may incur and then only the cost of repairing the specific parts listed in the contract of warranty and only after the necessity for repairs or replacements has been passed on by _____ Warranty Company and a written authorization obtained from that company for repairs and replacements."

How does this argue that the "contract of warranty" is not insurance? It says the company does not pay cash awards but rather <u>indemnifies</u> the certificate holder for his actual loss. Is not this <u>indemnity</u> the prime essential of insurance under the quoted definition? Further, is not the provision for inspection of the vehicle and authorization of repairs by the company exactly what is required by way of company "adjustment" in the case of physical damage coverage under standard insurance companies? The brief of company counsel appears to be actually an admission rather than argument.

In any event, the fact that the company contracts to pay someone to make the repairs rather than making them itself, and the further fact that the products repaired were neither manufactured nor sold by it, is sufficient to distinguish such so-called auto "warranties" from the television service warranties which we concluded were not insurance in our above-quoted opinion.

Further considering the certificates of warranty submitted as part of your file, it appears noteworthy that the initial step in obtaining a "Certificate of Warranty" is an inspection of the automobile by a company inspector. Is this not analogous to the physical examination given an applicant for life insurance? Far from distinguishing the "warranty" company's operation from insurance, this again produces a marked similarity. It is the process of selection of risk for the purpose of establishing favorable odds that the loss ratio will not prove disastrous under the company's existing premium rate structure. "It looks like a duck."

Turning to the voluminous complaint file consisting of inquiries to your office by aggrieved certificate holders, your letters to the various warranty companies, and their answers to you. Considering statements made to you in correspondence from the companies, we observe the following "badges" of insurance:

> September 2, 1959. ". . . and since the repairs made by this warranty holder were made without our authorization, our liability should not exceed our claim adjuster's findings of May 1959 . . ." (Emphasis supplied)
>
> August 24, 1959. "The claims office of the _____ System is located at . . ." (Emphasis supplied)
>
> June 4, 1959. "Please be advised we are presently processing claims for the following . . ."
>
> July 20, 1958. (to a "warranty" holder) "In accordance with your wishes we have canceled the warranty on your car. If you will please return the warranty, we will forward our check for a pro-rata refund of the fee received promptly."
>
> December 10, 1958. "Work Authorization -- Auto Life Plan"
>
> April 11, 1959. "A policy of the home office handling out-of-state cars has been adopted which facilitates such cases." (Emphasis supplied)

April 10, 1959. "The files covering the subject referred to in your recent letter have been transferred to our home office . . ."

February 16, 1959. "Also the majority of the work performed in this case was not covered . . . I did, however, submit a claim to our home office . . ." (Emphasis supplied)

September 27, 1958. "We have therefore closed our file in this matter."

May 20, 1958. "However, in ours as well as all warranties and insurance policies, there are certain exclusions."

Anyone familiar with insurance company claim department vernacular would agree that the foregoing "quacks like a duck".

That the "warranties" in question were represented to and understood by the purchaser to be insurance appears in the following excerpts from letters received by your department from garages and car owners:

August 25, 1958. (from a used car dealer) "Sometime back we insured our cars with the _____ Co. of _____"

July 29, 1958. (from a car owner) "I have an insurance contract with the . . . Company of . . . which was sold to me by the _____ Motor Company of _____. It was supposed to insure my car, a 1954 Packard, against all cost of parts and labor to me for a period of one year."

July 3, 1958. (from a car dealer and "warranty" agent) "During the early part of 1958 we agreed to sell our customers car warranty insurance made available by . . . "

October 27, 1958. (from a "warranty" holder) "I am writing to you about an insurance policy which I have . . . I bought a car and at the same time I paid $50 for a policy with the _____ Company and the policy was good for a period of one year from the time I got the car. If anything went wrong with the car during that time the insurance was to take care of it . . ."

December 21, 1958 (from a car owner) ". . . we purchased a car from a local car lot and also purchased warranty insurance . . . had to go to several garages before he could get the car fixed and there were several comments to the effect this insurance company will not pay . . ."

March 27, 1959. "Last July (1958) I was thinking of buying a car . . . The dealer to assure me of his good will suggested that I buy an insurance warranty . . . _____ fixed the transmission but not the rings since (the company) still owes them a bill for some time now, for some other policyholders' repairs."

April 11, 1959 (from the manager of a warranty company) "with regard to the above-mentioned warranty holder and his alleged difficulties with our company please be advised that as long as we have customer (sic), cars, warranties, insurance policies, courts and lawyers we will from time to time have difficulties and troubles."

The foregoing, although far from a complete catalog of pertinent excerpts from your file, is sufficient to indicate that the customers, agents, and even a district manager of the warranty companies concerning which you inquire refer to the so-called warranties as insurance, thereby objectively manifesting that they know and understand it to be insurance. "It walks like a duck."

The Supreme Court of Iowa, in the case of State ex rel Kuble v. Capitol Benefit Association, 237 Iowa 363, 21 NW 2d 890, 896, held that the Association made defendant there was not an insurance company for the reason that its officers and agents had never referred to what they sold as insurance nor had they in any way led anyone to believe it was insurance. From this holding, it would seem implied that representations by company officers and agents which in fact do lead an applicant to believe he is buying insurance bring the operations of such company within the meaning of the word "insurance".

The only facet of the question remaining is whether the "warranty insurance" sold by the companies in question is among any of the types of insurance subject to regulation under the laws of Iowa, as they appear in Title XX, Code of Iowa. Code section 505.8, which defines the general duties of the insurance commissioner seems pertinent. It provides that the commissioner shall have, "general control, supervision, and direction over all insurance business transacted in the state, and shall enforce all the laws of the state relating to such insurance." Code Chapter 515 relates to "Insurance Other Than Life" and definitely identifies the type of insurance hereinabove found to exist as a type subject to regulation in Iowa. Code section 515.48 (10) provides:

"Any company organized under this chapter or authorized to do business in this state may:

* * * * *

"10. Insure any additional risk not specifically included within any of the foregoing classes, which is a proper subject for insurance, is not prohibited by law or contrary to sound public policy, and which, after public notice and hearing, is specifically approved by the commissioner of insurance . . ."

Thus, although the auto "warranty" insurance described in your file is "insurance" within the textbook and judicial definitions, and could be written in Iowa by companies organized under Chapter 515 or authorized to do business in Iowa, if approved pursuant to notice and hearing under section 515.48 (10), it is evident the companies in question cannot lawfully write it in Iowa as they have met none of the aforesaid prerequisites. It further appears that the numerous complainants whose letters appear in the file you have submitted are entitled to the benefit of Code Chapter 507A, the "Iowa Unauthorized Insurers Process Act".

Although the question whether such automobile "warranty" insurance is actually insurance, as of the date of this writing, does not appear to have been passed upon by the court of last resort of any state, it is reassuring to note that the attorneys general of several states have reached conclusions similar to ours, i.e. that such "warranty" insurance is insurance. The opinions in point are:

1. Opinion of Frank F. Harding, Attorney General of Maine, December 3, 1957, to George F. Mahoney, Insurance Commissioner.

2. Opinion of Miles Lord, Attorney General of Minnesota, January 23, 1957, to Cyril S. Sheehan, Insurance Commissioner.

3. Opinion of Edmund G. Brown, Attorney General of California, November 21, 1957, to F. Britton McConnell, Insurance Commissioner. (We are also advised that an action for Declaratory Judgment is pending in California but no decision has as yet appeared in the Pacific Reporter advance sheets.)

4. Opinion of Stewart G. Honeck, Attorney General of Wisconsin, September 23, 1958, to Paul J. Rogan, Insurance Commissioner.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

COUNTIES: Jails – If a prisoner has been bedded down for the night he has been furnished a "night's lodging" even though his release is procured before morning. (Abels to Parkin, Jefferson Co. Atty., 10/9/59) #59-10-15

October 9, 1959

Mr. Robert D. Parkin
Jefferson County Attorney
Fairfield, Iowa

Dear Sir:

Pursuant to our telephone conversation of October 8 and conversation had with your sheriff this morning, the following is offered in supplement to the recent opinion of this office which was dedicated to the proposition that one night in jail is not two nights in jail.

That opinion disposed of the question, "How long is a night in jail?" for purposes of claiming the fifteen-cent fee provided by law to reimburse the sheriff for a night's lodging furnished a prisoner. It appears that the corollary question, "How short is a night in jail?" needs clarification at this time for the purpose of enabling the sheriff to properly keep his accounts. It is a rule of statutory construction that the need sought to be met or evil sought to be remedied may be considered in construing a statute. It is therefore proper to consider the fact, known as a matter of common knowledge, that the purpose of the fifteen-cent fee in question is to cover the cost of laundering and disinfecting the bedding furnished prisoners.

Thus, if "lights out" at the jail is 9:00 P.M. and a prisoner is bedded down at that time, the fact that someone secures his release before "reveille" does not alter the fact that he has been furnished a night's lodging. To revert to the illustration used in the opinion supplemented hereby, suppose the weary motorist, who checked into the motel, arose after an hour of sleepless tossing and informed the motel-keeper, "There are corncobs in your mattress. I'm checking out." One may be assured the motel-keeper would react promptly, and anti-socially if the motorist, after having occupied the bed, suggested he should be permitted to depart without paying for a night's lodging.

Therefore, in summary, one night's occupancy of a jail cell is not two night's lodging, but once the facilities for a night's lodging have been furnished, that the guest chooses to depart before the night is out, without using the full period of hospitality extended, does not alter the fact that a night's lodging has been extended to him.

Your sheriff also inquired whether, for accounting purposes, a night's lodging should be recorded as of the date of retiring or as of the date of arising. I am of the opinion that the date of

retiring is the proper date. If the lodging were voluntary rather than involuntary, such would be the date of the reservation.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

INSURANCE: Organization -- Reinsurance: Under Code sections 508.6 and 521.11, in a situation where all other statutory requirements have been met, it would be no violation of either section for the commissioner to issue a certificate to become effective midnight December 31 and for the commission to then approve a reinsurance plan subject to the condition that such plan not go into effect until midnight of December 31.
October 12, 1959
(Atels to Timmons, Ins. Comm'r., 10/12/59) 59-10-16

Honorable William E. Timmons
Commissioner
Insurance Department of Iowa
L O C A L

Dear Mr. Timmons:

Receipt is acknowledged of your letter of October 8 as follows:

"A Reinsurance Treaty has been submitted to this office for our approval and the approval of the Commission as provided for in Chapter 521, Code of Iowa.

"The parties to the Reinsurance Treaty are of the opinion that their procedure is limited to the provisions of Chapter 521 because of the provisions of Sections 521.2 and 521.11 and that therefore the general corporate merger and consolidation statutes are not available.

"The effect of the transaction would be to transfer the Arizona company to Iowa. The Federal Discount Corporation of Dubuque, Iowa, is the sole owner and holder of common equity stock of the Citadel Life Insurance Company of Phoenix, Arizona, which is all of the stock thereof outstanding. They propose to transfer this company to Iowa because the investment laws of the State of Arizona prevent their investing in anything other than Governments and because the Federal income tax on life insurance companies works to a disadvantage of the company.

"They propose to organize an insurance company to be licensed and effective simultaneously with the acceptance of the reinsurance contract of the Arizona company, the effective date to be after the last day of 1959 and before the first day of 1960.

"For tax reasons it is desirable that the assets of the Arizona company be utilized to the fullest extent in

59-10-11

capitalizing the Iowa company which will have been previously organized but not licensed until it assumes the assets and liabilities of the Arizona Company which will be the effective date. At the time the Iowa company receives the assets of the Arizona company, it will meet Iowa requirements with respect to capital and surplus.

"Our questions relate particularly to Sections 508.6 and 521.11 which are written in the past tense and would seem to contemplate the qualified Iowa company to exist for a time prior to the acceptance of the Reinsurance Treaty. The proponents of this treaty suggest that this can be a simultaneous transaction and the Iowa company can be organized simultaneously with the acceptance.

"In this particular transaction the company is solely owned by the Federal Discount Corporation. Both the Arizona company and the Iowa company will have the same stockholder, which will be a party to the Reinsurance Treaty, and the sole policyholder of both companies will be Old Republic Life Insurance Company, under contracts of reinsurance, which will also be a party to the treaty. The Old Republic is a duly authorized company in the State of Iowa. The Iowa company will be organized before the effective date and will deposit or cause to be deposited with me as Commissioner cash assets and other assets that will become the property of the Iowa company to meet Iowa insurance company requirements, which deposits will be made before the effective date."

Section 508.6, concerning which you make express inquiry, provides as follows:

"Deposit of securities -- certificate. Such securities shall be deposited with the commissioner of insurance and when such deposit is made and evidence furnished, by affidavit or otherwise, satisfactory to the commissioner, that the capital stock is all fully paid and the company possessed of the surplus required and that the company is the actual and unqualified owner of the securities representing the paid-up capital stock or other funds of the company, and all laws have been complied with, he shall issue to such company the certificate hereinafter provided for."

"Such securities" refers to the capital and surplus required by the provisions of section 508.5, hereinafter exhibited as follows:

"Capital and surplus required. No stock life insurance company shall be authorized to transact business under

> the provisions of this chapter with less than three hundred fifty thousand dollars capital stock fully paid for in cash and one hundred fifty thousand dollars of surplus paid in in cash or invested as provided by law. Nothing herein contained shall affect companies now authorized to transact business under the provisions of this chapter."

Thus, before a certificate can be issued to a new company, securities must be deposited, an affidavit or other evidence that capital stock is fully paid and surplus possessed must be furnished to the commissioner. In addition, the company articles must have been approved as provided in section 508.2. Relating this to your question as to whether the company can qualify to engage in business and simultaneously receive its first item of business as of the stroke of midnight, December 31, 1959: considering section 508.6 alone, there appears nothing to prevent the commissioner from making the certificate therein referred to effective, by way of recital on the face of the certificate, as of the stroke of midnight, December 31, provided he has, at the time he affixes his signature to such certificate, satisfied himself that all of the requirements of sections 508.2, 508.3, 508.5 and 508.6 have, in fact, been met. The transaction, therefore, appears lawfully possible insofar as section 508.6 is concerned.

The other section concerning which you inquire is section 521.11, hereinafter set forth as follows:

> "Approval and filing with commissioner. Any plan of consolidation or reinsurance submitted as herein contemplated, must first have been approved by the commission, and the result of said vote must be filed with the commissioner of insurance and be by him determined before any consolidation or reinsurance shall be effected."

As will be noted, the above section contemplates action by the insurance commission consisting of the Governor, Attorney General, and Commissioner of Insurance. In order for the commission to act on a reinsurance plan under section 521.11, it would appear that a bare minimum of three essentials must be present:

1. A reinsurance plan
2. A company with risks to reinsure
3. A company qualified to do the reinsuring

Whether the new company, whose certificate will have been signed by the commissioner but its effective date delayed until the stroke of midnight of December 31, provides the third

essential is the question. Referring to what has been hereinabove said, the following things will be true of such company as of the time the commission considers the plan:

1. Its articles will have been submitted and approved under section 508.2 in the form required by section 508.3.

2. It will have paid-up capital and surplus as required by section 508.5.

3. The commissioner will have satisfied himself that the conditions set forth in section 508.6 have been met and the required deposit will have been made.

4. A certificate will have been signed by the commissioner and issued to the company bearing an effective date of midnight December 31.

Assuming all of the foregoing things have happened as of the time the commission considers the reinsurance plan, and that such plan otherwise complies with law, the company will in every way be qualified to enter into such a plan save for the lapse of time between the date of consideration by the commission and midnight of December 31. In other words, the new company will be qualified under the plan but under a disability. Its situation will be a great deal like that of a minor awaiting his twenty-first birthday. Since the running of time is a certainty, I am of the opinion that the commission, if it finds the plan otherwise acceptable and signifies its approval, prior to December 31, but subject to the condition that the reinsurance agreement will not become effective between the companies until the removal of the disability at midnight on December 31, such approval would not violate section 521.11.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
cc: Swift, Murray and Christianson

COUNTIES: Recorder and Auditor -- Under Chapter 409, no discretion exists on the part of the Auditor or Recorder to review the propriety of a city council's action in approving a plat as to matters not required by law to be shown on the plat. (Ltr to Scholz, Mahaska Co. Atty., 10/12/59) #59-10-17

October 12, 1959

Mr. Charles H. Scholz
Mahaska County Attorney
Lacey Block Building
115 North Market Street
Oskaloosa, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 27 as follows:

"I request your opinion on the following question:

"Are the County Recorder and County Auditor required to accept for filing and recording in their respective offices, and to file and record in their respective offices, a plat which, when tendered to them for such purposes, fails to affirmatively show upon the fact thereof that one or more of the requirements of Sections 409.1, 409.7, 409.8, 409.9 and 373.12 have not been satisfied?

"Recently there was tendered to our County Recorder and County Auditor for recording and filing in said offices a plat which does not have endorsed upon it a certificate that such plat has been prepared by a registered land surveyor as provided in Section 409.1 of the Code, as amended by Section 3 of Chapter 133 of the Acts of the 58th General Assembly, and which does not have any certification establishing that such plat has been approved by the Planning Commission of the City of Oskaloosa, as required by Section 373.12. The plat is properly acknowledged and in all other respects appears to comply with all other requirements of the law with respect to the filing and recording of affidavits, but the problem is whether the officials referred to have any discretion as to the acceptance of the plat for filing and recording in their offices when the plat does not show upon its face that the two statutory requirements last referred to, or any of the other statutory requirements, have been satisfied."

59-10-17

The pertinent language in section 409.1, Code of Iowa, as amended by Chapter 133, section 3, Laws of the 58th General Assembly is:

> "Every original proprietor of any tract or parcel of land, who has subdivided, or shall hereafter subdivide the same into three or more parts ... shall cause a plat of such subdivisions ... to be made by a registered land surveyor holding a certificate issued under the provisions of Chapter 114 of the Code ..."

The statute as amended requires the plat "to be made" by a registered surveyor but no express requirement is made that he identify it, on its face, as his work. Neither does Chapter 114 set forth any general requirement that registered surveyors identify their work.

Section 409.7, to which you refer, provides as follows:

> "409.7 Filing -- approval. All such plats shall be filed with the clerk of the city or town and when so filed the council within a reasonable time shall consider the same, and shall, if it is found to conform to the provisions of sections 409.4, 409.5, and 409.6, by resolution approve the plat and direct the mayor and clerk to certify the resolution which shall be affixed to the plat."

Thus, the power of <u>approval</u> rests with the council rather than the County Recorder or Auditor.

Section 409.8 provides for acknowledgement by the proprietor and his spouse.

Section 409.9 provides the plat shall be accompanied by abstracts of title.

Section 373.12 provides that the recommendations of the city plan commission, where there is one, shall be obtained prior to approval by the council.

As I understand the facts stated in your letter, it is not definitely established that the plat was not made by a registered surveyor nor that the recommendations of the plan commission were not made to the council but, rather, that the accomplishment of these matters does not show by way of recital on the face of the plat or in the accompanying documentation.

However, nothing in the statutes requires it to show these matters. The consideration of recommendations of the plan commission is for the council. Further supporting this

view, see the last two paragraphs of Code section 409.14, which provide as follows:

> "The approval of the city council shall be deemed an acceptance of the proposed dedication for public use, and owners and purchasers shall be deemed to have notice of the public plans, maps and reports of the council and city plan commission, if any, having charge of the design, construction and maintenance of the city streets affecting such property within the jurisdiction of such cities.
>
> "If any such plat of land is tendered for recording in the office of the county recorder or county auditor of any county in which any city of the above class may be situated, it shall be the duty of such county recorder and auditor to examine such plat, to ascertain whether the indorsement of approval by the city council, as herein provided for, shall appear thereon. If it shall, and the plat otherwise conforms to the provisions of law, said officers shall accept same for recording. If such indorsement does not appear thereon said officers shall refuse and decline to accept such plat, and any filing thereof shall be void. Any failure to observe the provisions of this section on the part of any county recorder or county auditor shall constitute a misdemeanor in office."

The determination that the plat was made by a registered surveyor is also an item for consideration by the council before approval. Since the acts of public officials are presumed regular and proper in the absence of proof to the contrary, it must be presumed from the resolution of the council affixed as provided in section 409.7 that the council found all statutes requiring certain acts to be done, but not specifying recital of such acts, to have been complied with before approving the plat.

Where the plat is deficient upon its face in such matters as lack of the resolution of the council required by section 409.7, lack of the acknowledgement required by section 409.8, lack of the covenant required by section 409.2, lack of the abstract or opinion required by section 409.9, or lack of any other item specifically required as part of the filing, the absence of which is readily apparent on the face of the matter submitted, then the recorder and auditor should refuse to accept the papers for the reason that they are able to identify the papers submitted as something other than what the law requires them to accept.

However, where items not appearing on the face of the papers submitted for filing are not by statute required to so appear, the recorder and auditor must assume from the approval of the council that it satisfied itself all such prerequisites had been met before giving its approval.

In considering the powers of the auditor under somewhat similar statutory duties, the Supreme Court of Iowa said, in the case of Independent District of Danbury vs Christiansen, 242 Iowa 963, 49 N.W. 2d 263, at page 971 of 242 Iowa:

> "There is nothing in either statute that would give the auditor the right to determine the validity of accounts certified to him before transmitting the order to the treasurer. The law presumes public officers and boards do their duty -- that false certifications would not be made ..."

In conclusion, I am therefore of the opinion the auditor and recorder have no discretion to go back of the approval of the council for the purpose of determining whether or not matters required by law to be performed prerequisite to approval by the council but not expressly required to be set forth on the plat or in supporting documents were performed.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

CITIES AND TOWNS:

Compatibility of office -- Office of justice of the peace and member of city council are incompatible, and member of city council may act as election judge and such action does not violate Code section 368A.21. (Strauss to Barlow, Palo Alto Co. Atty., 10/13/59) # 59-10-18

October 13, 1959

Mr. Charles H. Barlow

Palo Alto County Attorney

Emmetsburg, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 10th inst. in which you submit the following:

"I would appreciate having your opinion as to the following questions:

(1) Is there incompatibility between the offices of Justice of the Peace and of City Councilman?

(2) Under 49.13 one of the Councilman's duties is to act as election judge in his precinct or ward. Does 368A.21, which states 'No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the termfor which he was elected ---' limit or prevent a councilman from serving as election judge? Please note that the election judge is a compensated office under 49.20, 43.32 Code of Iowa 1958.

(3) If it were to be construed that the office of election judge is not created by the City Council in case of a general or city election, does this hold true in the case of a special election where the judge and clerks are appointed by resolution of the Council.

"Would you please forward copy of your informal opinion (1957) interpreting Section 368A.21."

59-10-18

In reply thereto I would advise you as follows:

1. In answer to Question #1, I am of the opinion that incompatibility exists between the office of Justice of the Peace and City Councilman. My reason for this is found in the provisions of Section 368A.2(7) as amended by Chapter 277 of the Acts of the 58th General Assembly. This statute makes eligible any member of the city council to appointment as mayor pro tempore with all the powers of the mayor, including acting as a magistrate. The office of Justice of the Peace and Mayor were held to be incompatible in the case of State v. Anderson, 155 Iowa, 271. The potential status of the mayor pro tempore would be controlled by the same rule of law.

2. In answer to Question #2, I would advise that incompatibility does not exist between a member of the City Council and an election judge for two reasons:

(1) Acting as election judge is an additional duty bestowed upon members of the City Council, and

(2) Acting as election judge is not an office within the contemplation of Section 368A.21.

3. In answer to Question #3, I am of the opinion that insofar as special elections are concerned, no incompatibility exists between the office of councilman and the office of election judge. As stated in my answer to Question #2, the office of election judge is not an office within the contemplation of Section 368A.21.

As requested, I enclose herewith copy of informal opinion issued May 13, 1957, to Martin D. Leir, Scott County Attorney, re Code Section 368A.21.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4
Encl.

AGRICULTURE: Bang's disease--Section 164.11: A violation of section 164.11, 1958 Code of Iowa, is a misdemeanor. A transferee in a transaction made without accompaniment of a negative brucellosis test as provided by section 164.11 is not in violation of that section. (Craig to Scholz, Mahaska Co. Atty., 10/13/59) #59-10-19

October 13, 1959

Mr. Charles H. Scholz
Mahaska County Attorney
Lacey Block Building
115 North Market Street
Oskaloosa, Iowa

Dear Mr. Scholz:

Receipt is acknowledged of your letter of August 25, in which you have submitted the following:

> "In connection with Section 164.11 of the 1958 Code of Iowa, which provides:
>
> > 'It shall be unlawful for any person to sell or transfer ownership of any bovine animal unless it is accompanied by a negative brucellosis test report issued by an accredited veterinarian, conducted within thirty days.'
>
> "I desire your opinion on the following questions:
>
> > 1. Does a violation of this Section constitute a crime, and if so, what is the penalty therefor?
> >
> > 2. Where a sale or transfer of ownership of a bovine animal is made without being accompanied by a negative brucellosis test report issued by an accredited veterinarian, is the transferee, as well as the transferor in violation of Section 164.11?
>
> "In connection with the first question, I have been informed by an inspector of the State Department of Agriculture that the Attorney General's office has advised the State Department of Agriculture that the penalties specified in Section 163.29 are applicable to a violation of Section 164.11, but I am unable to locate such opinion in the published official opinions of your office."

59-10-19

Enclosed herewith is a copy of the opinion to which the inspector probably referred. It is a letter opinion, issued October 14, 1957, and appears in 1958 Opinions of the Attorney General, page 6, section 1.5. In answer to your first question, it holds that a violation of section 164.11, 1958 Code of Iowa, is a misdemeanor.

In answer to your second question, penal statutes are strictly construed. State v. Garland, 94 N.W. 2d 122 (1959). Since a violation of section 164.11, 1958 Code of Iowa, is a misdemeanor, the section must therefore be construed strictly. Section 164.11 provides, in pertinent part, "It shall be unlawful for any person to sell or transfer . . ." (Emphasis ours). A transferee, although a party to the transfer, is not selling or transferring. In my opinion, a transferee involved in a sale or transfer of ownership of a bovine animal, made without the accompaniment of a negative brucellosis test as provided by section 164.11, 1958 Code of Iowa, is not in violation of that section.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl
Encl Forrest to Sundberg,
10-14-57

TAXATION: Personal Property Assessment:

1. Where house mover stores houses on lot and resells them, they are deemed personal property, and assessed as merchandise inventory.

2. Assessor may not assess on basis of average inventory for the preceding year pursuant to section 428.17, Code 1958, where no inventory exists on January 1. (Brinkman to O'Connor, St. Tax Comm. 10/15/59)

October 15, 1959 # 59-10-20

John J. O'Connor
Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. O'Connor:

This will acknowledge your letter of September 3, 1959, in which you request the opinion of this department on the following question:

"A house mover buys houses, garages, and other small buildings, and moves them on their original timbers by low-boy trailer to a lot where they remain jacked up and on no permanent foundation until he sells same. He then transports them to the site designated by the purchaser, where they are to be permanently located. During ayear he will have perhaps four or five such buildings parked on his lot most of the time, waiting to be sold and delivered to a site selected by the purchaser. Does such a dealer in buildings not attached to or erected on real estate qualify as a merchant under the provisions of 1958 Iowa Code, Section 428.16? Must such a dealer have on hand at least one building on January 1st, before he would be subject to being assessed on such buildings. Is such a dealer to be assessed only on those buildings he has on hand on January 1st, or is he to be assessed on his average inventory of such buildings for the year immediately preceding January 1st of the year for which the assessment is being made as provided in Section 428.17?

"These questions arise in connection with buildings being removed to make way for interstate highways and city expressways."

The pertinent provisions of the 1958 Code of Iowa provide as follows:

"428.16 'Merchant' defined. Any person, firm, or corporation owning or having in his possession or under his control within the state, with authority to sell the same, any personal property purchased with a view to its being sold, or which has been consigned to him from any place out of this state to be sold within the same, or to be delivered or shipped

59-10-20

by him within or without this state, except a warehouseman as defined in section 542.58, shall be held to be a merchant for the purposes of this title."

"428.17 Stocks of merchandise. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory and enter the date thereof in the assessment roll. If, in the judgment of the assessor, the inventory is not correct, or if it was taken at such time as to render it unreliable as to the amount or value of such merchandise, he shall assess the same by personal examination. The assessment shall be made at the same ratio of the average value of the stock during the year next preceding the time of assessment, as is provided by section 441.13, and if the merchant has not been engaged in business for one year, then at a like ratio of the average value during such time as he shall have been so engaged, and if commencing on January 1, then at the same ratio of the value at that time."

The question resolves itself to whether the buildings stored on the dealer's lot must be treated as real or personal property. Courts are generally agreed that buildings once removed from their foundation lose their quality as real property and become personalty until again permanently attached to real estate, see New Rochelle Housing Authority v. Thomas, 91 N.Y.S. 239, 195 Misc. 536.

Since the buildings here involved are to be treated as personal property and qualify as merchandise under section 428.16, supra, if purchased by a dealer who habitually has his business by such buildings with the intent to resell, Jewel vs. Board of Trustees, 113 Iowa 47, 84 N. W. 937, and as such are to be assessed pursuant to section 428.17, supra, on the basis of the average inventory for the year next preceding the assessment date.

The question is also raised whether the law requires that the dealer owns some buildings on January 1, the assessment date, if an assessment based on the preceding year's average inventory is to be made. Section 428.4, Code of Iowa (1958), provides that all non-exempt real and personal property shall be listed and assessed each year in the name of the owner on the first day of January. In view of this statute, it

seems apparent that where the owner has no property on the assessment date, no assessment can be sustained.

This position is strengthened by the provision contained in section 428.17, supra, which states that if in the assessor's opinion the prior year's inventory is unreliable, he is to assess the property by personal examination; thus, by inference the statute implies that there must be property existent on the assessment date.

It is, therefore, the opinion of this department that the subject buildings shall be assessed as merchandise pursuant to section 428.17, supra, and that the law requires that there be some buildings existent in the hands of the owner on January 1, on which to base an assessment even though the assessment is computed by taking the preceding year's average inventory.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/WWR/bjf

TAXATION: Corporate Stock: (1) State Tax Commission recommended forms used by the assessors in arriving at a fair assessment are public records. (2) The "main business" of a corporation determines whether or not it is a "merchandising" corporation. (3) The "actual value" of corporate stock under Chapter 431, Code of Iowa (1958), is apparently determined by the net worth of such corporation. (4) "Capital actually invested" is the amount deducted from the "actual value" of corporate shares of stock in determining the assessable value of such shares. (Gill to Nazette, Linn Co. Atty.; 10/19/59) # 59-10-21

October 19, 1959

Richard F. Nazette
County Attorney
Linn County Court House
Cedar Rapids, Iowa

Dear Mr. Nazette:

This will acknowledge receipt of your letter of September 3, 1959, wherein the following problems were submitted:

"1. Are Banking Statements, Small Loan Statements, Commercial and Industrial Reports submitted to the Assessor on State Tax Commission recommended forms to assist him in arriving at a fair assessment, considered to be public records and thereby available to anyone wishing information?

"2. What factors are taken into consideration in determining whether an Iowa corporation shall be assessed as a merchandising or as a non-merchandising corporation? Should the greater percentage of net income derived from services or from merchandising be the determining factor in classifying a corporation and determining the Section of the Iowa Code under which it shall be assessed? In other words, if 75% of the net income is derived from services and 25% from merchandising, would this company be classified as a non-merchandising corporation?

"3. When assessing a non-merchandising or non-manufacturing Iowa corporation, shall the assessment be based solely on the market value of the corporation stock or shall factors and figures obtained from approved State Tax Commission Form #232-A be considered in assessing the value of corporate stock under Section 431.3, Code of Iowa. In other words, are you assessing the market value of the stock or the net worth of any said corporation?

"4. In arriving at the assessable value of the shares of the stock of Iowa Corporations under Section 431.1, Code of Iowa, shall the amount of capital actually invested in real estate or personal property

and deducted from the actual value of such shares be considered to be the book value as of the date of the report. In other words, shall the amount used as a deduction be the same as the net amount shown in the State of Condition on which the capital stock assessment is based?"

In response thereto, the following opinions are expressed:

1. In answer to your first question whether certain forms used by the assessors are public records, your attention is directed to a letter from M. A. Iverson, then Special Assistant Attorney General assigned to the State Tax Commission, to Ray E. Johnson, Vice Chairman of the Tax Commission, dated May 2, 1957, which for your information follows in part:

"It will be noted that the assessor's list of stockholders and the number of and value of shares of stock owned by such stockholders is based upon information the officers of national banks and state and savings banks and loan and trust companies are required by law to furnish the assessor. The information so furnished is filed and becomes an official record of the assessor's office. In Iowa we have no statutory provision relating specifically to the inspection of public records of this type and their availability for inspection must be determined with reference to the common law. Under the common law, the right to inspect public records is not an absolute right but is a qualified right. (23 R.C.L., p. 160, Section 10). However, the qualifications to this right are limited and may be summarized as follows:

"1. The applicant for the right to inspect such records must have some public or private beneficial interest to serve in making such an inspection as contrasted with mere curiosity or purposes which are in their nature unlawful or purely political.

"2. That the application for inspection be reasonable as to the time and place of such inspection, giving recognition to the regular office hours of the public official having custody of the records and recognition of the responsibilities of the public officer for the safety of such records. Within the qualifications above cited, the applicant for the inspection of the records of a city or a county assessor as to the list of stockholders with the amount of their holdings of any particular national or state bank may as a matter of right examine such records. This may be done without prior approval of the State Tax Commission. Permission to examine such records should be obtained from the city or county assessors or other officers or boards having custody of same. Under the law such permission may not be withheld if the purpose of examination is constructive."

In further support of the foregoing opinion, you are referred to Chapter 291, Section 17 (6), Acts of the 58th G. A. (1959), which follows:

"Sec. 17. Duties of assessor. The assessor shall:

" * * *.

"6. Make up all assessor's books and records as prescribed by the state tax commission, turn the completed assessor's books and records required for the preparation of the tax list over to the county auditor when the board of review has concluded its hearings and co-operate with the auditor in the preparation of the tax lists."

2. In answering your second inquiry, it must be stated that taxation is the rule and exemption the exception and anyone claiming an exemption must so clearly that he is exempt within the terms of the statute, Cornell College vs. Board of Review, 248 Iowa 385, 81 N. W. 2d 25 (1957); Crown Concrete Company vs. Conkling, 247 Iowa 609, 75 N. W. 2d 351 (1956); Oble vs. Iowa State Tax Commission, 246 Iowa 1241, 71 N. W. 2d 584 (1955). The particular problem presented by your letter, i.e., service as opposed to merchandising has not been before the Iowa Supreme Court; but in two recent cases, Cherry vs. Board of Review, 238 Iowa 189, 26 N. W. 2d 316 (1947) and Lichty vs. Board of Review, 230 Iowa 756, 298 N. W. 654 (1941), the Court was concerned with whether a particular corporation was a "manufacturer" or "merchandiser" for the purpose of Section 427.1 (20), Code of Iowa (1958). Justice Oliver, in the above case, supra, writing for the majority, said:

"No Iowa case directly in point has been called to our attention. But we think it proper and reasonable that shareholders of a corporation who contend the character of its operations are such as to exempt their stock from taxation must, in order to sustain such claim, show that the classification relied upon constitutes the main business of the corporation. A contrary rule would not accord with our holdings that such statutes should be strictly construed and would tend to broaden them unduly." (Emphasis added)

A recent opinion of this department dated June 5, 1959, lists the factors to be considered in the determination of whether a corporation can be classified as "merchandising", to-wit:

> "A study of the Supreme Court opinions referred to above (Cherry and Lichty cases, supra) reveals that the following is to be used as guides in determining whether a corporation is engaged in merchandising so as to render its shares of stock exempt from the moneys and credits tax as provided in Section 427.1 (20), Code of Iowa (1958). First, as stated in Lichty v. Board of Review, supra, a corporation cannot be both a manufacturer and a merchant. It is either one or the other or neither. Further, it is clear from a reading of the opinions above mentioned that it is the main business of the corporation within the State of Iowa that is determinative of whether a corporation qualifies as one 'engaged in merchandising'. Another rule to be observed, according to the two above mentioned cases, is that the sale of the corporation's own products, no matter where manufactured, is not to be considered merchandising activity. It was stated in Cherry v. Board of Review, supra, that capital investments, comparison of employment figures in the merchandising as opposed to the manufacturing area, costs of operation and inventories are not to be regarded as determinative in the consideration of whether a corporation is engaged in merchandising so as to render the stock of same exempt from the moneys and credits tax."

Therefore, it appears that when the foregoing opinions are applied to the factual situation as set forth in your letter if "services" constitutes the "main business" of the corporation, it is not a "merchandising" corporation within the meaning of Section 427.1 (20), Code of Iowa (1958).

3. With respect to your third question, your attention is directed to the statute set forth below:

> "431.1 Shares of stock. The shares of stock of any corporation organized under the laws of this state, * * *. 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 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. * * *."

> "431.3 Valuation of Stock. If the assessor is not satisfied with the appraisement and valuation furnished as provided in sections 431.1 and 431.2, he may make a valuation of the shares of stock based upon the facts contained in the statements above required, or upon any information within his possession, or that shall come to him, and shall, in either case, assess to the owners the stock at the valuation made by him."

Chapter 291, Section 21, Acts of the 58th G. A. (1959):

> "Sec. 21. Actual, assessed, and taxable value. All property subject to taxation shall be valued at its actual value * * *.
>
> "In arriving at said actual value the assessor shall take into consideration its productive and earning capacity, if any, past, present, and prospective, its market value, if any, and all other matters that affect the actual value of the property; and the burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate or inequitable."

The problem presented is, what is meant by "actual value" as found in the above cited sections. This problem has been before the Iowa Supreme Court on several occasions. The most recent being the case of Equitable Life Insurance Company of Iowa vs. City of Des Moines, 207 Iowa 879, 223 N. W. 744 (1929), wherein Justice Wagner wrote:

> "It is obvious that the net worth of the corporation determines the value of the shares of stock. The shares of stock represent the stockholders' interest in the property of the corporation. The interest of the stockholders must be measured by the value of the corporation's assets over and above its liabilities. In determining the net worth of the corporation, the taxes due must be considered a liability of the corporation."

4. Your fourth question asks whether or not the depreciated book value of personal property is the figure to be used as a deduction from the "actual value" of corporate stock in determining the assessable value of such shares of stock.

Your attention is directed to the third sentence in Section 431.1, Code of Iowa (1958), which states:

"In arriving at the assessable value of the shares of stock of such corporations, the amount of their capital actually invested in real estate or tangible personal property shall be deducted from the actual value of such shares." (Emphasis added)

It is apparent that the figure used as a deduction is not the depreciated book value of personal property, but the capital actually used in purchasing the personal property.

Very truly yours,

Gary S. Gill
Assistant Attorney General

GSG/bjf

STATE OFFICES AND DEPARTMENTS: Board of Accountancy -- Eligibility to take C.P.A. examination. Residence is a matter of intention, and as such Board of Accountancy must make fact determination as to whether an individual is a "resident of Iowa". (Craig to Denman, Bd of Acc., 10/19/59) # 59-10-22

October 19, 1959

Mr. Donald R. Denman, Member
Iowa Board of Accountancy
924 Insurance Exchange Building
Des Moines 9, Iowa

Dear Mr. Denman:

This will acknowledge receipt of your letter of October 15, in which you have submitted the following:

"Section 116.9 of the Code of Iowa defines the qualifications which a candidate must achieve in order to be allowed to sit for the C.P.A. examination. One qualification is that he must be a "resident of the state of Iowa".

"The Iowa Board of Accountancy wishes to know the Attorney General's definition of a "resident of the state of Iowa".

"Concerning a case which is being reviewed presently by the Board, we have an applicant who was born and lived the major portion of his life in Iowa until June, 1958, at which time he moved to Illinois. He states that he did not register to vote in Illinois, did not change his draft registration to Illinois, nor did he own property in Illinois. He further states that he did not file a 1958 Iowa income tax return. In July, 1959, the applicant moved to Cedar Rapids, Iowa and has lived there until the present.

"The Board wishes to know whether this applicant qualifies to sit for the C.P.A. examination November 4, 1959.

"In review, the Board desires (1) a definition of a "resident of the state of Iowa" and (2) an opinion of whether this applicant may qualify as a "resident" under the law to sit for the November C.P.A. examination."

In answer to question number 1, I refer you to Dodd v. Lorenz, 210 Iowa 513, 231 N.W. 422 (1930), where, at page 519 of 210 Iowa, the Court states, "The question of whether a person is a resident of one place or another is largely a

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question of intention, and, where the intention and the acts of the party are in accord with the fact of residence in a given place, there can be no doubt of the fact that such party is a bona-fide resident of the place where he intends to and does reside, and that he has the right to exercise all the rights and privileges accorded actual residents of such place, provided he comes within the provisions of the law regulating such rights."

In answer to question number 2, whether a particular individual is a resident of Iowa is a matter of factual determination, and must be made by your board. As the above definition states, the intention to be a resident of a particular place, and physical acts at that place which evidence such intention, are necessary to make a person a resident.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

BANKS AND BANKING: Interest on Public Deposits -- may not be paid on demand deposits. (Ltr to Gronstal, Supt of Banking, 10/20/59) #59-10-23

October 20, 1959

Mr. Joe H. Gronstal, Superintendent
Department of Banking
L O C A L

Dear Mr. Gronstal:

Receipt is acknowledged of your letter of October 9 as follows:

> "Our Department has been relying on an opinion of the Attorney General's office dated November 18, 1957, addressed to our Department with respect to Chapter 54, Acts of the 57th General Assembly (1957), the closing paragraph of which reads as follows:
>
> > 'In other words, funds in the hands of a governing council or Board other than the Treasurer of State may be invested in such certificates only when the fund in their hands is created by a direct vote of the people.' (The underscoring is ours.)
>
> "Since the adjournment of the 58th Iowa General Assembly in May, 1959, our Department, through its examiners, has been receiving every so often inquiries as to whether the provisions of the Public Funds Laws were changed in any way in regard to investable public funds by the 58th General Assembly.
>
> "The FEDERAL RESERVE ACT (subsection 12 of section 19) says, 'No member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand.' The FEDERAL DEPOSIT INSURANCE ACT (subparagraph (g), section 18) states, 'The Board of Directors (of the FDIC) shall by regulation prohibit the payment of interest on demand deposits in insured non-member banks (meaning those banks not members of the Fed System) and for such purposes it may define the term

59-10-23

"demand deposits".' In the RULES AND REGULATIONS of the Federal Deposit Insurance Corporation (paragraph 329.2) the regulation states '. . . no insured non-member bank shall directly or indirectly by any device whatsoever, pay any interest on any demand deposit.'

"Section 453.7 of the Iowa Code says:

> 'Interest Prohibited to Public Officer. No bank or trust company shall, directly or indirectly, by any device whatsoever, pay any interest to any public officer on any deposit of public funds, and no public officer shall take or receive any interest, whatsoever on public funds.'

"We have checked Section 453.1 and Section 453.7 and Section 452.10 of the Code, 1954 as amended by the 1957 General Assembly, which seems to us perfectly clear in saying that no public funds, other than those of the State Treasurer or "any fund created by a direct vote of the people,' can be put at interest in a bank or otherwise invested.

"We would appreciate your advice as to whether the investment of public funds (other than those of the State Treasurer or 'any fund created by a direct vote of the people') is still restricted as stated in your 1957 opinion to this Department and whether such funds may be otherwise invested contrary to the provisions of Section 452.10 and 453.1 of the 1958 Code of Iowa."

Recently this office had occasion to consider whether or not the language of Code section 453.1 permitted local governmental bodies to invest operating funds on hand over and above immediate needs in time certificates of deposit. In an opinion directed to the Des Moines County Attorney, Mr. T. K. Ford, under date of August 27, 1959, it was pointed out that section 453.1 authorizes the state treasurer to deposit or invest such money but authorizes the local treasurers to deposit only. It was further pointed out that the omission of the power to invest, with regard to local officers responsible for the safekeeping of public money, could hardly be explained away as legislative oversight for the reason that the same omission occurs in Code section 452.10. In defining the scope of the power of local officers to make the deposits in question, we referred to the decision of the Supreme Court of Iowa in the case of In Re Moylan, 219 Iowa 624 at page 627, in which the Court defined the words "invest" and "deposit" as follows:

> "The question as to whether a particular transaction between a fiduciary and a bank is a mere deposit or an investment, as distinguished from a mere deposit has frequently been before this court . . . The court has held, however, through a long line of decisions, that the placing of funds in a bank for convenience to be paid out on the order of the fiduciary or returned to him on demand is not an investment . . . (citing cases) . . . On the other hand, it has been held the placing of funds by a fiduciary on time deposit at interest, where funds cannot be withdrawn until the expiration of a fixed period of time is an investment. . . The question as to whether the fund is to draw interest is not controlling. The absolute right to withdraw the fund upon demand seems to be the controlling situation . . ."

On the basis of the quoted judicial definition we concluded that the words "deposit" and "interest" were words such as "may have acquired a peculiar and appropriate meaning in law" under the rule of construction embodied in subsection 2 of Code section 4.1. It followed that as a result of such meaning, a time certificate of deposit, would be classified as an investment because of the restriction on right of withdrawal. It also followed that payment of interest on a demand deposit would not constitute it an "investment" in violation of Code section 453.1.

This furnishes the background for your question. As has been pointed out, section 453.1 does not of itself prohibit a public officer from receiving or a bank from paying interest on demand deposits of local governmental bodies. In the absence of further statutory provision, under the case definition, the local government could aceept interest on demand deposits. However, as you point out, further statutory inhibition does exist in Code section 453.7.

The first part of section 453.7, quoted in your letter, is sufficient to answer your question, at least insofar as state banks are concerned, by the language, "No bank or trust company shall, directly or indirectly, by any device whatsoever, pay any interest on deposit of public funds . . ." The language is an absolute and unequivocal prohibition upon payment of interest and, as you also point out, the only statutory exception to the prohibition is that referring to "funds created by direct vote of the people" in section 453.10. In general the excepted funds are bond funds. There are a few statutory funds created by "direct vote of the people" other than bond funds but they may be readily identified by the terms of the specific statutes in which authorized. There is no merit, in my opinion, in the

sometimes-heard contention that where a public body (as for example a school district) is created by vote of the people, all of its operating funds are directly created by the same vote. It is the school district itself and not the incidents of its operation that is the direct result of such vote.

The same answer, i.e., that there may be no interest on banked deposits of public bodies other than on funds created by direct vote, could be reached and the contention would not be without merit, under the further provision of Code section 453.7, which says, ". . . no public officer shall take or receive any interest whatsoever on demand deposits of public funds". Since the answer arrived at under the "no bank" clause effectively forecloses the possibility of interest on demand deposits of public bodies, I prefer to base the opinion on that clause rather than the "no public officer" clause, for the reason that the phrase "public officer" is fraught with latent ambiguity in the context in which used. In construing a statute, it is proper to consider the evil sought to be remedied - - Jones v. Dunkelberg, 221 Iowa 1031, 265 N.W. 157; McGraw v. Seigel, 221 Iowa 127, 263 N.W. 533. Consideration of historical events prior to and at the time of enactment of the phrase in question leaves one in doubt as to what was sought to be remedied thereby. It is historical fact that public officers charged with the safekeeping of public money, at one time, not uncommonly, safeguarded it by depositing it to their own account and regarded the interest received as legitimate personal revenue for their trouble. Some notoriety is given by history to specific examples; one involving an early Superintendent of Public Instruction of the State of Iowa, in connection with handling of proceeds from sale of public lands relating to the permanent school fund, and another the handling of highway funds by the governor of a near-by state. History would thus support the argument that the prohibition against acceptance of interest by public officers was directed to the officer himself rather than to his government. On the other hand it could be argued, from history, that the prohibition was inspired by the great depression of 1929 and was intended to be all-inclusive as a means of aiding banks to remain solvent.

As has been pointed out, the "no bank or trust company" clause is sufficient to answer your question. I have said it applies at least to state banks. In my opinion it is equally applicable to national banks. Not all banks, state or national, are approved depositories. A depository must be approved as provided in Code sections 453.2 to 453.4 and, in addition, becomes a depository only upon acceptance of public deposits, as provided in Code section 453.5. It is my opinion that any bank, state, or otherwise, accepting public deposits as an approved depository, by such acceptance becomes subject to all

of the provisions of Chapter 453, including section 453.7. Even were this not true, the provisions of the Federal Reserve Act quoted in your letter tend to the same result with respect to national banks as does section 453.7 with respect to state banks.

The net result is that no interest can be received on any demand deposit of public money whether or not the local public treasury could receive it for the reason that no bank can pay it and, under section 453.1, only "a person, firm or individual engaged in the general banking business" can qualify as a depository. Therefore, only institutions to which one of the prohibitions on interest payment applies (section 453.7 or the Federal Reserve Act) are qualified under sections 453.2 to 453.4 for approval as depositories.

In conclusion you are advised that the investment of public funds (other than those of the State Treasurer or "any fund created by direct vote of the people" or fund specifically so authorized by statute) is still restricted as stated in the 1957 opinion of this office cited in your letter, and that such funds may only be kept or deposited in a vault or safe or in an approved depository bank as provided in sections 452.1C and 453.1 of the Code, and therefore may not be invested or otherwise deposited.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
cc: Wendell Gibson
Frank Warner
Mr. Foster

CITIES AND TOWNS: Tax levy -- Park Board may levy up to five mills under section 404.11 in lieu of tax as provided in section 370.6; however, limited to the provisions of Chapter 370 and the specific purposes named therein. (Rehmann to Shaff, St. Sen. 10/22/59) #59-10-24

October 22, 1959

Honorable David O. Shaff
State Senator, 22d District
246 Woodlawn
Clinton, Iowa

Dear Senator Shaff:

This is to acknowledge receipt of your letter of September 25, which was referred to me by Attorney General Erbe. In your letter you made the following inquiry:

> "The question is as to the control of the City Council over the budget of the Clinton Park Board. It is the position of the attorney for the Park Board that 404.25, section 4, permits the Park Board to adopt a budget and certify a levy not in excess of five mills (Sec. 404.11), which the City Council cannot disturb for the reason that the Park Board is an elected body.
>
> "However, later in this Section 4 it states as follows:
>
> > 'However, in no event shall levies exceed the limits prescribed in Section 404.2 and in Sections 404.6 to 404.12, inclusive, or exceed for this purpose without Council approval the levies heretofore permitted by law. (Sec. 370.6).'
>
> "It is the position of the City Administration that any budget of the Park Board calling for a levy in excess of one mill (Sec. 370.6) must be approved by the Council. Who is right?"

In reply thereto we advise as follows: your attention is directed to the case of Board of Park Commissioners vs. Marshalltown, 244 Iowa 844, at page 852, 58 N.W. 2d 394, in which the Court said:

> "Paragraph 4, section 25, chapter 159, also furnishes clear support for our decision. It states: 'Whenever a body charged by law with administering funds for any particular function, shall have been elected by the people, the corporation shall adopt the budget of said body and

59-10-24

shall allocate sufficient funds to meet said budget. However, in no event shall levies exceed the limits prescribed * * *.' As we have observed, plaintiff-board was elected by the people and it is conceded the limits prescribed will not be exceeded by the levy of a tax of one mill.

"Section 25, paragraph 4, thus expressly denies the council the right to reduce the budget of plaintiff-board. We cannot accept the argument that section 11 of the same chapter in effect confers a right upon the council which section 25 denies * * *."

In addition, section 404.11, Code 1958, in pertinent part provides:

"Recreation. Municipal corporations shall have power to annually cause to be levied for a fund to be known as the recreation fund a tax not to exceed five mills on the dollar on all taxable property within the corporate limits and allocate the proceeds thereof to be used for the following purposes: * * *

"8. In lieu of the taxes provided by sections 370.6, 370.28, 370.29, and 370.30 for park purposes."

A municipal corporation which has a body charged with the administration of funds for any particular function, which body is duly elected by the people, can allocate sufficient funds to meet its budget. If the Park Board elects to levy an annual tax under section 404.11, such a levy is in lieu of the authorization granted in section 370.6; however, it would authorize no more for park purposes than the taxes authorized in sections 370.6, 370.28, 370.29 and 370.30, nor would it authorize more for any of the specific purposes named in these sections than is levied under the aforesaid sections.

Therefore, the answer to your question is that the Park Board does not have to have the approval of the City Council before calling for a levy of a tax in excess of one mill, but the Board cannot exceed the limitations of Chapter 370.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

TAXATION: Motor Fuel--Computation and Payment--Credits--

Under the provision of Code sections 324.8 and 324.3, the deductions authorized under § 324.3 must be first taken from the total invoiced gallons, before the credit of 3% may be deducted in computing the tax due. (Bianco to Abrahamson, St. Treas., 10/22/59) #: 59-10-25

October 22, 1959

Hon. M. L. Abrahamson
Treasurer of Iowa
L O C A L

ATT: Carl H. Krause, Director
Motor Vehicle Fuel Tax Div.

Dear Sir:

We are in receipt of your recent request posing the following question:

> "According to the wording of Section 324.8, Paragraph 4, is the 3% to be allowed after the exemptions provided for in Section 324.3 have been deducted?"

In reply thereto we beg to advise as follows:

Section 324.8 Code of Iowa 1958 provides:

> "Tax reports--computation and payment of tax--credits. For the purpose of determining the amount of his liability for the tax herein imposed, each distributor shall, not later than the last day of the month next following the month in which this division becomes effective and not later than the last day of each calendar month thereafter, file with the treasurer a monthly report, signed under penalty for false certificate, which shall include the following:
>
> "1. A statement of the number of invoiced gallons of motor fuel received (within the meaning of the term "received" as defined in this division) by the distributor within this state during the next preceding calendar

59-10-25

month in such detail as is prescribed by the treasurer and as may be necessary for the proper administration of this division.

"2. A statement showing the deductions authorized in this division in such detail and with such supporting evidence as is prescribed by the treasurer and as may be for proper administration of this division.

"3. Such other information as the treasurer may require for the enforcement of this chapter.

"At the time of filing each monthly report, each distributor shall pay to the treasurer the full amount of the motor fuel tax due from the distributor for the next preceding calendar month computed as follows:

"4. From the total number of invoiced gallons of motor fuel 'received' by the distributor within the state during the next preceding calendar month shall be made the following deductions:

"First, the gallonage of motor fuel received and thereafter sold within the exemptions provided for in section 324.3; and second, the number of gallons of motor fuel equal to three per centum of the net number of invoiced gallons of motor fuel received by the distributor within this state during the next preceding calendar month, this percentage being a flat allowance to cover evaporation, shrinkage, and losses, other than those provided for in section 324.3, and the distributor's expenses and losses in collection, accounting for, and paying over the motor fuel tax.

"5. The number of invoiced gallons remaining after the deductions hereinabove set forth shall be multiplied by the per gallon motor fuel tax rate and resulting figure shall be the amount of motor fuel tax in dollars and cents due from the distributor for the next preceding calendar month. Any outstanding credit memoranda issued by the treasurer to the distributor may be applied against the amount due."

Section 324.3 reads as follows:

"Levy of excise tax--exemptions--credits. For the privilege of operating motor vehicles in this state an excise tax of four cents a gallon is hereby imposed upon the use of all motor fuel used for any purpose except as otherwise provided in this division. The tax shall be paid in the first instance by the distributor upon the invoiced gallonage of all motor fuel received by him in this state, within the meaning of the word "received" as defined in this division, less the deductions hereinafter authorized. Thereafter, except as otherwise provided, the per gallon amount of such tax shall be added to the selling price of each and every gallon of such motor fuel sold in this state and collected from the purchaser to the end that the ultimate consumer shall bear the burden of such tax; provided, however, that no tax shall be imposed or collected under this division with respect to the following:

"1. Motor fuel sold for export or exported from this state to any other state, territory, or foreign country.

"2. Motor fuel sold to the United States or any agency or instrumentality thereof.

"3. Motor fuel sold to any post exchange or other concessionaire on any federal reservation within this state; but the tax on motor fuel so sold, to the extent permitted by federal law, shall be collected by the post exchange or concessionaire, reported and paid the treasurer.

"4. Motor fuel sold to the state of Iowa or any of its agencies, but this exemption shall not apply to political subdivisions of this state."

Section 4.1(2) of the Code provides: "Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning.

We believe the statutes quoted above are plain and unambiguous.

Therefore in answer to your question, each distributor to avail himself of the 3% flat allowance to cover evaporation, shrinkage, and losses, and the distributor's expense and losses in collection, accounting for, and paying over the motor fuel tax; must use the following method of computation as permitted under sections 324.8 and 324.3 of the Code.

In his monthly statement he shall:

1. State the number of invoiced gallons of motor fuel received.

2. From this figure he may deduct the following gallonages of motor fuel sold.

   a. Motor fuel sold for export (Sec. 324.3 (1)).

   b. Motor fuel sold to the United States, etc. (Sec. 324.3.(2)).

   c. Motor fuel sold to post exchanges, etc. (Sec. 324.3(3)).

   d. Motor fuel sold to the State of Iowa, etc. (Sec. 324.3(4)).

   e. Any other deductions authorized by law, e.g. Chapter 43, Acts of the 57th G.A. and Chapter 58, Acts of the 58th G.A.

3. The tax shall then be computed upon the number of invoiced gallons remaining after the deductions enumerated in subparagraphs a, b, c, d, and e.

Respectfully submitted,

FRANK D. BIANCO
Second Assistant Attorney General

FDB:kj

TAXATION: Motor Vehicle Fuel -- when due -- penalty

The postmark of a report and remittance required under Section 324.60 is the controlling date and time when the penalty accrues under Section 324.64. (Brainco to Abrahamson, St. Treas. 10/22/59) # 59-10-26

October 22, 19595

Hon. M. L. Abrahamson
Treasurer of State
L O C A L

ATT: Mr. Carl H. Krause, Director
Motor Vehicle Fuel Tax Division

Dear Sir:

We have your letter of October 2 reading as follows:

"We respectfully request a written opinion on the following question:

"According to Section 324.60, is the postmark the controlling date and time when the 10% penalty accrues as set out in Section 324.64."

In response thereto we advise:

Section 324.60 reads as follows:

"Timely filing of reports--extension. The reports and remittances required under this chapter shall be deemed filed within the required time if postpaid, properly addressed and postmarked on or before midnight of the day on which due and payable. If the final filing date falls on a Saturday, Sunday or legal holiday the next secular or business day shall be the final filing date.

"The treasurer upon application may grant a reasonable extension of time for the filing of any required report or tax payment, or both." (Emphasis supplied)

59-10-26

Words and phrases shall be construed according to the context and the approved usage of the language. (See Sec. 4.1(2) Construction of Statutes).

Section 324.64 provides in pertinent part:

> "Penalty for failure to promptly report or pay fuel taxes. If a licensee or other person fails to file a required report with the treasurer on or before the time fixed for the filing thereof or if a licensee or other person fails to pay to the treasurer an amount of fuel taxes when due, a penalty of ten per cent of the tax unpaid and due shall be added, the unpaid tax and penalty shall immediately accrue and thereafter shall bear interest at the rate of one-half of one percent per month until paid."

Where the language of the statute is plain, there is no occasion for construction, though other meanings could be found, and courts cannot indulge in speculation but must give statute effect according to its plain and obvious meaning. (See cases cited Vol. 3 I.C.A. pp. 176 to 180 incl.)

Therefore, the postmark of a report and remittance required under Section 324.60 is the controlling date and time when the penalty accrues under Section 324.64.

Respectfully submitted,

FRANK D. BIANCO
Second Assistant Attorney General

FDB:kj

COMPATIBILITY OF OFFICE:

~~The office~~ of Deputy Sheriff and Probation Officer and Probation Officer and Justice of the Peace ~~are~~ Incompatible. (Strauss to Akers, St. Aud., 10/23/59) # 59-10-27

October 23, 1959.

Mr. Chet B. Akers,

A uditor of State

L O C A L

Attention of Mr. Holloway

Dear Sir:

This will acknowledge receipt of your letter of the 12th inst. in terms as follows:

> "We have learned that a deputy sheriff has been appointed probation officer by the Board of Supervisors. The original appointment was suggested by the Judge of the District Court and the supervisors concurred.
>
> The salary of the probation officer was $65.00 per month. The deputy sheriff received the regular salary as deputy sheriff, also the $65.00 as probation officer in 1958. The salary for the probation officer was raised to $75.00 per month for 1959.
>
> The question is can a deputy sheriff serve in that capacity and also serve as probation officer and be paid a salary for both positions.
>
> We have found that in another county a district Judge has appointed a Justice of the Peace as a probation officer. The question is, can a Justice of the Peace serve as a justice and also as a probation officer."

In reply thereto, I will advise as follows:

#1 - Insofar as the question of incompatibility between the office of Deputy Sheriff and Probation Office is concerned, I call your attention to the fact that the probation officer is an appointee of the Judge of the Juvenile Court, and may be appointed to serve two or more counties. See Chapter 171 of the Laws of the 58th G.A.

59-10-27

Such court officer is endowed with the following powers and duties, provided by Chapter 231.10, Code of Iowa, 1958 G.A. as follows:

> "Powers and duties - office and supplies. Probation officers, in the discharge of their duties as such shall possess the powers of peace officers. They shall be furnished by the county with a proper office and all necessary blanks, books, and stationery. It shall be the duty of said probation officers to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as the judge may require, and to take such charge of any child before and after trial as may be directed by the court."

On the other hand, Deputy Sheriffs are public officers having such powers as the Sheriff may assign to him, and during the absence and disability of the Sheriff, shall perform the duties of the Sheriff. That performance of duties imposed by the court and performance of duties required by statute and common law could be conflicting, is quite apparent.

In addition, the potential eligibility of the probation officer to serve in the county in which he has no power as Deputy Sheriff, constitutes an additional reason for concluding incompatibility between the offices.

#2 - Insofar as incompatibility between the Justice of the Peace and Probation Officer is concerned, it is to be observed that the Probation Officer has the powers of a peace officer (section 231.10) and would have the power to file informations which could be disposed of by himself as Justice of the Peace, a magistrate. See Chapter 748, Code of Iowa, 1958.

This potential of acting on informations files by himself would conclude the incompatibility of these offices.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS/B

CRIMINAL LAW: Usury -- Whether "carrying charge" is usurious depends on what part was in fact paid for the use of money.
(Strauss v. Doyle, St. Dep., 10/27/59) # 59-10-28

October 27, 1959

Honorable Donald V. Doyle
214 Insurance Exchange Building
Sioux City 1, Iowa

Dear Mr. Doyle:

Receipt is acknowledged of your letter relative to the usury statutes as follows:

> "It has come to my attention that many businesses are charging 8% and greater on time payments as a "carrying charge". This appears to create two problems, one is 535.5 & 535.6, and the other is income tax deductions.
>
> "The big catalog mail order companies charge over 10% for carrying charges. I have talked with various attorneys and men in the loan business and they do not see the consistency with this proceedure and Chapter 535 of the Code of Iowa. As it appears, 535.2, any charge of over 7% would be usury unless the loan was made by a loan company authorized to charge more and then it would appear that 535.6 would govern; is that correct?
>
> "Can a retailer charge 8% on greater on contracts for purchase of merchandise as a carrying charge? Could a insurance agent charge 8%, or greater, on installment payments on insurance.
>
> "How can the mail order businesses charge 8 to 12% as a carrying charge? Could any individual loan money and charge 7% interest and $5.00 carrying charge, or an addition 3% carrying charge?"

In other words, the problem is whether a larger amount than the legal interest rate of seven per cent may be exacted as a "carrying charge" on a time payment or installment payment contract.

Usury is defined as the reservation of a greater rate of interest than the law permits. Interest is money paid for the use of money. The applicable Code sections are section 535.2, which sets the rate of interest at five cents on the hundred by the year, unless the parties agree in writing for interest not to exceed seven cents on the hundred by the year, and section 535.4, which provides as follows:

> "No person shall, directly or indirectly, receive in money or in any other thing, or in any manner, any greater sum or value for the loan of money, or upon contract founded upon any sale or loan of real or personal property, than is in this chapter prescribed."

Section 535.4 provides that no more than the prescribed "sum or value" shall be received "upon contract founded upon any sale or loan of real or personal property". Thus the Iowa statute expressly refers to credit sales.

The difference between the cash sale price and the credit sale price of an article may be greater than the legal interest rate and still not be usury. In First National Bank of Marshalltown v. Owen, 23 Iowa 185, the Court, in deciding that an agreement by the purchaser of sheep to pay in addition to a sum of money two pounds of wool per year for each sheep sold was not usurious, stated:

> "If treated as interest, it was payable in property. Its value was necessarily fluctuating, and could not at the making of the contract, be well estimated. We concede that a contract of little terms might be shown to be usurious."

The Court decided that the wool was a part of the credit sale price.

The case of Gilmore & Smith v. Ferguson & Cassell, 28 Iowa 220, also involved the purchasing of sheep with a wool payment. The Court stated that one may sell his property for a much higher price on credit than he would for cash.

It is clear from the above two cases that a person may ask a credit-sale price in excess of a cash-sale price plus seven per cent interest by the year and such credit sale price will not be deemed usurious.

The cases of First National Bank of Marshalltown v. Owen, supra, and Gilmore & Smith v. Ferguson & Cassell, supra, are the only two cases in Iowa where the issue of an excess in credit price over the cash price has been directly dealt with. The Iowa Court in Callanan v. Shaw, 24 Iowa 441, laid down the rule that a credit sale is under the usury statutes.

We are left with the proposition that a credit sale price may be in excess of a cash sale price and that, in order to have usury in a credit sale, the interest rate with respect to the credit sale price must be in excess of the legal interest rate.

Interest is money paid for the use of money. Thus it is a fact question in every credit sale as to whether the amount of money paid in excess of the cash price is for the use of money or for another purpose. If it is for the use of money and exceeds the statutory rate, then it is usury.

Upon examination of the Iowa statutes, it does not appear that carrying charges must be itemized as such; thus just

because the amount paid above the sale price is greater than the legal rate of interest does not of itself render the transaction usurious. It must also be ascertained for what purpose the excess over the legal rate of interest was charged in order to make the transaction usurious. The Iowa Court has never decided what constitutes proper carrying charges; however, the following cases, though not dealing with credit sales, may furnish some indication as to how the Iowa Court would react if faced with the problem: Smith v. Wolf, 55 Iowa 555.

> "Nor, in our opinion, does the payment of the plaintiff's traveling expenses from Ohio to Iowa, for the purpose of examining the land proposed to be given in security, render the contract usurious if the amount paid was reasonable, and was not exacted as a means of obtaining illegal interest."

Iowa Savings & Loan Association v. Lawrence Heidt, 107 Iowa 297.

> "It is claimed that defendant did not receive the full amount of his loan, and this is correct. But the amounts deducted were necessary expenses in perfecting the loan."

Thus it appears that payment by the borrower of the necessary expenses of the lender, incurred in making the loan, in addition to the legal interest will not constitute usury. Whether the carrying charges in the illustrations given in your letter are usurious would depend upon the following factual determination, to be made in each case:

1. Determine the amount of payment required over the cash price.

2. Determine what part of that amount is paid for the use of money as distinguished from filing and recording fees,

credit investigation and other services.

3. Divide the cash price into the amount of money paid for the use of money for a period of one year. If the quotient exceeds the legal rate, the contract is usurious.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

STATE OFFICERS AND DEPARTMENTS:

Real Estate Commission -- Contract of employment by construction company authorizing an employee, at a stated salary, to hold open house on its housing projects and arouse interest in purchasing houses therein, is not within the exception of required possession of real estate license. (Strauss to Hart, Rl. Est. Com., 10/27/59)

59-10-29

October 27, 1959

IOWA REAL ESTATE COMMISSION

State Capitol

Des Moines 19, Iowa

Attention: E. A. Hart, Director

Dear Sir:

This will acknowledge receipt of yours of the 22 inst., which, with names therein omitted, states the following:

> "We enclose herewith a transmittal letter from _____ of _____, licensed as a real estate broker, and an "Employment Contract" entered into between _____ and _____. Neither _____ or _____ are currently licensed as either a broker or salesman.
>
> "_____ failed to qualify by examination for a license as a real estate salesman _____, and _____ want to hire him on a straight salary basis as a regular employee under subsection 1 of section 117.7, chapter 117 of the 1958 Code of Iowa.
>
> "We respectfully request an opinion as to whether such employment arrangement is contemplated in the above Code section or whether it would be considered a subterfuge to evade licensure requirements under chapter 117.
>
> "This case is being held in abeyance pending your opinion so we would appreciate a prompt response."

The contract referred to by you, likewise with the names omitted, provides the following:

59-10-29

"October 20, 1959

"Employment Contract" under Chapter 117.7

"This Agreement between _____ and _____, both of _____ to wit:

"1. Employee agrees to work for the employer at $600.00 monthly which will represent the entire compensation both present and future for the services rendered which will be as follows:

"1. Hold open house on the project and in the homes owned by the employer for the purpose of explaining same to the customer and arousing their interest and pursuading them to purchase said properties.

"2. The express purpose of this agreement is to clarify the employee's and employer's position as regards the subject real estate license law which specifically qualifying the employee named herein as a person who is hired for the express purpose of assisting the employer in the management, sale, leasing or rental of the properties owned by the employer which shall be matters in the regular course of the business of the employer."

I advise as follows:

I am of the opinion that the contract of employment here exhibited does not create an employment with the exception referred to by you, to wit: section 117.7(1). That section provides the following:

"117.7 Acts excluded from provisions. The provisions of this chapter shall not apply to the sale, exchange, purchase, rental, or advertising of any real estate in any of the following cases:

1. Owners or lessors, or to the regular employees thereof, with respect to the property owned and leased where such acts are performed in the regular course of or incident to the management of property owned and the investment therein."

Obviously, the language of this exception does not include "the sale, exchange, purchase, rental, or advertising" of any real estate as incident to the management of owned or leased properties, but expressly excludes such activities, except as they are related to the management of such properties. These are the activities that require a real estate license before their undertaking. Instead of excluding such activities, the contract expressly imposes them upon the employee as part of his management duties, these activities which are the very essence of a real estate operation.

I am of the opinion that the proposed employment contract is not within the exception of section 117.7(1).

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

COURTS: Probate notices -- posting fee -- Code section 618.12 appears the only authority for payment of fees for posting probate notices. (Ltr to Samore, Woodbury C. Atty., 10/28/59)
#59-10-30

October 28, 1959

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

Dear Mr. Samore:

Receipt is acknowledged of your letter of October 23 as follows:

"An Attorney General's opinion is respectfully requested concerning the status of fees described as follows:

These fees are for posting of probate notices in three public places as provided by the Code. The posting of these notices are by clerks in the office of the Clerk of the District Court, and such posting is done on their own time and not during the hours of duty in the Clerk's office.

It is my understanding that this is a custom throughout the State, and when the costs of probate are paid, such posting fees are paid to the individual in the Clerk's office who posted these notices. On occasion, the attorneys themselves or a member of the office staff of the attorney handling the probate, posts these notices. Fees in the amount of $1.50 are assessed, and upon payment of probate costs the attorney or the secretary is paid for this service.

Such fees are not listed in Section 606.15 of the 1958 Code of Iowa relating to fees of the Clerk of the District Court.

"The opinion requested here is to determine the legality and the propriety of the payment of such posting fees to such clerk or member of the staff of the Clerk of the District Court, who performs the services of posting probate notices at times aside and apart from the regular hours of duty of such clerk or member of the staff in the office of the Clerk of the District Court."

Section 618.12, Code 1958, provides:

"Fee for posting. In all cases where an officer in the discharge of his duty is required to post an advertisement or notice, he shall, when not otherwise provided, be allowed twenty-five cents, and the same mileage as a sheriff."

Rule of Civil Procedure No. 369 provides:

"Effect of notice by posting. Notice by posting shall not be recognized as having any effect, except in probate proceedings, or where expressly authorized by statute."

I am unable to discover any statutory authority other than code section 618.12 for the payment of posting fees. The relationship between the figure, twenty-five cents, and the figure $1.50 also seems obscure. However, I note from your letter that three postings are made, which would account for seventy-five cents, and it may be that the additional seventy-five cents represents mileage. If no mileage is involved, it may also be that someone at some time has assumed the 100% increase in fees provided in section 15, chapter 137, 54th G. A., with respect to fees established in code section 606.15, also applied to the fee provided in code section 618.12. In the case of Daily Record Co. v. Armel, 54 N.W. 2d 503, the Supreme Court held that the aforesaid act of the 54th G. A. had the effect of doubling the publication fee provided in code section 618.13. However, this was done on the theory that code section 618.13 and part of code section 606.15 were all enacted as part of one act, chapter 270, 50th G. A. Since code section 618.12 never was a part of Chapter 270, 50th G. A., it would appear that chapter 137, 54th G. A. did not have the effect of doubling the fee for posting notice.

Therefore, unless mileage between places of posting makes the difference, I know of no statutory authority to pay more than the twenty-five cents per posting provided in section 618.12 in connection with the postings described in your letter.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

HEALTH: Hospitals, county -- Trustees have no power to buy adjacent land for sole purpose of insuring against contingency of future undesirable neighbor. Proceeds of maintenance levy cannot be invested in bonds. (Opinion to Harris, Greene Co. Atty., 10/29/59) #59-11-4

October 29, 1959

Mr. David Harris
Greene County Attorney
Jefferson, Iowa

Dear Mr. Harris:

Receipt is acknowledged of your letter of October 15 as follows:

> "I would appreciate your opinion on the following two questions, both of which have reference to our County Hospital:
>
> "1. The Greene County Board of Hospital Trustees is interested in purchasing a strip of land adjacent to the hospital. This land 200 feet wide is now in agriculture land, and the sole purpose for purchasing the strip would be to insure against an undesirable neighbor, or land development next to the hospital. The strip of land could be purchased for less than $10,000.00, but would cost in excess of $5,000.00. May the Board make such a purchase under these circumstances, and if so, what steps are necessary.
>
> "2. Is it lawful for the Board to purchase Government bonds with a part of the substantial cash balance now in a bank, and which is a part of the maintenance fund. The Board feels that the advantageous interest rate now offered by Government bonds would be good advantage. Is such an investment legal?"

In answer to your first question, code section 347.13 (1) confers power upon hospital trustees to purchase land as follows:

> "Said board of hospital trustees shall:
>
> "1. Purchase, condemn, or lease a site for such public hospital, and provide and equip suitable hospital building."

Since it is given in your question that the sole reason for acquisition of the land is not to provide a site for a

59-11-4

hospital or expansion of existing facilities but rather to guard against the possibility of a future undesirable neighbor, I regret to advise you the board does not have the authority to make the purchase.

In answer to your second question, authority to make certain investments of the county public hospital fund in bonds is expressly conferred in code section 347.8 and in section 6, chapter 262, 58th G. A. However, such power is expressly limited to those monies derived from the sale of bonds or set aside for the depreciation fund. I must, therefore, advise you that under the familiar maxim, "expressio unius est exclusio alterius" that portion of the county public hospital fund derived from the maintenance levy cannot be invested in government bonds, at least not until it makes its way into the depreciation fund.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

STATE OFFICERS AND DEPARTMENTS: Aeronautics Commission, liens -- to be enforceable against bona fide purchaser for value, the lien provided in Code section 328.47 must be recorded with the appropriate federal agency. (Ltr to Wolverton, Air Enf. O., 10/30/59) #59-11-5

October 30, 1959

Aeronautics Commission
L O C A L

Attention: L. W. Wolverton, Air Enf. Officer

Gentlemen:

Receipt is acknowledged of your recent inquiry relative to the payment of registration fees on an aircraft subject to registration in Iowa.

It appears that the aircraft in question was sold to a purchaser in another state at a time when registration fees were due the State of Iowa and that such fees were never paid and became delinquent. Subsequently the out-of-state owner resold the aircraft to a purchaser residing in Iowa, thereby again making it subject to Iowa registration fees. The present owner is willing to pay the current Iowa registration fee but declines, through his attorney, to pay the fees and penalties due on the aircraft prior to its aforesaid removal from the state. Your office has made offer to waive the penalties upon payment of the delinquent fees in sum total of $10. In response to this offer, the present owner, through his attorney, has again declined payment expressing the opinion that the claim of the State of Iowa is a personal claim against the prior owner and not a lien against the aircraft. Section 328.47, Code of Iowa, provides:

> "All registration fees provided for in this chapter shall be and continue a lien against the aircraft for which said fees are payable until such time as they are paid as provided by law."

Section 328.49, Code of Iowa, provides:

> "The collection of all fees and penalties provided for in the chapter may be enforced against any aircraft or they may be collected by suit against the owner who shall remain personally liable therefor until such time as the transfer thereof shall be reported to the commission or until such time as the identity of the aircraft has been entitled by law and all fees and penalties to such date shall be paid."

59-11-5

Since your awareness of the identity of the present owner indicates the commission has notice of the transfer of possession of the aircraft, it is apparent collection cannot be enforced against the original owner and that if the fee is to be collected, other than by voluntary payment, it must be under the quoted provision that such "may be enforced against any aircraft".

This brings us to the question whether such lien is enforceable against a bonafide purchaser. The bonafide purchaser rule is a well-established common-law rule. However, as in the case of all common-law rules, it may be abrogated by statute. The provision in section 328.47 supra, that such fees "shall be and continue" a lien, would seem to be in derogation of the bonafide purchaser rule. In order to qualify under the common-law rule, the bonafide purchaser must be one without notice of the lien. It is apparent that the present owner had no actual notice but constructive notice has been held sufficient in such matters. 53 C.J.S., Liens, § 13.

Probably the best way of assuring that a purchaser will have notice of a lien such as the one in question is by an entry on the certificate of title as in the case of motor vehicles. However, certificates of title on aircraft are issued not by the state but by an agency of the federal government. At 76 F. Supp. 684 is reported a case, in re Veterans' Air Express Co., in which it was held that Congress, in enactment of the Civil Aeronautics Act, has prescribed the only way in which liens on aircraft may be recorded so as to serve as constructive notice to all persons -- Civil Aeronautics Act of 1938, §§ 1 (15, 18, 26), 2, 3, 308, 501, 503.

It thus appears that recovery against the original Iowa owner is barred by the transfer under Code section 329.49 and recovery against the aircraft in the hands of the present Iowa owner is barred, despite the continuing lien and enforcement provisions of sections 328.47 and 328.49, by the fact that the Act of Congress, as construed by the federal court, provides the only method for making such liens of notice to bonafide purchasers. Had Congress not occupied the field by providing what appears to be the exclusive method for giving notice of lien, the records of the Aeronautics Commission might be deemed sufficient constructive notice in view of the continuing lien provision of Chapter 328.

Insofar as the subject lien is concerned, it appears unenforceable at this time inasmuch as it was not recorded with the federal agency. It therefore follows that the aircraft should be registered upon payment of the current fees. It is recommended that all liens for unpaid registration be hereafter

recorded with the federal government in order to provide the requisite notice necessary to keep the lien enforceable.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

SCHOOL: Tuition -- County boards have no statutory duty to determine which school district is responsible for tuition.
(Lehmann to Falk, Page Co. Atty., 10/30/59) #59-11-6

October 30, 1959

Mr. William E. Falk
Page County Attorney
Clarinda, Iowa

Dear Mr. Falk:

Receipt is acknowledged of your letter of September 25 as follows:

> "The Mental Health Institute, Clarinda, Iowa, is a part of the Washington Rural Independent School District of Page County. The Board of Directors of this School District has notified the Clarinda Community School District of their following actions:
>
> > "(1) Their denial of responsibility for payment of tuition to the Clarinda Senior High School for a resident patient, on the basis he is a ward of the State, is not a legal resident of their district, or of Page County, and is residing on tax free State owned land; and
> >
> > "(2) Their denial of responsibility for payment of bus transportation for the children of State employees residing on the grounds of the Mental Health Institute, Clarinda, Iowa.
>
> "The controversy between the two districts has been discussed by the Board of Education of Page County, but no action has been taken. Under the above facts, what are the duties, if any, of the Page County Board of Education? May we have your opinion?"

In reply thereto, we advise as follows:

Section 273.12, Code 1958, provides in pertinent part:

> "The county board of education 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."

59-11-6

With respect to a controversy over the responsibility for the payment of tuition and bus transportation, this is a proper matter to be determined by the local school board based upon the facts concerning the person in question. Your attention is directed to Opinions of the Attorney General, 1958, page 198, Section 20.1, which states briefly that school residence is not the same as legal domicile but depends on actual residence which in turn depends upon a determination by the local board, in this case Washington Rural Independent School District, subject to appeal under Chapter 290, of the purpose in fact for which the child is present in the school district.

In addition, your attention is directed to Section 273.18 (b) in part:

> "The county superintendent shall, under the direction of the board, exercise the following powers and duties:
>
> "* * *
>
> "6. Advise and counsel local boards of education concerning their immediate problems * * *"

If permission is granted, the county superintendent is the only person with whom the local boards may bring this problem. But the final determination of any problem is left to the exclusive jurisdiction of the local boards. The method of appeal under Chapter 290 confers no statutory authority upon the county board of education to settle the controversy.

Therefore, in answer to your question, the county board of education has no duty to perform based upon the facts as presented in your letter.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Joe Davis,
Paul Johnston

INSURANCE: Mutual Benefit Association -- By-laws and application examined and conclusion reached that subject association cannot be regulated as an insurance company in the absence of further evidence showing it, in fact, conducts itself like an insurance company. (Abels to Timmons, Ins. Comr., 10/30/59)

#59-11-7

October 30, 1959

The Honorable William E. Timmons
Commissioner of Insurance
L O C A L

Attention: Charles R. Warren, Associate Counsel

Dear Sir:

Pursuant to your letter of October 1, I have examined the By-Laws and Membership Application of a certain association, as submitted therewith, for the purpose of ascertaining whether ~~they~~ it falls under Chapter 512 of the Code.

Upon thorough examination of the items submitted, it is my considered opinion that the drafters thereof had studied and were thoroughly familiar with 38 Am. Jur., Mutual Benefit Societies; the decision of the Supreme Court of Iowa in the case of State ex rel Kuble v. Capitol Benefit Ass'n., 237 Iowa 363; and section 512.4, Code of Iowa.

Under the opinion appearing at page 205 of the 1934 Report of the Attorney General, it appears that an association such as the subject association could be considered as coming under the insurance laws. However, that opinion was rendered before the Capitol Benefit Association case and is therefore of little assistance at this date.

This does not necessarily mean the association in question cannot ultimately be brought under the insurance laws if it can subsequently be proven to have acted as an insurance company. If the evidence that the state lacked in the Capitol Benefit Association case, namely that the association or its agents represent the "membership" sold as insurance, then a case could be made out for regulation. However, on the basis of the file submitted, that is, the by-laws and application blank, the association in question cannot be identified as an insurance company.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
Encl

59-11-7

TAXATION: City Assessor -- There is no statutory authority for the expenditure and disposition of any surplus remaining in "The City Assessment Expense Fund" created under Chapter 405, Code 1958, and disposition thereof requires legislative action. (Strauss to St. Auditor, 11/4/59) # 59-11-8

November 4, 1959

Auditor of State

State House

L O C A L

Attention: Earl C. Holloway, Supervisor of County Audits.

Dear Sir:

This will acknowledge receipt of yours of the 12th ult. in which you submitted the following:

> "We have had an inquiry about the balance that may be left in the city assessor's expense fund as of December 31, 1959. Under the old law this fund was created by money from the county, school and city, each body contributing one third of the budget.
>
> "Under the new law the maintenance of the office of assessor shall be a tax levied only upon the property in the area assessed by said assessor.
>
> "The question is, should the remaining balance in the city assessor's expense fund as of December 31, 1959, be carried to the new assessment expense fund or should it be apportioned back to the three taxing bodies who contributed to said fund.
>
> "The new law does not mention the disposition of this balance."

In reply thereto I advise as follows:

The statute under which the above-described fund is accumulated is section 405.18, Code 1958, which, after providing for a combined budget to be made up by the city council, school board, and county board of supervisors, with respect to the

accumulation of the foregoing fund and its expenditures, provides as follows:

> "At the joint meeting the three taxing bodies 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.
>
> "Each of the three taxing bodies shall contribute one-third of the amount required to make the final budget and shall, on the first day of January, April and July of each year remit one-third of its share to the county treasurer to be credited by him to a separate fund to be known as "The City Assessment Expense Fund", and from which fund all expenses incurred under this chapter shall be paid.
>
> "The county auditor shall keep a complete record of said fund and shall issue warrants thereon only on requisition of the city assessor.
>
> "The city assessor shall not issue requisitions so as to increase the total expenditures budgeted for the operation of the city assessor's office. * * *
>
> "Unexpended funds remaining in the city assessment expense fund at the end of a year shall be carried forward into the next year. Such balance of unexpended funds shall be credited to the final payment into the fund by the respective taxing bodies for the next year on an equal basis. The treasurer shall notify such taxing bodies of any such credits to which they are entitled."

Thus it will be seen that in the office of the county treasurer there was directed to be established "The City Assessment Expense Fund", the monies thereof to be withdrawn by requisition of the city assessor. This fund is made up of contributions by the three taxing bodies, to wit: the city, the county, and the school district, in equal proportions of one-third each. Chapter 405, Code 1958, was repealed by Chapter 291, Acts of the 58th General Assembly, which repeal became effective July 4, 1959. And while the assessments and levies from which this expense fund arises were validated, and the term of the assessor in office continued until the expiration of the statutory term, the office of the assessor as created by Chapter 405, Code 1958, ceased to exist July 4, 1959. The money on December 31, 1959, then in the assessment expense fund in the office of the county treasurer will be the result of the assessor's budget established in 1958, and the resulting taxes levied in 1958 and collected in the year1959. This is the expense fund over which the county treasurer has authority in 1959, and until December 31 thereof. Its expenditure by him is the result of requisitions by the city assessor for the purposes and uses provided by Chapter 405, Code 1958; not otherwise. Such expenditures are made from this fund under the provisions of Chapter 405, Code 1958, which was repealed by Chapter 291, Acts of the 58th General Assembly; likewise made by him as a ministerial officer having the powers conferred upon him by statute. Thus it is stated in:

Iowa Digest, Volume 6, page 90
Section 81 Authority and powers.
"U. S. Iowa 1873. County officers of the state are creatures of statute brought into existence for public purposes, and have no authority beyond that conferred upon them by the legislature. Supervisors v. U. S. 85 U.S. 71, 18 Wall 71, 21 L. Ed. 771."

And in:
Grigsby-Grunow Co. v. Hieb Radio Supply Co., 71 Fed 2d 113, page 114:
"...The county treasurer of Polk county, Iowa, has only such authority as is vested in him by statute, and for the reason that the filing of the joining petition was beyond the authority of the county treasurer, under the state law, the motion to strike his petition to join as a petitioning creditor was properly sustained."

With this rule established, on January 1, 1960, a new city assessment fund comes into existence under and by virtue of the budget and levies provided by Chapter 291, Acts of the 58th General Assembly, and the monies therein will result from the 1959 budget and levies made under the authority of such Chapter 291. On December 31, 1959, by reason of the repeal of Chapter 405, Code 1958, the city assessor, acting under such chapter, will have no statutory control of the 1960 fund and requisitions by him can be made only for the purposes defined in Chapter 405, Code 1958, and not under the provisions of Chapter 291, Acts of the 58th General Assembly. In other words, the requisitions so made would not be authorized and payment thereof by the county treasurer unauthorized for the purposes and uses defined for this fund in 1960. The city assessment expense fund in 1960 to be established in the office of the county treasurer is made up of tax monies from levies made upon property assessed by the city assessor. Thus the fund under scrutiny here could not be lawfully disposed of by the county treasurer.

This accords with the rule stated in the case of McKeon v. City of Council Bluffs, 206 Iowa 556, 221 N.W. 351, as follows:

> "It is the settled law of this jurisdiction that property may not be taxed for a purpose in which the owners or occupants have no interest, from which they can derive no benefit, and which is solely for the benefit of others, and that taxation for municipal purposes of agricultural lands which derive no benefit from the municipal government cannot be sustained."

The provisions of Section 405.18, Code 1958, respecting the disposition of unexpended funds remaining in the Expense Fund at the end of a year has no applicability, for it has been repealed, and in any event, the disposition thereof as provided in the numbered statute cannot be made because the obligation of the city, county, and school district to make contribution to the expense fund no longer exists.

In view of the foregoing, I am of the opinion that disposition of the fund will be attained by legislative action.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

SCHOOLS: Status -- School districts are quasi-corporate entities formed for educational purposes, not for profit. (Pehrmann to Pappas, Cerro Gordo Co. Atty.; 11/4/59)

59-11-9

November 4, 1959

Mr. William Pappas
Cerro Gordo County Attorney
Mason City, Iowa

Dear Mr. Pappas:

This is to acknowledge receipt of your letter of October 19, in which you ask the following:

> "I request an Attorney General's ruling as to the legal character of an Iowa Independent School District or an Iowa Community School District organized under Chapter 275 of the 1958 Code of Iowa.
>
> "This opinion is of importance to a number of teachers of these two types of school districts to assist in determining whether their employers qualify with the definition of certain types of corporations found in Section 501-C (3) of the 1954 Internal Revenue Code. * * * "
>
> "I do not ask that you interpret the foregoing Section of the Internal Revenue Code. This, of course, would be the exclusive province of Federal authorities.
>
> "I do ask, however, that you make a ruling as to whether or not employees of an Independent or Community School District are hired by corporate employers for educational purposes and not for profit."

In reply thereto, we advise as follows:

Section 274.1, Code 1958, provides:

> "Powers and jurisdiction. Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained."

59-11-9

A school district is a semi-autonomous political organization of the state possessing a quasi-corporate entity for governmental purposes, in that its organization is simply for the purpose of carrying out the function of public education and for nothing else. Independent School Dist. v. State Appeal Board, 230 Iowa 924, 299 N.W. 440; Dean v. Armstrong, 246 Iowa 412, 68 N.W. 2d 551; Silver Lake Consolidated School Dist. v. Parker, 238 Iowa984, 29 N.W. 2d 214; Ford v. Independent School District, 223 Iowa 795, 273 N.W. 870; Des Moines Independent Community School Dist. v. Armstrong, ____ Iowa ____, 95 N.W. 2d 515.

It is fundamental that school districts are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as incident to the exercise of a power or performance of a duty expressly conferred or imposed by statute. Ind. Sch. Dist. of Danbury v. Christiansen 242 Iowa 963, 49 N.W. 2d 263; Lincoln Dist. v. Redfield Dist., 226 Iowa 298, 283 N.W. 881.

Therefore, the school district must be given the power to make a profit from the express provisions of some statute. A full examination relating to school districts discloses no authority or power for a school corporation to make a profit from the operation of the government purpose of education.

Thus, in answer to your question, it may be said that employers of an independent or community school district are hired by special type corporate employers whose primary purpose is to carry out the governmental function of public education, and such corporations are not organized for profit.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

AGRICULTURE: Eligibility of Fees -- The Iowa State University Veterinary (Ambulatory) Clinic is not such an agency of the department of agriculture as to bear the burden of expenses under Brucellosis testing plans and therefore may file claims for services rendered from such sources as are available. (Maggart to Spry, Ags. Secy., 11/4/59) # 59-11-10

November 4, 1959

Honorable Clyde Spry, Secretary
Iowa Department of Agriculture
State House
LOCAL

Attn: A. L. Sundberg, DVM

Dear Dr. Sundberg:

Reference is made to your letter dated October 27, 1959, in which you requested the following:

> "The College of Veterinary Medicine, Iowa State University Ames, Iowa operates a Veterinary (Ambulatory) Clinic which in effect constitutes the equivalent of a private veterinary practice. The clinic is operated by full time state paid veterinarians, employed by the college. Many farmers in Ames area depend on the clinic for complete veterinary service. The College charges a fee comparable to a fee charged by a private practitioner for all services rendered, and all fees collected are placed in a fund which is used as financial support toward the clinic. Effective August 15th, 1959 the Iowa Department of Agriculture adopted a change in Brucellosis program. Since said date the cost of services of $1.00 per head paid to veterinarians for administering Brucella vaccine has been paid from county funds; the vaccine being furnished by the United States Department of Agriculture from Federal funds. Is the Clinic eligible to receive fees for such services, paid from county funds to support an operation, sponsored by and operated by full time state paid employees?"

Section 164.4, Iowa Code 1958, states:

> "If the owner shall agree to comply with and carry out the rules and regulations made by the department under section 164.2, the expense of such inspection and test shall be borne by the United States department of agriculture, or by the department, or county Bang's disease eradication fund or any combination thereof."

This section states who will have the burden of expense when inspection and tests are conducted under an approved Brucellosis testing plan, i.e. "by the United States department of agriculture, or by the department, or county Bang's disease eradication fund or any combination thereof."

59-11-10

Assuming the facts stated are correct, then the Clinic, as such, is placing a claim for services rendered, not the salaried veterinarians.

The question then presented, is the clinic a part of the"department" as per section 164.4? If the Clinic is part of the department it is to bear the burden of such expenses and therefor would not be eligible to receive fees for expenses the Clinic is expected to bear, being a part of the "department".

Section 164.1, Iowa Code 1958, defines "Department" as meaning the department of agriculture.

Section 159.1(2), Iowa Code 1958, states:

> "Department" shall mean the Iowa department of agriculture and wherever such department is required or authorized to do an act, unlessotherwise provided, it shall be construed as authorizing performance by an officer, regular assistant, or duly authorized agent of such department."

Under Brucellosis testing, the Clinic is not a duly authorized agent of such "department", therefore not being within the definition of "department" as per sections 159.1(2) and 164.1, Iowa Code, 1958.

It is the opinion of this office, that as the Clinic is not of such a character to bear the burden of expenses under Brucellosis testing that it is eligible to receive fees for services rendered from such sources which are available at that time.

Yours very truly,

JAMES R. MAGGERT
ASSISTANT ATTORNEY GENERAL

JRM/b

DRAINAGE: (1) The county under Section 465.23, Code of Iowa, as amended by Chapter 233, 57th General Assembly, is not responsible for the repair of tile lines projected across secondary road right of way prior to the effective date of the enactment by the 57th General Assembly. (2) The county under Section 465.23, Code of Iowa, as amended by Chapter 313, 58th General Assembly, is not responsible for the repair of drainage ditches projected across secondary road right of way prior to the effective date of the enactment by the 58th General Assembly. (Lyman to Newell, Louisa Co., 11/5/57) # 59-11-11

Counties, Secondary roads--

November 5, 1959

Mr. Russell R. Newell
Louisa County Attorney
Columbus Junction, Iowa

Dear Mr. Newell:

In your letter of October 23, 1959, the following inquiries were submitted:

> "This is a request for an opinion concerning the effect of two amendments to Section 465.23 of the Code of Iowa upon the responsibilities of the County.
>
> 1. Chapter 233 Section 1 of the Acts of the 57th G. A. amended this section with regard to tile lines. Under this amendment, what responsibility, if any, does the County have for the future maintenance, repair, and replacement of tile lines in place across secondary road R.O.W.'s before this amendment became effective?
>
> 2. Chapter 313 Section 1 of the Acts of the 58th G. A. further amended this section with regard to drainage ditches. Under this amendment what responsibility, if any, does the County have for the future maintenance, repair and improvement of drainage ditches located across secondary road R.O.W.'s before this amendment became effective?"

In your first inquiry you refer to "maintenance, repair and replacement". As you know Section 465.23, 1958 Code of Iowa, as amended, refers only to the word "repair".

Whether the word "repair" means or includes "maintenance, replacement or improvement" is a fact question. As stated

59-11-11

in Hogue vs. Monona-Harrison Drainage District, 229 Iowa 1156, 296 N.W. 204:

> "The question of what is 'repair' under the latter section has been before this court many times. The answer depends always upon the circumstances in each case." (Emphasis added)

For a discussion of what constitutes repair see Baldozier vs. Mayberry, 226 Iowa 693, 285 N.W. 140, and cases cited therein: Haugen vs. Drainage District, 231 Iowa 288, 1 N. W. 2d 242; 36 Words and Phrases, page 943.

If, in fact, a repair is involved the responsibility for such repair is controlled by the statute. Section 465.23, 1954 Code of Iowa, as amended by Chapter 233, 57th General Assembly, in pertinent part is as follows:

> "If a tile line must be projected across the right of way to a suitable outlet, the expense of both material and labor used in installing the tile drain across the highway and any subsequent repair thereof shall be paid from funds available for the highways affected." (Emphasis added)

The statutory word "thereof" has special significance in that it refers only to the subject matter previously described, i.e., the tile line installed pursuant to the authority granted in the above amendment enacted by the 57th General Assembly. See 41 Words and Phrases, page 537. Therefore, in answer to your first question the county, under Section 465.23, 1954 Code of Iowa, as amended, is not responsible for the repair of tile lines projected across secondary road right of way prior to the effective date of Chapter 233, 57th General Assembly.

With reference to your second question, Chapter 313, 58th General Assembly, amended Section 465.23, 1958 Code of Iowa, by making the second paragraph thereof applicable to "drainage ditches" as well as tile lines. The above reasoning is equally applicable to a drainage ditch.

Thus, the county, under Section 465.23, 1958 Code of Iowa, as amended, has no responsibility for the repair of drainage

ditches projected across secondary road right of way prior to the effective date of Chapter 313, 58th General Assembly.

Very truly yours,

HVF:lle

TAXATION:

~~TAXES~~ Motor Fuel - Refund to non-licensee --

Invoices and proof of claim for refund must be filed within three calendar months after date of purchase of fuel.

(Branco to Abrahamson, St. Treas., 11/5/59) #59-11-12

November 5, 1959

Hon. M. L. Abrahamson
Treasurer of State
L O C A L

ATT: Mr. Carl Krause, Director, Gas Tax Division
Mr. C. E. Borg, Supt., Gas Tax Refund Div.

Dear Sir:

Reference is made to your recent favor which reads as follows:

"There are on a few occasions during the year gasoline tax refund claimants who write to the undersigned in regard to a claim for refund which they have not received. After a thorough check we advise the claimants that we have not received or processed the claim.

"Under Section 324.17 of the Iowa Motor Vehicle Fuel Tax Law in Paragraph 9 it states: 'If an original invoice is lost or destroyed the treasurer may in his discretion approve a refund supported by a copy identified and certified by the seller as being a true copy of the original;'. This department accepts properly certified claims with the use of true copies of lost or destroyed invoices but we have required that they be filed within three calendar months of the purchase date.

"There are in a few instances inquiries made in connection with a refund where the claim is lost either in the mails or in some other manner where the claimant does not make inquiry until after the date limit for filing invoices. The question that I wish you would clarify is this, referring to Paragraph 9 of the Section above, may we approve a refund to a claimant under the terms which states that the treasurer may in his discretion approve a refund, regardless of whether the invoices are not filed within the three calendar month period as referred to in Paragraph 7 of the same section."

59-11-12

In reply thereto we would advise as follows:

Section 324.17 prescribes the method by which gasoline tax refunds may be made and with reference to the question propounded, we quote from said section in pertinent part these provisions:

> "324.17 Refund to nonlicensee-fuel used other than in motor vehicles. x x x Every claim filed subsequent to July 4, 1957 shall be subject to the following conditions: x x x
>
> "7. No refund shall be paid with respect to motor fuel purchased more than three calendar months prior to the date the claim was filed with the treasurer.
>
> "9. If an original invoice is lost or destroyed the treasurer may in his discretion approve a refund supported by a copy identified and certified by the seller as being a true copy of the original."

The provision of subparagraph 7 is mandatory and no refund can be paid, if the claim is based upon fuel purchased more than three months prior to the date of the claim. The refund provided herein is in the category of an exemption. Taxation is the rule, and exemption from taxation the exception. Crown Concrete Co. v. Conkling, 247 Iowa 609, 75 N.W. 2d 351. Such statutes must be strictly construed. Bd. of Directors of Fort Dodge Ind. School Dist. v. Bd. of Sup'rs. of Webster Co., 228 Iowa 544, 293 N.W. 38.

Subparagraph 9 relates to an altogether different matter, ie., the matter of the proof of the claim, wherein the original invoice having been lost or destroyed, in the discretion of the treasurer, a certified copy of said invoice may be accepted as proof of the claim. This will not obviate the claimant under these circumstances, from complying with the requirement of subparagraph 7 by seeing to it that his claim is filed not later than three months after date of purchase of the fuel.

The burden of filing the claim and proving the claim is upon the claimant and it is not within the discretion of the treasurer, except as provided in subparagraph 9 to liberalize the law, in contravention of the mandatory provisions of subparagraph 7.

Therefore in answer to your question, it is our opinion that the invoices, as well as any other proof of a claim for refund must

be filed within the three calendar month period referred to in subparagraph 7 of Section 324.17.

Respectfully submitted,

FRANK D. BIANCO
Second Assistant Attorney General

FDB:kj

TAXATION: Exemption--Municipal Property.--When crops are raised on municipal property and the profit therefrom is used to maintain city park, the property so used is subject to taxation. (Gill to Morrison, 11/9/59) 59-11-13

November 9, 1959

Mr. Gifford Morrison
County Attorney
213 S. Marion Ave.
Post Office Box 67
Washington, Iowa

Dear Mr. Morrison:

This will acknowledge receipt of your letter of October 21, 1959, which has been referred to me and wherein the following problem was submitted:

> "The facts are as follows: A woman named Mary Marr died some time ago leaving a Last Will and Testament. In her will she left a farm consisting of one hundred twenty acres to Washington County, with the stipulation that forty acres of the farm be used for a public park and the other eighty acres be put in cultivation, the net income of such cultivation to be used to keep up and maintain the park, and if at some future time the income was no longer needed to keep up the park then the remaining eighty acres was to be added to the park. This park is to be open to the public. She always kept the taxes on the farm paid promptly during her lifetime. During the course of administration of her estate some of her relatives tried to commence legal action for the construction of the Will in the hopes that it might be sold and they share in a settlement of the proceeds. However, this action was resisted and the Court construed the Will exactly as it reads, which is as above stated. There was not enough personal property in the estate to pay the costs of administration, plus the fees of the Administrator and the fees for the Administrator's attorney, and it was, therefore, necessary to keep the estate open for some time to utilize the proceeds for the crops to pay such expenses. The estate was then closed as to the Iowa property and the real estate turned over to the Board of Supervisors of Washington County. The District Court of Iowa in and for

Washington County was then petitioned to establish a charitable trust and to appoint three Trustees to look after and manage said real estate under the director of the Court. This the Court did and a charitable trust was established. The three present members of the Board of Supervisors being appointed as the Trustees, and they have qualified by putting up bond of $1000.00 and signing their oath.

"The County Treasurer now tells us that there are delinquent taxes and that he must put the same up for tax sale if something is not done prior to the 14th day of November, 1959. * * *.

" * * * *. Do we have to apply rent money to pay these taxes, or are these taxes wrongfully levied?"

In response thereto, your attention is directed to the following Iowa statute:

"427.1 (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."

The issue presented is whether or not the eighty acre tract of land is being put to public use when cultivated and crops are raised so that the profit may be used to maintain a park. The case of The Town of Mitchellville vs. Board of Supervisors, et al, 64 Iowa 554 must be considered. In this case, property was devised to the town and the rents therefrom were to be used to maintain the city park. The Supreme Court of Iowa in holding that this property was subject to taxation stated:

"To be exempt, the property in question in this case must be devoted entirely to public use, and not held for pecuniary profit. Now, it appears that the property is not devoted to public use, but an income is derived therefrom. The condition of the trust imposed by the donor is that the property itself

shall not be devoted to public use, but the profit arising therefrom shall be. It is therefore obvious that a pecuniary profit is derived from the property. It is, therefore, not exempt. It is true, the profits are devoted to public use, but the statute does not, because of this fact, provide that the property is exempt from taxation."

Research has failed to disclose any case overruling or qualifying the Mitchellville case.

In conclusion, you are advised the property is subject to taxation until put to public use. Therefore, applying this to be the situation outlined above, taxes are due and owing and must be paid.

Very truly yours,

Gary S. Gill
Assistant Attorney General

GSG:rh

CONSTITUTIONAL LAW! Aviation gasoline tax refunds --

CHAPTER 247, Acts of the 58th G.A. providing refund of moneys collected on account of aviation gasoline, its refund and transfer of unrefunded portion to the State Aviation Fund does not violate Section 8 of Article VII of the Constitution. (To Strauss to Abrahamson, St. Treas., 11/10/59) # 59-11-14

November 10, 1959.

Mr. M. L. Abrahamson,
Treasurer of State,
B U I L D I N G.

Dear Sir:

This will acknowledge receipt of yours of the 15th ult. in which you ask the following:

> "Is House File No. 244 as passed by the 58th General Assembly constitutional under Chapter 324, Code of Iowa, 1958?
>
> We request this written opinion for the reason that a similar bill passed by the North Dakota legislature has been declared unconstitutional".

In reply thereto, House File 244, Acts of the 58th G.A. now Chapter 247 of such acts, provides the following:

> "SECTION 1. Chapter three hundred twenty-four (324), Code 1958, is hereby amended by inserting a new section therein as follows:
>
> 'The portion of the moneys collected under the provisions of this chapter received on account of aviation gasoline shall be deposited in a separate fund to be maintained by the treasurer. All moneys reimbursed and repaid pursuant to Section three hundred twenty-four point seventeen (324.17) of the Code on account of motor fuel used for the purpose of operating aircraft shall be paid from said separate fund and all moneys remaining in said separate fund after all claims for refund and the cost of administering said fund have been paid shall be credited to the state aviation fund."
>
> "SECTION 2. Section three hundred twenty four point eighteen (324.18), Code 1958, is hereby amended by inserting therein follow-

ing the period (.) in line four (4)thereof the following:

'A special permit shall be obtained by applicants claiming a refund under the provisions of this chapter on account of motor fuel used for the purpose of operating aircraft.'

An amendment in exact terms, excepting only the reference to the Code section under which refund is authorized, as the foregoing was introduced in the 55th G.A. designated as House File 303. Constitutionality of such proposed bill was concluded in the opinion of this department issued Feb. 18th, 1953, copy of which is attached. In my opinion, the opinion issued in 1953 is applicable to the said bill as now enacted into law, and likewise the law is constitutional.

I would advise you that the North Dakota opinion, to which you refer, while dealing with a statute comparable to House File 244, and appropriating motor vehicle fuel refunds for aviation purposes, is to be distinguished from House File 244 in that House File 244 is based upon the theory that exemption of aviation fuel from taxation was intended and such exemption was secured by refund.

This does not appear to have been either in the structure or intent of the North Dakota statute. At any rate, the unconstitutionality of the North Dakota Act was not concluded by opinion referred to, but there being reasonable doubt of the constitutionality, the

Attorney General suggested a court decree under a declaratory judgment to determine the question.

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS/B
Encl.

COUNTIES: Hospitals --
Lucas County having a population of less than 17,000 can avail itself of the one mill additional tax for servicing bond issued for erection and equipment of the hospital, provided by Chapter 263 ~~of the~~ Acts of the 58th G.A.
(Strauss & Morr, Lucas Co. Atty., 11/10/59)
59-11-15

November 10, 1959.

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

Dear Sir:

This will acknowledge receipt of yours of the 4th inst. in which was submitted the following:

"Your opinion is requested on the following matter:

Lucas County, of less than 17,000 population, has established a County Public Hospital under Chapter 347 of the 1958 Code of Iowa, as amended. The hospital building is in the process of erection and equipping at this time. The tentative budget for 1960 includes a levy of one mill for "improvement, maintenance, and replacements," a fractional mill to service the bonds, and one mill for "erection and equipment". The County Auditor has been advised by the State Comptroller that the levy of the latter mill is unauthorized without a vote of the people.

Section 347.7, as amended, seemingly indicates two distinct components of the levy:

1. The tax that shall be levied at the rate voted not to exceed one mill, and in addition

2. The tax that may be levied for "erection and equipment" in certain counties not to exceed one mill, and for "improvement, maintenance, and replacements" not to exceed one mill.

The construction and wording of the Section after the amendment by the Fifty-Sixth General Assembly seems to allow the levy of one mill for "erection and equipment" on the same basis as the levy for "improvement, maintenance, and replacements". The use of the word "may" is new with the amendment and in its ordinary meaning probably would confer discretion as to the levy to the Board of Hospital Trustees. To require a vote of the people before the mill in question may be levied seems to be in

discord with the wording of the statute and chapter.

Our question: Can Lucas County levy a mill for "erection and equipment" of the County Public Hospital under Section 347.7 of the 1958 Code of Iowa, as amended, in addition to the levy for service on the bonds at the voted rate and the levy for "improvement, maintenance, and replacements"?

In reply thereto, I advise as follows:

The statute providing for county hospital levy in section 347.7 Code of Iowa 1958 provides as follows:

"Tax Levy. If the hospital be established, the board of supervisors, at the time of levying ordinary taxes, shall levy a tax at the rate voted not to exceed one mill; and may levy one additional mill in counties of twelve thousand population or less, in any one year for the erection and equipment thereof, and also a tax not to exceed one mill for the improvement, maintenance, and replacements of the hospital, as certified by the board of hospital trustees; provided, however, in counties having a population of one hundred thirty-five thousand inhabitants or over, the levy for improvements and maintenance of the hospital shall not exceed three and one-half mills in any one year. The proceeds of such taxes shall constitute the county public hospital fund. Provided, however, that the board of trustees of a county hospital of said county, where funds are available in the county public hospital fund of said county which are unappropriated, may use such unappropriated funds for erecting and equipping hospital buildings and additions thereto without authority from the voters of said county."

House File 513, Acts of the 56th G.A. amended the aforegoing designated 347.7 1954 Code of Iowa, in terms as follows:

"SECTION 1. Amend section three hundred forty-seven point seven (347.7), Code 1954, by inserting after the word "mill" in line four (4), a semi-colon(;) and adding thereto

the following: "and may levy one additional mill in counties of twelve thousand (12,000) population or less",

and Chapter 263, Acts of the 58th G. A. further amended the aforegoing numbered section in the following manner:

"SECTION 1. Section three hundred forty-seven point seven (347.7), Code 1958, is hereby amended by striking from line five (5) thereof the word "twelve" and inserting in lieu thereof the word "seventeen".

so that section 347.7 insofar as applicable here, as thus amended provides now:

"Tax Levy. If the hospital be established, the board of supervisors, at the time of levying ordinary taxes shall levy a tax at the rate voted not to exceed one mill; and may levy one additional mill in counties of seventeen thousand population or less, in any one year for the erection and equipment thereof."

In a opinion issued Oct. 26, 1951, it was stated:

"Respecting the county hospital budget for 1951, I would advise you that, insofar as original construction of the hospital is concerned, it seems to me,

1. If the hospital has been constructed and equipped, a levy for erection and equipping is unauthorized.

2. If the hospital is in process of construction or erection and equipping, a levy for erecting and equipping may be authorized and allowable as part of a levy made to service the bonds, if such two levies do not exceed the maximum of a mill provided by section 347.7, and the proceeds used only for such purposes.

3. After construction and equipping, if bonds have been authorized and issued for the purpose of purchasing a site for a county hospital, and the construction and equipping thereof, a levy for servicing the bonds only is authorized. A levy for equipping is unauthorized.

4. After a hospital is constructed and equipped,

the hospital trustees are limited to a levy for maintenance.

The levy for servicing bonds outstanding is made pursuant to the provisions of Section 76.2, Code 1950."

Thus use of the additional mill is at the discretion of the hospital trustees, in counties having a population of 17,000 or less, and by explanation attached to file 513 in terms for use as follows:

"Under the statute the county can vote not to exceed $200,000 for a county hospital, but they are limited to a levy of one mill to retire said bonds and interest, and in the smaller counties with their low valuation one mill is not sufficient to retire the bonds within 20 years. It is, therefore, necessary to increase the permissive millage rate in order to issue the maximum amount of bonds allowed."

Therefore, in your county, such additional one mill levy may be made, but its use is limited to servicing bonds issued for erection and equipping the hospital.

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS/B

AGRICULTURE: (1) Biological Products; Permits:-- One must have a permit to sell biological products, whether serum or virus only or both.

(2) Sales to Permittees:- Chapter 143, Acts of 58th General Assembly governs only virulent virus sales to permittees.

(suggest to Spry, Ag. Secy., 11/12/59)

November 12, 1959 #59-11-16

Honorable Clyde Spry
Secretary of Agriculture
State House
L O C A L

Attention: A. L. Sundberg, D.V.M.

Dear Dr. Sundberg:

Receipt is acknowledged of your letter of November 6 in which you make reference to the following inquiry submitted to your office by a retailer.

> "May I sell just the Anti-hog cholera serum alone to people without a permit? Does the law governing sales to permit holders cover only the selling of virulent virus alone or in combination with the serum?"

The above request involves two questions. The first question pertains to Section 166.3 and 166.1(1) which are set out below.

Section 166.3, Iowa Code 1958, states:

> "Every person, before engaging as a manufacturer of, or dealer in, biological products shall obtain from the department of agriculture a permit for that purpose and shall be required to have a separate permit for each place of business."

Section 166.1(1), Iowa Code 1958, defines biological products:

> "The words "biological products" shall include and be deemed to embrace only anti-hog-cholera serum and viruses which are either virulent or nonvirulent, alive or dead."

Section 166.3, supra, states the requirements when a permit must be obtained.

59-11-16

Section 166.1(1), supra, defines biological products. In referring to this section it will be observed that the definition embraces serum and viruses.

The word "and" being a conjunction, indicates that "serum and viruses", may be construed a biological product, independent of the other.

Therefore, in view of the above, a permit is necessary even where serum alone is sold.

Turning now to the second question, Chapter 143, 58th General Assembly, which repealed Section 166.16, Iowa Code 1958, states:

> "No person shall sell, distribute, use, or offer to sell, distribute, or use virulent blood or virus from cholera-infected hogs except for one or more of the following purposes:
>
> a. for the purpose of interstate or foreign shipment of such blood or virus;
>
> b. for the purpose of research at any biological laboratory or by any manufacturer of biological products;
>
> c. for the purpose of testing biological products by any governmental authority or by any manufacturer of biological products.
>
> d. for the purpose of manufacturing any biological products or for the purpose of producing immune hogs to be used in the production of hog cholera serum.
>
> e. for use in case of outbreaks of hog cholera, which require the use of virulent blood or virus, when such outbreaks exist as determined by the supervisor of the Iowa veterinary medicine diagnostic laboratory, department of veterinary medicine, Iowa State College, the department of agriculture shall forthwith approve the sale of virulent blood or virus to those persons entitled to use said virulent blood or virus including those persons who are holders of valid unrevoked written permits to administer the same."

This chapter specifically states that virulent blood or virus may be sold only to holders of permits to administer the same, or persons entitled to use the same and, also, for what purposes the virulent blood or virus may be sold.

"Serum" is excluded from this chapter, the effect being that this chapter governs only the selling of virulent virus alone.

It should be noted however, that when the virus and the serum are both requested from a purchaser, that the purchaser then must be, one entitled to use or a permittee entitled to administer, the virus.

Yours very truly,

JAMES R. MAGGERT
ASSISTANT ATTORNEY GENERAL

JRM/b

TOWNSHIPS: Powers -- the power to condemn a site for a community center under code section 359.28 and to levy a tax for a township hall under code chapter 360 upon vote of the electors may be exercised concurrently where, in fact, the premises acquired can be and are intended to serve both functions with neither interfering with, detracting from nor increasing the cost of the other. (Atels to Morr, Lucas Co. Atty., 11/5/59)

November 5, 1959 # 59-11-17

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

Dear Mr. Morr:

Receipt is acknowledged of your letter of November 4 as follows:

"Your opinion on the following matter is respectfully requested:

"The voters of Benton Township, in Lucas County, have adopted the proposition to levy a tax for the erection of a public hall. Located within the Township is a schoolhouse no longer used for school purposes due to the establishment of a community school district. The Township Trustees, since a statutory reversion, as provided in Section 297.15 of the 1958 Code of Iowa, is involved, are desirous of a condemnation proceeding to obtain title to both building and land. Chapter 360 of the 1958 Code of Iowa uses as words of acquisition, "purchase" and "by gift", whereas Section 359.28 indicates that the trustees are ". . . empowered to condemn, or purchase and pay for out of the general fund, or the specific fund voted for such purpose. . ." This section then makes reference to a community center". It would seem that Chapters 359 and 360 together would give the trustees power to condemn in this situation, and that "community Center" as used in Section 359.28, for purposes relative thereto, would also mean "public hall" as found in Chapter 360.

"Our question:

"Can Township Trustees, after the electors have adopted the proposition to levy a tax for the erection of a public hall, acquire by condemnation the site and building for the "public hall" as contemplated by Chapter 360 of the 1958 Code of Iowa?"

59-11-17

Code section 359.28 is the only statutory provision conferring power to eminent domain upon townships. It provides as follows:

> "Condemnation. The township trustees are hereby empowered to condemn, or purchase and pay for out of the general fund, or the specific fund voted for such purpose, and enter upon and take, any lands within the territorial limits of such township for the use of cemeteries, a community center or juvenile playgrounds, in the same manner as is now provided for cities and towns."

As is pointed out in the enclosed opinion, dated August 26, 1959, no power to condemn a site for a township hall is conferred anywhere in the Code.

However, as you point out, townships have power under the quoted section to condemn for a community center and, pursuant to vote of the people, to tax for a township hall.

I therefore agree with your conclusion that the powers may be exercised concurrently where, <u>in fact</u>, the building and grounds constructed and acquired pursuant to such exercise can be and are intended to be utilized as <u>both</u> township hall and community center incircumstances where neither function will detract from, interfere with nor increase the expense of the other.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
Encl. Ltr Opn 8-26-59,
Abels to Buchheit,
Fayette Co. Atty.

TOWNSHIPS: Funds, litigation -- where township is entirely absorbed into other townships, disposition of funds cannot be accomplished by courts. Duties of county attorney depend on population of county. (Strauss to Leir, Scott Co. Atty., 11/17/59) #59-11-18

November 17, 1959.

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

ATTENTION: Mr. Edward N. Wehr, Assistant County Attorney

Dear Sir:

Receipt is acknowledged of your letter of October 1st as follows:

> "Davenport Township in Scott County has for several years, through its Trustees, levied taxes for fire equipment pursuant to Section 359.43 of the Code of Iowa (1958).
>
> "A Substantial part of this Township has been annexed to the City of Davenport and there is so little left that a redistricting is contemplated. A portion of this Township will go into one township and the remaining portion will go into another township. There is better than $5,000.00 in the Fire Equipment Fund and a problem arises as to what will be the legal disposition of this fund. My question is: what is to be done with the Fire Equipment Fund when a Township is abolished and absorbed into two other existing Townships?
>
> "Another problem revolves around the Davenport Township Trustees. They are presently negotiating with the City of Davenport for fire protection and are also negotiating with other township trustees as well as volunteer fire departments for possible fire protection, at least until Davenport Township becomes a part of other Townships. Among the legal problems confronting the Township Trustees are the termination of a contract for the present fire protection received in that township. My additional question then, relates to whether the Township Trustees may employ and pay legal counsel for handling these matters or whether the sole services of the County Attorney are to be used."

I am of the opinion that the matter of collecting and disposing of taxes is wholly a legislative matter, and the

59-11-18

courts would have no authority to make a distribution thereof. See Code sections 359.26 and 359.27 for disposition of township funds undisposed of by reason of change in law.

The answer to your second question is somewhat easier. It depends upon the population of the county. The question has been discussed in great detail in opinions annotated under Code sections 359.18 and 359.19, I.C.A. In particular, see 1940 Report of the Attorney General, pages 327 and 426; 1932 Report, page 14 and 1942 Report, page 197. In general, it seems the county attorney is required to perform all of the legal services needed by township trustees in counties of less than twenty-five thousand population and all such services except where the trustees are made parties in litigation in counties of greater population.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS/B

INSURANCE: Credit unions -- group life policy -- The group life contracts entered into between CUNA Mutual and Iowa credit unions conform to the provisions of Code section 509.1(2f). (Atchs to Timmons, Ins. Comr., 11/19/59) # 59-11-20

November 19, 1959

The Honorable William E. Timmons
Commissioner of Insurance
L O C A L

Attn: J. Sidney Phillips, Actuary

Dear Commissioner:

I am in receipt of the file recently submitted by your office relative to Group Life Insurance Contracts entered into between the CUNA Mutual Insurance Society and various Iowa credit unions insuring the lives of the members of such credit unions in an amount equal to the deposit balance in the share account of each member but not to exceed $1000 per member. The question seems to be whether or not the said insurance is within the meaning of Code chapter 509, section 509.1(2f) of which provides as follows:

> "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 anyone of the following to be considered the policyholder:
> * * * * * * * * * * * * *
> "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."

Credit unions exist in Iowa by authority of Code chapter 533 and are defined in section 533.1 as follows:

> "A credit union is hereby defined as a co-operative, nonprofit association, incorporated within the provisions of this chapter for the purpose of creating a source of credit at a fair and reasonable rate of interest, of encouraging habits of thrift among its members and of providing the opportunity for people to use and control their savings for their mutual benefit."

59-11-20

Thus, credit unions have corporate entity. Determination whether or not such entity has all of the characteristics described in Code section 509.1 (2f) will furnish the answer to your question. Addressing ourselves to that determination, the first item to be determined is whether a credit union can properly be referred to as, "a common principal". Certainly credit unions have some relation to a group of persons, i.e., the members, but can it be properly called a "principal"? A "principal" has been defined as, "the person upon whom the primary obligation rests". 50 C. J. 13; Benson v. Alleman, 220 Iowa 731, 263 N. W. 305; 33 W. & P. 579. It has been held that a broker purchasing stock for a customer is in legal effect a "principal", Boehm v. Granger, 42 N. Y. S. 2d 246, 181 Misc. 680.

Since a credit union has a primary obligation to its members to safeguard their savings which, in effect, the purchase of the insurance in question aids; and in view of the analogy between purchasing stock in the New York case above-quoted and purchasing insurance in the instant matter, it appears to do no violence to the word "principal" to consider a credit union as "a common principal" of its members.

The next facet is whether the members constitute "a group of persons similarly engaged". The answer to this appears furnished by Code section 533.5 which provides in pertinent part:

> "Credit union organization shall be limited to groups having a common bond of occupation or association or to groups within a well-defined neighborhood, community or rural district."

Code section 533.1(7) further provides that:

> "In order to simplify the organization of credit unions, the superintendent of banking . . . shall cause to be prepared an approved form of articles of incorporation and a form of bylaws . . ."

Turning to a set of credit union bylaws, it is noted that they are contained in a standard printed booklet designed for use by all credit unions and containing blank lines at appropriate places for insertion of information necessary to adapt them to a specific credit union. Article V, section 1, of the aforesaid credit union bylaws provides:

> "Membership of this credit union shall consist of and be limited to _____"

In the particular set at hand, that of the State Employees Credit Union, the blank line has been filled as follows:

> ". . . employees of the State of Iowa (except those employed in educational, penal, hospital, and mental institutions and by the Iowa Highway Commission) and members of the immediate families of such persons."

In view of the membership provision of Code section 533.5 as illustrated by the quoted actual example of a set of credit union bylaws, I am of the opinion that credit union members are a "group of persons similarly engaged" within the meaning of Code section 509.1(2f).

The next facet of the problem is whether credit union members are a group of persons "between whom there exists a contractual relationship". Referring again to Code section 533.5, we find:

> "Credit union membership shall consist of the incorporators and such other persons as may be elected to membership and subscribe for at least one share, pay the installment thereon and the entrance fee."

Referring further to Article V of the standard bylaws, it appears that one who becomes a member of a credit union makes an application, pays a fee, and if elected to membership gains certain rights and privileges including the right to attend and vote at the annual meeting. I am, therefore, of the opinion that since the elements of mutuality, consideration, competent parties (qualification as members) and lawful subject matter are present in the act of becoming a member of a credit union, members of a credit union compose a group "between whom there exists a contractual relationship" for purposes of Code section 509.1(2f).

It is to be noted that in subsection 2f the comma <u>precedes</u> the phrase, "to insure the members of such group" thereby making it refer to "A policy issued to . . . a common principal . . .", rather than to the "contractual relationship" <u>between</u> the members of the group.

Since credit unions as constituted under the provisions of Code chapter 533 thus appear to fall within the meaning of Code section 509.1(2f), I am of the opinion that the policy in question qualifies as a lawful and properly issued policy of group insurance within the meaning of Code chapter 509.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

CITIES AND TOWNS:

Civil Service Commission -- Authority to abolish civil service commission is limited to cities having a population of less than 8000.

(Strauss to Naughton, St. Rep., 11/20/59)

#59-11-21

November 20, 1959

Honorable John M. Naughton

Box 263

Sergeant Bluff, Iowa

Dear Sir:

Reference is herein made to your request for opinion as to whether the civil service commission of Sioux City could be abolished under the authority of House File 56, 58th General Assembly.

In reply thereto, I would advise as follows:

Insofar as House File 56, 58th G.A., has pertinency to this question, Section 1 thereof, as it was introduced, provides the following:

> "Section 1. Section three hundred sixty-five point three (365.3), Code 1958, is hereby amended by adding thereto the following paragraph:
> 'Whenever the city council appoints a commission, it may, by ordinance, abolish it, and the commission shall stand abolished sixty (60) days from the date of the ordinance and the powers and duties of the commission shall revert to the city council.'"

Section 365.3, Code 1958, which the foregoing section was amending by addition thereto, provides the following:

> "365.3 Optional appointment of commission. In cities having a population of less than eight thousand, the city council may, by ordinance, adopt the provisions of this chapter in which case it shall either appoint such commission or provide, by ordinance, for the exercise of the powers and performance of the duties of the commission by the council. Where the city council exercises the powers of the commission the term 'commission' as used in this chapter shall mean the city council."

If the foregoing Section 1 of House File 56 had been adopted in the terms set out in the bill, Section 365.3, Code 1958, as thus amended would have provided the following:

> '365.3 Optional appointment of commission. In cities having a population of less than eight thousand, the city council may, by ordinance, adopt the provisions of this chapter in which case it shall either appoint such commission or provide, by ordinance, for the exercise of the powers and performance of the duties of the commission by the council. Where the city council exercises the powers of the commission the term "commission" as used in this chapter shall mean the city council. Whenever the city council appoints a commission, it may, by ordinance, abolish it, and the commission shall stand abolished sixty (60) days from the date of the ordinance and the powers and duties of the commission shall revert to the city council.

And as thus appearing, the answer to your question would have been in the negative; the power to abolish such commission was limited by its terms to cities having a population of less than 8000. However, the House of Representatives, in the consideration of House File #56, adopted the following amendment:

> "Amend section one (1), line eight (8), by striking the period and quotation marks and adding thereto the following: 'except whenever a city having a population of less than eight thousand (8,000) provides for the appointment of a civil service commission, it may by ordinance abolish such office, but said ordinance shall not take effect until it has been submitted to the voters at a regular municipal election and approved by a majority of the voters at such election. The ordinance shall be published once each week for two (2) consecutive weeks preceding the date of said election in a newspaper published in and having a general circulation in said city or town, In the event there is no newspaper published in such city, publication may be made in any newspaper having general circulation in the county."

(See Journal of the House, page 411.) and Section 1 of Chapter 273, Acts of the 58th General Assembly became the law and appears as follows:

"Section 1. Section three hundred sixty-five point three (365.3) Code 1958, is hereby amended by adding thereto the following paragraph:

'Whenever the city council appoints a commission, it may, by ordinance, abolish it, and the commission shall stand abolished sixty (60) days from the date of the ordinance and the powers and duties of the commission shall revert to the city council except whenever a city having a population of less than eight thousand (8000) provides for the appointment of a civil service commission, it may by ordinance abolish such office, but said ordinance shall not take effect until it has been submitted to the voters at a regular municipal election and approved by a majority of the voters at such election. The ordinance shall be published once each week for two (2) consecutive weeks preceding the date of said election in a newspaper published in and having a general circulation in said city or town. In the event there is no newspaper published in such city, publication may be made in any newspaper having general circulation in the county.'"

From the foregoing I am of the opinion that abolishment of the civil service commission is authorized only in cities having less than eight thousand population. This conclusion is fortified by the fact that appointment of a civil service commission in cities other than less than eight thousand population is the power of the mayor with the approval of the council, and not by the city council. See Section 365.1, Code 1958.

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS mmh4

SCHOOLS: Directors -- Vacancies on the entire school board would exist if none of the directors were properly qualified under section 277.28 or Chapter 78. Quo warranto is the proper procedure against a de facto board of directors. (Reference to King, Marshall Co. Atty., 11/20/59) #59-11-22

November 20, 1959

Mr. Charles King
Marshall County Attorney
Marshalltown, Iowa

Dear Mr. King:

This will acknowledge receipt of your letter of September 29 in which you state:

"At the school election held on the 2nd Monday in March, 1959, a Mr. Carl Bonzer was elected as a director of the school board, and he attended the organization meeting of the board held on the 3rd Monday of March, 1959, at which time the oath of office was administered to him by Mr. Earl E. Hall, who was the superintendent of schools of the Liscomb school district. Section 277.28 of the 1958 Code of Iowa, provides in part that the oath of office 'may be administered by any qualified member of the board, the secretary of the board, or the county superintendent of schools...'. And as to the time of taking the oath the statute provides that it shall be taken 'on or before the time set for the organization meeting of the board the 3rd Monday in March...' I am informed that for some years now it has been the custom in this particular school district to have the oath administered by the superintendent of schools of the district. For the purposes of this letter, let us assume that all five members of the board of directors of this district as presently constituted were administered the oath of office by the superintendent of schools of the school district. Mr. Bonzer and the other four members of the board of directors have been serving as such and conducting the business of the school district ever since they were elected and administered the oath, as above stated.

"Based upon the foregoing I should like to submit the following questions: (1) Are Mr. Bonzer and the other four members of the board of directors de jure

59-11-22

members of the board, de facto members, or neither? (2) If Mr. Benzer or the other four members of the board are not de jure members thereof, what steps, if any, should now be taken by the secretary of the school board or by the county superintendent of schools to correct the situation?"

In reply thereto, we advise as follows:

Section 277.29, Code 1958, provides in pertinent part as follows:

> "Failure * * * of the officer elected or appointed to qualify within the time prescribed by law; * * * shall constitute a vacancy."

In addition, Section 277.28, Code 1958, in pertinent part, provides:

> "* * * The oath may be administered by any qualified member of the board, the secretary of the board, or the county superintendent of schools, * * *"

The general provisions of Chapter 78, Code of Iowa 1958, also govern the administration of oaths of office. If the superintendent of schools of the Liscomb School District can fall within one of the provisions of Chapter 78, then the oath administered by him is proper. If, on the other hand, the superintendent of schools of the Liscomb School District cannot qualify as hereinabove set out, then all the members of the Liscomb Consolidated School District board are not properly qualified school directors of said board. However, because they were duly elected by the electors of the district, and a supposed qualification by one who may in fact be not qualified to administer the oath of office, does give color of office to those who have been acting as the school directors of the said district.

Therefore, in answer to your first question, the members of the board may not be properly qualified on the grounds of failure of the administration of the oath of office and if this is the case, the Liscomb Consolidated School District has a de facto school board.

In answer to your second question, the only way the actions of the said board can be questioned is by a quo warranto action. There is no indication in your letter that such a proceeding has been commenced against the said board. A declaratory judgment action could be brought to establish the right of the now-acting board; however, such an action is generally quite

time consuming. Unless there is some matter of immediate urgency, I would suggest that, at the next regular school election, the board be elected or re-elected and properly qualified.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Joe Davis &
Paul Johnston,
Dept of Pub Instr

SCHOOLS: Reimbursement -- Under section 284.1, school districts are not eligible to receive reimbursement from a municipal corporation, if the municipal corporation annexes an area within said school district. (Rehmann to Miller, St. Sen., 11/23/59)
59-11-23

November 23, 1959

Honorable Jack Miller
State Senator, 32d District
738 Badgerow Building
Sioux City, Iowa

Dear Senator Miller:

Receipt is acknowledged of your letter dated October 7, in which you state:

> "I have been requested by some of my constituents to obtain a ruling with respect to an interpretation of Section 284.1 of the Code. Inasmuch as I am not involved in matters covered by this section in my regular practice, I realize it is possible that previous court decisions or rulings may already cover the problem, and if they do I would appreciate it very much if these could be given to me.
>
> "The problem specifically is this: Under the said section, the City of Sioux City is required to pay to the Sergeant Bluff school district certain monies as a result of the removal of certain land from taxation in the Sergeant Bluff school district - to wit, the airport and grounds now leased to the federal government. In the event the city annexes certain land in the Sergeant Bluff School District, it would then appear that the city is not 'located wholly outside said school district' and thus the section would no longer apply. If this conclusion is proper, then, my constituents wish to know it; and, moreover, if such is the case, then the question is to what extent, if any, will the city be called on to continue to pay monies into the Sergeant Bluff School District?"

In order to answer the question propounded in your letter, it will be necessary to look to the historical background of Section 284.1 as it appears in the 1958 Code of Iowa.

Prior to the 43d General Assembly, rural schools, in school districts wherein the state was the owner of agricultural lands and the said districts solely located outside of cities and towns, were having difficulties in maintaining these rural schools due to the economic conditions that existed at that time. In 1929, to alleviate the problem, the General Assembly passed a bill appearing in Chapter 115, Acts of the 43d General Assembly.

The said act appears in the 1931 Code of Iowa in Section 4283-c9, and provides:

> "Whenever the State of Iowa is owner of agricultural lands in school districts not located within the limits of any city or town, and in said district there are established and being conducted rural schools, the State of Iowa shall contribute to the support of said rural school in said district."

In addition to the above-mentioned bill, legislature passed another bill in 1929 which enabled the cities and towns to acquire property outside its corporate limits for airports, which was considered a great safety factor for municipalities.

By 1933, a number of cities and towns in this state had acquired substantial tracts of land outside their corporate limits for the purpose of maintaining airports. This again placed upon these small rural school districts which maintained a school an economic burden, due to the loss of tax revenue from the lands acquired for airports, which the legislature tried to remedy. Thus the 45th General Assembly repealed the old law and enacted an entire new section which appears in the 1958 Code of Iowa as Section 284.1, which provides:

> "Reimbursement--by whom computed. When unplatted lands within the boundaries of a school district are owned by the government of the United States, by the state, by a county, or by a municipal corporation located wholly outside said school district, and such lands have been removed from taxation for school purposes, said school district shall be reimbursed, as hereinafter provided, in an amount which shall be computed by the county board of supervisors in the county in which such lands are located, which computation shall be made on or before the first day of September in the year in which said deductions are to be made."

When the bill was enacted into law, most cities and towns maintained an urban independent school district which for the most part was confined primarily to the corporate limits of the municipalities. The purpose behind the qualification is not clear as to whether it was to prevent reimbursement to these urban independent districts when the airport lies within the corporate limits or to prevent an expansion by annexation of a municipality toward the airport.

Therefore, in answer to your first question, if in fact part of Sergeant Bluff school district is incorporated into Sioux City, then the school district does not come within the qualification as set out in Section 284.1. In answer to your second question, failure of Sergeant Bluff to fall within Section 284.1 prevents the county board of supervisors from issuing the necessary certification of amount. This lack of certification relieves the city from any obligation to the Sergeant Bluff school district by reason of the existence of the airport in question.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Joe Davis &
Paul Johnston,
Dept of Pub Instr

SCHOOLS: School busses -- Under section 321.343, school busses are required to stop at railroad tracks in a business or residential district. (Riesmann to Winkel, Kossuth Co. Atty., 11/5/59) # 59-11-24

November 5, 1959

Mr. Gordon L. Winkel
Kossuth County Attorney
Box 405
Algona, Iowa

Dear Mr. Winkel:

This will acknowledge receipt of your letter of October 1, in which you ask the following:

> "The last part of this section provides that 'This section shall not apply at street railway grade crossings within a business or residence district.' The language 'street railway grade crossings' appears to be subject to different interpretations and if we are to uniformally enforce this section, we feel that a clarification is in order.
>
> "Stated more simply, does the above mentioned portion of Section 321.343 eliminate the requirement of those vehicles stopping at railroad intersections or crossings within a business or residentual district? Are the words 'street railway grade crossings' interpreted as railroad tracts or does it apply only to the street railway systems which are non-existant in our small towns and which are becoming more extinct each day."

In reply thereto, we advise as follows:

Section 321.343, Code 1958, provides in pertinent part:

> "The driver of any motor vehicle carrying passengers for hire, or of any school bus carrying any school child, . . . before crossing at grade any track or tracks of a railroad, shall stop such vehicle within fifty feet but not less than ten feet from the nearest rail of such railroad. . .This section shall not apply at street railway grade crossings within a business or residence district."

59-11-24

The terms"street railway" and "street railroad" have been defined to differentiate them from the term "railroad". In the Iowa case of Lewis v. Omaha & Council Bluffs Suburban Railway Co., 1912, 158 Iowa 137, 138 N.W. 1092, the Supreme Court said, at page 142, "Properly speaking, street railways . . . are only such as are authorized to occupy and use the streets of a city or town under franchise from the municipality."

The distinction is clearly drawn in the Iowa case of McLeod v. Chicago & Northwestern Railway Co., 1904, 125 Iowa 270, 101 N.W. 77, where at page 277 the Supreme Court explained, ". . . in ordinary parlance the word 'railway' or 'railroad', when not qualified by the word 'street', or other expression of similar import, has special reference to what are sometimes denominated 'commercial railroads'. By this is meant those larger, more expensive, and more permanent lines or systems extending from town to town and city to city, accommodating a heavier and more miscellaneous traffic, and requiring larger forces of employees, who are exposed to greater risks than is the case with street car lines and systems."

Based on the above decisions, the term "street railway grade crossings" is not synonymous with "track or tracks of a railroad". In answer to your question, school busses are required to stop, in the manner provided in section 321.343, at railroad tracks in a business or residential district.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:JEH:bl

AGRICULTURE. Marketing Division - Expenditures Under Marketing Division - Final Authority.

Chapter 139, Acts 58th General Assembly provides that expenditures are approved by the Secretary of Agriculture.

(Maggert to Spry, Agr. Secy. undated) 59-11-25

Honorable Clyde Spry
Secretary of Agriculture
State House
L O C A L

Attention: Loyd VanPatten

Dear Mr. VanPatten:

Reference is made to your letter dated November 3, 1959, in which the following was requested:

> "In whom is the final authority vested for the payment of expenditures incurred under the Agriculture Marketing Division, Chapter 139, Acts of the 58th General Assembly?"

The above request involves Section 4, Chapter 139, Acts of the 58th General Assembly, which states:

> "All fees collected as a result of the inspection and grading provisions set out herein shall be paid into the State treasury, there to be set aside in a separate fund which is hereby appropriated for the use of the division except as indicated. Withdrawals therefrom shall be by warrant of the State comptroller upon requisition by the director approved by the Secretary of Agriculture." (Emphasis supplied)

Section 4, supra, specially states that withdrawals are approved by the Secretary of Agriculture. The final authority for payment of expenditures then rests with the Secretary of Agriculture.

Yours very truly,

JAMES R. MAGGERT
ASSISTANT ATTORNEY GENERAL

JRM/b

59-11-25

CITIES AND TOWNS:

Mayor - Vacancy -- The death, prior to qualifying, of a person elected in November 1959, to the office of mayor to fill a term beginning January 2, 1960, creates a vacancy at the time of his death, and the vacancy is properly filled by the new council taking office January 2, 1960.

(Strauss to Larson, Atty., 11/24/59) November 24, 1959

#59-11-26

Mr. S. G. Larson
Attorney at Law
111 South Main
Paullina, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 20th inst. in which you submit the following:

"At the regular municipal election in November, M M. Woods was elected Mayor of the Town of Paullina, Iowa, his term to commence January 2, 1960. His election was to fill the office of mayor which is presently held by Gus Marten, present incumbent who will hold office until January 2, 1960.

"The officer eldct M. M Woods died November 14, 1959.

"Under the new amendment to Section 69.2 of the Code, which now includes the death of an officer elect before qualifying, there would be a vacancy in the office.

"Is the vacancy created immediately upon the death of the officer elect?

"Section 69.2 provides that every civil office shall be vacant upon the happening of either of the following events:

'4. The ..... death ..... of the officer elect before qualifying.'

"If the vacancy is created immediately upon his death, it is the duty of the present council to fill the vacancy.

"If the vacancy occurs January 2, 1960 when the officer elect would have taken office, then I assume the vacancy will be filled by the new council which goes into office January 2, 1960.

"I would appreciate any authorities and any suggestions you have on this matter."

59-11-26

In reply thereto, I would advise as follows:

It seems to me that the case of State vs. Best 225 Iowa 338, 280 N.W. 551, referred to by you controls the foregoing situation. There the candidate elect for supervisor died before qualifying on January 2d of the year marking the beginning of his term. On January 3d the Clerk, Auditor, and Recorder filled the vacancy. The Court said, with respect to this procedure, the following:

> "This was certainly intended to cover just such a situation as we find here. There was no vacancy in the term Mr. Best was serving, but, by this statutory provision, a vacancy in the term for which Jones was elected was created by the death of Jones 'the officer elect' before qualifying. Section 1145 relating to hold-over contains the qualifying clause: 'Except when otherwise provided.' And since the legislature has 'otherwise provided' for the situation arising because of the death of the officer elect and the proper officers, in compliance with section 1152, par. 5, of the 1935 Code, have fulfilled their duty by filling the vacancy in due time and since the new appointee, Mr. Bradfield, had qualified by filing his bond and oath, which was approved, and was ready to enter upon the duties of his office, Mr. Best had no legal right to hold the office as an incumbent holding over."

It would appear, therefore, that Woods' death created a vacancy at that time, but the vacancy was not filled until the beginning of the term in which the vacancy appeared.

On the authority of the case cited, I am of the opinion that the new council which goes into office January 2, 1960, will fill this vacancy.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

CORPORATIONS: Foreign - bidders - -
Qualifications of a foreign corporation is not a prerequisite to bidding upon public work, but contract results from acceptance of the bid and thereafter section 120 of Chapter 321, Acts of the 58th G.A. is applicable.
(Strawes to Maggert, Capitol Supt., 11/5/59)
#59-11-27

November 5, 1959.

Mr. Robert E. Maggert,
Superintendent,
Buildings & Grounds,
B U I L D I N G.

Dear Sir:

This will acknowledge receipt of yours of the 3rd inst. with the attached letter dated October 22nd, 1959 which stated the following:

> "We are a Missouri corporation in good standing and wish to determine whether there are any requirements (other than registration to do business with the Secretary of State) with which we must comply in order to bid on and perform electrical construction work in your state.
>
> "It is our understanding that registration to do business in your state is not a precondition to our bidding upon work to be performed in your state so long as we secure such registration prior to undertaking performance of any contract we may secure by reason of such bidding.
>
> "Please advise with respect to these matters at your earliest convenience."

In reply thereto, I would advise that insofar as a foreign profit corporation not presently having a permit to do business in Iowa is concerned, there is no statute barring such corporation from bidding upon public work in Iowa. However, if the bid of such is accepted, a contract results (See Pennington vs. town of Sumner 222-1005 270 N.W.629) and thereafter the bidder corporation would be controlled by Section 120 of Chapter 321, Acts of the

59-11-27

58 G.A. providing as follows:

"Transacting business without certificate of authority. No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state, until such corporation shall have obtained a certificate of authority, nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state, until a certificate of authority shall have been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets; provided however that no foreign corporation transacting business in this state shall maintain any action, suit or proceeding in this state upon any contract made by it in this state prior to the effective date of this Act unless prior to the making of such contract it shall have procured a permit to transact business in this state as required by the laws in force at the time of making such contract, which prohibition shall also apply to any assignee of such foreign corporation and to any person claiming under such assignee of such foreign corporation or under either of them.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.

A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by this Act upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this Act and thereafter filed all reports required by this Act, plus all penalties imposed by this Act for failure to pay such fees. The attorney general shall bring proceedings to recover all amounts due this state under the provisions of this section. If any foreign corporation shall transact business in this state without a certificate of authority, it shall by transacting such business be deemed thereby to have appointed the secretary of state its attorney for service of process."

Registration is required, in any event, prior to undertaking performance of the contract.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS/B

TAXATION: Assessments--Levee and Drainage Districts. Interest on assessment for benefits commences on the date of levy, except where payment is made pursuant to sections 455.63 and 455.64, Code of Iowa (1958). (Brunkman to McDonald, Dallas Co. Atty.: 11/12/59) # 59-12-1

November 12, 1959

John C. McDonald
Dallas County Attorney
Dallas Center
Iowa

Dear Mr. McDonald:

This will acknowledge your letter of September 29, 1959, in which you request the opinion of this department relative to the following problem:

"Chapter 455.62 of the 1958 Code of Iowa provides as follows:

'455.62 ASSESSMENTS--MATURITY AND COLLECTION. All drainage or levee tax assessments shall become due and payable at the same time as other taxes, and shall be collected in the same manner with the same penalties for delinquency and the same manner of enforcing collection by tax sales.'

"Chapter 455.63 provides as follows:

'455.63 PAYMENT BEFORE BONDS OR CERTIFICATES ISSUED. All assessments for benefits, as corrected and approved by the board, shall be levied at one time against the property benefited, and when levied and certified by the board, shall be payable at the office of the county treasurer. Each person or corporation shall have the right, within twenty days after the levy of assessments, to pay his or its assessment in full without interest, and before any improvement certificate or drainage bond is issued therefor, and any certificate at any time after issue, with accrued interest.'

"The County Auditor of Dallas County has requested an opinion as to whether interest on assessments for benefits commences twenty days after the same are levied and certified by the Board or whether the interest commences on the April 1st following the date of levy and certification by the Board."

59-12-1

In resolving this question, it is necessary to consider Sections 455.57 and 455.64, Code of Iowa (1958), along with those set out above. These statutes are set out as follows:

> "455.57 Levy--interest. When the board has finally determined the matter of assessments of benefits and apportionment, it shall levy such assessments as fixed by it upon the lands within such district, and all assessments shall be levied at that time as a tax and shall bear interest at four percent per annum from that date, payable annually, except as hereinafter provided as to cash payments thereof within a specified time."

> "455.64 Installment payments--waiver. If the owner of any premises against which a levy exceeding twenty dollars has been made and certified shall, within thirty days from the date of such levy, agree in writing indorsed upon any improvement certificate referred to in section 455.77, or in a separate agreement, that in consideration of having a right to pay his assessment in installments, he will not make any objection as to the legality of his assessment for benefit, or the levy of the taxes against his property, then such owner shall have the following options:
>
> "1. To pay one-third of the amount of such assessment at the time of filing such agreement; one-third within twenty days after the engineer in charge shall certify to the auditor that the improvement is one-half completed; and the remaining one-third within twenty days after the improvement has been completed and accepted by the board. All such installments shall be without interest if paid at said times, otherwise said assessments shall bear interest from the date of the levy at the rate of four percent per annum, payable annually, and be collected as other taxes on real estate, with like penalty for delinquency."

It is believed that Section 455.57, supra, clearly spells out the intent of the legislature by providing that with the exception of certain stated instances, interest shall run at the rate of four percent (4%) per annum from the date of levy. The exceptions are found in Sections 455.63 and 455.64, supra, which provide that if payment is made within the stated time period no interest is imposed. If, however, payment is made after the expiration of the specified period, interest is to be computed from the date of levy, Rystad vs. Grainage District, 170 Iowa 178, 152 N.W. 364.

The intent of the legislature in this connection is made particularly clear in Section 455.64, in the following terms:

> " * * * All such installments shall be without interest if paid at said times, otherwise said assessments shall bear interest from the date of levy at the rate of four percent per annum, * * *."

It is, therefore, the opinion of this office that except where payment is made within the periods specified in Section 455.63 and 455.64, supra, interest on assessments for benefits commences on the date of levy.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/WWR/bjf

COURTS: District -- fees collected by Clerk -- 1. The intent of Ch. 358, 58th G. A. was to clarify the authority of the Clerk of Court to collect a fee for certifying a change in the title of real estate. 2. Practical necessity manifested through administrative practice of long standing justifies collection by the Clerk for the Auditor of the fee prescribed in Code section 333.15 (Ltr to Hudson, Pocahontas Co. Atty. 11/23/59)

November 23, 1959 # 59-12-2

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Mr. Hudson:

Receipt is acknowledged of your letter of November 18 as follows:

> "I would like an opinion from your office relative to the following situation.
>
> "Chapter 358 of the Laws of the 58th General Assembly provides that the Clerk of District Court may now charge a fee of $1.00 for certifying a change in title of real estate. Since this new law is by way of addition to Section 606.15 of the 1958 Code of Iowa rather than by change of any existing provisions in said section, am I correct in assuming even though the Clerk of District Court had always charged a fee for such certificate of change of title presumedly under the authority of Section 606.15 subsection 13 that actually such charge did not authorize prior to this new law?
>
> "I would also like to know the opinion from your office as to what authority the Clerk of District Court has a charge as court costs in a sufficient amount to cover the fee which the Clerk is required to pay to the Auditor under Section 333.15 for transfer of title by the Clerk to the Auditor. It is my understanding that in practice the Clerks of District Court have always charged as court costs in addition to the other costs a sufficient amount so as to have funds out of which to pay to the Auditor the amount required under Section 333.15 for transfer of title from the Clerk to the Auditor. Please advise me if this practice is proper to continue."

In answer to your first question, you are advised that an amendment to a statute may be for the purpose of making it clearly state that which it was always supposed to say -- Des Moines Ind. Comm. Dist. v. Armstrong et al, 95 N. W. 2d 515, 521; Hansen v. Iowa Employment Security Comm., 239 Iowa 1139, 1141-1142, 34 N. W. 2d, 203, 205. I am advised that some question existed as to the authority for charging the fee under the original wording of the statute and that the purpose of the amendment was to clearly authorize it rather than to double it.

In answer to the second question, I am advised that the making of the collection in question by the Clerk for the Auditor in the circumstances described is an administrative practice of long standing in all counties. It is recognized as such in the Schedule of Clerks Fees and Items Taxable As Costs By Clerks of the District Court of Iowa as prepared and distributed by the office of the Supreme Court Statistician. In this connection see cases annotated under I.C.A. section 4.1, note 55.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

TOWNSHIPS: Fire Districts -- 1. Under Code section 357A.2, part of a township may be organized as a fire district (but not under Code section 359.42). 2. Under Code section 357A.13, part of a township may continue a levy under Code section 359.43 authorized prior to inclusion of the remainder of the township in a 357A township. 3. The patrons to whom service may be extended under Chapter 359 are enumerated in Code section 359.42. (Atch to Carlsen, Clinton Co. Atty; 11/24/59) # 59-12-3

November 24, 1959

Mr. John W. Carlsen
Clinton County Attorney
Court House
Clinton, Iowa

Attn: Lloyd G. Jackson, Assistant

Dear Mr. Carlsen:

Receipt is acknowledged of your letter of November 17 as follows:

> "In order to clarify a request made to this office, we submit the following questions for an opinion from your office."
>
> 1. "Suppose a fire district is organized under Chapter 357A of the Iowa code consisting of Township 'A' and a portion of Township 'B'. Prior to this organization neither township has qualified as a fire district under Section 359.42 et seq. After the organization under Chapter 357A, the remaining portion of township 'B' desires to vote to be taxed for fire protection. Must this remaining portion of township 'B' proceed under Chapter 357A? Can they, as only a portion of a township, use Chapter 359?"
>
> 2. "In the same situation, suppose township 'B' has already qualified as a fire district under Chapter 359. Then township 'A' which has not previously qualified and a small portion of township 'B' decide to become a benefited fire district under Chapter 357A. What then is the status of taxation in this portion of township 'B'?"
>
> 3. "Section 357A.13 states: 'When the boundary lines of such benefited fire district shall include an entire township, the township trustees shall no longer levy the tax provided by section 359.43 . . . .' No provision is made for the situation in which a portion of a township is included in a benefited district."

59-12-3

4. "Also in a similar situation, if township 'A' elects to be taxed under Chapter 359, is there any way that the small portion of township 'B', desiring to be serviced by the fire equipment in township 'A', can do so. The balance of township 'B' does not at the present time desire to be taxed for fire protection. In other words, is it permissible for the small portion of township 'B' to purchase fire protection from the equipment in Township 'A' on a personal subscription basis after township 'A' has elected to be taxed for this fire protection?

"The townships involved in this situation are rather anxious to proceed to organize for fire protection and your prompt answer would be appreciated."

1. In answer to your first question, it is clear that fire districts need not be composed of entire townships, but may include only a portion or portions of a township. Section 357A.2 provides:

"The benefited fire district may include all or portions of one township and any adjoining townships or portions thereof."

It thus appears possible as a matter of law for a portion of a township to be organized as a benefited fire district under Chapter 357A as, for example, the remaining portion of township "B" described in your first question. Such type of organization would, however, be subject to engineering survey and approval of the board of supervisors as provided in section 357A and a question might exist as to whether a fire district with a tax base of less than a township could finance an adequate fire-fighting establishment. In answer to the second part of your first question, prior opinions of this office indicate that Chapter 359 can be used only for the imposition of a township-wide tax. Therefore, as an <u>original</u> proceeding, Chapter 359 appears to have no utility for part of a township. However, Chapter 359 fire protection already in force at the time of creation of a Chapter 357A district may <u>continue</u> in the remaining portion as hereinbelow indicated.

2. In answer to your second question, Code section 357A.13 provides as follows:

"Township tax discontinued. When the boundary lines of such benefited fire district shall include an

entire township, the township trustees shall no longer levy the tax provided by section 359.43; and any indebtedness incurred for the purposes of sections 359.42 to 359.45, inclusive, shall be assumed by the benefited fire district and all the assets of said township which relate to the fire-fighting operation shall be transferred to the benefited fire district. Any property in the township purchased for dual purposes shall be held jointly."

Since the foregoing statute provides for discontinuance of the Chapter 359 levy only in the event "such benefited district shall include an entire township" it follows that the Chapter 359 levy and fire protection provided thereunder would continue where the Chapter 357A fire district did not include the entire township, as in the remaining portion of township "B" to which your letter refers.

3. Your third question is covered by the answers to 1 and 2.

4. In your fourth question, I assume that the portion of township "B" other than the part with which your question concerns itself would have become part of a Chapter 357A fire district and that the remaining portion has never had fire protection under either Chapter 357A or Chapter 359. If this be the case, then the individual residents are free to purchase their fire protection wherever they can find it. The real question is whether a township (township "A") having elected to provide fire protection under Chapter 359, can sell such protection to individual subscribers outside the township. The scope of protection which may be afforded under Chapter 359 is limited by section 359.42, which provides as follows:

"Authorization. The township trustees of any township may purchase, own, rent, or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires in said township, independently or jointly with any adjoining township or townships, likewise authorized as herein provided, or with any city or town."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

SCHOOLS: Special Education -- school boards cannot legally pay tuition for tutoring of children requiring special education unless such classes are established under the provisions of Chapter 281. (Rehmann to Gray, Calhoun Co. Atty., 11/25/59)

November 25, 1959 # 59-12-4

Mr. Jack R. Gray
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Gray:

This will acknowledge our conversation of October 19 and also your letter of October 15, in which you say:

> "In our county, we have mentally retarded children for whom no type of formal school is provided by the county board of education. For some time the county association for retarded children have carried on an annual fund drive for the purpose of defraying the cost of sending some of these children to a certain Ruth Carlson of Rockwell City, Iowa. She holds classes for these children, varying from 3 to 15 hours a week with the parents paying the balance of the cost. This year the association anticipated the class being set up in the county by the county board of education and are therefore out of money. The whole burden of the school costs rests upon the parents and in some cases amounts to over $500.00 a year. One of these parents went to one of the local school boards and asked the county to help pay for this cost amounting to the same as tuition and this superintendent asked me to inquire as to the legality of such a request. As was expected, other parents followed suit and made requests of their respective boards. One school board agreed to pay tuition and transportation and another indicated that they would also. Three other school boards withheld their decision until they have obtained ruling as to their authority and responsibility.
>
> "For your information, the teacher, Ruth Carlson, instructs these children in her own home and not in the parent's home. She has approximately nine such children and the questions arises as to whether or

not she is a home tutor. It is my understanding that Miss Carlson has a registered substitute certificate. Her other requirements are unknown except that they do not reach the qualifications for teaching retarded children.

"In determining whether or not the local school board is responsible for providing tuition and transportation for these children is it important whether or not the teacher meets the standards as prescribed by the division of special education and can a school district legally provide funds for such tutoring?"

The board of directors of any school district is a creature of statute created for the primary purpose of carrying out a governmental function of public education. Independent Sch. Dist. v. State Appeal Board, 230 Iowa 924, 299 N. W. 440. The legislature empowered the board of directors of a school district to provide adequate school facilities and faculties to carry out this governmental function.

In addition, the legislature makes a compulsory requirement to attend school if a child is a certain age. Section 299.1, Code 1958. Thus, the legislature gave broad powers to the board of directors of a school district, to provide adequate facilities or to make arrangements with other districts for such facilities. The board of directors of a school district needs only to provide educational facilities for those children who are average and normal.

Section 282.3, Code 1958, in pertinent part, says:

"Admission and exclusion of pupils. 1. The board may exclude * * * any child who in its judgment is so abnormal that his attendance at school will be of no substantial benefit to him, * * *"

Therefore, the funds which the school board may expend are primarily for the general education of average, normal children.

However, the legislature realized there was a need for a special type of education for those children who would require the special education. Because of the complexity of the problem and the greater expense involved, special education requirements have been established. The school districts do not have any statutory authority to establish special class or tutoring except as provided in Chapter 281, Code 1958. Funds of a school district can only be expended

for the education or tutoring of children requiring special education after full compliance with Chapter 281, Code 1958. However, the directors of a school district are under no mandatory duty to establish special education schools or classes.

Thus, in answer to your question, a school board is not responsible for providing tuition and transportation for children requiring special education unless such classes have been established in accordance with Chapter 281, Code 1958. Under section 281.4, Code 1958, teachers are to be qualified to instruct these special education classes. All the requirements of Chapter 281, Code 1958, must be met before a school district can legally provide funds for such tutoring.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

MOTOR VEHICLES: Examinations of applicants ~~for operator's or chauffeur's~~ licenses.

A duly appointed and authorized examiner of the Iowa Highway Safety Patrol does no violence to the provisions of 321.220, when examining applicants for operator's or chauffeur's licenses. Peschta Cady, Franklin Co. Atty., 12/1/59)

#59-12-5

December 1, 1959

Mr. G. A. Cady
County Attorney for Franklin County
Hampton, Iowa

Dear Sir:

Reference is made to your letter under date of November 25, 1959, the same reading as follows:

> "I am hereby requesting an opinion from your office concerning the following factual situation, which was posed to me by a member of the Iowa Highway Patrol, Driver's Examiner Division.
>
> "This patrolman would like to know whether or not he must, or whether he legally can give a driving test to a person who appears before him and requests the same, after he has successfully passed the written portion of the examination, when the party does not have an instruction permit; the officer is interested in knowing whether or not he is violating Section 321.220 of the 1958 Code of Iowa, if he permits this person to drive a vehicle.
>
> "Your early opinion in this matter would be appreciated."

In reply thereto:

Section 321.186, Code of Iowa, 1958, reads as follows:

> "The department may examine every new applicant for an operator's or chauffeur's license or any person holding a valid operator's or chauffeur's license when the department has reason to believe that such person may be physically or mentally incompetent to operate a motor vehicle, or whose driving record

59-12-5

appears to the department to justify such an examination. Such examinations shall be held in every county within periods not to exceed fifteen days. It shall include a test of the applicant's eyesight, his ability to read and understand highway signs regulating, warning, and directing traffic, his knowledge of the traffic laws of this state, and shall include an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle and such further physical and mental examinations as the department finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways."

Section 321.187, Code of Iowa, 1958, provides that:

"The department is hereby authorized to appoint persons from the highway patrol or may designate the county sheriff for the purpose of examining applicants for operators' and chauffeurs' licenses. It shall be the duty of any such person so appointed to conduct examinations of applicants for operators' and chauffeurs' licenses under the provisions of this chapter to make a written report of findings and recommendations upon such examination to the department. Examiners appointed by the department shall have the authority of peace officers for the purpose of enforcing the laws relating to motor vehicles and the operation thereof, and when on duty shall wear a uniform and proper identifying badge or badges as prescribed by the commissioner which shall be purchased by the department and paid for from the department maintenance fund."

In view of the foregoing, you are advised that a duly appointed and authorized examiner of the Iowa Highway Safety Patrol does no violence to the provisions of Section 321.220, Code of Iowa, 1958, when such examiner is examining applicants for operator's or chauffeur's licenses.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

COUNTIES:

Zoning -- County zoning commissioners appointed by the board of supervisors are not entitled to compensation or expenses. (Strauss to Hultman, Blackhawk Co. Atty., 12/1/59) #59-12-6

December 1, 1959

Mr. Evan L. Hultman
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Dear Evan:

This will acknowledge receipt of yours of the 23d ult. in which you submitted the following:

> "Section 358A.8 of the 1958 Code of Iowa states in part: 'In order to avail itself of the powers conferred by this chapter, the board of supervisors shall appoint a commission, to be known as the county zoning commission.'
>
> "At no place in the statute is any reference made authorizing compensation or mileage to the members serving as zoning commissioners.
>
> "The Black Hawk County Board of Supervisors has requested that I secure an opinion to the fdlowing question:
>
> Can Zoning Commissioners be paid compensation or mileage for services rendered as members of the county zoning commission?
>
> "Thanking you in advance for your assistance in this matter, I remain"

In reply to the foregoing I would advise:

The rule of compensation for public officers is stated generally in the case of Twinam v. Lucas County, 104 Iowa 231, 73 N.W. 473, to the effect that the uniform rule is that in the absence of some statute clearly authorizing it, a public officer is not entitled to compensation. See other cases holding the same rule under the title:

59-12-6

OFFICERS, in Callaghan's Iowa Digest. The same rule applies to the allowance of expenses, including mileage. See Chapter 79, Code 1958. See Opinion of the Attorney General appearing in the 1934 Report, page 305. And see Sections 341 and 369, Volume 43, American Jurisprudence, under the title: PUBLIC OFFICERS.

There may be some question whether such commissioners are "public officers," but whether they be or not, the foregoing rules would seem to apply. If not public officers, it would appear they would have no higher right to compensation and expenses than public officers.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

SAVINGS + LOAN ASSOCIATIONS: Dividends --
Dividends of building and loan associations shall be declared and apportioned annually, semiannually, or quarterly. Dividends declared on May 31 and November 30 are neither annual, semiannual, nor quarterly. (Strauss to Akers, St. Aud., 12/1/59)
#59-12-7

December 1, 1959

Mr. C. B. Akers
Auditor of State
B U I L D I N G

Attention: Mr. George D. Carson

My dear Mr. Carson:

This will acknowledge receipt of letter addressed to us by Barnes, Wadsworth, Elderkin, Locher & Pirnie, per James E. Bromwell, in which they submitted to me the following:

"Re: Sections 42 and 43, Chapter 338
Acts of the 58th General Assembly

"Our client, The Cedar Rapids Building and Loan Association contemplates the filing of amended and substituted Articles of Incorporation by reason of the enactment of Chapter 338 of the Acts of the 58th General Assembly. It has been the practice of the Cedar Rapids Building and Loan Association to pay dividends semiannually on the 31st day of May and the 30th day of November of each year. We have received, by courtesy of the Auditor of State, certain Model Articles of Incorporation for Iowa Savings and Loan Associations. We have likewise received, separately prepared, certain sections of the Modal Act which have been approved by the Federal Savings & Loan Insurance Corporation with the advice that these certain sections recommended and approved by them remain unchanged in the articles ultimately filed. We have, of course, particular concern about Section 18 of the Model Act. Specifically that portion which states:

'such dividends to be declared and apportioned by the Board of Directors out of net profits as of June 30 and December 31 each year after making provision, etc.'

"We are unclear as to the mandate contained in Sections 42 and 43 of the Act. Section 42 creating authority in the Board of Directors for the declaration of dividends does not fix dates for such declaration. Section 43, however, commences,

> 'As of June 30 and December 31 of each year, before declaring any dividends, the Board of Directors shall transfer and credit to a general reserve account, etc.'
>
> "If Section 43 establishes dates for the declaration of dividends, our Articles must, of course, conform. However, these dates are not a requirement of law, and if the Federal Savings & Loan Insurance Corporation does not have requirements otherwise based (concerning which we recognize you cannot advise) the association might well prefer to retain its present policy of declaring dividends on May 31st and November 30th both for accounting and public relations reasons.
>
> "We have written you thus directly following a conversation with the secretary to Mr. George C. Carson of the State Auditor's office, Mr. Carson being absent from his office by reason of illness. We would appreciate your advice on this subject."

Whether the dates of June 30 and December 31 of each year for the declaration of dividends as contained in the Model Act are authorized, it seems clear to me that fixing the declaration of dividends on May 31 and November 30 of each year is contrary to the provisions of Section 42 of Chapter 338, Acts of the 58th General Assembly. Such section provides the following:

> "SEC. 42. Dividends. After making such provision as it deems advisable for absorbing immediate and possible future losses, the board of directors of such association shall annually, semiannually, or quarterly declare and apportion as a dividend to members, according to its articles of incorporation, such portion of the association's net profits as it may deem available and as may be otherwise authorized under this chapter. Members shall participate in dividends in proportion to their respective investments therein. Dividends for a particular month shall be paid only on sums invested by a member prior to the tenth day of that month."

The provision there is that the dividends shall be declared and apportioned "annually, semiannually, or quarterly."

Declaration of such dividends on May 31 and November 30 is neither an annual, semiannual, nor quarterly declaration.

Copy of this letter is going forward to BARNES, WADSWORTH, ELDERKIN, LOCHER & PIRNIE, Attorneys and Counselors at Law, Higley Building, Cedar Rapids, Iowa, attention: Mr. James E. Bromwell.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

INSURANCE: Securities Division -- Installment sales -- where a certificate is paid for by installments due each time a hog is delivered rather than at regular calendar intervals, the irregularity of the installment periods does not take the certificate out of the definition of "stock" in Code section 501.1. (Atcls to Walters, Ins. Dept., 12/2/59)

December 2, 1959 #59-12-8

Mr. Robert L. Walters
Superintendent of Securities
Insurance Department of Iowa
L O C A L

Dear Mr. Walters:

Receipt is acknowledged of your letter of November 20 as follows:

> "In accordance with our telephone conversation of this morning, I have attempted to set forth below the salient features of the Retain Capital Certificates which Farmbest, Inc. proposes to issue in Iowa. I believe the enclosed registration statement filed with the Securities and Exchange Commission in connection with this issue will give you a fairly comprehensive picture of the corporation and the nature of its securities.
>
> "In summary, this registration application seems to present a proposition wherein hog producing members of the cooperative would pay to the corporation 25¢ on each hog marketed. The hog producer's payments would of course be of various amounts and made at irregular intervals depending on how many hogs he delivers to the slaughter house during the year.
>
> "The important feature of this plan as outlined on page 10 of the registration statement is that although payments toward purchase of a Retain Capital Certificate will in most cases be made at various times during the year, the certificate itself (evidencing all hog deliveries during the year) is issued once annually.
>
> "In view of the rather broad definition given the word 'stock' in Chapter 501 of the Code of Iowa, it would appear to us that this corporation's plan

for issuing Retain Capital Certificates would very likely constitute the sale of stock on the installment plan.

"Since as I mentioned this morning, this application is currently pending for determination in this department, we would appreciate it if you would give this matter your attention at an early date and advise as to your views."

The description of the "Retain Capital Certificates" given in Form S-1, Registration Statement under the federal securities act of 1933 filed with the Securities Exchange Commission by Farmbest, Inc., enclosed with your letter, is as follows:

"DESCRIPTION OF RETAIN CAPITAL CERTIFICATES

"As a condition of doing business with Farmbest on a cooperative basis, and as a means of assisting in furnishing the capital required in such operations, each member delivering hogs to the Association for marketing, agrees to pay the Association $0.25 per hog as invested capital, evidenced by retain capital certificates. Such payments are due and payable at the time of each delivery and may be deducted by the Association from the initial amount payable for the hogs. It is the intention of the Association to issue these certificates annually and each certificate shall be for the total amount of all payments of the member during the year.

"Such certificates shall not bear interest or dividends and shall be redeemed at full face amount, in cash, by years, in the order of issuance, not later than fifteen years from and after the last day of the fiscal year of the Association in which they were issued. Such certificate may be redeemed earlier if authorized by not less than a two-thirds vote of the board of directors.

"The certificates are transferable only upon the books of the Association and upon the written consent of its board of directors. The Association shall have a lien upon each certificate for all indebtedness of the holder to the Association and may apply the same against such indebtedness, but may not be compelled to do so prior to the date specified for redemption of the certificate.

> "Retain capital certificates shall be in the nature of equity capital, subordinate to all indebtedness of the Association and, in the event of liquidation or dissolution, subordinate to revolving fund certificates and preferred stock plus any dividends declared thereon, and unpaid, but entitled to payment in full ahead of any payment on common stock."

The definition of "stock" in Code section 501.1 is as follows:

> ". . .'stock' shall mean certificates, memberships, shares, bonds, contracts, debentures, stocks, tontine contracts, or other investment securities or agreements of any kind or character issued upon the partial payment or installment plan."

In an opinion at page 381 of the 1928 Report of the Attorney General it is stated that an arrangement whereby subscriptions were taken by a coal company for "thrift bonds" with down payment made at the time of subscription and the certificate issued at the time the balance was paid amounted to sale on the installment plan under the quoted section.

In an opinion appearing at page 201 of the same report, certificates issued on partial payments were held subject to the requirements of the statute even though the purchaser deposited an insurance policy with cash surrender value equal to the balance owed on the certificate as security for the balance of the installments.

In the case at hand the company issues certificates after receipt of installments throughout the year. The only thing unique about the installments is that they are payable each time a member delivers a hog rather than once a month or other period of time. That the cycle of installment payments happens to be based on the incidence of delivery of hogs rather than at regular intervals of time does not alter the fact that they are installments nor does it alter the fact that they are in payment for a certificate.

I am, therefore, of the opinion that the arrangement described is subject to the provisions of Code Chapter 501.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

Duplicate

CERTIFICATION FOR FREE TUBERCULOSIS CARE: The certification contained in the form used by the Floyd County Department of Public Welfare for free care of tuberculosis at the State Sanatorium violates the provisions of Section 254.8, and is contrary to the rules and regulations established by the Department of Health.

December 3, 1959.

Mr. Carl Gernetzky
Chairman, Finance Committee
State Board of Regents
State Office Bldg.
Des Moines, Iowa

Dear Sir:

This is to acknowledge receipt of your recent letter concerning the form used by the Floyd County Department of Public Welfare for admission of patients on a free care basis to the State Sanatorium at Oakdale. Your letter states in part:

> "We are concerned about the provisions in the certification section at the bottom of the fourth page of the Floyd County form. They seem to be in conflict with the Rules and Regulations shown in the smaller pamphlet regarding free care of tuberculous patients. We are wondering if the provisions under the certification section of the application are in keeping with the intent of the law for providing for free care of tuberculous patients.
> "We would appreciate it a great deal if you would give us your opinion on this matter."

The application used by the Floyd County Department of Public Welfare to which you refer, contains a request for detailed information concerning the family background and financial position of the applicant. On the back of the application is a "certification" which applicant signs. This certification states:

> "I, the undersigned, do certify that all the facts given by me in this application are correct and true and I do hereby make personal application for relief.
> "I do not have any other income or resources except as given in this application.
> "I agree that I will immediately notify the county relief authorities of any changes in the facts

> above stated or when I have secured work in private industry. I also agree to make every effort to secure employment in private industry.
>
> "I hereby authorize any banking or postal savings institutions, person, firm or corporation to disclose to representatives of the county relief authorities any information which they may desire concerning any questions asked in this application.
>
> "I am willing to make affidavit concerning the above statements if requested."

The legislative intent in providing for free treatment to legal residents of Iowa suffering from tuberculosis is set forth in Section 254.8, Code of Iowa, 1958. This section states in part:

> "Treatments shall be supplied free to any legal residents of Iowa suffering from tuberculosis * * * and expenditures of public funds for treatment of tuberculosis shall be considered expenditures for the protection of the public health and not as moneys advanced in the nature of welfare or relief."

Clearly, the tenor of the certification contained in the Floyd County application for assistance is quite contrary to the intention of the legislature regarding expenditures of public funds for treatment of tuberculosis as an expenditure for the protection of public health. The phrase in the certification, "* * * and I do hereby make personal application for relief" is in definite violation of the provisions of this section which state that the funds advanced shall not be considered as moneys used in the nature of welfare or relief.

Section 254.8, Code of Iowa, 1958, provides that the State Department of Health shall promulgate rules and regulations for the uniform administration of the provisions of this section. Rules and Regulations were adopted by the Department of Health on July 5, 1947 and remain in force and effect to this date. These rules and regulations designate a particular form (Form T-1) to be used at the time an applicant requests free treatment for tuberculosis. The form used by the Floyd County Department of Public Health is not designated nor approved as the proper form for certification of free care under the Rules and Regulations of the Department of Health, and the certification contained in

such form violates the intent and purposes of Section 254.8.

The information requested on the form used by Floyd County relating to the financial status of the patient and the resources of his family may be necessary for their purpose to establish the eligibility of the person for free care. The certification, however, should be made in accordance with the Rules and Regulations adopted by the State Department of Health and on the forms designated for such purpose.

Yours very truly,

Carl E. Peterson
Special Assistant Attorney General

CEP/sp

MOTOR VEHICLES:TRUCK OPERATORS' PERMITS -

1. No permit required of the owner of a motor truck under Ch. 327, Code 1958, when the owner of such motor truck rents such truck to another and the person renting such truck operates the same.

2. A permit is required of the owner if he hauls under oral contract and holds himself out generally and hauls for anyone who calls upon him to do so.

December 3, 1959

(Peschta Pappas, Cerro Gordo Co. Atty.; 12/3/59)

59-12-10

Mr. William Pappas
County Attorney, Cerro Gordo County
15 Second St., N. E.
Mason City, Iowa

Dear Sir:

Reference is made to your request for an opinion on the following matter, to wit:

> "There is a farmer herein Cerro Gordo County who owns his own truck. He rents the truck to other farmers for hauling farm supplies and grain and makes a charge of $30.00 per day for the rental of the truck. Sometimes the farmer drives the truck himself and at other times the person who rents the truck drives the truck. The contract between the farmer and persons renting the truck is oral, and the question arises as to whether or not this farmer is a motor vehicle truck operator within the meaning of Chapter 327 so he can be required to obtain a permit pursuant to Section 327.6 of the Code of Iowa."

In reply thereto:

A question very similar to the one you pose was answered in the 1930 Report of the Attorney General 260. In pertinent part, this opinion is as follows:

> "2. This operator is a retired farmer, living in town, and has no regular occupation. He does odd jobs about town and uses his truck to haul his own cream and livestock to market and in addition, hauls for his friends and neighbors but makes no regular business for such hauling. Last year he hauled 163 loads for other people and received the total sum of $200.25 for such work."

and

> "3. This operator lives in town and does odd jobs of work about town. He owns a Ford truck and is open for engagements at all times for

59-12-10

> trucking cream and livestock to town. He does not attempt to haul freight to other cities or make long hauls."

These situations were answered as follows:

> "2. ... While this man is using his truck for his own use, he is, of course, not operating for hire. This case would be determined by the fact whether or not he hauls for his neighbors incidentally or whether he holds himself out generally to the public to haul or operate his truck for hire. If he holds himself out generally and hauls for anyone who calls upon him, he should secure the permit. If he merely hauls for such neighbors as he sees fit to haul for, he would not be required to have a permit. This rule would also apply to any person operating a truck in this manner."

> "3. This operator would be governed by the rule above set out, that is, whether he holds himself out at all times for engagements. If so, he should procure the license. If not he would come under the rule expressed in division two hereof."

On the basis of this opinion it is my opinion that:

1. Under the facts stated, a permit would not be required of the owner of the truck when such owner is not operating the truck himself but has rented the same to another party who operates same.

2. When the owner operates the truck himself a permit would be required if the contract is oral and if he holds himself out generally and hauls for anyone who calls upon him and not just for his neighbors as he sees fit and then, incidently.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

MOTOR VEHICLES: Sunday sale ban.--
A trailer home being a vehicle subject to registration under the laws of this state comes within the purview of Ch. 243, Acts, 58th G. A. (Pesch to Samore, Woodbury Co. Atty. 12/4/59 #59-12-11

December 4, 1959

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

Dear Sir:

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

> "Reference is made to Chapter 243, Sunday Sales of Motor Vehicles, wherein Section 322.3 is amended as a new Section as follows:
>
> '"Section 1. Section three hundred twenty-two point three (322.3), Code 1958, is hereby amended by adding thereto a new subsection as follows:
>
> '"No person licensed under this chapter shall, either directly or through an agent, salesman or employee, engage in this state, or represent or advertise that he is engaged or intends to engage in this state, in the business of buying or selling at retail new or used motor vehicles on the first day of the week, commonly known and designated as Sunday."'
>
> "Your opinion is respectfully requested as to whether or not such probation applies to a person who may be licensed under this chapter but who deals exclusively in the sale of trailer homes. Reference is respectfully submitted to Section 321.130, Code of Iowa 1958, and to the opinion of the Attorney General 1949, Page 25, which held that trailer houses and commercial trailers are not motor vehicles, and hence are subject to assessment for personal property tax while in the hands of a dealer or a manufacturer in possession of a dealer's license."

In reply to your question as submitted, I advise you as follows:

Chapter 216 of the Acts of the 58th General Assembly reads as follows:

> "Section 1. Section three hundred twenty-one point one (321.1), Code 1958, is hereby amended by adding thereto the following subsection:
>
> '"House trailer and mobile home" means a trailer or semitrailer which is designed, constructed and equipped as a dwelling place, living abode or sleeping place, either permanently or temporarily, and is equipped for use as a conveyance on streets and highways.'

Chapter 221, Sec. 2 (1), Acts of the 58th General Assembly reads as follows:

> "Sec. 2. Section three hundred twenty-one point one hundred twenty-three (321.123), Code 1958, is hereby amended as follows:
>
> "1. By inserting in line one (1) of such section after the word, 'trailers' the words, 'and mobile homes'."

so that Section 321.123, Code 1958, reads in pertinent part as follows:

> "All trailers and mobile homes except those defined as semitrailers shall be subject to a registration fee to be fixed in accordance with the following schedule, * * * ."

Section 322.2 (7), Code 1958, defines "motor vehicle" to mean "any vehicle subject to registration under the laws of this state".

Therefore, a trailer home, being a vehicle subject to registration under the laws of this state, comes within the purview of Chapter 243, Acts of the 58th General Assembly.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

MOTOR VEHICLES: Safety Chains.--
A farm wagon and farm tractor need not be equipped with a safety chain as provided in Sec. 321.462, Code 1958.
(Perch to Van Ginkel, Cass Co. Atty., 12/4/59) # 59-12-12

December 4, 1959

Mr. James Van Ginkel
Cass County Attorney
Atlantic, Iowa

Dear Sir:

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

> "A farmer drives his farm tractor pulling a farm wagon from one part of his farm to another and in so doing travels over a public highway. Does this wagon and tractor have to be equipped with safety chains as provided in Section 321.462 of the 1958 Code of Iowa or, is it exempt from such requirement under the provisions of 321.383 of the 1958 Code."

In reply thereto:

Section 321.462, Code of Iowa, 1958, reads as follows in pertinent part:

> "When one vehicle is towing or pulling another vehicle the drawbar or other connection shall be of sufficient strength to pull all weight towed thereby and shall be fastened to the frame of the towing vehicle in such manner as to prevent sidesway, and in addition to such principal connection there shall be a safety chain which shall be so fastened as to be capable of holding the towed vehicle should the principal connection for any reason fail."

Section 321.383, Code of Iowa, 1958, reads as follows:

> "The provisions of this chapter with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, or farm tractors except as herein made applicable."

59-12-12

It is my opinion that the exceptions contained in Section 321.383, supra, are controlling in this matter, and, therefore the safety chain equipment requirement does not apply under the facts stated above.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

COUNTIES: Outside employment -- Compensation received for a service which was not an official duty, was not done under color of office or public employment, and was not done during working hours, may be personally retained by a public officer or employee. (Ltr to Samore, Woodbury Co. Atty., 12/8/59)

December 8, 1959

59-12-13

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

Dear Mr. Samore:

Receipt is acknowledged of your letter of November 13 as follows:

"With reference to the opinion above referred to, we would like to make certain observations.

"Sec. 618.12 of the 1958 Code, refers to Posted Notices which an officer, who could be the Clerk of the District Court, is required to post. Our inquiry was meant to be concerning the posting of notices which the Clerk is not required to do as a part of his official duties, such as notices of hearing on wills, executor's notices, administrator's notices, final report notices, etc., which the Court may direct an administrator, executor, or other person to give by posting. The charges are made by the person to give by posting. The charges are made by the person doing the posting and are usually $1.50, though it could be a different amount. There is no statute covering the charge and we did not mean to inquire concerning it.

"The question we meant an opinion on is as follows:

"Does the Clerk or any member of his staff have a right, as an individual, to post a notice which he is not officially required to post, when the Court directs an administrator, executor or other person under its jurisdiction, to give such notice by posting, and may he, or other member of his staff, retain the fee for himself if the posting is done on his own time?

> "For as long as anyone here can remember, and as long as I myself can remember, the Clerk or some member of his staff has posted notices of the above kind and the charge therefor was entered upon the cash book of the Clerk of Courts and disbursed to the person doing the posting. Also of my own knowledge, posting of this nature have been handled in the same manner in all adjoining counties where I have practiced. I am informed by the Clerk and by auditors working for the State Auditor, that this is the general practice throughout the State."

When you delivered the above letter, inquiry was also made as to whether the employees of the clerk's office can retain payment for acting as appraisers or for preparing items for the papers when the work done is no part of the duties of their office, not paid from public funds, and not done during regular working hours.

It now appears that the question intended in your prior letter, as well as in your present letter, as illustrated by the further specific items inquired about, was primarily whether the public employees could retain payment for certain services performed on their own time, rather than whether authority existed for the payment. As to the fees for posting which were the subject of the original inquiry, it now appears these are fees set by order of the probate court under sections 631.4, 638.36, 638.24, either in the order itself or by local court rule.

The problem as to when a public employee may be compensated for extra services rendered by him is not a new one nor is the line between what may be accepted and what may be personally retained if accepted always clear.

It seems well-established that in the absence of express statutory provision, or conditions annexed as a part of the hiring, a public employee may engage in income-producing activities on his own time. In a letter opinion dated February 20, 1924, it was stated, for example, that public school employees, including superintendents, may receive salary for work done for another employer on their own time.

On the other hand, in an opinion which appears at page 75 of the 1944 Report of the Attorney General, it was held that a county attorney who was appointed referee in probate could not retain fees paid him as referee. This, however, was because of an express statutory provision requiring all county officers receiving fees as referee to account for same (section 12041, Code 1939).

Similarly, in an opinion appearing at page 208 of the 1938 Report of the Attorney General, it was held that a deputy clerk appointed referee in probate must report and pay over to the county any fees received by him by reason of a provision in section 12041, Code 1935, that, "All fees received by any county officer as such referee shall become a part of the fees of his office and shall be accounted for as such". And, in an opinion appearing at page 12 of the 1940 Report of the Attorney General the same answer was given to the same question, quoting section 5245, Code 1935, "Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county." Section 5245 now appears as section 342.1, Code 1958.

In an opinion appearing at page 111 of the 1950 Report of the Attorney General, it is stated that overtime pay is not allowable to county employees.

At page 97 of the 1958 Report of the Attorney General appears an opinion to the effect that witness fees earned by a state employee on state time must be turned over to the state.

Particular note should also be taken of Code chapters 740 and 741 which make it a criminal offense to exact excessive fees or to accept tips or gratuities for the performance of official duties or acts done under color of official status. Especially see sections 740.10, 740.20 and 741.1.

On the basis of the cited opinions, you are therefore advised that, where a public officer receives fees or compensation for services performed at the place of his public employment during regular working hours, such fees or compensation cannot be personally retained. Further, where such fees or compensation are paid for the performance of an official duty, they may not be retained, irrespective of the time or place of performance.

However, where compensation is paid for performance of a service which is not an official duty and where performance was wholly outside regular working hours and was not done under color of office or public employment, it seems the officer or

employee may keep such compensation. Whether the facts of your inquiry fit into the former or latter category must be determined locally.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
cc: Mr. Holloway
Mr. Kading

SCHOOLS: Tuition -- There is no statutory authority for the payment of tuition for persons committed to mental health institute. (Rehmann to Lisle, Spkr., H.R., 12/9/59)
59-12-14

December 9, 1959

Honorable Vern Lisle
Page County Representative
Clarinda, Iowa

Dear Mr. Lisle:

This will acknowledge receipt of your letter of December 7, in which you state the following:

> "I am very much interested in a problem that exists here in the Clarinda School District which is in regard to the tuition for a boy who is presently under the care of the Clarinda Mental Hospital and who has been attending the Clarinda School since early fall.
>
> "This problem, I believe, was outlined to you in a letter which you received from Mr. William Anderson, the Superintendent of the Clarinda Public School system. Mr. Anderson and I have talked about this and I suggested that he write you for an opinion on the problem. He now tells me that you are unable to give this opinion unless it is requested by a member of the Legislature or by some state officer. This, being the case, I wish to make a formal request for this opinion and will appreciate your giving it your early attention, as we really need to know what is the thing to do here in this unusual situation."

In reply thereto, I advise as follows:

The problem presented by your letter has been before this office on several different occasions. When a person is committed to a mental health institute, jurisdiction of that person is under the Board of Control of State Institutions. In a letter opinion under the date of November 13,

59-12-14

1958, Pesch to Bd of Control, we stated at that time that the Board of Control has no legal obligation to pay tuition charges for education in a public school of a person committed to a mental health institute.

The purpose of the Mental Health Institutes is to remove from society those persons who are mentally ill and need treatment in order to rehabilitate them for society. Op. Atty. Gen., 1898, P. 324. The superintendent has custody of the patient by virtue of section 226.9, Code 1958, until the said superintendent finds the patient sane or upon orders of the commission of insanity with the approval of the Board of Control under section 229.30, Code 1958. Therefore, the patient must be confined to the institution unless paroled by virtue of section 226.23, Code 1958. These are the only conditions under which a patient may leave the mental health institute. There are no statutory provisions for permitting the patient to leave the institution for attendance in a public school.

The school board of the district in which the institution is located has made a determination that the patient is not a resident of that district entitling the Clarinda Public School system to tuition from the outside district. The school board of the district in which the institution is located is entitled to make this determination which may be appealed under Chapter 290, Code 1958. Op. Atty. Gen. 1958, page 198, section 20.1. On the other hand, the school district of the patient's legal settlement may be liable for tuition if said district falls within the purview of section 282.7, Code 1958. However, from the facts surrounding this problem, the patient came from Des Moines, Iowa, thus making section 282.7, Code 1958, inapplicable in this situation, so no further discussion is needed at this time.

Section 282.18, Code 1958, provides:

> "Children from charitable institution. Children who are residents of a charitable institution organized under the laws of this state or residents of the Iowa juvenile home or the Iowa Annie Wittenmyer home and who have completed a course of study for the eighth grade as required by section 282.19 shall be permitted to enter any approved public high school in Iowa that will receive them and the tuition and transportation when required by law shall be paid by the treasurer of state from any money in his hands not otherwise appropriated and upon warrants

> drawn and signed by the state comptroller on requisition issued by the superintendent of public instruction. The superintendent of public instruction is hereby empowered to require such reports, from such institution and from the high school such pupils attend, as are necessary properly to carry out the provisions of this section."

However, the reference to charitable institutions is to those institutions which are organized under Chapter 504, Code 1958, and not any state institutions except as provided in the section.

A problem similar to the one at hand was presented to this department prior to the 58th General Assembly. The school districts involved did not file a claim for the tuition lost, nor was there a bill introduced to make a provision for the payment of tuition and transportation in instances as the problem at hand. Thus, under the doctrine of expressio unius est exclusio alterious, tuition and transportation cannot be paid for patients in a mental health institute.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Paul Johnston
Joe Davis

HEALTH ~~DEPARTMENT~~: RULES AND REGULATIONS --

Under the provisions of §135B.7 the state department of health can adopt, amend, promulgate and enforce such rules, regulations and standards with respect to the different types of hospitals to be licensed, either as "general" or "restricted" licenses, within the categories defined in §135B.1(1) in accordance with the specific types of care or treatment for which such hospital is properly equipped. (Bianco to Zimmerer, Health Comm'r, 12/9/59)

December 9, 1959 #59-12-15

Dr. Edmund G. Zimmerer, M.D.
Commissioner
State Board of Health
L O C A L

Dear Doctor Zimmerer:

We have your favor of recent date reading as follows:

"This department is presently in the process of revising rules, regulations and standards promulgated pursuant to Section 135B.7 to incorporate the provisions of H.F. 533, Acts of the 58th General Assembly. At the same time an effort is being made to recognize the effect of Sections 135B.19 through 135B.32, Code 1958.

"The Hospital Licensing Board serving in an advisory capacity in accordance with the provisions of Section 135B.11(2) have expressed a definite aversion to rules and regulations which would permit the licensure of a hospital without the essential diagnostic services of laboratory and x-ray and have refused to approve the same.

"In order that the department may develop rules and regulations not inconsistent with the provision of the Code, we request an opinion in regard to the following:

"Do the provisions of Chapter 135B.19 through 135B.32 prohibit the promulgation of rules, regulations and standards which require that the departments of laboratory and x-ray be present in the hospital to qualify for licensure?"

In reply thereto we set forth the applicable statutes presently pertinent to the question upon which you desire an opinion.

59-12-15

Chapter 135 (H.F. 533) Acts of the 58th G.A. amends Section 135B.5 (Issuance and renewal of license) by adding to said section the following provision:

> "Sec. 2. Section one hundred thirty-five-B point five (135B.5), Code 1958, is amended by inserting in line fourteen (14) after the word 'regulation.' the following:
>
> "Licenses issued hereunder shall be either general or restricted in form. Where the facilities of an applicant for hospital license are suitable or adequate for only certain types of hospital care or treatment, the specific types of care or treatment for which such hospital is properly equipped shall be set forth on the face of the license and the lawful operation of the hospital shall be thereby restricted to the types of care and treatment so specified."

The 57th G. A. enacted Chapter 92 (H.F. 21), the Act being described as the "Pathology and Radiology Services in Hospitals Act." This act is now incorporated in Chapter 135B as Sections 135B.19 to 135B.32 inclusive.

Under the law as it existed prior to the enactment of the aforementioned amendments, the department promulgated Regulations 26 and 27 I.D.R. 1958, page 129, requiring hospitals to provide radiology and laboratory and pathological services. These are mandatory regulations and applied to all hospitals that qualified for licensure under the statute before the last two amendments were adopted.

Under the provisions of Section 135B.7 the state department of health with the advice of the hospital licensing board, shall adopt, amend, promulgate and enforce such rules, regulations and standards with respect to the different types of hospitals to be licensed hereunder as may be designed to further the accomplishment of the purposes of the chapter.

Section 135B.21 states that the ownership and maintenance of the laboratory and x-ray facilities and the operation of the same under this division (Pathology & Radiology Services in Hospitals) are proper functions of a hospital.

These services constitute medical services which must be performed by or under the direction and supervision of a doctor, and no hospital shall have the right, directly or indirectly, to direct, control or interfere with the professional medical arts and duties of the doctor in charge of the pathology or radiology facilities or of the technicians under his supervision. (See Sec. 135B.22)

Section 135B.23 requires that each hospital shall arrange for such services with a doctor and sections 135B.24 et seq sets forth the working arrangements and the method of charging fees for said services.

Prior to the enactment of Chapter 135 (H.F. 533) by the 58th G.A. only one form of license was issued applicable to all hospitals. It appears now under this amendment that two forms of licenses may be issued, i.e. "general" or "restricted."

We find this explanatory note appended to H.F. 533 which lends light to the intent of the legislature in adopting H.F. 533, to-wit:

> "The purpose of this bill is to permit hospitals in the smaller cities and towns which offer care and treatment in certain limited fields to lawfully continue in existence."

In construing a statute, we must seek the legislative intent from the statute as a whole.

In arriving at intention, the whole, and every part of the instrument, or enactment, is to be taken, and compared together.

All provisions of a statute should be given effect, if possible, and construed harmoniously.

With these rules of construction in mind, we believe and it is our opinion, in answer to your question, that where a hospital qualifies as a general hospital, that it is mandatory that such hospital shall arrange for the services designated as "Pathology and Radiology Services" in order to qualify for a "general" license.

That all other hospitals rendering services of a more limited nature may qualify for a "restricted" license in accordance with the specific types of care or treatment for which such hospital is properly equipped.

That under the provisions of Sec. 135B.7 the state department of health can adopt, amend, promulgate and enforce such rules, regulations and standards with respect to the different types of hospitals to be licensed, either as "general" or "restricted" licenses, within the categories defined in Section 135B.1(1) in accordance with the specific types of care or treatment for which such hospital is properly equipped.

Respectfully submitted,

FRANK D. BIANCO
Second Assistant Attorney General

FDB:j

SCHOOLS: Schoolhouses and Sites -- Under sections 278.1(2) and 277.2, a school board has authority to dispose of urban school property without reference to Code chapter 297 but such disposition can be made only for adequate consideration and the sum of $1.00 is ordinarily classed as "nominal" rather than "adequate". (Oeth to Oeth, Dubuque Co. Atty.; 12/10/59)

#59-12-16

December 10, 1959

Mr. Robert L. Oeth
Dubuque County Attorney
457 Bank & Ins. Building
Dubuque, Iowa

Attn: Frank D. Gilloon, Jr., Asst. County Attorney

Dear Sir:

This is to acknowledge receipt of your letter of November 27 in which you state the following:

"We would appreciate from your office an answer to the following questions:

"1. Can the Independent School District of Dyersville, Dubuque County, Iowa, sell a public school building and a school house site to the City of Dyersville for $1.00 at a special election rather than at a regular election?

"2. Does said school district, in any event, have the power to sell such school building and school house site for $1.00 to the City of Dyersville without bids and without appraisement?"

Code section 278.1(2) provides:

"The voters at the regular election shall have power to: * * *

"Direct the sale, lease, or other disposition of any schoolhouse or site or other property belonging to the corporation, and the application to be made of the proceeds thereof, provided, however, that nothing herein shall be construed to prevent the sale or lease of real or other property by the board of directors without an election to the extent authorized in section 297.22."

59-12-11

Section 277.2, Code 1958, provides as follows:

> "Special election. The board of directors in any school corporation may call a special election at which election the voters shall have the powers exercised at the regular election with reference to the sale of school property and the application to be made of the proceeds, the authorization of a schoolhouse tax or indebtedness, as provided by law, for the purchase of a site and the construction of a necessary schoolhouse, and for obtaining roads thereto."

Thus, the question of selling school property may be submitted to the voters at a special election.

Where the property is located within the limits of an incorporated city or town, Code sections 278.1 and 277.2 provide a complete and independent method of disposing of property without reference to Code Chapter 297. Sections 278.1 and 277.2 provide the method for disposal of school property by election. Sections 297.15 to 297.20 relate only to rural school property. Section 297.22 provides an alternate and independent method for sale of school property without an election but with appraisal. Also see Maxwell v. Custer, 238 Iowa 1306, to the effect that Code sections 278.1 and 277.2 provide a distinct and independent method for the disposal of school property.

However, it is well established that school property may not be disposed of except for adequate consideration. See Ind. Sch. Dist. v. DeWilde, 243 Iowa 685, 53 N.W. 2d 256. Also see opinion of this department dated February 20, 1940, a copy of which is enclosed herewith.

Unless it is shown that the sum of $1.00 is a fair price for the property in question, the same would be merely nominal rather than adequate consideration. Of course, situations can be imagined where, by reason of location, condition, cost of repair, or cost of razing, a building might not bring a fair price of even $1. If such unusual circumstances were shown in fact to exist, then the figure $1 might be considered adequate.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
Encl

HEALTH ~~DEPARTMENT~~: ~ Dead Bodies, ~ Removal --

Persons other than funeral directors or embalmers may be permitted to remove dead human bodies from hospitals or residences for burial or other final disposition upon compliance with the provisions of Chapter 141, Code of Iowa 1958, pertaining thereto. (Bianco to Zimmerer, Health Comm., 12/11/59) # 59-12-17

December 11, 1959

Dr. Edmund G. Zimmerer, M.D.
Commissioner
State Board of Health
L O C A L

ATT: L. E. Chancellor, Director
Division of Vital Statistics

Dear Sir:

We have your recent favor in which you pose the following question:

> "Does a person who is not licensed as a funeral director or embalmer have authority to remove a dead human body from a hospital or residence."

and in reply thereto we beg to advise as follows:

We note the following provisions of the law in the matter of the disposal of dead bodies, as extracted from Chapter 141, Code of Iowa, 1958.

> "141.2 Certificate and burial permit. No person, without securing a proper death certificate and a burial or removal permit, shall:
> 1. Keep a dead body for more than seventy-two hours after death or discovery of the same.
> 2. Remove such body from or into any registration district in this state. Provided, that in cases where it is impossible to secure such certificate, burial or removal permit without delay, the state registrar may permit the attending embalmer or his registered student, to remove a body from or into any registration district in the state on the condition that such certificate, removal or burial permit will be secured and properly filed before the body is buried or otherwise disposed of, said permit to be executed in triplicate on a form prepared by the state department of health.
> 3. Bury or make other final disposition of such body in this state." (Emphasis supplied)

59-12-17

"141.3 Execution and filing. The funeral director or embalmer or other person in charge of the funeral or disposition of the body of every person dying in this state shall be responsible for the proper execution of a death certificate, which shall be filled out in durable black ink, in a legible manner, and filed with the local registrar of the registration district in which the death occurred or the body was found." (Emphasis supplied)

"141.5 Particulars. In the execution of a death certificate, the personal particulars shall be obtained from the person best qualified to supply them. The death and last sickness particulars shall be furnished by the attending physician, or in the absence of such person, or if there be no such person, by the coroner. The burial particulars shall be supplied by the funeral director or embalmer or person acting as such. Each informant shall certify to the particulars supplied by him by signing his name below the list of items furnished." (Emphasis Supplied)

"141.6 Deaths without medical attendance. In case of any death occurring without medical attendance, the funeral director or embalmer, or person acting as such, shall promptly report the case to the coroner. In such cases the coroner shall furnish such information as may be required by the state registrar in order to classify the death." (Emphasis supplied)

"141.28 Delivery of burial permit. The funeral director or embalmer, or person acting as such, shall deliver the burial, removal, or disinterment permit to the person in charge of the cemetery before interring, disposing of, or disinterring any body therein." (Emphasis supplied)

Section 141.8 (Issuance of burial permit) in addition to naming the funeral director or embalmer, also refers to "or other person" in conjunction therewith.

It is quite evident from these provisions of the law, that funeral directors or embalmers, as such, are not given the exclusive right or perogative to remove or dispose of dead bodies, and that "other persons" may be authorized to do so under the provisions of the law for disposal of dead bodies.

The person having charge of a body cannot be considered the owner of it; but holds it only as a trust for the benefit of those who may, from family relationship or friendship, have an interest in it. The early common law recognized no property or property rights in the body of a deceased person. The established modern rule is that notwithstanding there can be no property right in a dead body in the commercial sense, there is a quasi-property right in dead bodies vesting in the nearest relatives of the deceased and arising out of their duty to bury their dead. This right, which corresponds in extent to the duty out of which it arises, includes the right to possession and custody of the body for burial, or to remove the body to a proper place. (See 15 Am. Jur. 831, Sec. 6).

However, the care of dead human bodies and the disposition of them by burial or otherwise is so closely related to the health and general welfare of the community that the business of caring for and disposing of such bodies may be regulated by license and special regulations under the general police power of the state. (See 54 Am. Jur. 507, Sec. 2) (Robinson v. Hamilton, 60 Iowa 134, 14 N.W. 202).

Therefore, in answer to your question, "other persons" as well as licensed funeral directors or embalmers may remove a dead human body from a hospital or residence, provided they have complied with all the provisions of the law, Chapter 141, Code of Iowa 1958, in the matter of securing a proper death certificate and a burial or removal permit.

Respectfully submitted,

FRANK D. BIANCO
Second Assistant Attorney General

FDB:kj

COUNTY BOARD OF SOCIAL WELFARE: REIMBURSEMENT OF EXPENSES: County has no authority to reimburse County Board member for expenses incurred as President of Northwest Chapter of Iowa Welfare Association. (Peterson to Cooper, Buena Vista Co. Atty., 12/18/59)

December 18, 1959. # 59-12-18

Mr. Richard W. Cooper
County Attorney
Buena Vista County
Storm Lake, Iowa

Dear Mr. Cooper:

This is to acknowledge receipt of your recent letter in which you state:

> "The Buena Vista County Department of Social Welfare has requested an opinion relative to the allowance of actual and necessary expenses incurred by a member of the County Board of Social Welfare.
>
> "This member of our local Board has been elected President of the Northwest Chapter (or Association) of Social Welfare for the 1960 term. I understand this association to be a voluntary organization similar to the State County Attorneys or Sheriffs Association. It will be necessary throughout the year 1960, for this local board member, in the performance of her duties as President of the Northwest Association, to attend meetings out of town and attend statewide meetings representing this area. These services are directly related to the work of the local board by way of effective liaison with the other county boards and with the overall solution of general problems confronting the county boards.
>
> "Section 234.10 of the 1958 Code of Iowa provides "All members of the county board shall be reimbursed for the actual and necessary expenses incurred by them in the discharge of their duties". The statute further provides for compensation for the members.
>
> "I hereby request your official opinion as to whether or not, under the above-stated facts, our local board member would be entitled to be reimbursed for actual and necessary expenses of attending district and state meetings and for other actual

59-12-18

> and necessary expenses connected with her office as President of the Northwest Association of Social Welfare under the general provisions of Section 234.10 of the Code. I presume that your opinion will have to be based upon your interpretation of the meaning of the words contained in the statute, 'in the discharge of their duties'."

My inquiries have determined that the organization to which you refer in your letter is the Northwest Chapter of the Iowa Welfare Association. This is a private organization composed of persons and agencies interested in welfare and related programs and financed primarily from the dues of its members.

The compensation for members of the County Boards of Social Welfare is authorized by Section 234.10, Code of Iowa, 1958. It stated in part:

> "All members of the county board shall be reimbursed for the actual and necessary expenses incurred by them in the discharge of their duties. They shall also receive compensation for services at the rate of three dollars per diem, but such compensation shall not exceed a total of ninety dollars in any one year in counties of less than thirty-three thousand population, or one hundred twenty dollars in counties of more than thirty-three thousand population. The expenses and compensation of county board members shall be paid from the general fund of the county; ***"

The function of the County Board of Social Welfare is described in Section 234.11, Code of Iowa, 1958, which states:

> "The county board shall be vested with the authority to direct in the county old-age assistance, aid to the blind, aid to dependent children and emergency relief with only such powers and duties as are prescribed in the laws relating thereto."

In connection therewith, Chapter 9, Laws of the 58th General Assembly, Section 6, includes as part of the duties of the County Board, the authority to direct in the county the program of Aid to the Disabled.

It will be noted that Section 234.11 provides that the County Board in its official capacity is limited to "only such powers and duties as are prescribed in the laws relating thereto." An examination of the categorical programs enumerated in Section 234.11, viz, Old Age Assistance, Chapter 249, Aid to the Blind, Chapter 241, Aid to Dependent Children, Chapter 239, Emergency Relief, Chapter 251, and Aid to the Disabled, Chapter 9, Laws of the 58th General Assembly, reveals nothing which would indicate a membership in an organization to which you have reference, as a part of the official duties of the County Board members.

Therefore, the question to be determined is whether or not the expense incurred by this county board member as President of the organization is "actual and necessary expense" incurred in the discharge of his duties as described in the various chapters relating to the specific programs.

A claim is not a just claim against a county unless the law somewhere either requires or authorizes its payment. Foster & Foster v. County of Clinton, 51 Iowa 541, 2 N.W. 207.

Quoting from the case of Clayton, County Assessor, vs. Barnes, et al., 16 Pac. 2d 1056, 1059, 52 Idaho 418 (1932) in which a problem of similar circumstances arose, it is stated:

> "It cannot be doubted that one who demands payment of a claim against the county must show some constitutional or statutory authority therefor, or that it arises from some contract, express or implied, which finds authority in law. C.S. Sec. 3504; 15 C.J. 562, Sec. 264; 7 Calif. Jur. 539, Sec. 105. It is also a well settled rule that the payment of such claim cannot be allowed upon the theory that the services performed, for which compensation is claimed, was beneficial to the county. 7 Calif. Juris 539, Sec. 105; Gibson v. Sacramento Co. 37 Calif. App. 523, 174 Pac. 935; Irwin V. Co. of Yuba, 119 Calif. 686, 52 Pac. 35."

It is noted that the membership in the organization to which you have reference is voluntary. The functions which this County Board member performs as President of the organization is only incidental to the fact that he is a County Board member and the expenses incurred in the capacity as President, while they may be beneficial to the county, they cannot be considered "actual and necessary expense" as contemplated by this Act.

Yours very truly,

Carl E. Peterson
Special Assistant Attorney General

CEP/sp

HEALTH: City hospitals, board vacancy --
A vacancy in the city Hospital Board of Trustees may be filled by the city council of the town in which the hospital exists, and the vacancy appointee shall hold the office until the next regular election at which the vacancy may be filled. (Strauss to Morrow, Allamakee Co. Atty., 12/21/59)
#59-12-19

December 21, 1959

Mr. Lynn W. Morrow

Allamakee County Attorney

Waukon, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 9th inst. in which you submitted the following:

> "I am requesting an opinion based upon the following facts:
>
> "The hospital board of trustees of a town under the provisions of Chapter 380 is an elective body, being elected for six year terms. One member whose term commenced January 1, 1956 and therefore whose term of office would end on December 31, 1961, resigned in writing to the Town Council on December 4, 1959. Chapter 69 of the Code of Iowa makes no provision for filling this vacancy.
>
> "Has the Hospital Board of Trustees, an elective body, the authority to appoint one to fill the unexpired portion of the term vacated by this resignation, or
>
> "Has the Town Council of the Town the authority to appoint one to fill the unexpired portion of the term vacated by this resignation, or
>
> "Must a special election be called to fill this vacancy?"

In reply thereto I would advise you as follows:

In the foregoing situation, where no provision is made for the filling of a vacancy in the specific body named, to wit, the Hospital Board of Trustees, I am of the opinion that the

power to fill this vacancy is in the town council under the provisions of Section 368A.1(8), providing 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:
> 1. * * *
> 2. * * *
> 3. * * *
> 4. * * *
> 5. * * *
> 6. * * *
> 7. * * *
> 8. Election for filling vacancies. Elect by ballot persons to fill vacancies in offices not filled by election by the council, and the person receiving a majority of the votes of the whole number of members shall be declared elected to fill the vacancy.
> See Constitution of Iowa, Art. XI §6"

The term of such vacancy appointee, according to Section 69.11, which provides as follows:

> "69.11 Tenure of vacancy appointee. An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified."

endures until the next regular election at which the vacancy can be filled.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

MOTOR VEHICLES: Length of load--
1. The restriction of three feet contained in Section 321.458, Code of Iowa, modifies both front wheels and front bumper, if so equipped, unless in conflict with Section 321.363, Code of Iowa.
2. A frame extended beyond the normal position of the front bumper, if an integral part of the vehicle and not a load, does not constitute a violation of Section 321.458, Code of Iowa

Ames, Iowa
December 22, 1959
(Lyman to Highway Com., 12/22/59) # 59-12-21

Iowa State Highway Commission
Ames, Iowa

Attention: Mr. Carl F. Schaeh

Gentlemen:

In your letter of November 23, 1959, the following two questions are presented:

"(1) May a vehicle be loaded three feet beyond the front bumper?

The code says that a load may extend three feet beyond the front wheels or the front bumper. Does the "three feet" refer only to the front wheels or does it also refer to the front bumper? It would appear to me that had the legislature intended it to mean three feet beyond the front bumper there would not have been any need to refer to the wheels. They would have said that the limitation was three feet beyond the most forward part of the vehicle.

(2) Is it permissible to extend the vehicle beyond the normal position of front bumper and attach a bumper to this extended portion?

If this is permissive, this section may be circumvented entirely. We believe that this section was put into the code for a number of safety purposes. One important reason is that it would limit the weight on the front axle. With heavy loads on this axle, the vehicle is much harder to steer."

Section 321.458, 1958 Code of Iowa provides:

"Loading beyond front. The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle if it is equipped with such a bumper."

59-12-21

1. It is a rule of statutory construction that the ordinary rules of grammar will be applied for the purpose of ascertaining the meaning of a statute, but they are not controlling when an intent in conflict therewith is disclosed, in which case the rule is disregarded and effect is given to the legislative intention. 82 C.J.S. Statutes, Section 340.

Under a grammatical construction of the above provision, the restriction of three feet modifies front wheels as well as front bumper. Thus, under such a construction, it would be permissible for a vehicle to be loaded not more than three feet beyond the front bumper, if such vehicle were equipped with a front bumper.

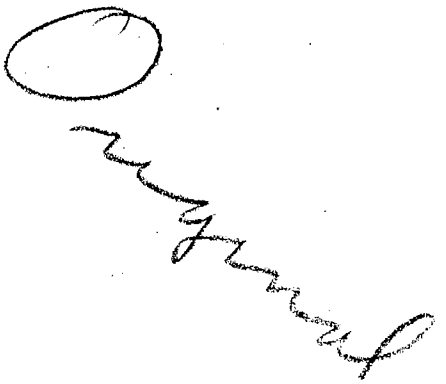
As stated hereinbefore, the grammatical construction prevails unless the legislature manifests an intention which conflicts therewith. Section 321.363, 1958 Code of Iowa, states:

> "No person shall drive a vehicle when it is so loaded... as to obstruct the view of the driver to the front or sides of the vehicle or as to interfere with the driver's control over the driving mechanism of the vehicle."

In this provision the legislature has manifested an intention in conflict with the grammatical construction. As mentioned in your letter, a heavy load on the front axle might interfere with the driver's control over the mechanism of the vehicle. In addition, a load on the front of a vehicle might obstruct the view of the driver. Whether either of these conditions exist is a fact question.

Thus, if as a fact, the load obstructs the view of the driver to the front or interferes with the driver's control over the mechanism of the vehicle, the grammatical construction would not prevail, in which case the restriction of three feet would not modify front bumper as used in Section 321.458, supra.

2. Your second inquiry pertains to extending the vehicle or the frame of the vehicle beyond the normal position of the front bumper and then attaching the front bumper to the extended portion thereof. This is answered by the 1956 attorney general opinion, at page 155. If, as a fact, the frame is an integral part of the vehicle, then Section 321.458, supra, is not violated, whereas, if it is considered a load then there would be a violation.



HVF:mj

SCHOOLS: Transportation -- school boards are under no obligation to take bids for the supply of gasoline for their school buses. Any person aggrieved by the contract executed by the school board may bring appeal under Chapter 290. (Edmund Gray. Calhoun Co. Atty.; 12/28/59) #59-12-22

December 28, 1959

Mr. Jack R. Gray
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Gray:

This is to acknowledge receipt of your letter of November 20 in which you state:

> "This is to advise you that I have received a complaint from one of the local citizens of Calhoun County, Iowa, concerning the matter in which the Rockwell City School Board contracts for the purpose of purchasing gasoline to be used by their school buses.
>
> "It appears from the facts given to me by the complainant that the Rockwell City School Board asked that bids be submitted for the school year 1959-1960.
>
> "He further advises me that the contract was awarded to one local station but that the School Board refuses to inform him of what the bid was and further advised that the bid was one cent above cost price to him.
>
> "This complainant feels that, as a taxpayer, as well as a gasoline dealer, that the School Board has accepted an illegal bid in that no one knows what the cost basis is and for further reason, that the School Board will not inform the others of what the cost basis to the contracted dealer is.
>
> "As you can probably tell, there is ill feeling concerning the way the bids were made and accepted and my complainant desires to know whether or not the School Board acted illegally in any way by accepting the bid as it did, and wants to know if there is anything that can be done to keep this from happening in the future. Your prompt attention would be appreciated."

59-12-22

In reply thereto we advise as follows:

There are no statutes requiring school boards to ask for bids in supplying gasoline for their school buses. However, if such bids are asked from respective dealers with regard to supply of gasoline for school buses, then the contract should be awarded to the lowest bidder or all bids rejected by the school board.

With regard to the school board withholding information concerning the contract, your attention is directed to an opinion under the date of January 23, 1956, Abels to Brinegar, State Board of Eugenics, which in essence states that there is no duty upon those who are custodians of the records to disclose what action was taken by the board unless there is specific statutory authority requiring such custodian to make public the contents of said records.

The proper procedure for your complainant to follow may be found in Chapter 290, Code 1958, and your attention is specifically directed to section 290.1.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
Encl
cc: Paul Johnston
Joe Davis

COUNTIES: Court Clerk -- hospital liens -- Under code sections 582.2 and 582.4 filing may be properly made only in the county where the hospital is located. (Otela to Morr, Lucas Co. Atty., 12/29/5

59-12-23

December 29, 1959

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

Dear Mr. Morr:

Receipt is acknowledged of your letter of December 18 as follows:

> "Your opinion on the following is respectfully requested:
>
> "Employee, not coming under the Workmen's Compensation Act, was injured within Lucas County while laboring for his employer, a resident of Lucas County, Iowa. Employee was hospitalized in a hospital outside of Lucas County and foreign hospital filed notice of lien for hospital service in the Lucas County Clerk's office. Section 582.2 of the 1958 Code of Iowa provides that the notice of lien '. . . shall be filed in the office of the clerk of the district court of the county in which such hospital is located . . .'
>
> "The question then is: Must the Clerk enter into the Lucas County hospital lien book, a hospital lien from a foreign County's hospital, when the Clerk's County is the County of residence of both the employee and employer, and the place the injury was sustained?"

Pursuant to our telephone conversation of December 28, it is my understanding that the hospital

59-12-23

in question is located within the state of Iowa but outside Lucas County.

Section 582.2, Code 1958, provides as follows:

> "Written Notice of Lien. No such lien shall be effective, however, unless a written notice containing the name and address of the injured person, the date of the accident, the name and location of the hospital, and the name of the person or persons, firm or firms, corporation or corporations alleged to be liable to the injured party for the injuries received, shall be filed in the office of the clerk of the district court of the county in which such hospital is located, prior to the payment of any moneys to such injured person, his attorneys or legal representative, as compensation for such injuries; nor unless the hospital shall also mail, postage prepaid, a copy of such notice with a statement of the date of filing thereof to the person or persons, firm or firms, corporation or corporations alleged to be liable to the injured party for the injuries sustained prior to the payment of any moneys to such injured person, his attorneys or legal representative, as compensation for such injuries. Such hospital shall mail a copy of such notice to any insurance carrier which has insured such person, firm, or corporation against such liability, if the name and address shall be known."

Section 582.4, Code 1958, provides as follows:

> "Lien book -- fees. Every clerk of the district court shall, at the expense of the county, provide a suitable well-bound book to be called the hospital lien docket in which, upon the filing of any lien claim under the provisions of this chapter, he shall enter the name of the injured person, the date of the accident, and the name of the hospital or other institution making the claim. Said clerk shall make a proper index of the same in the name of the injured person and such clerk shall be

> entitled to twelve cents for filing such claim, and at the rate of eight cents per folio for such entry made in the lien docket, and six cents for every search in the office for such lien claim."

The phrases "of the county in which such hospital is located" in section 582.2 and "under the provisions of this chapter" in section 582.4 appear to furnish the answer to the question as to proper county for recording; the former providing the exclusive method under the rule "expressio unius est exclusio alterius" and the latter operating as a limitation on the authority of the clerk to make entries in the hospital lien book. The further provision for mailing notice directly to the affected parties appears to bear out legislative intent that there shall be but one filing of the lien notice and that in the county where the hospital is located. It follows that entry of the lien in question in the hospital lien book of Lucas county is not authorized by the statute.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

The dates for filing nomination papers for state office prior to the primary election of 1960, are the following: The first date for filing is March 14, 1960 and the final date for filing is April 2, 19

December 29, 1959

Hon. Melvin D. Synhorst

Secretary of State

B U I L D I N G

Dear Sir:

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

> "We have received several inquiries as to the first and final dates for filing nomination papers prior to the June 6, 1960 primary election.
>
> "A formal opinion is respectfully requested from your office setting forth this information."

In reply thereto, in accordance with the provisions of Section 43.11(2), Code 1958, which provides the following:

> "43.11 Filing of nomination papers. Nomination papers in behalf of a candidate shall be filed:
> 1. * * *
> 2. For United States senator, for an elective state office, for representative in congress, and for member of the general assembly, in the office of the secretary of state not more than eighty-five days nor less than sixty-five days prior to the day fixed for holding said primary election.
> 3. * * * "

I advise that the first day for filing nomination papers for state office prior to the primary election of June 6, 1960, is March 14, 1960, and the final date for filing such nomination papers is April 2, 1960.

Yours very truly,

OS:nmh4

First Assistant Attorney General
OSCAR STRAUSS